

1 BILL LOCKYER  
Attorney General of the State of California  
2 MARY E. HACKENBRACHT  
Senior Assistant Attorney General  
3 ELLEN M. PETER, State Bar No. 72234  
Supervising Deputy Attorney General  
4 LINDA L. BERG, State Bar No. 194667  
CARYN L. CRAIG, State Bar No. 185621  
5 NICHOLAS STERN, State Bar No. 148308  
Deputy Attorneys General  
6 1300 "I" Street, Suite 125  
P.O. Box 944255  
7 Sacramento, CA 94244-2550  
JOSEPH BARBIERI, State Bar No. 83210  
8 GAVIN G. McCABE, State Bar No. 130864  
MARC N. MELNICK, State Bar No. 168187  
9 Deputy Attorneys General  
1515 Clay Street, 20th Floor  
10 P.O. Box 70550  
Oakland, CA 94612-0550  
11 Telephone: (510) 622-2133  
Fax: (510) 622-2270

12 Attorneys for Defendant Catherine E. Witherspoon

13 *Additional Counsel on Next Page*

14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE EASTERN DISTRICT OF CALIFORNIA — FRESNO DIVISION  
16

17 CENTRAL VALLEY CHRYSLER-JEEP,  
INC.; et al.,  
18 Plaintiffs,  
19 v.  
20 CATHERINE E. WITHERSPOON, in her  
official capacity as Executive Officer of the  
21 California Air Resources Board,  
22 Defendant,  
23 ASSOCIATION OF INTERNATIONAL  
AUTOMOBILE MANUFACTURERS,  
24 Plaintiff-Intervenor,  
25 SIERRA CLUB, NATURAL RESOURCES  
26 DEFENSE COUNCIL, ENVIRONMENTAL  
27 DEFENSE, BLUEWATER NETWORK,  
GLOBAL EXCHANGE and RAINFOREST  
28 ACTION NETWORK,  
Defendant-Intervenors.

NO. CIV F-04-6663 REC LJO

**DEFENDANT AND DEFENDANT-  
INTERVENORS' MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF THEIR MOTION FOR  
JUDGMENT ON THE PLEADINGS**

Hearing: August 18, 2006  
Time: 8:30 a.m.  
Courtroom: One  
Judge: Honorable Robert E. Coyle

1 DAVID D. DONIGER, State Bar No. 76262  
NATURAL RESOURCES DEFENSE COUNCIL  
2 1200 New York Ave., NW  
Washington, DC 20005  
3 Tel: (202) 289-2403  
Fax: (202) 789-0859  
4

MATTHEW F. PAWA (*pro hac vice*)  
5 BENJAMIN KRASS (*pro hac vice*)  
LAW OFFICES OF MATTHEW F. PAWA, P.C.  
6 1280 Centre Street, Suite 230  
Newton Centre, MA 02459  
7 Tel: (617) 641-9550  
Fax: (617) 641-9551  
8

DAVID BOOKBINDER (*pro hac vice*)  
9 SIERRA CLUB  
408 C Street, NE  
10 Washington, DC 20002  
Tel: (202) 548-4598  
11 Fax: (202) 547-6009

12 JAMES T.B. TRIPP (of counsel)  
ENVIRONMENTAL DEFENSE  
13 257 Park Avenue South  
New York, NY 10010  
14 Tel: (212) 616-1247  
Fax: (212) 505-2375  
15

Attorneys for Defendant-Intervenors Sierra Club, Natural  
16 Resources Defense Council, and Environmental Defense

17 DANIELLE R. FUGERE, State Bar No. 160873  
18 BLUEWATER NETWORK  
311 California Street, Suite 510  
19 San Francisco, CA 94104  
Tel: (415) 544-0790 x15  
20 Fax: (415) 544-0796

21 Attorneys for Defendant-Intervenors Bluewater Network,  
Global Exchange, and Rainforest Action Network  
22  
23  
24  
25  
26  
27  
28

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1 **INTRODUCTION**

2 Since 1967, the federal Clean Air Act has authorized California to set separate emission  
3 standards for new cars sold in California. Acting under the Clean Air Act’s grant of authority,  
4 California has led the nation for nearly 40 years in the development of technologies to reduce  
5 motor vehicle air pollution. Today, California is continuing that leadership by requiring  
6 reductions in greenhouse gas emissions from motor vehicles, which are responsible for 40  
7 percent of the State’s greenhouse gas emissions. Exercising its federal Clean Air Act authority,  
8 it has enacted a state law, California Health and Safety Code section 43018.5, and established  
9 standards to reduce motor vehicle emissions of four air pollutants that contribute to global  
10 warming.

11 California has a compelling interest in reducing greenhouse gas emissions. Global  
12 warming threatens the health of the State’s citizens by increasing the severity of heat waves and  
13 smog episodes. It harms coastal areas by causing sea levels to rise. It further reduces  
14 California’s chronically scarce water resources by decreasing mountain snowpacks and changing  
15 runoff patterns. It contributes to more severe wildfires that threaten large inhabited areas. And it  
16 threatens California’s economy with many direct and indirect impacts, including increased  
17 energy demands from rising temperatures, increased health care costs, increased business  
18 uncertainty and increased insurance rates. California’s standards will help curb global warming  
19 and reduce the severity of these impacts.

20 Instead of taking responsibility for its contribution to global warming, however, the  
21 automobile industry has chosen litigation. Plaintiffs, various automobile manufacturers, trade  
22 associations and dealers, filed this action to invalidate California’s greenhouse gas regulations,  
23 alleging that California’s standards are preempted under an assortment of federal laws and  
24 policies. All of their claims fail as a matter of law.

25 Plaintiffs claim that the Clean Air Act forbids regulation of greenhouse gas emissions,  
26 pointing to the federal Environmental Protection Agency (EPA) decision not to regulate them.  
27 But the Clean Air Act allows the regulation of “air pollutants,” and Plaintiffs cannot reasonably  
28 contend that the four greenhouse gases subject to California’s regulations are not the type of

1 chemical and physical substances defined in the Act as air pollutants. 42 U.S.C. § 7602(g). That  
2 EPA to date has chosen not to regulate greenhouse gases does not preclude California from  
3 moving ahead, because Congress contemplated that California could regulate air pollutants even  
4 where EPA has chosen not to. *See infra* at 14-15.

5 Plaintiffs’ primary claim, however, is that the federal Energy Policy and Conservation  
6 Act (EPCA) preempts California’s greenhouse gas emission standards. In their view,  
7 California’s standards impermissibly “relate to” EPCA’s fuel economy standards because the  
8 reduction of carbon dioxide emissions (one of the four regulated greenhouse gas pollutants)  
9 improves fuel economy. But Plaintiffs’ argument is miscast as a traditional preemption claim.  
10 To understand Congress’s objectives and determine whether Congress intended to preempt  
11 California emission standards, this Court must consider the joint policy established by EPCA and  
12 the Clean Air Act.

13 The two federal statutes together confirm California’s authority to set motor vehicle  
14 emission standards for air pollutants, including greenhouse gases that contribute to global  
15 warming. Since 1967, the Clean Air Act has authorized California to establish its own emission  
16 standards for new vehicles. When Congress enacted EPCA in 1975 and created fuel economy  
17 standards, it was aware that California emission standards under the Clean Air Act might affect  
18 fuel economy, sometimes positively and sometimes negatively. Although Congress at that time  
19 could have prohibited automobile emission standards that affected fuel economy, Congress did  
20 the opposite—it required that the Secretary of Transportation take the fuel economy effects of  
21 California emission standards into account in setting fuel economy standards.

22 Amending the Clean Air Act two years later, Congress had a second chance to limit  
23 automobile emission standards that affected fuel economy. Instead, it reaffirmed that California  
24 had the “broadest possible discretion” to adopt its own automobile emission standards. H.R.  
25 Rep. No. 95-294, at 301-02 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1380-81. Thus, both  
26 the language and legislative history of these two federal laws demonstrate that EPCA does not  
27 preempt California’s federally authorized automobile emission standards, even if they have the  
28 effect on fuel economy that Plaintiffs allege.

1 None of Plaintiffs’ remaining claims have merit. California’s federally authorized  
2 emission standards are not in conflict with federal foreign policy, and they promote the national  
3 global warming policy embodied in a ratified international treaty. Likewise, there is no dormant  
4 commerce clause issue when a State engages in regulatory action that is expressly authorized by  
5 federal law. Finally, California’s emission standards do not compel anyone to violate federal  
6 antitrust laws.

7 The Court should enter judgment on the pleadings in California’s favor on all claims.

### 8 **BACKGROUND—CHALLENGED REGULATIONS**

9 Adoption of California Health and Safety Code Section 43018.5. Section 209 of the  
10 Clean Air Act authorizes California to adopt its own motor vehicle emission regulations. *See* 42  
11 U.S.C. § 7543(b); *Motor & Equip. Mfrs. Ass’n v. Env’tl. Prot. Agency (“MEMA I”)*, 627 F.2d  
12 1095 (D.C. Cir. 1979). The special role that the Act assigns California will be explained in  
13 section I.A.

14 This action concerns greenhouse gas emission standards that California adopted under its  
15 Clean Air Act authority. In 2002, the California Legislature enacted California Health and  
16 Safety Code section 43018.5 as part of California’s “Vehicular Air Pollution Control”  
17 provisions, Cal. Health & Safety Code §§ 43000-4299.85. Section 43018.5(a) requires that the  
18 California Air Resources Board (“ARB”) adopt regulations “that achieve the maximum feasible  
19 and cost-effective reduction of greenhouse gas emissions from motor vehicles.”

20 In enacting section 43018.5, the California Legislature found that “[g]lobal warming is a  
21 matter of increasing concern for public health and the environment in the state” and that “[t]he  
22 control and reduction of emissions of greenhouse gases are critical to slow the effects of global  
23 warming.” 2002 Stats. Cal., ch. 200, § 1(a), (c) (uncodified). The Legislature identified the  
24 “compelling and extraordinary impacts” from global warming that would occur in California.  
25 These include: (1) reductions in the State’s water supply; (2) adverse impacts from increased air  
26 pollution caused by higher temperatures; (3) adverse impacts to food production caused by  
27 changes in water supply and the significant increase in pestilence outbreaks; (4) the doubling of  
28 catastrophic wildfires; (5) potential damage to the State’s coastline and ocean ecosystems from

1 increased storms and sea level rise; and (6) adverse economic impacts due to such things as the  
2 increased costs of food, water, energy, insurance, and public health infrastructure. *Id.* § 1(d).

3         The Legislature’s findings emphasize California’s responsibility to address the motor  
4 vehicle sources that cause global warming. The findings recognize that California has the  
5 world’s fifth largest economy and that its motor vehicle emissions account for 40 percent of the  
6 State’s greenhouse gas emissions. They also recognize that “California has a long history of  
7 being the first in the nation to take action to protect public health and the environment, and the  
8 federal government has permitted and even encouraged the State to take those actions.” *Id.* §  
9 1(b), (e), (f).

10         Section 43018.5 requires ARB to adopt regulations that achieve “the maximum feasible  
11 and cost-effective reduction of greenhouse gas emissions” from motor vehicles manufactured in  
12 model year 2009 and later. Cal. Health & Safety Code § 43018.5(a); *see id.* § 43018.5(i)(1)  
13 (defining “greenhouse gases”). “Maximum feasible and cost-effective reduction” is defined to  
14 mean “[c]apable of being successfully accomplished within the time provided in this section,  
15 taking into account environmental, economic, social, and technological factors” and  
16 “[e]conomical to an owner or operator of a vehicle, taking into account the full life-cycle costs of  
17 a vehicle.” *Id.* § 43018.5(i)(2); *see also id.* § 43018.5(c)(1), (c)(2) (requiring ARB to consider  
18 technological feasibility and economic impact).

19         Section 43018.5 also requires that ARB provide automakers alternative methods of  
20 compliance and grant them credits for early reductions. *Id.* § 43018.5(c)(3), (c)(5). It prohibits  
21 new fees and taxes, weight reduction requirements, limits on speed or vehicle miles traveled, and  
22 bans on any category of vehicle. *Id.* § 43018.5(d).

23         Adoption of Greenhouse Gas Emission Regulations. After the enactment of section  
24 43018.5, the Air Resources Board staff proposed regulatory amendments adding greenhouse gas  
25 emission standards to the State’s existing motor vehicle standards. (First Amended Complaint  
26 (“FAC”), filed Feb. 16, 2005, Exh. A, at 6.) These proposed amendments addressed four  
27 greenhouse gases: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. See Cal.  
28 Code Regs. tit. 13, § 1961.1(e)(4). After allowing opportunity for public comment, including

1 representatives from the automobile industry, ARB approved the proposed amendments at a  
2 public hearing in September 2004. (FAC ¶ 8; *see* FAC, Exh. A (Resolution 04-28).) ARB,  
3 acting through its Executive Officer in its normal process, later took final action and adopted  
4 regulatory language. (FAC, Exh. A, at 14-15; Request for Judicial Notice (“RJN”), Exhs. A &  
5 B.)<sup>1/</sup>

6 In its findings, ARB found that “[o]ver the past century the temperatures in the northern  
7 hemisphere have changed at a rate faster than at any other time over the last millennium, and that  
8 change is because human activities are altering the chemical composition of the atmosphere  
9 through the buildup of greenhouse gases and other pollutants.” (FAC, Exh. A, at 9.) ARB also  
10 found “no scientific uncertainty” about this, and cited the International Panel on Climate Change  
11 and the National Research Council for the proposition that “the global climate is changing at a  
12 rate unmatched in the past one thousand years.” (*Id.* at 9.) It identified how climate change is  
13 profoundly affecting California. (*Id.*)

14 ARB found that the proposed greenhouse gas emission standards would meet section  
15 43018.5’s requirements of technological feasibility and cost-effectiveness. (FAC, Exh. A, at 9-  
16 11.) It found that the required technology is or will soon be available. (*Id.* at 10.) It also found  
17 that the standards would benefit consumers because the technology packages on which the  
18 standards were based would result in a net savings to the consumer over a vehicle’s lifecycle.  
19 (*Id.* at 11.) Finally, ARB found that these emission standards would significantly reduce both  
20 greenhouse gas emissions and other forms of air pollution. (*Id.* at 14.)

21 The emission standards are not focused only on carbon dioxide. The final standards  
22 establish overall emission limits for all four greenhouse gases combined, weighting each gas  
23 emitted from motor vehicles according to its “global warming potential,” an accepted measure of  
24 its relative strength as a greenhouse gas. Cal. Code Regs. tit. 13, § 1961.1(e)(6). The standards  
25 give each automobile manufacturer flexibility to decide the relative emphasis for reducing each  
26 of the emissions in the different vehicles in its fleet. *Id.* § 1961.1(e)(6).

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27  
28 1. The Court may rely on documents that are subject to judicial notice. *Heliotrope  
General, Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999).

1 To provide further flexibility, the standards establish “fleet average” emission levels for  
2 vehicles that are produced and delivered for sale in California each model year. *Id.* §  
3 1961.1(a)(1)(A). The amendments set two fleet average standards, one for passenger cars and  
4 smaller light duty trucks, and another for larger light duty trucks and medium duty passenger  
5 vehicles. *Id.* § 1961.1(a)(1)(A)(table), (d). These standards begin with model year 2009 and  
6 become more stringent, in steps, through model year 2016. *Id.* § 1961.1(a)(1)(A) (table).  
7 Manufacturers with California sales of less than 60,000 vehicles in a model year can opt to defer  
8 compliance until model year 2016. *Id.* § 1961.1(a)(1)(C), (a)(1)(D).

9 Manufacturers receive credits for meeting the standards before model year 2009 and for  
10 surpassing the standards in any later year. These credits can be “banked” for use in a later year,  
11 transferred between a manufacturer’s smaller and larger vehicle categories, or sold to another  
12 manufacturer. *Id.* § 1961.1(b)(1)(A), (B). Manufacturers also may “equalize” their emission  
13 levels over five years, allowing them to miss the standards in a given model year so long as those  
14 levels are offset within that five-year period. *Id.* § 1961.1(b)(3).

15 The standards provide still more flexibility through an alternative compliance provision  
16 based on the use of alternative fuels, such as ethanol, that produce lower greenhouse gas  
17 emissions than gasoline over their full production life-cycle. *Id.* § 1961.1(a)(1)(B).  
18 Manufacturers whose vehicles use these alternative fuels earn credit towards compliance with  
19 California’s emission standards. Cal. Code Regs. tit. 13, § 1961.1(a)(1)(B).

20 On December 21, 2005, ARB submitted these greenhouse gas emission standards to EPA  
21 to obtain the waiver authorized by Clean Air Act section 209(b). (RJN, Exh. C.) EPA has not  
22 yet acted on ARB’s request.

23 Plaintiffs’ Legal Challenge. On February 16, 2005, a coalition of automobile  
24 manufacturers, dealers, an industry trade association and a local farm bureau filed a first  
25 amended complaint against the State of California, naming Catherine Witherspoon, ARB’s  
26 executive officer, as the defendant. The complaint alleges that California’s greenhouse gas  
27 emission regulations are preempted by the federal Energy Policy and Conservation Act (FAC ¶¶  
28 113-15), the Clean Air Act (FAC ¶¶ 122-23) and the federal government’s foreign policy power

1 (FAC ¶ 130). The complaint also alleges that the regulations violate the dormant Commerce  
2 Clause (FAC ¶ 137) and that they force companies to violate federal antitrust laws (FAC ¶ 143).  
3 On October 21, 2005, the Association of International Automobile Manufacturers (AIAM),  
4 another industry trade association, intervened on behalf of Plaintiffs.<sup>2/</sup>

5 California now files this motion for judgment on the pleadings on the complaints of both  
6 Plaintiffs and the Plaintiff-intervenor.

### 7 **BACKGROUND—LEGAL PRINCIPLES**

8 Standard of Review. Judgment on the pleadings is proper when there are no issues of  
9 material fact, and the moving party is entitled to judgment as a matter of law. *General*  
10 *Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*,  
11 887 F.2d 227, 230 (9th Cir. 1989) (citing Fed. R. Civ. P. 12(c)). The court accepts as true the  
12 factual allegations by the party opposing the motion and construes them in the light most  
13 favorable to that party. *Id.* (citing *McGlinchy v. Shell Oil Co.*, 845 F.2d 802, 810 (9th Cir.  
14 1988)). This applies only to material factual allegations, not to legal conclusions disguised as  
15 factual allegations. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).  
16 That Plaintiffs here allege that each of their claims raise “purely or predominately a legal  
17 question” (FAC ¶¶ 117, 124, 131, 137, 143) makes this motion particularly appropriate.

18 General Preemption Rules. This is not a typical preemption case. Examination of the  
19 two federal statutes most relevant to this case—the Clean Air Act and the Energy Policy and  
20 Conservation Act—demonstrates a single federal policy authorizing California to adopt emission  
21 standards for vehicular air pollutants that contribute to adverse effects on the climate. As a result  
22 of this authorization, Plaintiffs’ preemption claims fail.

23 This outcome accords with traditional preemption principles. Determining Congress’s  
24 intent is the Court’s “sole task” in a preemption case. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*,  
25 479 U.S. 272, 280 (1987). The burden is on the party asserting preemption. *Hillsborough*  
26 *County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985). The Supreme Court has  
27 always strongly discouraged preemption of state statutes; to find preemption, there must be “an

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2. References to “Plaintiffs” include the Plaintiff-intervenor except where the brief  
specifically states otherwise.

1 unambiguous congressional mandate to that effect.” *Florida Lime & Avocado Growers, Inc. v.*  
2 *Paul*, 373 U.S. 132, 147 (1963). Even where a federal statute contains an express preemption  
3 provision, the courts will narrowly construe the preemption provision. *Cipollone v. Liggett*  
4 *Group*, 505 U.S. 504, 518 (1992).

5 In an area where the States have traditionally acted, “we start with the assumption that  
6 the historic police powers of the States were not to be superseded by the Federal Act unless that  
7 was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S.  
8 218, 230 (1947). There is a “presumption that state or local regulation of matters related to  
9 health and safety is not invalidated under the Supremacy Clause.” *Hillsborough County*, 471  
10 U.S. at 715. Air pollution regulation, such as that at issue here, has historically been a matter of  
11 state concern. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960); *Exxon Mobil*  
12 *Corp. v. U.S. Env’tl. Prot. Agency*, 217 F.3d 1246, 1255-56 (9th Cir. 2000).

## 13 ARGUMENT

### 14 I.

#### 15 **THE CLEAN AIR ACT AUTHORIZES CALIFORNIA’S GREENHOUSE** 16 **GAS EMISSION STANDARDS.**

17 California’s authority under the Clean Air Act is central to this case. Like the other  
18 automobile emission standards that it has issued over the past 40 years, California’s greenhouse  
19 gas emission standards are eligible to receive the federal authorization provided in Clean Air Act  
20 section 209(b), 42 U.S.C § 7543(b). This brief demonstrates that California’s Clean Air Act  
21 authority defeats the automakers’ claims that California’s greenhouse gas standards are  
22 preempted by or conflict with federal statutes or policy.

23 This first argument addresses Plaintiffs’ Clean Air Act claim. Part A demonstrates that  
24 the Act authorizes California to establish (and other States to adopt) vehicle emission standards  
25 that regulate greenhouse gas emissions. Part B shows why Plaintiffs’ argument that California is  
26 not entitled to a section 209(b) waiver has no merit. Part C explains why Plaintiff-intervenor  
27 AIAM’s fact-based objections to California’s waiver must be heard by EPA, not this Court.

28 \\\

1           **A.     Section 209 of the Clean Air Act Authorizes California’s Emission**  
2           **Standards.**

3           California’s authority to regulate vehicle emissions is found in section 209 of the Act, 42  
4 U.S.C. § 7543. Section 209 was first adopted in 1967. Section 209(a) prohibits any State from  
5 adopting or attempting to enforce any standard relating to the control of emissions from new  
6 motor vehicles or new motor vehicle engines subject to the Act. 42 U.S.C. § 7543(a). Section  
7 209(b), however, provides California (and only California) a “waiver” from section 209(a)’s  
8 prohibition. *Id.* § 7543(b).<sup>3/</sup>

9           The procedure for obtaining a waiver is straightforward. Before submitting a waiver  
10 request under section 209(b), California first must determine that its emission standards in the  
11 aggregate are as protective of public health and welfare as applicable federal standards. 42  
12 U.S.C. § 7543(b). Once California has made this “protectiveness” determination, California’s  
13 emission standards are presumed eligible for a waiver, and the EPA administrator *must* grant  
14 California’s waiver request unless the administrator finds that (1) California’s determination is  
15 arbitrary or capricious; (2) California does not need separate standards to meet “compelling and  
16 extraordinary conditions;” or (3) California’s standards and accompanying enforcement  
17 procedures are not consistent with section 202(a). *Id.* § 7543(b)(1); *MEMA I*, 627 F.2d at 1121-  
18 22, 1128; *see Motor & Equip. Mfrs. Ass’n v. Nichols* (“*MEMA III*”), 142 F.3d 449, 453 (D.C.  
19 Cir. 1998).

20           In this case, California has made its “protectiveness” determination. (FAC, Exh. A, at  
21 15.) Therefore, California’s greenhouse gas emission standards are presumed eligible for federal  
22 approval under section 209(b). *MEMA I*, 627 F.2d at 1121-22, 1128. EPA may deny approval  
23 of California’s waiver request only if those opposing the request bear the burden of  
24 demonstrating that California’s action does not satisfy the factual conditions set forth in  
25 subparagraphs (A) through (C) of Section 209(b)(1). *Id.* For example, EPA does not make its

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26           3.       The waiver provision in section 209(b) applies only to a State with a vehicle  
27 emissions regulatory program in place before March 30, 1966. California was the only State that  
28 met this requirement and therefore is the only State entitled to seek a waiver under section  
209(b). *Engine Mfrs. Ass’n v. U.S. Envtl. Prot. Agency*, 88 F.3d 1075, 1080 (D.C. Cir. 1996).  
Other States, however, may adopt California’s standards. 42 U.S.C. § 7507.

1 own de novo determination on whether California’s standards, as a package, are as protective as  
2 the federal standards; instead, to deny a waiver EPA must determine that California’s  
3 determination is arbitrary and capricious. Likewise, California does not have to prove that it  
4 needs the standards to meet compelling and extraordinary conditions; rather, EPA must establish,  
5 as a factual matter, that California does not need them. And EPA bears the burden of  
6 establishing that, as a factual matter, California’s standards are not technologically feasible in the  
7 lead time allowed. *Id.*

8 Two important consequences flow from this statutory scheme. First, the Clean Air Act  
9 positively authorizes the California’s standards. A section 209(b) waiver bars any claim that  
10 California’s standards are preempted by the Clean Air Act. 42 U.S.C. § 7543(b); see *MEMA III*,  
11 142 F.3d at 453.

12 Second, California emission standards that qualify for a section 209(b) waiver are  
13 effectively “federalized” under the Clean Air Act. Automobile manufacturers selling cars in  
14 California thereafter must meet California emission standards to comply with their federal  
15 obligations under the Clean Air Act. On this point, the Act provides:

16 In the case of any new motor vehicle or new motor vehicle engine to which State  
17 standards apply pursuant to a waiver granted under paragraph (1), *compliance*  
18 *with such State standards shall be treated as compliance with applicable Federal*  
19 *standards* for purposes of this title.

20 42 U.S.C. § 7543(b)(3) (emphasis added).

21 The Clean Air Act therefore creates two sets of standards with federal status—the ones  
22 adopted by California and those adopted by EPA. See *Engine Mfrs. Ass’n*, 88 F.3d at 1080.  
23 Other States, although barred from setting their own standards, are authorized by section 177 of  
24 the Act to adopt California’s emission standards as their own, in lieu of EPA’s federal standards.  
25 42 U.S.C. § 7507; see *MEMA III*, 142 F.3d at 453. In theory, once EPA has issued a waiver for  
26 California emission standards, every other state in the Union could adopt California’s standards,  
27 displacing separate federal standards altogether. Indeed, since the Clean Air Act’s enactment,  
28 numerous States have adopted California’s emission standards; ten States already have adopted  
California’s greenhouse gas emission standards. The Clean Air Act is no ordinary federal-state

1 partnership, but one in which California’s federally approved standards have equal dignity with  
2 the federal government’s own emission standards.

3 Congress’s decision to allow California to regulate motor vehicle emissions is steeped in  
4 history. California began regulating automobile emissions in 1964, long before federal  
5 regulation. *See Engine Mfrs. Ass’n*, 88 F.3d at 1079-80, *Ford Motor Co. v. Env’tl. Prot. Agency*,  
6 606 F.2d 1293, 1294 n.1, 1295 (D.C. Cir. 1979). Congress knew that California was the nation’s  
7 leader in developing technological strategies to address air pollution and expected that California  
8 could operate as a “laboratory for innovation.” *MEMA I*, 627 F.2d at 1111; *see Engine Mfrs.*  
9 *Ass’n*, 88 F.3d at 1079. Overriding the automobile industry’s “adamant objection,” Congress  
10 preserved California’s authority to develop its own vehicular emissions regulatory program.  
11 *Motor Vehicle Mfrs. Ass’n v. New York St. Dep’t of Env’tl. Cons.*, 17 F.3d 521, 525 (2nd Cir.  
12 1994). Separately, Congress also allowed California to adopt fuel regulations and non-road  
13 engine regulations. 42 U.S.C. §§ 7543(e)(2), 7545(c)(4)(B).

14 California’s authority to establish standards under the Act is at least as broad as that  
15 conferred on EPA. From the start Congress anticipated that California’s standards would be  
16 “more stringent than, or applicable to emissions or substances not covered by, the national  
17 standards.” H.R. Rep. No. 90-728 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1958; see 42  
18 U.S.C. § 7543(b)(1)(B) (requiring California standards to be at least as protective as federal  
19 ones). When Congress adopted the 1977 Clean Air Act amendments, it intended “to ratify and  
20 strengthen the California waiver provision and affirm the underlying intent of that provision, i.e.,  
21 to afford California the broadest possible discretion in selecting the best means to protect the  
22 health of its citizens and the public welfare.” H.R. Rep. No. 95-294, at 301-02 (1977), *reprinted*  
23 *in* 1977 U.S.C.C.A.N. 1077, 1380-81; *see also MEMA I*, 627 F.2d at 1108 n.22, 1110 & n.31,  
24 1128. As the District of Columbia Circuit found:

25 The history of congressional consideration of the California waiver provision,  
26 from its original enactment up through 1977, indicates that Congress intended the  
27 State to continue and expand its pioneering efforts at adopting and enforcing  
28 motor vehicle emission standards different from and in large measure more  
advanced than the corresponding federal program . . . .

1 *MEMA I*, 627 F.2d at 1110-11. “In short, Congress consciously chose to permit California to  
2 blaze its own trail with a minimum of federal oversight.” *Ford Motor Co.*, 606 F.2d at 1297.

3 **B. California’s Standards Qualify for a Waiver Because Greenhouse**  
4 **Gases Are Air Pollutants Covered by the Clean Air Act.**

5 Plaintiffs contend, however, that section 209(b)(1)(C) bars California from obtaining a  
6 waiver because in their view California’s greenhouse gas emission standards are “not consistent”  
7 with section 202. This claim fails.

8 Consistency review under section 209(b)(1)(C) requires evaluation of only two  
9 components—technological feasibility and consistency between federal and state certification  
10 requirements. *MEMA III*, 142 F.3d 449, 463 (D.C. Cir. 1998). “Neither the court nor the agency  
11 has ever interpreted compliance with Section 202(a) to require more.” *Id.* (citations omitted).  
12 Plaintiffs here contend that a section 209(b)(1)(C) consistency review allows EPA to go beyond  
13 this narrow determination and add another test: that EPA must also be regulating the pollutants  
14 that are the subject of the waiver request. Plaintiffs argue that because EPA has disclaimed  
15 authority to regulate greenhouse gases, California is also prevented from regulating them.  
16 Assuming without conceding that Plaintiffs have raised an issue that is relevant in a 209(b)(1)(C)  
17 consistency review, Plaintiffs’ claim nevertheless fails.

18 Plaintiffs’ argument depends entirely on EPA’s statement in 2003 that EPA does not have  
19 authority under Clean Air Act section 202 to regulate carbon dioxide at the federal level for  
20 global climate change purposes and that greenhouse gases are not covered “air pollutants” under  
21 the Act. FAC ¶ 123; see *Control of Emissions From New Highway Vehicles and Engines*, 68  
22 Fed. Reg. 52922 (Sept. 8, 2003). Relying on this statement, Plaintiffs contend that California’s  
23 assertion of authority to regulate greenhouse gases is not consistent with section 202, and  
24 therefore it cannot qualify for a waiver under section 209(b)(1)(C).

25 Plaintiffs’ claim fails because EPA’s 2003 statement is wrong as a matter of law.  
26 Greenhouse gas emissions are “air pollutants” subject to regulation under section 202. The  
27 Clean Air Act broadly defines “air pollutant” to include “any physical, chemical, biological,  
28 radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” 42

1 U.S.C. § 7602(g). The four greenhouse gases subject to California’s standards (carbon dioxide,  
2 methane, nitrous oxides and hydrofluorocarbons) easily satisfy this definition—they are physical  
3 or chemical substances emitted into the ambient air. Likewise, the Act expressly covers adverse  
4 effects on “climate” and “weather,” which are included within the statutory definition of  
5 “welfare.” *Id.* § 7602(h). The adverse health effects of global warming flowing from, for  
6 example, heat waves, enhanced urban smog, and the spread of infectious diseases also qualify as  
7 dangers to “public health.” *See id.* § 7521(a). The statutory language is therefore unambiguous:  
8 greenhouse gases such as carbon dioxide are air pollutants and may be regulated by the Act.

9 No court has approved EPA’s statement or Plaintiffs’ claim that greenhouse gases are not  
10 subject to regulation under the Clean Air Act. The only judge to have directly addressed this  
11 legal issue found that EPA *has* the authority to regulate greenhouse gases under section 202.  
12 *Massachusetts v. Env’tl. Prot. Agency*, 415 F.3d 50, 73 (D.C. Cir. 2005) (Tatel, J., dissenting),  
13 *petition for cert. filed* (Mar. 2, 2006) (no. 05-1120). His opinion is compelling and persuasive.

14 In *Massachusetts*, twelve States (including California), several cities, and numerous  
15 environmental groups challenged EPA’s denial of a petition to regulate motor vehicle  
16 greenhouse gas emissions under section 202. EPA asserted that it did not have the authority to  
17 regulate greenhouse gases and that, as a back-up rationale, it would not regulate them even if it  
18 did have the authority. *Id.* The panel denied the petitions by a 2-1 vote, but without ruling on  
19 the question of EPA’s authority to regulate greenhouse gases.

20 Judge Randolph did not address the question of EPA’s authority, *id.* at 56 n. 1, instead  
21 deferring to EPA’s “policy considerations” and voting to deny the petitions on the basis of  
22 EPA’s backup rationale. Judge Sentelle also avoided the authority issue, joining Judge  
23 Randolph in the judgment but not in his opinion. Judge Sentelle thought that the petitioners  
24 lacked standing, a position rejected by the other two judges. *Id.* at 59 (Sentelle, J., dissenting in  
25 part and concurring in the judgment).

26 Judge Tatel alone addressed the issue of EPA’s authority, and he concluded in his  
27 dissenting opinion that section 202 *does* provide EPA the authority to regulate greenhouse gases.  
28 *Massachusetts*, 415 F.3d at 73. First, Judge Tatel found that greenhouse gases are “air

1 pollutants” under the statutory definition because this “exceedingly broad language plainly  
2 covers GHGs emitted from motor vehicles . . . .”. *Id.* at 73. Second, Judge Tatel found that the  
3 Clean Air Act had explicitly authorized EPA to regulate pollutants based on their adverse effects  
4 on “climate,” a term expressly included in the definition of “welfare,” *id.* at 69 (citing 42 U.S.C.  
5 § 7602(h)).

6 Judge Tatel then dismissed EPA’s various rationales for ignoring the unambiguous  
7 statutory text. *Massachusetts*, 415 F.3d at 68-73. Among these, he rejected EPA’s theory that  
8 global warming had to be addressed in a new statute specifically addressed to climate change.  
9 He also rejected EPA’s argument that EPCA restricts EPA’s Clean Air Act authority, because  
10 Congress “acknowledged, and indeed accepted” the overlap of the two statutes. 415 F.3d at 72-  
11 73. Judge Tatel likewise rejected EPA’s “misplaced” reliance on *Food & Drug Admin. v. Brown*  
12 *& Williamson Tobacco Corp*, 529 U.S. 120 (2000). He showed that the legal principles of that  
13 Supreme Court decision undercut, rather than supported, EPA’s claim that it lacks authority.  
14 415 F.3d at 72.<sup>4/</sup>

15 Judge Tatel was correct—EPA has the authority to regulate greenhouse gas emissions  
16 under section 202(a). As a result, EPA cannot lawfully determine under section 209(b)(1)(C)  
17 that California’s waiver request is inconsistent with section 202.

18 That EPA to date has not regulated greenhouse gases does not preclude California from  
19 moving ahead. Nothing in the Clean Air Act makes EPA regulation of a pollutant a prerequisite  
20 for California emission standards. Rather, Congress specifically anticipated that California  
21 could regulate air pollutants even where EPA had chosen not to. *See* H.R. Rep. No. 90-728

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23 4. *Brown & Williamson* concluded that Congress in the Food, Drug and Cosmetic  
24 Act (FDCA) had “directly spoken to the issue here and precluded the Food and Drug  
25 Administration’s jurisdiction to regulate tobacco products.” 529 U.S. at 133. Central to the  
26 Supreme Court’s analysis was that the FDA for more than sixty years had held the position that  
27 it had no authority to regulate tobacco products under the FDCA and that, over this period,  
28 Congress had repeatedly enacted tobacco-specific legislation that ratified the FDA’s  
longstanding interpretation. The Court concluded that if tobacco products were subject to the  
FDCA, then the FDA would have no other option than to ban them, a drastic result that was  
contradicted by the tobacco-specific enactments that were all premised on tobacco remaining  
legal for sale. The Court thus held that the FDA’s reinterpretation of its authority could not  
stand in the face of these Congressional enactments. 529 U.S. at 154-57.

1 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1958 (expecting that California would adopt  
2 standards “more stringent than, or applicable to emissions or substances not covered by, the  
3 national standards”).

4 Therefore, the Court should reject Plaintiffs’ claim that California is legally barred from  
5 obtaining a waiver to regulate greenhouse gas emissions, and it should enter judgment in  
6 California’s favor on Plaintiffs’ Clean Air Act claim.<sup>5/</sup>

7 **C. The Plaintiff-Intervenor’s Factual Claim That California Lacks**  
8 **“Compelling and Extraordinary Conditions” Under Section**  
9 **209(b)(1)(B) Must First Be Addressed by EPA.**

10 AIAM contends that California’s greenhouse gas emission standards are not entitled to a  
11 waiver under section 209(b)(1)(B), arguing that California lacks “compelling and extraordinary  
12 conditions” because carbon dioxide “disperses evenly throughout the atmosphere” and allegedly  
13 does not cause “localized environmental impacts.” (AIAM Comp. ¶ 46.) This claim fails.

14 AIAM’s assertion presents an inherently factual question that first must be addressed to  
15 EPA in its waiver proceeding. 42 U.S.C. § 7543 (b)(1)(B). In the EPA proceeding, the  
16 automakers have the burden of producing “clear and compelling” evidence for their factual  
17 objections. *MEMA I*, 627 F.2d at 1121-22. This means that AIAM would have the burden of  
18 proving that the impacts that California has cited—for example, the danger to California’s water  
19 supply from the declining snowpack or the California Bay-Delta’s vulnerability to sea level  
20 rise—are not “localized environmental impacts.” (*See* RJN, Exh. C (California’s waiver  
21 request)). The automakers may not circumvent EPA’s authority to grant California’s waiver  
22 application by raising their factual claims here.

23 Deferring this factual question to EPA is consistent with this Court’s earlier ruling  
24 allowing Plaintiffs to raise the “purely legal” question whether California’s standards are  
25 consistent with section 202. (Order Denying Defendant’s Motion to Dismiss First Amended

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26 5. Plaintiffs also assert that California’s greenhouse gas emission standards are  
27 impliedly preempted by the Clean Air Act. (FAC ¶ 122.) This argument is meritless. If  
28 California qualifies for a waiver, then the Act expressly waives preemption of California’s  
regulations. There is no room for implied preemption under this scheme. *MEMA I*, 627 F.2d at  
1107, n. 20; *see* 42 U.S.C. § 7416 (no preemption of state law under Act except as specifically  
provided).

1 Complaint (Doc. 30), filed Oct. 21, 2005, at 23-24.) The Court has found this legal issue fully  
2 developed and fit for decision by the Court. In contrast, the factual issue raised by AIAM is  
3 expressly directed to EPA to decide. See *United States v. General Dynamics Corp.*, 828 F.2d  
4 1356, 1362 (9th Cir. 1987); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1357 (9th Cir.  
5 1978).

6 \*\* \*\* \*

7 In summary, rather than prohibit California’s regulation of greenhouse gas emissions, the  
8 Clean Air Act authorizes California to set automobile emission standards for air pollutants,  
9 including greenhouse gas emissions. Therefore, the Court should enter judgment in California’s  
10 favor on the Clean Air Act claims of both Plaintiffs and Plaintiff-intervenor.<sup>6/</sup>

11 **II.**

12 **THE ENERGY POLICY AND CONSERVATION ACT DOES NOT**  
13 **PREEMPT CALIFORNIA’S GREENHOUSE GAS EMISSION**  
14 **STANDARDS.**

15 Plaintiffs also assert that California’s greenhouse gas emission standards are preempted  
16 by the federal Energy Policy and Conservation Act (“EPCA”), 49 U.S.C. §§ 32901-32919. They  
17 allege that, because restrictions on carbon dioxide emissions lead to improved fuel economy,  
18 California’s greenhouse gas emission standards are “related to” fuel economy standards and fall  
19 within EPCA’s preemption clause. (See FAC ¶ 4). Plaintiffs miscast this controversy as a  
20 typical federal state preemption case, when it actually involves the relationship of two federal  
21 statutes, EPCA and the Clean Air Act. Far from preempting California’s emission standards,  
22 EPCA commands the Secretary of Transportation to accommodate federal and California  
23 emission requirements under the Clean Air Act when setting EPCA’s fuel economy standards.

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25 6. If greenhouse gas emissions are not covered by the Clean Air Act, as Plaintiffs  
26 contend, then California’s regulations would not be preempted by section 209(a), which only  
27 applies to substances governed by the Act, 42 U.S.C. § 7543(a). In addition, the savings  
28 provision of section 116, 42 U.S.C. § 7416, would protect California’s regulations from claims  
that its regulations are impliedly preempted by the Clean Air Act. The Court need not address  
this question here because, as shown, California’s regulations are authorized by the Clean Air  
Act.

1           **A.       A Brief Description of the Energy Policy and Conservation Act.**

2           Congress enacted EPCA in 1975, in the wake of the Arab oil embargo. *Natural Res. Def.*  
3 *Council v. Herrington*, 768 F.2d 1355, 1364 (D.C. Cir. 1985). Congress was concerned with the  
4 “serious long-term economic and national security problems that continuing dependence on  
5 foreign sources of energy would create.” *Id.*

6           EPCA established federal fuel economy standards for new vehicles. These are  
7 commonly called CAFE standards (for “corporate average fuel economy” standards) and set the  
8 minimum average fuel economy required of an automobile manufacturer’s new vehicle fleet in a  
9 given model year. 49 U.S.C. § 32904(a)(1)(B); *Center for Auto Safety v. NHTSA*, 793 F.2d  
10 1322, 1324 (D.C. Cir. 1986). As originally enacted, the statute itself established a schedule of  
11 standards for passenger automobiles ramping up from 18 miles per gallon in model year 1978 to  
12 27.5 miles per gallon in 1984. EPCA, Pub. L. No. 94-163, § 301, 1975 U.S.C.C.A.N. (89 Stat.)  
13 871, 902. For model years after 1984, the standard for passenger automobiles remains at 27.5  
14 miles per gallon unless raised by the Secretary of Transportation. 49 U.S.C. § 32902(b).

15           The Secretary of Transportation is also authorized to set and revise fuel economy  
16 standards for light trucks. 49 U.S.C. § 32902(a). One key provision requires that standards  
17 established by the Secretary, for either cars or light trucks, must be set at the “maximum feasible  
18 average fuel economy level.” 49 U.S.C. § 32902(a), (c). In determining the maximum feasible  
19 level, the Secretary shall consider “technological feasibility, economic practicability, *the effect of*  
20 *other motor vehicle standards of the Government on fuel economy*, and the need of the United  
21 States to conserve energy.” 49 U.S.C. § 32902(f) (emphasis added). The National Highway  
22 Traffic Safety Administration (“NHTSA”), which administers EPCA under a delegation from the  
23 Secretary (49 C.F.R. § 1.50(f)) recently raised the CAFE standard for light trucks by a small  
24 amount through model year 2011 (Average Fuel Economy Standards for Light Trucks Model  
25 Years 2008-2011 (“New Truck CAFE Standards”) 71 Fed. Reg. 17566 (Apr. 6, 2006)), but  
26 NHTSA has never raised the standard for automobiles (*see* 49 C.F.R. § 531.5(a)).

27           EPCA contains a preemption provision, 49 U.S.C. § 32919(a), which states:

28       \\

1 When an average fuel economy standard prescribed under this chapter is in effect,  
2 a State or a political subdivision of a State may not adopt or enforce a law or  
3 regulation related to fuel economy standards or average fuel economy standards  
4 for automobiles covered by an average fuel economy standard under this  
5 chapter.<sup>7/</sup>

6 **B. The Energy Policy and Conservation Act Recognizes California’s**  
7 **Authority to Set Vehicle Emission Standards under the Clean Air Act.**

8 **1. Determining the scope of the Energy Policy and Conservation**  
9 **Act’s preemption provision requires the Court to examine the**  
10 **objectives of the two relevant federal statutes.**

11 Plaintiffs cannot reasonably dispute that on their face California’s state law and  
12 regulations establish air pollution emission standards under its Clean Air Act authority, not fuel  
13 economy standards. Nor can they can reasonably dispute that the purpose of EPCA is to avoid  
14 dependence on foreign energy sources and that California’s greenhouse gas standards serve the  
15 very different objective of curbing global warming. Nevertheless, Plaintiffs contend (FAC ¶ 4,  
16 9, 113) that because California’s greenhouse gas emission standards have the effect of reducing  
17 fuel consumption, they are “related to” fuel economy standards and are therefore preempted  
18 under 49 U.S.C. § 32919(a).

19 When interpreting a “relate to” preemption clause, the Supreme Court has said that “[w]  
20 simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term,  
21 and look instead to the objectives of the [applicable federal] statute as a guide to the scope of the  
22 state law that Congress understood would survive.” *New York State Conference of Blue Cross &*  
23 *Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). The Supreme Court in *Travelers*  
24 rejected earlier and much broader interpretations of this term, *see, e.g., Morales v. Trans World*  
25 *Airlines, Inc.*, 504 U.S. 374, 383-85 (1992). The Court observed:

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26 7. This provision was enacted in 1975 (EPCA, § 301, 89 Stat. at 914) and  
27 subsequently recodified with non-substantive wording changes. *See* Act of July 5, 1994, Pub. L.  
28 No. 103-272, § 1(a) 1994 U.S.C.C.A.N. (108 Stat.) 745 (“Certain general and permanent laws of  
the United States, related to transportation, are revised, codified, and enacted by subsections  
(c)-(e) of this section without substantive change . . . .”); Act of Oct. 31, 1994, Pub. L. No. 103-  
429, § 6(43)(A) 1994 U.S.C.C.A.N. (108 Stat.) 4377, 4382 (stating only that “Section 32918 is  
redesignated as section 32919”). There is no published decision interpreting section 32919(a),  
and EPCA’s legislative history does not comment on it. *See* S. Conf. Rep. No. 94-516, at 160  
(1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 2001 (tracking the statutory language).

1 If “relate to” were taken to extend to the furthest stretch of its indeterminacy, then  
2 for all practical purposes pre-emption would never run its course, for “[r]eally,  
3 universally, relations stop nowhere.” But that, of course, would be to read  
4 Congress's words of limitation as mere sham, and to read the presumption against  
pre-emption out of the law whenever Congress speaks to the matter with  
generality.

5 514 U.S. at 655. The Ninth Circuit likewise has narrowly interpreted a “relate to” preemption  
6 clause. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184,  
7 1189 (9th Cir. 1998); see *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation &  
8 Devel. Comm’n*, 410 F.3d 496 (9th Cir. 2005), *petition for cert. filed* (Sept. 12, 2005) (No. 05-  
9 331) (narrowly construing “with respect to” preemption provision in a different part of EPCA  
10 and rejecting the preemption claim).

11 To apply *Travelers* and ascertain the federal objectives in this case, the Court must  
12 analyze the relationship of EPCA and the Clean Air Act. In construing interrelated statutes,  
13 courts presume a “congressional intent to create a symmetrical and coherent regulatory scheme,”  
14 *Brown & Williamson*, 529 U.S. at 133, and that it harmonize all applicable federal statutes, see  
15 *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Morton v. Mancari*, 417 U.S. 535, 551 (1974).  
16 Because the two federal laws in question establish one coherent and harmonious policy that  
17 expressly accommodates California’s emission standards, there is neither an inter-federal nor a  
18 federal-state conflict.<sup>8/</sup>

19 **2. The Energy Policy and Conservation Act requires the**  
20 **Secretary of Transportation to account for federal and**  
21 **California air pollution emission standards when setting fuel**  
22 **economy standards.**

23 When Congress adopted EPCA in 1975 it knew that motor vehicle emission standards  
24 affected fuel economy. See H.R. Rep. No. 94-340, at 86-87, 89-91 (1975), *reprinted in* 1975

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25 8. This analysis conforms with the Supreme Court’s general approach to express  
26 preemption arguments. Judicial interpretation of an express preemption provision “does not  
27 occur in a contextual vacuum.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The  
28 provision’s interpretation is informed by two factors: the presumption against preempting state  
police power regulation and the need to discern congressional intent “from the language of the  
pre-emption statute and the ‘statutory framework’ surrounding it.” *Id.* at 486; see *Cipollone v.*  
*Liggett Group*, 505 U.S. 504, 518 (1992).



1 into account “the effect of other motor vehicle standards of the Government on fuel economy”  
2 when it sets fuel economy standards. 49 U.S.C. § 32902(f). In carrying out this requirement,  
3 NHTSA (under delegation from the Secretary) has consistently treated “other motor vehicle  
4 standards” in section 32902(f) to include both federal and California emission standards under  
5 the Clean Air Act, and has repeatedly taken California emission standards into account when  
6 setting fuel economy standards. *See, e.g.,* Light Truck Average Fuel Economy Standard, Model  
7 Year 2004, 67 Fed. Reg. 16052, 16057 (Apr. 4, 2002) (discussing California emission standards  
8 as a government regulation that NHTSA must take into account in setting maximum feasible fuel  
9 economy); Request for Comments, National Academy of Science Study and Future Fuel  
10 Economy Improvements, Model Years 2005-2010, 67 Fed. Reg. 5767, 5767 (Feb. 7, 2002)  
11 (asking for information on fuel economy effects of California regulations).<sup>10/</sup>

12       Therefore, since EPCA’s enactment in 1975, Congress has been aware that California’s  
13 emission standards affect fuel economy. Nothing in EPCA shows an intent to displace  
14 California’s role as a regulator of motor vehicle emissions, a function that the State has exercised  
15 since the 1960’s under the Clean Air Act. Instead, rather than preempt emission standards that  
16 affected fuel economy, even those that affect it adversely, Congress has required that NHTSA  
17 respect California emission standards when establishing fuel economy standards. In these  
18 circumstances, Congress could not have intended that California’s federally authorized emission  
19 standards are “related to” fuel economy standards within the meaning of 49 U.S.C. § 32919(a).

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21  
22 the transportation laws in 1994, Congress deleted original section 502(d) because it had been  
23 “[e]xecuted.” *See* H.R. Rep. No. 103-180, at 584 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818,  
24 1401 (reference to section 2002(d), the original U.S. Code section number). This 1994  
25 reorganization made no substantive changes. *Id.* at 5.

26       10. There are other examples of how NHTSA has accepted California emission  
27 standards in setting fuel economy standards. *See* Light Truck Average Fuel Economy Standards;  
28 Model Years 1996-1997, 59 Fed. Reg. 16312, 16317 (Apr. 6, 1994) (“Standards are also  
becoming tighter in California.”); Light Truck Average Fuel Economy Standards Model Years  
2005-2007, 68 Fed. Reg. 16868, 16896 (Apr. 7, 2003) (discussing California emission  
standards); *see also* 40 C.F.R. §§ 600.207-86(a)(1), (b)(1), 600.207-93(a)(1), (b)(1), 600.307-  
86(c)(9), 600.307-93(c)(9), 600.311-86(c) (requiring certain CAFE-related actions if California  
vehicles “are likely to exhibit significant differences in fuel economy from those intended for  
sale in other states”).

1                   **3. The Clean Air Act also authorizes emission standards that**  
2                   **affect fuel economy standards.**

3                   Further evidence that Congress intended this relationship between emission standards and  
4 fuel economy standards is found in the Clean Air Act and its legislative history.

5                   Had Congress been concerned that California’s emission standards impaired achievement  
6 of EPCA’s objectives, the 1977 Clean Air Act amendments presented Congress with the perfect  
7 opportunity to provide otherwise. When it amended the Clean Air Act in 1977, however,  
8 Congress instead strengthened California’s authority and provided it with the “broadest possible  
9 discretion.” H.R. Rep. No. 95-294, at 301-02; *see also MEMA I*, 627 F.2d at 1108 n.22, 1110 &  
10 n.31, 1128. Congress knew that the regulation of automobile emissions would affect fuel  
11 economy; some members even expressed concern that California emission standards might  
12 decrease fuel economy. *See, e.g.*, H.R. Rep. No. 95-294 at 480, 482 (separate views of Rep.  
13 Dingell). The 1977 House Report devoted seven pages to the relationship between emission  
14 standards and fuel economy standards, H.R. Rep. No. 95-294, at 244-51, *see id.* at 239-40, and  
15 concluded that compliance with federal and California emission standards would not interfere  
16 with industry’s ability to meet fuel economy standards. *Id.* at 248 (“The most important  
17 conclusion . . . is that the automobile industry can achieve the standards specified in the  
18 Committee bill while it simultaneously meets the mandated fuel economy standards”).

19                   Congress expressly contemplated that emission standards might improve fuel economy.  
20 Citing developments in fuel injection technology that reduced both emissions and fuel  
21 consumption, the 1977 House Report stated: “The development of new or improved engine  
22 technologies which simultaneously reduce emissions and fuel consumption can and should be  
23 pursued.” *Id.* at 247 (quoting National Academy of Sciences report). Congress was pleased that  
24 compliance with emission standards might improve fuel economy. There is no indication  
25 anywhere in the legislative history to the 1977 amendments that Congress thought that emission  
26 standards that improved fuel economy conflicted with or undermined EPCA’s objectives.<sup>11/</sup>

27 \_\_\_\_\_  
28                   11. The 1977 Clean Air Act amendments contained two very limited exceptions to  
emission standards that *decreased* fuel economy. These allowed EPA to (1) waive certain

1 In short, far from tying California’s hands in 1977, Congress afforded California the  
2 “broadest possible discretion” to help solve the nation’s air pollution problems. *See supra* at 10-  
3 11, 21-22. With the goal of protecting the public health and welfare from air pollutants,  
4 Congress once again encouraged California to take the lead in regulating emissions, knowing  
5 that California’s standards could affect fuel economy. Thus, the legislative histories of both  
6 EPCA and the Clean Air Act contradict Plaintiffs’ contention that EPCA’s preemption provision  
7 preempts California’s federally approved emission standards. Plaintiffs’ EPCA claim therefore  
8 fails even assuming as true their allegation that California’s emission standards directly affect  
9 fuel economy.

10 **C. The National Highway Traffic Safety Administration’s Recent**  
11 **Statement Concerning Preemption of California’s Emission**  
12 **Standards Is Entitled to No Deference and is Wrong as a Matter of**  
13 **Law.**

13 Plaintiffs are likely to rely on NHTSA’s recent pronouncement, contained in the  
14 preamble to that agency’s revised light truck fuel economy standards, that EPCA preempts  
15 California’s greenhouse gas emission standards. New Truck CAFE Standards, 71 Fed. Reg. at  
16 17654. NHTSA’s statement is entitled to no deference and is wrong as a matter of law.

17 This Court owes no deference to NHTSA’s statement on preemption. Although  
18 contained in the preamble to the light truck rule, NHTSA’s opinion has nothing to do with that  
19 rule. Unlike the remainder of the preamble, which explains the legal and factual basis for the  
20 agency’s revised light truck fuel economy standards, NHTSA’s gratuitous preemption discussion  
21 appears to be aimed only at influencing this litigation and does not explain or support the content  
22 of its revised fuel economy standards. NHTSA styles its comments as “interpret[ing]” EPCA, *id.*

23  
24 \_\_\_\_\_  
25 federal emission standards for automobile manufacturers in certain circumstances and (2) revise  
26 heavy duty vehicle emission standards for certain model years if those standards could not be  
27 achieved “without increasing cost or decreasing fuel economy to an excessive and unreasonable  
28 degree.” See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 201(c), 224(a), 1977  
U.S.C.A.N. (91 Stat.) 685, 752-53 (enacting section 202(b)(6)), 766 (enacting section  
202(a)(3)(C)(i)). These minor exceptions demonstrated that Congress itself internally  
harmonized the two statutes and that it refused to preempt emission standards even when they  
adversely affected fuel economy.

1 at 17668-70, but interpretive rules “enjoy no Chevron status as a class.” *United States v. Mead*  
2 *Corp.*, 533 U.S. 218, 233 (2000), referring to *Chevron U.S.A., Inc., v. Natural Resources Defense*  
3 *Council*, 467 U.S. 837 (1984).

4         Moreover, the threshold legal issue—whether EPCA preempts California regulations that  
5 are adopted under the Clean Air Act—is outside NHTSA’s purview: the “courts do not owe  
6 deference to an agency’s interpretation of a statute it is not charged with administering or when  
7 an agency resolves a conflict between its statute and another statute.” *Ass’n of Civilian*  
8 *Technicians v. Fed. Labor Relations Auth.*, 200 F.3d 590, 592 (9th Cir. 2000) (citing *Cal. Nat’l*  
9 *Guard v. Fed. Labor Relations Auth.*, 697 F.2d 874, 879 (9th Cir. 1983)). And it is doubtful that  
10 an “agency regulation determining the pre-emptive effect of any federal statute is entitled to  
11 deference.” *Medtronic*, 518 U.S. at 512 (O’Connor, J., concurring). The legal merit of  
12 NHTSA’s position “is a question of federal preemption law for the courts alone to decide.”  
13 *Ass’n of Intern. Auto. Mfrs., Inc. v. Comm’r, Mass. Dept. of Env’tl Prot.*, 208 F.3d 1, 5 (1st Cir.  
14 2000) (rejecting deference to agency interpretation).

15         On the merits, the NHTSA statement is both irrelevant and wrong. It is irrelevant  
16 because, even if California’s greenhouse standards have the effect on fuel economy that NHTSA  
17 and Plaintiffs say that they do, it would not matter. As shown, the Clean Air Act and EPCA,  
18 construed harmoniously, authorize California to set emission standards that improve fuel  
19 economy.

20         In addition, the NHTSA statement is legally wrong. Initially, the NHTSA opinion is  
21 fatally predicated on its belief that EPA does not have authority to regulate greenhouse gases  
22 under the Clean Air Act. New Truck CAFE Standards, 71 Fed. Reg. at 17658-59. This brief has  
23 shown that EPA does have that authority. *See infra* at 12-15. NHTSA’s one-sided view of its  
24 preemptive powers also ignores the strong presumption against preempting state police power  
25 regulation. E.g., *Medtronic, Inc.*, 518 U.S. at 486. And it ignores the broad discretion that  
26 Congress intended to grant California under the Clean Air Act.

27         Finally, NHTSA impermissibly distinguishes between carbon dioxide and other emission  
28 standards. NHTSA acknowledges that California has authority to require use of certain

1 technologies when addressing *non*-carbon dioxide pollutants, but asserts that California has no  
2 authority to require those same technologies when addressing carbon dioxide itself. New Truck  
3 CAFE Standards, 71 Fed. Reg. at 17669 (col. 3). This distinction makes no sense. As  
4 demonstrated above, EPCA itself instructs NHTSA to take into account California’s emission  
5 standards when setting fuel economy standards. *See supra* at 16-21. When California standards  
6 that are designed to curb non-carbon dioxide pollutants affect fuel economy—positively or  
7 negatively—NHTSA must take (and has taken) that effect into account. There is no basis in the  
8 statutory text for a different view when the standard is addressed to emissions of carbon dioxide  
9 or other greenhouse gas pollution. Nor is NHTSA’s distinction found in the EPCA preemption  
10 provision, 49 U.S.C. § 32919(a). If non-carbon dioxide emission standards that affect fuel  
11 economy are not “related to” fuel economy standards under section 32919(a), as NHTSA has  
12 conceded for the past 30 years, then neither are carbon dioxide emission standards.

13 The Court should not accord NHTSA’s view of preemption any deference.

14 **D. There Is No Implied Field or Conflict Preemption Under the Energy**  
15 **Policy and Conservation Act.**

16 Plaintiffs also claim that California’s regulations are impliedly preempted under the  
17 “field” and “conflict” preemption doctrines. Field preemption exists when the challenged state  
18 law “regulates conduct in a field that Congress intended the Federal Government to occupy  
19 exclusively.” *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). In claiming field  
20 preemption, one must show a “scheme of federal regulation . . . so pervasive as to make  
21 reasonable the inference that Congress left no room for the States to supplement it.” *Rice v.*  
22 *Santa Fe Elevator*, 331 U.S. at 230.

23 Here, California adopted emission standards under its federal Clean Air Act authority.  
24 Federal law directs the Secretary of Transportation to take the effects of Clean Air Act emission  
25 standards into account when setting federal fuel economy standards. In these circumstances,  
26 Plaintiffs cannot reasonably contend that EPCA established a field of federal regulation so  
27 pervasive that it left no room for state regulation that might affect it.

28 The Supreme Court rejected a field preemption claim in less compelling circumstances in

1 *Pacific Gas and Electric Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190  
2 (1983). A state law imposed a moratorium on new nuclear plants until there was a means for  
3 disposing of high level nuclear waste. The Supreme Court found that the state law was not  
4 preempted by the federal Atomic Energy Act despite the regulatory overlap. Recognizing the  
5 different functions of the federal and state schemes, the Court found that Congress intended that  
6 the federal government should regulate the safety aspects of nuclear plants but that the States  
7 should retain their traditional responsibility for regulating electrical utilities for determining  
8 questions of need, reliability, cost, and related state concerns. Similarly, there is no field  
9 preemption here despite any arguable overlap of California's emission standards and fuel  
10 economy standards. Congress not only intended to preserve California's traditional authority  
11 over air pollution and automobile emissions but affirmatively authorized it in Clean Air Act  
12 section 209(b).

13 Plaintiffs also cannot show that California's greenhouse gas standards conflict with  
14 federal fuel economy standards. Conflict preemption may occur because either (1) compliance  
15 with both laws is physically impossible, or (2) the state law stands as an obstacle to the "full  
16 purposes and objectives of Congress." *English*, 496 U.S. at 78-79. To satisfy the "obstacle" test,  
17 a plaintiff must show an "irreconcilable conflict between the federal and state standards."  
18 *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 495 (9th Cir. 1984) (quoting *Silkwood v. Kerr-*  
19 *McGee Corp.*, 464 U.S. 238, 256 (1984)). State law does not stand as an obstacle "when the  
20 federal government contemplates coexistence between federal and local regulatory schemes."  
21 *Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002); see  
22 *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

23 Plaintiffs cannot meet either branch of this test. They do not and cannot contend that it is  
24 physically impossible to comply with EPCA's fuel economy standards because EPCA sets  
25 *minimum* nationwide, average fuel economy standards. See 49 U.S.C. § 32901(a)(6); H.R. Rep.  
26 No. 94-340, at 1, 87-89. EPCA does not prevent or discourage manufacturers from surpassing  
27 those minimum standards; it even provides manufacturers credits for surpassing them. 49 U.S.C.  
28 § 32903. Nor can Plaintiffs contend that California's regulations stand as an obstacle to

1 congressional objectives or create an irreconcilable conflict with them. As shown, Congress  
2 intended that fuel economy standards take automobile emission standards into account, and  
3 Plaintiffs acknowledge that California’s standards make it easier, not harder, to meet fuel  
4 economy standards. (FAC ¶ 77; AIAM Comp. ¶¶ 43, 45.)

5 \*\* \*\* \*

6 For all these reasons, the Court should grant California’s motion on Plaintiffs’ EPCA  
7 preemption claim.

8 **III.**

9 **CALIFORNIA’S GREENHOUSE GAS EMISSION STANDARDS DO NOT**  
10 **CONFLICT WITH UNITED STATES FOREIGN POLICY.**

11 In their third claim, Plaintiffs allege that California’s greenhouse gas emission standards  
12 are preempted because they supposedly conflict with United States foreign policy to pursue  
13 multilateral agreements to reduce international greenhouse gas emissions and with its ability “to  
14 speak with one voice upon matters of global climate change.” (FAC ¶¶ 130-131.) The Court  
15 should enter judgment in California’s favor on this claim because (1) California’s emission  
16 standards are federally authorized and (2) California’s standards do not conflict with any United  
17 States foreign policy concerning global warming.

18 **A. Because Congress Authorized California to Adopt Automobile**  
19 **Emission Standards, California’s Regulations Cannot Interfere with**  
20 **United States Foreign Policy.**

21 In *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), the Supreme Court  
22 rejected a claim that a California law using a “worldwide combined reporting” method for  
23 computing foreign corporation taxes prevented the federal government from “speaking with one  
24 voice” on international trade. *Id.* at 302, 320. Despite the absence of an explicit congressional  
25 authorization for the California law in question, the Court found sufficient evidence that  
26 Congress was willing to tolerate this particular state tax law despite its potential foreign policy  
27 implications. *Id.* at 324-28.

28 In this case, Congress has not just implicitly tolerated California’s adoption of motor  
vehicle emission standards—it has expressly authorized them. California’s greenhouse gas

1 standards do not even become effective until the federal government itself has examined them  
2 and issued a Clean Air Act section 209(b) waiver. For this reason alone, California’s federally  
3 authorized emission standards cannot conflict as a matter of law with federal foreign policy.

4 **B. Alternatively, There Is No “Clear Conflict” Between Federal Policy**  
5 **and the Challenged State Regulation.**

6 Even if the Court were to disregard the federal authorization for California’s emission  
7 standards and treat California’s standards as a purely state act, it should nevertheless enter  
8 judgment dismissing Plaintiffs’ claim because they fail to show any conflict with federal foreign  
9 policy.

10 A claim that a state law is preempted by federal foreign policy requires a “clear conflict”  
11 between the federal foreign policy and the challenged state law. *American Ins. Ass’n v.*  
12 *Garamendi*, 539 U.S. 396, 420-26 (2003). In this case, Plaintiffs claim that California’s efforts  
13 to reduce global warming conflicts with the federal government’s greenhouse gas foreign policy  
14 because, in their view (1) the federal government is seeking multilateral agreements requiring  
15 other nations (particularly developing countries) to reduce their greenhouse gas emissions and  
16 (2) state law emission limitations reduce the federal government’s “leverage” to obtain a  
17 multilateral agreement. (FAC ¶ 95; *see also* FAC ¶¶ 9(c), 130.)

18 Plaintiffs’ depiction of federal policy is inaccurate. The documents upon which Plaintiffs  
19 rely show that the United States has committed to take the lead in reducing greenhouse gas  
20 emissions without conditioning its action on agreements with developing nations. California’s  
21 greenhouse gas emission standards are consistent with that policy.

22 **1. The United States and other nations acknowledge in the Rio**  
23 **Treaty that they should take the lead in combating climate**  
24 **change.**

25 None of the sources upon which Plaintiffs rely support their view of federal policy. First,  
26 Plaintiffs cite the United Nations Framework Convention on Climate Change (commonly  
27 referred to as the “Rio Treaty” or the “UNFCCC”), to which the United States is a party. (FAC ¶  
28 40.) President George H.W. Bush signed the Rio Treaty in June 1992 and the Senate ratified it  
in October 1992. S. Rep. No. 103-35, at 76-78 (1993). (RJN, Exh. D (copy of the Rio Treaty).)

1 The Rio Treaty establishes federal policy on global warming but California’s greenhouse gas  
2 emission standards are consistent with this foreign policy.

3 Far from establishing a do-nothing policy until further multilateral agreements are  
4 reached, the Rio Treaty commits the United States to “adopt national policies and take  
5 corresponding measures” that “will demonstrate that developed countries are taking the lead in  
6 modifying longer-term trends in anthropogenic emissions. . . .” (RJN, Exh. D at 12.) In other  
7 words, rather than trying to leverage action in developing countries by holding back domestic  
8 action, the United States has chosen to lead by example. The reasons that the United States and  
9 other developed nations agreed to take the lead are that “the largest share of historical and  
10 current global emissions of greenhouse gases has originated in developed countries,” and “per  
11 capita emissions in developing countries are still relatively low.” (RJN, Exh. D, at 2.)

12 The Rio Treaty reflects the United States’s obligation to assume a leadership role in other  
13 ways. The United States and other treaty signatories have “the responsibility to ensure that  
14 activities within their jurisdiction or control do not cause damage to the environment of other  
15 States or of areas beyond the limits of national jurisdiction.” (RJN, Exh. D, at 2.) They  
16 recognize “that various actions to address climate change can be justified economically in their  
17 own right and can also help in solving other environmental problems.” (RJN, Exh. D, at 4.) The  
18 Rio Treaty further states that the “Parties should protect the climate system”; that “the developed  
19 country Parties should take the lead in combating climate change and the adverse effects  
20 thereof;” and that the “Parties should take precautionary measures to anticipate, prevent or  
21 minimize the causes of climate change and mitigate its adverse effects.” (RJN, Exh. D, at 9.)

22 Nor do California’s standards conflict with current executive branch policy. The current  
23 executive branch policy, stated by the State Department’s senior diplomats on climate change, is  
24 to oppose negotiations over binding limits on greenhouse gas emissions—whether under the Rio  
25 Treaty or any other forum—even if those negotiations include limits for developing countries.  
26 (See RJN, Exh. E (Nov. 29, 2005 statement of Harlan L. Watson, Senior Climate Negotiator and  
27 Alternate Head of U.S. Delegation, Montreal, Canada) (“the United States is opposed to any  
28 such discussions under the Framework Convention. . . . We see no change in current conditions

1 that would result in a negotiated agreement consistent with the U.S. approach. . . . We are not a  
2 party to the Kyoto Protocol and we do not support any such approach under the Convention for  
3 future commitments”); RJN, Exh. F (Dec. 7, 2005 statement of Paula Dobriansky, Under  
4 Secretary of State, to the Conference of Parties to the UNFCCC, Montreal, Canada) (“It is our  
5 belief that progress cannot be made through these formalized discussions. . . . [W]e also believe  
6 firmly that negotiations will not reap progress, as I indicated, because there are differing  
7 perspectives”).) Thus, there is no rational basis for any claim that domestic emissions reductions  
8 could be withheld in order to gain diplomatic leverage over developing nations because the  
9 United States is not negotiating with developing nations for binding limits on greenhouse gas  
10 emissions.

11 In short, by becoming party to the Rio Treaty, the United States committed to taking  
12 leadership action to reduce its domestic greenhouse gas emissions, even if that meant unilateral  
13 action. This commitment to combat global warming is not dependent on action by other  
14 countries or on future agreements. California’s emission standards are fully consistent with this  
15 policy.

16 **2. California’s greenhouse gas emission standards do not conflict**  
17 **with any federal law or executive branch foreign policy.**

18 Plaintiffs also allege that a foreign policy against unilateral domestic action can be found  
19 in a hodgepodge of domestic laws. (FAC ¶¶ 52-57.) None of these establishes a federal policy  
20 of taking no action to reduce greenhouse gas emissions until a multilateral agreement is reached.

21 The Global Climate Protection Act of 1987 assigns various roles and responsibilities to  
22 federal agencies. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. Law  
23 100-204, title XI, § 1103(c), 1987 U.S.C.C.A.N. (101 Stat.) 1331, 1409. Section 1103(b) directs  
24 the Environmental Protection Agency to coordinate domestic climate change policy, using the  
25 research findings of various agencies. Section 1103(c) directs the Secretary of State to  
26 “coordinate those aspects of United States policy requiring action through the channels of  
27 multilateral diplomacy.” (See FAC ¶ 40, 52). Directing the Secretary of State to coordinate  
28 diplomacy with other nations does not conflict with California’s regulations.

1 The Global Climate Protection Act provides no other basis for finding a conflict with  
2 California’s regulations. The Act finds that “manmade pollution” may be causing global  
3 warming and that this warming could have powerful adverse effects on the earth’s habitability.  
4 Pub. L. No. 100-204, § 1102. It also finds that “[n]ecessary actions must be identified and  
5 implemented in time to protect the climate” and that “international cooperation will be greatly  
6 enhanced by United States leadership.” *Id.* The Act also states that the United States should  
7 seek to “identify technologies and activities to limit mankind’s adverse effect” on global climate  
8 by (1) slowing the rate of increase of atmospheric greenhouse gas concentrations in the near term  
9 and (2) stabilizing or reducing atmospheric concentrations of greenhouse gases over the long  
10 term.” *Id.* § 1103(a)(3). And, although the Act states that the United States should “work  
11 toward multilateral agreements,” *id.* § 1103(a)(4), it does not state or suggest that the United  
12 States should withhold action until multilateral agreements are reached.<sup>12/</sup>

13 In addition, neither the National Climate Program Act of 1990, 15 U.S.C. §§ 2902-08,  
14 nor the Global Change Research Act, *id.* §§ 2931-38, provide Plaintiffs any assistance. These  
15 acts focus on coordinating federal, state, private, and international research activities. *Id.* §§  
16 2904(f)(1), 2931(a)(6), 2932(e)(4). They state that “an effective Federal research program will  
17 require efficient interagency coordination, and coordination with the research activities of State,  
18 private, and international entities.” *Id.* § 2931(a)(6). Neither law establishes a federal policy to  
19 take no action to reduce greenhouse gas emissions until a multilateral agreement is reached, nor  
20 do they conflict with California’s regulations.

21 Plaintiffs also cite a non-binding (and now superseded) Senate resolution, expired budget  
22 riders, and executive branch research initiatives. (FAC ¶¶ 54-56.) None of these has the force of  
23 law, and none demonstrates a conflict between federal foreign policy and California’s emission  
24 standards.

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25  
26 12. The Act’s other two goals are also compatible with California’s regulations. *See*  
27 Pub. L. No. 100-204, § 1103(a)(1) (“increase worldwide understanding of the greenhouse effect  
28 and its environmental and health consequences”), (a)(2)(“foster cooperation among nations to  
develop more extensive and coordinated scientific research efforts with respect to the greenhouse  
effect”).

1           The Byrd-Hagel Senate resolution concerning U.S. participation in Rio Treaty protocols  
2 was non-binding. *Cf. Yang v. Cal. Dept. of Social Services*, 183 F.3d 953, 958-59 (9th Cir.  
3 1999) (“sense of Congress” statement about Hmong veterans in budget act was not enforceable  
4 law). Moreover, the resolution has been countermanded by a more recent one. *See* 151 Cong.  
5 Rec. S6980, S7033, S7037 (daily ed. June 22, 2005) (calling for legally binding limits “on  
6 emission of greenhouse gases that slow, stop, and reverse the growth of such emissions” and that  
7 “will encourage comparable action by other nations”); *see also* 151 Cong. Rec. S7267, S7282  
8 (daily ed. June 23, 2005) (“almost from the day of that vote [on the Byrd-Hagel Resolution]  
9 those on both sides of the issue have misrepresented and misconstrued its intent. What was  
10 meant as a guide for action has instead been invoked, time and again, as an excuse for inaction”)  
11 (statement of Senator Byrd).

12           The expired appropriations riders are equally unavailing. Plaintiffs allege that “[o]n  
13 several occasions, Congress has attached riders to appropriation bills to prohibit the Executive  
14 Branch from using funds ‘to propose or issue rules, regulations, decrees, or orders for the  
15 purpose of implementation, or in preparation for implementation, of the Kyoto Protocol’ without  
16 the ratification of that treaty by the Senate.” (FAC ¶ 55.) These riders at most stated that the  
17 Executive Branch should not spend federal money to implement an unratified treaty. They do  
18 not establish congressional opposition to domestic regulation of greenhouse gas emissions.<sup>13/</sup>

19           The President’s Climate Change Research Initiative, the FreedomCAR Initiative, and a  
20 statement by EPA also do not substantiate Plaintiffs’ claims. (FAC ¶¶ 52, 53.) These nonbinding  
21 federal research and development actions are insufficient to preempt state law. *Barclays Bank*,  
22 512 U.S. at 327-30 (“the Executive Branch actions—press releases, letters, and amicus  
23 briefs—on which Colgate here relies are merely precatory” and “lack the force of law”). Nor do  
24 these executive branch statements reveal any conflict that might justify preemption. The  
25 President’s Climate Change Research Initiative is just that, a research initiative “to reduce  
26

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27           13.     An example of this kind of rider can be found at section 517 of a 2001  
28 appropriations bill. *See* Act of December 21, 2000, Pub. L. No. 106-554, App. C, § 517, 2000  
U.S.C.A.N. (114 Stat.) 2763, 2763A-154.

1 scientific uncertainty regarding global change.” (FAC ¶ 52.) The FreedomCar Initiative  
2 program is a voluntary program between the federal government and the automotive industry to  
3 research hydrogen fuel cells. EPA’s statement that EPA regulation of greenhouse gas emissions  
4 could “weaken U.S. efforts to persuade developing countries to reduce the GHG intensity of  
5 their economies” (FAC ¶ 53) is a nonbinding statement of opinion by a government entity with  
6 no authority to develop foreign policy.

7 Finally, Plaintiffs’ first amended complaint exposes a glaring contradiction in their claim  
8 that federal policy prohibits unilateral commitments to reduce emissions. Plaintiffs refer to  
9 federal fuel economy regulations that “will limit the release of carbon dioxide from those  
10 vehicles” and allege that “[b]y setting fuel economy standards, the national government has  
11 regulated the level of greenhouse gases released by cars and trucks sold in this country” for more  
12 than 25 years. (FAC ¶ 4.) These allegations of unilateral federal action contradict their theory  
13 that the federal government opposes a mandatory reduction of emissions absent a multilateral  
14 agreement.

15 To summarize, the sources upon which Plaintiffs rely do not establish a federal policy of  
16 withholding domestic action as a bargaining chip to obtain multilateral emission reduction  
17 agreements. In the complete absence of a “clear conflict” between the State’s actions and U.S.  
18 foreign policy, *American Insurance Association*, 539 U.S. at 421, there is no basis for  
19 preempting California’s emission standards.

#### 20 IV.

### 21 CALIFORNIA'S GREENHOUSE GAS REGULATIONS DO NOT 22 VIOLATE THE DORMANT COMMERCE CLAUSE.

#### 23 A. A State Regulation Expressly Authorized by Congress Does Not 24 Violate the Dormant Commerce Clause

25 In their fourth claim, Plaintiffs allege that California’s greenhouse gas emission standards  
26 violate the “dormant” or “negative” Commerce Clause. (FAC ¶¶ 134-140.) California has been  
27 enforcing emission standards under its Clean Air Authority since the 1960’s and no court has  
28 held that this federally authorized activity violates the dormant Commerce Clause. There is a  
good reason for this: a State does not violate the dormant Commerce Clause when it engages in

1 regulatory action that is authorized by federal law.

2         The Constitution grants Congress the power to “regulate Commerce . . . among the  
3 several States.” U.S. Const. art. I, § 8, cl. 3. This grant of power implicitly contains “a further,  
4 negative command, known as the dormant Commerce Clause.” *Oklahoma Tax Comm'n v.*  
5 *Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1994). This negative command prevents the States  
6 from engaging in economic protectionism through regulatory measures “designed to benefit in-  
7 state economic interests by burdening out-of-state competitors.” *New Energy Co. of Indiana v.*  
8 *Limbach*, 486 U.S. 269, 273-74 (1988).

9         Congress, however, may confer regulatory authority upon the States, and any action  
10 taken by a State within the scope of its congressional authorization is immune to a dormant  
11 Commerce Clause challenge, even if the State’s exercise of that authority affects interstate  
12 commerce. *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981); *see*  
13 *also White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983). Congress  
14 should clearly express its intent to allow States to burden interstate commerce. *Hillside Dairy*  
15 *Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *see South-Central Timber Dev., Inc. v. Wunnicke*, 476 U.S.  
16 82, 91-92 (1984). But Congress’s intent need not be stated expressly in the statute, and may be  
17 gleaned from the overall statutory scheme and its legislative history. *Shamrock Farms Co. v.*  
18 *Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998); *see Northeast Bancorp, Inc. v. Board of*  
19 *Governors*, 472 U.S. 159, 169, 174 (1985) (finding dormant Commerce Clause exemption in  
20 legislative history); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982) (implying  
21 exemption from overall statutory scheme).

22         Clean Air Act section 209(b) expressly authorizes California to set standards applicable  
23 to automobile manufacturers selling new cars in California. 42 U.S.C. § 7543(b). By conferring  
24 California with the authority over the manufacture of new cars that are sold in California, this  
25 federal law directly authorizes California to regulate a significant aspect of interstate commerce.  
26 As the congressional debates over the Clean Air Act demonstrate, Congress knew that requiring  
27 automobile manufacturers to comply with California’s standards would affect interstate  
28 commerce, yet allowed and encouraged California to adopt its own more stringent standards.

1 See *supra* at 9-11; 20-22; see *MEMA I*, 627 F.2d at 1109-10; H.R. Rep. No. 90-728, reprinted in  
2 1967 U.S.C.C.A.N. at 1958. This congressionally authorized regulatory scheme eliminates any  
3 dormant Commerce Clause concerns.

4 Consistent with this analysis, one California appellate court has found that section 209(b)  
5 barred a dormant Commerce Clause challenge to California’s emission standards. In *People ex*  
6 *rel. State Air Res. Bd. v. Wilmshurst*, 68 Cal.App.4th 1332 (1999), the defendants argued that  
7 California violated the dormant Commerce Clause by defining “new” cars more broadly than the  
8 federal definition. The *Wilmshurst* court rejected the Commerce Clause argument, concluding  
9 that section 209(b)’s waiver provisions “demonstrate an intent by Congress to grant California  
10 the broadest possible discretion in adopting and enforcing standards for the control of emission  
11 from new motor vehicles.” *Id.* at 1345; see also *Oxygenated Fuels Ass’n, Inc., v. Davis*, 163  
12 F.Supp.2d 1182, 1188 (E.D. Cal. 2001), *aff’d*, 331 F.3d 665 (9th Cir. 2003) (finding that Clean  
13 Air Act’s authorization of California’s fuel emission regulations precluded a Commerce Clause  
14 challenge)

15 The Court should reject Plaintiffs’ Commerce Clause argument because federal law  
16 authorizes California to regulate automobile emissions despite their effect on interstate  
17 commerce.

18 **B. Alternatively, the Plaintiffs’ Dormant Commerce Clause Argument**  
19 **Fails Because California’s Standards Are Neither Facially**  
20 **Discriminatory Nor Do They Impose Burdens on Out-of-State**  
21 **Businesses That Exceed the Burdens on In-State Businesses.**

22 Alternatively, should the Court reject the argument that Congress authorized California to  
23 regulate interstate commerce, the plaintiffs’ dormant Commerce Clause argument still fails. The  
24 plaintiffs claim that California’s greenhouse gas emission standards will burden interstate  
25 commerce by increasing the purchase price of new motor vehicles (FAC ¶¶ 135-37), but that  
26 type of impact is not protected by the dormant Commerce Clause.

27 The dormant Commerce Clause prohibits “economic protectionism,” *New Energy Co. of*  
28 *Ind.*, 486 U.S. at 273; that is, it applies only to laws that discriminate against interstate commerce  
or, at the very least, place disparate burdens on interstate commerce that exceed those on

1 intrastate commerce. *Automated Salvage Transport, Inc. v. Wheelabrator Env'tl. Sys. Inc.*, 155  
2 F.3d 59, 75 (2d Cir. 1998). The courts have established a two-tiered test to assess a dormant  
3 Commerce Clause claim. First, where a state law “directly regulates” or facially “discriminates  
4 against interstate commerce, or when its effect is to favor in-state economic interests over out-of-  
5 state interests,” the regulation is invalid. *Brown-Forman Distillers Corp. v. New York St. Liquor*  
6 *Auth.*, 476 U.S. 573, 579 (1986); see *Country Classic Dairies, Inc. v. State of Mont. Dept. of*  
7 *Commerce Milk Control Bureau*, 847 F.2d 593, 595 (9th Cir. 1988) The plaintiffs’ claim fails  
8 this test—the plaintiffs do not allege, and California’s standards do not contain, any provision  
9 that facially discriminates against interstate commerce.

10 Second, where a state law regulates evenhandedly and has only indirect effects on  
11 interstate commerce, courts apply the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137,  
12 142 (1970). Under this test, courts consider whether the challenged statutes or regulations  
13 “impose burdens on interstate trade that are ‘clearly excessive in relation to the putative local  
14 benefits.’” *Am. Trucking Ass’n v. Michigan Pub. Serv. Comm’n*, 125 S.Ct. 2419, 2423 (2005)  
15 (quoting *Pike*, 397 U.S. at 142). Therefore, the claimant must show at a minimum that the state  
16 regulation will have a disparate impact on interstate commerce. *Automated Salvage Transport*,  
17 155 F.3d at 75; see *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288 (2nd Cir. 1995).

18 The plaintiffs’ claim also fails the *Pike* test. They allege only that the greenhouse gas  
19 emission regulations will increase the purchase price to customers. (FAC ¶ 135.) But they have  
20 failed to identify an intrastate commercial interest that is favored at the expense of out-of-state  
21 competitors and therefore have not alleged that these emission standards have a disparate impact  
22 on interstate commerce.

23 The Court should enter judgment in California’s favor on the plaintiffs’ dormant  
24 Commerce Clause claim.

25 **V.**

26 **CALIFORNIA’S GREENHOUSE GAS EMISSION STANDARDS ARE**  
27 **NOT PREEMPTED BY THE SHERMAN ANTITRUST ACT.**

28 Plaintiffs’ final claim alleges that California’s greenhouse gas emission standards are

1 preempted because they supposedly force automakers to violate section 1 of the Sherman  
2 Antitrust Act (the “Sherman Act”), 15 U.S.C. § 1. (FAC ¶¶ 143, 144.) Plaintiffs allege that the  
3 regulations compel certain manufacturers to aggregate their sales data for compliance purposes  
4 and that this aggregation *may* result in illegally restraining trade because it “will likely require  
5 the exchange of supply and price information.” (FAC ¶ 143.) This facial preemption claim fails  
6 as a matter of law.

7       Aggregation provisions have been part of both federal and California emissions  
8 certification regulations for years.<sup>14/</sup> California’s greenhouse gas regulations allow (but do not  
9 require) a low-volume manufacturer to average its compliance over a multi-year period.  
10 *Compare* Cal. Code Regs. tit. 13, § 1961.1(a)(1)(A) *with id.* § 1961.1(a)(1)(C), (a)(1)(D). Where  
11 a high-volume manufacturer owns ten percent or more of that low-volume manufacturer, the  
12 regulations require the two manufacturers to aggregate their sales. (FAC ¶ 142; *see* Cal. Code  
13 Regs. tit. 13, § 1900(b)(22). These aggregation provisions prevent a large volume manufacturer  
14 from delaying or reducing its compliance commitment by marketing through a smaller  
15 subsidiary.

16       In determining whether the Sherman Act preempts a state statute, a hypothetical conflict  
17 is never enough: “A party may successfully enjoin the enforcement of a state statute only if the  
18 statute on its face irreconcilably conflicts with federal antitrust policy.” *Rice v. Norman*

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19  
20       14.     The federal aggregation provisions for small-volume manufacturers have been in  
21 effect since 1990 and were EPA policy for many years before that. Control of Air Pollution  
22 From New Motor Vehicles and New Motor Vehicle Engines; Certification Procedures, 55 Fed.  
23 Reg. 7178 (February 28, 1990); *see also* 40 C.F.R. §§ 86.092-14, 86.1801-01(d), 86.1810(i)(8),  
24 86.1826-01, 86.1838-01, 86.1845-01, 86.1845-04. California and EPA have also jointly adopted  
25 aggregation provisions as part of the “CAP 2000” effort to streamline certification procedures  
26 for manufacturers of new motor vehicle. *See* Control of Air Pollution From New Motor  
27 Vehicles; Compliance Programs for New Light-Duty Vehicles and Light-Duty Trucks, 64 Fed.  
28 Reg. 23906, 23959 (May 4, 1999) (amending 40 C.F.R. § 86.1838-01). California has utilized  
similar aggregation provisions for its Low-Emission Vehicle II (“LEV II”) test procedures and  
for meeting its fleet-average non-methane organic gas requirements, two programs for which  
EPA has approved section 209(b) waivers. *See* California State Motor Vehicle Pollution Control  
Standards; Waiver of Federal Preemption–Notice of Decision, 68 Fed. Reg. 19811 (April 22,  
2003); California State Motor Vehicle Pollution Control Standards; Notice of Within-the-Scope  
Determination for Amendments to California’s Low Emission Vehicle Standards, 70 Fed. Reg.  
22034 (April 28, 2005).

1 *Williams Co.*, 458 U.S. 654, 659 (1982). Plaintiffs must establish that there is “no set of  
2 circumstances” under which the greenhouse gas emission standards would be valid. *United*  
3 *States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs’ antitrust preemption claim fails for at  
4 least three reasons.

5 First, Plaintiffs’ allegations themselves negate a facial preemption challenge. They  
6 allege only that:

7 price information will *likely* have to be exchanged and *perhaps* even fixed. The  
8 two manufacturers will need to coordinate the sales of vehicles according to their  
9 fuel economy, promoting the most fuel-efficient vehicles or restricting the less  
fuel-efficient vehicles, *as necessary*. Such coordination will *likely* require the  
exchange of supply and price information.

10 (FAC ¶ 143 (emphasis added).) It is not enough that the aggregation provisions *might* have an  
11 anticompetitive effect when applied in a future concrete factual situation. Plaintiffs must  
12 establish that there is an “irreconcilable” facial conflict, *Rice v. Norman Williams*, 458 U.S. at  
13 659, or that there is “no set of circumstances,” *United States v. Salerno*, 481 U.S. at 745, under  
14 which the greenhouse gas emission standards would not conflict with the Sherman Act.  
15 Plaintiffs’ frequent use of qualifiers dooms their preemption claim because they implicitly  
16 concede that there are situations in which there would be no conflict with the Sherman Act.

17 Second, as a matter of law, the aggregation provisions are optional and therefore cannot  
18 be said to pose an irreconcilable conflict with the Sherman Act. For example, the definition of a  
19 “small volume manufacturer” means

20 a manufacturer with California sales less than 4,500 new passenger cars, light-  
21 duty trucks, medium-duty vehicles, heavy-duty vehicles and heavy-duty engines  
22 based on the average number of vehicles sold for the three previous consecutive  
model years *for which a manufacturer seeks certification as a small volume*  
*manufacturer . . .*

23 Cal. Code Regs. tit. 13, § 1900(b)(22) (emphasis added). The aggregation provision, located  
24 within this definition, is not implicated unless a manufacturer first *chooses* to “seek certification”  
25 as a small volume manufacturer. Although Plaintiffs may argue that an eligible manufacturer  
26 would have a strong incentive to seek certification as a lower volume manufacturer, that  
27 argument would fall short of demonstrating that there is “no set of circumstances” under which  
28 the greenhouse gas emission standards would not conflict with the Sherman Act. *See Sanders v.*

1 *Lockyer*, 365 F.Supp.2d 1093, 1101 (N.D. Cal. 2005).

2           Finally, even assuming that there are manufacturers whose sales are aggregated, and that  
3 these manufacturers were to exchange supply and price information, the legality of this  
4 information exchange would still need to be determined in the context of a concrete factual  
5 situation under the rule of reason analysis. But, as the Supreme Court has held: “Analysis under  
6 the rule of reason requires an examination of the circumstances underlying a particular economic  
7 practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent  
8 with federal antitrust laws.” *Rice v. Norman Williams*, 458 U.S. at 661.

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**CONCLUSION**

The Court should grant California’s motion for judgment on the pleadings as to each of Plaintiffs’ claims.

Dated: June 1, 2006

Respectfully submitted,

**BILL LOCKYER**  
Attorney General of the State of California  
**MARY E. HACKENBRACHT**  
Senior Assistant Attorney General  
**ELLEN M. PETER**  
Supervising Deputy Attorney General  
**JOSEPH BARBIERI**  
**LINDA L. BERG**  
**CARYN L. CRAIG**  
**GAVIN G. McCABE**  
**NICHOLAS STERN**  
Deputy Attorneys General

/s/ Marc N. Melnick  
**MARC N. MELNICK**  
Deputy Attorney General  
Attorneys for Defendant

**SIERRA CLUB**

/s/ David Bookbinder (as authorized on June 1, 2006)  
**DAVID BOOKBINDER**  
Attorneys for Defendant-Intervenors Sierra Club, Natural Resources Defense Council, and Environmental Defense

**BLUEWATER NETWORK**

/s/ Danielle R. Fugere (as authorized on June 1, 2006)  
**DANIELLE R. FUGERE**  
Attorneys for Defendant-Intervenors Bluewater Network, Global Exchange, and Rainforest Action Network