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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
26 SIERRA CLUB, NATURAL RESOURCES
DEFENSE COUNCIL, ENVIRONMENTAL
27 DEFENSE, BLUEWATER NETWORK,
GLOBAL EXCHANGE and RAINFOREST
28 ACTION NETWORK,
Defendant-Intervenors.

NO. 1:04-CV-06663-AWI-LJO

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

Hearing: September 15, 2006
Time: 9:00 a.m.
Courtroom: Two
Judge: Honorable Anthony W. Ishii

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27
28

TABLE OF CONTENTS

	<u>Page</u>
1 INTRODUCTION	1
2 ARGUMENT	3
3 I. THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR ON	
4 THE AUTOMAKERS’ CLEAN AIR ACT CLAIMS.	3
5 II. THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR ON	
6 THE AUTOMAKERS’ ENERGY POLICY AND CONSERVATION ACT	
7 CLAIMS.	7
8 A. California’s Regulations are Not Preempted by the Energy Policy and	
9 Conservation Act’s Express Preemption Provision.	7
10 1. California’s greenhouse gas emission standards are not “fuel	
11 economy standards.”	7
12 2. California’s greenhouse gas emission standards are not “related to”	
13 fuel economy standards.	8
14 a. The Energy Policy and Conservation Act does not expressly	
15 preempt California Clean Air Act emission standards	
16 because the Energy Policy and Conservation Act requires	
17 that these standards be considered when setting fuel	
18 economy standards.	8
19 b. The Energy Policy and Conservation Act does not allow	
20 NHTSA to pick and choose which California emission	
21 standards it must consider.	10
22 B. California’s Greenhouse Gas Regulations are Not Impliedly Preempted by	
23 the Energy Policy and Conservation Act.	13
24 1. California’s greenhouse gas regulations do not operate in a field	
25 that Congress intended that the federal government would occupy	
26 exclusively.	13
27 2. California’s greenhouse gas regulations do not stand as an obstacle	
28 to the accomplishment of congressional purposes and objectives.	13
C. NHTSA’s opinion that California’s Clean Air Act standards are preempted	
by the Energy Policy and Conservation Act is entitled to no deference.	17
III. THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR ON	
PLAINTIFFS’ DORMANT COMMERCE CLAUSE CLAIM.	18
IV. THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR ON	
PLAINTIFFS’ FOREIGN POLICY CLAIM.	20

1
2
3
4
5
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9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS (CON'T)

	<u>Page</u>
V. THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA'S FAVOR ON PLAINTIFFS' ANTITRUST CLAIM.	24
CONCLUSION	26

TABLE OF AUTHORITIES

	<u>Pages</u>
CASES	
<i>Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Devel. Comm'n</i> , 410 F.3d 492 (9th Cir. 2005), <i>cert. denied</i> , 126 S.Ct. 2887 (2006)	12
<i>American Ins. Assn. v. Garamendi</i> , 539 U.S. 396 (2003)	23
<i>Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.</i> , 200 F.3d 590 (9th Cir. 2000)	17
<i>Barclay's Bank PLC v. Franchise Tax Board</i> , 512 U.S. 298 (1994)	23
<i>Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.</i> , 793 F.2d 1322 (D.C. Cir. 1986)	17
<i>Compassion in Dying v. Washington</i> , 79 F.3d 790 (9th Cir. 1996)	25
<i>Connecticut v. American Elec. Power Co.</i> , 406 F.Supp.2d 265 (SD.N.Y. 2005)	21
<i>Crosby v. Nat'l Foreign Trade Council</i> , 530 U.S. 363 (2000)	22, 23
<i>Decker v. Massey-Ferguson, Ltd.</i> , 681 F.2d 111 (2nd Cir. 1982)	4, 12
<i>Dishman v. UNUM Life Ins. Co.</i> , 269 F.3d 974 (9th Cir. 2001)	9
<i>Egelhoff v. Egelhoff</i> , 532 U.S. 141 (2001)	9
<i>English v. General Elec. Co.</i> , 496 U.S. 72 (1990)	13
<i>Geier v. American Honda Motor Co.</i> , 529 U.S. 861 (2000)	14
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	12
<i>Hunt v. Washington St. Apple Advertising Comm'n</i> , 432 U.S. 333 (1977)	25
<i>Massachusetts v. Env'tl. Prot. Agency</i> , 415 F.3d 50 (D.C. Cir. 2005), <i>cert. granted</i> , 126 S.Ct. 2690 (2006)	<i>passim</i>
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992)	9
<i>Morton v. Mancari</i> , 417 F.3d 535 (1974)	2
<i>Motor & Equip. Mfrs. Ass'n v. Env'tl. Prot. Agency</i> , 627 F.2d 1095 (D.C. Cir. 1979)	16
<i>Motor & Equip. Mfrs. Ass'n v. Nichols</i> , 142 F.3d 449 (D.C. Cir. 1998)	15
<i>Natural Res. Def. Council, Inc. v. U.S. Env'tl. Prot. Agency</i> , 655 F.2d 318 (D.C. Cir. 1981)	15
<i>New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995)	8, 9

TABLE OF AUTHORITIES (CON'T)

		<u>Pages</u>
1		
2		
3	CASES (CON'T)	
4	<i>Pennsylvania v. Interstate Commerce Comm'n</i> , 561 F.2d 278 (D.C. Cir. 1977)	2
5	<i>People ex rel. Lockyer v. Nat'l Highway Traffic Safety Admin.</i> , No. 06-72317 (9th Cir. filed May 2, 2006)	18
6	<i>People ex rel. Lockyer v. Nat'l Highway Traffic Safety Admin.</i> , No. C 06-02654 SC (N.D. Cal. filed Apr. 19, 2006)	18
8	<i>People ex rel. State Air Res. Bd. v. Wilmshurst</i> , 68 Cal.App.4th 1332 (1999)	18
9	<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	19
10	<i>Planned Parenthood of Idaho, Inc. v. Wasden</i> , 376 F.3d 908 (9th Cir. 2004)	25
11	<i>Rice v. Norman Williams Co.</i> , 458 U.S. 654 (1982)	24
12	<i>Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers</i> , 531 U.S. 159 (2001)	6
13	<i>Skysign Int'l, Inc. v. City & County of Honolulu</i> , 276 F.3d 1109 (9th Cir. 2002)	14
14	<i>Texas v. United States</i> , 523 U.S. 296 (1998)	25
15	<i>Toumajian v. Frailey</i> , 135 F.3d 653 (9th Cir. 1998)	9
16	<i>United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Management Auth.</i> , 438 F.3d 150 (2d Cir. 2006)	19
18	<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	24
19	<i>Yamaha Motor Corp. v. Jim's Motorcycle, Inc.</i> , 401 F.3d 560 (4th Cir. 2005)	19
20	<i>Zschernig v. Miller</i> , 389 U.S. 429 (1967)	22
21		
22	FEDERAL STATUTES	
23	United States Code, title 42	
23	§ 7507	5, 6
24	§ 7521	3, 9
24	§ 7521(a)(2)	15
24	§ 7521(a)(4)	15
25	§ 7543	3
25	§ 7543(a)(4)	15
26	§ 7543(b)	<i>passim</i>
26	§ 7543(b)(1)(B)	4, 5
27	§ 7543(b)(1)(C)	3-5, 15
27	§ 7607(b)	16
28		

TABLE OF AUTHORITIES

	<u>Pages</u>
FEDERAL STATUTES (CON'T)	
United States Code, title 49	
§ 32901	2
§ 32901(a)(6)	7
§ 32901(a)(10)	7, 8
§ 32902(b)	17
§ 32902(f)	<i>passim</i>
§ 32903	17
§ 32919(a)	3, 7-11
Act of July 5, 1994, Pub. L. No. 103-272, 1994 U.S.C.C.A.N. (108 Stat.) 745	17
Energy Policy Conservation Act (EPCA), Pub. L. 94-163 (1975), 1975 U.S.C.C.A.N. (89 Stat.) 871	17
FEDERAL REGULATIONS	
Code of Federal Regulations, title 49	
§ 531.5(a)	17
§ 533.5(a) (Table IV)	17
Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566 (Apr. 6, 2006)	10
California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18887 (May 3, 1984)	5
Reforming the Automobile Fuel Economy Standards Program, 68 Fed. Reg. 74908 (Dec. 29, 2003)	17
Request for Comments; National Academy of Science Study and Future Fuel Economy Improvements, Model Years 2005-2010, 67 Fed. Reg. 5757 (Feb. 7, 2002)	17
CALIFORNIA STATUTES	
California Health & Safety Code	
§ 43018.5(a)	15
§ 43018.5(i)(2)	15
CALIFORNIA REGULATIONS	
California Code of Regulations, Title 13	
§ 1961.1(e)(4)	8
OTHER AUTHORITIES	
H.R. Rep. No. 94-340 (1975), <i>reprinted in</i> 1975 U.S.C.C.A.N. 1762	17
D. & D-Is.' Reply M. of P. & A. in Support of Their Mtn. for Judgment on the Pleadings	No. 1:04-CV-06663-AWI-LJO

1 **INTRODUCTION**

2 In its opening memorandum, California demonstrated that greenhouse gases are air
3 pollutants under the Clean Air Act and that California’s vehicular greenhouse gas emission
4 regulations are eligible for a waiver under section 209(b) of the Act. California then
5 demonstrated that the Energy Policy Conservation Act (EPCA) neither expressly nor impliedly
6 preempts California’s regulations. California’s emission standards adopted under the Clean Air
7 Act do not impermissibly “relate to” EPCA’s fuel economy standards because EPCA itself
8 requires that the Secretary of Transportation take into account both federal and California Clean
9 Air Act emission standards when determining fuel economy standards. Far from preempting
10 California emission standards, EPCA requires the Secretary of Transportation to honor them
11 when determining fuel economy standards.

12 The responses of Plaintiffs and Plaintiff-intervenor (collectively “the automakers”) are
13 noteworthy for what they do not say. Now that the Supreme Court has agreed to review the
14 Environmental Protection Agency (EPA) decision upon which they had built their principal Clean
15 Air Act argument, *Massachusetts v. Env’tl. Prot. Agency*, 415 F.3d 50 (D.C. Cir. 2005), *cert.*
16 *granted*, 126 S.Ct. 2690 (2006), the automakers have shifted their claims to avoid the significant
17 possibility of an adverse ruling in that case. In their responses, the automakers do not contest
18 California’s threshold legal premise that greenhouse gas emissions are covered pollutants under
19 the Clean Air Act. They now contend that California lacks authority to regulate greenhouse gases
20 because global warming does not create “compelling and extraordinary” circumstances in
21 California. Moreover, the automakers claim that California’s Clean Air Act authority does not
22 matter. They claim that EPCA preempts California’s regulations even if California were to
23 receive a section 209(b) waiver from EPA. (Plaintiffs’ Memorandum of Points and Authorities in
24 Opposition to Motion for Judgment on the Pleadings, filed July 24, 2006, (Pl. Br.) at 49.)

25 The Court should reject the automakers’ interpretation and grant California’s motion. The
26 automakers’ problem is this. They view EPCA as the only game in town, when EPCA must be
27 examined in light of its interaction with the Clean Air Act. “It is well established that when two
28 regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the

1 extent possible, both given effect.” *Pennsylvania v. Interstate Commerce Comm’n*, 561 F.2d
2 278, 292 (D.C. Cir. 1977); *see, e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974).

3 EPCA itself incorporates California’s Clean Air Act emission standards into the EPCA
4 regulatory framework. EPCA directs the Secretary of Transportation, when setting fuel economy
5 standards, to consider “the effect of other motor vehicle standards of the Government on fuel
6 economy.” 49 U.S.C. § 32902(f). The term “other motor vehicle standards of the Government”
7 has always included both federal *and* California emission standards adopted under the Clean Air
8 Act. (*See* Defendant and Defendant-Intervenors’ Memorandum of Points and Authorities in
9 Support of Their Motion for Judgment on the Pleadings, filed June 1, 2006, (Def. Br.) at 20.)
10 The National Highway Traffic Safety Administration (NHTSA), acting under delegation of the
11 Secretary of Transportation, has a long-established practice of taking into account the fuel
12 economy effects of California emission standards when setting federal fuel economy standards.
13 (*Id.* at 21 & n.10.)

14 The automakers quietly concede that EPCA requires that the Secretary of Transportation
15 honor most California Clean Air Act emission standards when setting fuel economy standards.
16 (Pl. Br. at 41-44; Memorandum of Points and Authorities of Plaintiff-Intervenor, Association of
17 International Automobile Manufacturers, in Opposition to Defendants’ Motion for Judgment on
18 the Pleadings, filed July 24, 2006, (AIAM Br.) at 22-24.) But they wish to create an exception
19 for California’s greenhouse gas standards. They argue that EPCA section 32902(f) does not
20 apply if California emission standards, in their words, “directly regulate fuel economy.” But
21 California standards do not “directly regulate” *fuel economy*, a term that has a defined meaning
22 under EPCA, 49 U.S.C. section 32901, because they do not establish mileage standards. The
23 technologies that are used to meet these standards may have an effect on fuel economy, but so do
24 the technologies used to meet many other Clean Air Act emission standards, some positively and
25 some negatively. EPCA does not allow NHTSA to pick and choose which standards to consider.

26 Throughout their responses, the automakers treat California’s standards as if those
27 standards were the isolated acts of a State that seeks to dictate how NHTSA performs its job.
28 *They fail to grasp, however, that NHTSA is not required to consider California’s standards*

1 *unless EPA, another federal agency, has approved them.* This means that, once federal EPA has
2 granted them a waiver, California’s standards have federal status. They are not an “obstacle” to a
3 federal statutory objective. Instead, they are an integral component of a federal regulatory
4 scheme in which Congress has required one federal agency—NHTSA—to consider the valid
5 motor vehicle standards adopted or approved by another federal agency—EPA.

6 This explicit legislative direction answers the preemption question: because EPCA section
7 32902(f) requires that NHTSA “shall consider” other motor vehicle standards such as California’s
8 Clean Air Act standards, the express preemption provision in section 32919(a) cannot be
9 interpreted to preempt Clean Air Act standards that NHTSA is required to consider. Likewise,
10 EPCA does not impliedly preempt California’s greenhouse standards—California’s standards
11 cannot be an impermissible “obstacle” if NHTSA is required to take those very emission standards
12 into account when setting fuel economy standards. And that conclusion holds regardless of
13 whether the emission standard has a large or small impact on fuel efficiency because Congress did
14 not create any exception to this statutory command.

15 The automakers put little effort into defending their other claims, and none has merit.
16 California’s motion for judgment on the pleadings should be granted.

17 ARGUMENT

18 I.

19 **THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR** 20 **ON THE AUTOMAKERS’ CLEAN AIR ACT CLAIMS.**

21 In their complaints, the automakers’ principal Clean Air Act argument was that California
22 lacks authority to set emission standards for greenhouse gases under section 209 of the Act
23 because, in their view, the federal EPA lacks the authority to regulate them under section 202.
24 (First Amended Complaint, filed Feb. 16, 2005, (FAC) ¶¶ 122-23; Complaint in Intervention of
25 Intervenor Association of International Automobile Manufacturers for Injunctive and Declaratory
26 Relief, lodged Feb. 3, 2005, (AIAM Comp.) ¶ 62.) That argument—that California’s standards
27 must be rejected under section 209(b)(1)(C) as “not consistent with section 202(a)”—depended
28 entirely on EPA’s 2003 decision disclaiming authority. *Id.* After the filing of this motion, the

1 Supreme Court granted review in *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *cert.*
2 *granted*, 126 S.Ct. 2690 (2006), to address EPA’s authority to regulate greenhouse gases.

3 To avoid the impact of an adverse ruling in that case, the automakers have dramatically
4 shifted their Clean Air Act claims. In their responses to this motion, both Plaintiffs and Plaintiff-
5 intervenor have virtually abandoned their principal Clean Air Act claim. The automakers fail to
6 challenge California’s threshold argument that the Clean Air Act authorizes regulation of
7 greenhouse gas emissions as air pollutants. In addition, the automakers do not contest
8 California’s argument that EPA has the authority to issue a waiver to California under section
9 209(b)(1)(C). Instead, they now contend that whatever the Supreme Court—or this
10 Court—decides regarding California’s Clean Air Act authority is irrelevant to their EPCA claim.
11 (Pl. Br. at 49-51.) Based on California’s earlier arguments, and because the automakers do not
12 defend their claim that EPA may not issue a waiver under section 209(b)(1)(C), the Court should
13 enter judgment for California on this issue. *See Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111,
14 115 (2nd Cir. 1982) (motion to dismiss “may be granted as to part of a complaint and denied as to
15 the remainder”).

16 Shifting ground, Plaintiffs (but not AIAM) now claim that the only Clean Air Act issue is
17 whether that California’s regulations are preempted unless it obtains a waiver from EPA. (Pl. Br.
18 at 54.) But with their admission, at least for purposes of this motion, that greenhouse gas
19 emissions are air pollutants, there is no dispute between the parties on that issue: California has
20 applied for a new waiver and has no intent to enforce its regulations until EPA grants the waiver.
21 Plaintiffs’ Clean Air Act response leaves no controversy for the Court to decide. The Court
22 therefore should enter judgment for California on this claim.

23 In the context of their EPCA claim, the automakers now argue that whatever the scope of
24 the federal EPA’s authority over vehicle emissions, California’s authority is limited to regulating
25 the causes of the State’s “acute smog,” i.e., carbon monoxide and hydrocarbons. (Pl. Br. at 13;
26 AIAM Br. at 28.) AIAM relies on section 209(b)(1)(B), which provides that EPA may reject
27 California’s standards if EPA determines that the state “does not need” those standards “to meet
28 compelling and extraordinary conditions.” AIAM argues that, as a matter of law, greenhouse

1 gases do not produce “compelling and extraordinary conditions” because, in their view, those
2 terms are limited to the particular smog conditions that existed in California when the Clean Air
3 Act was enacted. (AIAM Br. at 28-30.)

4 This argument has no more substance than the “consistency” argument the automakers
5 have abandoned. First, and dispositively, AIAM’s quarrel with California’s findings is a factual
6 issue that is committed to EPA to decide in the section 209(b) waiver proceeding. (Def. Br. at
7 15-16.) In the EPA proceeding, section 209(b)(1)(B) places the burden of proof on EPA to
8 demonstrate that California does not need its standards to meet compelling and extraordinary
9 conditions—a burden California contends EPA cannot carry. AIAM, however, has not contested
10 California’s argument that EPA has primary jurisdiction to determine this factual dispute, and in
11 fact concedes the issue. (*Id.*; *see* AIAM Br. at 28 n.24.)

12 Second, the automakers’ effort to reposition this issue as a legal one should be rejected.
13 The plain text of section 209(b)(1)(C) does not limit the scope of California’s authority to a
14 particular set of smog conditions. The terms “compelling and extraordinary conditions” are
15 general and expansive, granting California authority to respond to a variety of air pollution
16 problems that significantly affect the state. California has used its authority not only to deal with
17 the smog conditions known in 1967, but also to address newly recognized threats to public health
18 and welfare, including diesel particulate matter (a cause of cancer) and other toxic pollutants such
19 as benzene and formaldehyde. *See, e.g.*, California State Motor Vehicle Pollution Control
20 Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18887, 18890-1 &
21 n.30 (May 3, 1984) (diesel particulates). Indeed, Congress intended California to have the
22 authority to set standards for motor vehicle emissions that EPA had not already regulated. (Def.
23 Br. at 10-11, 22-23.)

24 AIAM also argues that “compelling and extraordinary conditions” means conditions that
25 are unique to California, and that the global warming problem is not unique to California. (AIAM
26 Br. at 29.) But if California’s authority were limited to problems that only California faces, there
27 would be no rationale for section 177 of the Act, 42 U.S.C. § 7507, which allows other States to

28 \\\

1 adopt California’s standards in order to address pollution problems they share with California.
2 The global warming impacts of greenhouse gases are just such a problem.

3 AIAM tries a different bank shot off section 177. AIAM notes (1) that section 177
4 authorizes other states to adopt California’s standards if they have “plan provisions approved
5 under this part” of the Clean Air Act, and (2) those plans are aimed at attainment or maintenance
6 of national ambient air quality standards. From this, they reason that California’s standards must
7 be limited to meeting those national ambient air quality standards. (AIAM Br. at 30-31.) There
8 are two flaws in this argument.

9 First, as mentioned above, section 209(b) itself does not limit California to addressing a
10 particular set of smog conditions, but provides a waiver “for the control of emissions from new
11 motor vehicles” where those standards are at least as protective of public health and welfare as
12 federal standards. Second, there is nothing in section 177 that says other States may adopt
13 standards that relate only to the national ambient air quality standards. Rather, having an
14 approved attainment plan is a prerequisite to “adopting and enforcing standards relating to the
15 control of emissions from new motor vehicles” Importantly, limiting section 177 States in
16 the matter suggested by AIAM would create havoc with the statute. As AIAM itself notes,
17 section 177 States must adopt California’s standards as a whole package—a requirement imposed
18 in order to protect automakers from being subject to more than two vehicle standards. The
19 California package includes the State’s earlier standards addressed to the national ambient air
20 quality standards as well as the State’s current greenhouse gas standards. Thus, no section 177
21 State elects California’s greenhouse gas standards by themselves. By electing the entire
22 California’s emission standards package, each section 177 State is adopting measures related to
23 attaining or maintaining the national air quality standards.

24 The Court should enter judgment against the automakers’ Clean Air Act claims.^{1/}

25
26 1. The automakers also suggest that the Clean Air Act may not govern carbon
27 dioxide emissions because Congress rejected certain proposed changes during the 1990
28 amendments to the Clean Air Act (AIAM. Br. at 31-32), but this line of attack is futile. *See Solid
Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001)
 (“[f]ailed legislative proposals are a particularly dangerous ground on which to rest an
 interpretation of a prior statute”).

1 I.

2 **THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR**
3 **ON THE AUTOMAKERS’ ENERGY POLICY AND CONSERVATION**
4 **ACT CLAIMS.**

5 The automakers now rest their chance for success almost exclusively on their claim that
6 EPCA preempts California’s greenhouse gas emission standards. They assert both express and
7 implied preemption claims but their arguments in support of both theories are almost
8 indistinguishable. Defendant and Defendant-Intervenors’ response to these claims will be the
9 same—Congress did not expressly or impliedly preempt California’s federally approved Clean Air
10 Act standards because they are “other motor vehicle standards” that EPCA compels NHTSA to
11 consider.

12 **A. California’s Regulations Are Not Preempted by the Energy Policy and**
13 **Conservation Act’s Express Preemption Provision.**

14 The automakers contend that California’s regulations are expressly preempted by EPCA
15 section 32919(a) because, they allege, California’s regulations will necessarily require significant
16 fuel economy improvements as a result of technologies used to reduce carbon dioxide emissions.
17 (Pl. Br. at 3, 5, 10, 40; AIAM Br. at 2-5.) Assuming for the sake of argument that California’s
18 regulations have the effect on fuel economy that they allege, the automakers’ express preemption
19 argument fails as a matter of law because California emission standards are not “related to” fuel
20 economy standards within the meaning of section 32919(a).

21 **1. California’s greenhouse gas emission standards are not “fuel**
22 **economy standards.”**

23 First, California’s greenhouse gas emission standards are not fuel economy standards, de
24 facto or otherwise. The automakers ignore EPCA’s definitions concerning “fuel economy” and
25 “fuel economy standards.” These are the terms that are the object of section 32919(a)’s “relating
26 to” phrase. EPCA section 32901(a)(6) provides that “‘average fuel economy standard’ means a
27 performance standard specifying a minimum level of average fuel economy applicable to a
28 manufacturer in a model year.” 49 U.S.C. § 32901(a)(6). Likewise, section 32901(a)(10)
provides that “‘fuel economy’ means the average number of miles traveled by an automobile for

1 each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the
2 Administrator under section 32904(c) of this title.” 49 U.S.C. § 32901(a)(10).

3 California greenhouse gas emission standards are neither of these. They do not specify an
4 average level or any particular level of “fuel economy” or mileage per gallon applicable to a
5 manufacturer in a model year. They are standards that regulate vehicle emissions. The standards
6 can be met by applying pollution control technologies that curb emissions of four greenhouse
7 gases: carbon dioxide, nitrous oxide, methane and hydrofluorocarbons. *See* Cal. Code Regs. tit.
8 13, § 1961.1(e)(4). (Def. Br. at 4.) They also provide auto manufacturers an alternative
9 compliance path through the use of alternative fuels—a pathway for carbon dioxide reduction that
10 is independent of EPCA’s fuel economy standards. (*See* Def. Br. at 6.)

11 The language of California’s regulations are not the subject of a factual dispute.
12 Regardless of their alleged impact on fuel efficiency, California’s regulations are not “fuel
13 economy” standards within the meaning of EPCA.

14 **2. California’s greenhouse gas emission standards are not**
15 **“related to” fuel economy standards.**

16 **a. The Energy Policy and Conservation Act does not**
17 **expressly preempt California’s Clean Air Act emission**
18 **standards because the Energy Policy and Conservation**
Act requires that these standards be considered when
setting fuel economy standards.

19 The next question is whether California’s Clean Air Act emission standards are “related
20 to” fuel economy standards within the meaning of EPCA section 32919(a). The automakers rely
21 on outdated case law in arguing for an expansive construction of this term. As California showed
22 in its opening brief, the Supreme Court definitively has taken a narrower, functional approach to
23 the term “related to”: “We simply must go beyond the unhelpful text and the frustrating difficulty
24 of defining its key term, and look instead to the objectives of the [applicable federal] statute as a
25 guide to the scope of the state law that Congress understood would survive.” *New York State*
26 *Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

27 The automakers virtually ignore *Travelers* and harken back to earlier ERISA cases
28 advancing a more expansive view of “related to” that the Supreme Court abandoned in *Travelers*

1 and later cases. (Pl. Br. at 39-40; AIAM Br. at 20-21.) The Supreme Court in *Egelhoff v.*
2 *Egelhoff*, 532 US 141, 146-147 (2001) confirmed *Travelers*' narrower construction of the term
3 "related to" and criticized its own expansive view in *Morales v. Trans World Airlines, Inc.*, 504
4 U.S. 374 (1992), the earlier case on which the automakers chiefly rely. The Court stated that "we
5 have cautioned against an 'uncritical literalism' that would make pre-emption turn on 'infinite
6 connections.'" *Egelhoff*, 532 U.S. at 146-147. The Ninth Circuit has confirmed this narrower
7 reading. See *Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974, 980 (9th Cir. 2001) (criticizing
8 "connection/reference test"); *Toumajian v. Frailey*, 135 F.3d 648, 653 n.3 (9th Cir. 1998) (noting
9 that *Travelers* narrowed *Morales*). Therefore, determining the objectives of the applicable federal
10 statute remains the primary guide to the scope of state law that Congress thought would survive.
11 *Egelhoff*, 532 U.S. at 146-147; *Travelers*, 514 U.S. at 656.

12 To apply the rule in this case, one must look to the provision of EPCA that establishes the
13 relationship between the Clean Air Act and EPCA. EPCA section 32902(f), 49 U.S.C. §
14 32902(f), provides that, in determining the maximum feasible level, NHTSA shall consider
15 "technological feasibility, economic practicability, *the effect of other motor vehicle standards of*
16 *the Government on fuel economy*, and the need of the United States to conserve energy." There
17 is no dispute that "other motor vehicle standards of the Government" includes both Clean Air Act
18 standard set by EPA under section 202 and California standards approved by EPA under section
19 209(b). (Def. Br. at 20-21 & n.10.) The italicized phrase in section 32902(f) therefore means
20 that NHTSA must take the effect of Clean Air Act motor vehicle standards into account when
21 determining the appropriate fuel economy standards.

22 Plaintiffs complain that "this is the only provision in [EPCA] that receives [Defendants']
23 attention" (Pl. Br. at 10), but that attention is warranted: this is the EPCA provision that
24 connects the Clean Air Act and EPCA and that explains their relationship. Section 32902(f) could
25 hardly be more clear. NHTSA must take those "other motor vehicle standards" as a given and
26 consider their effect when setting fuel economy standards. When federal or California emission
27 standards increase fuel consumption, section 32902(f) gives NHTSA the authority to relax fuel

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1 The distinction that the automakers (and NHTSA) seek to draw between emission
2 standards that “directly regulate fuel economy” and other emission standards that “tangentially”
3 affect fuel economy is contrived. Accepting as true (for the purposes of this motion) the
4 automakers’ factual allegation that reductions in greenhouse gas emissions can only be achieved in
5 a way that improves fuel economy, there is no basis for their legal characterization that
6 California’s greenhouse gas emission standards “directly regulate fuel economy.” Rather, as the
7 undisputed regulatory text of California’s standards shows, these standards directly regulate
8 vehicle emissions. As is the case with other California emission standards, the technology used to
9 meet these standards may have the effect of improving fuel economy.

10 More importantly, EPCA itself does not allow NHTSA to pick and choose which of these
11 vehicle standards it will take into account. EPCA section 32902(f) directs, without exception,
12 that the Secretary “shall consider . . . other motor vehicle standards.” To reach the result desired
13 by the automakers and NHTSA, section 32902(f) would have to be rewritten to provide that the
14 Secretary shall consider “technological feasibility, economic practicability, the effect of other
15 motor vehicle standards of the Government on fuel economy, and the need of the United States to
16 conserve energy, **except that the Secretary may disregard motor vehicle standards adopted**
17 **under section 209(b) of the Clean Air Act when in the judgment of the Secretary they**
18 **amount to a direct regulation of fuel economy.”** (Hypothetical text in bold.) The automakers
19 should direct their argument to Congress.

20 One more example demonstrates why the automakers’ view of the relationship between
21 the Clean Air Act and EPCA is untenable. Suppose that the Supreme Court in *Massachusetts v.*
22 *EPA* upholds EPA’s authority to regulate greenhouse gas emissions and that EPA later adopts
23 greenhouse gas emission standards that are identical to California’s. Section 32919(a)'s express
24 preemption provision would not apply to EPA. NHTSA would have no choice but to consider
25 the effect of those federal greenhouse gas standards on fuel economy as required by section
26 32902(f). The treatment of California’s standards can be no different because section 32902(f)
27 does not distinguish between California and federal motor vehicle standards.

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1 The automakers’ other arguments in favor of their express preemption claim are meritless.
2 They argue that EPCA established three levels of preemption—rules relating to fuel economy
3 standards, rules relating to labeling and rules relating to purchase of state fleet vehicles—and that
4 the preemption rule concerning fuel economy was intended to be the most strict of the three. (Pl.
5 Br. at 24-26; AIAM Br. at 5-6.) The point is irrelevant, because even if it is the most strict
6 preemption provision in EPCA, it is still necessary to determine what the provision covers and
7 what it does not. As demonstrated, section 32902(f) is the key provision that illuminates
8 Congress’s objectives, because it explains the connection between EPCA and the Clean Air Act.

9 The automakers also argue that the presumption against preemption does not apply where
10 Congress regulates in an area that is traditionally an area of federal and not state concern. (AIAM
11 Br. at 19 n. 21.) But California’s standards regulate emissions, not fuel economy. California’s
12 regulation of automobile emissions predated federal regulation in this area, and the Clean Air Act
13 long ago carved out a special role for California to continue acting in this area. (See Def. Br. at
14 11-12.) Thus, this is an ideal case in which the presumption against preemption applies. *E.g., Air*
15 *Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Devel. Comm’n*, 410 F.3d,
16 492, 496 & n.1 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2887 (2006); *see also Gregory v.*
17 *Ashcroft*, 501 U.S. 452, 458-59 (1991).

18 Finally, the automakers repeatedly assert that California is arguing for an “implied repeal”
19 of EPCA’s preemption provision. (Pl. Br. at 9, 10, 27, 37, 49, 53.) This is a talking point, not a
20 legal argument. California argues that the express preemption provision does not apply to
21 California’s emission standards because section 32902(f) requires NHTSA to consider them.
22 California has never argued for an implied repeal, nor claimed that EPCA’s preemption provision
23 is “null and void” (AIAM Br. at 32). EPCA’s preemption clause continues to apply to any state
24 standard related to fuel economy standards that does not have this Clean Air Act sanction.

25 In short, the automakers’ express preemption claim is a legal question raising no factual
26 issues. The Court may grant judgment on the express preemption issue alone. *Decker*, 681 F.2d
27 at 115.

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1
2 **B. California’s Greenhouse Gas Regulations Are Not Impliedly
3 Preempted by the Energy Policy and Conservation Act.**

4 The automakers next claim that they should be allowed to go to trial to establish that
5 California’s greenhouse gas regulations are impliedly preempted by EPCA on the grounds that (1)
6 the federal government “occupies the field” of fuel economy and (2) California’s regulations stand
7 as an obstacle to the accomplishment of the EPCA’s purposes and objectives. (Pl. Br. at 44-48;
8 AIAM Br. at 24-26.) Both arguments fail as a matter of law.

9 **1. California’s greenhouse gas regulations do not operate in a
10 field that Congress intended that the federal government
11 would occupy exclusively.**

12 The automakers’ field preemption argument is a reworking of their express preemption
13 argument. (Pl. Br. at 44-45.) California’s response is the same. EPCA does not establish a field
14 that Congress intended that federal government occupy exclusively, because EPCA itself
15 expressly provides California a role by requiring that “other motor vehicle standards of the
16 Government,” a phrase that includes California’s Clean Air Act emission standards, be taken into
17 account when determining fuel economy standards. Moreover, by conceding that EPCA requires
18 NHTSA to consider at least some California emission standards that affect fuel economy (e.g., Pl.
19 Br. at 45), the automakers acknowledge that the federal government does not exclusively occupy
20 this field.

21 The Court should enter judgment against Plaintiffs’ field preemption claim.

22 **2. California’s greenhouse gas regulations do not stand as an
23 obstacle to the accomplishment of congressional purposes and
24 objectives.**

25 The Court should also enter judgment against the automakers’ “conflict preemption”
26 claim. Conflict preemption may occur when (1) compliance with both laws is physically
27 impossible, or (2) the state law stands as an obstacle to the “full purposes and objectives of
28 Congress.” *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

The automakers do not claim that it is impossible to comply with both California emission
standards and EPCA fuel economy standards. Their conflict preemption claim is based only on
the “obstacle” test. State law does not stand as an obstacle “when the federal government

1 contemplates coexistence between federal and local regulatory schemes.” *Skysign Int’l, Inc. v.*
2 *City & County of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002).

3 The automakers argue that EPCA requires that NHTSA set fuel economy standards at the
4 “maximum feasible” level after considering a variety of factors identified in the statute. (Pl. Br. at
5 46-48; AIAM Br. at 26-27.) The automakers claim that California’s greenhouse gas regulations
6 pose an impermissible obstacle to this “balancing” process, *id.*, and that “the only way that
7 NHTSA could set fuel economy levels would be simply to adopt the standards set by California,
8 which would require it to ignore every other statutorily mandated criteria.” (Pl. Br. at 47.) The
9 automakers’ conflict preemption claim fails as a matter of law.

10 The short answer is the explanation already given—California’s emission standards do not
11 stand as an obstacle to the EPCA process because EPCA requires that California emission
12 standards be considered in the EPCA process. In other words, the federal government
13 contemplates “coexistence between federal and local regulatory schemes,” *Skysign Int’l, Inc.*, 276
14 F.3d at 1117, because it makes consideration of Clean Air Act emission standards part of the
15 EPCA “balancing” process. EPCA does not contain an exception that would allow NHTSA to
16 disregard a statutorily mandated factor just because it might have a significant impact on the
17 weighing of the other factors.

18 Plaintiffs cite a number of cases for the proposition that state law that disrupts a “balanced
19 relationship” created by Congress is preempted. (See AIAM Br. at 24-26.) Those cases are
20 distinguishable. In each of them (such as *Geier v. American Honda Motor Co.*, 529 U.S. 861
21 (2000)) the preempted state law lacked what California has here—a positive authorization in
22 federal law. They did not involve a situation like this where one federal statute incorporates state
23 standards approved under another federal statute into the “balancing” process.

24 The automakers’ implied preemption claim is founded on its misperception of EPCA’s
25 place in the federal regime. The automakers treat California greenhouse gas emission standards as
26 if those standards were the isolated acts of a State that seeks to dictate how NHTSA performs its
27 job. They fail to grasp, however, that NHTSA is not required to consider California’s standards
28 unless EPA, another federal agency, has approved them. This has important consequences. It

1 means that California emission standards are an integral component of an overlapping federal
2 scheme in which Congress has required one agency—NHTSA—to consider the motor vehicle
3 standards adopted or approved by another federal agency—EPA. Far from being an obstacle,
4 they are part of the EPCA process for devising fuel economy standards and advance important
5 *federal* objectives that must be taken into account.

6 In addition, the Clean Air Act imposes similar obligations on EPA that EPCA places on
7 NHTSA. Both statutes require their respective agencies to consider the technological feasibility
8 and economic practicability of standards. The Clean Air Act provides that EPA’s emission
9 standards “shall take effect after such period as the Administrator finds necessary to permit the
10 development and application of the requisite technology, giving appropriate consideration to the
11 cost of compliance within such period.” 42 U.S.C. § 7521(a)(2); *see also Natural Res. Def.*
12 *Council, Inc. v. U.S. Env’tl. Prot. Agency*, 655 F.2d 318, 322 (D.C. Cir. 1981) (describing EPA’s
13 “technology-based” standards). Under section 209(b)(1)(C), EPA uses this same standard in
14 determining whether to grant California emission standards a section 209(b) waiver. 42 U.S.C. §
15 7543(b); *see Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998)
16 (explaining that “[t]he ‘technological feasibility’ component of section 202(a) obligates California
17 to allow sufficient lead time to permit manufacturers to develop and apply the necessary
18 technology”). EPA is also required by section 202(a)(4), 42 U.S.C. 7543(a)(4), to determine that
19 no unreasonable safety risks are created by the technologies used to meet emission standards.^{2/}

20 Therefore, technological feasibility, economic practicability, compliance lead time and
21 safety are not the exclusive concerns of NHTSA, as the automakers suggest. When the
22 automakers claim that California’s standards interfere with NHTSA’s consideration of similar
23 factors, they are really criticizing Congress’s decision to allocate these judgments to two federal
24

25 2. The California statute requires that these emission standards “achieve the
26 maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.”
27 Cal. Health & Safety Code § 43018.5(a). This level of reduction was specifically defined as the
28 reduction “[c]apable of being successfully accomplished within the time provided by this section,
taking into account environmental, economic, social, and technological factors” and
“[e]conomical to an owner or operator of a vehicle, taking into account the full life-cycle costs of
a vehicle.” *Id.* § 43018.5(i)(2).

1 agencies, rather than one, in the overlapping but consistent regulatory system created by the Clean
2 Air Act and EPCA.

3 Further, the automakers have a federal legal remedy to challenge the federal EPA's
4 adoption of motor vehicle standards or its grant of a Clean Air Act waiver to California under
5 section 209(b). 42 U.S.C. § 7607(b); *see, e.g., Motor & Equip. Mfrs. Ass'n v. Env'tl. Prot.*
6 *Agency*, 627 F.2d 1095 (D.C. Cir. 1979).) This judicial oversight insures the integrity and validity
7 of the Clean Air Act emission standards that EPCA requires NHTSA to consider.

8 In short, neither NHTSA nor the automakers are at the mercy of California. California's
9 Clean Air Act emission standards are part of a comprehensive federal scheme in which federal
10 concerns about air pollution have been embodied in the federally adopted or approved motor
11 vehicle standards that NHTSA must consider under section 32902(f). It would conflict with the
12 purposes of both the Clean Air Act and EPCA to allow NHTSA to disregard California's
13 federally approved emission standards, including its greenhouse gas standards. And what
14 NHTSA cannot disregard, it certainly cannot preempt.

15 The Court should grant judgment against the automakers' implied preemption claim.^{3/}

16
17 3. Consequently, because Congress in section 32909(f) demanded that NHTSA
18 consider these federally adopted or approved vehicle standards, it is irrelevant whether they affect
19 the weighing of other statutory factors. In any event, the automakers greatly overstate that
20 impact.

21 The automakers allege, for example, that California's carbon dioxide reductions would
22 cause new cars to exceed the nationwide fuel economy standard. (AIAM Br. at 14.) Suppose
23 hypothetically that the effect of California's reduction of carbon dioxide emissions is that new
24 light trucks sold in California in 2012 cannot, as a fleet, be less than 25 mpg but that the national
25 CAFE standard is 22 mpg. This would not force NHTSA to set a national fuel economy standard
26 of 25 mpg, as the automakers imply, because California's regulations would affect only California
27 and those States that have adopted California's regulations. If NHTSA determined that
28 complying with California standards would be economically impracticable for auto manufacturers,
it might leave the nationwide standard at 22 mpg or even lower it. Or, NHTSA might raise the
nationwide fuel economy standard, if it finds that it is California's regulations have led the auto
industry to adopt new technology that leads to more fuel efficient automobiles nationwide.
NHTSA therefore would not be required to ignore the other "statutorily mandated criteria" when
determining a nationwide standard, but would be free to raise or lower the national standard
depending on its weighing of the other factors.

In addition, the automakers overstate the effect of California's standards on the
"maximum feasible" determinations that NHTSA has actually made. First of all, NHTSA has not
set a fuel economy standard for passenger cars for over 15 years, and that standard remains as set
D. & D-Is.' Reply M. of P. & A. in Support of Their Mtn. for Judgment on the Pleadings No. 1:04-CV-06663-AWI-LJO

1 **C. NHTSA’s opinion that California’s Clean Air Act standards are**
2 **preempted by the Energy Policy and Conservation Act is entitled to**
3 **no deference.**

4 The automakers rely heavily on NHTSA’s opinion that California’s greenhouse gas
5 regulations are preempted by EPCA. (Pl. Br. at 30-31; AIAM Br. at 16-19.) California
6 previously addressed why “courts do not owe deference to an agency’s interpretation of a statute
7 it is not charged with administering or when an agency resolves a conflict between its statute and
8 another statute,” *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 200 F.3d 590, 592
9 (9th Cir. 2000), and why the legal merit of NHTSA’s position “is a question of federal preemption
10 law for the courts alone to decide,” *Ass’n of Intern. Auto. Mfrs., Inc. v. Comm’r, Mass. Dept. of*
11 *Env’tl Prot.*, 208 F.3d 1, 5 (1st Cir. 2000). (See Def. Br. at 23-25.) Further, as just demonstrated,
12 in substance NHTSA’s opinion is wrong.

13 AIAM offers two rationales why NHTSA’s preemption discussion was “indispensable” to
14 its preemption discussion. First, AIAM says that if NHTSA had to pay attention to California
15 standards it would render NHTSA’s rulemaking a “dea[d] letter,” and federal agencies are entitled
16 to declare state regulation preempted to protect their discretionary authority. (AIAM Br. at 17.)
17 AIAM also argues that NHTSA had to “decide the validity” of California’s regulations to fulfill its

18 by Congress, at 27.5 miles per gallon (mpg). See Act of July 5, 1994, Pub. L. No. 103-272, §
19 1(e), 1994 U.S.C.C.A.N. (108 Stat.) 745, 1059 (enacting 49 U.S.C. § 32902(b)); 49 C.F.R. §
20 531.5(a). NHTSA has actually admitted that “a more stringent fuel economy standard than 27.5
21 mpg might better represent the ‘maximum feasible’ level for the passenger car fleet.” See
22 *Reforming the Automobile Fuel Economy Standards Program*, 68 Fed. Reg. 74908, 74909 & n.2
(Dec. 29, 2003). Second, the fuel economy standard for light trucks only goes to model year
2011. See 49 C.F.R. § 533.5(a) (Table IV). NHTSA has not determined its “maximum feasible”
level past then.

23 Finally, EPCA’s overarching purpose is improving fuel efficiency. *E.g.*, Energy Policy
24 Conservation Act (EPCA), Pub. L. 94-163 (1975), § 2(5), 301, 1975 U.S.C.C.A.N. (89 Stat.)
25 871, 874, 901-16; H.R. Rep. No. 94-340 (1975), at 1, 86-94, *reprinted in* 1975 U.S.C.C.A.N.
26 1762, 1763, 1848-56. Because the automakers allege that California’s regulations improve fuel
27 economy, those regulations are consistent with the statute’s primary purpose. Although the
28 automakers suggest that a “maximum feasible” level is an upper limit on fuel economy, CAFE
standards are minimum standards. See 49 U.S.C. § 32902(b); *Center for Auto Safety v. Nat’l*
Highway Traffic Safety Admin., 793 F.2d 1322, 1324, 1338 (D.C. Cir. 1986). Automobile
manufacturers may and do go beyond that standard (Request for Comments; National Academy
of Science Study and Future Fuel Economy Improvements, Model Years 2005-2010, 67 Fed.
Reg. 5757, 5769 (Feb. 7, 2002)), and gain extra credits for doing so (49 U.S.C. § 32903).

1 obligation to consider the effect of “other motor vehicle standards.” (*Id.* at 18.) NHTSA itself did
2 not appear to offer those rationales, and did not have to address the preemption of California
3 emission standards that had not yet been granted a waiver by EPA. Most importantly, NHTSA has
4 no authority to decide the validity of regulations adopted under the Clean Air Act.

5 NHTSA’s opinion is wrong and not entitled to deference. The Court should enter
6 judgment for California on the automakers’ EPCA claims.^{4/}

7
8 **III.**

9 **THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR
ON PLAINTIFFS’ DORMANT COMMERCE CLAUSE CLAIM.**

10 In its opening brief, California argued that Plaintiffs’ dormant Commerce Clause claim fails
11 because the Clean Air Act authorized California’s greenhouse gas regulations, and there is no
12 Commerce Clause violation where Congress authorizes States to regulate interstate commerce.
13 (Def. Br. at 33-34.) Plaintiffs do not dispute this legal principle, nor do they dispute that the Clean
14 Air Act is a federal law that permits state regulation of interstate commerce. (Pl. Br. at 65.) They
15 contend instead that “other federal laws” can still evince Congressional intent to limit state
16 regulation of interstate commerce, and that EPCA is one of those laws. (*Id.* at 65-66.)

17 Plaintiffs’ argument fails. Section 209(b) of the Clean Air Act allows California to regulate
18 interstate commerce by setting auto emission standards for new cars in California. If that were not
19 the case, *all* of California’s emission standards would be subject to attack under the dormant
20 Commerce Clause, not just the greenhouse gas standards at issue. A California appellate decision,
21 *People ex rel. State Air Res. Bd. v. Wilmshurst*, 68 Cal.App.4th 1332 (1999), persuasively
22 supports California’s argument (Def. Br. at 35), yet Plaintiffs neglect to even address that
23 authority.

24
25 _____
26 4. California has petitioned the Ninth Circuit to review NHTSA’s rulemaking.
27 *People ex rel. Lockyer v. Nat’l Highway Traffic Safety Admin.*, No. 06-72317 (9th Cir. filed May
28 2, 2006). There is also a pending action under the Freedom of Information Act to attempt to
discover the extent of the automobile industry’s influence in the NHTSA rulemaking. *People ex*
rel. Lockyer v. Nat’l Highway Traffic Safety Admin., No. C 06-02654 SC (N.D. Cal. filed Apr.
19, 2006).

1 Plaintiffs argue that EPCA reopens the door to a dormant Commerce Clause claim. But if
2 Plaintiffs were correct that EPCA rescinds California’s Clean Air Act authority, there would be no
3 need for a dormant Commerce Clause inquiry. Conversely, if California prevails on Plaintiffs’
4 preemption claims, their dormant Commerce Clause claim necessarily fails because California’s
5 preemption defense is based on its federal authorization under both acts.

6 In response to California’s alternative dormant Commerce Clause argument, Plaintiffs claim
7 that they are entitled to a trial on whether California’s standards violated the balancing test in *Pike*
8 *v. Bruce Church, Inc.*, 397 U.S. 137 (1970). California showed in its opening brief that, even if
9 California’s authority under the Clean Air Act did not put end to the inquiry, California’s standards
10 would satisfy the requirements in *Pike* because they did not discriminate between interstate and
11 intrastate commerce and their burdens were not “clearly excessive” in relation to their benefits.
12 (Def. Br. at 35-36.) California demonstrated that Plaintiffs did not state a claim under the *Pike*
13 balancing test because they alleged only that California’s regulations would increase consumers’
14 purchase price and did not allege a burdensome or disparate impact on interstate commerce.

15 In their response, Plaintiffs argue that their allegation that the regulations would increase
16 the automobiles purchase price entitles them to a trial under the *Pike* test. They contend that
17 *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 568-569 (4th Cir. 2005),
18 “effectively” holds that a price increase caused by a state law was sufficient to establish a *Pike*
19 claim. (Pl. Br. at 64.) Plaintiffs misread *Yamaha*. The Fourth Circuit found that the district court
20 misapplied the *Pike* test by limiting it to situations involving a compelling need for national
21 uniformity in regulation. *Yamaha*, 401 F.3d at 572. The Fourth Circuit did not endorse Plaintiffs’
22 current argument that a dormant Commerce Clause claim is created by price increases alone.

23 Plaintiffs also claim that *United Haulers Ass’n Inc. v. Oneida-Herkimer Solid Waste*
24 *Management Auth.*, 438 F.3d 150, 156-57 (2d Cir. 2006), expands the *Pike* test beyond “disparate
25 impact.” The two additional factors mentioned in that case (regulation of commercial activity
26 wholly outside a state’s borders and regulatory requirements inconsistent with those of other
27 states) have no application in this case.

28 \\\

1 In sum, federal authorization under the Clean Air Act and EPCA insulates California from a
2 dormant Commerce Clause challenge. And even if California could not rely on its federal
3 authorization, there is no Commerce Clause violation because Plaintiffs have not pleaded facts to
4 demonstrate a *Pike* violation.

5
6 **IV.**

7 **THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR**
8 **ON PLAINTIFFS’ FOREIGN POLICY CLAIM.**

9 The Court should dismiss Plaintiffs’ foreign policy claim for five reasons.

10 First, Plaintiffs’ response to the motion for judgment on the pleadings ignores Defendant
11 and Defendant-Intervenors’ primary argument: that is, because the federal Clean Air Act
12 authorizes California to set greenhouse gas emission standards, those standards are immune from a
13 charge that they conflict with and are preempted by U.S. foreign policy. That un rebutted
14 proposition is by itself sufficient to defeat Plaintiffs’ foreign policy claim.

15 Second, Plaintiffs continue to insist that there are factual issues to try on foreign policy, but
16 elsewhere they have disclaimed an intention to present foreign policy evidence at trial. (*See*
17 Plaintiffs Memorandum of Points and Authorities in Opposition to Motion to Continue Trial Date
18 and Modify Scheduling Order, filed July 11, 2006, at 4-5 (stating that expert testimony will be
19 limited to EPCA issues and, possibly, scientific issues).)^{5/}

20 Third, Plaintiffs ignore the fact that their foreign policy legal theory—that domestic action
21 reduces the federal government’s “leverage” in pursuit of emission reductions from other
22 countries—is directly at issue in *Massachusetts v. EPA*. In that case the Supreme Court will
23 consider whether EPA may decline to find that a pollutant “may reasonably be anticipated to

24 5. The one supposedly factual issue identified in Plaintiffs’ response relates to
25 unspecified press reports of meetings held by state officials with Canadian counterparts, at their
26 invitation. (Pl. Br. at 56.) Despite Plaintiffs’ conspiratorial undertones in Plaintiffs’ memorandum
27 and the references to unspecified press reports in paragraph 70 of their first amended complaint,
28 meetings of this kind are unremarkable. CARB has widely recognized expertise in motor vehicle
pollution control technology, and for decades CARB officials have frequently participated in
technical consultations with counterparts in many nations. These technical consultations do not
interfere with any aspect of the conduct of U.S. foreign policy. Further, as a matter of law,
consultations of this kind can have no bearing on the validity of California’s regulations. Thus this
supposed factual issue is legally irrelevant and does not require a trial.

1 endanger” public health or welfare based on “policy considerations” that have nothing to do with
2 danger to health or welfare. See <http://www.supremecourtus.gov/qp/05-01120qp.pdf>. One
3 “policy consideration” cited by EPA is the claim that federal regulation of greenhouse gas
4 emissions would reduce the President’s leverage to negotiate limits on other countries’ emissions.
5 Plaintiffs rely on the same EPA claim in their response to the motion for judgment on the
6 pleadings, where they state that “[b]ecause EPA has decided that it cannot proceed unilaterally,
7 then no individual State should do so, either.” (Pl. Br. at 56.) It follows that if the Supreme Court
8 holds that EPA may not entertain these extraneous “policy considerations” under the Clean Air
9 Act, then there will also be no legal basis for Plaintiffs’ mirror-image foreign policy argument
10 against California.^{6/}

11 Plaintiffs also fail to overcome the fatal logical flaw in their leverage argument. The current
12 policy of the Executive Branch, as evidenced by official statements of the State Department, is to
13 *oppose* any negotiations toward binding emission limits on the U.S., other developed countries, or
14 developing countries. (See Def. Br. at 29-30.) The Executive Branch cannot withhold domestic
15 action as leverage towards an objective it is not pursuing. Thus, given the current administration’s
16 policy, withholding federal (or state) regulation of greenhouse gases serves no foreign policy
17 function.

18 Fourth, Plaintiffs argue from a hodgepodge of failed legislation, expired funding riders, a
19 superseded Senate resolution, and legislation authorizing research and diplomacy that Congress
20 has established a policy against domestic action. EPA is offering the same hodgepodge for the
21 Supreme Court’s inspection in *Massachusetts*. Defendant and Defendant-Intervenors have already
22 methodically demonstrated that these materials demonstrate no such legislative policy. (See Def.
23 Br. at 30-33.) Defendant and Defendant-Intervenors have also shown that by ratifying the U.N.
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26 6. Plaintiffs cryptically suggest that the district court in *Connecticut v. American*
27 *Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2006), reached—in their words, not the
28 court’s—the “conclusion that current American foreign policy opposes mandatory, unilateral
regulation of CO2 emissions.” (Pl. Br. at 60.) Because this question is pending in *Massachusetts*,
and because the Connecticut case is on appeal to the Second Circuit (oral argument was held in
May 2006), no weight is due their characterization of this opinion.

1 Framework Convention on Climate Change (to which the United States became a party in 1992),
2 Congress actually adopted the policy of *taking* corrective action. (Def. Br. at 29-31.)⁷

3 Fifth, Plaintiffs misconstrue a string of Supreme Court cases. The cases on which Plaintiffs
4 rely all deal with state statutes quite different from California’s greenhouse gas emission standards
5 (and their related state statute): each one expressly referenced the laws or conduct of foreign
6 governments (and in one case foreign businesses) with the obvious objective of applying state
7 pressure to change those laws or conduct. Neither California’s statute nor its emission standards
8 makes any such reference or displays any such intent.

9 For example, in *Zschernig v. Miller*, 389 U.S. 429 (1967), the Court struck down an
10 Oregon inheritance law that limited the rights of non-residents from communist countries on the
11 basis that they confiscate private property; the Court found that the law inappropriately took state
12 courts into judging “the ‘democracy quotient’ of a foreign regime.” *Id.* at 435. Nothing in
13 California’s statute or regulations inquires into or turns on the status of any foreign government’s
14 laws or policies.

15 Likewise, in *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000), the Court
16 struck down a Massachusetts law that imposed trade sanctions on companies doing business in
17 Burma in a clear effort to put pressure on the Burmese government to change offensive policies.
18 The Court found that the Massachusetts law imposed “a different, state system of economic
19 pressure against the Burmese political regime” that would “blunt the consequences of discretionary
20 Presidential action” under a federal sanctions law with the same objective. *Id.* at 376 (footnote
21 omitted). Nothing in California’s law or regulations seeks to change the laws or policies of any
22 foreign government.

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25 7. Defendant and Defendant-Intervenors showed that the Framework Convention
26 commits the United States “to adopt national policies and to take corresponding measures” that
27 “will demonstrate that developed countries are taking the lead in modifying longer-term trends in
28 anthropogenic emissions. . .” (Def. Br. at 30.) Plaintiffs throw up later and supposedly
contradictory international documents like so much confetti but none of them has the status of a
ratified treaty, which is the law of the land. None of them negates the U.S. commitment under
the Convention to take the lead in fighting global warming.

1 In *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003), the Court struck down a
2 California law that sought to compel European insurance companies to disclose Holocaust-era
3 insurance policy data as a condition of doing business in the state. The Court found a “clear
4 conflict” between the state law and an executive branch agreement with European governments to
5 secure compensation from those companies through other means, citing again *Crosby’s* concern
6 about applying “a different, state system of economic pressure” on those companies. *Id.* at 423.
7 The Court distinguished this state law, aimed at specific companies for the specific purpose of
8 achieving compensation for past events outside of California, from laws with general purposes and
9 application. “[Q]uite unlike a generally applicable ‘blue sky’ law, [this state law] effectively singles
10 out only policies issued by European companies, in Europe, to European residents, at least 55
11 years ago.” *Id.* at 425-26. California’s statute and regulations apply generally to all auto
12 companies now selling vehicles in the state and concern only the current greenhouse gas emissions
13 of vehicles sold in California. Nothing in the state law or regulations conditions access to the
14 California market on the emissions of vehicles sold in other jurisdictions.

15 In addition, *Crosby* and *Garamendi* involved conflict between the state law and a federal
16 foreign policy objective embodied in either a federal statute or an executive agreement. In this
17 case, however, there is no federal law or executive agreement embodying the policy of withholding
18 domestic action that Plaintiffs allege.

19 Plaintiffs also misconstrue *Barclay’s Bank PLC v. Franchise Tax Board*, 512 U.S. 298
20 (1994). Defendant and Defendant-Intervenors did not cite *Barclay’s* to argue (in Plaintiffs’ words)
21 that “Congressional inaction in the field of automotive greenhouse gas regulation should immunize
22 CARB’s rule from challenge under the foreign policy preemption and related doctrines.” (Pl. Br.
23 at 58.) Rather, the *Barclay’s* Court upheld a California law in light of evidence that Congress
24 informally considered and approved the California law at issue. This evidence fell short of enacted
25 federal legislation. In this case, there is far more than that: The Clean Air Act affirmatively
26 authorizes California’s standards.

27 The Court should enter judgment for California on Plaintiffs’ foreign policy claims.

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V.

**THE COURT SHOULD ENTER JUDGMENT IN CALIFORNIA’S FAVOR
ON PLAINTIFFS’ ANTITRUST CLAIM.**

In its opening memorandum, California demonstrated that Plaintiffs’ antitrust claim fails. Plaintiffs cannot establish that California’s greenhouse gas emission standards are, on their face, preempted by the Sherman Antitrust Act because Plaintiffs’ unequivocal allegations fail to demonstrate that there is an “irreconcilable” conflict with the Sherman Act and that there is “no set of circumstances” under which the greenhouse gas emission standards would be valid. (Def. Br. at 36-39, citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) and *United States v. Salerno*, 481 U.S. 739, 745 (1987).)

In their opposition, Plaintiffs did not dispute California’s argument that as a matter of law the aggregation provisions that give rise to their antitrust claim are optional. (See Def. Br. at 38.) Nor did Plaintiffs dispute that the aggregation provisions are a continuation of longstanding federal and state regulatory construct for certification of compliance with automobile emissions standards. (*Id.* at 37 & n.14.) Plaintiffs also conceded that there are circumstances under which the challenged aggregation provisions would be valid. (Pl. Br. at 67.) Thus, Plaintiffs implicitly concede that the allegations in their first amended complaint are insufficient to support a facial Sherman Act preemption claim.

Instead, Plaintiffs’ opposition argument rests on their assertion that their antitrust claim is not a facial challenge but is an “as-applied challenge.” (Pl. Br. at 67 & n.50.) Plaintiffs’ antitrust claim, however, must be dismissed without leave to amend whether it is construed as a facial challenge or as an as-applied challenge.

First, the language of Count V demonstrates that Plaintiffs have stated a facial challenge: “Plaintiffs request a declaration that the regulation adopted in Resolution 04-28 is preempted by the Sherman Act.” (FAC at ¶ 146.) Plaintiffs ask the Court to invalidate the entire greenhouse gas regulations, not simply the aggregation provisions. By seeking the complete invalidation of the regulations, Plaintiffs’ antitrust claim is a facial challenge and barred under *Rice* and *Salerno*.

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1 Second, although Plaintiffs now claim that they are stating an as-applied claim, they do not
2 identify any specific language in their complaint that supports their argument. Plaintiffs' position is
3 also belied by their allegation that the question of whether the Sherman Act preempts California's
4 greenhouse gas emission standards "is purely or predominantly a question of law." (FAC ¶ 143.)

5 To state an as-applied claim, Plaintiffs would need to allege a specific application of the
6 aggregation provisions. They have not done that, nor could they, given that California's
7 regulations do not apply until the 2009 model year. Moreover, Plaintiffs' first amended complaint
8 concedes that they are unsure if any manufacturer will share information in a manner that might
9 conflict with the Sherman Act. (FAC ¶ 143; *see* Def. Br. at 38.) Thus, far from requesting a
10 ruling on the aggregation provisions as applied to a specific factual situation, Plaintiffs seek an
11 advisory ruling about highly uncertain future situations. Therefore, if Plaintiffs wish to
12 characterize this as an "as-applied" claim, it is unripe because it "rests upon contingent future
13 events that may not occur as anticipated," if they occur at all. *Texas v. United States*, 523 U.S.
14 296, 300 (1998).

15 Plaintiffs' reliance on *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) is
16 misplaced. Unlike here, the plaintiffs in *Compassion in Dying* did not seek a complete invalidation
17 of the state regulation at issue. *Id.* at 797 & n.8. In addition, the *Compassion in Dying* court
18 clarified that insofar as the plaintiffs' challenge to the Washington statute was construed as a facial
19 challenge, the challenge fell within the narrow exception to *Salerno* that applies to abortion cases
20 and certain first amendment claims. *Id.* at 798. Plaintiffs ignore this, as well as the Ninth Circuit's
21 later pronouncement that outside first amendment and abortion cases, "[f]acial challenges to state
22 statutes are usually guided by the rule of *United States v. Salerno* . . . which requires 'the
23 challenger [to] establish that no set of circumstances exists under which the Act would be valid.'" *Planned Parenthood of Idaho, Inc. v. Wasden* 376 F.3d 908, 920 (9th Cir. 2004)^{8/}

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26 8. In addition, the standing of plaintiff Alliance of Automobile Manufacturers in this
27 action is limited to situations where "neither the claim asserted nor the relief requested requires
28 the participation of individual members in the lawsuit." *Hunt v. Washington St. Apple Advertising
Comm'n*, 432 U.S. 333, 343 (1977). In the as-applied antitrust claim Plaintiffs now assert, it
would be necessary to ascertain specific information about the particular relevant manufacturers.
The Alliance cannot bring such a claim, and this is an additional reason judgment should be
D. & D-Is.' Reply M. of P. & A. in Support of Their Mtn. for Judgment on the Pleadings No. 1:04-CV-06663-AWI-LJO

1 The Court should enter judgment on Plaintiffs' antitrust claim because it is barred as a
2 facial challenge and would be unripe if it were construed as an as-applied challenge.

3 **CONCLUSION**

4 The Court should grant California's motion for judgment on the pleadings as to each of the
5 automakers' claims.

6 Dated: June 1, 2006

7 Respectfully submitted,

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28 _____
granted against it on this claim.