

1 KAMALA D. HARRIS, State Bar No. 146672
 Attorney General of California
 2 RANDY L. BARROW, State Bar No. 111290
 Supervising Deputy Attorney General
 3 NICHOLAS STERN, State Bar No. 148308
 COURTNEY S. COVINGTON, State Bar No. 259723
 4 LINDA GÁNDARA, State Bar No. 194667
 Deputy Attorneys General
 5 1300 I Street, Suite 125
 P.O. Box 944255
 6 Sacramento, CA 94244-2550
 Telephone: (916) 445-4853
 7 Fax: (916) 327-2319
 E-mail: Linda.Gandara@doj.ca.gov
 8 *Attorneys for Defendants Richard W. Corey in his
 official and personal capacity as Executive Officer
 9 of the California Air Resources Board, Mary D.
 Nichols in her official and personal capacity as
 10 Chairman of the California Air Resources Board,
 and Matt Rodriquez in his official capacity as
 11 Secretary of the California Environmental
 Protection Agency*

12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA – SACRAMENTO
 14

15 **OWNER-OPERATOR INDEPENDENT
 DRIVERS ASSOCIATION, INC., DALE L.
 16 CURTICE, JR. d/b/a CURTICE
 TRUCKING, INC., NELSON
 17 GREENWADE, SR. d/b/a DREAM TEAM
 EXPRESS LLC, LANCE HENNING d/b/a
 18 LANCE HENNING TRUCKING, LEO T.
 JOLIN, BARRY VUN CANNON d/b/a
 19 NACO LLC, JOHNNY WEST, RICHARD
 M. HUNTER, and RUSSELL A. SHORT,**

2:14-cv-00186-MCE-AC

**DEFENDANTS' MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION TO DISMISS**

Date: April 17, 2014
 Time: 2:00 p.m.
 Courtroom: 7
 Judge: The Honorable Morrison C.
 England, Jr.
 Trial Date: None Set
 Action Filed: December 6, 2013

Plaintiffs,

v.

22 **RICHARD W. COREY in his official and
 personal capacity as Executive Officer of the
 23 California Air Resources Board; MARY D.
 NICHOLS in her official and personal
 24 capacity as Chairman of the California Air
 Resources Board; MATT RODRIGUEZ in
 25 his official capacity as Secretary of the
 California Environmental Protection
 26 Agency,**

Defendants.

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INTRODUCTION

1
2 In 2008 the California Air Resources Board (Air Board) adopted the Truck and Bus
3 Regulation, California Code of Regulations, title 13, section 2025. This Regulation requires
4 specified diesel trucks and buses to retrofit their vehicles in order to reduce their emissions in
5 California, and applies to all of the specified categories of trucks operated in California,
6 regardless of their origin.

7 The plaintiffs consist of eight individual truckers and a truckers association (collectively
8 Plaintiffs). They allege that the Truck and Bus Regulation violates the dormant Commerce
9 Clause. Plaintiffs have named three defendants in this action: Richard W. Corey, Executive
10 Officer of the Air Board; Mary Nichols, the Chairman of the Air Board; and Matt Rodriguez, the
11 Secretary of the California Environmental Protection Agency. While Secretary Rodriguez is
12 named solely in this official capacity, Plaintiffs seek an injunction against Mr. Corey and Ms.
13 Nichols in their personal capacities. (Compl. ¶ 24-25, 53-56.)

14 Defendants bring this motion because Plaintiffs have failed to state a personal-capacity
15 claim against Mr. Corey and Ms. Nichols. First, Plaintiffs have failed to allege facts sufficient to
16 support these personal-capacity claims. To allege a personal-capacity claim against a public
17 official, a plaintiff must plead facts showing that the official, through his or her own individual
18 action, has violated the Constitution. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Plaintiffs'
19 Complaint is devoid of any allegations that Mr. Corey or Ms. Nichols engaged in any conduct at
20 all. Instead, Plaintiffs' only allegations against Mr. Corey and Ms. Nichols are that they are the
21 officials charged with investigating and/or enforcing the regulations. (Compl. ¶¶ 24, 25.) These
22 allegations are insufficient to support a claim that these defendants are personally liable to the
23 Plaintiffs.

24 Second, Plaintiffs are seeking injunctive relief, not damages. Injunctive relief is not
25 available in a personal-capacity action.

26 Third, Mr. Corey and Ms. Nichols are entitled to qualified immunity. Defendants sued in
27 their personal capacities are entitled to qualified immunity unless their conduct violated clearly
28 established constitutional rights of which a reasonable person would have known. *Pearson v.*

1 *Callahan*, 555 U.S. 223, 231 (2009). Plaintiffs' complaint does not allege any such conduct.
2 Instead, it seeks to hold Mr. Corey and Ms. Nichols personally liable based solely on the
3 allegations that, as a result of the offices they hold, they are charged with enforcing an allegedly
4 unconstitutional regulation. Mr. Corey and Ms. Nichols could not have known that, merely by
5 holding their official positions, they were violating Plaintiffs' constitutional rights. Accordingly,
6 Plaintiffs' personal-capacity claims against Mr. Corey and Ms. Nichols should be dismissed with
7 prejudice.

8 BACKGROUND

9 I. REGULATORY BACKGROUND.

10 A. The Air Board

11 The Air Board is a department in the California Environmental Protection Agency. In 1967,
12 the Legislature established the Board to: (1) attain and maintain healthy air quality; (2) conduct
13 research into the causes of and solutions to air pollution; and (3) systematically attack the serious
14 problems caused by motor vehicle emissions, which are the major causes of air pollution in the
15 State. Cal. Health & Safety Code § 39003; *Harris Transportation Co. v. California Air*
16 *Resources Board* 32 Cal. App. 4th 1472, 1475 (1995). The Board is a national leader in the
17 regulation of emissions from motor vehicles. Indeed, the history of the federal Clean Air Act
18 indicates that Congress intended California to "continue and expand its pioneering efforts at
19 adopting and enforcing motor vehicle emission standards different from and in large measure
20 more advanced than the corresponding federal program; in short, to act as a kind of laboratory for
21 innovation." *Motor and Equipment Mfrs. Ass'n v. E.P.A.*, 627 F.2d 1095, 1111 (D.C. Cir. 1994);
22 *see also Engine Mfrs. Ass'n v. United State Env'tl. Prot. Agency*, 88 F.3d 1075, 1079-80 (D.C. Cir.
23 1996).

24 The Air Board works within a cooperative federal-state system for controlling pollution.
25 Under this system, the United States Environmental Protection Agency (US EPA) promulgates
26 the National Ambient Air Quality Standards (NAAQS), which are health based-standards for
27 certain pollutants that every state must meet. *Bayview Hunters Point Cmty. Advocates v. Metro*
28 *Trans. Comm'n*, 366 F.3d 692, 695 (9th Cir. 2004.) Each state is then required to propose a set of

1 measures, in the form of a “State Implementation Plan” or “SIP,” that will enable the State to
2 meet these federal standards.¹ The SIP is submitted to the US EPA for review and approval.
3 Once approved by the US EPA, the SIP has the force and effect of federal law. *Safe Air for*
4 *Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1091 (9th Cir. 2007).

5 **B. The Truck and Bus Regulation.**

6 In this action, Plaintiffs challenge the constitutionality of the Air Board’s Truck and Bus
7 Regulation, title 13, section 2025, of the California Code of Regulations. The Air Board adopted
8 this Regulation in 2008, and amended it in 2011. The goal of the Regulation is to protect health
9 and safety by reducing emissions of diesel particulate matter (PM) and oxides of nitrogen (NOx)
10 from trucks and buses operating in California. *California Dump Truck Owners Ass’n v. Nichols*,
11 924 F. Supp. 2d 1126, 1132 (E.D. Cal. 2012).

12 The Truck and Bus Regulation has two essential components, which must be complied with
13 on two separate schedules. First, to reduce PM emissions, the Regulation requires specified
14 diesel buses and trucks to have diesel particulate filters (PM filters), which reduce emissions of
15 diesel PM. While model year 2007 and newer diesel trucks have PM filters as part of their
16 standard equipment, older diesel trucks do not. As such, these trucks need to be either retrofitted
17 with PM filters or replaced with a model year 2007 (or newer) engine by deadlines specified in
18 the Regulation. Cal. Code Regs. tit. 13, § 2025(f); *see also California Dump Truck Owners Ass’n*,
19 924 F. Supp. 2d at 1133. Second, to reduce NOx emissions, the Truck and Bus Regulation
20 requires vehicles to be upgraded to model year 2010 engines (or engines with equal or lower
21 emissions) by specified deadlines, which are subsequent to the deadlines for compliance with the
22 PM requirements. Cal. Code Regs. tit. 13, § 2025(f) *see also California Dump Truck Owners*
23 *Ass’n*, 924 F. Supp. 2d at 1133. The Regulation does not differentiate between in-state and out-
24 of-state trucks, and applies to all trucks operating in California, regardless of their origin. Cal.
25 Code Regs. tit. 13, § 2025; *see also Compl. ¶ 1* (regulations impose requirements “on both
26 intrastate and interstate carriers and owner-operators”).

27 ¹ *See* 42 U.S.C. §§ 7410 (state implementation plans required), 7502 (state
28 implementation plan for nonattainment areas), 7511 (plan requirements), 5907 (sanctions).

1 The Truck and Bus Regulation and its amendments are part of the Air Board's regulatory
2 efforts to bring California into compliance with national air quality standards. Thus, the
3 Regulation was part of the SIP that California submitted to the US EPA. The US EPA approved
4 the Truck and Bus Regulation, effective May 4, 2012. 77 Fed. Reg. 20308-01 (Apr. 4, 2012); *see*
5 *also* 76 Fed. Reg. 40652 (July 11, 2011).

6 **II. PLAINTIFFS' COMPLAINT**

7 In this action, Plaintiffs allege that the Truck and Bus Regulation violates the dormant
8 Commerce Clause. Plaintiffs have named three state officials as defendants in this action:
9 Richard Corey, Mary Nichols, and Matt Rodriquez. One of these defendants, Matt Rodriquez,²
10 Secretary of the California Environmental Protection Agency, is named solely in his official
11 capacity. (Compl. ¶ 26.)

12 The other two defendants, Richard W. Corey, the Air Board's Executive Officer, and Mary
13 D. Nichols, the Air Board Chairman, are sued in both their official and their personal capacities.
14 Plaintiffs allege that, as the Air Board's Executive Officer, Mr. Corey is "the individual charged
15 with the enforcement of the challenged regulation, and is authorized to investigate noncompliance
16 with the challenged regulation and impose fines for noncompliance." (Compl. ¶ 24.) As to Ms.
17 Nichols, Plaintiffs allege that, as Chairman of the Air Board, Mary Nichols "is responsible for the
18 enforcement" of the Truck and Bus Regulation. (Compl. ¶ 25.) Plaintiffs' Complaint contains no
19 other allegations that are specific to either Mr. Corey or Ms. Nichols.

20 Plaintiffs' Complaint is comprised of three counts. In their first count, Plaintiffs allege that
21 the Truck and Bus Regulation violates the dormant Commerce Clause, and seek an injunction
22 preventing Defendants from implementing or enforcing the Regulation. (Compl. ¶¶ 37-52, Prayer,
23 ¶ B.) In their second count, Plaintiffs allege that a controversy exists regarding the
24 constitutionality of the Truck and Bus Regulation, and seek a declaratory judgment that the
25 Regulation violates the dormant Commerce Clause. (Compl. ¶¶ 50-52, Prayer, ¶ A.) In their
26 third count, Plaintiffs allege that Richard Corey and Mary Nichols, in their personal capacities,

27 ² Plaintiffs misspelled Secretary Rodriquez's last name, erroneously suing him under the
28 name of "Matt Rodriguez."

1 have violated Plaintiffs' constitutional rights in violation of 42 U.S.C. § 1983. (Compl. ¶ 54-55.)
2 However, Plaintiffs are not seeking damages pursuant to § 1983. Instead, the only remedy
3 Plaintiffs' seek in their third count is an injunction to permanently enjoin Mr. Corey and Ms.
4 Nichols. (Compl. ¶ 56, Prayer, ¶ C.)

5 In their prayer, Plaintiffs seek declaratory relief and an injunction. Plaintiffs also seek
6 attorneys fees pursuant to 42 U.S.C. § 1988 and California Code of Civil Procedure section
7 1021.5. (Compl., Prayer, ¶¶ A.-D.)

8 LEGAL STANDARD

9 A motion to dismiss a lawsuit for failure to state a claim upon which relief can be granted is
10 brought under Federal Rule of Civil Procedure 12(b)(6). When ruling on a motion to dismiss, the
11 court must accept as true the factual allegations contained in the complaint. *Love v. United States*,
12 915 F.2d 1242, 1295 (9th Cir. 1989). However, this applies only to material factual allegations,
13 not to legal conclusions which are cast in the form of factual allegations. *Warren v. Fox Family*
14 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). In evaluating a motion under Rule
15 12(b)(6), the Court may take judicial notice of matters of public record, including "records and
16 reports of administrative bodies," without converting the motion to a motion for summary
17 judgment. *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), overruled
18 on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

19 ARGUMENT

20 I. PLAINTIFFS' THIRD COUNT SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE 21 FAILED TO STATE A CLAIM AGAINST COREY AND NICHOLS IN THEIR PERSONAL CAPACITIES

22 A. Plaintiffs Have Alleged No Basis for Suing Corey and Nichols in Their 23 Personal Capacities.

24 Plaintiffs bring their third count pursuant to 42 U.S.C. § 1983. In this count, Plaintiffs
25 allege that the Truck and Bus Regulation violates Plaintiffs' constitutional rights, and that Mr.
26 Corey and Ms. Nichols, in their personal capacities, have violated Plaintiffs' constitutional rights.
27 This claim fails because Plaintiffs have not alleged any basis for imposing personal liability on
28 either defendant, and they seek a remedy that is available only in an official-capacity action.

1 In bringing their claims against Mr. Corey and Ms. Nichols in their personal capacities,
2 Plaintiffs appear to have confused personal-capacity claims with official-capacity claims. State
3 agencies are not subject to suit under § 1983. However, state officials, when properly sued in
4 their official capacities for injunctive relief, may be subject to suit under § 1983. *Will v.*
5 *Michigan Dept. of State Police* 491 U.S. 58, 71, n.10 (1989) (“When sued for prospective
6 injunctive relief, a state official in his official capacity is considered a ‘person’ for [42 U.S.C.]
7 § 1983 purposes.”) When a plaintiff wishes to sue a state agency for prospective declaratory or
8 injunctive relief pursuant to 42 U.S.C. § 1983, that action should be brought against the
9 appropriate state officials, in their official capacity. Thus, official-capacity suits filed against
10 state officials are simply an alternative way of pleading an action against the entity of which the
11 defendant is an officer, alleging that a policy of that entity is the moving force behind a
12 deprivation of constitutional rights. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

13 In contrast, “[p]ersonal-capacity suits seek to impose personal liability upon a government
14 official for actions [the official] takes under color of state law.” *Kentucky v. Graham*, 473 U.S.
15 159, 165 (1985). To establish personal liability under § 1983, a plaintiff must show that “the
16 official, acting under color of state law, caused the deprivation of a federal right.” *Hafer v. Melo*,
17 502 U.S. 21, 25. “Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must
18 plead that each Government-official defendant, through the official’s own individual actions, has
19 violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676.

20 Here, Plaintiffs have not alleged that either Corey or Nichols has enforced the Truck and
21 Bus Regulation against them, or against any trucker. Indeed, Plaintiffs have not alleged that
22 Corey or Nichols have taken *any* action that violated their constitutional rights. Instead, Plaintiffs
23 merely allege that, by virtue of the offices they hold, Mr. Corey and Ms. Nichols are charged with
24 enforcing the Regulation. But personal-capacity claims cannot be based solely on the fact that a
25 defendant held a particular office. *Ashcroft v. Iqbal*, 556 U.S. at 676-77. Because plaintiffs have
26 failed to allege that Mr. Corey or Ms. Nichols engaged in conduct giving rise to the constitutional
27 violation, Plaintiffs’ Complaint is deficient under Federal Rule of Civil Procedure 8(a)(2).
28 *Ashcroft v. Iqbal*, 556 U.S. at 687. Indeed, if Plaintiffs’ allegations were sufficient to establish

1 personal liability, every high public official could be held personally liable for every agency
2 action. This is simply not the law. *Ashcroft v. Iqbal*, 556 U.S. at 676, 683. As such, Plaintiffs’
3 personal-capacity claims against Mr. Corey and Ms. Nichols must be dismissed.

4 Further, the relief that Plaintiffs seek in this action is not even available in a personal-
5 capacity action. Here, Plaintiffs are asking for an injunction against Mr. Corey and Ms. Nichols
6 in their personal capacities. (Compl. ¶¶ 55, 56.) But an injunction against Mr. Corey and Ms.
7 Nichols in their personal capacities would only bind these individuals. It would mean that these
8 individuals could not enforce the Regulation after they left state service and were no longer acting
9 in their official capacities, but it would not prevent the Air Board from doing so. *Kentucky v.*
10 *Graham*, 473 U.S. 159, 166, & n.11. Such a result is clearly not appropriate. Accordingly, the
11 declaratory and injunctive relief that Plaintiffs seek is only available in an official capacity suit.
12 *Wolfe v. Strankman*, 392 F.3d 358, 360, n.2 (9th Cir. 2004) (noting that “the declaratory and
13 injunctive relief [plaintiff] seeks is only available in an official capacity suit.”).

14 In their complaint, Plaintiffs appear to have confused personal capacity-claims with
15 official-capacity claims. The actions alleged in the Complaint do not give rise to personal
16 liability, and the relief Plaintiffs seek is not available in a personal-capacity action. Accordingly,
17 the third count of the Complaint, which seeks relief against Corey and Nichols in their personal
18 capacities, should be dismissed with prejudice.

19 **B. Alternatively, Plaintiffs’ Personal-Capacity Claims Should Be Dismissed**
20 **Because Corey and Nichols Are Entitled to Qualified Immunity.**

21 **1. Qualified Immunity Is Appropriate Where Defendants’ Conduct**
22 **Does Not Violate a Clearly Established Right.**

23 As discussed above, the injunctive relief sought by Plaintiffs is not available in a personal-
24 capacity action. However, to the degree that Plaintiffs are seeking any remedy against Mr. Corey
25 and Ms. Nichols other than an injunction, Plaintiffs’ personal-capacity claims against Mr. Corey
26 and Ms. Nichols should also be dismissed because Corey and Nichols are entitled to qualified
27 immunity. The qualified immunity doctrine protects government officials from civil liability
28 “insofar as their conduct does not violate clearly established statutory or constitutional rights of
which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009),

1 quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine provides immunity from
2 suit, not a mere defense to liability; it is designed to resolve insubstantial claims against
3 government officials prior to discovery. *Pearson*, 555 U.S. at 231. Thus, the Supreme Court has
4 “repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible
5 stage in litigation.” *Id.* at 232, quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). When
6 qualified immunity is apparent as a matter of law and on the facts alleged in the complaint, it
7 provides an appropriate basis for dismissal at the pleading stage. *See Dunn v. Castro*, 621 F.3d
8 1196, 1999 (9th Cir. 2010).

9 Qualified immunity is determined through a two-part test. The first question, or “prong,” is
10 whether the facts alleged by a plaintiff make out a violation of a constitutional right. *Pearson*,
11 555 U.S. at 232. The second question is whether “the right at issue is ‘clearly established’ at the
12 time of defendant’s alleged misconduct.” *Id.* If either question is answered in the negative, the
13 defendant is immune from liability for damages. *Id.* Courts may consider the two prongs in
14 either order. *Pearson*, 555 U.S. at 236. Indeed, it may be particularly appropriate to consider the
15 second prong first on a motion to dismiss. *Id.* at 239; *see also Dunn v. Castro*, 621 F.3d at 1199.

16 **2. Mr. Corey and Ms. Nichols Are Entitled to Qualified Immunity**
17 **Because Their Conduct Did Not Violate a Clearly Established Right.**

18 Plaintiffs’ allegations demonstrate that Mr. Corey and Ms. Nichols are entitled to qualified
19 immunity. As discussed above, to maintain a personal-capacity suit against a public official
20 under § 1983, “a plaintiff must plead that each Government-official defendant, through the
21 official’s own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662,
22 676 (2009). Here, Plaintiffs do not allege that Mr. Corey or Ms. Nichols engaged in *any* conduct
23 that violated their constitutional rights. Instead, Plaintiffs seek to impose personal liability
24 against Mr. Corey and Ms. Nichols based solely on the fact that, as officers of the Air Board, they
25 are charged with enforcing the Truck and Bus Regulation.

26 These allegations are insufficient to establish that Mr. Corey and Ms. Nichol’s individual
27 actions violated a clearly established right. Accordingly, Plaintiffs’ personal-capacity claims
28 against Corey and Nichols should be dismissed with prejudice.

1 **3. Mr. Corey and Ms. Nichols Reasonably Relied on a Regulation**
2 **Promulgated by a State Agency.**

3 Even if simply holding office were sufficient to subject Ms. Corey's and Ms. Nichols to
4 personal liability, they are still entitled to qualified immunity because their actions were
5 objectively reasonable. "[W]hether an official protected by qualified immunity may be held
6 personally liable for an allegedly unlawful official action generally turns on the 'objective legal
7 reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at
8 the time it was taken." *Dittman v. California*, 191 F.3d 1020, 1027 (1999). Within this context,
9 when "a public official acts in reliance on a duly enacted statute or ordinance, that official
10 ordinarily is entitled to qualified immunity." *Id.* The rationale for this rule is that an official who
11 is charged with enforcing a statute or regulation is "ordinarily entitled to rely on the assumption
12 that the council members have considered the views of legal counsel and concluded that the
13 ordinance is a valid and constitutional exercise of authority." *Grossman v. City of Portland*, 33
14 F.3d 1200, 1209 (9th Cir. 1994).

15 Thus, as a general rule, an official is entitled to qualified immunity if: 1) he or she is relying
16 on a duly enacted law, and 2) that law is not "patently violative of fundamental constitutional
17 principles." *Dittman*, 191 F.3d at 1027. Both prongs of this test are met here.

18 **a. Corey and Nichols Were Charged with Enforcing a Duly**
19 **Enacted Law**

20 Here, Plaintiffs seek to impose personal liability on Corey and Nichols based on the fact
21 that, as Air Board officials, they were charged with enforcing the Truck and Bus Regulation. As
22 in *Dittman* and *Grossman*, Mr. Corey and Ms. Nichols are entitled to qualified immunity because
23 the Regulation was duly enacted by the Air Board. As such, it was objectively reasonable for Mr.
24 Corey to assume that the constitutionality of the Regulation had been considered by the Air Board
25 and its attorneys, and that the Air Board approved the regulation upon concluding that it was
26 constitutional. Similarly, as Chair of the Air Board, Ms. Nichols would know the Air Board and
27 its attorneys considered whether the Regulation violated the dormant Commerce Clause, and
28

1 concluded that it did not. (Request for Judicial Notice in Support of Motion To Dismiss, Ex. 1,
2 Final Statement of Reasons for Rulemaking, at pp. 213-231.)

3 This rule is particularly applicable here because the Truck and Bus Regulation has gone
4 through an additional layer of review and approval. Specifically, the Truck and Bus Regulation
5 was reviewed and approved by the US EPA. As discussed above, under the federal Clean Air Act,
6 the US EPA sets National Ambient Air Quality Standards. Each state, including California, is
7 required to submit a state implementation plan, or SIP, showing “enforceable emission limitations
8 and other control measures” that are necessary to meet these national standards, as well as
9 timelines for compliance, for US EPA approval. *Bayview Hunters Point City. Advocates v. Metro*
10 *Transp. Commission*, 366 F.3d 692, 695 (9th Cir. 2004). The state must also provide assurances
11 “that it has the necessary legal authority and adequate resources to implement the SIP.”
12 *California Dump Truck Owners Assn. v. Nichols*, 924 F. Supp. 2d 1126, 1137-38 (E.D. Cal. 2012.)
13 Because the Truck and Bus Regulation is one of the measures that California is relying on to meet
14 the National Ambient Air Quality Standards, the Air Board submitted the Regulation to the US
15 EPA for its review and approval. 77 Fed. Reg. at 20309, 20311. Following its review, the US
16 EPA approved the rule. In so doing, the US EPA concluded that it knows “of no obstacle under
17 Federal or State law in [the Air Board’s] ability to implement the regulation.” 76 Fed. Reg.
18 40652, 40658 (July 11, 2011).

19 Given that the Regulation survived these multiple levels of review and approval, it was
20 objectively reasonable for Corey and Nichols to assume that the regulation was constitutional.

21 **b. The Truck and Bus Regulation Is Not Patently Unconstitutional.**

22 While a defendant acting in accordance with a duly enacted statute or regulation will
23 generally be entitled to qualified immunity, there may still be personal liability if that regulation
24 is patently unconstitutional. This narrow exception does not defeat qualified immunity in this
25 case because the constitutionality of the Truck and Bus Regulation is well supported by case law.

26 Here, the Truck and Bus Regulation is a health and safety regulation that does not
27 distinguish between local truckers and out-of-state truckers. There is no clearly established law
28 prohibiting such a regulation. Instead, analogous air pollution regulations have withstood

1 Commerce Clause challenges. For example, in *Huron Portland Cement Co. v. City of Detroit*,
2 *Mich.*, 362 U.S. 440 (1960) the United States Supreme Court considered the constitutionality of
3 the Detroit Smoke Abatement Code (Code). The purpose of the Code was to reduce air pollution
4 in Detroit. Compliance with the Code would require structural changes to certain types of vessels
5 that visited Detroit's port. *Id.* at 441. A company maintaining a fleet of ships engaged in
6 interstate commerce challenged the Code, alleging in part that the Code violated the dormant
7 Commerce Clause. *Id.* at 441. The *Huron Portland* Court rejected this argument, noting that the
8 Code is a "regulation of general application, designed to better the health and welfare of the
9 community." *Id.* at 448. Even though the Code required structural changes to vessels engaged in
10 interstate commerce, the court found that "no impermissible burden on commerce has been
11 shown." *Id.* at 441, 448.

12 Similarly, in *Pacific Merchant Shipping Assn. v. Goldstene*, 639 F.3d 1154 (9th Cir. 2011)
13 (*PMSA*), the Ninth Circuit rejected a Commerce Clause challenge of a regulation requiring ocean-
14 going vessels to switch to cleaner-burning fuels when they were within twenty-four miles of
15 California's coastline. The *PMSA* court reasoned that the regulation "does not fall under the
16 'direct' category of state regulations because the central purpose of the Vessel Fuel Rules is to
17 protect the health and well-being of the state's residents from the harmful effects" of pollution. *Id.*
18 at 1179. Additionally, the regulation was even-handed and did not appear to be discriminatory, as
19 it applied to all ocean-going vessels visiting California's ports. Therefore, to assess the
20 constitutionality of the regulation, the court balanced the benefits to the state against the burdens
21 on interstate commerce. Finding that the health benefits of the regulation outweighed the burdens
22 on interstate commerce, the court rejected plaintiff's Commerce Clause arguments. *Id.* at 1181.

23 As in *Huron Portland* and *PMSA*, the Truck and Bus Regulation is designed to protect the
24 health and safety of California's citizens by reducing NOx and particulate matter. As in these
25 cases, it is a rule of general applicability, applying to trucks regardless of their state of origin.
26 Further, as discussed above, the Regulation is necessary for the State to comply with federal
27 Clean Air Act Requirement, and has been approved not only by the Air Board, but also by the US
28 EPA. 77 Fed. Reg. 20308. As the *PMSA* court explained, "it appears to be especially

1 inappropriate to strike down state regulations as contrary to the dormant Commerce Clause . . .
2 when these same regulations are needed to comply with basic federal standards in the first place.”
3 *PMSA*, 639 F.3d at 1181, n.8.

4 As such, the Truck and Bus Regulation is not patently unconstitutional. Mr. Corey and Ms.
5 Nichols are therefore entitled to qualified immunity. *Dittman*, 191 F.3d at 1027; *see also Heart of*
6 *America Grain Inspection Service, Inc. v. Missouri Dept. of Agriculture*, 123 F.3d 1098 (8th Cir.
7 1997) (given the “inherently uncertain” nature of the balancing inquiry in a Commerce Clause
8 analysis, “qualified immunity should normally be available” to officials enforcing the challenged
9 regulation). Accordingly, the personal-capacity claims against Corey and Nichols should be
10 dismissed with prejudice.

11 CONCLUSION

12 In this action Plaintiffs allege personal-capacity claims against Richard Corey and Mary
13 Nichols based solely on allegations that, as officers of the Air Board, Mr. Corey and Ms. Nichols
14 were charged with enforcing the Truck and Bus Rule. These allegations are insufficient to
15 support personal-capacity claims and, in any event, these defendants are entitled to qualified
16 immunity. Accordingly, Defendants respectfully request that the Court dismiss the third court in
17 Plaintiffs’ Complaint, and the personal-capacity claims against Mr. Corey and Ms. Nichols, with
18 prejudice.

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Dated: January 27, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
RANDY L. BARROW
Supervising Deputy Attorney General

/s/ Linda Gándara
LINDA GÁNDARA
Deputy Attorney General
*Attorneys for Defendants Richard W.
Corey in his official and personal capacity
as Executive Officer of the California Air
Resources Board, Mary D. Nichols in her
official and personal capacity as Chairman
of the California Air Resources Board, and
Matt Rodriguez in his official capacity as
Secretary of the California Environmental
Protection Agency*

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CERTIFICATE OF SERVICE

Case Name: **OWNER-OPERATOR
INDEPENDENT DRIVERS
ASSOCIATION, INC., et al. v.
RICHARD W. COREY in his
official and personal capacity as
Executive Officer of the
California Air Resources Board;
et al.** No. **1:13-CV-01998-LJO-SAB**

I hereby certify that on January 27, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 27, 2014, at Sacramento, California.

LINDA GÁNDARA
Declarant

/s/ Linda Gándara
Signature