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IN THE UNITED STATES DISTRICT COURT

14

FOR THE EASTERN DISTRICT OF CALIFORNIA

15

FRESNO DIVISION

16

17

**CENTRAL VALLEY CHRYSLER-JEEP,
INC.; et al.,**

18

Plaintiffs,

19

v.

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CATHERINE E. WITHERSPOON,

21

Defendant.

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NO. CIV F-04-6663 REC LJO

**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S
MOTION TO DISMISS**

Hearing: June 13, 2005
Time: 1:30 p.m.
Courtroom: One
Judge: Hon. Robert E.
Coyle

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3 INTRODUCTION	1
4 ARGUMENT	2
5 I. VENUE IN THIS CASE IS NOT PROPER IN FRESNO.	2
6 A. <i>Leroy and District No. 1</i> Are Binding Precedent, Requiring this	
7 Court to Exclude Harm from its Calculus on Venue and Intra-	
8 district Venue.	4
9 B. Excluding Harm in Deciding Intra-district Venue Is Not Illogical.	10
10 C. Without Looking at Harm, Intra-district Venue Is Proper Only in	
11 Sacramento.	11
12 D. Even If the Court Were to Look at Harm, Plaintiffs Do Not Meet	
13 Their Burden to Show Harm in this Division.	12
14 II. THE PRUDENTIAL CONCERNS OF RIPENESS COUNSEL THE COURT TO	
15 DISMISS OR STAY THIS CASE FOR A SHORT PERIOD OF TIME.	15
16 A. There Has Been No Final Action.	18
17 B. Other Prudential Reasons Counsel the Court to Wait.	20
18 C. Waiting Three or Four Months Does Not Impose Any Real Harm	
19 on Plaintiffs.	23
20 III. PRIMARY JURISDICTION REQUIRES DISMISSAL OF THE SECOND	
21 CLAIM.	25
22 A. The Substance of Plaintiffs' Claim Is under Section 209(b), Not	
23 Section 209(a), of the Clean Air Act.	27
24 B. The Primary Jurisdiction Doctrine Applies to Legal Issues.	28
25 C. Plaintiffs' Cases Are Not Relevant.	29
26 D. Plaintiffs' Invocation of 42 U.S.C. Section 1983 Is Irrelevant.	29
27 CONCLUSION	33
28	

TABLE OF AUTHORITIES

	<u>Pages</u>
Cases	
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967), <i>overruled on other grounds</i> , <i>Califano v. Sanders</i> , 430 U.S. 99 (1977)	16
<i>Abramoff v. Shake Consulting, L.L.C.</i> , 288 F.Supp.2d 1 (D.D.C. 2003)	9
<i>Anchorage v. United States</i> , 980 F.2d 1320 (9th Cir. 1992)	17, 23
<i>Association of Am. Med. Colls. v. United States</i> , 217 F.3d 770 (9th Cir. 2000)	16
<i>Association of International Automobile Manufacturers, Inc. v. Commissioner</i> , 208 F.3d 1 (2000)	29
<i>C-Y Dev. Co. v. City of Redlands</i> , 703 F.2d 375 (9th Cir. 1983)	31
<i>Cactus Corner, LLC v. U.S. Department of Agriculture</i> , 346 F.Supp.2d 1075 (E.D. Cal. 2004)	3
<i>California Correctional Peace Officers Ass’n v. State Personnel Bd.</i> , 10 Cal.4th 1133 (1995)	18
<i>California Division of Labor Standards Enforcement v. Dillingham Constr.</i> , 519 U.S. 316 (1997)	21
<i>Californias for Safe & Competitive Dump Truck Transp. v. Mendonca</i> , 152 F.3d 1184 (9th Cir. 1998)	21
<i>Chavez v. Director, Office of Workers Comp. Programs</i> , 961 F.2d 1409 (9th Cir. 1992)	17
<i>Columbia Broadcasting System, Inc. v. United States</i> , 316 U.S. 407 (1942)	16
<i>Decker Coal Co. v. Commonwealth Edison Co.</i> , 805 F.2d 834 (9th Cir. 1986)	3, 6, 12
<i>District No. 1 v. Alaska</i> , 682 F.2d 797 (9th Cir. 1982)	<i>passim</i>
<i>Engine Manufacturers Association v. South Coast Air Quality Management District</i> , 541 U.S. 246 (2004)	29
<i>Gilliam v. Miller</i> , 973 F.2d 760 (9th Cir. 1992)	28
<i>Golden State Transit Corp. v. City of Los Angeles</i> , 493 U.S. 103 (1989)	30
<i>Gonzaga v. Doe</i> , 536 U.S. 273 (2002)	30
<i>Hart v. Massanari</i> , 266 F.3d 1155 (9th Cir. 2001)	3, 4, 5, 9
<i>Henry’s Wrecker Serv. Co. v. Prince George’s County</i> , 214 F.Supp.2d (D.Md. 2002)	30
<i>Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.</i> , 891 F.2d 719 (9th Cir. 1989)	30

TABLE OF AUTHORITIES (CON'T)

	<u>Pages</u>
Cases (con't)	
<i>In re Duncan</i> , 713 F.2d 538 (9th Cir. 1983)	3
<i>In re Imperial Credit Indus., Inc. Securities Litigation</i> , 252 F.Supp.2d 1005 (C.D.Cal. 2002)	14
<i>In re Stern</i> , 345 F.3d 1036 (9th Cir. 2003)	5
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	11
<i>Jenkins Brick Co. v. Bremer</i> , 321 F.3d 1366 (11th Cir. 2003)	8, 9, 11, 12
<i>Jones v. Lincoln Elec. Co.</i> , 188 F.3d 709 (7th Cir. 1999)	14
<i>Keaukaha-Panaewa Cmt. Ass'n v. Hawaiian Homes Comm'n</i> , 739 F.2d 1467 (9th Cir. 1984)	31
<i>Koresko v. RealNetworks, Inc.</i> , 291 F.Supp.2d 1157 (E.D. Cal. 2003)	4
<i>Leroy v. Great Western United Corp.</i> , 443 U.S. 173 (1979)	<i>passim</i>
<i>Motor & Equip. Mfrs. Ass'n v. Environmental Prot. Agency</i> , 627 F.2d 1095 (D.C. Cir. 1979)	25, 28
<i>Murphy v. Schneider National, Inc.</i> , 362 F.3d 1133	12
<i>Myers v. Bennett Law Offices</i> , 238 F.3d 1068 (9th Cir. 2001)	9, 10
<i>National Park Hospitality Ass'n v. Department of Interior</i> , 538 U.S. 803 (2003)	16
<i>New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995)	21
<i>Nissan Motor Co. v. Nissan Computer Corp</i> , 89 F.Supp.2d 1154 (C.D. Cal. 2000)	4
<i>Norita v. Northern Mariana Islands</i> , 331 F.3d 690 (9th Cir. 2003)	13
<i>Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Devel. Comm'n</i> , 461 U.S. 190 (1983)	16
<i>Piedmont Label Co. v. Sun Garden Packing Co.</i> , 598 F.2d 491 (9th Cir. 1979)	4, 12
<i>Price v. City of Stockton</i> , 390 F.3d 1105 (9th Cir. 2004)	30
<i>Pyramid Lake Paiute v. Hodel</i> , 882 F.2d 346 (9th Cir. 1989)	3
<i>Regional Rail Reorganization Act Cases</i> , 419 U.S. 102 (1974)	16
<i>Reiter v. Cooper</i> , 507 U.S. 258 (1993)	30
<i>Rilling v. Burlington N.R.R.</i> , 909 F.2d 399 (9th Cir. 1990)	31

TABLE OF AUTHORITIES (CON'T)

	<u>Pages</u>
Cases (con't)	
<i>Save Our Valley v. Sound Transit</i> , 335 F.3d 982 (9th Cir. 2003)	29
<i>Securities Investor Protection Corp. v. Vigman</i> , 764 F.2d 1309 (9th Cir. 1985)	11
<i>Sierra Club v. United States Nuclear Regulatory Comm'n</i> , 825 F.2d 1362 (9th Cir. 1987)	16
<i>Stewart Organization, Inc. v. Ricoh Corp.</i> , 487 U.S. 22 (1988)	3
<i>Sutain v. Shapiro & Lieberman</i> , 678 F.2d 115 (9th Cir. 1982)	<i>passim</i>
<i>Texas v. United States</i> , 523 U.S. 296 (1998)	16
<i>Thomas v. Anchorage Equal Rights Comm'n</i> , 220 F.3d 1134 (9th Cir. 2000)	17
<i>Union Pac. R.R. v. California Public Utils. Comm'n</i> , 346 F.3d 851 (9th Cir. 2003)	16
<i>United States v. General Dynamics Corp.</i> , 828 F.2d 1356 (9th Cir. 1987)	25
<i>United States v. Sioux</i> , 362 F.3d 1241 (9th Cir. 2004)	5
<i>United States v. Western Pac. R.R.</i> , 352 U.S. 59 (1956)	28
<i>US West Communications v. MFS Interlenet, Inc.</i> , 193 F.3d 1112 (9th Cir. 1999)	16
<i>Wachovia Bank, N.A. v. Burke</i> , 319 F.Supp.2d 275 (D.Conn. 2004)	30
<i>Wilson v. Union Security Life Ins. Co.</i> , 250 F.Supp.2d 1260 (D.Idaho 2003)	3
<i>Woodke v. Dahm</i> , 70 F.3d 983 (8th Cir. 1995)	8, 9, 12
Federal Statutes	
United States Code, title 5	
§ 701(b)(1)	28
§ 706	28
United States Code, title 28	
§ 1331	30, 31
§ 1391(b)	4, 8
§ 1391(b)(1)	10
§ 1406(a)	3
United States Code, title 42	
§ 1983	26, 29-31
§ 7507	29
§ 7521	27
§ 7521(a)	26, 28, 29
§ 7543	<i>passim</i>

TABLE OF AUTHORITIES (CON'T)

	<u>Pages</u>
Federal Statutes (con't)	
United States Code, title 42 (con't)	
§ 7543(a)	25-30
§ 7543(b)	<i>passim</i>
§ 7543(b)(1)	25, 26, 28, 31
§ 7543(b)(1)(C)	28, 29
§ 7602(k)	26
§ 7607(b)(1)	25
United States Code, title 49	
§ 32919(a)	21
Act of November 2, 1966, Pub. L. No. 89-714, 1966 U.S.C.C.A.N. (80 Stat. 1111)	
1300	4
Energy Policy and Conservation Act, Pub. L. No. 94-163, 1975 U.S.C.C.A.N. (89 Stat.) 871	21, 22
Federal Rules	
Federal Rules of Evidence	
602	13
701	13
702	13
703	13, 14
1002	13
1003	13
Local Rules of the Eastern District of California	
Rule 3-120	5, 8, 10
Rule 3-120(d)	4
Local Rules of the Northern District of California	
Rule 3-2(c)	8
California Statutes	
Government Code	
§ 11343	19
§ 11343.4	19
§ 11346.8(c)	19
§ 11349	19
§ 11349.1(a)	19
§ 11349.3	19
Health and Safety Code	
§ 43018.5(a)	18
§ 43018.5(b)(1)	23, 24

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2
3
4
5
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7
8
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14
15
16
17
18
19
20
21
22
23
24
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27
28

TABLE OF AUTHORITIES (CON'T)

	<u>Pages</u>
Other Authorities	
H.R. Rep. No. 94-340 (1975) , <i>reprinted in</i> 1975 U.S.C.C.A.N. 1762	22
H.R. Rep. No. 95-294 (1977), <i>reprinted in</i> 1977 U.S.C.C.A.N. 1077	22
California State Motor Vehicle Pollution Control Standards; Notice of Within-the-Scope Determination for Amendments to California’s Low Emission Vehicle Standards (“LEV II”), 70 Fed. Reg. 22034 (Apr. 28, 2005)	26, 27
California State Motor Vehicle Pollution Control Standards; Amendments to the California Zero Emission Vehicle (ZEV) Regulation; 2003-2006 Model Year Within the Scope Request; 2007 and Subsequent Model Years Waiver Request; Opportunity for Public Hearing, 70 Fed. Reg. 2860 (Jan. 18, 2005)	26
California State Motor Vehicle Pollution Control Standards; Notice of Within-the-Scope Determinations for Amendments to California’s Heavy-Duty Vehicle and Engine Standards for 1995 Urban Ban and 1998 NO _x Regulations, 69 Fed. Reg. 59920 (Oct. 6, 2004)	26
California State Motor Vehicle Pollution Control Standards; Within the Scope Requests; Opportunity for Public Hearing and Comment, 69 Fed. Reg. 5542 (Feb. 5, 2004)	26
Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (Sept. 8, 2003)	26
California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption–Notice of Waiver Decision and Within the Scope Determination, 64 Fed. Reg. 42689 (Aug. 5, 1999)	27
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California Motor Vehicle Pollution Control; Emission Control System Warranty Regulations; Waiver of Federal Preemption, 44 Fed. Reg. 61096 (Oct. 23, 1979)	27
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1 **INTRODUCTION**

2 Plaintiffs’ opposition brief avoids the core issues raised by this motion to dismiss.
3 Instead, it appears to be an attempt to distract the Court from those issues. The primary issues
4 for the Court to decide are: (1) whether harm is properly part of the calculus on venue, given
5 binding Ninth Circuit precedent to the contrary; (2) whether it is prudent for the Court to
6 withhold jurisdiction for three or four months, given the increased certainty that time would
7 bring to the issues in this case; and (3) whether, given the express language in Clean Air Act
8 section 209(b), Congress intended for the U.S. Environmental Protection Agency (“US EPA”) to
9 decide the questions under that section. On these issues, Plaintiffs seem to have little or nothing
10 to say. Defendant Witherspoon submits that these questions are relatively easy to answer in her
11 favor, and respectfully requests that the Court grant her motion.

12 Unfortunately, even on these venue and jurisdictional issues, Plaintiffs appear to
13 be arguing about the wisdom of California’s policy choice to develop these greenhouse gas
14 emission standards. Of course, that is for California’s elected and appointed officials to decide,
15 not this Court. Plaintiffs’ federal claims raise primarily questions about congressional intent.
16 They are not, for example, vehicles to second-guess the factual findings made by the Air
17 Resources Board. Certainly this motion to dismiss is not the place for a debate on the factual
18 basis for these proposed regulatory amendments. Nevertheless, because Plaintiffs flood the
19 Court with declarations, defendant Witherspoon is obligated to reiterate that the Air Resources
20 Board found these proposed regulatory amendments to be both technologically feasible and cost
21 effective, even having small economic benefits for Californians. (*See* First Amended Complaint
22 (“FAC”), Exh. A.; Supplemental Request for Judicial Notice (“SRJN”), Exh. B; Albu Decl.)
23 Nor does the Air Resources Board believe its steps are symbolic. The possible effects of global
24 warming are dire for Californians. Rising oceans. Shrinking snowpack. Adverse health effects
25 due to heat and more smog. More intense weather and wildfires. California is doing what it can,
26 within its jurisdiction, to try to prevent these effects. If other jurisdictions follow California’s
27 lead, each doing their own part, the world will be that much closer to solving this problem.

28 But, again, these factual points are not at issue on this motion. Instead, the issues

1 are venue, ripeness, and primary jurisdiction. This brief will address each in turn.

2 **ARGUMENT**

3 **I.**

4 **VENUE IN THIS CASE IS NOT PROPER IN FRESNO.**

5 Plaintiffs present the Court with an extraordinary amount of paper to attempt to
6 show that the local car dealer plaintiffs are harmed now, in an attempt to meet their burden that
7 intra-district venue is proper. In fact, Plaintiffs’ opposition reads as if the local car dealers were
8 the only plaintiffs. But this is just a distraction. It should be obvious to the Court that the major
9 automobile manufacturers are the real plaintiffs in this case. The fact that General Motors
10 Corporation, DaimlerChrysler Corporation, and their fellow multi-national automobile
11 manufacturers – in a cynical attempt to create venue in this Division – have selectively joined
12 local car dealers is just an artifice. The challenged proposed greenhouse gas emission regulatory
13 amendments, if adopted, will at some point and to some degree affect every single automobile
14 manufacturer and every single California car dealer. That is, after all, the purpose: to decrease
15 greenhouse gas emissions, on average, from every vehicle sold in California.

16 But just because these proposed regulatory amendments may have a large purpose
17 and a wide scope does not mean Plaintiffs have an “unfettered choice” on venue, or intra-district
18 venue. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185 (1979). Rather, the purpose of
19 venue provisions, which are by definition meant to limit the possible venues, is to protect
20 *defendants*, not plaintiffs, and venue statutes are not to be read to benefit plaintiffs. *Id.* at 183-
21 184 & n.18. The statutory and local rule venue requirements must be interpreted consistent with
22 this purpose. And, of course, in interpreting the venue requirements – whether they be inter-
23 district or intra-district – Plaintiffs cannot escape the law of this Circuit. As explained below,
24 Plaintiffs’ arguments on venue simply ignore or fail to give proper respect to the relevant,
25 binding Ninth Circuit cases.¹

26
27 1. In their brief, Plaintiffs also make reference to an unpublished ruling by this Court
28 in a previous case, and to state venue rules. Neither helps Plaintiffs.

As Plaintiffs admit, the previous case before this Court settled, and was voluntarily dismissed. (Oppo. Brf. at 9 n.12.) There was no judgment entered. Thus, this

1 What follows in this section are a couple of preliminary points, and then
2 discussion of the relevant venue issues: (1) the binding precedent of *Leroy* and *District No. 1 v.*
3 *Alaska*, 682 F.2d 797, 799 (9th Cir. 1982), which hold that harm is not part of the calculus on
4 venue; (2) applying that precedent to the question of intra-district venue is not illogical; (3)
5 applying that precedent means intra-district venue is not proper in this Division; and (4)
6 Plaintiffs’ failure to show harm in this Division.

7 Plaintiffs attempt to turn defendant Witherspoon’s motion on venue into a
8 question of convenience. But defendant Witherspoon explicitly explained that her motion to
9 dismiss was not brought as a motion based on the convenience of parties and witnesses.
10 (Opening Brf. at 12.) Rather, the question is whether Plaintiffs’ choice was proper – whether it
11 complied with the Court’s local rules requiring cases be filed where they “arose.” Federal statute
12 requires that a plaintiff’s choice of district *and* division be proper. *See* 28 U.S.C. § 1406(a). The
13 question of convenience is a separate, distinct issue. *Decker Coal Co. v. Commonwealth Edison*
14 *Co.*, 805 F.2d 834, 842 (9th Cir. 1986).

15 Plaintiffs start out by asserting that defendants have the burden to show improper
16 venue, citing to two cases from the Third and Seventh Circuits. (Oppo. Brf. at 45.) Plaintiffs
17 simply ignore the Ninth Circuit case on point on this question, which we cited in our opening

18
19 Court’s intermediate rulings in that case do not bind the parties, or the Court, in this case. *E.g.*,
20 *Pyramid Lake Paiute Tribe v. Hodel*, 882 F.2d 346, 369 n.5 (9th Cir. 1989); *In re Duncan*, 713
21 F.2d 538, 541, 542, 544 (9th Cir. 1983). Even if this Court’s prior ruling was published, it is not
22 binding authority. *See Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (explaining that
23 trial court decisions, unlike appellate court decisions, are not “binding authority”); *Cactus*
24 *Corner, LLC v. U.S. Department of Agriculture*, 346 F.Supp.2d 1075, 1106 (E.D. Cal. 2004)
25 (“No trial court decision is binding precedent.”). And “an unpublished decision is usually not
suitable as a source of persuasive authority.” *Wilson v. Union Security Life Ins. Co.*, 250
F.Supp.2d 1260, 1262 n.3 (D. Idaho 2003) (citing *Hart*, 266 F.3d at 1278). Moreover, as
Plaintiffs admit, the cases of *Leroy* and *District No. 1* were not briefed in that prior case. (Oppo.
Brf. at 46 (calling cases “new-found”).) Plaintiffs cannot mean to suggest that the Court cannot
evaluate this motion based on the law and facts presented to it now.

26 Venue in this Court is a matter of federal law. *Leroy* at 183 n.15; *District No. 1* at
27 798; *Sutain v. Shapiro & Lieberman*, 678 F.2d 115, 117 (9th Cir. 1982). State law has no
28 relevance in interpreting what venue is proper in federal courts, even in diversity cases. *Stewart*
Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988). State law venue rules apply to state
courts, and California can choose to set venue in its courts differently than the federal
government and this District.

1 brief. (Opening Brf. at 11.) The Ninth Circuit has held: “Plaintiff had the burden of showing
2 that venue was properly laid.” *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491,
3 496 (9th Cir. 1979). *See also Koresko v. RealNetworks, Inc.*, 291 F.Supp.2d 1157, 1160 (E.D.
4 Cal. 2003); *Nissan Motor Co. v. Nissan Computer Corp.*, 89 F.Supp.2d 1154, 1161 (C.D. Cal.
5 2000). *Piedmont Label* is binding on this Court. *See Hart v. Massanari*, 266 F.3d 1155, 1170-
6 71 (9th Cir. 2001) (explaining that district courts must follow the decisions of their court of
7 appeals). For Plaintiffs to suggest otherwise is simply misleading to the Court, shows a lack of
8 respect for the Ninth Circuit’s precedent, and is without any merit.

9 Plaintiffs’ position on this issue fails to understand or acknowledge that, in the
10 Ninth Circuit, under the binding precedent of *District No. 1*, harm is not part of the calculus for
11 venue in federal question cases challenging state laws. *See* 682 F.2d at 799. Plaintiffs’
12 opposition brief is filled with suggestions that venue in this District can be based on a plaintiff’s
13 harm in such cases. But this approach is inconsistent with *District No. 1*. It certainly is not the
14 appropriate basis for venue in this District for this case: that is based on defendant
15 Witherspoon’s residence. (Opening Brf. at 11-12 n.4.) Once the binding precedent of *District*
16 *No. 1* is acknowledged, it is not so surprising that the same principles apply to intra-district
17 venue. This case should be transferred to the Sacramento Division.

18 **A. *Leroy* and *District No. 1* Are Binding Precedent, Requiring this**
19 **Court to Exclude Harm from its Calculus on Venue and Intra-**
20 **district Venue.**

21 Plaintiffs attempt to belittle the precedent of *Leroy* and *District No. 1*, as
22 “developed under a now-discarded version of the federal venue statute,” and therefore not
23 relevant to interpretation of the Court’s local rule on intra-district venue. This is incorrect.
24 *Leroy* and *District No. 1* interpreted a venue statute that used the very same terminology – where
25 an action “arose” – used in this Court’s local rule on intra-district venue. *Compare* Act of
26 November 2, 1966, Pub. L. No. 89-714, 1966 U.S.C.C.A.N. (80 Stat. 1111) 1300 (former 28
27 U.S.C. § 1391(b), setting venue in federal question cases “in the judicial district where all
28 defendants reside, or in which the claim arose, except as otherwise provided by law”) *with* Local
Rule 3-120(d) (requiring actions “arising in” particular counties to be commenced in particular

1 divisions). This Court’s local rule on intra-district venue is not a “throwback” to those earlier
2 cases; rather, its operative language was originally adopted *at the same time* as the federal venue
3 statute interpreted by *Leroy* and *District No. 1*. (See Request for Judicial Notice (“RJN”), filed
4 Mar. 7, 2005, Exh. A (General Order No. 18, adopted in 1966).) Thus, as this motion’s opening
5 brief explained, these cases provide the rules for interpreting Local Rule 3-120, for that local rule
6 utilizes the same language, deals with the same topic (venue), and was initially adopted at the
7 same time. See, e.g., *United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004) (“similar
8 language in similar statutes should be interpreted similarly”). Plaintiffs make no argument that
9 these are not the same words, are not on the same topic, or were not initially adopted at the same
10 time.

11 Plaintiffs also attempt to distinguish *Leroy* and *District No. 1*. While those cases
12 certainly had different facts, they established binding precedent on this Court on venue. After
13 all, one of the purposes of appellate courts is to announce rules for future application by lower
14 courts, not simply decide particular cases or the application of principles to particular cases.
15 *Hart*, 266 F.3d at 1170-72, 1176-77. This Court is bound by prior Ninth Circuit cases’ “reason
16 and spirit” and their “mode of analysis.” *In re Stern*, 345 F.3d 1036, 1043 (9th Cir. 2003); *Hart*,
17 266 F.3d at 1070. This includes the Ninth Circuit precedent’s treatment of “other rules
18 considered and rejected.” *Hart*, 266 F.3d at 1070. *Leroy* and *District No. 1* held, in unequivocal
19 terms, that the effects of a state law are irrelevant in determining the proper venue of a case
20 challenging that state law. *Leroy*, 443 U.S. at 186; *District No. 1*, 682 F.2d at 799. In *Leroy*
21 (and it appears also in *District No. 1*), the lower court had said – like Plaintiffs here – that harm
22 could be a basis for venue. *Leroy*, 443 U.S. at 183, 186; *District No. 1*, 682 F.2d at 798. Both
23 cases explicitly considered and rejected this argument, and did so without any qualifications.
24 *Leroy*, 443 U.S. at 186-87; *District No. 1*, 682 F.2d at 799. Thus, those courts’ rejection of harm
25 is binding precedent on this Court.

26 In trying to distinguish *Leroy*, Plaintiffs argue that the concerns expressed there
27 are not present here. In *Leroy*, the Court discussed three reasons why venue was inappropriate in
28 the State where effects of the defendant State’s law were felt. 443 U.S. at 185-86. The first

1 reason (prefaced by the phrase “Most importantly”) was that the venue where harm allegedly
2 occurred was not the location of the actions taken by the state defendants to establish and enforce
3 the state requirements – it was not the “locus” of the claim.² *Id.* While the Court did not
4 explicitly tie this is to the language of the federal venue statute (where the “claim arose”), this
5 first reason is easily connected to the Ninth Circuit’s test for federal question venue (where “a
6 substantial part of the acts, events, or omissions occurred that gave rise to the claim for relief”).
7 *See, e.g., Sustain*, 678 F.2d at 117. The second reason discussed in *Leroy* (prefaced by the phrase
8 “Less important”) was that a challenge to a state law might include the interpretation of that state
9 law, and that federal judges sitting in that state were “better qualified” to do so. *Id.* at 186. The
10 third reason (placed in an altogether separate paragraph) was that finding venue proper where a
11 state law has its impacts “would subject the [State] officials to suit in almost every district in the
12 country” and this would be “inconsistent with the underlying purpose of the provision, for it
13 would leave the venue decision entirely in the hands of plaintiffs.” *Id.* The Court, however, did
14 not enumerate these three reasons as factors or criteria of equal weight – as Plaintiffs seem to
15 imply. *Id.* at 185-86. Rather, they were separate reasons leading to the conclusion that the Court
16 should adopt the rule that it did (that harm is not part of the calculus of venue for federal

18 2. Plaintiffs interpret this first reason in terms of the inconvenience to defendants.
19 (Oppo. Brf. at 50.) This is a misinterpretation. While convenience was certainly part of the
20 context for the Court’s decision, the Court did not explain this reason in terms of convenience.
21 *Leroy*, 443 U.S. at 183, 185-86. Rather, the Court explained this reason in terms of the location
22 of the “action that was taken . . . that provides the basis for [the plaintiff’s] federal claim” and
23 also the location of “the bulk of the relevant evidence and witnesses—apart from employees of the
24 plaintiff, and securities experts who come from all over the United States.” *Id.* at 185-86. As the
25 Ninth Circuit explained, convenience does not control the question of proper venue: “The
26 determinative factors are set out in the statute: residence of the parties or situs of the claim.”
27 *Decker Coal*, 805 F.2d at 842.

28 It is important to recognize that proper venue is not precisely about the distance to
the courthouse for a particular defendant. After all, some judicial districts are quite small in
geographical size, and others (like the Eastern District of California) are quite large. For
example, the driving distance from Fresno to Sacramento (approximately 175 miles) is longer
than the distance from Boston to Providence, Rhode Island (approximately 50 miles), Hartford,
Connecticut (approximately 100 miles), or Concord, New Hampshire (approximately 70 miles) –
all sites of courthouses in different judicial districts. Closer to home, the driving distance from
Fresno to Sacramento is longer than the distance from San Francisco or Oakland (where the
Northern District sits) to Sacramento (approximately 85 miles).

1 question cases). And while the second (less important) reason would not be applicable here, the
2 first and third certainly are. As discussed below (and in the opening brief), the acts that give rise
3 to Plaintiffs’ claims occurred outside this Division. And if venue could be set where a state
4 law’s impacts were felt, plaintiffs Alliance of Automobile Manufacturers, General Motors
5 Corporation, and DaimlerChrysler Corporation could bring this case – with these local car dealer
6 plaintiffs or some other local car dealers as co-plaintiffs – anywhere in the country. This
7 possibility, though analytically consistent with Plaintiffs’ argument, would be inconsistent with
8 the principle of venue restrictions.

9 Plaintiffs argue that the holding of *District No. 1* applies only where more than
10 one state was involved. (Oppo. Brf. at 51.) However, the *District No. 1* Court did not make such
11 a distinction; instead, it focused on the fact that the “locus” of the claim – where the statute was
12 enacted and would be enforced – was in a different venue. 682 F.2d at 798-99. Moreover, in
13 discussing the three reasons set forth in *Leroy*, the *District No. 1* court acknowledged that they
14 were not all necessary to find venue improper:

15 We note that the Supreme Court’s concern that state officials not face suits in
16 many different districts does not seem applicable in this case. . . . However, the
17 inapplicability of that factor does not make venue proper in Washington. The
18 other factors discussed in the text still make Alaska a more plausible locus of
19 these claims.

20 *Id.* at 799 n.2. Thus, it is not surprising that, while the Ninth Circuit discussed the various
21 district court cases that included harm in their calculus of venue as “involv[ing] districts in only
22 one state,” the Court still spoke broadly when it stated that “To the extent that these cases are
23 inconsistent with *Leroy*, we decline to follow them.” *Id.* If the Court felt *Leroy*’s exclusion of
24 harm did not apply to intra-state venue conflicts, it would not have needed to say these cases
25 were “inconsistent with *Leroy*” or that it “decline[d] to follow them.” It would have just
26 distinguished those cases as involving intra-state venue conflict, and ignored them. But this the
27 Court did not do. Instead, it “declined to follow them.” *Id.* Thus, while *District No. 1* involved
28 a different set of facts (like most cases), it still applied the rule that harm is not part of the
29 calculus on venue and still focused on where the state defendants’ challenged actions occurred.
30 It fully applies here.

1 Plaintiffs go to great lengths to suggest that excluding harm from the calculus of
2 intra-district venue would be inconsistent with the current federal venue statute. (Oppo. Brf. at
3 48-50.) But Plaintiffs can point to absolutely nothing in the federal venue statute that requires
4 districts to set intra-district venue in a particular way. Moreover, the test the Ninth Circuit
5 developed to interpret the “claim arose” language – and which should apply to interpreting Local
6 Rule 3-120 – is strikingly similar to the current venue statute.³ *Compare Sutain*, 678 F.2d at 117
7 (venue is appropriate where “a substantial part of the acts, events, or omissions occurred that
8 gave rise to the claim for relief”) *with* 28 U.S.C. § 1391(b) (venue is appropriate where “a
9 substantial part of the events or omissions giving rise to the claim occurred”). *See also* N.D. Cal.
10 Local Rule 3-2(c) (explicitly defining the term “arises” in terms of where “a substantial part of
11 the events or omissions which give rise to the claim occurred”). Both focus on the same thing:
12 the acts that gave rise to the claim. There is no reason that the Supreme Court, or the Ninth
13 Circuit, would not apply the same precedent to both the old version of the federal venue statute
14 and the current version. Certainly there is no inconsistency in applying the same precedent to
15 both, and to this local rule, too.

16 In arguing such inconsistency, Plaintiffs point primarily to a set of district court
17 cases *in other circuits* that hold that harm is part of the calculus on venue.⁴ Whatever the

18
19 3. As Plaintiffs point out (Oppo. Brf. at 47), one significant difference between the
20 prior version of the federal venue statute for federal question cases and the current version is that
21 it is now clear that there can be more than one place where venue is proper. *See Jenkins Brick*
22 *Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003) (explaining this change). *See also Leroy*,
23 443 U.S. at 184-85 (declining to decide whether the former venue statute’s “language adopts the
24 occasionally fictive assumption that a claim may arise in only one district”). For example, as the
25 opening brief on this motion recognized, venue in this case could be appropriate in the Eastern
26 District of California or the Central District of California. (Opening Brf. at 11-12 n.4, 16 n.6,
27 17.) Local Rule 3-120 could be interpreted the same way. But the question still remains
28 whether harm is part of this calculus, and/or whether facts exist to show that “a substantial part
of the acts, events, or omissions occurred that gave rise to the claim for relief” occurred in the
Fresno Division.

26 4. Other cases from still other circuits are consistent with *District No. 1*, though not
27 phrased in the same fashion. The Eighth Circuit rejected looking at the “location of the ultimate
28 effect” of the defendant’s conduct: “We think it far more likely that by referring to ‘events and
omissions giving rise to the claim,’ Congress meant to require courts to focus on relevant
activities of the defendant, not of the plaintiffs.” *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir.
1995). More recently, the Eleventh Circuit followed *Woodke*, and focused on “the place where

1 validity of these cases in other circuits, this Court must follow Ninth Circuit precedent. *See*
2 *Hart*, 266 F.3d at 1070-71. The inescapable conclusion of *District No. 1* is that harm is not part
3 of the calculus on venue. That case is valid precedent on this issue. This is not only because the
4 Ninth Circuit test for where a claim arose is essentially the same as the language in the current
5 federal question venue statute. It is also because it appears that the Ninth Circuit’s holding in
6 *District No. 1* was not dependent on whether the Ninth Circuit’s general test for where a claim
7 arose continued to be the appropriate test for federal question venue. *See District No. 1*, 682
8 F.2d at 799 (explaining that, in excluding harm, the Court need not decide whether the
9 “substantial contacts” test for venue remained the proper test after *Leroy*). The Ninth Circuit’s
10 holding in *District No. 1* was simply the logical conclusion, given the underlying purposes of
11 venue rules in general.

12 The only Ninth Circuit case that Plaintiffs cite in opposition is *Myers v. Bennett*
13 *Law Offices*, 238 F.3d 1068 (9th Cir. 2001). The venue discussion in *Myers*, however, was
14 expressly limited to the tort context: “at least one court has found that *in a tort action*, the locus
15 of the injury was a relevant factor. *Cf. Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 867-68 (2nd
16 Cir. 1992).” 238 F.3d at 1076 (emphasis added). Here, the claim is a challenge to a state law –
17 as in *Leroy* and *District No. 1* – not a tort claim. The claim in *Myers* (under the Fair Credit
18 Reporting Act, for improperly ordering a credit report) – like a tort action – is very different
19 from a challenge to a state law. First, the claim in *Myers* was essentially a claim “that the
20 defendant unlawfully invaded the plaintiff’s privacy by obtaining information deemed
21 confidential.” 238 F.3d at 1074. Thus, the harm – the invasion of privacy – is explicitly an
22 element of the claim. Conversely, in making a challenge to a state law, the harm is not an
23 element of the claim. Second, in a tort claim, like in *Myers*, the universe of where “substantial
24 part of the acts, events, or omissions occurred that gave rise to the claim” is limited. That
25 universe is where the two parties interacted. There might be one or two, or perhaps three,

26
27
28 the wrong has been committed,” and “[o]nly the events that directly give rise to a claim.”
Jenkins Brick, 321 F.3d at 1371-72. *See also, e.g., Abramoff v. Shake Consulting, L.L.C.*, 288
F.Supp.2d 1, 4 (D.D.C. 2003) (following *Jenkins Brick* and *Woodke*).

1 districts with connections to the dispute. Conversely, most state laws, given the interstate nature
2 of the national economy, on their face reach many companies that do business in other States and
3 import their products or services. If harm were part of the calculus for those cases, venue would
4 be appropriate throughout the country. That is exactly what *Leroy* sought to avoid. Lastly, it is
5 important to note that the parties in *Myers* did not raise *Leroy* or *District No. 1* in their briefing
6 (see SRJN, Exhs. C, D, E, F (appellate briefs in *Myers*)), and the Ninth Circuit did not appear to
7 recognize their relevance. *Myers* is not on point, and surely cannot be read to overrule *Leroy* or
8 *District No. 1*.

9 Thus, *Leroy* and *District No. 1* remain binding precedent in this Circuit. Harm is
10 not part of the calculus on venue in this Circuit or intra-district venue in this District.

11 **B. Excluding Harm in Deciding Intra-district Venue Is Not**
12 **Illogical.**

13 Plaintiffs argue that excluding harm from the venue analysis leads to “absurd
14 results.” But the only result they point to is that if “a regulation were adopted in and enforced
15 solely by State officials based in Los Angeles” venue would be proper in the Eastern District, but
16 not proper in either the Fresno or Sacramento Division. (Oppo. Brf. at 49.) Plaintiffs do not
17 understand the principles of venue and of *Leroy* and *District No. 1*. If a state law was adopted in
18 Los Angeles, and enforced in Los Angeles, then venue would be proper in only the Central
19 District of California, because that is where the acts occurred that gave rise to the challenge (and
20 intra-district venue would be appropriate depending on the local rules of the Central District).
21 That is, if the state law was adopted and enforced in Los Angeles by Los Angeles-based
22 officials, venue would *not* be proper in the Eastern District of California.⁵ There is nothing
23 absurd about this.

24 _____
25 5. Perhaps Plaintiffs meant to suggest that it is possible that a Sacramento-based
26 official could adopt and enforce a state regulation in Los Angeles. In that case, venue would be
27 proper in Sacramento, because venue can be based on residence. See 28 U.S.C. § 1391(b)(1).
28 This is, of course, a hypothetical question, and not the situation here. Moreover, the simple way
to avoid any incongruities that might arise in such a case is to interpret the “arising in” language
in Local Rule 3-120 to also include (at least in those situations) the *defendant’s* residence. This
is consistent with holdings and policies laid out in *Leroy*.

1 Plaintiffs reach for hyperbole in stating that applying *Leroy* and *District No. 1* to
2 intra-district venue “would make it *illegal* for local businesses to sue an officer of the State of
3 California in this courthouse.” (Oppo. Brf. at 46 (emphasis in original).) In deciding this
4 motion, though, all the Court would need to do is acknowledge that, in this case, all of defendant
5 Witherspoon’s acts to set these proposed regulatory amendments occurred in Sacramento (or Los
6 Angeles) and apply the law of the Ninth Circuit. As the Court is well aware, there are plenty of
7 other circumstances where local individuals or businesses might sue state officials in this
8 Division, where those state officials reside or take their actions locally. In any event, there is
9 nothing illogical about generally having challenges to state law occur in the state capital,
10 Sacramento. It is, after all, the Supreme Court that emphasized that the purpose of venue
11 provisions is to protect defendants. *Leroy* at 183-84.

12 **C. Without Looking at Harm, Intra-district Venue Is Proper**
13 **Only in Sacramento.**

14 Plaintiffs assert that the Air Resources Board conducts its business “on a
15 Statewide basis.” (Oppo. Brf. at 46.) But the question of venue is not a question of where a
16 defendant does its business. To conflate those two questions confuses venue with personal
17 jurisdiction. *See Jenkins Brick*, 321 F.3d at 1372 (disapproving of district court cases because
18 they used a personal jurisdiction analysis for venue). Constitutional due process allows personal
19 jurisdiction when the defendant has “minimum contacts” with the forum. *E.g., International*
20 *Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). But personal jurisdiction and venue are
21 distinct concepts and both must be proper for a court to hear a case. *Securities Investor*
22 *Protection Corp. v. Vigman*, 764 F.2d 1309, 1313 (9th Cir. 1985). As explained in defendant
23 Witherspoon’s opening brief, intra-district venue in this District depends on where the claim
24 arises, and under Ninth Circuit precedent that depends where “a substantial part of the acts,
25 events, or omissions occurred that gave rise to the claim for relief.” *Sutain*, 678 F.2d at 117.
26 That is not equivalent to where a defendant does business.

27 In addition, Plaintiffs refer to a public informational meeting held in Fresno
28 during the summer of 2004. (Oppo. Brf. at 46.) But holding such a meeting is not enough to

1 create intra-district venue for this case. Instead, there must be acts within this Division that give
2 rise to Plaintiffs' claims. *Sutain*, 678 F.2d at 117. "Only the events that directly give rise to a
3 claim are relevant." *Jenkins Brick*, 321 F.3d at 1371. Thus, in *Jenkins Brick* (a breach of
4 contract case seeking to enforce a former employee's covenant not to compete), the Court's
5 venue analysis excluded the location of sales and training meeting, where salary and benefits
6 came from, and where the agreement was sent. *Id.* at 1372-73. And, in *Woodke* (a case alleging
7 passing off of a trademark), the Court's venue analysis excluded the location where the product
8 was manufactured, as well as where an agreement between the parties was executed. 70 F.3d at
9 985-86. This is also consistent with the Ninth Circuit case of *Decker Coal*, where the plaintiff
10 alleged breach of contract and the defendant relied on a force majeure clause; the Court found
11 venue proper only where the contract was breached, and not where the force majeure events
12 occurred (and where the focus of the trial would be). 805 F.2d at 842-43. Here, Plaintiffs' basic
13 claim is that the adoption and enforcement of these proposed regulatory amendments is
14 inconsistent with federal law. Plaintiffs' claims are not based on anything that occurred or did
15 not occur at the public informational meeting held in Fresno. In fact, Plaintiffs' claims in this
16 action are not procedural at all; they are challenges to the substance of what was acted on by the
17 Air Resources Board in September 2004 at its hearing in Los Angeles. Plaintiffs' reliance on the
18 Fresno meeting is particularly disingenuous, since none of them (or anyone from the automobile
19 industry, or anyone opposing these proposed regulatory amendments) attended that meeting.
20 (Kaspar Decl. ¶¶ 5, 6 & Exh. B.) Thus, the acts that give rise to Plaintiffs' claims are the acts
21 approving and adopting these challenged proposed regulatory amendments, not some
22 information meeting held before the agency formally initiated its rulemaking process. As was
23 explained, these acts occurred in Sacramento (and Los Angeles).

24 **D. Even If the Court Were to Look at Harm, Plaintiffs Do Not**
25 **Meet Their Burden to Show Harm in this Division.**

26 Even if the Court, contrary to *Leroy* and *District No. 1*, were to look at harm in
27 determining venue, Plaintiffs still have the burden to show that the evidence supports their
28 position. *Piedmont Label*, 598 F.2d at 496. See also *Murphy v. Schneider National, Inc.*, 362

1 F.3d 1133, 1138 (analogizing to moving party’s burden on summary judgment in determining
2 motion to change venue). To show harm in this Division, Plaintiffs rely on the local car dealer
3 plaintiffs. To show harm to them, Plaintiffs cannot point directly to the challenged proposed
4 greenhouse gas emission regulatory amendments, for those only apply to automobile
5 manufacturers. (*See, e.g.*, RJN, Exh. C, at A-6 (§ 1961.1(a)(1)(A)).) Instead, Plaintiffs assert
6 that, to comply with these proposed regulatory amendments: automobile manufacturers will
7 need to install technology that reduces greenhouse gas emissions by improving their vehicles’
8 engines and transmissions; that this technology has costs; that in response to these costs,
9 automobile manufacturers will limit the models of vehicles available in California; that this
10 action will decrease sales in California; that this decrease in sales will limit the local car dealer
11 plaintiffs’ future revenue and profits (in 2010 and 2011); and that this decreases the value of the
12 local car dealer plaintiffs’ businesses. (Oppo. Brf. at 52.) This is an extended chain of expert
13 opinion testimony. Plaintiffs’ showing is insufficient, both because it relies on inadmissible
14 evidence and because it is flawed in many respects.

15 Plaintiffs have no admissible evidence on the linchpin of this chain of causation:
16 that the costs of the required technology will decrease sales. Plaintiffs rely on two declarants for
17 this point: Reginald R. Modlin and Alan R. Weverstad. (The crucial paragraphs are identified
18 in footnotes on the third page of the declaration of Plaintiffs’ expert accountant, Stuart H.
19 Harden.) There are two problems with Plaintiffs’ evidence. First, it appears that the information
20 contained in these declarations is “taken from” or “based on” other documents. (*See* Modlin
21 Decl. ¶ 7; Weverstad Decl. ¶ 10.) This is inappropriate. Declarations, like any evidence, must
22 be shown to be based on personal knowledge or the declarant’s own expert opinion, and cannot
23 be testimony about the contents of documents. *See* Fed. R. Evid. 602, 701, 703, 1002, 1003;
24 *Norita v. Northern Mariana Islands*, 331 F.3d 690, 697-98 (9th Cir. 2003) (declarants must show
25 personal knowledge, in part so court can evaluate other evidentiary objections such as hearsay).
26 But the bigger problem with Plaintiffs’ evidence on this point is that the declarants are not
27 qualified to provide expert opinion testimony on the question of whether sales will decrease. *See*
28 Fed. R. Evid. 702 (explaining qualifications necessary for expert testimony). An expert must

1 have expertise in the subject matter on which he or she testifies. *See, e.g., Jones v. Lincoln Elec.*
2 *Co.*, 188 F.3d 709, 723-24 (7th Cir. 1999) (explaining that metallurgist not qualified to testify on
3 toxicology). Mr. Modlin is a lawyer, and both he and Mr. Weverstad are engineers. (Modlin
4 Decl. ¶ 2; Weverstad Decl. ¶ 2.) Other than identifying their professions and the length of their
5 employment, neither declarant provides any information on their qualifications to provide expert
6 opinion testimony on any subject. In any event, the question of how increased costs (or model
7 availability) translates into decreased sales is not an engineering question (or a legal question),
8 but a marketing or economic question. Mr. Modlin and Mr. Weverstad are simply not qualified
9 to express an opinion on that question, because they have not shown any expertise on marketing
10 or economics. Since Mr. Harden’s conclusions on the value of the local car dealer plaintiffs’
11 businesses are explicitly based only on these statements by Mr. Modlin and Mr. Weverstad, Mr.
12 Harden’s conclusions are not admissible either.⁶ Thus, even though harm is not part of the
13 analysis of venue under Ninth Circuit precedent, Plaintiffs have failed to show harm in this
14 Division.

15 Moreover, even if the Court were to consider Plaintiffs’ inadmissible evidence on
16 this point, Plaintiffs’ expert testimony is flawed. As detailed in the declaration of Mr. Steve
17 Albu, plaintiffs General Motors Corporation and DaimlerChrysler Corporation can meet the
18 proposed standards for model years 2010 and 2011 with slight reductions in greenhouse gas
19 emissions. All automobile manufacturers can meet the proposed greenhouse gas emission
20 standards – for these early model years as well as up through model year 2016 – through existing
21 technologies. These existing, already-in-use technologies include turbocharging, variable value

22
23 6. Federal Rule of Evidence 703 and its Advisory Committee Notes explain the
24 three kinds of evidence that experts can base their opinions on: personal knowledge; evidence
25 admitted at the hearing or trial; and otherwise inadmissible evidence that is “of a type reasonably
26 relied upon by experts in [his] particular field.” Mr. Harden bases his opinion, in part, on this
27 second category – what is in the declarations of Mr. Modlin and Mr. Weverstad. Mr. Harden’s
28 declaration would not qualify for the third category. Mr. Harden provides no basis for the Court
to conclude that the sales information these gentlemen provided to him is the kind “reasonably
relied upon by experts in [his] particular field.” Moreover, that information was prepared in
litigation, and is inherently unreliable. *See In re Imperial Credit Indus., Inc. Securities*
Litigation, 252 F.Supp.2d 1005, 1012-13 (C.D. Cal. 2002) (expert may not rely on another
expert’s report not admitted into evidence).

1 timing (optimizing the opening and closing of engine valves), an automated manual
2 transmission, modifications to the fuel injection system, and improved low-leak air conditioning
3 systems. There is no need for any automobile manufacturers to make a shift to hybrid electric
4 engines (or eliminate models). In addition, as detailed in the declaration of Dr. Reza Mahdavi,
5 there are some fundamental flawed economic assumptions in Plaintiffs' analysis. That analysis
6 fails to take into account the high profits associated with Plaintiffs' larger vehicles, fails to
7 account for the resulting alternative purchases made by consumers (even assuming models are
8 not available), fails to place any decrease in sales in the context of the highly fluctuating sales
9 numbers of the local car dealer plaintiffs, and used an inferior method to value these businesses.
10 Plaintiffs' expert evidence is neither reliable nor persuasive, and it fails to demonstrate that there
11 will be a change in the present value of the local car dealer plaintiffs' businesses.

12 ** ** **

13 Federal law requires that a case be filed in both the proper district and the proper
14 division. The Ninth Circuit's binding precedent is that venue, in cases challenging state laws or
15 regulations, cannot be based on the harm to the plaintiffs. Because of this, the filing of this case
16 in this Division was not proper. The Court should transfer the case to the Sacramento Division.

17 II.

18 **THE PRUDENTIAL CONCERNS OF RIPENESS COUNSEL** 19 **THE COURT TO DISMISS OR STAY THIS CASE FOR A** 20 **SHORT PERIOD OF TIME.**

21 Plaintiffs seem to misunderstand the nature of defendant Witherspoon's ripeness
22 argument. Defendant Witherspoon did not argue that the Air Resources Board has not set down
23 a course of action to regulate greenhouse gas emissions from motor vehicles, or that the Air
24 Resources Board did not make major policy decisions about the contours of these proposed
25 regulatory amendments. She did not argue, in this motion, that Plaintiffs' claims are not ripe
26 until the proposed greenhouse gas emission regulatory amendments are effective or are enforced
27 against automobile manufacturers. Nor did she argue that Plaintiffs' case does not raise
28 significant legal issues (including whether the proposed greenhouse gas emission standards are
fuel economy standards), issues on which she and Plaintiffs fundamentally disagree. In their

1 opposition brief,⁷ Plaintiffs rebut these far-reaching straw man arguments, but defendant
2 Witherspoon’s motion to dismiss did not reach so far. Instead, defendant Witherspoon’s point is
3 that – because these proposed regulatory amendments are not final and there is no harm due to a
4 short delay – the Court, and the parties, would be well served to wait (probably just three or four
5 more months) before having this case be active, and enter discovery and motion practice.

6 Plaintiffs ignore the purposes of the ripeness doctrine. As the Supreme Court
7 recently reminded us, one of the purposes of prudential ripeness is “to protect the agencies from
8 judicial interference until an administrative decision has been formalized.” *National Park*
9 *Hospitality Ass’n v. Department of Interior*, 538 U.S. 803, 808 (2003) (quoting *Abbott*
10 *Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967), *overruled on other grounds*, *Califano v.*
11 *Sanders*, 430 U.S. 99 (1977)). “Principles of federalism lend this doctrine additional force when
12 a federal court is reviewing a state agency decision at an interim stage in an evolving process.”
13 *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999). The
14 purpose of requiring finality is to avoid the situation “where pending administrative proceedings
15 or further agency action *might* render the case moot and judicial review completely
16 unnecessary.” *Sierra Club v. United States Nuclear Regulatory Comm’n*, 825 F.2d 1356, 1362
17 (9th Cir. 1987) (emphasis added). So, a “claim is not ripe for adjudication if it rests upon
18 contingent future events that may not occur as anticipated, or indeed may not occur at all.”
19 *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks and citations
20 omitted). And “[i]nformal or ‘tentative’ regulations are not final.” *Association of Am. Med.*
21 *Colls. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000). The Ninth Circuit looks for true
22 finality: whether the agency’s process has been “completed” and whether “the action has the
23 status of law.” *Id.*

24 Plaintiffs also misapply the Supreme Court cases they cite in arguing that finality

25
26 7. Proposed intervenor Association of International Automobile Manufacturers
27 (“AIAM”) has sought permission to file an opposition brief and declaration on the ripeness issue,
28 even though it is not a party. Because the Court has not yet allowed that filing, defendant
Witherspoon is not responding to that brief in this reply brief. Should the Court allow that brief
to be filed, defendant Witherspoon respectfully requests an opportunity to file a short reply brief
to that proposed opposition brief.

1 is not required. (*See* Oppo. Brf. at 24-28.) Those cases stand for the proposition that a challenge
2 can be ripe before it is applied to or enforced against a particular individual or business. For
3 example, in *Columbia Broadcasting System, Inc. v. United States*, the agency’s regulations had
4 been adopted, and the ripeness question was whether the courts had to wait until they were
5 applied to deny a particular broadcaster’s license. 316 U.S. 407, 417-23 (1942). In each of
6 Plaintiffs’ cases, the statute or regulation being challenged had been adopted and finalized,
7 though not applied to a particular case. *See Pacific Gas & Elec. Co. v. State Energy Resources*
8 *Cons. & Devel. Comm’n*, 461 U.S. 190, 197-98 (1983); *Regional Rail Reorganization Act Cases*,
9 419 U.S. 102, 109-17 (1974); *Columbia Broadcasting*, 316 U.S. at 417; *Union Pac. R.R. v.*
10 *California Public Utils. Comm’n*, 346 F.3d 851, 856-57 (9th Cir. 2003). Here, there has been no
11 final action adopting these proposed regulatory amendments.⁸ So Plaintiffs’ cases have no
12 application.

13 Plaintiffs rely on a balancing test for determining prudential ripeness. *See*
14 *Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992) (“[R]ipeness will prevent
15 review if the systemic interest in postponing adjudication due to lack of fitness outweighs the
16 hardship on the parties created by postponement.” (quoting *Chavez v. Director, Office of*
17 *Workers Comp. Programs*, 961 F.2d 1409, 1414 (9th Cir. 1992)). We will address two aspects
18 of the fitness issue, and then the hardship issue. The fitness issue relates to whether there is final
19 action and whether a delay would help ensure the proper invocation of the Court’s jurisdiction.⁹
20 The hardship issue is not whether the challenged law imposes a harm, but whether a *delay* in the
21 case would impose a substantial harm.

22 \\\

23
24
25 8. Plaintiffs have only challenged the proposed regulatory amendments, and not the
26 underlying authorizing statute (Assembly Bill 1493). (*See, e.g.*, FAC at 47 (prayer seeking relief
only against “the regulation adopted by CARB and Defendant on September 24, 2004, in
Resolution 04-28”).)

27 9. While the prudential ripeness concerns that defendant Witherspoon raises are not
28 within the constitutional requirements of Article III of the Constitution, these prudential ripeness
concerns still raise jurisdictional issues. *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d
1134, 1341-42 (9th Cir. 2000).

1 **A. There Has Been No Final Action.**

2 Plaintiffs’ brief argues that defendant Witherspoon and the Air Resources Board
3 are moving inevitably towards adopting final regulatory amendments that Plaintiffs believe are
4 preempted by federal law. But Plaintiffs cannot contradict the basic fact that no final regulatory
5 amendments are yet in place.¹⁰ Defendant Witherspoon has not taken final action on these
6 proposed regulatory amendments (as required by the Air Resources Board’s resolution (*see*
7 FAC, Exh. A, at 14-15)), or forwarded them to California’s Office of Administrative Law for
8 filing with the California Secretary of State (as required by California law). (*See* Opening Brf. at
9 22-23.)

10 There are significant, important tasks that remain to be taken. Defendant
11 Witherspoon and her staff continue to consider public comment submitted during the course of
12 these proceedings, and are “preparing a written response to all comments received that have
13 raised significant environmental issues.” (FAC, Exh. A, at 15. *See also* RJN, Exh. D, SRJN,
14 Exh. A.) She and her staff are preparing an environmental analysis that “assur[es] that all
15 feasible mitigation measures or feasible alternatives available that would substantially reduce
16 any significant adverse environmental impacts have been incorporated into the final action.”
17 (FAC, Exh. A, at 15.) And she must decide on what “appropriate final action” to take. (*Id.*)
18 This decision could include changes to the proposed regulatory amendments, or could include

21 10. Plaintiffs raise the issue that Assembly Bill 1493 directed the Air Resources
22 Board to adopt these proposed regulatory amendments by January 1, 2005. *See* Cal. Health &
23 Safety Code § 43018.5(a). Admittedly, though the Air Resources Board approved of these
24 proposed regulatory amendments by that date, it did not adopt them by that date. (While the
25 difference between these two terms – “approve” and “adopt” – might seem semantic, it is a
26 difference that the Air Resources Board and its staff regularly use, and which the automobile
27 manufacturers and their counsel should be aware.) As the Air Resources Board’s resolution
28 makes clear, the proposed regulatory amendments were not adopted in September 2004 (FAC,
Exh. A, at 14-15) – and Plaintiffs have not, and cannot allege, that the required steps for final
regulatory amendments have been taken. This delay in adoption does not invalidate these
proposed regulatory amendments. *See, e.g., California Correctional Peace Officers Ass’n v.*
State Personnel Bd., 10 Cal.4th 1133, 1145-46 (1995) (stating California law that statutory time
deadlines are directory and not mandatory unless a penalty is explicitly proscribed, and therefore
the failure to meet such a deadline does not invalidate late action).

1 bringing this matter back to the Air Resources Board for further consideration.¹¹ In fact, the
2 latest public notice issued on these proposed regulatory amendments explicitly recognizes that
3 possibility. (SRJN, Exh. A, at 2.) Even after defendant Witherspoon makes a final decision, she
4 must submit any final regulatory amendments to California’s Office of Administrative Law,
5 which reviews regulations submitted to it for necessity, authority, clarity, consistency, reference,
6 and nonduplication, and must approve the proposed regulatory amendments before they become
7 final. *See* Cal. Govt. Code §§ 11343, 11343.4, 11349, 11349.1(a), 11349.3. Until that happens,
8 these proposed regulatory amendments are still proposals, and do not have the force of law.

9 Defendant Witherspoon takes her responsibilities seriously, and she and her staff
10 intend to carefully evaluate all comments and all issues before she takes final action to adopt
11 these proposed regulatory amendments. This is evidenced by the second post-hearing notice that
12 defendant Witherspoon’s staff issued recently. (*See* SRJN, Exh. A.) Because there are literally
13 boxes of comments (including those from plaintiff Alliance of Automobile Manufacturers) to be
14 evaluated, it has simply taken an extended period of time to do so. Defendant Witherspoon
15 cannot and will not pre-judge the ultimate outcome – whether she intends to adopt the
16 regulations as already circulated to the public; whether she intends to make modifications; or
17 whether she intends to bring the matter back to the Air Resources Board for more significant
18 modifications or further consideration. Those decisions will be made during this on-going
19 administrative process at the appropriate time and will not be known until final action is taken.
20 And, of course, defendant Witherspoon has no control over California’s Office of Administrative
21 Law, which could reject these regulatory amendments.

23 11. Plaintiffs suggest that any significant “retreat” from the proposed regulatory
24 amendments approved by the Air Resources Board would violate California law. (Oppo. Brf. at
25 23.) This is simply incorrect. Any change in the proposed regulatory amendments need only be
26 “sufficiently related to the original text that the public was adequately placed on notice that the
27 change could result from the originally proposed regulatory action.” Cal. Gov. Code §
28 11346.8(c). And, of course, a decision to return the matter to the Air Resources Board for
further consideration would not violate this provision. It is particularly ironic that Plaintiffs now
say that defendant Witherspoon cannot, for example, decide to not finalize these proposed
regulatory amendments, since their public comments submitted before and after the September
23, 2004 public hearing have universally requested that she do just that.

1 The question of prudential ripeness is whether it is prudent to wait until these
2 steps are completed. There is no dispute that these proposed regulatory amendments are not yet
3 effective and that they are not being enforced.¹² The question is whether the Court should
4 entertain this case now, when these obvious steps and uncertainty still remain, or whether the
5 Court should wait, to make sure the invocation of its jurisdiction is necessary.

6 **B. Other Prudential Reasons Counsel the Court to Wait.**

7 As the opening brief on this motion explains, there are other reasons why the
8 Court should wait.¹³ (Opening Brf. at 27-30, 32-33.) The most significant of these is that the
9 District of Columbia Circuit (after hearing oral argument on April 8, 2005) is now preparing to
10 decide the case of *Commonwealth of Massachusetts v. U.S. Environmental Protection Agency*,
11 Nos. 03-1361 through 03-1368. A decision is expected in August. (See Opening Brf. at 26-27.)
12 While defendant Witherspoon agrees that that case and this case involve different issues,
13 Plaintiffs' attempt to minimize the importance of the District of Columbia Circuit case is not
14 candid.

15 Plaintiffs basically acknowledge that their second claim (preemption under the
16 Clean Air Act) depends on a particular outcome in the District of Columbia Circuit case. (Oppo.
17 Brf. at 30-31.) After all, the District of Columbia Circuit has before it the propriety of the very
18 administrative decision on which Plaintiffs explicitly base their second claim. There is no reason

19 _____
20 12. Plaintiffs make much of the rulings of this Court in the prior litigation regarding
21 zero emission vehicles (ZEVs). While defendant Witherspoon believes the Court should decide
22 this case based on the arguments and facts before it now (*see supra* footnote 1), it is particularly
23 galling that Plaintiffs fail to acknowledge that in the prior litigation "the court recognize[d] the
24 general rule that agency rulemaking actions cannot be challenged until they are final," but found
25 that general rule not applicable because the defendants were in fact enforcing the regulations
26 despite them not being final. (Plaintiffs' Request for Judicial Notice, filed May 2, 2005, Exh. 9,
27 at 16-17.) Here, there is no allegation that defendant Witherspoon is already enforcing these
28 proposed regulatory amendments.

29 13. Other than the pending District of Columbia Circuit case discussed in the text,
30 these issues include the factual nature of parts of Plaintiffs' claims, the possible review by the
31 Legislature, the effect of the waiver process on the effective date of these proposed regulatory
32 amendments. Defendant Witherspoon believes these other issues are adequately briefed in her
33 opening brief, and so will not simply repeat those arguments here. Importantly, each of these
34 issues apply both now and after September (when the ripeness concerns raised by this motion
35 will most likely be resolved).

1 why the parties should have to litigate – or the Court should have to decide – Plaintiffs’ second
2 claim while the validity of that administrative decision is so close to being decided. This would
3 only require the parties to re-brief that issue once the District of Columbia Circuit issues its
4 decision.

5 Plaintiffs claim that the *Commonwealth of Massachusetts* case has no relevance to
6 their claim under the federal fuel economy statute.¹⁴ Plaintiffs posit the fuel economy
7 preemption issues in this case as simple and straightforward. Plaintiffs know better than this.

8 Plaintiffs know that one of defendant Witherspoon’s arguments on preemption
9 under the Energy Policy and Conservation Act (“EPCA”) (which sets federal fuel economy
10 standards) is that California’s motor vehicle emission standards – which historically have
11 affected fuel economy – cannot be preempted by EPCA because they are authorized by Clean
12 Air Act section 209(b) if they meet that section’s criteria. While this is not the place to brief that
13 issue, a short explanation is appropriate. The fuel economy preemption provision Plaintiffs rely
14 on preempts state laws “related to fuel economy standards.” 49 U.S.C. § 32919(a). But the
15 Supreme Court has explained that the phrase “related to” is hopelessly ambiguous because
16 “everything is related to everything else.” *California Division of Labor Standards Enforcement*
17 *v. Dillingham Constr.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring); *New York State*
18 *Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56
19 (1995). Thus, the courts have interpreted language like this to preempt state laws that
20 demonstrably affect congressional objectives. *Dillingham*, 519 U.S. at 325; *Californians for*
21 *Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998).
22 Not only is the federal fuel economy statute’s only explicit purpose to increase fuel economy
23 (EPCA, Pub. L. No. 94-163, § 2(5), 1975 U.S.C.C.A.N. (89 Stat.) 871, 874), but when Congress
24 adopted the fuel economy preemption provision and when Congress strengthened the Clean Air
25

26 14. Plaintiffs do not even address defendant Witherspoon’s arguments that the
27 District of Columbia Circuit decision may be relevant to Plaintiffs’ third and fourth claims
28 (foreign policy preemption and dormant Commerce Clause, respectively) (Opening Brf. at 25-
26), and so the Court should presume that, as defendant Witherspoon explained, those claims
should await a decision from the District of Columbia Circuit.

1 Act provision allowing California to adopt its own emission standard program, Congress knew
2 and approved of emission standards adopted by California that significantly affected fuel
3 economy. *See* H.R. Rep. No. 94-340, at 86-94 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762,
4 1848-56 (1975 EPCA legislative history, discussing fuel economy effects of federal and
5 California emission standards); H.R. Rep. No. 95-294, at 244-51 (1977), *reprinted in* 1977
6 U.S.C.C.A.N. 1077, 1323-30 (1977 Clean Air Act legislative history, approving of emission
7 standards that also increased fuel economy). In fact, EPCA, as enacted, specifically required the
8 Department of Transportation to consider the effects of California emission standards when
9 deciding whether to adjust fuel economy standards for individual manufacturers in 1978, 1979,
10 or 1980. EPCA, § 301, 89 Stat. at 905 (section 502(d)(3)(D)(i), referring to Section 209(b) of
11 the Clean Air Act). *See generally* EPCA, § 301, 89 Stat. at 904-05 (enacting section 502(d) of
12 the act); H.R. Rep. No. 94-340, at 90-91. With these direct, acknowledging, and approving
13 references to California emission standards, Congress would not have intended, at the same time,
14 to preempt these same California emission standards. Thus, defendant Witherspoon believes
15 congressional intent is best preserved by allowing California to continue to adopt and enforce
16 emission standards that are approved by US EPA under Clean Air Act section 209(b), even
17 though they have effects on fuel economy.

18 The District of Columbia Circuit’s decision will likely affect the Court’s analysis
19 of this issue. While the actual effect obviously will depend on what the decision says, an
20 important aspect of that decision will be whether the regulation of carbon dioxide for global
21 warming purposes is within the scope of the Clean Air Act at all. (RJN, Exh. E, at 4, 14-38.) In
22 addition, the District of Columbia Circuit has before it the issue of how to construe the
23 interaction between EPCA and the Clean Air Act mobile source provisions. (*Id.*, Exh. E, at 4,
24 38-43.) Plaintiffs cannot seriously contend that these issues are not at play, and will not be
25 briefed, in the case before this Court.

26 What Plaintiffs propose is that this case remain active and the parties brief the
27 fuel economy preemption issue in advance of a decision from the District of Columbia Circuit.
28 That briefing will most likely need to substantially be revised – if not re-done – to consider the

1 District of Columbia Circuit’s decision. This would only be a waste of time and resources, for
2 the parties and for the Court.

3 **C. Waiting Three or Four Months Does Not Impose Any Real**
4 **Harm on Plaintiffs.**

5 Plaintiffs argue that they have alleged present harm. But the question on ripeness
6 (which is a question of timing) is not whether Plaintiffs will be harmed (or are presently
7 harmed). The question is whether *delaying* the progress of this case – for just a few months –
8 will cause them any harm. *Anchorage*, 980 F.2d at 1323, 1325-26. It is not apparent that
9 Plaintiffs have addressed the impact of this short delay at all (and they certainly have not alleged
10 anything specific on this issue in their amended complaint). In any event, there is no real harm
11 to such a short delay.

12 The lack of any such harm is seen by examining the consequences of Plaintiffs’
13 and defendant Witherspoon’s differing perspectives on the course of this litigation over that
14 period of time. Plaintiffs have said they would like to have a hearing on the merits in
15 September.¹⁵ (Oppo. Brf. at 38.) If the Court grants this motion (and dismisses or stays this
16 case), defendant Witherspoon still acknowledges the possibility of a hearing on the merits by the
17 end of the year. This is four months later. In either case, Plaintiffs will have an opportunity to
18 ask the Court to decide the merits so that these proposed regulatory amendments might not ever
19 go into effect. Since these issues are important enough, and involve several purely legal issues –
20 in fact, Plaintiffs assert that only legal issues are at play in their case – the Court can reasonably
21 expect the losing side to file a notice of appeal (or otherwise seek appellate review). The Ninth

22
23 15. To be clear, defendant Witherspoon does not believe a hearing on the merits in
24 September is realistic, even if this motion to dismiss is denied. While Plaintiffs have not
25 disclosed what claims, issues, and arguments they intend to raise in their proposed summary
26 judgment motion, the Court can expect extensive briefing. On this motion to dismiss, which
27 raised just three procedural issues, the briefing is in excess of 120 pages, and the motion itself
28 was filed over three months before the hearing. Briefing on the merits would be more extensive.
However, as long as the motions were decided by the end of the year (the earliest these proposed
regulatory amendments could become effective (Cal. Health & Safety Code § 43018.5(b)(1)),
there would be no need for a motion for preliminary injunction. But without knowing more
specifics about Plaintiffs’ intentions, defendant Witherspoon cannot agree to anything at this
point. The parties would need to meet and confer.

1 appropriate application of federalism principles – to let her finish finalizing these proposed
2 regulatory amendments before this case becomes active and the parties begin discovery and
3 motion practice. Since the Court must decide this ripeness question at the time it decides this
4 motion, it must decide at this time whether to accept jurisdiction. A dismissal or stay is
5 appropriate.

6 III.

7 PRIMARY JURISDICTION REQUIRES DISMISSAL OF 8 THE SECOND CLAIM.

9 As this motion’s opening brief explained, the question on primary jurisdiction is
10 whether Congress intended that the administrative agency “have the first word” on a particular
11 issue. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987).

12 Plaintiffs absolutely, completely ignore this question. And they ignore the text of
13 Clean Air Act section 209(b), which specifically entrusts the question of whether California
14 emission standards are preempted to the Administrator of US EPA. *See* 42 U.S.C. § 7543(b)(1).
15 That section states that the “Administrator shall, after notice and opportunity for public hearing,
16 waive” preemption for California emission standards. *Id.* And the section states that “No such
17 waiver shall be granted if the Administrator” makes certain findings. *Id.* The plain language
18 shows that Congress intended for the Administrator of US EPA to make these initial
19 determinations, not a Court. Of course, that decision can be reviewed by the courts, but, again,
20 Congress has explicitly spoken as to which courts should hear those challenges: the Courts of
21 Appeals. *See id.* § 7607(b)(1); *Motor & Equip. Mfrs. Ass’n v. Environmental Prot. Agency*
22 (*“MEMA I”*), 627 F.2d 1095 (D.C. Cir. 1979). Given this language, it is easy to see that the
23 primary jurisdiction doctrine applies to Clean Air Act section 209(b).

24 Instead of addressing the primary jurisdiction doctrine or the text of the statute
25 (that Plaintiffs claim as a basis for preemption), Plaintiffs make a variety of arguments: (1) that
26 their claim is based on both subsections (a) and (b) of Clean Air Act section 209; (2) that legal
27 issues are not affected by the primary jurisdiction doctrine; (3) that two Clean Air Act
28 preemption cases show the inapplicability of this doctrine; and (4) that applying the primary

1 jurisdiction doctrine would be inconsistent with 42 U.S.C. section 1983.¹⁷ As explained below,
2

3 17. In an attempt to further distract the Court from applying the primary jurisdiction
4 doctrine to the claim alleged in their amended complaint, Plaintiffs also claim that defendant
5 Witherspoon does not acknowledge the Administrator's authority over the substance of the
6 question raised by Plaintiffs' second claim. (Oppo. Brf. at 39-41.) This is simply incorrect. It is
7 true, as discussed below in this footnote, that it is possible that a new waiver may not be required
8 for these challenged proposed greenhouse gas emission regulatory amendments. But Plaintiffs'
9 second claim is premised on, and is only applicable if, California seeks a new waiver for these
10 proposed regulatory amendments. That is because the substance of Plaintiffs' second claim is
11 that these proposed regulatory amendments are "not consistent with" Section 202(a) of the Clean
12 Air Act. (See Section III.A.; FAC ¶ 123.) But Clean Air Act section 202(a), by its own terms,
13 only applies to regulations promulgated by US EPA. See 42 U.S.C. § 7521(a) (entitled
14 "Authority of Administrator to prescribe by regulation"). Clean Air Act section 202(a) only has
15 applicability to California because consistency with that subsection is one of the criteria the
16 Administrator evaluates under Clean Air Act section 209(b)(1) – the California waiver provision.

17 It is also possible that these proposed regulatory amendments are not within the
18 scope of Section 209 – either subsection (a) or subsection (b) – at all, and therefore California
19 would not need a waiver to avoid preemption. This is not how California would have normally
20 understood the scope of Section 209. However, this is a very real, possible consequence of US
21 EPA's current position that the Clean Air Act's term "air pollutant" does not include pollution
22 contributing to global warming. See Control of Emissions from New Highway Vehicles and
23 Engines, 68 Fed. Reg. 52922, 52925-29 (Sept. 8, 2003). While California and others (in
24 *Commonwealth of Massachusetts v. U.S. Environmental Protection Agency*) have challenged this
25 position as inconsistent with the statutory language, if the District of Columbia Circuit agrees
26 with US EPA, this narrow interpretation would also limit the reach of Section 209(a) because
27 that section refers to emission standards which are defined in terms of "air pollutants." See 42
28 U.S.C. §§ 7543(b), 7602(k). If that is the case, no waiver would be necessary because there is no
preemption. And Plaintiffs' second claim, based on either the preemption provision (subsection
(a) of Clean Air Act section 209) or the waiver criteria (subsection (b) of Clean Air Act section
209), would have no basis, either.

29 A third theoretical possibility is that these proposed regulatory amendments
30 would not require a new waiver because they are within the scope of an already-approved
31 waiver. The criteria by which the Administrator confirms that California regulations are
32 "within-the-scope" are similar, but different from, the criteria for a new waiver. See California
33 State Motor Vehicle Pollution Control Standards; Notice of Within-the-Scope Determination for
34 Amendments to California's Low Emission Vehicle Standards ("LEV II"), 70 Fed. Reg. 22034,
35 22035 (Apr. 28, 2005) (explaining criteria). (These "within-the-scope" decisions are the kinds of
36 determinations that are improperly characterized in the declaration of Gregory J. Dana (at
37 paragraphs 10 through 16), and for which California can enforce pending a US EPA decision.
38 See California State Motor Vehicle Pollution Control Standards; Amendments to the California
Zero Emission Vehicle (ZEV) Regulation; 2003-2006 Model Year Within the Scope Request;
2007 and Subsequent Model Years Waiver Request; Opportunity for Public Hearing, 70 Fed.
Reg. 2860 (Jan. 18, 2005) (regarding ZEVs); California State Motor Vehicle Pollution Control
Standards; Notice of Within-the-Scope Determinations for Amendments to California's Heavy-
Duty Vehicle and Engine Standards for 1995 Urban Ban and 1998 NO_x Regulations, 69 Fed. Reg.
59920 (Oct. 6, 2004) (regarding urban buses and heavy duty engines); California State Motor

1 none of these arguments have any merit.

2 **A. The Substance of Plaintiffs’ Claim Is under Section 209(b), Not**
3 **Section 209(a), of the Clean Air Act.**

4 Plaintiffs assert that their second claim raises preemption under both subsections
5 (a) and (b) of Clean Air Act section 209. (Oppo. Brf. at 38-39.) This does not make a
6 difference. The substance of Plaintiffs’ claim is that “regulation of carbon dioxide and
7 greenhouse gases to address global climate change is not authorized by section 202(a) of the
8 Clean Air Act” and this – and only this – “precludes California from adopting any new motor
9 vehicle emission standards for carbon dioxide or greenhouse gases.”¹⁸ (FAC ¶ 123. *See also*
10 FAC ¶¶ 50-51.) This question is evaluated only under subsection (b) of Section 209, not
11 subsection (a). Subsection (a) is the generally applicable preemption provision for motor vehicle
12 emission standards. 42 U.S.C. § 7543(a). Subsection (b) is the exception granted for California.

14 Vehicle Pollution Control Standards; Within the Scope Requests; Opportunity for Public
15 Hearing and Comment, 69 Fed. Reg. 5542 (Feb. 5, 2004) (regarding OBD II); California State
16 Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption–Notice of Waiver
17 Decision and Within the Scope Determination, 64 Fed. Reg. 42689 (Aug. 5, 1999) (regarding
18 evaporative emissions); California State Motor Vehicle Pollution Control Standards; Waiver of
19 Federal Preemption–Notice of Waiver Decision and Within the Scope Determination; Notice of
20 Correction and Republication and Opportunity for Public Hearing, 63 Fed. Reg. 18403 (Apr. 15,
21 1998) (regarding warranty requirements.) However, like with a new waiver, the
22 appropriateness of a “within-the-scope” determination is appropriately first reviewed by the
23 Administrator, not the courts (and always has been). *See, e.g.*, LEV II, 70 Fed. Reg. at 22035-36
24 (explaining criteria for “within-the-scope” determination, and avenue for subsequent judicial
25 review); California Motor Vehicle Pollution Control; Emission Control System Warranty
26 Regulations; Waiver of Federal Preemption, 44 Fed. Reg. 61096, 61099 (Oct. 23, 1979)
27 (explaining that US EPA reviews all California emission-standard-related regulations, whether
28 “within-the-scope” or not). In any event, defendant Witherspoon believes that, if these proposed
greenhouse gas emission standards are governed by Clean Air Act section 209, they (standing
alone) would not qualify as “within-the-scope” of previous waivers, and would require a new
waiver. Therefore, this theoretical possibility is not relevant to this matter.

18. In their original complaint, Plaintiffs more clearly admitted that the issue raised
by their second claim is whether US EPA’s narrow interpretation of Clean Air Act section 202
(excluding regulations adopted for global warming purposes) would prevent “the regulation
approved by CARB in Resolution 04-28 from receiving a waiver of federal Clean Air Act
preemption under section 209(b) of the Clean Air Act.” (Complaint ¶ 99. *See also* Complaint ¶¶
46-47.) Though defendant Witherspoon pointed to this language in the opening brief on this
motion (at page 37), Plaintiffs have not attempted to distance themselves from these allegations.
Plaintiffs simply try to avoid – or confuse – the issue.

1 *Id.* § 7543(b)(1); *MEMA I*, 627 F.2d 1095. Both of these subsections generally apply to
2 standards for the “control of emissions from new motor vehicles or new motor vehicle engines.”
3 42 U.S.C. § 7543(a), (b)(1). They are coextensive on this point. *MEMA I*, 627 F.2d at 1107.
4 But it is only under subsection (b) that the Administrator of US EPA will evaluate whether
5 California’s standards are “consistent with section 7521(a) of this title” – that is consistent with
6 section 202(a) of the Clean Air Act. 42 U.S.C. § 7543(b)(1)(C). The question under subsection
7 (a) is simply whether the state law is an emission standard. Of course, if that is not the case, then
8 there can be no preemption under either subsection (a) or subsection (b). But if a California law
9 is an emission standard then both subsection (a) and subsection (b) apply, and the question is the
10 criteria set forth in subsection (b). Thus, Plaintiffs’ claim is – and can only be – that California’s
11 proposed greenhouse gas emission standards do not meet the requirements of Clean Air Act
12 section 209(b).¹⁹ This is for the Administrator to decide.

13 **B. The Primary Jurisdiction Doctrine Applies to Legal Issues.**

14 Plaintiffs also argue that the issue they raise is a legal issue, implying that the
15 doctrine of primary jurisdiction only applies to factual issues. (Oppo. Brf. at 41-44.) This is
16 simply wrong. *See United States v. Western Pac. R.R.*, 352 U.S. 59 (1956) (deciding, on the
17 Court’s own initiative, that the legal question of construction of a tariff was subject to the
18 primary jurisdiction doctrine). Plaintiffs fail to address this case, cited for this proposition in the
19 opening brief, at all. Instead, they cite a variety of cases²⁰ for the obvious proposition that courts
20 sometimes interpret statutes with administrative interpretations in mind (and with appropriate
21 deference) and sometimes without such interpretations. This simply does not address the

23 19. The second claim alleged by proposed intervenor AIAM more clearly admits that
24 the question of Clean Air Act preemption is a question of applying Clean Air Act section 209(b).
25 AIAM claims that California’s proposed greenhouse gas emission regulatory amendments
26 cannot meet the requirements for “a waiver under Section 209(b) of the CAA because the CARB
27 Greenhouse Gas Regulations are not needed ‘to meet compelling and extraordinary conditions’
and are not ‘consistent with section 202(a)’ of the CAA.” (AIAM’s Proposed Complaint in
Intervention, lodged Feb. 3, 2005, ¶ 62.) AIAM adds an issue that Plaintiffs do not appear to
allege, but both of these are issues for the Administrator of US EPA to decide.

28 20. In addition, Plaintiffs cite to 5 U.S.C. section 706, which sets the scope of review
under the federal Administrative Procedures Act. But that section only applies to federal
agencies. 5 U.S.C. § 701(b)(1); *Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir. 1992).

1 question of primary jurisdiction: whether Congress intended the agency to answer a particular
2 question in the first instance. Here, as explained above, Congress intended for the Administrator
3 of US EPA to determine consistency with Section 202(a) of the Clean Air Act. *See* 42 U.S.C. §
4 7543(b)(1)(C).

5 **C. Plaintiffs' Cases Are Not Relevant.**

6 Plaintiffs argue that two cases, *Engine Manufacturers Association v. South Coast*
7 *Air Quality Management District*, 541 U.S. 246 (2004) and *Association of International*
8 *Automobile Manufacturers, Inc. v. Commissioner* (“AIAM”), 208 F.3d 1 (2000), show that
9 primary jurisdiction does not apply to Clean Air Act section 209 preemption. (Oppo. Brf. at 42-
10 43.) However, neither case involved the question Plaintiffs seek to present to this Court:
11 whether the challenged law met the criteria for a waiver under subsection (b) of Clean Air Act
12 section 209. In *Engine Manufacturers*, the Court looked only to whether the local rules were
13 standards within the meaning of Clean Air Act section 209(a). 541 U.S. at 248. In *AIAM*, the
14 questions were: (1) again, whether the state laws were standards within the meaning of Clean
15 Air Act section 209(a); and (2) whether those standards were identical with California standards,
16 as required by Clean Air Act section 177. 208 F.3d 5-8. In fact, in *AIAM*, the Court explicitly
17 distinguished the questions before it from the question of a California waiver, for which “the
18 EPA is in fact the agency charged with issuing such waivers to California.” *Id.* at 5 n.2. Thus,
19 neither case is relevant to the question before this Court – whether Congress intended the
20 Administrator of US EPA to have the first word on whether these proposed regulatory
21 amendments meet the requirements of Clean Air Act section 209(b).

22 **D. Plaintiffs' Invocation of 42 U.S.C. Section 1983 Is Irrelevant.**

23 Plaintiffs also argue that recognizing the primary jurisdiction of US EPA would
24 be contrary to 42 U.S.C. section 1983 (“Section 1983”). (Oppo. Brf. at 45-45.) There are three
25 separate reasons this argument fails.

26 First, Clean Air Act section 209 cannot be enforced through Section 1983. As the
27 Court knows, Section 1983 by itself does not provide any rights; it only provides a mechanism to
28 enforce other rights (found in the Constitution or federal statutes). *Save Our Valley v. Sound*

1 *Transit*, 335 F.3d 932, 936 (9th Cir. 2003). The Supremacy Clause itself does not qualify.
2 *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 & n.4 (1989). Recently,
3 the Supreme Court clarified (and narrowed) the kinds of federal statutes that can be enforced
4 through Section 1983. *See Price v. City of Stockton*, 390 F.3d 1105, 1109-10 (9th Cir. 2004)
5 (discussing *Gonzaga v. Doe*, 536 U.S. 273 (2002)). Now, to qualify for Section 1983, the federal
6 statute must contain “‘rights-creating’ language.” *Gonzaga*, 536 U.S. 287. “In other words, to
7 create enforceable rights the language of the statute must focus on individual entitlement to
8 benefits rather than the aggregate or systemwide policies and practices of a regulated entity.”
9 *Price*, 390 F.3d at 1110. *Gonzaga* explained that statutory language such as “‘No person . . .
10 shall . . . be subjected to discrimination’” is adequate rights-creating language. 536 U.S. at 287.
11 Plaintiffs fail to acknowledge this threshold question. Nevertheless, given the usual terminology
12 of preemption provisions – which focus on the relative roles of the federal and state government,
13 and describe what laws state governments cannot enforce – they will rarely meet this test.
14 *Compare, e.g., Henry’s Wrecker Serv. Co. v. Prince George’s County*, 214 F.Supp.2d 541, 543-
15 46 (D.Md. 2002) (no Section 1983 right for preemption provision stating “. . . a State . . . may
16 not enact or enforce a law . . .”) with *Wachovia Bank, N.A. v. Burke*, 319 F.Supp.2d 275, 288-90
17 (D.Conn. 2004) (Section 1983 right exists for preemption provision stating “No national bank
18 shall be subject to . . .”). Certainly, the Clean Air Act preemption provision – which begins “No
19 State or political subdivision thereof shall . . .,” 42 U.S.C. § 7543(a) – does not use “rights-
20 creating language” such as discussed in *Gonzaga*. Thus, Plaintiffs’ invocation of Section 1983 is
21 without merit.²¹

22 Second, Plaintiffs misunderstand how the primary jurisdiction doctrine works.
23 This doctrine does not implicate the Court’s jurisdiction. *Reiter v. Cooper*, 507 U.S. 258, 268
24 (1993). Rather, like the abstention doctrines the courts regularly apply, “[p]rimary jurisdiction
25 is a doctrine of common law, wholly court-made, that is designed to guide a court in determining

27 21. This does not eliminate jurisdiction for Plaintiffs’ claims, nevertheless, for
28 preemption claims can be brought directly under 28 U.S.C. section 1331 (without the mechanism
of Section 1983). *See Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint
Apprenticeship Comm.*, 891 F.2d 719, 725 (9th Cir. 1989).

1 not difficult to determine here. Congress meant for the Administrator of US EPA to determine
2 whether California's emission standards qualify for a waiver of preemption.

3 **CONCLUSION**

4 There is a time and a place for Plaintiffs' claims. But it is not now and it is not in
5 the Fresno Division. For these reasons, defendant Witherspoon respectfully requests that the
6 Court either dismiss this case in its entirety; or transfer it to the Sacramento Division, stay it until
7 the proposed greenhouse gas emission regulatory amendments are approved by California's
8 Office of Administrative Law and the District of Columbia Circuit has decided *Commonwealth*
9 *of Massachusetts v. U.S. Environmental Protection Agency*, and dismiss the second claim.

10 Dated: May 27, 2005

11 Respectfully submitted,

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