

1 SAGASER, JONES & HAHEYSY
2 2445 Capitol Street, 2nd Floor
3 Post Office Box 1632
4 Fresno, California 93717-1632
Telephone: (559) 233-4800
Timothy Jones #119841
John P. Kinsey #215916

5 KIRKLAND & ELLIS LLP
6 655 Fifteenth Street, N.W., Suite 1200
7 Washington, D.C. 20005
8 Telephone: (202) 879-5000
9 Stuart A. C. Drake (*pro hac vice*)
Andrew B. Clubok (*pro hac vice*)
Michael E. Scoville (*pro hac vice*)
Derek S. Bentsen #232550

10 Attorneys for all Plaintiffs

11
12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF CALIFORNIA**

14 CENTRAL VALLEY CHRYSLER-JEEP,
15 INC., *et al.*,

16 Plaintiffs,

17 vs.

18 CATHERINE E. WITHERSPOON, in her
19 official capacity as Executive Director of the
20 California Air Resources Board,

21 Defendant,

22 ASSOCIATION OF INTERNATIONAL
23 AUTOMOBILE MANUFACTURERS,

24 Plaintiff-Intervenor,

25 SIERRA CLUB, *et al.*,

26 Defendant-Intervenors.

Case No. CIV-F-04-6663 AWI LJO

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT AND
DEFENDANT-INTERVENORS'
MOTION FOR SUMMARY JUDGMENT
AND DISMISSAL**

Date: November 27, 2006
Time: 1:30 p.m.
Courtroom: Two
Judge: Hon. Anthony W. Ishii
Trial Date: January 30, 2007

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1
2 **Digest of Pleadings and Correspondence**
3

4 *Note: This digest of pleadings and correspondence between the parties is intended to provide the Court with a summary*
5 *of earlier motions practice, and with a summary of the evolution of the CARB Executive Officer's position on the*
6 *justiciability of claims presented here. Documents other than pleadings that are cited here are included in and attached*
7 *to plaintiffs' accompanying request for judicial notice, the declarations filed in conjunction with this brief, or are*
8 *available in the referenced public sources.*

9 September 2004 -- CARB approves the CO2 regulation proposed by the CARB staff. CARB directs the
10 CARB Executive Officer to seek either a "new waiver" under Clean Air Act § 209(b), or "within the scope"
11 approval from EPA. CARB also directs the Executive Officer to complete remaining steps in rulemaking
12 process required by the California Administrative Procedure Act. Board Resolution 04-28 (attached as
13 Exhibit A to Declaration of Thomas Cackette).

14 *Note: Under CARB's interpretation of the Clean Air Act, new standards that are "within the scope" of*
15 *regulations previously approved by EPA can be put into full effect before EPA completes its review of the new*
16 *standards. (See Exhibit E. to Declaration of S. Kingsley Macomber ("Macomber Decl.") (Email of Mar. 22,*
17 *2005 from Thomas Cackette to Dennis McLerran)).*

18 December 2004 -- Plaintiffs commence litigation to challenge the CO2 regulation approved by CARB in
19 September 2004. (Doc. # 1.)

20 *Note: Cal. Health & Safety Code § 43018.5(a) directed CARB to complete its CO2 rulemaking by*
21 *January 1, 2005.*

22 January 2005 -- CARB misses the deadline in Health & Safety Code § 43018.5(a) to complete the CO2
23 rulemaking. Instead, in the spring of 2005, the CARB Executive Officer invites additional public comment
24 on portions of the rulemaking record. (See CARB, Second Notice of Public Availability of Supporting
25 Documents and Information, available at <http://www.arb.ca.gov/regact/grnhsgas/2nd15day.pdf>.)

26 February 2005 -- In light of CARB's failure to meet its statutory deadline, plaintiffs file a First Amended
27 Complaint in this action, pursuant to Fed. R Civ. Pro. 15(a). Count I seeks permanent injunctive and
28 declaratory relief under EPCA. Count II seeks a determination that CARB cannot require compliance with
the CO2 standards unless those standards have been specifically approved by EPA under the Clean Air Act.
(Doc.# 23.)

March 7, 2005 -- The CARB Executive Officer files a motion to dismiss the First Amended Complaint on
ripeness grounds. Defendant describes the CO2 regulations approved by CARB in September 2004 as
"proposed regulatory amendments," notes that the California Office of Administrative Law might disapprove
the regulations, and claims that "[i]f the [regulatory] process stopped right now, for any reason, the challenged
proposed regulatory amendments would not impose any obligations on anyone." (Doc. #30-9 at 23.)

March 25, 2005 -- CARB staff member Cackette sends an electronic mailing to Washington State officials, in
which he states that CARB "will seek a within the scope waiver" for the CO2 standards. According to Mr.
Cackette, "What this means is we think the criteria for the waiver still stand, and no new review [by EPA] is
required" in order to put the CO2 standards into full effect. (Exhibit B to Macomber Decl.)

August 5, 2005 -- CARB completes its submission of the CO2 regulation to the California Office of
Administrative Law, which approves the regulation without change on September 15, 2005. (CARB,
Rulemaking on Proposed Greenhouse Gas Regulation, <http://www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm>.)
The CARB Executive Officer withdraws her ripeness defense. (Transcript of Hearing on Motion to Dismiss

1 at 5-6 (July 25, 2005) (attached as Exhibit 1 to plaintiffs' request for judicial notice.)

2 October 10, 2005 -- After supplemental briefing on the issue of ripeness, Judge Coyle denies defendant's
3 March 2005 motion to dismiss, and holds that "this action is ripe for review based on the grounds initially
4 asserted by the plaintiffs." (Doc # 142 at 3-4 n.1.)

5 December 21, 2005 -- The CARB Executive Officer sends a letter to EPA seeking review of the CO2
6 regulations. Letter and attachments cite Board Resolution 04-28, and do not clearly state whether the request
7 is for within-the-scope review or for a "new waiver." (Exhibit B to Declaration of Thomas Cackette) (Letter
8 of Dec. 21, 2005 from Catherine Witherspoon to Stephen Johnson, U.S. EPA Administrator.)

9 March 17, 2006 -- At a hearing on scheduling issues, Judge O'Neill directs defendant to determine whether
10 effective date of the CO2 standards can be postponed, in order to relieve the need for the case to proceed to
11 trial in January 2007.

12 March 28, 2006 -- Defendant files a response to Judge O'Neill's question and states, "Anything that would
13 change the standards themselves would need to be done through a public, administrative process." (Doc. #
14 192 at 9.) Defendant states that manufacturers are obligated to certify that their vehicles comply with the
15 CO2 standards by providing data "before the start of model year 2009," but claims that "there will be no
16 enforcement -- in the strict sense -- until after model year 2014," apparently referring to penalty claims for
17 noncompliance with the regulation. (*Id.* at 10-11.)

18 June 1, 2006 -- Defendants file a motion for judgment on the pleadings. In subsequent briefs, defendants state
19 that EPA's approval of CARB standards is "straightforward" and that those standards are "presumed eligible
20 for federal approval," and that they have already demonstrated that the regulations are "eligible for federal
21 approval." (Doc. # 232 at 8-9; Doc. # 335-1 at 1.)

22 July 1, 2006 -- Defendants file motion to stay case pending disposition of *Massachusetts v. EPA*. (Doc. #
23 254.) The motion for a stay is denied by Judge O'Neill, based on the Court's findings that plaintiffs would be
24 prejudiced by delay. (Doc. # 297.) The Court denies reconsideration. (Doc. # 345.)

25 August 23, 2006 -- Counsel for plaintiffs writes to counsel for defendant, and notes that pleadings in this case
26 indicate that defendant has stated that she has "no intent to enforce the regulation until EPA grants the
27 waiver." Counsel for plaintiffs asks counsel for defendant to determine if that means that defendant will
28 agree to initiate regulatory action needed to postpone the regulation's requirements, so that manufacturers can
cease or suspend "committing unrecoverable sums on compliance with the ... standards until the legality of
those standards is finally determined under federal law." (Exhibit G to Macomber Decl.) (Letter of Aug. 23,
2006 from Stuart Drake to Aron Livingston & Marc Melnick.)

August 25, 2006 -- A CARB employee testifying in discovery for defendant under Fed. R. Civ. Pro. 30(b)(6)
states that the lead time needed for compliance with the model year 2012 CO2 standards is five to seven
years. (See Plaintiffs' Statement of Undisputed Material Facts #3-16.)

September 1, 2006 -- Counsel for defendant responds to the August 23 letter, and states that manufacturers'
lead time for compliance with CARB regulations commences when CARB adopts the regulations, not when
EPA approves them. Defense counsel's letter does not address the request. (Exhibit F to Macomber Decl.)
(Letter of Sept. 1, 2006 from Marc Melnick to Stuart Drake.)

September 15, 2006 -- At argument on the motion for judgment on the pleadings, the Court inquires into
jurisdiction, specifically asking whether the case is ripe despite no EPA action on the waiver request.
Counsel for defendant states, "we think the Court can decide [the merits] here today. It would not be an
advisory opinion. It would help all the parties." (Exhibit 2 of plaintiffs request for judicial notice) (Transcript
of Hearing on Defendants' Motion for Judgment on the Pleadings at 16-17 (Sept. 15, 2006).)

1 **Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment**

2 Plaintiffs Central Valley Chrysler-Jeep, Inc. *et al.* (collectively “plaintiffs”) respectfully
3 submit this memorandum of points and authorities in opposition to the motion of defendant and
4 defendant-intervenors (collectively, “defendants”) for summary judgment and dismissal.

5 **Preliminary Statement**

6 This action seeks pre-enforcement review of a regulation adopted by the California Air
7 Resources Board (“CARB” or “the Board”). The CARB regulation sets limits on carbon dioxide
8 (“CO2”) from motor vehicles. Plaintiffs seek permanent declaratory and injunctive relief against
9 enforcement of the CO2 standards, principally on the ground that the standards are preempted by the
10 federal Energy Policy & Conservation Act (“EPCA”). The case has been on file for almost two
11 years. A trial date has been set for January 30, 2007.

12 The motion now before the Court claims that there is no longer a ripe and justiciable
13 controversy between the parties that requires the Court’s attention. Though presented as a motion
14 for summary judgment, which can be granted only if undisputed facts entitle the movant to
15 judgment, defendants’ motion ignores the most important facts that bear on the Court’s jurisdiction,
16 and on the need to adhere to the current trial date. In brief:

17 1. When CARB approved the CO2 regulation in 2004, it intended to require the
18 automobile industry to produce vehicles with significantly reduced gasoline consumption. CARB
19 knew that the industry would have to start investing in the necessary technologies as soon as the
20 Board completed the California rulemaking process. CARB’s understanding of the industry’s need
21 to start work immediately was correct. According to deposition testimony provided by a CARB
22 witness earlier this year, some manufacturers will need up to seven years to comply with the CARB
23 standards that take full effect in model year 2012.¹ (*See* pp. 10-11 below.) Model year 2012 begins
24 in calendar year 2011, about four and a half years from now. In other words, some manufacturers
25 who are not already working on the necessary technologies for model year 2012 will not be able to
26 deploy those technologies in time for this regulation.

27 _____
28 ¹ See Plaintiffs’ Counterstatement of Undisputed Material Facts (“Plaintiffs’ UMF”) at 20-27.

1 exercise it. That is when they sought and obtained the Court's decision on their motion for judgment
2 on the pleadings.

3 Having lost substantial parts of their motion for judgment on the pleadings, and facing the
4 prospect of trial on the merits early next year, defendants have responded with a plethora of new
5 motions. In the present motion, defendants now claim that -- unlike the situation in September 2006
6 -- this case is "no longer" ripe for adjudication. (Defts. Mem. at 3 l.19.) According to defendants,
7 the Court's subject-matter jurisdiction has been dissolved by two events: (i) the Court's decision on
8 September 25 that the CO2 regulation is preempted by section 209(a) of the Clean Air Act unless
9 EPA grants a waiver, and (ii) a declaration from the CARB staff stating that the CARB staff will not
10 take "enforcement action" until that waiver is granted.

11 The linchpin for defendants' new-found theory for dismissal is the declaration from a
12 member of the CARB staff (Mr. Thomas Cackette).⁶ As explained below, the statements by Mr.
13 Cackette are plainly designed to reverse prior out-of-court statements in which he indicated that
14 CARB would proceed with enforcement of the CO2 regulation without awaiting any action by EPA.
15 Mr. Cackette's prior statements are consistent with normal CARB practice, which is to expect the
16 industry to comply with their regulations without awaiting the formality of EPA review. (See pp. 6-
17 7.) Mr. Cackette's new declaration seeks, in essence, either to change or confuse defendant's
18 position on the critical issue of what CARB expects the industry to do, and when CARB expects the
19 industry to do it.

20 The correct judicial analysis for situations like the one now facing the Court is clear.
21 Defendant is essentially claiming that a case that was once ripe and justiciable must now be
22 dismissed as moot. In the parlance of the case law, this *sua sponte* change in defendants' position is
23 called "voluntary cessation," and such reversals of a party's position are viewed with extreme
24 skepticism by the Supreme Court and the Ninth Circuit. (See pp. 16-18 below.) There are many
25 reasons why Mr. Cackette's declaration and the ad hoc change in defendants' overall position do not
26 demonstrate mootness and do not divest the Court of jurisdiction. (*Id.*)

27 ⁶ Declaration of Thomas A. Cackette in Support of Deft. and Deft.-Intervenors' Mot. for Summary
28 Judgment and Dismissal (filed Oct. 27, 2006) [hereafter "Cackette Decl."].

1 Even if defendants were not saddled with the need to demonstrate mootness -- which under
2 the case law they clearly are -- their motion should still be denied. All Mr. Cackette and defendants
3 appear to be promising is that CARB will not take some unspecified actions to “enforce” the CO2
4 regulation until EPA grants a “new waiver” for the regulation. For the dealers caught up in this huge
5 regulatory controversy, such a commitment about how the bureaucracy will conduct itself has no
6 present value. If the waiver is approved by EPA, the dealers most directly affected by this
7 regulation will lose significant parts of their product lines. Even allowing for uncertainty, the dealer
8 analysis described in an accompanying declaration⁷ shows current losses in business value averaging
9 about \$1 million per dealer.

10 For the manufacturers, Mr. Cackette’s carefully-worded statement indicates that CARB
11 retains the ability to put the CO2 standards into effect as soon as EPA grants a waiver. Given the
12 lead time needed for compliance -- which, as noted above, a CARB witness has estimated at seven
13 years for some standards and some manufacturers -- the manufacturer plaintiffs cannot await the end
14 of the EPA waiver process before investing in compliance. CARB’s goal is clear: it is trying to
15 force the industry to commit to compliance with the CO2 standards before the industry can have its
16 day in court. Defendants’ motion should be denied.

17 **Counterstatement of the Case**

18 Defendants appear to concede that the waiver proceedings at U.S. EPA will not determine
19 whether the CO2 regulations are preempted by EPCA and the foreign policy doctrine. That is one of
20 the issues decided by the Court in its disposition of defendants’ motion for judgment on the
21 pleadings, and so defendants are obliged to accept that view of the law -- which plaintiffs believe is
22 entirely correct.

23 Defendants’ new argument for dismissal has these elements: (a) CARB will not take
24 “enforcement action” until a waiver is granted by EPA; (b) if no waiver is granted by EPA there will
25 never be any “enforcement action” with respect to the CO2 regulations; and (c) manufacturers

26 ⁷ See Declaration of Stuart Harden filed Nov. 13, 2006 ¶ 11. (As noted above, evidence bearing on
27 the competitive impacts of the regulation and the effects of the regulation on dealers is offered by the
28 dealer and the individual manufacturer plaintiffs, not by the plaintiff Alliance of Automobile
Manufacturers.)

1 should therefore await EPA's action on the waiver before litigating the EPCA and foreign-policy
2 preemption claims presented here.

3 Defendants never explain what "enforcement action" means -- which is an issue that, if
4 necessary, plaintiffs wish to pursue in factual detail. Defendants never grapple with the practical
5 realities of how the automobile industry must spend resources to comply with regulations even
6 before they are externally or formally "enforced" by a government agency. And they cannot conceal
7 the fragility of the promises contained in Mr. Cackette's declaration. Each of those deficiencies in
8 defendants' theory for dismissal is examined below.

9 **I. Basic Regulatory Framework**

10 Under the California Health & Safety Code, "all motor vehicles" in California must comply
11 with emissions standards set by CARB, with few exceptions not relevant here. Cal. Health & Safety
12 Code § 43000(d). Except for some types of specialty vehicles, CARB is forbidden to certify any
13 vehicle that does not meet its emissions standards using the prescribed test procedures. *Id.*
14 § 43102(a). The importation or sale of uncertified vehicles in California is a serious offense subject
15 to large civil penalties. *See, e.g., id.* §§ 43150-43156.

16 Well before the start of a given model year, vehicle manufacturers test prototypes of new
17 models to establish compliance with the CARB standards, which are also made available for
18 confirmatory testing by the CARB staff. Vehicles that meet CARB's standards for a given model
19 receive an "Executive Order" that permits them to be sold lawfully in California. *See* Macomber
20 Decl ¶ 6. As a practical matter, vehicle manufacturers must have clear plans for compliance with
21 future model year emissions standards in place the summer before the calendar year in which they
22 will start production. *Id.* ¶¶ 7-8. Model year 2009, for example, starts in calendar year 2008.⁸
23 Thus, for model year 2009 (the first model year to which the CO2 standards apply), manufacturers
24 need to know exactly how they will comply with the emissions standards by the summer of 2007, so
25 that they can meet with the CARB staff and review those plans well before the start of production in
26 2008. *Id.*

27 Under the current legislative and regulatory status quo, the CO2 regulations are mandatory

28 ⁸ *See* Plaintiffs' UMF at 3.

1 and fully operative. The regulations are codified in section 1961.1 of title 13 of the California Code
2 of Regulations. The text of the regulation, which has been fully approved by every relevant
3 administrative body in the State of California, provides that “[t]he requirements of this section
4 1961.1 *shall become effective* on January 1, 2006.” 13 C.C.R. § 1961.1(g) (emphasis added). The
5 regulation further provides that “greenhouse gas emission levels from new 2009 and subsequent
6 model year [vehicles] ... *shall not exceed*” the specified numerical limits. *Id.* § 1961.1 (emphasis
7 added). There is no textual provision or annotation to the text stating that the regulations do not
8 take effect until approved by EPA, and unlike some other California statutes, the legislation
9 authorizing the CO2 regulations did not require federal approval before the state law would become
10 operative.⁹

11 **II. The “Within the Scope” Concept at CARB and EPA**

12 CARB and its staff routinely put new standards into full effect, and start to enforce them,
13 before U.S. EPA has taken any action approving the new standards under the federal Clean Air Act.
14 *See* Macomber Decl. ¶¶ 12-19. CARB and the staff take such steps because they consider most of
15 their new standards to be amendments to prior regulations, that come “within the scope” of EPA
16 decisions approving prior standards or prior sections of a particular part of the codified provisions of
17 title 13. *Id.* The device of claiming that new regulations are “within the scope” of other regulations,
18 sometimes containing very different requirements, has been used for decades in California waiver
19 proceedings, and is indispensable to CARB’s normal regulatory practice. *Id.* ¶ 12-14.

20 Examples of this routine CARB practice abound. One set of California tailpipe pollution
21 standards for model year 2001 vehicles went into effect even though EPA did not complete its
22 review until September 2004. *See* 69 Fed. Reg. 60995 (Oct. 14, 2004); 68 Fed. Reg. 62295 (Nov. 3,
23 2003). EPA did not act on a separate California rule governing other emissions until four years after
24 the California standard began to apply. *See* 67 Fed. Reg. 54180 (Aug. 21, 2002). EPA did not
25 complete its review of California’s emission regulations for some truck engines until more than six
26 years after the regulations became effective in California. *See* 69 Fed. Reg. 59920 (Oct. 6, 2004).

27 It is also important to note that the CARB staff have not abstained from enforcement of new
28

⁹ *See* note 34 below.

1 requirements prior to EPA's approval, even when they initially requested that EPA treat their request
2 for review as a request for a new waiver (as opposed to a request for a "within the scope"
3 determination). In one very recent matter, the CARB staff simply reclassified the part of a
4 regulation that they wished to put into effect as "within the scope" of some other regulation. *See*
5 *Macomber Decl.* ¶¶ 12-19. Indeed, for all practical purposes, then, the review and approval of
6 CARB regulations by EPA does not serve as a meaningful condition precedent to implementation of
7 those regulations by CARB and the industry. Vehicle manufacturers cannot and do not await EPA's
8 action on CARB submittals to EPA before taking the steps needed to comply with new CARB
9 standards, given CARB's liberal use of the "within the scope" concept.¹⁰

10 **III. CARB's Treatment of the CO2 Standards**

11 Before Mr. Cackette filed his declaration in this action two months ago, it seemed clear that
12 CARB intended to follow its normal practice, and treat the CO2 standards as "within the scope" of
13 prior regulations. Both in papers in this Court and in filings at EPA, the CO2 or greenhouse gas
14 standards were carefully described as "amendments" to the rules that already applied to tailpipe
15 emissions of passenger cars and light-duty trucks, called the "low emission vehicle" or "LEV"
16 regulations.¹¹

17 The September 2004 Board Resolution that approved the CO2 standards expressly gave the
18 CARB Executive Officer the option of treating them as "within the scope" of the prior LEV
19 regulations. *See Macomber Decl.* ¶ 20. Mr. Cackette himself stated in March 2005 that it was his
20 intention (and presumably that of CARB) to treat the CO2 standards as "within the scope" of the
21 LEV program, so that they could take full effect even without specific new EPA approval action. In
22 a document Mr. Cackette sent to officials in the State of Washington in March 2005, Mr. Cackette

23 ¹⁰ See Plaintiffs' UMF at 37-38.

24 ¹¹ *See, e.g.*, Exhibit B to Cackette Decl., at 5 (describing the CO2 standards as "amendments" to
25 "California's passenger vehicle emissions standards"); CARB Resolution 04-28, September 23,
26 2004, at 7, 14, *available at* <http://www.arb.ca.gov/regact/grnhsgas/res0428.pdf>. (envisioning the
27 "incorporation" of the CO2 standards within CARB's existing low emission vehicle (LEV)
28 regulations); Deft. and Deft.-Intervenors' Mem. of Points and Authorities in Support of Mot. for
Judgment on the Pleadings (Doc. 232, filed June 1, 2006), at 4 (describing the CO2 standards as
"regulatory amendments adding greenhouse gas emissions standards to the State's existing motor
vehicle standards").

1 wrote:

2 “For each regulatory change we make (typically one every 1-2 years ...) we seek a
3 “within-the scope” waiver from EPA. What this means is *we think the criteria for*
4 *the waiver still stand, and no new waiver is needed.* EPA has not yet acted on
5 several recent amendments to LEV, but since [they are] within the scope waiver
6 request[s], we say the new revisions are enforceable even before EPA acts (i.e.,
7 within the scope of a previous waiver.... *The CO2 regulations are a modification to*
8 *the LEV regulations. Thus, we will seek a within the scope waiver,* and we will
9 demonstrate that the LEV regulations, including the CO2 standards, are consistent
10 with the ... criteria for the already granted LEV waiver. We will do this regardless of
11 the outcome of the lawsuit filed against EPA’s decision that CO2 is not a pollutant.”

12 See Macomber Decl. ¶ 21 and exhibit E thereto (emphasis added). Thus, at least as recently as the
13 spring of 2005, Mr. Cackette’s understanding was that he would consider the CO2 standards as
14 amendments to the LEV regulations, “within the scope” of those regulations, and capable of
15 enforcement “even before EPA acts.”

16 After this Court found this case to be ripe for the first time (in October 2005), the CARB
17 Executive Officer eventually submitted the CO2 standards to EPA for review, in late December
18 2005. In that communication, however, defendant did not indicate precisely whether she was
19 requesting what Mr. Cackette would call a “new waiver” or a request for “within-the-scope” review.
20 Equally important, her December 2005 letter to EPA contained this notation on page one: “[W]e
21 reserve our right to assert (at a later time) that no new waiver is required for California to adopt or
22 enforce the subject regulations.”¹² In other words, defendant was explicitly reserving the right to
23 take a position contrary to the one that she has now offered as ground for dismissal.¹³

24 **IV. The Regulatory Status Quo**

25 It was against the foregoing regulatory backdrop that plaintiffs in this action included Count
26 II in the First Amended Complaint. Given CARB’s fast-and-loose practices at EPA, they sought --
27 in addition to the permanent relief they need under EPCA -- a determination that CARB could not in
28 any event treat its CO2 standards as lawful and effective, unless and until EPA granted a waiver
approving those regulations under the Clean Air Act.

Before turning to the continuing need for relief under EPCA, it should be noted that

¹² See Macomber Decl. ¶ 22 and exhibit B to Cackette Decl.

¹³ In addition, defendant has not, to plaintiffs’ knowledge, retreated from her position in writing to EPA.

1 plaintiffs' claim under the Clean Air Act remains valid and ripe. Mr. Cackette's declaration does not
2 change the text of the CARB regulation -- which is something he and the Executive Officer are
3 forbidden by California law and by binding CARB resolutions from doing. *See* Macomber Decl.
4 ¶ 11. Under the current regulatory text, the CARB rule will apply starting in model year 2009,
5 which begins as early as January 2, 2008.¹⁴ Mr. Cackette, his supervisor (the CARB Executive
6 Officer), the CARB General Counsel, and indeed every member of the Board able to instruct or
7 influence the CARB staff can be replaced at any time. In addition, there is nothing that constrains
8 either Mr. Cackette, or his superior Ms. Witherspoon, from recasting the now-pending request at
9 EPA, *sua sponte*, as a "within-the-scope" request that (in their view) can be put into effect
10 immediately and without any prior clearance from EPA. Similarly, as a matter of California law,
11 there is nothing other than their own forbearance that prevents CARB and its staff from exercising
12 the "right" they have reserved in their waiver application to treat the waiver process as entirely
13 irrelevant to the legitimacy of their actions.

14 Absent a change in the text of the CO2 regulation in the manner specified by California law,
15 any model year 2009 vehicle that has not passed CARB's CO2 standards and been approved for sale
16 in California on that basis cannot be imported into California. At this point, the only legally
17 enforceable way to change the status quo would be for CARB to amend the CO2 regulation, in a
18 fully binding and irrevocable manner. There is no indication that CARB intends to do so, or could
19 do so prior to the time in 2007 when manufacturers must take the next, extremely costly steps toward
20 compliance with the current standards. Any such amendment would have to allow the industry the
21 five to seven years' lead time, after EPA granted a waiver, before standards as stringent as those
22 currently set for model year 2012 could take effect. Such a step would probably invite litigation
23 against the State by some of the same parties who are now aligned with CARB in this case. At a
24 practical level, though regrettably given the "scorched-earth" tactics of its adversaries here, the only
25 way that the automobile industry can acquire the certainty and predictability that it needs is through
26 this litigation.

27 _____
28 ¹⁴ *See* Plaintiffs' UMF at 2.

1 **V. The Practical Requirements of the CO2 Regulations**

2 The key facts about the requirements of the CO2 regulations as they bear on the issue of
3 ripeness cannot be in genuine dispute, and are presented in plaintiff's Separate Statement of
4 Undisputed Material Facts. The main points are summarized here.

5 In September 2005, when the CARB Executive Officer finally completed the post-hearing
6 paperwork that finalized the CO2 regulation, she made it clear that she expected vehicle
7 manufacturers to start their efforts to comply with the regulation at that time, if they had not already
8 started to do so. Specifically, in the "Final Statement of Reasons" in support of the CO2 regulation,
9 the Executive Officer stated that she and the staff "expected that a manufacturer would plan for a
10 rollout of new technologies" to comply with the CO2 standards "that would begin in 2009 and then
11 build on the initial efforts with additional ... technologies ... commensurate with previous
12 investments."¹⁵ And, in the request for a waiver from EPA she stated that lead time should be
13 considered from the date of the regulation's adoption by CARB.¹⁶

14 The Executive Officer's understanding of the need to begin investment in compliance with
15 the standards well before they would take effect was correct. The CARB staff's expectation was that
16 the automobile industry would use new technology on its vehicles in order to reduce fuel
17 consumption to the levels that would bring those vehicles into compliance with the standards. To
18 use resources efficiently, the introduction of new technologies must be staggered across a vehicle
19 manufacturer's product line. A manufacturer that deferred expenditures on new technologies needed
20 to comply with the CO2 standards in model year 2011 would have to spend capital and other
21 resources inefficiently by trying to meet the standards.¹⁷ Limits on capital resources, engineering
22 personnel, and the capacity of the machine tool industry require a financially competitive
23 manufacturer to start investments in any new products needed to comply with the CO2 regulations

24 _____
25 ¹⁵ Plaintiffs' UMF at 3; Exhibit 9 to plaintiffs' request for judicial notice.

26 ¹⁶ Exh. B. to Cackette Decl. at 3 ("This waiver submission reiterates that manufacturers' lead time to
27 comply with California standards such as these begins no later than the date CARB adopts them in
28 their final form.")

¹⁷ Plaintiffs' UMF 17.

1 long before the first model year to which the rule applies.¹⁸ Disruption of normal product
 2 development cycles would have severe economic consequences. For that reason, capital-constrained
 3 manufacturers cannot delay implementation of product plans.¹⁹

4 There is also no legitimate dispute about the specific amount of lead time needed for the
 5 manufacturers who are subject to this regulation, if they were to try to comply with the regulation in
 6 the manner contemplated by CARB and the staff. The time estimated by defendant for the major
 7 manufacturers to come into compliance with the model year 2012 standards, for example, ranges
 8 from five to seven years.²⁰ The necessary work, in CARB's opinion, is supposed to get under way
 9 before any action by EPA on a waiver request. *See* Macomber Decl. ¶ 25 and Exh. F ("the Air
 10 Resources Board's position has always been, and continues to be, that ... lead time is calculated
 11 from the date the Air Resources Board adopts the relevant regulatory provisions.") CARB's analysis
 12 indicates that it expects three manufacturers to install technologies to reduce fuel consumption on 90
 13 to 100 percent of their full-size trucks by model year 2012.²¹ Evidence from two of those three
 14 manufacturers indicates that to accomplish that, very significant capital investments will be needed
 15 and cannot be deferred past the summer of 2007.²² If those investments are not made by that time,
 16 the affected manufacturers will not be able to remain competitive in even a portion of the full-size
 17 truck market in California.²³

18 Given the lead-times involved in preparing for compliance with the CARB regulations, and
 19 the imminence of the date by which massive infusions of capital into the compliance will be needed,
 20 the assurances by Mr. Cackette that CARB will not try to "enforce" the regulation for the time being,
 21 and will not take "enforcement action" for some years to come, not only lacks legal significance -- it

22 ¹⁸ Plaintiffs' UMF 18.

23 ¹⁹ Plaintiffs' UMF 18.

24 ²⁰ Plaintiffs' UMF 20-27.

25 ²¹ Plaintiffs' UMF 28-33.

26 ²² Declaration of Alan R. Weverstad ¶ 8 ("Weverstad Decl."); Declaration of Reginald R. Modlin ¶ 8
 27 ("Modlin Decl.").

28 ²³ Weverstad Decl. ¶ 9; Modlin Decl. ¶ 9. Even with high levels of investment, however, those same
 manufacturers will not be able to remain competitive in the passenger-car markets. This has severe
 consequences for their dealers. *See* Harden Decl. ¶¶ 3, 11.

1 has no practical meaning or value to the industry. When defendants first started to suggest that they
2 would consider committing themselves to the EPA review process, during the course of the briefing
3 on defendants' motion for judgment on the pleadings last summer, counsel for plaintiffs wrote to
4 counsel for the CARB Executive Officer.²⁴ It was proposed that CARB or the Executive Officer
5 take appropriate action under state law to defer the implementation of the regulation, so that
6 manufacturers could avoid committing unrecoverable sums on compliance with the regulation prior
7 to a determination of the regulation's legality at EPA.²⁵ A similar overture to defendant, to defer
8 implementation of the regulation so that the trial date could be deferred, had been advanced by
9 Magistrate Judge O'Neill at an earlier stage of the case.²⁶

10 The Magistrate Judge's efforts at deferral of the regulation had been unavailing.²⁷ Similarly,
11 the letter responding to plaintiffs' counsel pointedly omitted any response to the suggestion that
12 CARB take legally enforceable action postponing its regulation.²⁸ Nor does Mr. Cackette's
13 declaration do so.²⁹ As far as one can tell from Mr. Cackette's declaration, CARB will "enforce" the
14 CO2 standards as soon as CARB receives a waiver of preemption from EPA, presumably on the
15 very next day or in whatever model year would apply at the time when the waiver is granted.

16 Just as no manufacturer has ever deferred efforts to comply with a CARB regulation until

17 ²⁴ See Macomber Decl. ¶ 26 and Exh. G.

18 ²⁵ See Macomber Decl. ¶ 26 and Exh. G.

19 ²⁶ Order on Motions (Doc. 183, Mar. 17, 2006), at 2 (directing counsel for the defendant to "have an
20 answer to the question of whether the State of California will forego enforcement of the law at issue
in this litigation for a time equal to the time being requested to extend the trial date").

21 ²⁷ See Mem. of Points and Authorities in Support of Deft.'s and Deft.-Intervenors' Mot. to Continue
22 Trial Date and Modify Scheduling Order (Doc. 255, filed July 1, 2006), at 15-18 (explaining
defendant's unwillingness to agree to any delay in enforcement of the regulation).

23 ²⁸ Macomber Decl. ¶ 26.

24 ²⁹ Mr. Cackette's declaration does not even commit, on his own behalf or anyone else's, to a single
25 year's delay in enforcement of the regulation after the date when EPA approves the waiver.
26 CARB's waiver application at EPA contends that there is plenty of lead time to comply with the
27 CO2 standards, and that EPA must defer to CARB's judgment on the lead time issue. See
28 Macomber Decl. ¶ 25 and Exh. B to Cackette Decl. It is therefore somewhat disingenuous for
defendants to suggest that the Court should give any significance to the fact that, in one single
instance more than 20 years ago, EPA conditioned approval of a CARB regulation on a one-year
grace period. See Defs' Memo at 7-8.

1 after EPA's waiver process is over, no manufacturer could tell its dealers and shareholders that it
2 decided not to invest in compliance with the CARB regulation based on the contents of Mr.
3 Cackette's declaration. The CO2 standards become increasingly stringent with each model year
4 once they become applicable in model year 2009. A manufacturer that took no steps to start
5 complying with the regulation in the first model year to which it applies (model year 2009) would
6 soon find itself unable to make up the deficits in later years, and would have no prospect of ever
7 complying with the regulation.³⁰

8 Defendants are hardly in a position to question the evidence that the CO2 regulation will
9 force massive expenditures on compliance, *before* any administrative process at EPA is concluded.
10 Their bare factual claims, in their separate Statement of Undisputed Fact, that CARB "is not
11 currently enforcing the ... regulations" and that "CARB will take no action to enforce" the
12 regulations, ignore the practical realities of the current situation. If defendants were truly interested
13 in avoiding the need for this Court and the parties to proceed to trial now, it lies within the official
14 defendant's power to initiate the necessary state administrative procedures to formally suspend the
15 current regulation and to amend the rule in a manner that ensures that the rule's legality is
16 determined before the five-to-seven-year compliance clock starts to tick. It would only be by
17 allowing ample lead time *after* the EPA waiver decision that the defendant could possibly divest this
18 Court of jurisdiction. (As noted above, the compliance period estimated by the CARB witness in
19 discovery for compliance with the model year 2012 standards is five to seven years, depending on
20 the manufacturer.) But, because defendants are manifestly unwilling to take such sensible actions,
21 the only choice this Court possesses is to deny the motion and to proceed to the merits.

22 **Procedural Considerations**

23 Defendants' motion requires attention to three important, threshold procedural points.

24 First, on a motion for summary judgment the court "view[s] the evidence in the light most
25 favorable to the nonmoving party [and determines if] there are any genuine issues of material fact"
26 in dispute. *Bliesner v. Communication Workers of America*, 464 F.3d 910, 913 (9th Cir. 2006). To
27 the extent that plaintiffs bear any burden initially to establish subject-matter jurisdiction, they have

28 ³⁰ Plaintiffs' UMF at 33 and references.

1 proffered such evidence and the Court must give that evidence “all justifiable inferences” in favor of
2 the non-moving party. *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9th Cir. 2006)
3 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999)).

4 Second, as outlined above and explained in detail below, defendants’ present motion
5 challenging the Court’s subject-matter jurisdiction stands in significant tension with their position on
6 their motion for judgment on the pleadings. On that motion, they conceded that the Court had
7 subject-matter jurisdiction and should proceed to the merits. Defendants’ new theory for dismissal
8 suggests mootness, based on nothing more than their own representations concerning CARB’s
9 enforcement intentions, and in such cases they have the burden of proving that the Court has now
10 been divested of jurisdiction. *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528
11 U.S. 167, 189 (2000); *see pp. 16-18 below.*

12 Third, defendants are attempting to introduce “facts” in support of their motion that are both
13 contested and that fail to give the Court all the information it would need, even if it chose to credit
14 those “facts” in the first place. If the Court is not prepared to find that defendants’ evidence is on its
15 face insufficient to permit defendants’ motion to be granted, plaintiffs seek leave to take limited
16 discovery from Mr. Cackette and from the official defendant, Ms. Witherspoon, in an accompanying
17 declaration from counsel submitted pursuant to Fed. R. Civ. Pro. 56(f).³¹ Plaintiffs are entitled to
18 present at a hearing any evidence that the Court may require in order to demonstrate subject-matter
19 jurisdiction and prudential ripeness. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group*, 438
20 U.S. 59, 72 (1978) (“The District Judge held ... hearings on the questions of standing and ripeness;
21 his factual findings form the basis for our analysis of these issues.”). Plaintiffs are prepared either to
22 take any necessary discovery now on an expedited basis, or to address the factual issues raised by
23 defendants’ motion at the time of the trial on the merits in January 2007. Either approach would be
24 consistent with any need the Court identifies to determine the validity of defendants’ factual claims
25 on the current motion, and with plaintiffs’ paramount interest in bringing this case to a decision on
26 the merits on the current schedule.

27 ³¹ *See* Declaration of Timothy Jones Pursuant to Fed. R. Civ. P. 56(f) in Opposition to Defendant
28 and Defendant-Intervenors’ Motion for Summary Judgment and Dismissal (filed November 13,
2006).

Argument

1
2 The first challenge presented by defendants' motion is to determine the correct legal rubric
3 under which defendants are proceeding. As recently as the time when the Court heard argument on
4 defendants' motion for judgment on the pleadings, in September 2006, and decided that motion, the
5 Court and the parties all appeared to agree that the Court had subject-matter jurisdiction of this
6 case.³² Lest there be any doubt on that point, plaintiffs first review the Court's Article III
7 jurisdiction over this case to date and on a going-forward basis. (*See* pp. 16 below.) Because
8 jurisdiction certainly attached to this case as recently as September 2006, what defendants are
9 essentially suggesting is not a lack of ripeness in this case at it stood as recently as September 2006,
10 but that new events have made the case moot. (*Id.* at 16-17.) Under controlling Supreme Court and
11 Ninth Circuit precedent, defendants cannot carry their heavy burden of demonstrating mootness. (*Id.*
12 at 17-18.)

13 This Court thus retains the same subject-matter jurisdiction under Article III that it possessed
14 two months ago. Defendants' only remaining theory for dismissal is that even if the Court has
15 jurisdiction, the balance of factors related to "prudential" ripeness ("fitness" of the issues and
16 hardship) compel dismissal without prejudice. To the extent that argument has not been
17 procedurally waived, it is nothing more than an attempt to have the Court reconsider its decisions
18 earlier this year that denied a stay of the trial date. (*See* pp. 30-36 below.) Because these arguments
19 for delay now have even less merit than they did last summer, prudential grounds cannot justify
20 defendants' motion for summary judgment and dismissal.

21
22 ³² This Court had already determined, in ruling on defendants' first motion to dismiss filed in March
23 2005, that "this action is ripe for review based on the grounds initially asserted by the plaintiffs."
24 Order Denying Motion to Dismiss (Oct. 21, 2005) (Doc. # 142) at 3-4 n.1. Defendants confessed
25 jurisdiction at the hearing on their motion for judgment on the pleadings. *See* (Exhibit 2 of plaintiffs
26 request for judicial notice) (Transcript of Hearing on Defendants' Motion for Judgment on the
27 Pleadings (Sept. 15, 2006). Obviously, the Court could not have entered its decision on defendants'
28 motion for judgment on the pleadings in September 2006 if it did not have subject-matter
jurisdiction. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94-95 (1998) (federal
courts must address jurisdiction before considering merits); *Border Power Plant Working Group v.*
Department of Energy, 260 F. Supp. 2d 997, 1008 (S.D. Cal. 2003) (same).

1 **I. This Case Presents a Live Case and Controversy and Continues to Meet the Test**
 2 **for Constitutional Ripeness.**

3 Plaintiffs begin the jurisdictional analysis with the fundamental reasons why this Court has
 4 and always had Article III jurisdiction over the claims presented here, and then turn to the
 5 significance of the “evidence” that defendants now suggest should defeat that jurisdiction.

6 **A. This Court Had Article III Jurisdiction At The Time of The Motion For**
 7 **Judgment on the Pleadings.**

8 Defendants’ eleventh-hour challenge to the jurisdiction of this Court warrants a restatement
 9 of some basic principles about Article III standing and ripeness.

10 To satisfy Article III’s standing requirement, plaintiffs must show that: (1) they have
 11 suffered “injury in fact” that is (a) concrete and particularized; and (b) actual or imminent, not
 12 conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the
 13 defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a
 14 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). When plaintiffs
 15 demonstrate Article III standing, their claims are also constitutionally ripe. *See, e.g., Cal. Pro-Life*
 16 *Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003); *see also City of Auburn v. Qwest*, 260
 17 F.3d 1160, 1171 (9th Cir. 2001) (case is ripe if there is a “realistic danger” of injury due to a
 18 statute’s “operation”).

19 “The ‘Supreme Court has consistently recognized that threatened rather than actual injury
 20 can satisfy Article III standing requirements,’” and by implication the Constitutional component of
 21 ripeness. *Harris v. Board of Supervisors*, 366 F.3d 754, 761 (9th Cir. 2004) (quoting *Friends of the*
 22 *Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir.2000) (en banc)). The
 23 Ninth Circuit has recently explained that even “evidence of a concrete risk of harm ... is sufficient”
 24 to create federal jurisdiction.” *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir.2004); *see*
 25 *also Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir.2002) (“a credible threat
 26 of harm” constitutes “actual injury”); *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir.2001) (“evidence of
 27 a credible threat to the plaintiff’s physical well being” sufficient to satisfy injury requirement).³³

28 ³³ In *Harris*, for example, the Ninth Circuit found that citizens had suffered a cognizable injury from
 the County’s decision to reduce the number of available hospital beds because the reduction
 (Continued...)

1 Thus, in the Ninth Circuit “a credible threat of harm is sufficient to constitute actual injury for
2 standing purposes, whether or not a statutory violation has occurred.” *Cent. Delta*, 306 F.3d at 950.

3 Turning to the facts of this case, three points should be beyond dispute. First, CARB’s CO2
4 regulation is on its face currently effective and does not by its terms require any action from EPA to
5 permit its implementation. *See* 13 C.C.R. § 1961.1(g) *and* pp. 5-6 above. The regulation is based on
6 a state law that does not condition the effectiveness of the law or the regulation on approval by the
7 federal government, in contrast to other enactments of the California Legislature.³⁴ The Health &
8 Safety Code gives CARB officials no discretion to refrain from enforcement of duly adopted
9 emissions standards. (*See* pp. 5-6 above.) Defendant made that clear last July, when she advised
10 Magistrate Judge O’Neill that the current regulatory text did not permit postponement of the CO2
11 program.³⁵

12 Second, as the evidence recited above and contained in the accompanying Macomber
13 Declaration indicates, there is no implicit or institutional limit on CARB’s power to enforce
14 standards prior to EPA approval. To the contrary, CARB has a long history of enforcing new
15 standards before EPA acts on them. *See* Macomber Dec. ¶ 12-17 and pp. 6-7 above. For its part,
16 EPA has no authority to tell CARB that it cannot enforce its regulations on an *ad hoc* basis.³⁶ The

17 increased the *threat* of injury should the plaintiffs have needed medical attention. 366 F.3d at 762.

18 ³⁴ *See, e.g.*, Cal. Welf. & Inst. Code Ann. § 11450.03(b) (West Supp.1994) (“This section shall not
19 become operative until the date of approval by the United States Secretary of Health and Human
20 Services necessary to implement the provisions of this section so as to ensure the continued
21 compliance of the state plan [with federal law].”); Cal. Welf. & Inst. Code § 1400.85 (“This section
22 shall not be implemented until the director has executed a declaration, that shall be retained by the
23 director, that any necessary waivers and federal financial participation have been obtained.”); *see*
24 *also In re Luis B.*, 142 Cal. App. 4th 1117, 1123 (2006) (“Use of the mandatory language ‘shall’
25 indicates a legislative intent to impose a mandatory duty; no discretion is granted.”).

26 ³⁵ *See* Mem. of Points and Authorities in Support of Deft.’s and Deft.-Intervenors’ Mot. to Continue
27 Trial Date and Modify Scheduling Order (Doc. 255, filed July 1, 2006), at 16 n.9 (even a one-year
28 delay of implementation would go “well-beyond defendant Witherspoon’s discretion”).

³⁶ *See* Cackette Decl. ¶ 7; *but see* Macomber Decl. ¶ 15 (EPA has no power under federal or state
law to prevent CARB from taking “enforcement action”). Defendants cite no provision of federal or
state law that gives U.S. EPA any legal power to prevent CARB from taking enforcement action,
and plaintiffs are aware of no instance in which EPA has been able to do so. If the Court deems Mr.
Cackette’s unsupported assertion to the contrary to be credible, plaintiffs would be entitled under
Fed. R. Civ. Pro. 56(f) to take discovery. *See* Jones Decl. ¶ 2.

1 only remedy against enforcement action by CARB is judicial.

2 Third, by the CARB defendant's own admission, the automobile industry needs to be taking
3 major steps now in order to comply with CARB's future standards. See pp. 10-11 above and
4 Plaintiffs' UMF at 36-39. Unless one assumes that EPA will never grant CARB's waiver request --
5 which is obviously not a fact to which any defendant is prepared to stipulate -- it does not matter
6 when CARB takes formal "enforcement action" against a given manufacturer. CARB's witness in
7 discovery in this case has stated that five to seven years of lead time are needed to comply with the
8 new CO2 standards, and undisputed evidence in the record confirms that four years of capital-
9 intensive work are needed before the start of the 2012 model year. The 2012 model year starts no
10 later than the spring of 2011, which means that heavy capital expenditures must be incurred starting
11 in the summer of 2007, and that other work on compliance must already be under way.³⁷

12 It also does not matter whether CARB refrains from taking any formal "enforcement action"
13 until long into the future. It will be impossible for some manufacturers to compete effectively in the
14 2012 model year if they are not already (today, in November 2006) spending resources on
15 compliance, and if they are not already prepared to escalate work by next spring (in 2007). A lack of
16 formal "enforcement" until some future date is irrelevant in establishing injury, standing and Article
17 III ripeness so long as the risk of enforcement is credible. Cf. *Lake Carriers' Ass'n v. MacMullan*,
18 406 U.S. 498, 507-08 (1972) (plaintiffs' conduct was coerced by state regulation despite current
19 non-enforcement of the regulation because substantial lead time was needed to come into
20 compliance); accord, *Cent. Delta Water Agency v. United States*, 306 F.3d at 950.

21 In addition to the manufacturers' need to take steps now to comply with the regulation, the
22 dealer plaintiffs have already sustained significant injury. For the roughly 30 Fresno-area dealers
23 whose situations could be evaluated in the limited time available to prepare these papers, plaintiffs'
24 expert has determined that the average current loss in value is about \$1 million.³⁸ Such losses easily

25 ³⁷ Plaintiffs' UMF at 3, 37-39.

26 ³⁸ See Harden Decl ¶ 11. The dealer plaintiffs' current value "necessarily incorporates expected
27 future profits." *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1236 (10th Cir. 2003) (internal
28 quotation omitted). "The [method used here] stems from the well-accepted proposition that the
value of a corporation is given by a risk-adjusted discounted cash flow analysis of its future profit
streams." *Okerlund v. United States*, 365 F.3d 1044, 1048 (Fed. Cir. 2004).

1 confer Article III standing. Dealerships that have reduced current value will incur higher borrowing
 2 costs, have lower value as investment properties, and must plan to recover overhead with a narrower
 3 revenue base than their competitors who do not sell the same domestic nameplates. *See Clinton v.*
 4 *New York*, 524 U.S. 417, 432 (1998) (The Supreme Court “‘routinely recognizes probable economic
 5 injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy
 6 the [Article III ‘injury-in-fact’ requirement]. It follows logically that any petitioner who is likely to
 7 suffer economic injury as a result of [governmental action] that changes market conditions satisfies
 8 this part of the standing test.’”) (quoting 3 K. Davis & R. Pierce, *Administrative Law Treatise* 13-14
 9 (3d ed. 1994)); *cf. Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005) (“[C]ognizable economic
 10 injury” arises from higher costs).

11 These facts easily establish that plaintiffs had, at a minimum, a “credible threat” of injury
 12 from the operation of the CARB regulation. *Cent. Water*, 306 F.3d at 950. Thus, the plaintiffs met
 13 the tests for Article III jurisdiction.

14 **B. Plaintiffs’ Claims for Relief Remain Ripe under Article III.**

15 Apparently recognizing that this Court had jurisdiction, defendants assert that “there is *no*
 16 *longer* a justiciable controversy” between the parties due to the Court’s decision on the defendants’
 17 motion for judgment on the pleadings and Mr. Cackette’s declaration. Defs’ Mot for SJ at 3
 18 (emphasis added). Despite the defendants’ failure to recognize it, their argument essentially claims
 19 that a case that was once ripe -- as recently as September of this year -- is now moot: “[A] case is
 20 moot when the issues presented are *no longer* ‘live’ or the parties lack a legally cognizable interest
 21 in the outcome.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (emphasis added). In this
 22 section of their brief, plaintiffs first explain why, when one applies the level of scrutiny needed for
 23 suggestions of mootness like that contained in defendants’ motion, defendants’ argument is
 24 unavailing. (*See* Part B.1 below.) Plaintiffs next explain why, even if one puts aside the stringent
 25 requirements to demonstrate mootness, defendants have offered no sound basis for the Court to
 26 renounce jurisdiction over the preemption claims presented here.

27 **1. Under the Mootness Doctrine of the Supreme Court and the Ninth
 28 Circuit, Mr. Cackette’s Declaration Does Not Remove the
 “Credible Risk of Harm.”**

The gist of Mr. Cackette’s declaration is that -- despite CARB’s track record of enforcing

1 some standards before EPA approves them, its recent action reclassifying other standards on an *ad*
 2 *hoc* basis to permit their immediate enforcement, and his own statements to the contrary with respect
 3 to the specific standards involved in this litigation -- CARB will not “enforce” those standards until
 4 EPA grants a waiver. Necessarily, Mr. Cackette also presumably believes the following to be true:

- 5 • Manufacturers would not need to take any costly steps to comply with the regulations
 6 at any time prior to the waiver decision; and
- 7 • He (or someone else) will ensure that no consequences will be visited on any
 8 manufacturer that acts in reliance on his new commitment.

9 The first -- and on this record insurmountable -- problem with Mr. Cackette’s view of the
 10 case is that it is contradicted by the analysis of the CARB staff in the administrative process and in
 11 this litigation. As noted above, the CARB staff is already on record that compliance efforts had to
 12 begin as soon as the rule was written and adopted. Their testimony in discovery in this case has
 13 reinforced that view. The second problem is that Mr. Cackette’s notion of what “enforcement
 14 action” means to him is obscure. A third problem is that Mr. Cackette has no ability to rewrite the
 15 current regulation in a formal way, which is what would be needed to suspend its enforcement in
 16 practical terms.

17 The Supreme Court has adopted a “stringent” standard for allowing statements or actions like
 18 that of Mr. Cackette to divest a federal court of jurisdiction. *Friends of the Earth v. Laidlaw Env’tl.*
 19 *Servs.*, 528 U.S. 167, 189 (2000). Once a plaintiff establishes federal jurisdiction, it is well settled
 20 that a defendant’s voluntary action ““does not deprive a federal court of its power”” to adjudicate
 21 plaintiffs’ claims. *Friends of the Earth*, 528 U.S. at 189 (2000) (quoting *City of Mesquite*, 455 U.S.
 22 283, 289 (1982)); *see also ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005). Even the repeal of a
 23 challenged regulation has been held insufficient to divest a federal court of jurisdiction, unless it is
 24 “absolutely clear” that the conditions that created federal jurisdiction in the first place could not
 25 reasonably recur.³⁹

26 ³⁹ *See, e.g., City of Mesquite*, 455 U.S. at 289; *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir.
 27 2003) (internal quotation omitted); *see also Coral Const. Co. v. King County*, 941 F.2d 910, 928 (9th
 28 Cir. 1991) (“mootness is a matter relating to the exercise rather than the existence of judicial power
 ... and the[the Court] may continue to exercise authority over a purportedly moot case where the
 (Continued...)”)

1 Mr. Cackette's declaration falls well short of the mark. There is no evidence before the
2 Court to establish that he can bind either the current Board or any future Board not to engage in the
3 type of *ad hoc* decision-making that has in the past permitted it to enforce new standards before EPA
4 has approved them. While he recites his understanding of CARB's current views on the legal status
5 of the CO2 regulations, there is nothing to prevent another CARB official, now or later, from taking
6 a different view of CARB's legal options under the Clean Air Act. *Cf. Kucharek v. Hanaway*, 902
7 F.2d 513, 519 (7th Cir. 1990) (declining to rely on interpretation given by Attorney General because
8 "he may change his mind about the meaning of the statute; and he may be replaced in office"). If
9 CARB had intended to condition manufacturers' investment in the new standards on EPA's approval
10 of those standards, it could have written a rule that allowed sufficient lead-time *both* for EPA
11 review, *and then* for manufacturers to comply. It did not take such a step; counsel for CARB
12 confirmed this summer that CARB would not take such a step;⁴⁰ and Mr. Cackette's carefully-
13 worded declaration stops well short of explaining how, based on his new-found position, the industry
14 can make rational business decisions that do not risk either the commitment of enormous investment
15 in technology not demanded by the market, on the one hand, or the real possibility of forced
16 exclusions from the California market on the other.⁴¹ Mr. Cackette's statement does not moot even
17 the Clean Air Act claim, because there is still relief that could be granted on that Claim.

18 Even if Mr. Cackette's declaration could be given the force of a statute or a regulation, and
19 thus potentially moot the Clean Air Act claim, this Court would still have jurisdiction over the
20 remaining claims in this case, and would be obligated to exercise it. Once jurisdiction has properly
21 attached to a claim, the burden is on the defendant to prove the case is moot, not on plaintiffs to
22 prove standing and ripeness. *See Friends of the Earth*, 528 U.S. at 191; *see also Malama Makua v.*
23 *Rumsfeld*, 136 F.Supp.2d 1155, 1161 (D. Hawaii 2001) (explaining that "ripeness is not a moving
24 target affected by a defendant's action" and if the case was ripe, "[d]efendants cannot avoid judicial
25 balance of interests favors such continued authority") (internal quotation and citations omitted).

26 ⁴⁰ *See* Macomber Decl. ¶ 25-26.

27 ⁴¹ If in their reply papers defendants try to erect some theory from Mr. Cackette's declaration
28 suggesting why manufacturers can in fact rely upon his statements as a basis for discontinuing
compliance efforts, then discovery will clearly be in order. *See* Jones Decl. ¶ 2.

1 scrutiny by withdrawing the [their challenged actions] and arguing that the case is no longer ripe”);
2 *Flintkote Co. v. General Acc. Assur. Co.*, 410 F.Supp.2d 875, 882 (N.D. Cal. 2006) (explaining that
3 once a case is ripe, ripeness “is not subsequently defeated through changed circumstances.”);
4 *Santillan v. Gonzalez*, 388 F. Supp. 2d 1065, 1072 (N.D. Cal. 2005) (same).

5 As plaintiffs indicate below, they are fully prepared and able to prove that their claims are
6 ripe and justiciable if examined in the first instance. (*See pp. 23-30 below.*) But, examined using
7 the correct doctrinal approach, in the current posture of this case, the issue is mootness, and the
8 burden of demonstrating justiciability cannot be shifted to plaintiffs. *See Adarand Constructors, Inc.*
9 *v. Slater*, 528 U.S. 216 (2000). In *Adarand*, the plaintiff had sued to challenge a federal preference
10 for minority owned small businesses in awarding contracts. While his case was on appeal before the
11 Tenth Circuit, the Department of Transportation gave plaintiff the treatment he sought. The Tenth
12 Circuit dismissed the case because the plaintiff could no longer show a sufficiently concrete injury to
13 confer standing (which is the same as constitutional ripeness). The Supreme Court reversed, and
14 explained that it was not the plaintiff’s burden to prove anew the jurisdictional predicates he had
15 already proved; rather it was defendant’s burden to prove that the preference would not later be re-
16 applied to the detriment of the plaintiff. *See* 528 U.S. at 221-22.

17 The difficulty defendants face in meeting their “heavy burden”⁴² to show mootness is
18 particularly overwhelming with respect to plaintiffs’ EPCA and foreign policy preemption claims.
19 As the Ninth Circuit has held, “a case is not moot where *any* effective relief may be granted.”
20 *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006) (emphasis in original). In its
21 decision on the motion for judgment on the pleadings, this Court recognized that even if EPA grants
22 a waiver of federal preemption for the CO2 regulations under the Clean Air Act, the issue of whether
23 those regulations conflict with the federal fuel economy program under EPCA will remain for the
24 courts to decide.⁴³ Thus, this Court can (and should, after trial on the merits) grant “effective relief”

25 ⁴² *ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005) (quoting *Friends of the Earth*, 528 U.S. at 191).

26 ⁴³ As the Court held, “Nothing in the statutory language or the legislative history of the Clean Air
27 Act, the EPCA, or any other statute before the court indicates Congress’s intent that an EPA waiver
28 would allow a California regulation to disrupt the CAFE program.” Order (1) Granting in Part and
Denying in Part Deft. and Deft.-Intervenors’ Mot. for Judgment on the Pleadings and (2) Limiting
Discovery of Global-Warming Science Documents (Sept. 25, 2006) (Doc. # 363) at 16. The Court
(Continued...)

1 in the form of a permanent injunction against the enforcement of the regulation, based on the
 2 violation of EPCA, and regardless of the status of the regulation in the EPA waiver process. Only
 3 this will provide complete and permanent relief to the plaintiffs.

4 In the final analysis, the only way that plaintiffs' claims under EPCA and the foreign policy
 5 powers of the United States will *not* have to be heard at some point by this Court is if each of the
 6 following occur: (1) EPA *denies* the waiver; (2) CARB follows through on Mr. Cackette's assertion
 7 (contrary to CARB's past practice) that CARB will not seek to enforce the regulation absent a
 8 waiver; and (3) the denial of the waiver is upheld on appeal. Given that defendants are actively
 9 seeking approval for such a waiver, they are in no position to argue that the EPA waiver will be
 10 denied. For that reason alone, they certainly cannot carry their burden of proving that the EPCA and
 11 foreign policy claims are moot.

12 **2. Even if Defendants Could Shift the Burden Of Proving Article III**
 13 **Jurisdiction Back to Plaintiffs, Nothing in the Cackette**
 14 **Declaration or Any Other Part of the Record Defeats That**
 15 **Jurisdiction.**

16 Even if the Court were to revisit the issue of jurisdiction *ab initio*, and without the benefit of
 17 the mootness doctrine in the Supreme Court and the Ninth Circuit, it should be clear that it still has
 18 Article III jurisdiction over the claims that remain in the case following its September 25 decision.

19 The Court has already twice considered the impact of the CO2 regulations on the plaintiffs.
 20 In May 2005, the CARB Executive Officer moved to transfer this action from Fresno to Sacramento;
 21 the Court denied that motion, finding based on the evidence submitted to it that the dealer plaintiffs
 22 in this area had been sufficiently affected by the regulation to support their decision to proceed in
 23 Fresno.⁴⁴ In July 2006, all defendants moved for a stay of this action pending a decision in
 24 *Massachusetts v. EPA*. In denying that motion, Magistrate Judge O'Neill found evidence of
 25 prejudice to both the dealer and manufacturer plaintiffs if the case were to be stayed, and the Court
 26 affirmed that decision after a review of the evidence on a motion for reconsideration by the

27 _____
 28 also correctly recognized that "the criteria considered by EPA in granting a waiver" do not ensure
 that no interference with the objectives of EPCA will occur. *Id.*

⁴⁴ Order Denying Deft's Mot. to Dismiss First Amended Complaint. (Oct. 21, 2005) (Doc. # 142) at 15-16.

1 defendant-intervenors.⁴⁵

2 For the reasons summarized above and presented in the declarations accompanying this
3 memorandum, plaintiffs' Article III standing and the Constitutional ripeness of their claims remain
4 unaffected by Mr. Cackette's declaration or by anything else in the record. The most important type
5 of relief sought here is a permanent injunction against enforcement of the CO2 regulations under
6 EPCA and, if the issue needs to be reached, the foreign policy powers of the United States. Mr.
7 Cackette's declaration verges on a confession that plaintiffs are entitled to an injunction or a
8 declaration that, under the Clean Air Act, CARB cannot require the industry to take any action to
9 comply with the CO2 regulation unless EPA approves the EPA regulation. But fashioning an
10 appropriate order granting that relief would be difficult.⁴⁶ More to the point, however, an order
11 based solely on the Clean Air Act would only protect the industry until EPA acted on the waiver
12 request and thus would not grant plaintiffs all the relief to which they are entitled. It would not
13 provide the full and permanent relief from the CO2 regulation to which plaintiffs are entitled on their
14 other preemption claims, and in particular the claim stated under EPCA.

15 Defendants' attack on the Court's Article III jurisdiction ignores the need for a decision on
16 the legality of the CO2 regulations under EPCA, independent of the EPA waiver process. The Ninth
17 Circuit has explained that where the "[p]romulgation of the challenged regulations present[s]
18 plaintiffs with the immediate dilemma to choose between complying with newly imposed,
19 disadvantageous restrictions and risking serious penalties for violation,' the controversy is ripe."
20 *Qwest*, 260 F.3d at 1171 (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993)). That
21 is exactly the dilemma posed by this regulation for the manufacturer plaintiffs.

22 ⁴⁵ Order on Defts' Mot. to Modify the Scheduling Order (July 18, 2006), at 5 ("Plaintiffs have shown
23 that a delay in the trial will impact their ability to plan, research and implement the technologies
24 necessary to comply with the Regulations. They have shown that the uncertainty of the Regulations
25 is currently adversely impacting the ongoing value of plaintiff automobile dealerships."); Order on
26 Defts' Mot. for Reconsideration of the Order Denying Request to Modify Scheduling Order (Aug.
27 25, 2006), at 5-7 (upholding the magistrate judge's findings that plaintiffs would suffer prejudice
28 from a delay of the trial).

⁴⁶ Defendants would surely balk at an order that required them to allow five to seven years' lead time
for compliance with the CO2 standards after any decision by EPA approving the regulation under
the Clean Air Act, but that is exactly the type of relief to which plaintiffs would be entitled, based on
the testimony of the CARB witness in discovery in this case. *See* Plaintiffs' UMF at 20-27.

1 There can be no legitimate question that the regulation poses a serious “realistic” threat to
2 their businesses. *Chang v. United States*, 327 F.3d 911, 922 (9th Cir. 2003); *Qwest*, 260 F.3d 1160,
3 1171 (9th Cir. 2001) (case is ripe if there is a “realistic danger” of injury due to statutes “operation”);
4 *Cent. Delta*, 306 F.3d at 950 (“credible threat” sufficient). Even with huge expenditures, some
5 manufacturers will no longer be able to compete on an equal footing with a full product line in
6 California.⁴⁷ Unless the defendants can prove that there is no “credible” or “realistic” threat that the
7 regulation will be enforced, this case is certainly ripe as the manufacturer plaintiffs have the
8 dilemma between choosing costly compliance or risking future injuries. But the CARB defendant
9 has represented to both this Court and EPA that CARB is legally entitled to the waiver. Thus, she
10 certainly cannot say now that there is no credible or realistic threat the waiver will be granted. And,
11 of course, the dealer plaintiffs are currently suffering under a decrease in the value of their
12 businesses. That is, in and of itself, sufficient to create a ripe controversy. *Johnson v. Stuart*, 702
13 F.2d 193, 196 (9th Cir. 1983).

14 Defendants appear fundamentally to misunderstand federal ripeness doctrine. In one case
15 cited by defendants, the Court of Appeals found on the facts before it that civil or criminal
16 prosecution for violation of an ordinance governing residential leases was too uncertain to warrant or
17 permit federal review.⁴⁸ There are dozens of similar cases in which federal courts have declined to
18 entertain challenges to State or local laws involving the potential for prosecution. As the Supreme
19 Court held long ago, in comparing those decisions with cases that involved complex regulatory
20 programs like the program involved in this case:

21 “[D]ecisions concerning justiciability of cases of apprehended criminal prosecution
22 are not pertinent. Because the decision to investigate a criminal prosecution is
23 usually discretionary with the prosecuting authorities, even a person with a settled
24 intention to disobey the law can never be sure that the sanctions of law will be
25 invoked against him. Further, whether or not the injury will occur is to some extent
26 within the control of the complaining party himself, since he can decide to abandon
27 his intention to disobey the law. For these reasons, the maturity of such disputes for
28

⁴⁷ See Modlin Decl. ¶ 9; Weverstad Decl. ¶ 9. As noted above, the evidence bearing on the competitive impacts of the regulation and the effects of the regulation on dealers is offered by the dealer and the individual manufacturer plaintiffs, not by the plaintiff Alliance of Automobile Manufacturers, whose members include many manufacturers and which does not take positions on competitive issues.

⁴⁸ *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134 (9th Cir. 2000).

1 resolution before prosecution is decided on a case-by-case basis, by considering the
2 likelihood that the complainant will disobey the law, the certainty that such
3 disobedience will take a particular form, any present injury occasioned by the threat
4 of prosecution, and the likelihood that a prosecution will actually ensue.”

5 *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 n.29 (1974). In this case, the principal
6 problem faced by plaintiffs is not that the CARB Executive Officer may some day try to impose
7 fines on them. The problem for all manufacturers is that they must take steps now to comply with
8 the CO2 standards, if they want to remain in the California new-vehicle market. The problem for
9 many dealers is that they have already lost, in the study conducted to date, an average of \$1 million
10 in present value. No exercise of any prosecutorial discretion was necessary to cause either type of
11 injury, or will be needed to force manufacturers to incur even greater expenses or dealers to incur
12 even larger losses.

13 Defendants quote *Texas v. United States*, 523 U.S. 296 (1998), for the proposition that “a
14 claim is not ripe for adjudication if it rests upon contingent future events that may not occur as
15 anticipated, or indeed may not occur at all” to contend that this case is constitutionally unripe. 523
16 U.S at 300 (1998); *see* Defts’ Mem. at 5 l. 12. In *Texas*, however, the plaintiff made no showing of
17 any present or imminent harm to anything other than an “abstract” interest of no legal significance.
18 In this case, by contrast, there is nothing “contingent” about the current impacts of the regulation.
19 Plaintiffs’ claims are based among other things on the **current** injury to the dealers, the **current**
20 change in manufacturers’ allocations of their resources required by the regulation, and by the
21 **imminent need** for the manufacturers to make even rational business plans and investment decisions,
22 long before EPA’s waiver proceedings are completed.

23 Furthermore, given the timing of EPA’s waiver proceedings, neither those proceedings nor
24 any other event aside from a final decision in this case will be able to prevent further imminent harm
25 to plaintiffs from the challenged regulation.⁴⁹ Not only are the dealer plaintiffs suffering from the
26 loss in value their businesses have sustained, but manufacturers also have to choose now between
27 investing substantial resources in compliance or risking the possibility that they will be completely
28

⁴⁹ As Mr. Cackette states, EPA waiver proceedings take at least a year, and no hearing has been scheduled yet for the CO2 regulations. Even if EPA were to conclude the waiver proceeding in record time, no decision can be expected before the industry reaches the zero-hour for heavy capital investment, aimed at the 2012 standards, in the summer of 2007.

1 unprepared if the regulation is ultimately enforced. *See, e.g., Qwest*, 260 F.3d at 1171-72
2 (“Hobson’s Choice” made claims ripe); *see also Chang*, 327 F.3d at 921; *Cent. Delta*, 306 F.3d at
3 950; *cf. Volvo NA v. Mens International Professional Tennis Council*, 857 F.2d 55, 64 (2d Cir. 1988)
4 (“the prospect or fear of future events may have a real impact on present affairs, such that a
5 preemptive challenge is ripe.”); *Johnson* 702 F.2d at 196 (because plaintiffs “have sustained actual
6 injury and this injury would be redressed by the relief sought, the constitutional requirement of
7 ripeness as well as standing is met.”); *accord Lake Carriers*, 406 U.S. at 507 (regulatory challenge
8 was ripe even if courts assumed there was no current formal enforcement, because lead time required
9 to come into compliance effectively required imminent efforts at compliance).⁵⁰

10 The Supreme Court’s decisions in *Pacific Gas & Electric Co. v. State Energy Resources*
11 *Conservation & Devt. Comm’n*, 461 U.S. 190 (1983) (“*PG&E*”), and *Duke Power Co. v. Carolina*
12 *Envtl. Study Group*, 438 U.S. 59 (1978) confirm the ripeness of plaintiffs’ claims here.

13 1. In *PG&E*, the Court considered a challenge to a California law that prohibited the
14 certification of new power plants. The Court found the challenge ripe, even though the application
15 of the challenged law was at least seven years away and the prohibition could be lifted at any time
16 by an intervening administrative decision. Despite the possibility that the ultimate question could
17 later be mooted by an administrative decision before the application of the law, the Court in *PG&E*
18 explained that “[t]o require the industry to proceed without knowing whether the [challenged state
19 law] is valid would impose a palpable and considerable hardship on the utilities.” *Id.* at 201-02; *see*
20 *also RRR Cases*, 419 U.S. at 144 (despite fact that a step remained in ratification of challenged
21 program, case was ripe when “decisions to be made now or in the short future may be affected” by
22 the legality of the challenged action).

23 The plaintiff manufacturers in this case face a dilemma identical to the one in *PG&E*. In
24 essence, defendants argue that a future administrative decision by EPA could moot this case. But,
25 just as in *PG&E*, the industry has to make decisions about future product plans without knowing

26 ⁵⁰ This case might be different if the challenged CO2 standards granted manufacturers the requisite
27 lead time for compliance starting *after* the conclusion of the EPA waiver review process. But that is
28 not the situation presented here. Defendants have rejected plaintiffs’ attempts to reach an agreement
along those lines.

1 what EPA will do at some point in the future (or whether the State would even abide by an adverse
2 EPA ruling). The need to make compliance decisions years in advance and to spend unrecoverable
3 sums in order to meet the standards set by defendants' regulation is surely a "palpable and
4 considerable" hardship for plaintiffs in this case. *See also Com. of Pa. Dept. of Public Welfare v.*
5 *U.S. Dept. of Health and Human Services*, 101 F.3d 939, 946 (3d Cir. 1996) ("The fact that the new,
6 higher interest rate is a contingent future charge does not preclude it from causing harm to the party
7 at the time it is put into place."); *Riva v. Massachusetts*, 61 F.3d 1003, 1012 (1st Cir.1995) (fact that
8 harm from adoption of a plan negatively affected payments that plaintiff was to receive many years
9 into the future did not preclude adjudication of claim at the current time; the plan concretely harmed
10 plaintiff in creating uncertainty regarding his future income stream).

11 2. In *Duke Power*, the Court addressed the validity of a federal law that would limit the
12 liability of federally certified nuclear reactors in the case of a meltdown. The Court found that
13 plaintiffs living near the site of a proposed reactor had standing because the effects of the
14 construction of the reactor would constitute an immediate injury-in-fact. Moreover, and of particular
15 importance here, the Court held that the case was ripe because delaying resolution would not
16 "advance [the Court's] ability to deal with the legal issues" and would "foreclose any relief from the
17 present injury suffered by" the plaintiffs. 438 U.S. at 81-82.

18 The *Duke Power* Court's holding applies with equal or greter force here. The harm the
19 plaintiffs presently suffer is at least as concrete as the harm suffered by the plaintiffs in *Duke Power*.
20 And while delaying a resolution would not aid this Court in addressing the legal issues, it would
21 "foreclose any relief" for the dealer plaintiffs the present injury their businesses are suffering; and it
22 would "foreclose any relief" for the manufacturers who must make imminent choices regarding
23 whether they will commit enormous resources and restructure their product plans in order to
24 comply.⁵¹

25 The cases cited by defendants do not support dismissal. *Anderson v. Green*, 513 U.S. 557

26 ⁵¹ *Duke Power* presents one of the more obvious cases that conflict with the theory defendants have
27 advanced here. The statute in *Duke Power* only became applicable in the event of a nuclear
28 meltdown. Thus, the application of the statute was based on a contingent event that may have never
come to pass, and indeed was highly unlikely to come to pass. The Supreme Court nonetheless
found the case ripe.

1 (1995), involved a situation where there was no current injury to any party nor any need to make
2 immediate choices. Significantly, the *Anderson* decision was clarified in *Clinton v. New York*, 524
3 U.S. 414 (1998), which defendants do not discuss. *Clinton* involved a challenge to the statutory line-
4 item veto that allowed the president to “veto” certain budget lines. In arguing that the case was not
5 justiciable, the United States relied on *Anderson* and argued that New York had not been injured
6 because a waiver petition pending before the Secretary of HHS could allow New York to remain
7 unaffected by the veto. The Solicitor General -- just like the defendants here -- argued that under
8 *Anderson* there is “no justiciable dispute where the occurrence of the loss is contingent on the
9 outcome of an as-yet unresolved waiver application.” See Brief of U.S., No. 97-1374, at 20,
10 (attached hereto as Exhibit 6 to plaintiffs’ request for judicial notice).

11 The *Clinton* decision rejected that argument. The Supreme Court explained that New York
12 had been harmed because a contingent liability had been eliminated by the Act, but then had been
13 reimposed by the veto. Even though the liability was ultimately contingent on the outcome of the
14 HHS waiver ruling, “[t]he revival of a substantial contingent liability immediately and directly
15 affects the borrowing power, fiscal strength, and fiscal planning of the potential obligor.” 524 U.S.
16 at 431. The Court then explained that because there was an “immediate injury” in *Clinton*, the
17 Government’s reliance on *Anderson* was “misplaced.” *Id.* at 431 n.16. Likewise, in this case, the
18 injury to the dealer plaintiffs arising from the CO2 regulation establishes ripeness -- even if one
19 assumed that EPA might later deny a waiver. See also *RRR Cases*, 419 U.S. at 146 (case was ripe
20 because deferral of decision might make judicial action untimely, even though harm was contingent
21 upon future events); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942)
22 (fact that agency’s action did not immediately “compel action ... or impose penalties” was irrelevant
because petitioners’ business prospects had been adversely affected).

23 Defendants also try to invoke the unpublished decision in *International Truck & Engine*
24 *Corp. v. Lloyd*, No. 01-1245 (E.D. Cal. Oct. 24, 2001), apparently for the proposition that the
25 pendency of *any* EPA waiver proceeding is enough to defeat federal jurisdiction. No such rule can
26 be constructed from that decision. As the *International Truck* court noted, the case before it was not
27 one “in which ‘the very promulgation of a law may itself affect a party enough to satisfy the
28 constitutional requirement.’” Op. at 5 (quoting *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1171

1 (9th Cir. 2001)). Here, in contrast, due to the lead time issues involved in this case, the
 2 “[p]romulgation of the challenged regulations present[s] plaintiffs with the immediate dilemma to
 3 choose between complying with newly imposed, disadvantageous restrictions and risking serious
 4 penalties for violation,’ [and therefore] the controversy is ripe.” *Qwest*, 260 F.3d at 1171 (quoting
 5 *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993)).

6 **C. The Court’s Decision on the Merits Will Finally Resolve the Critical
 7 Issues Presented Here and Would Not Constitute an “Advisory Opinion.”**

8 Defendants also argue that a decision on the merits of plaintiffs’ claims would amount to an
 9 improper “advisory opinion.” According to defendants, “If U.S. EPA does not grant the section
 10 209(b) waiver requested by CARB, then any decision by this Court on the other two claims is
 11 entirely advisory.” (Defts Mem at 9). Stripped to its essentials, defendants are thus arguing that
 12 federal courts are without authority to decide ripe claims or controversies based on the possibility
 13 that some future event might render a decision unnecessary, or diminished in practical significance.
 14 By that theory, because CARB could at some point amend its CO2 regulation, or Congress might
 15 change the EPCA statute, or the California Legislature might alter CARB’s CO2 program, the
 16 federal courts have no power to enjoin the enforcement of a regulation that is currently causing harm
 17 and that threatens imminently to cause further harm. Such a proposition is obviously mistaken.
 18 Advisory opinions are those that have no effect on the parties before the court. *See, e.g., Schneider*
 19 *v. Chertoff*, 450 F.3d 944, 959 (9th Cir. 2006). A judgment by this Court will resolve a real
 20 controversy between the parties and (if they prevail) will grant plaintiffs full relief from current and
 21 imminent harm; such a judgment would not be an advisory opinion.

21 **II. Defendants’ Residual “Prudential” Defenses Against a Decision on the Merits
 22 Have No Factual Support and No Basis in the Law of This Circuit.**

23 Like their new-found Article III concerns, defendants’ “prudential” ripeness defenses --
 24 presented only after invoking the Court’s jurisdiction for purposes of their motion for judgment on
 25 the pleadings -- also lack merit. The Court may have discretion to deny the prudential objections as
 26 untimely and waived.⁵² The prudential ripeness doctrine, like the prudential third-party standing

27 ⁵² *See Simmonds v. INS*, 326 F.3d 351, 357-58 (2d Cir. 2003) (“Rules of prudence, recognized as
 28 such, can then be more easily scrutinized for their success in promoting better judicial
 (Continued...)”)

1 doctrine at issue in *Craig v. Boren*, 429 U.S. 190, 193-94 (1976), should not be invoked to “foster
2 repetitive and time-consuming litigation under the guise of caution and prudence.”

3 In any case, defendants’ arguments for dismissal on grounds of prudential ripeness also fail
4 on the merits. The prudential component of the ripeness inquiry “focuses on whether the record is
5 adequate to ensure effective review.” *Qwest*, 260 F.3d at 1171. It requires the court to consider two
6 factors: “the fitness of the issues for judicial decision and the hardship to the parties of withholding
7 court consideration.” *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (internal quotation
8 omitted); *see generally RRR Cases*, 419 U.S. at 138-43 (1974); *Abbott Labs. v. Gardner*, 387 U.S.
9 136, 149 (1967). Fitness of the issues and hardship to the parties are balanced against each other,
10 such that a strong showing with respect to one can compensate for a relatively weaker showing with
11 respect to another.⁵³ In this case, both of these factors weigh in favor of finding that plaintiffs’
12 EPCA and foreign policy claims are prudentially ripe for review.

13 **A. The Evidence of Hardship Is Uncontested.**

14 As discussed above the two elements of ripeness -- fitness of the issues for review and
15 hardship to the parties -- must be balanced together. Defendant’s “fitness” concerns are immaterial,
16 as will be demonstrated below. Even if they had any substance, however, they are “outweigh[ed]”

17 decisionmaking, without confusing them with their more fundamental and more rigid,
18 constitutionally-based cousins.”); *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 945-46 (9th Cir.1993)
19 (“Although jurisdictional limitations cannot be waived, we hold that arguments raising prudential
20 limitations can be deemed waived if not raised in the district court.”); *Laub v. U.S. Dept. of*
21 *Interior*, 342 F.3d 1080, 1087 n. 6 (9th Cir. 2003) (defendants waived a prudential standing
22 challenge by failing to raise it in the district court); *Magana v. Com. of the Northern Mariana*
23 *Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997) (“[D]efendants may raise an affirmative defense for the
24 first time in a motion for summary judgment only if the delay does not prejudice the plaintiff.”).

25 ⁵³ *See Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409, 1414 (9th Cir.
26 1992); *see also Stern v. U.S. Dist. Court*, 214 F.3d 4, 10 (1st Cir. 2000) (“[A] very strong showing
27 on one axis may compensate for a relatively weak showing on the other.”); *Neb. Pub. Power Dist. v.*
28 *MidAm. Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000) (“[T]he two ripeness branches must
operate on a sliding scale”); Laurence H. Tribe, *Am. Constitutional Law* § 3-10, at 80 (2d ed. 1988)
 (“Cases in which early legal challenges are held to be ripe normally present either or both of two
features: significant present injuries produced by contemplation of a future event; *or* legal questions
that do not depend for their resolution on an extensive factual background.”) (emphasis added).
Thus, “[w]hether an issue is ripe for judicial determination depends on the *combined weight* of the
question’s fitness for adjudication and the hardship to the parties if review is delayed.” *Friedman*
Bros. Inv. Co. v. Lewis, 676 F.2d 1317, 1319 (9th Cir. 1982) (emphasis added).

1 by the immediate hardship plaintiffs will suffer if adjudication of the illegality of CARB's standards
2 is postponed. *See Chavez*, 961 F.2d at 1414; *Friedman Bros.*, 676 F.2d at 1319. There is ample
3 evidence of hardship in the record from any delay in rendering final judgment on the merits of the
4 only claims that can provide plaintiffs with final and lasting relief -- the EPCA and Foreign Policy
5 preemption claims. This Court is already familiar with plaintiffs' evidence and arguments in this
6 regard (which have been set forth in detail earlier in this brief), for evidence and arguments similar
7 to those set forth here were offered in response to defendants' motion to continue the trial date and to
8 stay the case in light of *Massachusetts v. EPA*. As Judge O'Neill found in ruling on that motion,
9 "[p]laintiffs have shown that a delay in the trial will impact their ability to plan, research and
10 implement the technologies necessary to comply with the Regulations. They have shown that the
11 uncertainty of the Regulations is currently adversely impacting the ongoing value of plaintiff
12 automobile dealerships."⁵⁴

13 Though defendants are surely aware of the evidence regarding the present harm suffered by
14 the local dealers in the form of diminution in the value of their businesses, they made no attempt to
15 address that harm in their motion. With respect to the manufacturers, defendants' sole argument is
16 that, in their view, it would be permissible for EPA to grant a waiver for the CO2 standards but
17 indicate or require that more lead time for compliance would be needed. That is a strange and
18 counter-factual argument, coming from the CARB Executive Officer. In her filings at EPA, she has
19 insisted that the CO2 regulation allows adequate lead time, and that EPA must defer to her judgment
20 on the lead time issue and all related questions. (*See Macomber Decl.* ¶ 25.) In a letter more
21 recently sent to plaintiffs' counsel, which inquired about this very issue, her counsel stated that
22 CARB believed that lead time for compliance with CARB regulations should be measured from the
23 time when CARB adopts the rule, not from the time when EPA approves it. (*Id.*) CARB's witness
24 in discovery said that five to seven years are needed to comply with the model year 2012 standards.
25 (*See pp. 11 above.*) Obviously, if EPA decides somehow to require more lead time for compliance

26 ⁵⁴ Order on Defts' Mot. to Modify the Scheduling Order (July 18, 2006), at 5; *see also* Order on
27 Defts' Mot. for Reconsideration of the Order Denying Request to Modify Scheduling Order (Aug.
28 25, 2006), at 5-7 (upholding the magistrate judge's findings that plaintiffs would suffer prejudice
from a delay of the trial).

1 with the regulation, that decision lies well in the future. If EPA does not grant each manufacturer the
2 necessary lead time, it will be too late for the affected manufacturers to recover. In other words,
3 each manufacturer faces the following choice: either adjust its investments and business plans to
4 comply with CARB's regulation, at an enormous cost, or take the chance that EPA will disagree
5 with CARB's adamantly-stated position in its filings at EPA and the position of its counsel in this
6 Court and risk being found in noncompliance with the regulation.⁵⁵

7 At the end of the day, defendants offer no convincing demonstration of how manufacturers
8 are supposed to comply with the CO2 regulations if they defer any significant expense until EPA
9 renders a decision on the waiver. Thus, manufacturers face precisely the type of "Hobson's Choice"
10 that makes a pre-enforcement challenge to a regulation ripe, and that qualifies as hardship under the
11 prudential branch of the ripeness doctrine. *See, e.g., PG&E*, 461 U.S. at 201-02; *Qwest Corp.*, 260
12 F.3d at 1172; *Abbott Labs.*, 387 U.S. at 152-53; *CBS*, 316 U.S. at 413, 423 (sustaining the exercise
13 of jurisdiction over an unapplied regulation where the threat of its eventual enforcement allegedly
14 impaired "appellant's ability to conduct its business and maintain its public broadcasting service ...
15 and [where] the regulations will make the operation of appellant's business more costly, reduce its
16 earnings and render its property and business less valuable"); *see also Middle S. Energy, Inc. v.*
17 *Arkansas Public Service Com'n*, 772 F.2d 404, 413 (8th Cir. 1985) (finding hardship sufficient to
18 support jurisdiction where "the threatened action is likely to cause great injury, in the form of higher
19 financing costs"); *Freehold Cogeneration*, 44 F.3d 1178, 1188-89 (3d Cir. 1995) (sustaining
20 jurisdiction because "[i]t takes but little experience in financial markets to realize that lending
21 institutions will not lend a borrower large sums of money when the life of the underlying project is
22 threatened"); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 524 (3d Cir. 1976) (explaining that a
23 regulation can "put[] the complaining party on the horns of a dilemma: if he complies and awaits
24 ultimate judicial determination of the action's validity, he must change his course of day-to-day
25 conduct, for example, by undertaking substantial preliminary paper work, scientific testing and

26 ⁵⁵ For the reasons explained by the automobile industry officials and experts in their declarations, the
27 single case (more than 30 years ago) in which EPA was able to defer a CARB rule by a single model
28 year has never given the industry a basis to defer compliance with new CARB standards. *See*
plaintiffs' UMF at 37-39.

1 recordkeeping [or] alternatively, if he does not comply, he risks sanctions or injuries including, for
2 example, civil and criminal penalties, or loss of public confidence”).

3 **B. The Issues Are Fit for Decision Here and Cannot be Decided in Another**
4 **Forum.**

5 Defendants also fail to explain how this Court can deem the preemption issues in this case
6 suddenly “unfit” for review, even though defendants considered them to be fit as recently as
7 September 2006, when the Court heard and decided their motion for judgment on the pleadings.

8 For at least two decades, the Supreme Court has made clear that Supremacy Clause
9 challenges to industry-wide standards are predominantly legal in nature and are fit for judicial action
10 without awaiting agency enforcement. *PG&E*, 461 U.S. at 201 (“The question of pre-emption is
11 predominantly legal, and although it would be useful to have the benefit of [the state’s interpretation
12 and application of the law], resolution of the pre-emption issue need not await that development.”).
13 The Ninth Circuit has a long line of precedent reiterating that basic rule. *See, e.g., Qwest*, 260 F.3d
14 at 1172 (“[This case] presents a pure question of law: Are the [local] ordinances preempted by state
15 or federal law? No further factual record would narrow or clarify that issue.”) (citation omitted);
16 *Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996) (“[T]he issue of whether a
17 federal law ‘occupies the field’ and thereby preempts state law is ‘purely legal.’”) (quoting *Sayles*
18 *Hydro Assocs. v. Maughan*, 985 F.2d 451, 454 (9th Cir. 1993)); *Hotel Employees & Rest. Employees*
19 *Int’l Union v. Wilhelm*, 984 F.2d 1507, 1513 (9th Cir. 1993) (“Preemption is predominantly a legal
20 question, resolution of which would not be aided greatly by development of a more complete factual
21 record.”).

22 Moreover, the limited facts this Court will need in order to resolve plaintiffs’ claims are fully
23 capable of being established now and will not be established in any other proceeding. For plaintiffs’
24 EPCA claims, as this Court has already recognized in its decision denying defendants’ motion for
25 judgment on the pleadings, the Court will need to evaluate the effects the challenged regulations will
26 have on the objectives of the federal CAFE program, including the objectives of “avoiding economic
27 harm to the automobile industry, maintaining consumer choice, and ensuring vehicle safety.” Order
28 on Motion for Judgment on the Pleadings (Sept. 25, 2006), at 10. Evidence on all of these points has
been put forward in the numerous expert reports that have been filed and in the numerous

1 depositions that have been conducted thus far. Furthermore, as defendants have now conceded and
2 the Court has found, EPA does not consider these same factors during its waiver review proceedings.
3 *Id.* at 14 (“Defendants disclaim making any contention that the EPA would consider whether the
4 EPCA preempted the California regulations or consider whether the regulations affect the ‘goals and
5 purposes’ of the EPCA. Defs’ Objection to Pls’ Surreply Brief 3:12-18. Defendants concede that
6 the EPA’s review of the regulations is limited by the criteria in section 209(b). *Id.* at 3:18-20.”)
7 And there is no other administrative proceeding yet to be conducted that will assist this court in
8 determining the facts that go to EPCA preemption.

9 Much of defendants’ challenge to the fitness of the issues presented here for decision simply
10 replows old ground. Defendants try to claim that this case is not fit for adjudication now, based on
11 the pendency of *Massachusetts v EPA*. But the issues of express preemption and implied conflict
12 preemption under EPCA that are necessary to a decision on the merits of this case do not depend in
13 any way on the outcome of the *Massachusetts* case. Even if the Supreme Court takes the unlikely
14 step of holding that EPA can, and must, adopt motor vehicle CO2 regulations, the question will still
15 remain whether the specific state CO2 regulations challenged in this action interfere with federal
16 law. The Supreme Court does not have before it the specific regulation challenged in this action,
17 does not have before it the evidence demonstrating how this regulation interferes with the federal
18 fuel economy law, and as this Court has already noted, may never reach the question of whether any
19 federal agency (much less any state agency) can regulate motor vehicle greenhouse gas emissions.
20 The Court has already determined that a stay of this action until the summer of 2007 was not
21 appropriate based on the pendency of the *Massachusetts* case. (*See* Order on Motion for
22 Reconsideration (Aug. 25, 2006) (Doc # 345) at 7.) *A fortiori*, a dismissal of this case based on the
23 pendency of the *Massachusetts* case is not proper. Indeed, defendants cite not a single decision for
24 the proposition that litigation pending elsewhere can make a case prudentially unripe.

25 Defendants also make the half-hearted assertion that plaintiffs’ claims are unfit for review
26 because California has itself petitioned the Ninth Circuit to review NHTSA’s views on preemption
27 under the Energy Policy and Conservation Act. *See People ex rel. Lockyer v. Nat’l Highway Traffic*
28 *Safety Admin.*, No. 06-72317 (9th Cir. Filed May 2, 2006). But this Court has already determined
that while NHTSA’s views may be given some weight, the legal issues of preemption presented here

1 are for this Court to determine. (See Order on Motion for Judgment on the Pleadings (Sept. 25,
2 2006), at 10 n.8.) Just as the record in *Massachusetts v. EPA* does not include the specific evidence
3 of implied preemption under EPCA contained in the record here, NHTSA did not have before it the
4 record that plaintiffs will present here. NHTSA's statements are hardly necessary to sustain
5 plaintiffs' claims here, and even if courts were to look askance at all or part of NHTSA's analysis,
6 plaintiffs' implied conflict preemption claims that will be offered at trial in no way depend on
7 NHTSA's more abstract analysis.

8 **Conclusion**

9 For the foregoing reasons, the motion for summary judgment and dismissal should either be
10 denied on the current record, or plaintiffs should be permitted to offer evidence opposing the motion
11 at a hearing on jurisdiction, or as part of the trial on the merits.

12
13 DATED: November 13, 2006

Respectfully submitted,

SAGASER, JONES & HAHESY

14
15 /s/ Timothy Jones
16 Timothy Jones
17 Attorney for all Plaintiffs
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