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17 UNITED STATES DISTRICT COURT  
18 EASTERN DISTRICT OF CALIFORNIA – FRESNO

19 CENTRAL VALLEY CHRYSLER-JEEP, INC.,  
20 et al,  
21 Plaintiffs,

22 v.  
23 Catherine E. WITHERSPOON, in her official  
24 capacity as Executive Officer of the California  
25 Air Resources Board,  
26 Defendant,

27 THE ASSOCIATION OF INTERNATIONAL  
28 AUTOMOBILE MANUFACTURERS  
29 Plaintiff-Intervenor,

30 SIERRA CLUB, NATURAL RESOURCES  
31 DEFENSE COUNCIL, ENVIRONMENTAL  
32 DEFENSE, BLUEWATER NETWORK,  
33 GLOBAL EXCHANGE and RAINFOREST  
34 ACTION NETWORK,  
35 Defendant-Intervenors.

CASE NO. CIV-F-04-6663-REC-LJO

**NOTICE OF MOTION AND MOTION OF  
PLAINTIFF-INTERVENOR THE  
ASSOCIATION OF INTERNATIONAL  
AUTOMOBILE MANUFACTURERS FOR  
SUMMARY JUDGMENT; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

DATE: December 11, 2006  
TIME: 1:30 p.m.  
JUDGE: Anthony W. Ishii

**TO ALL PARTIES AND THEIR ATTORNEY OF RECORD,**

**PLEASE TAKE NOTICE** that on December 11, 2006, at 9:00 am, or as soon thereafter as the matter may be heard before the Honorable Anthony W. Ishii, in Courtroom Two of the United States District Court for the Eastern District of California, located at 1130 O Street, Fresno, California, Plaintiff-Intervenor the Association of International Automobile Manufacturers (“AIAM”) will and hereby does move this Court, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for summary judgment as to the First Claim for Declaratory and Injunctive Relief set forth in the Complaint in Intervention (Preemption Under The Federal Energy Policy And Conservation Act) on the ground that there is no genuine issue of material fact, and that AIAM is entitled to judgment as a matter of law that the regulatory amendments approved by the California Air Resources Board in Resolution No. 04-28, dated September 24, 2004, are both expressly and impliedly preempted by federal law.

This Motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the accompanying Statement of Undisputed Facts, the Declarations of Charles H. Haake and Harold M. Haskew, the Request for Judicial Notice, all other pleadings, records and papers filed in this action, such other matters as the Court may judicially notice, and such further evidence or argument as may be presented at or before the hearing of this motion.

DATED: November 8, 2006

KIMBLE, MACMICHAEL & UPTON

By: \_\_\_\_\_ /s/  
Jon Wallace Upton

Attorneys for Plaintiff Intervenor,  
Association of International Automobile Manufacturers

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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

On September 25, 2006, this Court entered an order denying the Defendants' Motion for Judgment on the Pleadings on AIAM's causes of action under the Energy Policy and Conservation Act ("EPCA") and the Clean Air Act. In its decision, the Court correctly dispatched the Defendants' legal argument that the regulations challenged here are valid under the waiver provision of Section 209(b) of the Clean Air Act, and are therefore rendered immune from a preemption challenge under EPCA or other federal law. Because the Court found that the allegations in this action state a claim for conflict preemption, it declined to decide at that stage whether the other theories of preemption – express preemption and field preemption – have merit. *Memorandum Opinion and Order (1) Granting In Part and Denying In Part Defendant and Defendant Intervenors' Motion for Judgment on the Pleadings and (2) Limiting Discovery of Global Warming Science Documents* (the "September 25 Order") (ECF 363) at 7-8.

Discovery in this action is largely complete, and the time is ripe for this Court to determine that the AB 1493 Regulations are preempted by EPCA as a matter of law based on the undisputed facts of the case. These undisputed facts are straightforward and show that the AB 1493 Regulations (a) are expressly preempted by EPCA because they are "related to fuel economy standards," and (b) are impliedly preempted by EPCA because they intrude into the field of fuel economy regulation which has been reserved for the federal government, and on their face conflict with the federal CAFE program.

On the most fundamental level, the regulations are "related to fuel economy standards" and are therefore expressly preempted because there is no functional difference between a carbon dioxide emission standard and a fuel economy standard. Carbon dioxide emissions are a direct and unavoidable by-product of fuel consumption, and the only known practical way for a manufacturer of today's gasoline-powered automobile to reduce tailpipe emissions of CO<sub>2</sub> is to improve the fuel economy. In fact, the Defendant admits that fuel economy and carbon dioxide emissions are so closely equivalent that one can translate the AB 1493 standards mathematically to an equivalent miles-per-gallon fuel economy standard. The Defendant also admits that compliance with the

1 regulations will as a practical matter require dramatic improvements in fuel economy. For these  
2 reasons, the National Highway Traffic Safety Administration (“NHTSA”) has concluded that “CO2  
3 standards and GHG standards” are the “functional equivalents” of fuel economy standards. *Light*  
4 *Trucks Model Years 2008-2011*, 71 Fed. Reg. 17566, 17670 (Apr. 6, 2006), (the “Light Truck  
5 Standards”). These facts are not in dispute and demonstrate that there is a direct and inextricable  
6 relationship between carbon dioxide emissions standards and fuel economy standards.

7 Not only does EPCA expressly preempt the AB 1493 Regulations, but the undisputed facts  
8 also demonstrate that the regulations intrude into the field of fuel economy which is exclusively  
9 regulated by the federal government, and create a direct and unavoidable conflict with the federal  
10 fuel economy program. Accordingly, the regulations also are impliedly preempted. EPCA sets forth  
11 the federal statutory and regulatory scheme for regulating fuel economy, and vests NHTSA with the  
12 exclusive authority to prescribe national fuel economy standards at the level it determines constitutes  
13 the “maximum feasible average fuel economy level,” for a given model year. As this Court has  
14 found, the federal fuel economy program strives to balance a number of competing goals:  
15 maximizing fuel economy, maintaining consumer choice, protecting the automotive industry from  
16 adverse economic consequences, and ensuring vehicle safety. The CAFE standard for passenger cars  
17 is currently set by statute at 27.5 miles per gallon (mpg). For light duty trucks (pickups, minivans,  
18 sport utility vehicles and “cross-over” vehicles) NHTSA has determined that the “maximum feasible  
19 average fuel economy level” is a national fleet-wide average of 23.1 and 23.5 mpg for the 2009 and  
20 2010 model years, respectively, and then transitions to a vehicle-specific size-based approach for the  
21 2011 model year and beyond.

22 The AB 1493 Regulations effectively require fuel economy greatly in excess of these federal  
23 levels – reaching over 40 mpg for the PC/LDT1 category and over 26 mpg for the LDT2/MDPV  
24 category – and rejects the attribute-based approach adopted by NHTSA for light-duty trucks. The  
25 Defendant does not dispute this. Thus, by definition the California regulations upset the balance  
26 between the competing interests struck by the federal program. NHTSA recognizes the inherent  
27 conflict posed by allowing individual States to effectively regulate fuel economy through the guise of  
28 reducing greenhouse gas emissions, concluding in recent rulemaking that state regulation of carbon

1 dioxide “would ‘abrogate EPCA’s regime,’ rendering NHTSA’s careful balancing of consideration[s]  
2 a nullity.” *Light Truck Standards* 71 Fed. Reg. at 17668. Thus, NHTSA has stated that a “state law  
3 that seeks to reduce motor vehicle carbon dioxide emissions is both expressly and impliedly  
4 preempted” by EPCA. *Average Fuel Economy Standards for Light Trucks*, 70 Fed. Reg. 51414-01,  
5 at 51457 (Aug. 30, 2005). The U.S. Environmental Protection Agency shares this view. *Control of*  
6 *Emissions From New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52925 (Sept. 8, 2003)  
7 (“Congress has not authorized the Agency to regulate CO2 emissions from motor vehicles to the  
8 extent such standards would effectively regulate car and light truck fuel economy, which is governed  
9 by a comprehensive statute administered by DOT.”).

10 This action raises issues of profound importance to the automobile industry in America. If  
11 implemented, the AB 1493 Regulations will dramatically affect how manufacturers must design and  
12 market their new cars and trucks intended for California. While automobile manufacturers continue  
13 to work aggressively to produce more fuel efficient motor vehicles that emit reduced levels of  
14 greenhouse gases, California lacks the authority to dictate the means for achieving these ends. The  
15 nation’s dependency on oil and the interwoven issue of global warming are national issues that  
16 require a national approach. That is the fundamental purpose of EPCA. By enacting these  
17 regulations, California has intruded into a field long reserved for the Federal Government and is  
18 regulating the automobile industry in a manner which Congress never intended. This Court should  
19 therefore find that the AB 1493 Regulations are preempted by federal law and enjoin their  
20 enforcement.

## 21 II. SUMMARY JUDGMENT STANDARD

22 Summary judgment is appropriate if no genuine issues of material fact exist, and the moving  
23 party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for  
24 summary judgment bears the initial burden of “informing the district court of the basis for its motion,  
25 and identifying those portions of [the record] which it believes demonstrate the absence of a genuine  
26 issue of material fact.” *Celetox Corp. v. Catrett*, 477 U.S. 317 (1986). The non-moving party  
27 thereafter must produce “specific facts,” Fed. R. Civ. P. 56(e), showing not merely “that there is  
28 some metaphysical doubt as to the material facts,” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

1 475 U.S. 574, 586-87 (1986), but rather “that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).  
2 Where the party moving for summary judgment bears the burden of persuasion at trial, the moving  
3 party is entitled to summary judgment if it can establish that the undisputed facts entitle it to  
4 judgment as a matter of law. *Celotex*, 477 U.S. at 322-23.

5 Summary judgment is particularly appropriate in cases which raise primarily legal issues,  
6 such as federal preemption. *See e.g., Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835 (9th Cir.  
7 2002) (affirming summary judgment that state leg-trap ban was preempted by the Endangered  
8 Species Act); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (affirming summary  
9 judgment holding that claims against defoliant manufacturer were preempted by Federal Insecticide,  
10 Fungicide, and Rodenticide Act); *Fireman's Fund Ins. Co. v. City of Lodi*, 296 F. Supp. 2d 1197  
11 (E.D. Cal. 2003) (granting partial summary judgment holding that portions of municipal ordinance  
12 were preempted by CERCLA).

### 13 III. LEGAL BACKGROUND CONCERNING EXPRESS 14 AND IMPLIED PREEMPTION

15 Preemption flows inexorably from the U.S. Constitution, which commands that the laws of  
16 the United States “shall be the supreme law of the land, any thing in the constitution, or laws of any  
17 State to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Therefore, a “fundamental  
18 principle of the Constitution is that Congress has the power to preempt state law.” *Crosby v. Nat’l*  
19 *Foreign Trade Council*, 530 U.S. 363, 372 (2000).

20 Federal law may preempt state law in three different ways. First, Congress may preempt state  
21 law in express terms. *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir.  
22 2002). Second, preemption may be inferred when federal regulation in a particular field is “so  
23 pervasive as to make reasonable the inference that Congress left no room for the States to supplement  
24 it.” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This is often referred to  
25 as “field preemption.” Third, preemption may be implied when state law actually conflicts with  
26 federal law. *Id.* This is known as “conflict preemption.” A conflict for preemption purposes arises  
27 when “compliance with both federal and state regulations is a physical impossibility,” *Florida Lime*  
28 *& Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law “stands as an

1 obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines*  
2 *v. Davidowitz*, 312 U.S. 52, 67 (1941).

3 Federal preemption does not turn on a state’s characterization or labeling of its own law.  
4 Indeed, if that were the case, preemption could always be defeated by carefully worded legislative or  
5 regulatory findings. Thus, in *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88 (1992),  
6 the Supreme Court noted that “[i]n assessing the impact of a state law on the federal scheme, we have  
7 refused to rely solely on the legislature’s professed purpose and have looked as well to the effects of  
8 the law.” *Id.* at 105. The Court there held that state regulations concerning the handling of  
9 hazardous waste were preempted by the Occupational Safety and Health Act, even though the stated  
10 purpose of the regulation was to protect the public from spills. The Court found that:

11 it would defeat the purpose of [the preemption provision] if a state could enact  
12 measures stricter than OSHA’s and largely accomplished through regulation of worker  
13 health and safety simply by asserting a non-occupational purpose for the legislation.  
***Whatever the purpose or purposes of the state law, pre-emption analysis cannot  
ignore the effect of the challenged state action on the pre-empted field.***

14 *Gade*, 505 U.S. 106-107 (emphasis added) (citation omitted).<sup>1</sup> Accordingly, in determining whether  
15 the AB 1493 Regulations are preempted, this Court’s focus should not be on the State’s expressed  
16 purpose in enacting the regulations, but rather on their ultimate effect and impact.

#### 17 **IV. EXPRESS PREEMPTION UNDER EPCA**

##### 18 **A. The Federal Government Exclusively Regulates Fuel Economy Through The 19 Federal Energy Policy and Conservation Act**

20 In 1975, Congress passed the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-  
21 163, 89 Stats 871 (1975), as a comprehensive response to the energy crisis of the early 1970’s.  
22 49 U.S.C. §§ 32901 *et seq.* One prong of EPCA’s national approach to energy policy was the  
23 imposition of new fuel economy requirements on the automobile industry in the form of mandatory

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24  
25 <sup>1</sup> *See also Aloha Airlines v. Dir. of Taxation*, 464 U.S. 7, 13-14 (1983) (“The manner in which the  
26 state legislature has described and categorized [its law] cannot mask the fact that the purpose and  
27 effect of the provision are to impose a levy upon the gross receipts of airlines” which was  
28 preempted under federal law); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). (“We can no  
longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal  
law as long as the state legislature in passing its law had some purpose in mind other than one of  
frustration.”).

1 corporate average fuel economy (“CAFE”) standards. Under the CAFE program, an automobile  
 2 manufacturer can sell any combination of vehicles it chooses, so long as the average fuel economy of  
 3 its nationwide fleet meets the applicable CAFE standard. Congress selected the fleet-wide averaging  
 4 approach to “ensure wide consumer choice by leaving maximum flexibility to the manufacturer” to  
 5 produce a “diverse product mix” while meeting the applicable CAFE standards. S. Rep. No. 94-179,  
 6 at 6 (1975).

7 The text of the EPCA statute provides for a congressionally-established average fuel economy  
 8 standard for passenger automobiles of 27.5 miles per gallon. 49 U.S.C. § 32902(b). The statute  
 9 further provides, however, that “the Secretary of Transportation may prescribe regulations amending  
 10 the standard under subsection (b) of this section for a model year to a level that the Secretary decides  
 11 is the maximum feasible average fuel economy level for that model year.” 49 U.S.C. § 32902(c).<sup>2</sup> In  
 12 determining “the maximum feasible average fuel economy level,” NHTSA is required to consider  
 13 technological feasibility, economic practicability, the effect of other government regulations on fuel  
 14 economy and the nation's need to conserve energy. 49 U.S.C. § 32902(f).<sup>3</sup> NHTSA has, for  
 15 example, amended the passenger car standard in the past to address situations in which market  
 16 conditions rendered the statutory standard impracticable and infeasible despite manufacturers’ good-  
 17 faith compliance plans. *Passenger Automobile Average Fuel Economy Standards Model Year 1986*,  
 18 50 Fed. Reg. 40528 (Oct. 4, 1985). The current CAFE standard for passenger cars is 27.5 mpg, as set  
 19 forth by Congress in the statute. 49 C.F.R. § 531.5. NHTSA, however, is in the process of  
 20 considering reforming the CAFE program for all motor vehicles, and has stated that “[a]ny potential  
 21

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22 <sup>2</sup> The statute further provides that if the proposed revision increases the standard above 27.5 miles  
 23 per gallon or decreases the standard below 26.0 miles per gallon, the revision must be submitted  
 24 to Congress for approval. 49 U.S.C. § 32902(c)(2). NHTSA has interpreted this provision as a  
 25 congressionally enacted restriction on its authority to raise the CAFE standard for passenger cars  
 26 above 27.5 mpg.

27 <sup>3</sup> As this Court found, the goals NHTSA strives to fulfill in making this determination include  
 28 maximizing fuel economy, avoiding economic harm to the automobile industry, maintaining  
 consumer choice, and ensuring vehicle safety. *Sept. 25 Order* at 10. “In selecting the maximum  
 feasible level, NHTSA strives to set the standards as high as it can without causing significant  
 adverse consequences for the manufacturers or consumers.” *Light Truck Standards*, 71 Fed. Reg.  
 at 17668.

1 reforms to the CAFE system should be considered in light of their ability not only to enhance fuel  
 2 economy but also to ensure the economic well-being and safety of the American public.” *Reforming*  
 3 *the Automobile Fuel Economy Standards Program*, 68 Fed. Reg. 74908 at 74913 (Dec. 29, 2003).<sup>4</sup>

4 With respect to non-passenger automobiles, such as light-duty trucks, the statute requires the  
 5 Secretary of Transportation to set “the maximum feasible average fuel economy level that the  
 6 Secretary decides the manufacturers can achieve in that model year.” 49 U.S.C. § 23902(a).<sup>5</sup>

7 To ensure national uniformity in fuel economy regulations, EPCA includes a broad express  
 8 preemption clause at 49 U.S.C. §32919(a). That section provides:

9 When an average fuel economy standard prescribed under this chapter [49 U.S.C.  
 10 §§ 32901, *et seq.*] is in effect, a State or a political subdivision of a State may not  
 11 adopt or enforce a law or regulation related to fuel economy standards or average fuel  
 economy standards for automobiles covered by an average fuel economy standard  
 under this chapter [49 U.S.C. §§ 32901, *et seq.*].

12 49 U.S.C. § 32919(a). The legislative history of EPCA’s preemption provision confirms that  
 13 Congress intended it to preempt broadly *all* regulation in the area of fuel economy and for the  
 14 Department of Transportation to have sole authority to regulate this field. For example, the original  
 15 Senate bill would have preempted state laws only if they were “inconsistent” with federal fuel  
 16 economy standards, labeling, or advertising. S. 1883, 94th Cong., 1st Sess., § 509. Similarly, the  
 17 House bill would have preempted state laws only if they were not “identical to” a Federal  
 18 requirement. H.R. 7014, 94th Cong. § 507 (as introduced), § 509 (as reported) (1975). Instead of  
 19 adopting these more limited forms of preemption, the final version of the law expressly preempts all  
 20 state laws that relate to fuel economy standards. No exception is made for state laws on the ground  
 21 that they are consistent with or identical to federal requirements. Moreover, as the legislative history  
 22 of an earlier draft of EPCA makes clear, Congress intended this preemption provision to have a broad  
 23 application, irrespective of the metric used to measure fuel economy: “State or local fuel economy

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24  
 25 <sup>4</sup> NHTSA has implemented reform for light-duty trucks in the recently enacted light truck  
 standards and is seeking authority to enact similar reform for the passenger car program.

26 <sup>5</sup> The current CAFE standards for light-duty trucks go through the 2011 model year. However,  
 27 NHTSA is statutorily obligated to enact light-duty truck CAFE standards at least eighteen months  
 28 before the beginning of each model year. 49 U.S.C. § 32902(a). NHTSA has never failed to  
 comply with this mandate.

standards would be preempted, regardless of whether they were in terms of miles per gallon or some other parameter such as horsepower or weight.” S. Rep. No. 93-526, at 66 (1974).

**B. There Is A Direct, Inextricable, And Mathematical Relationship Between Carbon Dioxide Emissions and Fuel Economy**

For general public consumption, fuel economy is commonly expressed in terms of the number of miles driven per gallon of fuel consumed (mpg). Fuel economy under the CAFE program, however, is actually determined by measuring a vehicle’s exhaust emissions. Pursuant to EPA guidelines,<sup>6</sup> exhaust emissions of hydrocarbons (“HC”), carbon monoxide (“CO”), and CO<sub>2</sub> per mile traveled are measured. 40 C.F.R. § 86.144-90. After effectively “counting” all of the carbon atoms emitted per mile driven, EPA then uses a formula found at 40 C.F.R. § 600.113-93(e), commonly referred to as the carbon balance equation, to calculate the amount of fuel burned per mile driven (because a gallon of gasoline contains a fixed number of carbon atoms). *Declaration of Harold M. Haskew* (“Haskew Decl.”), ¶ 14. The final result is expressed in miles per gallon of fuel consumed. Because of advances made in reducing emissions of CO and HC, “CO and HC play an increasingly and extremely minor role in the measurement of fuel economy, such that fuel economy has become virtually synonymous with CO<sub>2</sub> emission rates.” *Light Truck Standards*, 71 Fed. Reg. at 17660; *Haskew Decl.* ¶ 15.

Thus, for all practical purposes, the federal fuel economy standard is actually a fleet-average carbon dioxide emissions limit. Indeed, as NHTSA stated in the recently enacted revisions to the CAFE standard for light-duty trucks, “[f]uel consumption and CO<sub>2</sub> emissions from a vehicle are two ‘indissociable’ parameters” such that “fuel economy is directly related to emissions of greenhouse gases such as CO<sub>2</sub>.” *Light Truck Standards*, 71 Fed. Reg. at 17659.

The reason EPA relies on carbon dioxide emissions to measure fuel economy is a matter of basic chemistry and automotive engineering. Carbon dioxide emissions from a motor vehicle are

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<sup>6</sup> The EPCA statute and NHTSA’s regulations require that fuel economy be measured by way of “procedures established by the Administrator of the Environmental Protection Agency.” 49 U.S.C. § 32904(c); 49 C.F.R. §§ 531.6(a), 533.6(b). Thus, despite the fact that NHTSA is the federal agency with the substantive responsibility for implementing the EPCA statute, EPA is granted the limited responsibility for designing and administering the test procedures for compliance.

1 directly and inversely proportional to the vehicle's fuel economy and there is a mathematical formula  
 2 whereby one can convert CO<sub>2</sub> emissions into a miles-per-gallon fuel economy figure and vice-versa.  
 3 *Separate Statement of Undisputed Facts* ("Sep. State.") Fact No. 9. Carbon dioxide is a natural and  
 4 unavoidable byproduct of combustion of carbon-containing fuels such as gasoline, coal and natural  
 5 gas. Sep. State. Fact No. 1. The relationship between fuel consumption and CO<sub>2</sub> emissions for a  
 6 given fuel is fixed and depends only on the carbon composition of the fuel that is burned. *Id.* Fact  
 7 No. 2. A gallon of a typical commercial grade of gasoline contains approximately 5.5 pounds (or  
 8 2,475 grams) of carbon. *Id.* Fact No. 3. When that carbon is combusted, the 2,475 grams of carbon  
 9 combines with approximately 6,600 grams of oxygen from the atmosphere and becomes  
 10 approximately 9,075 grams of CO<sub>2</sub>. *Id.* Fact No. 4. Thus, "[b]ased on its content (carbon and  
 11 hydrogen), as a matter of basic chemistry, the burning of a gallon of gasoline produces about 20  
 12 pounds [9,075 grams] of CO<sub>2</sub>." *Light Truck Standard*, 71 Fed. Reg. at 17659; *Sep. State*. Fact No. 4.

13 Perfect combustion of gasoline results in just two products from the fuel in the exhaust: CO<sub>2</sub>  
 14 and water. However, combustion in internal combustion engines is often incomplete, and small  
 15 amounts of carbon monoxide and unburned hydrocarbons are released in the emissions – hence the  
 16 inclusion of these two substances in the calculation of fuel economy. *Sep. State*. Fact No. 5.<sup>7</sup> Even  
 17 so, CO<sub>2</sub> comprises the overwhelming majority of the carbon-containing compounds in the exhaust.  
 18 For example, NHTSA estimates that model year 2006 light-duty trucks emit on average 471 grams of  
 19 CO<sub>2</sub> per mile driven in the city, but only 0.042 grams of HC and 0.56 grams of CO. *Light Truck*  
 20 *Standard*, 71 Fed. Reg. at 17661; *Sep. State*. Fact No. 6.

21 Carbon dioxide, however, is fundamentally different from other automotive emissions that are  
 22 commonly regulated by EPA and the State of California in that there is no "bolt on" aftertreatment  
 23 device that can capture or chemically alter CO<sub>2</sub> emission.<sup>8</sup> *Sep. State*. Fact No. 10. Improving fuel

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25 <sup>7</sup> Combustion engines also emit oxides of nitrogen (NO<sub>x</sub>), but those compounds do not originate  
 26 from the fuel. Rather, the heat from the combustion process causes the oxidation of nitrogen in  
 the air flowing through the engine. *Light Truck Standards*, 71 Fed. Reg. at 17659.

27 <sup>8</sup> For example, the technologies that produce reductions in HC and CO emissions – such as  
 28 catalytic converters and computer-controlled air/fuel mixture controls – do so by more  
 completely combusting them to CO<sub>2</sub> and water. *Light Truck Standards*, 71 Fed. Reg. at 17660.

1 economy is the only known practical way for a manufacturer of today's gasoline-powered  
2 automobiles to reduce tailpipe emissions of CO<sub>2</sub>. *Id. Light Truck Standards*, 71 Fed. Reg. at 17656  
3 (“the only technologically feasible, practicable way for vehicle manufacturers to reduce CO<sub>2</sub>  
4 emissions is to improve fuel economy.”); *Control of Emissions From New Highway Vehicles and*  
5 *Engines*, 68 Fed. Reg. 52922, 52929 (Sept. 8, 2003) (“No technology currently exists or is under  
6 development that can capture and destroy or reduce emissions of CO<sub>2</sub>, unlike other emissions from  
7 motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO<sub>2</sub> is to  
8 improve fuel economy.”)

9 These facts show that fuel economy and CO<sub>2</sub> emissions are essentially the same thing. If you  
10 know how much CO<sub>2</sub> a vehicle emits per mile traveled, then determining that vehicle's fuel economy  
11 is a matter of a simple mathematical conversion, like converting degrees Fahrenheit to degrees  
12 Celsius. As the depositions of witnesses from CARB demonstrate, there is no dispute about this fact.  
13 For example, CARB's Program Manager for Motor Vehicle Greenhouse Gas Regulation, Charles  
14 Shulock, testified as follows: “[Q.] You agree there is a mathematical formula by which one could  
15 translate miles per gallon into CO<sub>2</sub> emissions per mile; correct? A. Yes.” *Deposition of Charles*  
16 *Shulock* (“Shulock Depo.”) at 134:7-10. CARB's other designated witnesses agreed. Steve Albu,  
17 Assistant Division Chief of the Mobile Source Control Division, testified:

18 Q. Considering the standard -- the regular type of gasoline sold in California, what is  
19 the relationship between improvements of fuel economy and decreases to CO<sub>2</sub> tail  
pipe emissions from motor vehicles?

20 A. As I said --

21 [Objection interposed]

22 THE WITNESS: As I said, they're linked.

23 BY MR. CLUBOK:

24 Q. Yeah. But how, sir? Are they closely linked?

25 A. Yes.

26 Q. They're precisely linked; aren't they, sir?

27 A. To an equation, yes.

28

1 Q. And in fact, there are mathematically, directly and [in]versely proportional.  
2 Correct?

3 [Objection interposed]

4 THE WITNESS: That is correct.

5 *Deposition of Steve Albu* (“Albu Depo.”) at 66:21-67:20. *See also Deposition of Paul Hughes*  
6 (“Hughes Depo.”) at 177:9-178:1 (testifying that carbon dioxide emissions decrease as fuel economy  
7 increases in a manner that can be mathematically defined).

8 **C. The AB 1493 Regulations Impose De Facto Fuel Economy Standards**

9 Despite EPCA’s carefully balanced program and its broad preemption provision aimed at  
10 protecting that balance, and despite the direct and mathematically defined relationship between  
11 carbon dioxide emissions and fuel economy, the State of California is attempting to limit the level of  
12 CO2 emissions from new motor vehicles sold in California. Indeed, this is the second time the State  
13 has attempted to do so. Its prior attempt involved amendments to the State’s Zero Emission Vehicle  
14 program. The enforcement of those regulations was preliminarily enjoined because Judge Coyle  
15 found that the regulations “will have the practical effect of regulating fuel economy.” *Cent. Valley*  
16 *Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 U.S. Dist. LEXIS 20403 at \*9  
17 (E.D. Cal. June 11, 2002). Although different in substance, the AB 1493 Regulations challenged  
18 here suffer from the same infirmity as the prior regulations and should therefore suffer the same  
19 fate.<sup>9</sup>

20 **1. The AB 1493 Regulations Require Reductions In CO2 Emissions And**  
21 **Improvements In Fuel Economy**

22 This Court is familiar with the structure and the substance of the AB 1493 Regulations from  
23 prior briefing, so they will not be recounted here. *See September 25 Order* at 2-3. The important

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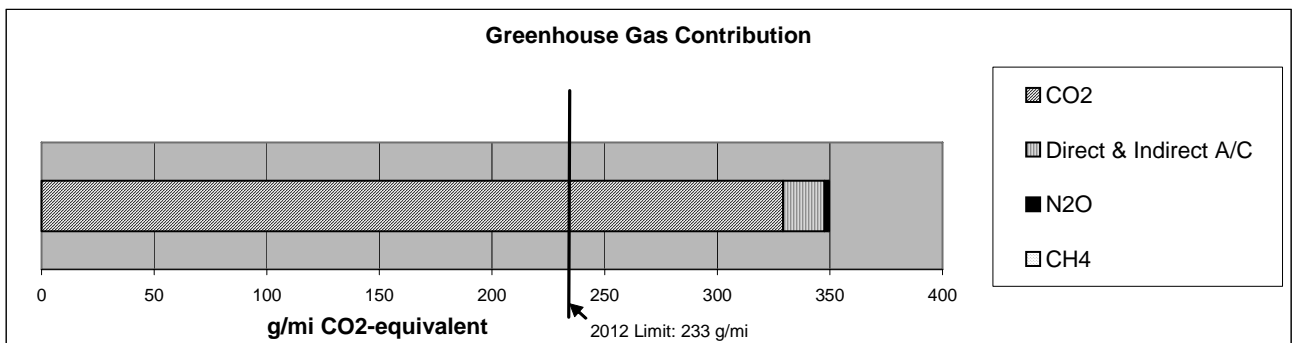
24 <sup>9</sup> Indeed, the regulations at issue here present a clearer case for preemption than the 2001 ZEV  
25 amendments at issue in *Central Valley Chrysler-Plymouth*. Those amendments related to fuel  
26 economy only insofar as one alternative method of compliance with the ZEV regulations  
27 measured fuel consumption and CO2 emissions. Despite the fact that this compliance option  
28 constituted a relatively small aspect of the entire regulatory scheme, the Court nevertheless found  
that “enforcement of the 2001 ZEV amendments is precluded by complete preemption” under  
EPCA. *Cent. Valley Chrysler-Plymouth*, 2002 U.S. Dist. LEXIS 20403, at \*7 n.3. Here, in  
contrast, the entirety of the AB 1493 Regulations is aimed at improving fuel economy and  
thereby reducing emissions of CO2.

1 point for purposes of this motion is that although the AB 1493 Regulations purport to address  
 2 emissions other than just CO<sub>2</sub> – namely hydrofluorocarbons from air conditioners, methane and  
 3 nitrous oxide – in reality the contribution of the other greenhouse gases is insignificant when  
 4 compared with the CO<sub>2</sub> component of the regulations. In fact, it would be impossible to comply with  
 5 the regulations without dramatically curtailing CO<sub>2</sub> emissions. This is demonstrated in the following  
 6 table, showing CARB’s estimated emission rates from a “baseline” large passenger car:

Greenhouse Gas Emission Rates from Large Passenger Cars		
Source	Emissions	CO <sub>2</sub> -Equivalent
CO <sub>2</sub> Emissions (With No Air Conditioning)	329.2 g/mi	329.2 g/mi
“Indirect” CO <sub>2</sub> Emissions (From Air Conditioning)	15.40 g/mi	15.40 g/mi
Methane Emissions	0.005 g/mi	0.12 g/mi
Nitrous Oxide Emissions	0.006 g/mi	1.78 g/mi
Direct A/C Emissions (refrigerant leakage)	0.007 g/mi	9.00 g/mi
<b>TOTAL</b>	<b>344.61 g/mi</b>	<b>355.5 g/mi</b>
CO <sub>2</sub> as a Percent of Total	99.9%	96.9%

14 Haskew Decl. ¶ 8.

15 The CO<sub>2</sub>-equivalent emissions limit for the 2012 model year for the PC/LDT1 category is  
 16 233 g/mi. Thus, assuming the values above are representative of a manufacturer’s average baseline  
 17 PC/LDT1 fleet, reducing all of the forms of greenhouse gas emissions other than CO<sub>2</sub> would be  
 18 grossly insufficient to meet the standard, as depicted in the graphic below:



25 In fact, CARB witnesses readily admit that the AB 1493 Regulations will require significant  
 26 reductions in carbon dioxide emissions, and that doing so will necessarily require improvements in  
 27 fuel economy:

28 Q. So over 90 percent of the regulation is going to be in ARB's expectation complied with by reducing CO<sub>2</sub> tailpipe emissions; correct?

1 A. Correct.

2 Q. And the only way that you are aware of to reduce CO<sub>2</sub> tailpipe emissions is by  
3 improving fuel economy; correct?

4 A. *It's by reducing the fuel usage, yes.* There is a fuel savings from complying with  
5 the greenhouse gas regulations.

6 *Hughes Depo.* at 162:2-11 (emphasis added).

7 Moreover, as discussed above, there is a mathematical link between CO<sub>2</sub> emissions and fuel  
8 economy. This formula can be applied to the AB 1493 Regulations to determine the minimum fleet-  
9 average fuel economy required by the regulations. Sep. State. Fact No 18. CARB staff agrees. In  
10 fact, their own internal analyses of the regulations show that when they reach their most stringent  
11 point in the 2016 model year, they will amount to a *de facto* fuel economy standard for the PC/LDT1  
category of roughly 43 miles per gallon.

12 [Q] What is the standard for 2016 greenhouse gas emissions?

13 A. For cars, it's 205.

14 Q. And you could translate that into a miles-per-gallon equivalent; correct?

15 A. Well, no. That isn't a miles-per-gallon number. One could -- it's CO<sub>2</sub> equivalent,  
16 not CO<sub>2</sub>, okay. So I need further --

17 Q. One could translate that. Assuming there was no air conditioning technology  
18 applied, one could translate that 205 CO<sub>2</sub> equivalent emission standard to a miles-per-  
gallon standard?

19 [Objection interposed]

20 BY MR. CLUBOK:

21 Q. [Through a] Mathematical formula?

22 A. If you assumed it represented only CO<sub>2</sub> emissions, then yes.

23 Q. And do you have an idea about roughly what that would be in terms of miles per  
gallon?

24 A. Somewhere perhaps around 43 miles per gallon.

25 Q. Yeah. In fact, there has been some internal discussion of that particular number,  
26 43 miles per gallon, in terms in connection with setting the standard, hasn't there, sir?  
You didn't just come up with that number off the top of your head?

27 A. No. I have done the conversion myself.

28

1 Q. So when you have done the conversion yourself, that 205 CO2 equivalent  
2 emissions standards, if it's purely achieved through CO2 emissions reduction, would  
translate to an approximately 43-mile-per-gallon standard?

3 A. Right.

4 *Hughes Depo.* at 270:8-271:18. Mr. Albu made a similar calculation and raised it directly with  
5 Defendant Witherspoon and others at CARB:

6 Q. So sir, Exhibit Albu 004 is an E-mail dated August 3rd, 2004, from Steve Albu.  
7 That's an E-mail that you wrote.

8 Correct, sir?

9 A. Yes.

10 Q. And on Exhibit Albu 004, which is Bates labeled ARB 390347, you are writing in  
response to an E-mail that Tom Cackette had written to you.

11 Correct?

12 A. It looks that way, yes. I haven't read this whole yet.

13 \* \* \*

14 Q. Can you please read what -- can you please read the first sentence that you wrote  
15 in your communication of August 3rd, 2004, to Mr. Cackette, Mr. Cross, Ms.  
Witherspoon, Mr. Shulock and Mr. Hughes?

16 A. "***Our standard for cars amounts to 43 miles per gallon***, which isn't a cake walk  
17 like some enviros seem to believe, (recall the Toyota Echo, their smallest car with an  
automatic transmission is rated at 33 city, 39 highway)."

18 *Albu Depo.* at 61:14-63:19 (emphasis added).

19 Admittedly, the analysis referred to in these deposition passages did not account for air  
20 conditioning credits provided for in the regulations. However, even assuming the maximum use of  
21 air conditioning credits (13.0 g/mi for model year 2009 through 2012, and 18.5 g/mi for model year  
22 2013 through 2016) and the total elimination of methane and nitrous oxide emissions (thus making  
23 CO2 the only greenhouse gas emitted), one could use the same mathematical formula used by CARB  
24 staff to determine the minimum fuel economy required to meet the AB 1493 standard. This  
25 conversion for each model year is set forth below:

26 //

PC/LDT1			LDT2/MDPV		
Model Year	CO2 Emissions Limit (in grams)	Corresponding Fuel economy (in miles per gallon)	Model Year	CO2 Emissions Limit (in grams)	Corresponding Fuel economy (in miles per gallon)
2009	336	27.0 mpg	2009	452	20.1 mpg
2010	314	28.9 mpg	2010	433	21.0 mpg
2011	280	32.4 mpg	2011	403	22.5 mpg
2012	246	36.9 mpg	2012	374	24.2 mpg
2013	245.5	36.9 mpg	2013	373.5	24.3 mpg
2014	240.5	37.7 mpg	2014	368.5	24.6 mpg
2015	231.5	39.2 mpg	2015	359.5	25.2 mpg
2016	223.5	40.6 mpg	2016	350.5	25.9 mpg

Sep. State. Fact Nos. 20-21. Thus, even accounting for the maximum reduction of the other regulated substances, the regulations still place strict limits on – and require dramatic reductions in – CO2 emissions.

## 2. The AB 1493 Regulations Are Based On The Use Of Technologies That Improve Fuel Economy.

In setting the numerical standards for the AB 1493 Regulations, CARB made an assessment of the technologies automakers could use to reduce carbon dioxide emissions from their vehicles. Not surprisingly, because the regulations require improvements in fuel economy (by CARB’s own admission), all of the technologies relied on by CARB in the rulemaking are fuel savings technologies. These so-called “Carbon Dioxide Reduction Technologies” include “valvetrain, transmission, vehicle accessory, hybrid-electric, and overall vehicle modifications designed to reduce engine exhaust CO<sub>2</sub> emissions from conventional vehicles.” *Sep. State. Fact No. 22; Cal Air Res. Bd., Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles 49-69* [hereinafter ISOR] (attached as Exhibit 1 to the Request for Judicial Notice filed concurrently herewith). These technologies are set forth in Table 5.2-3 of the ISOR and are discussed in greater detail in Section 5.2A of the ISOR. *Id.*

None of these Carbon Dioxide Reduction Technologies cause reductions in CO2 emissions by capturing or treating tailpipe CO2 emissions. *Sep. State. Fact No. 24.* As discussed above, that is not

1 possible. Rather, these technologies consist primarily of improvements to the engine and  
2 transmission that reduce fuel consumption. *Id.* Any reduction in CO2 emissions is simply a  
3 consequence of the fact that less fuel is burned to power the vehicle. *Id.* These technologies,  
4 therefore, are by and large the very same technologies NHTSA considered in determining the  
5 “maximum feasible average fuel economy level” for light-duty trucks in its recent rulemaking.  
6 *Compare ISOR at 49-69, with Light Truck Standards, 71 Fed. Reg. at 17583-585; see also Light*  
7 *Truck Standards, 71 Fed. Reg. at 17661* (“The technologies that would be employed to reduce CO2  
8 emissions are, in all relevant ways, the same technologies as underlie NHTSA’s judgment about the  
9 appropriate CAFE standards for light-duty trucks”).<sup>10</sup>

10 Moreover, CARB staff admits that the only feasible and cost effective means they assessed in  
11 the rulemaking for reducing carbon dioxide emissions is use of fuel savings technologies:

12 [Q] Has there been any modeling, analysis or testing by the Air Resources Board or  
13 at the Air Resources Board's direction or that the Air Resources Board has relied upon  
14 to identify the feasibility of reducing CO2 tailpipe emissions through methods other  
15 than by adding technologies that improve fuel economy?

16 [Objection interposed]

17 THE WITNESS: The technologies we modeled are all listed in the ISOR. Since those  
18 technologies reduce the emissions of CO2, then clearly they have an impact on fuel  
19 economy.

20 \* \* \*

21 [Q] Identify if you are aware of any modeling, testing or analysis conducted by or on  
22 behalf of the Air Resources Board that demonstrates the feasibility of reducing CO2  
23 tailpipe emissions through any method other than by adding technologies to the  
24 vehicle that improve fuel economy.

25 A. I am not aware of any.

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26 <sup>10</sup> NHTSA’s technology assessments was based in part on a 2002 report by the National Academy  
27 of Sciences entitled “Effectiveness and Impact of Corporate Average Fuel Economy (CAFE)  
28 Standards.” *Light Truck Standards, 71 Fed. Reg. at 17572. See Nat’l Acad. of Sci., Effectiveness*  
*and Impact of Corporate Average Fuel Economy (CAFE) Standards 3 (2002) [hereinafter NAS*  
*CAFE Study]* (attached as Exhibit 2 to the Request for Judicial Notice). The report assessed over  
two dozen different technologies in terms of their ability to reduce fuel consumption, their  
applicability to various classes of motor vehicles, and cost. These technologies include advanced  
engine technologies (such as variable valve timing, cylinder deactivation and engine downsizing  
and turbocharging), transmission technologies (such as the use of five-speed and six-speed  
transmissions and continuously variable transmissions), and the use of hybrid-electric engines.  
*Id.* at 35-39.

1 *Hughes Depo.* at 179:18-180:7; 181:11-17; *see also Albu Depo.* at 435:20-436:22 (testifying that the  
 2 only cost-effective means of complying with AB 1493 is incorporating the fuel savings technologies  
 3 discussed in the ISOR and improving air conditioning systems). Therefore, CARB's assessment  
 4 concludes that ninety percent of the greenhouse gas reductions will come from technologies that  
 5 improve fuel economy. *Albu Depo.* at 437:19-22 ("Q. Fair to say that over 90 percent of the  
 6 reductions assumed under AB 1493 will come from technologies that improve fuel economy? A. I  
 7 think that's fair.").

8 **D. The AB 1493 Regulations Are Preempted By EPCA Because They Are "Related  
 9 to Fuel Economy Standards"**

10 The discussion above demonstrates that carbon dioxide emissions and fuel economy are flip  
 11 sides of the same coin, and that because the AB 1493 Regulations place strict limits on carbon  
 12 dioxide emissions from motor vehicles, they are directly and inextricably "related to fuel economy  
 13 standards." 49 U.S.C. § 32919(a). NHTSA, the federal agency that is responsible for implementing  
 14 EPCA, agrees that such regulations are preempted:

15 In mandating federal fuel economy standards under EPCA, Congress has expressly  
 16 preempted any state laws or regulations relating to fuel economy standards. A State  
 17 requirement limiting CO<sub>2</sub> emissions is such a law or regulation because it has the  
 18 direct effect of regulating fuel consumption. CO<sub>2</sub> emissions are directly linked to fuel  
 19 consumption because CO<sub>2</sub> is the ultimate end product of burning gasoline. Moreover,  
 20 because there is but one pool of technologies for reducing tailpipe CO<sub>2</sub> emissions and  
 21 increasing fuel economy available now and for the foreseeable future, regulation of  
 22 CO<sub>2</sub> emissions and fuel consumption are inextricably linked. It is therefore NHTSA's  
 23 conclusion that such regulation is expressly preempted.

24 *Light Truck Standards*, 71 Fed. Reg. at 17654.<sup>11</sup>

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25 <sup>11</sup> In its September 25 Order denying the Defendants' Motion for Judgment on the Pleadings, this  
 26 Court correctly noted that "it is also appropriate to 'place some weight' upon NHTSA's  
 27 interpretation of the EPCA's objectives." *September 25 Order* at 10 (quoting *Geier v. American  
 28 Honda Motor Co.*, 529 U.S. 861, 883-84, 120 S. Ct. 1913, 146 L. Ed.2d 914 (2000)). *See also  
 Indus. Truck Ass'n v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997) ("[a]n agency's interpretation  
 of the preemptive effect of its regulations is entitled to deference where Congress has delegated  
 authority to the agency, the agency's interpretation is not contrary to a statute, and agency  
 expertise is important to determining preemption."). Agency deference is especially appropriate  
 where, as here, the agency "is likely to have a thorough understanding of its own regulation and  
 its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements."  
*September 25 Order* at 10 (quoting *Geier*, 529 U.S. at 883).

1 Congress's intent to preempt broadly any and all state action in the area of fuel economy is set  
 2 forth unambiguously in the language of EPCA, which preempts any state law or regulation "related  
 3 to fuel economy standards or average fuel economy standards for automobiles." 49 U.S.C.  
 4 § 32919(a). As discussed above, this preemption provision is without exception, and the legislative  
 5 history shows that it was worded intentionally broad. *See* p. 8, *infra*.

6 "For purposes of the present case, the key phrase, obviously, is 'relat[ed] to.'" *Morales v.*  
 7 *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). The Supreme Court consistently has held that  
 8 preemption provisions "related to" a particular field express a broad preemptive purpose. In  
 9 *Morales*, for example, the Supreme Court held that certain state air travel industry guidelines  
 10 governing the content and format of advertising for airline fares, frequent flier miles, and  
 11 compensation for overbooking were preempted by the Airline Deregulation Act. That Act expressly  
 12 preempted the states from "enacting or enforcing any law, rule, regulation, standard, or other  
 13 provision having the force and effect of law relating to rates, routes, or services of any air  
 14 carrier . . . ." *Morales*, 504 U.S. at 383. In holding that the Act preempted the state guidelines, the  
 15 Court relied on the expansive phrase "relating to." "The ordinary meaning of these words is a broad  
 16 one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association  
 17 with or connection with' – and the words thus *express a broad pre-emptive purpose.*" *Id.* (emphasis  
 18 added) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). The Court analogized the "relating  
 19 to" language from the Airline Deregulation Act with the preemption clause in the Employee  
 20 Retirement Income Security Act of 1974 ("ERISA"), which preempts all state laws "insofar as they  
 21 . . . relate to any employee benefit plan":

22 We have said, for example, that the "breadth of [that provision's] pre-emptive reach is  
 23 apparent from [its] language," [*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96  
 24 (1983)]; that *it has a "broad scope,"* *Metropolitan Life Ins. Co. v. Massachusetts*, 471  
 25 U.S. 724, 739 (1985), and *an "expansive sweep,"* *Pilot Life Ins. Co. v. Dedeaux*, 481  
 26 U.S. 41, 47 (1987); and that it is "*broadly worded,*" *Ingersoll-Rand Co. v.*  
 27 *McClendon*, 498 U.S. 133, 138 (1990), "*deliberately expansive,*" *Pilot Life*, [481  
 28 U.S.] at 46, and "*conspicuous for its breadth,*" [*FMC Corp. v. Holliday*, 498 U.S. 52,  
 58 (1990)].

*Morales*, 504 U.S. at 383-84 (emphasis added); *see also Engine Mfrs. Ass'n v. S. Coast Air Quality*  
*Mgmt. Dist.*, 541 U.S. 246 (2004) (certain aspects of fleet rules adopted by the air quality district that

1 prohibited the purchase or lease by various public and private fleet operators of vehicles that did not  
 2 comply with stringent emission requirements were “related to” the control of emissions and were  
 3 therefore preempted under the Clean Air Act).

4 The Defendant likely will cite to the *Travelers* case and argue that the phrase “related to” is  
 5 not unbounded because, “[i]f ‘relate to’ were taken to extend to the furthest stretch of its  
 6 indeterminacy, then for all practical purposes pre-emption would never run its course, for ‘really,  
 7 universally, relations stop nowhere.’” *New York State Conference of Blue Cross & Blue Shield Plans*  
 8 *v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). *Travelers*, however, does not require a narrow  
 9 reading of the “related to” language. Rather, that case merely stands for a common-sense restriction  
 10 on the “related to” language – that “pre-emption does not occur . . . if the state law has only a  
 11 **tenuous, remote, or peripheral connection with**” the preempted field. *Travelers*, 514 U.S. at 661  
 12 (emphasis added) (quoting *Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 n.1  
 13 (1992)); see also *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev.*  
 14 *Comm’n*, 410 F.3d 492, 502 (9th Cir. 2005) (“The issue is whether the relation is ‘indirect, remote,  
 15 and tenuous’ or not.”) (quoting *Californians For Safe & Competitive Dump Truck Transp. v.*  
 16 *Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998)).<sup>12</sup> In fact, the subsequent Supreme Court case of  
 17 *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), reaffirmed *Morales* and described how that case should be  
 18 read with *Travelers*:

19 ERISA’s pre-emption section, 29 U.S.C. § 1144(a), states that ERISA “shall  
 20 supersede any and all State laws insofar as they may now or hereafter relate to any  
 21 employee benefit plan” covered by ERISA. **We have observed repeatedly that this**  
 22 **broadly worded provision is “clearly expansive.”** *New York State Conference of Blue*  
 23 *Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); see, e.g.,  
 24 ***Morales v. Trans World Airlines, Inc.***, 504 U.S. 374, 384 (1992) (listing cases in  
 which we have described ERISA pre-emption in broad terms). But at the same time,  
 we have recognized that the term “relate to” cannot be taken “to extend to the furthest  
 stretch of its indeterminacy,” or else “for all practical purposes pre-emption would  
 never run its course.” *Travelers*, [514 U.S. at 655].

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25  
 26 <sup>12</sup> In the *Air Conditioning* case, the court held that the regulation at issue was not preempted  
 27 because “[t]he relation between placing a manufacturer’s name, the model name, and the date of  
 28 manufacture on an appliance and measures of energy consumption, as defined in EPCA [42  
 U.S.C. § 6297(a)], is indirect, remote, and tenuous.” *Air Conditioning & Refrigeration Inst. v.*  
*Energy Res. Conservation & Dev. Comm’n*, 410 F.3d 492, 502 (9th Cir. 2005).

1 *Egelhoff*, 523 U.S. at 146 (emphasis added).

2 Applying this Supreme Court precedent to the AB 1493 Regulations leads to the inescapable  
 3 conclusion that the regulations violate EPCA’s broad express preemption provision. There can be  
 4 no question that the AB 1493 Regulations are “related to fuel economy standards.” And, there can be  
 5 no credible argument that the regulations have “only a tenuous, remote, or peripheral connection  
 6 with” fuel economy standards. *Travelers*, 514 U.S. at 661. As NHTSA states, fuel economy is  
 7 “virtually synonymous with CO2 emission rates.” *Light Truck Standards*, 71 Fed. Reg. at 17660; *see*  
 8 *also id.* at 17657 (“a State GHG standard is [a] fuel economy standard in almost all but name and  
 9 stated purpose. It would have virtually the same effects as a fuel economy standard.”)<sup>13</sup> CARB’s  
 10 own internal staff analyses mathematically translated the standard for the PC/LDT1 category for the  
 11 2016 model year to a fuel economy of roughly 43 mpg to make clear to management the impact of  
 12 the proposed standards. A relationship cannot be any more direct than that.

13 Finally, the text and structure of EPCA and the regulations promulgated thereunder  
 14 demonstrate that CO2 emissions limits are related to fuel economy standards. “Fuel economy” is  
 15 defined in the statute as “the average number of miles traveled by an automobile for each gallon of  
 16 gasoline (or equivalent amount of other fuel) used, *as determined by the Administrator [of EPA]*  
 17 *under section 32904(c) of this title.*” 49 U.S.C. § 32901(a)(10) (emphasis added). Section 32904(c),  
 18 in turn, provides in relevant part that “[t]he Administrator [of EPA] shall measure fuel economy for  
 19 each model and calculate average fuel economy for a manufacturer under testing and calculation  
 20 procedures prescribed by the Administrator.” 49 U.S.C. § 32904(c). Thus, the statutory definition of  
 21 “fuel economy” must be read in the context of the procedures established by EPA for measuring fuel  
 22 economy. As discussed above, those procedures require fuel economy to be measured based  
 23 primarily on the rate of CO2 emissions from the motor vehicle. 40 C.F.R. § 86.144-90; 40 C.F.R. §  
 24 600.113-93(e). *See also Light Truck Standards*, 71 Fed. Reg. at 17661 (“compliance with federal fuel  
 25

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26 <sup>13</sup> Thus, the fact that these regulations are preempted under EPCA does not mean that other forms of  
 27 state regulation – such as speed limits and gasoline taxes – would also be preempted because such  
 28 regulation would unquestionably fall within a State’s legitimate police powers and have only an  
 “indirect, remote, and tenuous” relationship with fuel economy.

1 economy standards is based primarily on CO2 emission rates of covered vehicles”); *see also id.* at  
 2 17660 (“fuel economy has become virtually synonymous with CO2 emission rates.”). Thus, the  
 3 EPCA statute and the regulations effectively define “fuel economy” based on CO2 emissions.  
 4 Accordingly, the AB 1493 Regulations are expressly preempted under EPCA because they are  
 5 “related to fuel economy standards” and their enforcement should be enjoined.<sup>14</sup>

#### 6 IV. IMPLIED PREEMPTION UNDER EPCA

7 In addition to running afoul of EPCA’s express preemption provision, the AB 1493  
 8 Regulations also are impliedly preempted by EPCA under the doctrines of “field preemption” and  
 9 “conflict preemption.” Each of these doctrines provides an independent basis for finding these  
 10 regulations preempted by federal law.

##### 11 A. The AB 1493 Regulations Are Preempted Because EPCA Occupies The Field Of 12 Fuel Economy Regulation

13 Under the doctrine of “field preemption,” “preemption may be inferred when federal  
 14 regulation in a particular field is ‘so pervasive as to make reasonable the inference that Congress left  
 15 no room for the States to supplement it.’” *Bank of Am. v. City & County of San Francisco*, 309 F.3d  
 16 551, 558 (9th Cir. 2002) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Sayles*  
 17 *Hydro Ass’n v. Maughan*, 985 F.2d 451, 455 (9th Cir. 1993). “When the federal government  
 18 completely occupies a given field or an identifiable portion of it . . . , the test of preemption is

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19  
 20 <sup>14</sup> This holds whether or not the Court narrowly construes EPCA’s preemption provision, as the  
 21 Defendant will likely claim it must. It bears noting, however, that there is no presumption against  
 22 preemption where Congress is regulating “in an area where there has been a history of significant  
 23 federal presence.” *United States v. Locke*, 529 U.S. 89, 108 (2000); *also Buckman Co. v.*  
 24 *Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347-48 (2001) (no presumption against preemption  
 25 because “[p]olicing fraud against federal agencies is hardly ‘a field which the States have  
 26 traditionally occupied’”); *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th  
 27 Cir. 2002) (presumption against federal preemption of state law is inapplicable to federal banking  
 28 regulation because of the history of federal presence in the field). Here, “because the states have  
 not traditionally occupied the field on fuel economy regulation and fuel economy regulation has  
 had a history of significant federal presence, the presumption [against preemption] is not  
 triggered in this action.” *Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017,  
 2002 U.S. Dist. LEXIS 20403, at \*8-\*9 (E.D. Cal. June 11, 2002). Moreover, it is immaterial  
 that California has couched its regulations as “emissions standards” and thereby attempted to  
 argue that they fall within the State’s traditional police power. *Locke*, 529 U.S. at 108-09 (no  
 presumption against preemption even though state law was arguably designed to protect the  
 health and safety of its citizens).

1 whether ‘the matter on which the state asserts the right to act is in any way regulated by the federal  
2 government.’” *Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc.*, 379 F.3d  
3 641, 647 (9th Cir. 2004) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev.*  
4 *Comm’n*, 461 U.S. 190, 212-13 (1983)).

5 Congress’s intent that EPCA occupy the entire field of automobile fuel economy is clear from  
6 two factors. The first is the breadth of EPCA’s express preemption provision. Congress forbade  
7 states from adopting or enforcing any regulation that had any relation to fuel economy standards.  
8 Preemption is not restricted to regulations that actually prescribe fuel economy standards. *See*  
9 *Morales*, 504 U.S. at 385 (“[h]ad the statute been designed to pre-empt state law [only with respect to  
10 actually prescribing rates, routes and services] it would have forbidden the States to ‘regulate rates,  
11 routes, and services.’”). Nor is preemption here restricted to regulations that are actually inconsistent  
12 with EPCA. *Compare Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d.  
13 1056, 1072 (9th Cir. 2005) (“by expressly limiting federal preemption to state requirements that are  
14 inconsistent with the federal regulations, Congress signaled its intent not to occupy the entire field of  
15 payphone regulation.”) Indeed, as discussed above, Congress rejected these more narrow forms of  
16 preemption in enacting the EPCA statute.

17 In this way, the preemption provision found in 49 U.S.C. § 32919 is much broader in scope  
18 and more absolute than the preemption provision found elsewhere in EPCA concerning appliance  
19 testing and labeling (42 U.S.C. § 6297(a)) that the Ninth Circuit considered in *Air Conditioning &*  
20 *Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm’n*, 410 F.3d 492 (9th Cir. 2005). That  
21 section only preempts state labeling regulations that required the disclosure of information “other  
22 than information required under 6294 of this title [establishing federal labeling requirements].” 42  
23 U.S.C. § 6297(a)(1)(B). Therefore, the court found that a state regulation that “only requires  
24 compliance with federal marking requirements” was not preempted by that statute. *Air Conditioning*  
25 *& Refrigeration Inst.*, 410 F.3d at 502. In contrast, EPCA’s preemption of any state law or regulation  
26 “related to fuel economy standards or average fuel economy standards” is without exception or  
27 qualification, and would preempt a state regulation that merely required a manufacturer to comply  
28 with federal CAFE standards.

1 Second, other provisions of EPCA carve out of this broad express preemption provision  
 2 specifically enumerated areas in which states may regulate. For example, EPCA provides that states  
 3 “may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs,” but  
 4 only if those requirements are “identical” to the federal requirements. 49 U.S.C. § 39219(b). EPCA  
 5 also allows a state to “prescribe requirements for fuel economy for automobiles obtained for its own  
 6 use.” 49 U.S.C. § 39219(c). The fact that Congress saw the need to preserve expressly these  
 7 narrowly limited areas of state autonomy shows that it intended EPCA to otherwise occupy the entire  
 8 field of fuel economy regulation.

9 NHTSA has exclusively occupied the field of fuel economy since EPCA’s enactment in 1975.  
 10 Moreover, other than California’s earlier failed attempt with the ZEV amendments, no state has ever  
 11 attempted to regulate fuel economy. Yet as discussed above, the AB 1493 Regulations intrude into  
 12 this field because they have the force and effect of regulating motor vehicle fuel economy. They are  
 13 therefore impliedly preempted by EPCA.

14 **B. The AB 1493 Regulations Are Preempted Because They Conflict With The**  
 15 **Federal CAFE Program**

16 The Supreme Court has described conflict preemption as “pre-empting state law that ‘under  
 17 the circumstances of the particular case . . . stands as an obstacle to the accomplishment and  
 18 execution of the full purposes and objectives of Congress’ -- whether that ‘obstacle’ goes by the  
 19 name of ‘conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency;  
 20 violation; curtailment; . . . interference,’ or the like.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861,  
 21 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, where Congress or a  
 22 federal agency has sought to create a balanced relationship between competing interests through  
 23 comprehensive statutory or regulatory treatment, state law disturbing that balance is preempted. *See,*  
 24 *e.g., Geier*, 529 U.S. at 873 (state tort claim was preempted by federal safety standard where tort  
 25 rules would upset the Department of Transportation’s gradual phase-in of air bags).<sup>15</sup>

26 <sup>15</sup> *See also Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986)  
 27 (congressional determination to reduce federal regulation to allow market forces to set price  
 28 preempts state regulation that would upset intricate cost relationships of the market); *Michigan*  
*Canners & Freezers Ass’n., Inc. v. Agri. Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984)

[Footnote continued on next page]

1 Here, the EPCA statute authorizes NHTSA to set CAFE standards at “the maximum feasible  
 2 average fuel economy level” for a given model year. 49 U.S.C. § 32902(a), (c). Relying on “the  
 3 language of the EPCA and NHTSA’s statements,” this Court previously found that “among the  
 4 objectives of the CAFE program are maximizing fuel economy, avoiding economic harm to the  
 5 automobile industry, maintaining consumer choice, and ensuring vehicle safety.” *September 25*  
 6 *Order* at 10. In the recently enacted Light Truck Standards, for example, NHTSA stated that it  
 7 “balanced the express statutory factors and other relevant considerations, such as safety concerns,  
 8 effects on employment and the need for flexibility to transition to a Reformed CAFE program that  
 9 can achieve greater fuel savings in a more economically efficient way” and “determined that the  
 10 standards under both Unreformed CAFE and Reformed CAFE represent the maximum feasible fuel  
 11 economy level for each system.” *See Light Truck Standards*, 71 Fed. Reg. at 17569. The AB 1493  
 12 Regulations upset the CAFE program’s balance in a number of respects.

13 **1. The AB 1493 Regulations Conflict With EPCA On Their Face Because**  
 14 **They Require More Stringent Fuel Economy And Are Structured**  
 15 **Inconsistently**

16 The first conflict between the two regulatory regimes is how they classify vehicles. The  
 17 CAFE program provides for separate standards for passenger automobiles and light-duty trucks. The  
 18 California regulations, however, split the light-duty truck category into two groups. The smaller  
 19 light-duty trucks (“LDT1s”) are combined with passenger cars for calculating fleet-wide emissions  
 20 and the heavier light-duty trucks (“LDT2s”) are placed in a separate category and classified together  
 21 with certain heavier vehicles, called Medium Duty Passenger Vehicles (“MDPVs”). This difference  
 22 in classification is significant because of the way fleet-wide standards function. Because the smaller  
 23 light duty trucks tend to have higher fuel economy than the larger light duty trucks but lower fuel

24 [Footnote continued from previous page]

25 (Agricultural Fair Practices Act preempts state marketing statute that undermines balanced  
 26 relationship Congress sought to establish between agricultural producers and “handlers”); *Edgar*  
 27 *v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed.2d 269 (1982) (plurality opinion) (noting  
 28 that the Williams Act struck a careful balance between the interests of offerors and target  
 companies and finding that the state statute in question “upset” this balance and therefore was  
 preempted); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 (1st Cir. 1987) (state tort liability  
 preempted when enforcement would be “seriously disruptive to the congressionally calibrated  
 balance of national interests”).

1 economy than passenger cars, removing them from the truck fleet and placing them with the  
 2 passenger cars for compliance purposes has the effect of increasing the stringency of both of the  
 3 fleet-wide standards under AB 1493.

4 Second, the AB 1493 Regulations conflict with the CAFE program in terms of the different  
 5 levels of fuel economy required under each. The current CAFE standard for passenger cars is  
 6 prescribed by statute at 27.5 mpg. 49 U.S.C. § 32902(b); 49 C.F.R. § 531.5. The AB 1493  
 7 Regulations in contrast would require manufacturers to produce a fleet of passenger cars and small  
 8 light duty trucks with a combined average fuel economy of over 36 mpg for the 2012 model year,  
 9 gradually increasing to over 40 mpg by the 2016 model year (assuming full air conditioning credits).  
 10 Thus, by definition the State of California has come to a radically different conclusion than Congress  
 11 about the appropriate level of fuel economy for passenger cars.

12 The AB 1493 Regulations likewise conflict with the light-duty truck CAFE standards, in  
 13 terms of both their different numeric levels and their inconsistent structures. The recently enacted  
 14 Light Truck Standards provide for a transitional “Unreformed CAFE” standard which sets fleet-wide  
 15 CAFE standards at 22.5, 23.1 and 23.5 mpg for the 2008, 2009 and 2010 model years, respectively.  
 16 *Light Truck Standards*, 71 Fed. Reg. at 17566. The regulations then transition to a “Reformed  
 17 CAFE” system starting in 2011 whereby a fuel economy “target” will be calculated for each model of  
 18 light truck based on the model’s “footprint.”<sup>16</sup> *Id.* Pursuant to the formula, models with a smaller  
 19 “footprint” will have a higher, more stringent, fuel economy target, and models with a larger  
 20 “footprint” will have a lower target. *Id.* Each manufacturer’s required fleet-wide CAFE performance  
 21 for a given model year is the production-weighted mean fuel economy target of all the light truck  
 22 models in its fleet. *Id.* at 17607.<sup>17</sup>

23 The transition to an attribute-based approach for CAFE represents a dramatic shift in how  
 24 NHTSA sets fuel economy standards for light-duty trucks. It was specifically recommended by the

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26 <sup>16</sup> The “footprint” is the product of the average track width (the distance between the centerline of  
 the tires) and wheelbase (the distance between the centers of the axles).

27 <sup>17</sup> During a transition period between model years and 2010, manufacturers may elect to comply  
 28 with the Reformed CAFE standard or the Unreformed standard.

1 National Academy of Sciences, which found that “[t]he CAFE program might be improved  
2 significantly by converting it to a system in which fuel economy targets depend on vehicle attributes”  
3 such as vehicle weight or size. *NAS CAFE Study, supra*, at 5. NHTSA adopted this approach for  
4 light-duty trucks only after it carefully considered and weighed EPCA’s competing goals. For  
5 example:

- 6 • Increased Energy Savings: “The Reformed CAFE system increases the energy  
7 savings of the CAFE program over the longer term because fuel saving  
8 technologies will be required to be applied to light trucks throughout the entire  
9 industry, not just by a limited number of manufacturers.” *Id.* at 17618.
- 10 • Economic Practicability: “[Reformed CAFE] prevents adverse economic  
11 consequences by incorporating greater consideration of economic practicability  
12 issues into the projections of the timing and rate at which manufacturers can  
13 introduce fuel economy improving technologies into their fleets, and by setting the  
14 Reformed CAFE standards, beginning in MY 2011, at the level at which marginal  
15 benefits equal marginal costs.” *Id.* at 17568.
- 16 • Consumer Choice: “Reformed CAFE . . . more fully respects economic  
17 conditions and consumer choice” because it “does not force vehicle manufacturers  
18 to adjust fleet mix toward smaller vehicles unless that is what consumers are  
19 demanding.” *Id.* at 17570.
- 20 • Safety: “In addition to the improved energy savings, this CAFE program enhances  
21 safety by eliminating the previous regulatory incentive to downsize vehicles and  
22 by raising the light truck standards so that there is no regulatory incentive from the  
23 CAFE program to design small vehicles as light trucks instead of passenger cars.”  
24 *Id.* at 17568.

25 The AB 1493 Regulations are not based on an attribute approach. Rather, they set a single  
26 uniform average for each fleet – the very approach NHTSA and the NAS CAFE Study found to be  
27 inferior because it could cause adverse safety consequences and economic hardship. All of the  
28 benefits NHTSA sought to secure by enacting the Reformed CAFE program necessarily will be  
swept away if automakers are forced to comply with the more stringent numerical fuel economy  
levels required under AB 1493.

Another direct conflict between the California regulation and new Light Truck Standard is the  
pace at which manufacturers are required to integrate fuel savings technologies across their fleets.<sup>18</sup>  
The Light Truck Standards are based on a six-year phase in period to “reduce the economic impact of

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<sup>18</sup> Recall that the technologies CARB relied on for setting the AB 1493 standards are the same fuel savings technologies NHTSA relied on in setting the Light Truck Standards.

1 applying technology by providing greater flexibility as to when fuel economy improvements are  
 2 expected.” *Light Truck Standards*, 71 Fed. Reg. at 17590. Indeed, the aggressiveness of the phase in  
 3 period was the subject of numerous comments and received very careful consideration by NHTSA, as  
 4 demonstrated by the following discussion in the Federal Register notice:

5 The agency recognizes that vehicle manufacturers must have sufficient lead time to  
 6 incorporate changes and new features into their vehicles. In making its lead time  
 7 determinations, the agency considered the fact that vehicle manufacturers follow  
 8 design cycles when introducing or significantly modifying a product. For the final  
 9 rule, the agency based our lead time assumptions more closely on the findings of the  
 10 NAS report, typically relying on the mid-point of the NAS range for full market  
 11 penetration, i.e., 6 years or approximately a 17 percent phase-in rate.<sup>[19]</sup> As illustrated  
 12 in Appendix B of this document, and as discussed further below, the agency made  
 13 numerous adjustments to timing when applying technologies in order to address lead  
 14 time concerns.

15 *Light Truck Standards*, 71 Fed. Reg. at 17626. The AB 1493 Regulations, however, would require  
 16 auto makers to incorporate the very same fuel reduction technologies, but within a four-year phase in  
 17 period. Sep. State. Fact No. 26. This substantially shorter lead time compared to NHTSA is a facial  
 18 conflict between the regulations. This conflict is particularly significant in light of the admission by  
 19 CARB’s designated witness on lead time, who testified that it will actually take manufacturers up to  
 20 seven years in order to bring their fleets into compliance with the 2012 model year standards.

21 *Deposition of Steve Albu at 272:15-273:19.*

22 **2. The AB 1493 Regulations Conflict With EPCA With Regard To The**  
 23 **State’s Consideration of EPCA’s Statutory Criteria**

24 It is not surprising that California and NHTSA reach such different regulatory outcomes given  
 25 that the State was not required to (and did not) consider the same factors weighed by NHTSA in  
 26 setting CAFE standards. *See* Cal. Health & Safety Code § 43018.5 (setting forth the statutory criteria  
 27 for the regulations). Consider, for example, the impact of the AB 1493 Regulations on employment  
 28 outside of California. Nothing in the statute requires CARB to determine the regulations’ impacts on

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25 <sup>19</sup> The NAS CAFE study states “[t]echnology changes require very long lead times to be introduced  
 26 into the manufacturers’ product lines. Any policy that is implemented too aggressively (that is, in  
 27 too short a period of time) has the potential to adversely affect manufacturers, their suppliers,  
 28 their employees, and consumers. Little can be done to improve the fuel economy of the new  
 vehicle fleet for several years because production plans already are in place. The widespread  
 penetration of even existing technologies will probably require 4 to 8 years.” NAS CAFE Study,  
*supra*, at 5.

1 employment outside of California. *Id.*; *see also Shulock Depo.* at 235:2-11 (“Q. So the law does not  
2 -- the state law does not require you to assess the job loss that may result in the auto industry as a  
3 result of the AB 1493 regulation? A. Outside of California? Q. (Nodding head) A. No. Q.  
4 Okay. And so you made no analysis of that; correct? A. Correct.”).

5 It is, however, the official position of CARB that the regulations will not impact sales  
6 volumes (and thus employment) because (CARB claims) the required fuel savings technologies are  
7 economically feasible and because there is adequate lead time for manufacturers to adopt them.  
8 *Shulock Depo.* at 211:12-212:14. This official position, however, was reached despite a modeling  
9 analysis conducted on behalf of CARB in the rulemaking concluding that the implementation of the  
10 AB 1493 Regulations will result in a 4.7% decrease in new motor vehicle sales in the State of  
11 California. Sep. State. Fact No. 33. That modeling analysis is contained in one of CARB’s  
12 “Technical Support Documents” called “Other Considerations.” *Id.* Mr. Shulock estimated that this  
13 lost sales would amount to roughly 97,000 units in 2020 alone. *Id.*<sup>20</sup> Despite this conclusion,  
14 however, it is undisputed that CARB conducted no formal analysis of the number of jobs that would  
15 be lost in the industry should sales in California fall by 4.7%:

16 Q. Okay. And just to be clear, I'm asking you on behalf of the Air Resources Board  
17 now.

18 Did the Air Resources Board do any kind of study, investigation, data collection,  
19 analysis, anything like that, to assess how many jobs, if at all, would be lost as a result  
of an approximately 5 percent decrease in sales of new motor vehicles in California as  
a result of the AB 1493 regulations?

20 A. No.

21 *Shulock Depo.* at 233:13-20; *see also id.* at 241:6-14 (“Q. My question to you is, did the Air  
22 Resources Board think it was important – ‘yes’ or ‘no,’ it was important or was not important, at the  
23 time of the rulemaking to investigate how many jobs might be lost in the United States if it were true  
24 that there would be a hundred thousand fewer new motor vehicle sales as a result of the regulation?

25 A. Well, I -- cannot say whether we considered it important or not. We did not do it.”); *Hughes*

26 \_\_\_\_\_  
27 <sup>20</sup> Mr. Shulock’s personal opinion is that the regulations will result in some loss of sales volume.  
28 *See Shulock Depo.* at 220:12-221:1 (“My personal opinion is that there will be some loss in sales.  
I do not -- feel able to quantify it.”)

1 *Depo.* at 287:4-8 (“Q. Okay. Has there been any analysis, modeling or testing of the impact on jobs  
2 outside of California in connection with AB-1493's implementation? A. I don't believe so.”); *Sep.*  
3 *State.* Fact Nos. 34-35. There was likewise no analysis conducted of the impact on jobs if the AB  
4 1493 Regulations are implemented in the other states that have adopted them under Section 177 of  
5 the Clean Air Act.<sup>21</sup>

6 Q. And have you made any effort to determine the total amount of lost sales of new  
7 motor vehicles that might occur nationwide if California's regulation is upheld and the  
8 other states that have adopted it also are upheld?

8 A. No.

9 Q. And have you made any effort at all to consider how many job losses might result  
10 from all of those lost new motor vehicle sales if California's regulation is upheld and  
11 the other states that you predict and hope will adopt or have adopted the regulation's  
12 efforts are also upheld?

12 A. On the national level, you're saying?

13 Q. Yeah.

14 A. No.

15 *Shulock Depo.* at 242:7-21; *Sep. State.* Fact Nos. 34-35.

16 Thus, CARB's assessment of the employment impacts of its regulation poses a direct conflict  
17 with NHTSA's implementation of the CAFE program in either one of two ways. If CARB has  
18 indeed concluded that the AB 1493 Regulations will have no impact on sales or employment, then it  
19 conflicts with NHTSA's determination that the Light Truck Standards – which are far less stringent  
20 than the AB 1493 standards – would result in a decrease in sales volume of just under 11,000 units  
21 per year, and a resulting negative impact on employment that it determined would be insignificant.  
22 *See Final Regulatory Impact Analysis, Corporate Average Fuel Economy and CAFE Reform For MY*  
23 *2008-2011 Light Trucks* (attached as Exhibit 3 to the Request for Judicial Notice) at VII-16 (Table  
24 VII-7b); *Light Truck Standard*, 71 Fed. Reg. at 17591. Alternatively, if the conclusion in CARB's  
25 Other Considerations document is correct and the regulations will cause a decrease in sales of up to  
26 4.7% in those states adopting them, then CARB proceeded with its rulemaking without even

27 <sup>21</sup> Section 177 allows states other than California to adopt the California emissions standard instead  
28 of being governed by the federal scheme. 42 U.S.C. § 7507.

1 assessing what sort of employment impact this loss would have on the automobile industry. Either  
2 approach is entirely inconsistent with how NHTSA implements the employment-related goals of the  
3 CAFE program.

4 Safety is another consideration where CARB's rulemaking conflicts with NHTSA's balancing  
5 approach. It is NHTSA's view that there is a link between fuel economy and vehicle safety in that  
6 "[t]he historical fact is . . . that carmakers respond to CAFE standards by reducing the size of their  
7 fleets." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 325 (D.C.  
8 Cir. 1992). Indeed, the NAS CAFE Study states that:

9 the evidence is clear that past downweighting and downsizing of the light-duty vehicle  
10 fleet, while resulting in significant fuel savings, has also resulted in a safety penalty.  
11 In 1993, it would appear that the safety penalty included between 1,300 and 2,600  
12 motor vehicle crash deaths that would not have occurred had vehicles been as large  
13 and heavy as in 1976.

14 *NAS CAFE Study, supra*, at 28. NHTSA, therefore, is on record as saying that any change in CAFE  
15 standards will only be made after careful consideration of its safety impacts. *Reforming the*  
16 *Automobile Fuel Economy Standards Program*, 68 Fed. Reg. 74908-01 at 74913 (Dec. 29, 2003); *see*  
17 *also Passenger Automobile Average Fuel Economy Standards for Model Years 1987-88*, 51 Fed.  
18 Reg. 35594, 35613 (Oct. 6, 1986). *Passenger Automobile Average Fuel Economy Standards for*  
19 *Model Year 1989*, 53 Fed. Reg. 39275, 39294 (Oct. 6, 1988).

20 CARB's rulemaking conflicts with NHTSA by not considering any connection between more  
21 stringent fuel economy regulations, vehicle downsizing and any resultant impact on safety. This  
22 omission was an artifact of the AB 1493 statute, which provides that the regulations adopted by  
23 CARB shall not "require" a reduction in vehicle weight. Cal. Health & Safety Code § 43018.5(d)(3).  
24 CARB staff construed this to mean that they could not even consider whether weight reduction would  
25 be a cost-effective compliance option (even if not explicitly required):

26 Q. Has there been any analysis, modeling or testing of the cost-effectiveness of  
27 down-weighting as opposed to including various technologies for purposes of  
28 increasing fuel economy or decreasing greenhouse gas emissions in order to comply  
with AB-1493?

[Objection interposed]

THE WITNESS: No. We were specifically instructed by AB-1493 not to consider  
weight reduction so we didn't examine that arena.

1 *Hughes Depo.* at 287:9-18; *Sep. State.* Fact Nos. 38-39. Thus, CARB conducted no analysis of  
2 whether the regulations would have any impact on vehicle safety:

3 Q. Now, sir, has there been any analysis, modeling or testing of the safety impact of  
4 AB-1493?

5 A. I am not aware of any.

6 Q. Okay. And again, you are speaking now as the designated representative of the  
7 Air Resources Board; correct?

8 A. Yes.

9 *Id.* at 286:19-287:3; *Sep. State.* Fact Nos. 38-39.

10 The Defendant likely will respond by saying that manufacturers can comply with the  
11 regulations in a cost effective manner without downsizing their vehicles, and there should therefore  
12 be no impact on safety. The point, however, is not whether CARB is right or wrong on this question.  
13 Rather, the point is that CARB's conclusion and its overall lack of consideration of safety impacts  
14 conflicts with the approach required to be taken by NHTSA. In contrast to NHTSA's (and the NAS  
15 CAFE Study's) conclusions regarding the relationship between more stringent fuel economy  
16 standards, vehicle downsizing, and safety, CARB has set a standard that requires improvements in  
17 fuel economy by over 45% over the current CAFE standard, and blithely shrugs off any safety  
18 consequences as a non-issue.

19 Moreover, even if the more stringent fuel economy required by the AB 1493 Regulations  
20 were by themselves to have no safety impacts, their structure conflicts with NHTSA's safety-related  
21 considerations in adopting an attribute-based approach for light trucks. That agency concluded that  
22 this new approach optimizes vehicle safety because it eliminates a "regulatory incentive to downsize  
23 vehicles," which in NHTSA's view reduces safety. *Light Truck Standards*, 71 Fed. Reg. at 17568.  
24 By setting a single numeric standard for each fleet instead of enacting an attribute-based standard, the  
25 AB 1493 Regulations necessarily conflict with NHTSA's approach for ensuring vehicle safety.

26 It is therefore beyond dispute that the mere act of CARB's adopting a regulation that  
27 effectively mandates fuel economy greatly in excess of the requirements of the federal CAFE  
28 program creates an inexorable conflict. "In selecting the maximum feasible level, NHTSA strives to  
set the standards *as high as it can* without causing significant adverse consequences for the

1 manufacturers or consumers.” *Light Truck Standards*, 71 Fed. Reg. at 17668 (emphasis added). “The  
2 process of achieving those goals involves great expertise and care.” *Id.* Thus, as NHTSA has  
3 determined, any state regulation of CO2 emissions outside of the CAFE program “would ‘abrogate  
4 EPCA’s regime,’ rendering NHTSA’s careful balancing of consideration[s] a nullity” because the  
5 fuel economy of the cars sold in all states which have adopted the AB 1493 Regulations would not be  
6 determined by the federal CAFE standard, but rather by the more stringent AB 1493 standard. *Id.*  
7 (citation omitted). Because the AB 1493 Regulations conflict with the federal CAFE program, they  
8 are impliedly preempted by EPCA.

9 **V. CONCLUSION**

10 The essential facts of this case are beyond dispute and establish that the AB 1493 Regulations are  
11 preempted by federal law. EPCA preempts any state regulation “related to fuel economy standards.”  
12 California has promulgated a regulation limiting vehicular emissions of CO2, which by all accounts  
13 is the functional equivalent of a fuel economy standard. Moreover, the regulations effectively require  
14 vehicle manufacturers to improve the fuel economy of their fleets because doing so is the only  
15 practical means of reducing tailpipe CO2 emissions. Finally, Because these regulations require fuel  
16 economy levels greatly in excess of those established by the Federal Government, they create a direct  
17 and inexorable conflict with the CAFE program administered by the National Highway Traffic Safety  
18 Administration.

19 DATED: November 8, 2006

20 KIMBLE, MACMICHAEL & UPTON

21  
22 By: \_\_\_\_\_ /s/  
Jon Wallace Upton

23 Attorneys for Intervenor,  
24 Association of International Automobile Manufacturers

25 Attorneys for The Association of International  
26 Automobile Manufacturers

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