

1 dealerships located in Modesto, Turlock, Merced, Madera, Lemoore,
2 Tulare, and Porterville: Central Valley Chrysler-Jeep, Inc.;
3 Kitahara Pontiac GMC Buick, Inc.; Madera Ford Mercury, Inc.;
4 Madera Chevrolet; Frontier Dodge, Inc.; Tom Fields Motors, Inc.;
5 Pistoresi Chrysler Dodge Jeep; Bob Williams Chevrolet; Courtesy
6 Oldsmobile Cadillac, Inc.; Merle Stone Chevrolet, Inc.; Merle
7 Stone Porterville, Inc.; Sturgeon and Beck Incorporated; and
8 Swanson Fahrney Ford, Inc. General Motors Corporation and
9 DaimlerChrysler Corporation are also plaintiffs. The Tulare
10 County Farm Bureau and the Alliance of Automobile Manufacturers
11 are also plaintiffs. The defendant is Catherine E. Witherspoon
12 in her official capacity as Executive Officer of the California
13 Air Resources Board.

14 The FAC alleges an action for declaratory and injunctive
15 relief under the Supremacy Clause in Article VI of the United
16 States Constitution and 42 U.S.C. § 1983. The FAC challenges the
17 requirements of A.B. 1493, codified at California Health and
18 Safety Code § 43018.5, and the regulation proposed by the
19 California Air Resources Board (CARB) set forth in Resolution No.
20 04-28, dated September 24, 2004. The FAC alleges that CARB has
21 interpreted the statute to require the adoption and enforcement
22 of rules to limit the release of carbon dioxide from new motor
23 vehicles sold in California beginning in the 2009 model year,
24 which starts in calendar year 2008. The FAC, which is very
25 verbose, alleges the following claims for declaratory and
26 injunctive relief:

1 1. Count I - Preemption under the Energy
2 Policy and Conservation Act of 1975 (EPCA),
3 49 U.S.C. §§ 329021-32919, specifically
4 Section 32919(a).

5 2. Count II - Preemption under § 209(a) of
6 the Federal Clean Air Act, 42 U.S.C. §
7 7543(a).

8 3. Count III - Preemption under the foreign
9 policy of the United States and the foreign
10 affairs powers of the Federal Government.

11 4. Count IV - Violation of the Dormant
12 Commerce Clause of the United States
13 Constitution.

14 5. Count V - Violation of the Sherman Act,
15 15 U.S.C. § 1.

16 The FAC prays for a declaratory judgment that "the regulation
17 adopted by CARB and Defendant on September 24, 2004, in
18 Resolution 04-28 violates federal law" and for a preliminary and
19 permanent injunction enjoining Defendant "from implementing or
20 enforcing the regulation adopted by CARB in Resolution 04-28, or
21 any substantially similar regulation."

22 Defendant has filed a motion to dismiss the FAC on the
23 following grounds: (1) venue is improper in the Fresno Division
24 and the case should be transferred to the Sacramento Division,
25 and (2) the primary jurisdiction doctrine requires dismissal of
26 Count II.¹

¹Defendant also moved to dismiss the FAC on the ground that
the case is not ripe because final action had not been taken to
adopt the regulatory amendments set forth in Resolution 04-28 and
for other reasons. However, in her reply brief, defendant limited
this aspect of her motion to dismiss to a stay pending final
adoption and approval of the proposed regulatory amendments. Just
prior to oral argument, the plaintiffs and defendant stipulated to
the withdrawal of this ground for dismissal of the action, without

1 **1. Intra-District Venue.**

2 The FAC alleges in pertinent part:

3 33. Each of the dealer plaintiffs and
4 members of plaintiff Tulare County Farm
5 Bureau are residents of this District, and
6 each will suffer harm in this District as a
7 result of Defendant's actions. Each of the
8 manufacturers represented by the Alliance as
9 a plaintiff does business in this District
10 and will also suffer harm in this District as
11 a result of CARB's regulations. Venue in
12 this Court is proper under 28 U.S.C. §
13 1391(b).

14 Defendant moves the court to transfer venue of this action
15 from the Fresno Division to the Sacramento Division. In so
16 moving, defendant concedes that venue in the Eastern District of
17 California is proper. She also emphasizes that this motion is
18 not based on the convenience of the parties or witnesses.
19 Rather, relying on Rule 3-120(d), Local Rules of Practice,
20 defendant contends that this is a civil action "arising in"
21 Sacramento County and not in any of the counties covered by the
22 Fresno Division of the Eastern District.

23 Plaintiffs have the burden of showing that venue is proper
24 in the Fresno division of the Eastern District of California.
25 Piedmont Label Company v. Sun Garden Packing Company, 598 F.2d
26 491, 496 (9th Cir. 1979); see also Nissan Motor Co., Ltd. v.

prejudice to its renewal, pending completion of the final approval
process by September 20, 2005. By notice filed on September 16,
2005, defendant advised the court that California's Office of
Administrative Law approved the proposed regulatory amendments on
September 15, 2005 and that the state administrative process
necessary to the approval of the regulatory amendments is now
complete. Therefore, the court rules that this action is ripe for
review based on the grounds initially asserted by plaintiffs.

1 Nissan Computer Corporation, 89 F.Supp.2d 1154, 1161 (C.D.Cal.),
2 aff'd on other grounds, 264 F.3d 675 (9th Cir. 2000).²

3 Prior to 1990, 28 U.S.C. § 1391(b) provided that
4 federal question civil actions "may be brought only in the
5 judicial district where all defendants reside, or in which the
6 claim arose, except as provided by law." Section 1391(b) was
7 amended in 1990 to provide, in pertinent part, that federal
8 question civil actions

9 may, except as otherwise provided by law, be
10 brought only in (1) a judicial district where
11 any defendant resides, if all defendants
12 reside in the same State, (2) a judicial
13 district in which a substantial part of the
14 events or omissions giving rise to the claim
15 occurred ..., or (3) a judicial district in
16 which any defendant may be found, if there is
17 no district in which the action may otherwise
18 be brought.

19 Although the parties generally agree that cases construing
20 Section 1391(b) control construction of Local Rule 3-120(d), the
21 parties dispute the applicability of decisions construing Section
22 1391(b) as in effect prior to 1990. Defendant relies on such
23 cases and plaintiffs argue that those decisions have no value.
24 However, this dispute is immaterial to the resolution of the
25 motion. In Sutain v. Shapiro and Lieberman, 678 F.2d 115, 117

26 ²Plaintiffs, citing Murphy v. Schneider Nat'l, Inc., 362 F.3d
1133 (9th Cir. 2004), argue that the court must accept plaintiffs'
allegations of venue as true as well as any evidence plaintiffs put
forward in opposition to the motion to dismiss and to require that
defendant present evidence in support of the contention that venue
in this division is improper. However, Murphy has no relevance to
the resolution of this motion. Murphy was discussing a venue
motion based on a forum-selection clause, a fact not present in
this action.

1 (9th Cir. 1982), the Ninth Circuit, quoting Commercial Lighting
2 Products, Inc. v. United States District Court, 537 F.2d 1078,
3 1080 (9th Cir. 1976), construed the term "claim arose" for
4 purposes of Section 1391(b) to mean that venue is proper "'in any
5 district in which a substantial part of the acts, events, or
6 omissions occurred that gave rise to the claim for relief.'" Because the Ninth Circuit's construction of the term "claim
7 arose" for purposes of Section 1391(b) prior to the 1990
8 amendment essentially tracks the current language of Section
9 1391(b), cases from the Ninth Circuit applying Section 1391(b)
10 prior to the amendment remain authoritative.

12 The essential issue is the relevance of harm to the
13 plaintiffs in determining intra-district venue.

14 Defendant contends that where the harm occurs is not
15 relevant to a determination of venue where venue is based on
16 where the claim arises. In so contending, defendant relies on
17 Leroy v. Great Western United Corp., 443 U.S. 173 (1979) and
18 District 1, Pacific Coast District, M.E.B.A. v. Alaska, 682 F.2d
19 797 (9th Cir. 1982).

20 In Leroy, the plaintiff was a Delaware corporation with
21 headquarters in Texas that brought an action in the Northern
22 District of Texas against Idaho state officials challenging an
23 Idaho state statute that imposed restrictions on corporate
24 takeovers of companies having substantial assets in Idaho. The
25 district court ruled in pertinent part that venue in Texas under
26 Section 1391(b) did not lie because the defendants did not reside

1 in Texas and the claim arose in Idaho. The Court of Appeals
2 reversed the district court on this issue, holding that, because
3 the allegedly invalid restraint against the corporation occurred
4 in Texas, Texas was the judicial district in which the claim
5 arose. The Supreme Court reversed the Court of Appeal, holding
6 in pertinent part:

7 Nor, as the District Court correctly
8 concluded, is venue available under §
9 1391(b). The first test of venue under that
10 provision - the residence of the defendants -
11 obviously points to Idaho rather than Texas.
12 The Court of Appeals reasoned, however, under
13 the second relevant test that the claim arose
14 in Dallas because that is the place where the
15 Idaho officials 'invalidly prevented Great
16 Western from initiating a tender offer for
17 Sunshine.' ... The court buttressed its
18 conclusion by noting that a single action
19 against the officials of New York, Maryland,
20 and Idaho could not have been instituted in
21 any one place unless the claim was treated as
22 having arisen in Dallas

23 The easiest answer to this latter argument is
24 that Great Western's complaint did not in
25 fact raise justiciable claims against any
26 officials save those in Idaho. But that is
not the only answer. Although the legal
issues raised in the complaint challenging
the constitutionality of the statutes of
three different States were similar, and the
convenience of Great Western would obviously
be served by consolidating the three claims
for trial in one district, the general venue
statute does not authorize the plaintiff to
rely on either of those reasons to justify
its choice of forum.

In most instances, the purpose of statutorily
specified venue is to protect the *defendant*
against the risk that a plaintiff will select
an unfair or inconvenient place of trial.
For that reason, Congress has generally not
made the residence of the plaintiff a basis
for venue in nondiversity cases ... The

1 desirability of consolidating similar claims
2 in a single proceeding may lead defendants,
3 such perhaps as the New York and Maryland
4 officials in this case, to waive valid
5 objections to otherwise improper venue. But
6 that concern does not justify reading the
7 statute to give the plaintiff the right to
8 select the place of trial that best suits his
9 convenience. So long as the plain language
10 of the statute does not open the severe type
11 of 'venue gap' that the amendment giving
12 plaintiffs the right to proceed in the
13 district where the claim arose was designed
14 to close, there is no reason to read it more
15 broadly on behalf of plaintiffs.

9 Moreover, the plain language of § 1391(b)
10 will not bear the Court of Appeals'
11 interpretation. The statute allows venue in
12 'the judicial district ... in which the claim
13 arose.' Without deciding whether this
14 language adopts the occasionally fictive
15 assumption that a claim may arise in only one
16 district, it is absolutely clear that
17 Congress did not intend to provide for venue
18 at the residence of the plaintiff or to give
19 that party an unfettered choice among a host
20 of different districts ... Rather, it
21 restricted venue either to the residence of
22 the defendants or to 'a place which may be
23 more convenient to the litigants' - i.e.,
24 both of them - 'or to the witnesses who are
25 to testify in the case.' ... In our view,
26 therefore, the broadest interpretation of the
language of § 1391(b) that is even arguably
acceptable is that in the unusual case in
which it is not clear that the claim arose in
only one specific district, a plaintiff may
choose between those two (or conceivably even
more) districts that with approximately equal
plausibility - in terms of the availability
of witnesses, the accessibility of other
relevant evidence, and the convenience of the
defendant (but *not* of the plaintiff) - may be
assigned as the locus of the claim

24 This case is not, however, unusual. For the
25 claim has only one obvious locus - the
26 District of Idaho. Most importantly, it is
action was taken in Idaho by Idaho residents
- the enactment of the statute by the

1 legislature, the review of Great Western's
2 filing, the forwarding of the comment letter
3 by Deputy Administrator Baptie, and the entry
4 of the order postponing the effective date of
5 the tender by Finance Director McEldowney -
6 as well as the future action that may be
7 taken in the State by its officials to punish
8 or to remedy any violation of its law, that
9 provides the basis for Great Western's
10 federal claim. For this reason, the bulk of
11 the relevant evidence and witnesses - apart
12 from employees of the plaintiff, and
13 securities experts who come from all over the
14 United States - is also located in the State.
15 Less important, but nonetheless relevant, the
16 nature of this action challenging the
17 constitutionality of a state statute makes
18 venue in the District of Idaho appropriate.
19 The merits of Great Western's claims may well
20 depend on a proper interpretation of the
21 State's statute, and federal judges sitting
22 in Idaho are better qualified to construe
23 Idaho law, and to assess the character of
24 Idaho's probable enforcement of that law,
25 than are judges sitting elsewhere.

14 We therefore reject the Court of Appeals'
15 reasoning that the 'claim arose' in Dallas
16 because that is where Great Western proposed
17 to initiate its tender offer, and that is
18 where Idaho's statute had its impact on Great
19 Western. Aside from the fact that these
20 'contacts' between the 'claim' and the Texas
21 District fall far short of those connecting
22 the claim and the Idaho District, we note
23 that this reasoning would subject the Idaho
24 officials to suit in almost every district in
25 the country. For every prospective offeree -
26 be he in New York, Los Angeles, Miami, or
elsewhere, rather than in Dallas - could
argue with equal force (or Great Western
could argue on his behalf) that he had
intended to direct his broker to accept the
tender and was frustrated in that desire by
Idaho law. As we noted above, however, such
a reading of § 1391(b) is inconsistent with
the underlying purpose of the provision, for
it would leave the venue decision entirely in
the hands of plaintiffs, rather than making
it 'primarily a matter of convenience of
litigants and witnesses.' ... In short, the

1 District of Idaho is the only one in which
2 'the claim arose' within the meaning of §
3 1391(b).

4 443 U.S. at 183-187.

5 District 1 involved the Alaska Marine Highway System, which
6 is owned and operated by Alaska and operates ferries between
7 Washington and Alaska as well as between Alaskan ports. Many of
8 the System's employees live in Washington, the System has a
9 terminal in Seattle, and much of the maintenance is performed in
10 Seattle. Alaska enacted a statute providing that no employee of
11 the System may be relieved at a duty station or port outside
12 Alaska. The union sued Alaska and Alaska officials in the
13 Western District of Washington, contending that the statute was
14 unconstitutional. The district court denied Alaska's motion to
15 dismiss for improper venue, holding that the claim arose in the
16 Western District of Washington under either a "substantial
17 contacts" standard or a more lenient standard applicable to cases
18 involving challenges to statutes. The Ninth Circuit reversed the
19 district court, holding in pertinent part:

20 In Leroy ... [t]he Supreme Court acknowledged
21 that, under the broadest possible reading of
22 section 1391(b), a claim may arise in two or
23 more districts only in the unusual case in
24 which the districts may, with approximately
25 equal plausibility in terms of the
26 availability of witnesses, the accessibility
of other relevant evidence, and the
convenience of the defendant (but not of the
plaintiff), be called the locus of the claim.
In such a case, the plaintiff may select the
forum from among these districts. The Court
held, however, that Leroy was not the unusual
case and that the claim in that case arose in
Idaho, not Texas.

1 First, the Court noted that all of the
2 defendants' acts were, and their enforcement
3 of the statute would be, in Idaho. For that
4 reason, most of the relevant evidence and
5 witnesses, besides employees of the plaintiff
6 and securities experts, were in Idaho.
7 Second, in deciding the constitutionality of
8 an Idaho statute, federal judges in Idaho are
9 better qualified to construe the statute and
10 to assess the character of Idaho's
11 enforcement than judges elsewhere. The Court
12 rejected the argument that venue lay in Texas
13 because that was where the tender offeror
14 suffered harm, noting those contacts with
15 Texas fell 'far short' of the contacts with
16 Idaho and that such reasoning would subject
17 the Idaho officials to suit in many different
18 districts

19 The analysis in Leroy indicates that venue in
20 this case lies only in Alaska. First,
21 because the enactment of the 'Change Port'
22 statute was, and any enforcement will be, in
23 Alaska, most of the evidence and witnesses
24 are there. Second, it would be preferable
25 for a federal judge in Alaska to decide these
26 claims rather than for one in Washington to
do so. Although the statute in this case
does not seem on its face susceptible of
narrowing interpretations, we cannot say that
the Alaska courts, or a district judge in
Alaska, could not read the statute narrowly
so as to save it from possible constitutional
infirmity. Thus, even though Alaska appears
to have been able to defend the statute's
constitutionality in Seattle, the State of
Washington cannot be called the locus of
these claims as plausibly as Alaska.

27 Since Leroy, several courts have held, in
28 cases involving challenges to the
29 constitutionality or application of state
30 statutes, that venue was proper where the
31 effects of the statutes were felt as well as
32 where they were enacted and administered ...
33 Each of these cases, however, involved
34 districts in only one state. Thus, the
35 concern in Leroy that federal judges in a
36 state are better suited to rule on that
37 state's statutes than are judges elsewhere
38 was inapplicable. Moreover, some of the

1 cases failed to discuss Leroy ... To the
2 extent that these cases are inconsistent with
Leroy, we decline to follow them.

3 This court has stated that a claim arises 'in
4 any district in which a substantial part of
the act, events, or omissions occurred that
5 gave rise to the claim for relief.' ... This
'substantial contacts' test suggests that a
6 claim may sometimes arise in more than one
district. Leroy did not indicate what
7 constitutes the unusual case in which a claim
may do so ... Thus, it is unclear what effect
8 Leroy had on the 'substantial contacts' test.
However, we need not decide that question in
9 this case. We merely hold that, under the
analysis of Leroy, venue in this case,
10 involving a constitutional challenge to an
Alaska statute, lies only in Alaska.

11 682 F.2d at 798-799.

12 Relying on Leroy and District 1, defendant argues that a
13 claim challenging the propriety of a state law does not "arise"
14 where its effects are felt:

15 The location of a state law's effects is
16 simply not relevant to venue. To say
otherwise would allow plaintiffs to challenge
17 state laws wherever they please. This would
make restrictions on venue meaningless. And
18 it would be bad policy. After all, as the
Supreme Court reminds us, the purpose of
19 venue provisions is to protect the defendant
from improper venue choices

20 In this case, these same principles are at
21 play. Plaintiff Alliance of Automobile
Manufacturers brings this case on behalf of
22 its members - including plaintiff General
Motors Corporation and DaimlerChrysler
23 Corporation - who are headquartered
throughout the country and who build
24 automobiles throughout the country as well
... If venue were appropriate where the
25 effects of the challenged proposed regulatory
amendments were felt, venue would also be
26 appropriate throughout the country. Such a
construction is both implausible and unfair.

1 Instead, the question is where 'a substantial
2 part of the acts, events, or omissions
3 occurred that gave rise to the claim for
4 relief.' ... Here, Plaintiffs bring a facial
5 challenge to the Air Resources Board's
6 proposed regulatory amendments. Plaintiffs
7 have sued the Air Resources Board's Executive
8 Officer, the person who would issue the final
9 regulatory amendments and who would be
10 responsible for enforcing the then-final
11 regulatory amendments. Thus, the acts that
12 give rise to Plaintiffs' claims are
13 defendant's Witherspoon's acts to adopt these
14 proposed regulatory amendments. Defendant's
15 Witherspoon's office and, thus, official
16 residence are in Sacramento ... Within this
17 District, Sacramento is the place where
18 defendant Witherspoon and her staff have
19 taken steps towards adopting these proposed
20 regulatory amendments ... Thus, the acts
21 within this District that Plaintiffs
22 challenge have occurred (and will occur) in
23 Sacramento. These are the acts that gave
24 rise to Plaintiffs' claims. And so venue
25 within this District is proper only in the
26 Sacramento District.

 However, as plaintiffs argue, the facts in Leroy and in
District 1 are sufficiently different from those before the court
with respect to the issue of venue to make these cases
inapplicable in resolving this motion. Specifically, this action
does not involve an attempted challenge to a state statute in a
district court sitting in an entirely different state. Here, the
issue is whether venue is proper in one division as opposed to
the other division of the same district court. The facts of
Leroy and District No. 1 are simply too different from those
before the court to make either case controlling in the
determination of intra-district venue in this action.

 Rather, the court concludes that proper intra-district venue

1 in this action is controlled by the analysis set forth in Bay
2 County Democratic Party v. Land, 340 F.Supp.2d 802 (E.D.Mich.
3 2004).³

4 In Bay City Democratic Party, political parties and other
5 organizations brought a Section 1983 action against Michigan's
6 Secretary of State and Director of Elections, alleging that
7 Michigan's intended provision ballot procedure would violate Help
8 America Vote Act. The district court rejected the defendants
9 contention that venue was proper only in the judicial district in
10 which the Secretary of State resides, i.e., where the capitol is
11 located. In so ruling, the district court held in pertinent
12 part:

13 The defendants also claim that no part of the
14 claim has occurred in this district since the

15 ³Plaintiffs also refer the court to Myers v. Bennett Law
16 Offices, 238 F.3d 1068, 1075-1076 (9th Cir. 2001), wherein the Ninth
Circuit held in pertinent part

17 Under [Section 1391(b)], venue is proper in a
18 judicial district if 'a substantial part of
19 the events or omissions giving rise to the
20 claim occurred' in that district. 28 U.S.C. §
21 1392(b)(2); see also Lamont v. Haig, 590 F.2d
22 1124, 1134-35 (D.C.Cir. 1978) ('the
23 substantiality of the operative events is
24 determined by assessment of their
25 ramifications for efficient conduct of the
26 suit'). With this policy in mind at least one
court has found that in a tort action, the
locus of the injury was the relevant factor
... As noted above, at least one of the
'harms' suffered by Plaintiff is akin to the
tort of invasion of privacy and was felt in
Nevada. Accordingly, a substantial part of
the events giving rise to the claim occurred
in Nevada. Thus, venue was proper.

1 election directives were drafted in and
2 distributed from Lansing, and no voter's
3 provisional ballot has been ignored so no
4 injury has occurred yet. However, the
5 language of Section 1391(b)(2) - which
6 permits venue to be laid in a district 'in
7 which a substantial part of the events giving
8 rise to the claim occur' - has been
9 interpreted by the Sixth Circuit to mean a
10 substantial connection to the claim. After
11 the 1990 amendments to the venue statute,
12 courts 'no longer ask which district among
13 the two or more potential forums is the best
14 venue. Rather they ask whether the district
15 the plaintiff chose has a substantial
16 connection to the claim, *whether or not other
17 forums had greater contacts.*' First of
18 Mich., 141 F.3d at 263 ... To establish a
19 substantial connection to the claim, it is
20 generally sufficient to demonstrate that
21 injury or loss alleged in the lawsuit
22 occurred in the chosen venue. Uffner v. La
23 Reunion Francaise, S.A., 244 F.3d 38, 41-43
24 (1st Cir. 2001). In cases involving state
25 officials, a substantial connection to the
26 claim occurs not only where the 'triggering
event' takes place, but also where the
effects of the decision are felt. See
McClure v. Manchin, 301 F.Supp.2d 564, 569
(N.D.W.Va. 2003) (rejecting secretary of
state's claim that a state election law
challenge must be brought in the district
where the state government sits); Emison v.
Catalano, 951 F.Supp. 714, 721 (E.D.Pa.
1996) (suits challenging official acts may be
brought in the district where the effects of
the challenged statute are brought [sic]
despite being enacted elsewhere); School
Dist. of Philadelphia v. Pennsylvania Milk
Marketing Bd., 877 F.Supp. 245, 249 (E.D.Pa.
1995) (rejecting the argument that venue is
proper only where official decision was
made). In this case, the effects of the
election directive are felt statewide,
including within Bay County where one of the
plaintiffs is located.

340 F.Supp.2d at 808-809.

The court has reviewed the record in this action and

1 concludes that plaintiffs have demonstrated that venue is proper
2 in the Fresno Division of the Eastern District of California
3 under the standards articulated in Bay City Democratic Party.

4 Consequently, the court denies defendant's motion to dismiss
5 this action on the ground of improper venue.

6 At oral argument, plaintiff requested that the court certify
7 the denial of the motion to dismiss on the ground of venue for
8 immediate appeal pursuant to 28 1292(b).

9 Section 1292(b) provides in pertinent part:

10 When a district judge, in making in a civil
11 action an order not otherwise appealable
12 under this section, shall be of the opinion
13 that such order involves a controlling
14 question of law as to which there is
15 substantial ground for difference of opinion
16 and that an immediate appeal from the order
17 may materially advance the ultimate
18 termination of the litigation, he shall so
19 state in writing in such order. The Court of
20 Appeals which would have jurisdiction of an
21 appeal of such action may thereupon, in its
22 discretion, permit an appeal to be taken from
23 such order, if application is made to it
24 within ten days after the entry of the order;
25 Provided, however, That application for an
26 appeal hereunder shall not stay proceedings
in the district court unless the district
judge or the Court of Appeals or a judge
thereof shall so order.

21 Section 1292(b) is to be used only in exceptional situations in
22 which allowing an interlocutory appeal would avoid protracted and
23 expensive litigation. United States Rubber Co. v. Wright, 359
24 F.2d 784, 785 (9th Cir. 1966). Plaintiff must demonstrate that
25 (1) there is a controlling question of law, (2) that there are
26 substantial grounds for difference of opinion, and (3) that an

1 immediate appeal may materially advance the ultimate termination
2 of the litigation. In re Cement Antitrust Litigation, 673 F.2d
3 1020, 1026 (9th Cir. 1982).

4 "[A]ll that must be shown in order for a question [of law]
5 to be 'controlling' is that resolution of the issue on appeal
6 could affect the outcome of litigation in the district court."
7 In re Cement Antitrust Litigation, id., 673 F.2d at 1026.

8 Here, the court concludes that the issue of where the claim
9 arose for purposes of intra-district venue is a controlling
10 question of law.

11 To demonstrate "a substantial ground for difference of
12 opinion" on a question for Section 1292(b) certification, the
13 moving party must show more than its own disagreement with a
14 court's ruling. The term refers to the legal standard applied in
15 the decision for which certification is sought and whether other
16 courts have substantially differed in applying that standard.
17 See Harter v. GAF Corp., 150 F.R.D. 502, 518 (D.N.J. 1993).

18 With regard to this factor, the court concludes that
19 defendant has demonstrated a substantial ground for difference of
20 opinion given defendant's position that the determination of
21 intra-district venue is governed by Leroy and District 1.

22 The court concludes that an immediate appeal of the denial
23 of defendant's motion to transfer venue to the Sacramento
24 division of the Eastern District will materially advance the
25 ultimate termination of this litigation. This is because a
26 reversal by the Ninth Circuit of this court's ruling on intra-

1 district venue may result in the vacation of any substantive
2 rulings made by this court and the transfer of this action to the
3 Sacramento Division. See Olberding v. Illinois Cent. R. Co., 346
4 U.S. 338 (1953); Cottman Transmission Systems, Inc. v. Martino,
5 36 F.3d 291 (3rd Cir. 1994); Gogolin & Stelter v. Karn's Auto
6 Imports, Inc., 886 F.2d 100 (5th Cir. 1989); see also Bechtel v.
7 Liberty Nat. Bank, 534 F.2d 1335 (9th Cir. 1976).

8 Accordingly, the court certifies the issue of intradistrict
9 venue under 28 U.S.C. § 1391(b) and Rule 3-120(d), Local Rules of
10 Practice, for immediate appeal pursuant to 28 U.S.C. 1292(b).

11 **2. Primary Jurisdiction.**

12 Count II of the FAC alleges preemption under the federal
13 Clean Air Act. Count II alleges in pertinent part:

14 122. The regulation adopted by CARB on
15 September 24, 2004, in Resolution 04-28, is a
16 standard related to the control of emissions
17 from new motor vehicles. The regulation is
18 preempted by section 209(a) of the Clean Air
19 Act, 42 U.S.C. § 7543(a). In addition, the
20 regulation conflicts with the Clean Air Act
21 and stands as an obstacle to the objectives
22 of Congress in its comprehensive approach to
23 environmental regulation of motor vehicles.

24 123. EPA has determined that regulation of
25 carbon dioxide and greenhouse gases to
26 address global climate change is not
authorized by section 202(a) of the Clean Air
Act [42 U.S.C. § 7521(a)]. Notice of Denial
of Petition for Rulemaking, *Control Emissions
from New Highway Vehicles and Engines*, 68
Fed.Reg. 52922 (Sept. 8, 2003). That
authoritative determination by EPA precludes
California from adopting any new motor
vehicle emission standards for carbon dioxide
or greenhouse gases. California must, at a
legal minimum, seek reconsideration of EPA's
interpretation of section 202(a) before

1 California may adopt new motor vehicle
2 emission standards for carbon dioxide or
greenhouse gases.

3 Defendant moves to dismiss Count II based on the primary
4 jurisdiction doctrine, contending that the question raised by
5 Count II, whether the proposed regulatory amendments are
6 preempted by the Clean Air Act, is specifically entrusted to the
7 Administrator of the EPA, with any review by the U.S. Court of
8 Appeals.

9 "The doctrine of primary jurisdiction ... is concerned with
10 promoting proper relationships between the courts and
11 administrative agencies charged with particular regulatory
12 duties." United States v. Western Pacific Railroad, 352 U.S. 59,
13 63 (1956). The doctrine is applicable in federal courts when an
14 action "requires the resolution of issues which, under a
15 regulatory scheme, have been placed within the special competence
16 of an administrative body." Id. at 64. As further explained in
17 United States v. General Dynamics Corp., 828 F.2d 1356, 1362 (9th
18 Cir. 1987):

19 The doctrine of primary jurisdiction operates
20 as follows: 'When there is a basis for
21 judicial action, independent of agency
22 proceedings, courts may route the threshold
23 decision as to certain issues to the agency
24 charged with primary responsibility for
25 governmental supervision or control of the
26 particular industry or activity involved.'
... The doctrine applies when 'protection of
the integrity of a regulatory scheme dictates
preliminary resort to the agency which
administers the scheme.' ... Thus, it is the
extent to which Congress, in enacting the
regulatory scheme, intends an administrative
body to have the first word on issues arising

1 in judicial proceedings that determines the
2 scope of the primary jurisdiction doctrine
3

4 There are four factors uniformly present in
5 cases where the doctrine properly is invoked:
6 (1) the need to resolve an issue that (2) has
7 been placed by Congress within the
8 jurisdiction of an administrative body having
9 regulatory authority (3) pursuant to a
10 statute that subjects an industry or activity
11 to a comprehensive regulatory scheme that (4)
12 requires expertise or uniformity in
13 administration.

14 If a court refers an issue to an administrative agency pursuant
15 to the doctrine of primary jurisdiction, the court is not
16 deprived of subject matter jurisdiction; rather, the court "has
17 discretion either to retain jurisdiction or, if the parties would
18 not be unfairly disadvantaged, to dismiss the case without
19 prejudice." Reiter v. Cooper, 507 U.S. 258, 268 (1993).

20 Section 7521(a) [Section 202(a) of the Clean Air Act]
21 provides in pertinent part that

22 [t]he Administrator shall by regulation
23 prescribe ... in accordance with the
24 provisions of this section, standards
25 applicable to the emission of any air
26 pollutant from any class or classes of new
27 motor vehicles or new motor vehicle engines,
28 which in his judgment cause, or contribute
29 to, air pollution which may reasonably be
30 anticipated to endanger public health or
31 welfare.

32 Section 7543(a) [Section 209(a) of the Clean Air Act]
33 provides in pertinent part:

34 No state or any political subdivision thereof
35 shall adopt or attempt to enforce any
36 standard relating to the control of emissions
37 from new motor vehicles or new motor vehicle
38 engines subject to this part. No State shall

1 require certification, inspection, or any
2 other approval relating to the control of
3 emissions from any new motor vehicle or new
4 motor vehicle engine as condition precedent
to the initial sale, titling (if any), or
registration of such motor vehicle, motor
vehicle engine, or equipment.

5 However, Section 7543(b) provides in pertinent part:

6 (1) The Administrator shall, after notice and
7 opportunity for public hearing, waive
8 application of this section to any State
9 which has adopted standards (other than
10 crankcase emission standards) for the control
11 of emissions from new motor vehicles or new
12 motor vehicle engines prior to March 30,
1966, if the State determines that the State
standards will be, in the aggregate, at least
as protective of public health and welfare as
applicable Federal standards. No such waiver
shall be granted if the Administrator finds
that -

13 (A) the determination of the
14 State is arbitrary and capricious,

15 (B) such State does not need
16 such State standards to meet compelling and
extraordinary conditions, or

17 (C) such State standards and
18 accompanying enforcement procedures are not
consistent with section 7521(a) of this
title.

19 (2) If such State standard is at least as
20 stringent as the comparable applicable
21 Federal standard, such State standard shall
22 be deemed to be at least as protective of
health and welfare as such Federal standards
for purposes of paragraph (1).

23 (3) In the case of any new motor vehicle or
24 new motor vehicle engine to which State
25 standards apply pursuant to a waiver granted
26 under paragraph (1), compliance with such
State standards shall be treated as
compliance with applicable Federal standards
for purposes of this subchapter.

1 Defendant argues that the doctrine of primary jurisdiction
2 should apply to Count II because the issue whether CARB will
3 receive a waiver of the preemption of emissions has been
4 committed to the Administrator of the EPA by Congress pursuant to
5 Section 7453(b) (1). Defendant contends:

6 Importantly, the Administrator's discretion
7 is significantly circumscribed. For example,
8 California's regulations 'are presumed to
9 satisfy the waiver requirements and ... the
10 burden of proving otherwise is on whoever
11 attacks them.' *MEMA I*, 627 F.2d at 1121.
12 California is given the 'broadest possible
13 discretion.' *Id.* at 1128. And '[t]he
14 agency's longstanding interpretation [has
15 been] that section 209(b) does not require
16 California to establish perfect compliance
17 with' the Clean Air Act. *MEMA III*, 142 F.3d
18 at 463. Thus, on at least the
19 'protectiveness' question, the Administrator

20 is not to overturn California's
21 judgment lightly. Nor is he to
22 substitute his judgment for that of
23 the State. There must be clear and
24 compelling evidence that the State
25 acted unreasonably in evaluating
26 the relative risks of various
pollutants in light of the air
quality, topography, photochemistry,
and climate in that State, before
the EPA may deny a waiver.

H.R. Rep. No. 95-294, at 302 (1977) ... And
US EPA has consistently interpreted the
consistency requirement to be limited to the
factual question of whether 'there is
inadequate lead time to permit the
development of the necessary technology given
the cost of compliance within that time
period or the Federal and State test
procedures impose inconsistent certification
requirements.' See, e.g., California State
Motor Vehicle Pollution Control Standards;
Waiver of Federal Preemption, Decision, 57
Fed.Reg. 24788, 24789 (1992). See also *MEMA
III*, 142 F.3d at 463 (stating that '[n]either

1 the court nor the agency has ever interpreted
2 compliance with section 202(a) to require
more' than this).

3 In addition, Congress has specifically
4 designed how these decisions are to be
5 reviewed by the courts. Review of any final
6 action by the Administrator must be in either
7 the U.S. Court of Appeals for the District of
8 Columbia Circuit or, if the final action is
9 'locally or regionally applicable,' in the
10 appropriate U.S. Court of Appeals. 42 U.S.C.
11 § 7607(b)(1). That judicial review is also
12 circumscribed to whether the Administrator
acted arbitrarily or capriciously, or not
consistent with law. *MEMA I*, 627 F.2d at
1105-06. And that judicial review is based
solely on an administrative record ...
Lastly, the District of Columbia Circuit has
explained that the Administrator's
construction of the Clean Air Act is given
deference because of his agency's 'technical
expertise.' *Id.* at 1106.

13 Relying on this legal exposition, defendant argues:

14 Plaintiffs are attempting to avoid this
15 administrative waiver process. They seek a
16 declaration from this Court that California
17 cannot meet the waiver requirements of Clean
18 Air Act section 209(a) because these proposed
19 regulatory amendments would be inconsistent
20 with Section 202 of the Clean Air Act.
21 Congress has specifically entrusted that
22 decision to the Administrator of US EPA, with
direct appeal (on an administrative record)
to the U.S. Court of Appeals. This Court
need not - and should not - insert itself
into that process, risking the possibility
that two courts might reach inconsistent
decisions on that question. Rather, the
Court should apply the primary jurisdiction
doctrine.

23 The court concludes that the primary jurisdiction doctrine
24 does not apply to the allegations of Count II. The court concurs
25 with plaintiffs that the primary jurisdiction doctrine does not
26 apply because plaintiffs raise "two pure questions of statutory

1 interpretation under the Clean Air Act that can and must be
2 determined by the federal courts." As plaintiffs note, there is
3 no principle of administrative law requiring a court to await an
4 agency's interpretation of the law before the court interprets
5 the law. If an agency has already interpreted a statutory
6 provision, the court looks to that agency interpretation only if
7 the statute at issue is silent or ambiguous on the issue. See
8 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
9 467 U.S. 837, 842-843 (1984). Plaintiffs contend:

10 Interpreting the preemptive scope of the
11 Clean Air Act is no different. To the extent
12 EPA has already interpreted the relevant
13 provisions - and plaintiffs believe EPA's
14 determination that section 202(a) does not
15 permit regulation of greenhouse gases forbids
16 CARB's regulation ... - then the Court simply
17 applies Chevron's two-step test. To the
18 extent there are unanswered questions of
19 statutory interpretation, the Court answers
20 those questions the same way it answers any
21 other questions of federal statutory
22 interpretation.

23 Plaintiffs' position is supported by the holding in
24 International Auto. Mfrs. v. Commissioner, 208 F.3d 1 (1st Cir.
25 2000).⁴ In International Auto. Mfrs., automobile manufacturers
26 challenged automobile emission standards adopted by
27 Massachusetts, contending that the regulations were preempted by

28 ⁴Plaintiffs also refer the court to Engine Mfgs. v. South
29 Coast Air Quality Manag., 541 U.S. 246 (2004), a decision which
30 does not address the issue of primary jurisdiction. Although
31 plaintiffs assert that "[t]here is no doubt that if 'primary
32 jurisdiction' had been raised in *South Coast*, it would have been
33 rejected", because the issue is not raised or discussed in the
34 Supreme Court's opinion, this court concludes that South Coast is
35 not relevant to resolution of the issue before this court.

1 the Clean Air Act. The district court ruled in favor of the
2 automobile manufacturers. In an earlier appeal from the district
3 court's decision, the First Circuit opted to stay its
4 determination of the matter pending a referral of several
5 questions to the EPA under the doctrine of primary jurisdiction,
6 including whether the Massachusetts ZEV mandates were "standards"
7 for purposes of Section 177 of the Clean Air Act, whether the
8 California MOAs were "standards" for purposes of Sections 177 and
9 209, and whether the ZEV mandates were otherwise "identical to
10 California standards for which a waiver has been granted" as
11 required by Section 177. After EPA issued an opinion letter
12 responding to these questions, a petition for review of that
13 letter was filed. In dismissing the petition for review, the
14 First Circuit ruled in pertinent part:

15 The litigation in Appeal No. 99-2245 is an
16 unfortunate consequence of our previous
17 decision to stay the appeal in No. 98-1036
18 pending a primary jurisdiction referral to
19 the EPA. While our intentions in making that
20 referral reflected an appropriate respect for
21 the policies underlying the doctrine of
22 primary jurisdiction, in retrospect our
23 referral to the EPA was somewhat inartful.

24 As is fairly clear from our prior opinion, it
25 was our intention to allow the EPA to issue
26 binding rulings or decisions on the questions
27 of statutory interpretation and application
28 that we referred to the agency. However, in
29 hindsight, our decision to invoke the primary
30 jurisdiction doctrine sua sponte without any
31 briefing from the parties was not a wise one.
32 Of the several issues referred for the EPA's
33 consideration, it now appears that the agency
34 was not in a position to determine any of
35 them authoritatively. For instance, as all
36 parties now apparently agree, the ultimate

1 legal determination of whether the
2 Massachusetts regulations are preempted by
3 the CAA is a question of federal preemption
4 law for the courts alone to decide.
5 Similarly, the subsidiary issues of what
6 constitutes a 'standard' under CAA §§ 209 and
7 177 and whether the ZEV mandates are
8 'identical' to California standards require
9 us to interpret the CAA for purposes of
10 applying federal preemption law, not for
11 purposes of administering the CAA; as such,
12 the issues fall squarely within this Court's
13 jurisdiction but not within any particular
14 expertise or special administrative
15 competence of the EPA. Presumably, this is
16 why the EPA's September 15, 1999 opinion
17 letter is written in terms of the EPA's
18 'beliefs' regarding the various issues
19 referred for its consideration. In fact, in
20 the No. 99-2245 litigation, the EPA has taken
21 the position that the September 15, 1999
22 opinion letter was an advisory opinion only,
23 with no independent impact upon the parties.
24 We agree with this characterization.

13 The Administrative Procedure Act subjects all
14 'final agency actions' to judicial review ...
15 Agency action is final if it constitutes a
16 "'definitive statement [] of [the agency's]
17 position" with "direct and immediate"
18 consequences.' ... The EPA's opinion letter
19 does not purport to be a definitive statement
20 by the agency of its position on these
21 various issues. For example, with regard to
22 the question of whether a waiver has been
23 granted for the California MOAs, the EPA
24 makes explicit reference to the pending
25 proceedings on California's request for a
26 'within the scope' determination of its
amended LEV program. Likewise, the agency
takes great pains to limit its conclusion
that the MOAs constitute standards for
purposes of §§ 209 and 177 to the 'unique
circumstances' of this case, expressly
suggesting that a different analysis would be
appropriate in most cases. Nor does the
opinion letter have any direct or immediate
consequences for the parties. There was no
controversy before the agency other than the
referral from this Court, and the EPA
correctly recognized that this Court will

1 decide the preemption issues before us on
2 appeal, not the agency. Because the
3 September 15, 1999 opinion letter was not
4 intended to be a definitive statement of the
5 EPA's positions and has no direct or
6 immediate impact on the parties, we hold that
7 it is not a reviewable final agency action,
8 and we dismiss the petition for review

9 208 F.3d at 4-5.

10 Here, the issue before the court in Count II is whether the
11 regulations set forth in Resolution No. 04-28 constitute
12 standards related to the control of emissions from new motor
13 vehicles and, therefore, preempted by Section 209(a) of the Clean
14 Air Act. This is an issue for this court to decide.

15 The fact that defendant has the ability to seek a waiver of
16 this preemption, if preemption is ultimately determined by this
17 court, does not cause the primary jurisdiction doctrine to apply.
18 As plaintiffs contend:

19 This case is entirely different. Whether
20 CARB's 'greenhouse gas' emission standards
21 are preempted 'standards' under Section
22 209(a) is a pure question of statutory
23 interpretation. Likewise, whether CARB's
24 regulation of 'greenhouse gases' is
25 'consistent with' section 202(a), given that
26 EPA has concluded as a matter of statutory
 interpretation that 'greenhouse gases' are
 not 'pollutants' under section 202(a), is a
 pure question of statutory interpretation.
 Of course, if CARB were to seek a waiver from
 EPA, plaintiffs would be perfectly entitled
 to argue that any waiver would be contrary to
 the statute, and EPA's decision could then be
 reviewed by the D.C. Circuit. That
 possibility is, however, irrelevant. It is
 no more relevant than the possibility that
 ... Massachusetts might have petitioned for a
 waiver in *AIAM*.

 Whether a waiver *can* be sought, or *will* be

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

sought, does not alter the substance of the statutory interpretation question at issue. Count II presents pure questions of statutory interpretation regardless whether a waiver is sought. Courts may defer to an agency's authoritative construction of an ambiguous federal statute, but courts simply do not await an agency's attempt at statutory interpretation.

Therefore, the court denies defendant's motion to dismiss Count II pursuant to the primary jurisdiction doctrine.⁵

ACCORDINGLY:

- 1. Defendant's Motion to Dismiss is denied.
- 2. The issue of intradistrict venue is certified for appeal to the Ninth Circuit Court of Appeal pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

Dated: October 20, 2005
668554

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE

⁵The parties appear to dispute whether plaintiffs are precluded from resorting to 42 U.S.C. § 1983 to enforce Section 209 of the Clean Air Act. However, because this issue is unrelated to application of the primary jurisdiction doctrine, the court does not address it further in resolving this motion to dismiss.