

April 4, 2004

Mark J. Langer
Clerk
United States Court of Appeals for
the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001

Re: Commonwealth of Massachusetts v. EPA, No. 03-1361 and
consolidated cases

Dear Mr. Langer:

Pursuant to Circuit Rule 28(j), Petitioners hereby submit supplemental authorities concerning a new and independent basis for Petitioners' standing (and thus this Court's subject matter jurisdiction.) This new basis for standing is a subsequent injury to state sovereignty caused by the EPA determination (the "202 Denial") at issue here.

In 2002, petitioner State of California enacted a statute (Cal. Health & Safety Code §43018.5) requiring a state agency to adopt greenhouse gas emission standards for new motor vehicles, which the agency is in the process of doing. However, on December 7, 2004, the auto industry filed suit against California, alleging, inter alia, that EPA's "authoritative determination" in the 202 Denial "precludes California from adopting any new motor vehicle emission standards for carbon dioxide or greenhouse gases."¹

Because the 202 Denial is the basis of a challenge to a state statute and regulations, California has suffered injury to its sovereign power to enforce state law. In State of Alaska v. U.S. Dept. of Transportation, 868 F.2d 441, 443 (D.C. Cir. 1989), this Court held that 27 states had standing to challenge Department of Transportation administrative orders that allegedly preempted state consumer protection laws. Because such preemption injured petitioners' "sovereign power to enforce state law", the Court held that "we are satisfied that the States meet the standing requirements of Article III." Id. at 444. Other circuits agree that when federal agency action is used to preempt state law, such injury to state sovereignty establishes Article III standing, e.g., State of Ohio v. U.S. Department of Transportation, 766 F.2d 228, 233 (6th Cir. 1985)("Ohio has standing to challenge the Department's regulations and undertake to vindicate its own law.")

¹ First Amended Complaint, ¶123, Central Valley Chrysler-Jeep, Inc. v. Witherspoon, No. 04-6663, U.S.D.C. for the Eastern District of California. Petitioners regret this relatively late submission, but only during subsequent proceedings in Central Valley did they recognize the connection between those claims and petitioners' standing in this case.

Thus, in addition to the grounds for standing established in Petitioners' briefing, California also has standing based on injury to its sovereign power to enforce state law.

Sincerely,

Marc Melnick
Counsel for Petitioner State of California

cc: Counsel of Record