

No. 07-16908

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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PEOPLE OF THE STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN JR.,  
ATTORNEY GENERAL,  
*Plaintiff and Appellant,*

v.

GENERAL MOTORS CORPORATION, a Delaware Corporation, et al.,  
*Defendants and Appellees.*

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On Appeal From The United States District Court  
For The Northern District Of California

The Hon. Martin J. Jenkins, District Judge  
No. C06-05755 MJJ

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**APPELLEES' ANSWER BRIEF**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that Defendant and Appellee GENERAL MOTORS CORPORATION (“GM”) is a publicly-held corporation. GM has no parent corporation. The following publicly-held company beneficially own more than 10% of GM’s stock: State Street Bank & Trust Company.<sup>1</sup>

The undersigned counsel further states that Defendant and Appellee TOYOTA MOTOR NORTH AMERICA, INC. (“TMNA”) is a wholly-owned subsidiary of Toyota Jidosha Kabushiki Kaisha t/a Toyota Motor Corporation (“TMC”). TMC is a publicly-held corporation in Japan and has no parent corporation. There is no publicly-held corporation that owns 10% or more of TMC’s stock.

The undersigned counsel further states that Defendant and Appellee FORD MOTOR COMPANY (“Ford”) is a publicly-held corporation. Ford has no parent corporation, and there is no publicly-held corporation that owns 10% or more of Ford’s stock.

The undersigned counsel further states that Defendant and Appellee AMERICAN HONDA MOTOR CO., INC. (“AHMC”) is a wholly-owned

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<sup>1</sup> Acting in various fiduciary capacities for various employee benefit plans.

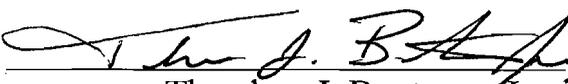
subsidiary of Honda Motor Co. Ltd. (“HMC”). HMC is a publicly-traded company, with ADR certificates traded on the New York Stock Exchange.

The undersigned counsel further states that Defendant and Appellee DAIMLERCHRYSLER CORPORATION became DaimlerChrysler Company LLC, effective March 31, 2007, and DaimlerChrysler Company LLC changed its name to Chrysler LLC, effective July 30, 2007. Chrysler LLC (“Chrysler”) is indirectly wholly owned by Chrysler Holding LLC. An affiliate of Cerberus Capital Management, L.P., holds an 80.1% ownership interest in Chrysler Holding LLC, and Daimler AG holds a 19.9% ownership interest in Chrysler Holding LLC.

The undersigned counsel further states that Defendant and Appellee NISSAN NORTH AMERICA, INC. (“Nissan”) is a wholly-owned subsidiary of Nissan Motor Co., Ltd. (“Nissan Motors”), which is a publicly-traded corporation in Japan.

DATED: April 2, 2008

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## INTRODUCTION

California seeks to conscript the federal judiciary into its effort to breathe life into a sweeping new “global warming” tort that has no legitimate origins in federal law, no jurisprudential stopping point, and the potential to wreak incalculable damage on the nation’s carefully regulated transportation industry and the national economy. The district court was correct to dismiss this lawsuit as “unreasonably encroaching into the global warming issues currently under consideration by the political branches.” ER 21.

*First*, as the district court correctly held, the questions that California seeks to adjudicate through its global warming tort lawsuit are quintessentially political questions. What is an unreasonable contribution to the sum total of carbon dioxide (“CO<sub>2</sub>”) and other greenhouse gases in the earth’s atmosphere? How much CO<sub>2</sub> should automobiles be designed to emit? What level of global warming is acceptable (as opposed to unreasonable)? How much fault should California bear for its own conduct in promoting automobile use? What responsibility should be borne by individuals and by other sectors of the economy, other States, and other countries? Such complex matters of public and foreign policy and commerce are properly reserved in our system of government for the political branches, which possess both the institutional expertise and constitutional prerogative to address them.

*Second*, although the district court did not reach the issue, the case must also be dismissed because there exists no “federal common law” nuisance claim for global warming. At most, the Supreme Court has recognized, in a very narrow band of cases decided decades or even a century ago, a simple federal common law nuisance claim allowing one State to seek an injunction to halt transboundary pollution originating from a stationary source located outside the State’s borders. No case in the history of American jurisprudence authorizes a federal common law nuisance claim in these circumstances—where a State seeks *money damages* against private companies for *lawful* conduct (*e.g.*, designing a heavily-regulated product that is crucial to our transportation needs and economy) that occurred partially *within* the plaintiff’s own borders, as well as outside the United States and around the world, and that the plaintiff itself has encouraged, facilitated, and stimulated for over a century.

Moreover, even if the “federal common law” of public nuisance theoretically could be construed to authorize such an unprecedented money-damages super-tort—an expansion that would turn *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), on its head—California’s claim has been displaced. Through the Clean Air Act (“CAA”) and the Energy Policy and Conservation Act (“EPCA”), Congress has created a comprehensive scheme for regulating CO<sub>2</sub> and other greenhouse gas emissions from motor vehicles. The important regulatory and other policymaking

activity that has occurred in recent months only underscores that federal courts are foreclosed from making common law in this area.

In short, climate change and global warming are among the most complex and delicate political, economic, and environmental issues of our time and simply cannot be resolved by the federal courts through the medium of a fanciful common law tort claim. The political branches of our government, along with leaders of other nations, are actively grappling with these issues, and Congress has expressly considered vehicle emission and fuel economy standards and made careful judgments that vest sole authority in these areas in expert federal agencies. The district court correctly rejected California's attempt to inject itself into the political debate about global warming by converting it into a tort lawsuit.

### STATEMENT OF JURISDICTION

The Automakers disagree with California's contention that "[w]here a state brings an action to address interstate pollution, it presents a federal question." Br. 3. As discussed *infra*, there is simply no such thing as a "federal common law" claim for public nuisance under the circumstances of this case. The absence of any valid federal claim presents an independent reason why the district court lacked subject matter jurisdiction. *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 840 (9th Cir. 2004).

The Automakers agree, however, that this Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's judgment.

### **STATEMENT OF ISSUES PRESENTED**

1. Whether the district court properly dismissed California's global warming lawsuit as presenting a nonjusticiable political question?
2. Whether dismissal is warranted on the alternative grounds—which the district court did not reach—that (a) the “federal common law” of public nuisance does not authorize a State to assert a multi-billion dollar damages claim against product manufacturers for lawful conduct occurring both within the plaintiff's borders and around the world, particularly where the plaintiff itself has authorized and encouraged the challenged conduct, and (b) any theoretical “federal common law” claim has been displaced by the presence of not one, but two overlapping federal regulatory schemes governing automotive CO<sub>2</sub> and greenhouse gas emissions.

### **STATEMENT OF THE CASE**

California filed its operative complaint on October 24, 2006. ER 34-48. The Automakers timely moved to dismiss on December 15, 2006. The district court heard argument on the Automakers' motion on March 6, 2007. The district court issued an order granting the Automakers' motion on September 17, 2007 (ER 8-31), holding that California's “claim presents a non-justiciable political

question.” ER 30. The district court concurrently entered judgment. ER 5. California timely filed its notice of appeal on October 17, 2007. ER 1-3.

### **STATEMENT OF FACTS**

California’s Statement of Facts (Br. 8-11) provides no mention of the political branches’ extensive policymaking and regulatory efforts with respect to global warming—including a number of important developments occurring after the district court’s dismissal order—and also fails to disclose that California has consented to, promoted, and profited from the very conduct that it now claims amounts to a public nuisance. Because this context is crucial in evaluating the applicability of the political question doctrine, and also in determining whether there exists a “federal common law” global warming tort claim, the Automakers supplement California’s statement as follows.

**I. THE POLITICAL BRANCHES HAVE ENGAGED IN A MULTIFACETED COURSE OF ACTION TO ADDRESS GLOBAL WARMING ON A DOMESTIC AND INTERNATIONAL LEVEL.**

**A. Policymaking By Congress And The Executive Branch.**

As detailed in the district court’s “Chronology of Relevant Environmental Policy” (ER 12-14), the political branches of the federal government have carefully studied and addressed the issue of global warming over the past thirty years. In 1978, Congress established a “national climate program” to improve understanding of global climate change through research, data collection, assessments, information dissemination, and international cooperation. National Climate

Program Act of 1978, 15 U.S.C. §§ 2901 *et seq.* In 1980, Congress directed the Office of Science and Technology Policy to engage the National Academy of Sciences in a study of the “projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities” authorized by the Energy Security Act. Energy Security Act, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75 (1980).

In 1987, Congress directed the Secretary of State to coordinate U.S. negotiations concerning global climate change and directed the Environmental Protection Agency (“EPA”) to develop and propose to Congress a coordinated national policy on the issue. Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, §§ 1102-03, reprinted at 15 U.S.C. § 2901 note. Three years later, in 1990, Congress established a 10-year research program for global climate issues, directed the President to establish a research program to “improve understanding of global change,” and provided scientific assessments every four years that “analyze[] current trends in global change.” Global Change Research Act, 15 U.S.C. §§ 2931-2938. In that year, Congress also established a program to research agricultural issues related to global climate change. Pub. L. No. 101-624, tit. XXIV, § 2402, 104 Stat. 4058, 4058-59 (1990). And in 1992, Congress directed the Secretary of Energy to conduct several assessments related to

greenhouse gases and report to Congress. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002 (1992).

In 1992, President Bush signed, and the Senate ratified, the United Nations Framework Convention on Climate Change (“UNFCCC”), which brought together a coalition of countries to work toward a coordinated approach to address the international issue of global warming. In 1997, this coalition negotiated the Kyoto Protocol, which called for mandatory reductions in the greenhouse gas emissions of developed nations. UNFCCC, Kyoto Protocol (Dec. 11, 1997).

President Clinton signed the Kyoto Protocol, but it was never presented to the Senate, which formally expressed misgivings over the prospect that the potential economic burdens of CO<sub>2</sub> reductions would be shouldered exclusively by developed nations. In fact, in 1997, the U.S. Senate resolved by vote of 95-0 that the United States should not sign the Kyoto Protocol or any other agreement that would unilaterally limit domestic emissions without enacting corresponding limits as to developing nations. S. Res. 98, 105th Cong. (1997).

President Clinton, too, expressed similar reservations. President’s Remarks at the National Geographic Society, 2 Pub. Papers 1408, 1410 (Oct. 22, 1997) (“The industrialized world must lead, but developing countries also must be engaged. The United States will not assume binding obligations unless key developing nations meaningfully participate in this effort.”). Thereafter, Congress

passed a series of bills that affirmatively barred EPA from implementing the Protocol. Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000).

The current administration has reiterated its opposition to the type of unilateral emissions reductions proposed in the Kyoto Protocol. Letter from President George W. Bush to Senators Hagel, Helms, Craig & Roberts (March 13, 2001), at <http://www.whitehouse.gov/news/releases/2001/03/20010314.html> (administration “oppose[s] the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance”).

In short, U.S. policy on global warming has long been to insist on broad-based international cooperation and to work with other nations to develop an efficient and coordinated response. The materials cited in California’s brief only underscore that this policy and approach remain in effect. Br. 25 (conceding that UNFCCC did “not set any binding emission limitations,” that Bali Action Action calls for “future negotiations with foreign countries,” and that the one agreement that would have imposed unilateral limitations—the Kyoto Protocol—was never ratified).

**B. Regulation of Automotive Emissions By Federal Administrative Agencies.**

In addition to pursuing these broad-based initiatives to address the issue of global warming generally, Congress has created a comprehensive regulatory scheme to govern the specific type of emissions at issue in this case: CO<sub>2</sub> and other greenhouse gas emissions from automobiles. As discussed below, these regulatory efforts include a number of important developments occurring after the dismissal of California's lawsuit.

Clean Air Act. The first component of this scheme is the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, which "establishe[s] a comprehensive state and federal scheme to control air pollution in the United States" and authorizes EPA to implement and oversee this scheme. ER 19-20.

In 1999, EPA received a rulemaking petition asking it to regulate greenhouse gas emissions from automobiles, but it denied the petition in 2003 due to, *inter alia*, its belief that it lacked statutory authority under the CAA to do so. *Control of Emissions From New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52922-23 (Sep. 8, 2003). Later that year, California (along with certain other States) brought an action against EPA in the D.C. Circuit to challenge the agency's denial of the rulemaking petition. In July 2005, the D.C. Circuit rejected this challenge and upheld EPA's denial of the petition. However, in April 2007, the Supreme Court reversed, holding that (a) EPA possesses statutory authority

under the CAA to regulate greenhouse gas emissions from automobiles, (b) EPA must “prescrib[e] standards” regulating such emissions if it makes an “endangerment finding” (*i.e.*, “a judgment” that such emissions “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”), and (c) to the extent any State is dissatisfied with EPA’s regulatory efforts in these areas, that State has “special solicitude” and a “procedural right” to bring an action in federal court under 42 U.S.C. § 7607(b)(1) challenging EPA’s decisionmaking “as arbitrary and capricious.” *Massachusetts v. EPA*, 127 S.Ct. 1438, 1454-63 (2007) (“*Massachusetts*”).

In May 2007, the President signed an executive order directing EPA to make the regulatory determinations required by the CAA. Exec. Order No. 13,432, 72 Fed. Reg. 27717 (May 14, 2007). EPA is now in the process of making those determinations. 72 Fed. Reg. 69735, 69934 (Dec. 10, 2007) (EPA’s proposed plan to “implement the President’s recent Executive Order” and to respond to “the Supreme Court rul[ing] that EPA must determine . . . whether greenhouse gas emissions . . . from new motor vehicles cause or contribute to air pollution that endangers public health or welfare”). In fact, EPA recently announced that it would initiate an Advanced Notice of Proposed Rulemaking seeking public comment on the endangerment issue and the overall ramifications of regulating CO<sub>2</sub> from stationary and mobile sources. Letter from EPA Administrator to

Senators Boxer and Inhofe (Mar. 27, 2008), *at*

[http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=48cc5c7d-56ef-426b-ba32-d027aad08eb6](http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=48cc5c7d-56ef-426b-ba32-d027aad08eb6).

Nor are these the only recent actions by EPA in this area. Under the CAA, California has a unique right—not shared by any other State—to ask EPA for authorization to promulgate its own automotive emissions standards and regulations. 42 U.S.C. § 7543(b)(1). In December 2005, California filed a waiver petition seeking permission to issue automotive CO<sub>2</sub> regulations, but EPA recently issued a Notice of Decision denying that petition. 73 Fed. Reg. 12156, 12168 (Mar. 6, 2008). California has filed suit in this Court (08-70011) and in the D.C. Circuit (08-1063) challenging EPA’s decision.

Energy Policy and Conservation Act. The second component of this regulatory scheme is the Energy Policy and Conservation Act (“EPCA”), 49 U.S.C. § 32901 *et seq.* The EPCA imposes fleetwide fuel economy requirements on the automobile industry in the form of mandatory corporate average fuel economy (“CAFE”) standards. Under the CAFE program, an automobile manufacturer may sell any combination of its vehicles consumers choose to buy, as long as the average fuel economy levels of its nationwide car and truck fleets do not exceed the applicable CAFE standard. 49 U.S.C. § 32902.

Currently, the EPCA provides for a congressionally-established average fuel economy standard for passenger automobiles of 27.5 miles per gallon. 49 U.S.C. § 32902(b). This, however, is another regulatory area that has witnessed recent activity. In late 2007, Congress passed, and President Bush signed into law, the Energy Independence and Security Act of 2007, which requires a 40% increase in the standard—to an average of at least 35 miles per gallon—by 2020. Pub. L. No. 110-140, § 102(a), 121 Stat. 1492.

This change “*represents a major step forward in . . . confronting global climate change.*” Press Release, The White House, Fact Sheet: Energy Independence and Security Act of 2007, at 1 (Dec. 19, 2007), at <http://www.whitehouse.gov/news/releases/2007/12/20071219-1.html> [hereinafter FACT SHEET] (emphasis added). Indeed, both EPA and the National Highway Traffic Safety Administration (“NHTSA”)—the agency responsible for administering the EPCA program—have determined that the fuel economy standards promulgated under the EPCA are functionally equivalent to CO<sub>2</sub> emission standards, because there is a direct, inextricable, and mathematical relationship between CO<sub>2</sub> emissions and fuel economy. *Average Fuel Economy Standards for Light Trucks Model Years 2008-2011*, 71 Fed. Reg. 17566, 17659 (April 6, 2006) (NHTSA: “fuel economy is directly related to emissions of greenhouse gases such as CO<sub>2</sub>”); *Control of Emissions*, 68 Fed. Reg. at 52925

(EPA: CO<sub>2</sub> emissions standards “would effectively regulate car and light truck fuel economy”). As those expert agencies have explained, there is only one way for a manufacturer of today’s gasoline-powered automobiles to reduce tailpipe emissions of CO<sub>2</sub>: to improve the fuel economy of the vehicle so that it burns less gasoline per mile driven. *Light Truck Standards*, 71 Fed. Reg. at 17656; *Control of Emissions*, 68 Fed. Reg. at 52929.

Accordingly, the Supreme Court has recognized that NHTSA’s regulatory obligations under the EPCA “overlap” with EPA’s regulatory obligations under the Clean Air Act. *Massachusetts*, 127 S.Ct. at 1461-62. As this Court recently noted: “[T]he CAFE standard will affect the level of the nation’s greenhouse gas emissions and impact global warming.” *Center for Biological Diversity v. NHTSA*, 508 F.3d 508, 547 (9th Cir. 2007).

## **II. CALIFORNIA FILES ITS GLOBAL WARMING TORT LAWSUIT, WHICH THE DISTRICT COURT DISMISSES.**

California fosters a culture and identity that affirmatively encourages the use of automobiles. Among other things, the State licenses and certifies the Automakers’ products for sale within California (Cal. Health & Safety Code §§ 43100-43105); affirmatively *requires* the Automakers to distribute their products inside the State in certain circumstances (Cal. Vehicle Code

§ 11713.3(a)); owns and operates a fleet of over 37,000 vehicles for official governmental use;<sup>2</sup> maintains a massive, multi-billion dollar highway and freeway system spanning more than 50,000 miles;<sup>3</sup> derives *tens of billions* of dollars of revenue each year from taxes on new vehicle sales, gasoline taxes, and registration fees;<sup>4</sup> and heavily promotes “automobile tourism,” encouraging visitors to “[p]ack up the family” and “hit the road” by embarking on dozens of statewide “driving tours” spanning thousands of miles.<sup>5</sup>

Despite all of this,<sup>6</sup> California chose to file suit against the defendants—six

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<sup>2</sup> DGS, SB552-2205-Final-Report (May 16, 2006), *at* <http://www.documents.dgs.ca.gov/ofa/sb552/SB552-2005-Final-Report-5-16-2006.pdf>.

<sup>3</sup> GOVERNOR’S BUDGET SUMMARY 2006-07, at 213-22 (Jan. 2006), *at* <http://www.dof.ca.gov/Budget/Budget2006-07/FullBudgetSummary.pdf>.

<sup>4</sup> Legislative Analyst, Fiscal Analysis of Congestion Relief Transportation Fund #2 (May 10, 2001), *at* [http://www.lao.ca.gov/ballot/2001/010466\\_INT.htm](http://www.lao.ca.gov/ballot/2001/010466_INT.htm); GOVERNOR’S BUDGET SUMMARY 2006-07, at 38-40.

<sup>5</sup> CAL. TRAVEL & TOURISM COMM’N, CALIFORNIA DRIVES 2006, at 1 (2006), *at* <http://www.nxtbook.com/nxtbooks/sunset/californiadrives06/index.php?startid=1>.

<sup>6</sup> The aforementioned facts, which are established by matters of public record properly subject to judicial notice, are relevant in showing that California has consented to and participated in the very conduct it challenges in this case. As noted *infra*, this is relevant in evaluating justiciability and in determining the validity of California’s “federal common law” claim. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (courts “may look beyond the complaint to matters of public record” when assessing subject matter jurisdiction); *Lee v. City of Los*

[Footnote continued on next page]

manufacturers of motor vehicles lawfully sold and operated in California and the world—in late 2006, arguing that the Automakers should be held “jointly and severally liable” for the “billions of dollars in damages” California had allegedly incurred because of global warming, as well as for any future damages it might incur. ER 34-36, 46. In September 2007, the district court issued an order dismissing California’s lawsuit under the political question doctrine, finding that it implicated three separate tests for nonjusticiability.

First, the court determined that the case would require “an initial decision as to what is unreasonable in the context of carbon dioxide emissions”—a policy determination of the type not suitable for judges and juries. ER 17-18. The court held that such judicial policymaking was particularly unwarranted because “reductions in carbon dioxide emissions” is “an issue still under active consideration by those branches of government” (ER 19-21), and emphasized that *Massachusetts* “further underscore[d] the conclusion that policy decisions concerning the authority and standards for carbon dioxide emissions lie with the political branches of government, and not with the courts.” ER 21-24.

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*Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The Automakers also sought judicial notice of these facts during the district court proceedings (SER 14-18), which California did not oppose in relevant part. SER 3-6.

Second, the court held that the case “would have an inextricable effect” on issues of “interstate commerce and foreign policy” that are “textual[ly] commit[ted] . . . to the political branches of government.” ER 25-27. The court noted that awarding damages against the defendants for their “lawful worldwide sale of automobiles” “would likely have commerce implications in other States”; that imposing “mandatory unilateral restrictions on domestic manufacturers” could “impede” the political branches’ “diplomatic objective” of persuading “developing countries [to] make a reciprocal commitment”; and that such damages would, in any event, punish the Automakers for lawful conduct outside the United States and thus “run headlong into nonjusticiable foreign policy issues.” *Id.*

Third, the court concluded that it lacked judicially manageable or discoverable standards for adjudicating California’s claim. ER 27-29. The court acknowledged that, in a handful of “trans-boundary nuisance cases” largely decided during the late 1800s and early 1900s, the Supreme Court relied on the federal common law of public nuisance to order injunctive relief. *Id.* But the court rejected California’s argument that these cases somehow provided a “well-established” legal framework for resolving its tort claim, finding the cases “legally, and factually, distinguishable in important respects.” *Id.* The court concluded: “Unlike the equitable standards available in Plaintiff’s cited cases, here the Court is

left without a manageable method of discerning the entities that are creating and contributing to the alleged nuisance.” *Id.*

Having dismissed the case for lack of justiciability, the court did not decide whether California’s federal common law claim was, in fact, valid. ER 30. The court also declined to exercise supplemental jurisdiction over California’s state-law nuisance claim. ER 30-31.

### SUMMARY OF THE ARGUMENT

Justiciability. The district court properly dismissed California’s global warming lawsuit under the political question doctrine.

*First*, to adjudicate California’s claim, the courts would be required to sort through and balance an array of competing interests—including environmental, industrial, commercial, foreign policy, and consumer choice concerns—and make an initial policy determination as to how much CO<sub>2</sub> and other greenhouse gases automobiles should be allowed to emit. Such policy determinations, which would have far-reaching implications not only for the automobile industry, but for all sectors of the economy, are reserved under our system of government for the political branches. The Supreme Court’s recent decision in *Massachusetts* powerfully confirms that the proper role of the federal courts in this area is to *review* regulatory decisions concerning automobile emissions—not to make such policy decisions in the first instance via common law tort claims.

*Second*, the political question doctrine also bars adjudication of this lawsuit because its resolution would interfere with U.S. policy on interstate commerce and foreign affairs—areas of concern that are textually committed to Congress and the political branches. Imposing the multi-billion dollar sanction sought by California would be tantamount to retroactively punishing the Automakers for lawful, highly-regulated conduct, across the United States and around the world, that Congress has permitted and that is vital to our and other countries’ economies and transportation needs. This would also contravene U.S. foreign policy on global warming, which seeks a coordinated, international response.

*Third*, this case is also nonjusticiable because there are no judicially discoverable or manageable standards for adjudication. Not only do the courts lack a framework for deciding the threshold question of tort *liability*—which, as noted, would require an initial policy determination as to how much CO<sub>2</sub> automobiles should be allowed to emit—but California’s claim for billions of dollars in retroactive money damages raises a mind-numbingly complex array of apportionment issues that are intractable and literally unprecedented.

No Valid Federal Claim. Alternatively, the district court lacked subject matter over California’s lawsuit for the independent reason that California’s “federal common law” tort claim simply does not exist.

*First*, to the extent the “federal common law” of public nuisance has any continued vitality, it only permits one State to seek an injunction barring transboundary pollution originating from a stationary source outside its borders. It certainly does not authorize federal courts to create multi-billion dollar “common law” tort remedies against product manufacturers for lawful conduct occurring both within the plaintiff’s borders and around the globe.

*Second*, even if the federal common law of nuisance could theoretically be extended and applied in this fashion, Congress has displaced California’s claim by creating a pair of overlapping statutory frameworks governing automotive greenhouse gas emissions and fuel economy. Fundamental separation-of-powers principles preclude the judiciary from recognizing a federal common law claim under these circumstances.

### **STANDARD OF REVIEW**

As California notes (Br. 15), this Court reviews *de novo* the district court’s finding of nonjusticiability. The plaintiff bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

## ARGUMENT

### **I. THE DISTRICT COURT PROPERLY DISMISSED CALIFORNIA'S GLOBAL WARMING LAWSUIT BECAUSE IT RAISES NONJUSTICIABLE ISSUES RESERVED FOR RESOLUTION BY THE POLITICAL BRANCHES OF THE FEDERAL GOVERNMENT.**

Global warming is an issue of public and foreign policy fraught with scientific complexity, as well as profound political, social, and economic consequences. These exceedingly complex issues must be confronted at the national and international levels by Congress, expert federal agencies, and the President. They cannot be rationally addressed through piecemeal tort litigation seeking billions of dollars in retroactive damages against businesses for making essential, lawful, and comprehensively regulated products that are so crucial to our country's culture and economy.

The district court properly recognized these considerations in concluding that California's lawsuit raises nonjusticiable questions that must be addressed and resolved by the political branches of the federal government, not the courts. As shown below, this lawsuit qualifies as a nonjusticiable political question under each of the separate tests set forth in *Baker v. Carr*, 369 U.S. 186 (1962). And as this Court has recognized, "any single [*Baker*] test can be dispositive." *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005). *See also Vieth v. Jubelirer*, 541

U.S. 267, 277 (2004) (plurality opinion) (describing the *Baker* criteria as “six independent tests”).<sup>7</sup>

**A. Resolving This Case Would Require An Initial Policy Determination.**

Although the district court found that “several of the *Baker*” tests compel a finding of nonjusticiability, it began by looking to the third test—*e.g.*, whether deciding this case would require “an initial policy determination of a kind clearly for nonjudicial discretion”—because this test was “the most relevant” and “largely controls the analysis.” ER 16-25. As shown below, the district court’s analysis on this point was plainly correct.

**1. This lawsuit would require the courts to supplant the political branches and make an initial decision as to the reasonableness of automotive CO<sub>2</sub> emissions.**

At bottom, California’s complaint is that the Automakers’ vehicles, as designed, emit too much CO<sub>2</sub> and other greenhouse gases; that their vehicles should be designed to produce some unspecified lesser amount of those emissions; and that the Automakers engaged in tortious misconduct by failing to design their vehicles to conform to this as-yet unarticulated emissions limit. After all—and as

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<sup>7</sup> The Automakers argued below that California’s lawsuit qualified as nonjusticiable under all six *Baker* tests (SER 2), but the district court looked only to the first three tests in ordering dismissal. For sake of brevity, the Automakers will confine their appellate briefing to the first three *Baker* tests, but note that the remaining tests equally support dismissal.

California itself acknowledges—not *all* greenhouse gas emissions are impermissible. Br. 30 (“[T]here are many . . . sources of greenhouse gas pollution emissions, *some of which are tortious, some of which are not.*”) (emphasis added).

Consequently, adjudicating California’s claim would require the courts to determine whether—and if so, at which point—the Automakers’ emission levels ceased being permissible and became tortious. *See also* Br. 36 (California’s acknowledgment that “this case will require the court . . . to decide . . . whether the Automakers’ conduct renders them liable”); ER 18 (district court’s observation that resolving lawsuit would require “an initial decision as to what is unreasonable in the context of carbon dioxide emissions”).

But deciding how much CO<sub>2</sub> is too much CO<sub>2</sub> is a quintessential policy decision, implicating an unavoidable tradeoff between a wide array of competing concerns—including economic, environmental, industrial, foreign policy, and consumer interests. This is a policy determination of the highest order that is properly reserved for expert federal agencies and the political branches of the federal government, not for *ad hoc* resolution by the judiciary. *Medellin v. Texas*, 552 U.S. \_\_\_, 2008 WL 762533, \*14 (Mar. 25, 2008) (“Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. . . . [D]epending on an ad hoc judgment of the judiciary [to

create federal law] . . . cannot readily be ascribed to those same Framers.”). As Judge Jenkins observed: “The balancing of those competing interests is the type of initial policy determination to be made by the political branches, not by this Court.” ER 19.

In 2005, the District Court for the Southern District of New York rejected a similar “global warming public nuisance” claim brought by the Attorneys General of California and other States against a group of electric power plants. *Connecticut et al. v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *appeal pending* (“*AEP*”). That court held that because “resolution of the issues presented . . . requires identification and balancing of economic, environmental, foreign policy, and national security interests, ‘an initial policy determination of a kind clearly for non-judicial discretion’ is required.” *Id.* at 274.<sup>8</sup>

*AEP*’s reasoning is, if anything, even more persuasive here, given the ongoing efforts of the political branches to address CO<sub>2</sub> and other greenhouse gas

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<sup>8</sup> Other courts have, like *AEP*, dismissed “global warming public nuisance” lawsuits for lack of subject matter jurisdiction. *Korsinsky v. U.S. EPA*, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005); *Comer v. Murphy Oil USA, Inc.*, 1:05-CV-00436 (S.D. Miss. Aug. 30, 2007) (dismissing nuisance claim alleging that oil and gas companies’ emissions exacerbated Hurricane Katrina: “Plaintiffs’ claims are non-justiciable pursuant to the political question doctrine.”).

emissions in the *specific* context of automobiles. Not only have Congress and the Executive Branch engaged in a multifaceted course of “actions and deliberate inactions in the area of global warming” (ER 19-21), but (1) in the wake of *Massachusetts*, EPA has initiated its own regulatory process concerning automotive greenhouse gas emissions (pages 9-11 *supra*), and (2) in December 2007 Congress passed, and the President signed into law, a bill mandating increases in the federal fuel economy standard (pages 11-13 *supra*). Deciding the threshold question of tort liability in this case would thus require the courts to inject themselves into these ongoing political and regulatory debates and make the exact policy determinations that the political branches are actively addressing. ER 21 (district court’s conclusion that imposing damages would “unreasonably encroach[] into the global warming issues currently under consideration by the political branches”). *See also Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (“The choice [the court is] urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.”); *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

**2. California’s attempts to evade the third *Baker* test are baseless.**

California seeks to avoid application of the third *Baker* test by describing its claim in vague generalities. According to California, no policy determination

would be required because it only “seeks adjudication of the particular dispute, framed by its complaint” and because the courts would only “be required to rule on the elements of the tort.” Br. 35-36. But this simply begs the question. One of the essential *elements* of California’s tort claim is liability; resolving the issue of liability would require judges and juries to sort through and balance an array of competing interests and identify the tipping point at which CO<sub>2</sub> emission levels should be deemed tortious; and this exercise would pose a fundamental policy question that Congress has specifically assigned to a federal regulatory agency, which is currently considering it.

California also contends that adjudicating its lawsuit would “not require the court to establish[] a generally applicable regulatory ‘standard.’” Br. 36-38. But this is both irrelevant—the third *Baker* test simply asks whether a nonjudicial “initial policy determination” would be required, and that standard is plainly met here—and wrong. California seeks to impose billions of dollars in damages, for past and future emissions, against the Automakers for selling vehicles in California and around the world. Such damages would have an undeniable regulatory effect, as the only way a company could hope to avoid paying them for vehicles sold in the future would be to reduce worldwide and California emissions below whatever (thus far undefined) level the courts determine to be “unreasonable.” As the Supreme Court recently explained:

[C]ommon-law liability is “premised on the existence of a legal duty,” and a tort judgment therefore establishes that the defendant has violated . . . [an] obligation. . . . [T]ort law . . . disrupts . . . no less than . . . regulatory law to the same effect.

*Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1008 (2008) (citation omitted).<sup>9</sup>

California also criticizes the district court for taking too “narrow [a] view of the federal courts’ function under the federal common law” and touts *Nebraska v. Wyoming*, 325 U.S. 589 (1945), as a case where a federal court resolved “a detailed and highly technical” issue rather than deferring to administrative agencies. Br. 37-38. But *Nebraska* was a dispute between two States over water apportionment—a unique species of case over which the Supreme Court has original jurisdiction under Article III, § 2 of the Constitution. *Nebraska*, 325 U.S. at 591. The Supreme Court is constitutionally *required* to hear and resolve most such cases, and because such cases involve technical issues and require fact-finding—functions outside the Supreme Court’s usual purview—the Court often appoints special masters to hear evidence and assist with adjudication.<sup>10</sup> Whatever

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<sup>9</sup> See also *Gore v. BMW of N. Am., Inc.*, 517 U.S. 559, 573 n.17 (1996) (“State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.”).

<sup>10</sup> See generally Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*,

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latitude the Supreme Court may have to resolve technical and even policy-driven issues in cases falling within its original jurisdiction—latitude expressly conferred by the Constitution—it is obviously improper to extrapolate from this unique subset of cases (as California attempts to do) a “rule” authorizing federal courts to supersede administrative agencies and make initial policy judgments in other contexts.

Finally, California cites a pair of Supreme Court cases that were decided, respectively, over 100 and 35 years ago—*Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee I*”)—as holding that “federal courts [have] the responsibility and authority to provide the states a forum and remedy in interstate pollution cases” and that States “are not obliged to wait for . . . regulatory solutions.” Br. 38-41. Notably, California refers to the Supreme Court’s much more recent decision in *Massachusetts* only once throughout its entire discussion of this issue, claiming (in a parenthetical, no less) that *Massachusetts* supports “federal jurisdiction” whenever a State brings a lawsuit seeking protection from global warming. Br. 41.

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86 MINN. L. REV. 625, 632, 640-58 (2002). In fact, *Nebraska* utilized this process. 325 U.S. at 591 (“A Special Master . . . was appointed and hearings were held before him.”).

These arguments are easily rejected. Putting aside, for the moment, the multiple ways in which this case differs from *Tennessee Copper and Milwaukee I* (pages 37-44, 46-54 *infra*), what is notable is California's conspicuous failure to square its position with *Massachusetts*. As the district court explained, *Massachusetts's* core holding is "that the authority to regulate carbon dioxide lies with the federal government, and more specifically with the EPA as set forth in the CAA" and that, to the extent any State (including California) is dissatisfied with EPA's efforts in this regard, it has a "'procedural right' to advance its interests through administrative channels" and/or to mount an "arbitrary and capricious" challenge to EPA's decisions in federal court. ER 23. This lawsuit represents an obvious attempt to end-run that careful structure, which "emphasizes that initial policy determinations are made by the political branches while preserving a framework for judicial review of those determinations." *Id.*

This understanding of *Massachusetts* also refutes California's claim that that decision somehow creates "federal jurisdiction" over all global warming lawsuits. Br. 41. *Massachusetts* holds that States have "special solicitude," for purposes of demonstrating *standing*, when seeking judicial review of EPA's decisions under 42 U.S.C. § 7607(b)(1). 127 S.Ct. at 1454-55 ("Congress has recognized a concomitant procedural right [of States] to challenge the rejection of [a] rulemaking petition as arbitrary and capricious. Given that procedural right . . .

[States are] entitled to special solicitude in our standing analysis.”). Thus, far from giving federal courts *carte blanche* to ignore the political question doctrine whenever presented with “common law” tort claims premised on global warming, *Massachusetts* underscores that the proper way for California to advance its views is to petition EPA and, if necessary, to seek judicial review of that agency’s decisions. *See generally* ER 24-25 (“Unlike the procedural posture of *Massachusetts*, the current case is not before the Court by way [of] an administrative challenge to an EPA[] decision, but rather as an interstate global warming damages tort claim. Plaintiff’s argument essentially ignores this procedural distinction.”).

**B. California’s Nuisance Claim Implicates Issues Of Interstate Commerce And Foreign Policy Whose Resolution Is Textually Committed To The Political Branches Of Government.**

This case also easily satisfies the first *Baker* test, which looks to whether there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Baker*, 369 U.S. at 217. As the district court correctly found, California’s “federal common law global warming nuisance tort would have an inextricable effect on interstate commerce and foreign policy— issues constitutionally committed to the political branches of government.” ER 25-27.

**1. This lawsuit interferes with issues of interstate and foreign commerce that are textually committed to Congress.**

The Constitution provides that “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .” U.S. Const. art. I, § 8, cl. 3. By seeking to impose damages for the Automakers’ lawful worldwide sale of vehicles,<sup>11</sup> this lawsuit would directly interfere with Congress’s power over national and foreign commerce.

In fact, such a lawsuit by California would seek to thrust policy decisions made by a federal court about global warming in response to one State’s tort claim on all fifty States and other nations by imposing damages against the Automakers for selling vehicles in those other States and countries. *E.g.*, *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1062 (2007) (large damage awards “may impose one State’s (or one jury’s) ‘policy choice,’ say as to the conditions under which (or even whether) certain products can be sold, upon ‘neighboring States’ with different public policies”) (citation omitted); *Gore*, 517 U.S. at 571 (discussing Domestic Commerce Clause and due process principles in tort context and declaring that “one State’s power to impose burdens on the interstate market for

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<sup>11</sup> ER 46 (complaint: “Emissions . . . from defendants’ products, *no matter where such products are operated*, . . . cause an increase in the atmospheric concentration of carbon dioxide and other greenhouse gases *worldwide*”) (emphases added).

automobiles is not only subordinate to the federal power over interstate commerce, . . . but is also constrained by the need to respect the interests of other States”)

(citations omitted); *Healy v. Beer Institute*, 491 U.S. 324, 335-36 (1989)

(Constitution has a “special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres”).

As the district court concluded:

[R]ecognizing such a new and unprecedented federal common law nuisance claim for damages would likely have commerce implications in other States by potentially exposing automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce within those States. . . . [T]he potential ramifications of a judicial decision on global warming in this case would sufficiently encroach upon interstate commerce[] to cause the Court to pause before delving into such areas so constitutionally committed to Congress.

ER 26-27.

California acknowledges that the regulation of interstate and foreign commerce is textually committed to Congress (Br. 22), but argues that federal courts have a “concurrent” duty “under long-standing federal precedent” to adjudicate public nuisance claims, irrespective of their potential to interfere with such commerce. Br. 19-22. But as discussed *infra*, the century-old nuisance cases to which California refers involved simple claims for injunctive relief in which one State sued another State (or residents of another State) to halt transboundary

pollution from a stationary source. None of the cases presented *any* risk of interference with issues of foreign commerce or foreign policy, and to the extent the cases had any impact on domestic interstate commerce, that impact was limited, at most, to a few companies in one or two States. In sharp contrast, granting the relief sought by California in this case would have enormous “commerce implications” in every State and across every facet of the national and global economy. ER 26.

This also undermines California’s claim that its lawsuit is justiciable because “there is no constitutional commitment of tort adjudication.” Br. 19-21. As this Court has recognized, simply labeling a lawsuit a “tort” suit does not render it *per se* justiciable. Adjudicating California’s claims would require the federal courts to decide political questions—something they lack jurisdiction to do, irrespective of the type of lawsuit at issue. *Alperin*, 410 F.3d at 558-62 (declining to adjudicate certain tort claims seeking money damages because those claims “present[ed] a nonjusticiable political question”); *id.* at 562 (“The slave labor claims present no mere tort suit.”).

Finally, California contends that *Gore*, *Healy*, and other “dormant Commerce Clause cases” are irrelevant when considering justiciability, claiming that such cases only limit States from interfering with interstate commerce “under their own laws” and thus have no applicability when a State brings a “federal” tort

claim. Br. 21-22. But this cuts too narrowly. The teaching of those cases is that *Congress*—not state governments and not the judiciary—is responsible for overseeing issues of interstate commerce under our Constitution and system of government. Because adjudicating this lawsuit would unquestionably interfere with Congress’s textual prerogative in this area, the lawsuit is nonjusticiable under the first *Baker* test.

**2. This lawsuit interferes with issues of foreign policy that are textually committed to the political branches.**

Similarly, “the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] . . . the propriety of the exercise of that power is not open to judicial review.” *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999) (citation omitted); *Baker*, 369 U.S. at 211 n.31 (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”) (citation omitted); U.S. Const. art. II, § 2, cl. 2 (treaty-making power).

California’s global warming lawsuit would, unquestionably, directly interfere with these prerogatives. The political branches are engaged in a deliberate course of action on the international stage to address global warming

and have, to date, firmly rejected calls to impose unilateral limitations on CO<sub>2</sub> emissions in the U.S. But California's request that the Judiciary create a new global warming nuisance tort would impose just such unilateral limitations. This tort would not only allow the State to recover retroactive damages against the Automakers for past emissions from vehicles they sold, but also would allow it to recover damages for sales *in the future* unless those companies reduced the CO<sub>2</sub> emissions from their vehicles to some as-yet-undefined level deemed to be "reasonable" by the courts. This is unilateral U.S. regulation pure and simple. It flatly contradicts the foreign policy decisions of democratically-accountable actors. *See also* ER 27 (district court's conclusion that lawsuit would "impede . . . diplomatic objective[s]").

California, however, denies that its lawsuit would interfere with foreign policy, arguing that (a) EPA, which lacks authority to formulate foreign policy, is the only governmental body to have condemned unilateral restrictions on CO<sub>2</sub> emissions, and (b) two district courts that have "go[ne] beyond EPA's assertion" have "found no such policy." Br. 23-24. But as noted (pages 5-8 *supra*), the EPA statements at issue are only one of *multiple* authorities—including statements made by both the current and former President—establishing a U.S. policy disfavoring unilateral restrictions on domestic emissions and encouraging a coordinated,

international approach. *See also* ER 14 (district court's discussion of presidential statements).

Moreover, the authorities cited by California show, at the very most, that the U.S. government has exhibited solicitude toward certain efforts by *local* and *state* governments to implement CO<sub>2</sub> reduction programs that are either *voluntary* or, if mandatory, limited to the particular locality. U.S. Dept. of State, U.S. Climate Action Report—2006, at 4 (2007), *at* <http://www.state.gov/documents/organization/89646.pdf> (“A number of U.S. states and cities are implementing a range of voluntary, incentive-based, and locally relevant mandatory measures. Many of these . . . contribute to meeting the President’s GHG intensity goal.”). Such local and voluntary measures are a far cry from what California seeks to accomplish through this tort suit—authorizing a single jury in California to directly regulate global automotive manufacturing by setting an automotive emissions standard that would, as a practical matter, be applicable not just across the *entire* U.S., but around the *world*, enforceable through the threat of billions of dollars of tort damages.

In any event, the foreign policy implications of California’s lawsuit go significantly beyond its interference with U.S. diplomacy in negotiating multilateral treaties. As the district court recognized, this lawsuit would also “run headlong” into other “nonjusticiable foreign policy issues” by “punish[ing]

Defendants for lawfully selling their automobiles . . . in the global market.” ER 27. The Automakers’ products are vital not just to the U.S. economy and transportation sector, but to the economies and transportation needs of other countries. Burdening the manufacture and distribution of such lawful products—for example, by allowing a single jury in California to tell Ford which type of vehicles it may sell in China—would pose foreign policy risks in this regard as well.

Accordingly, this lawsuit does not simply “touch[] foreign relations” (Br. 23), but rather it contravenes decisions made by, and directly interferes with powers expressly vested in, the political branches. Although California may disagree with the federal government’s emphasis on multilateralism in combating global warming, it has no business thwarting this approach by seeking to impose what would amount to billion-dollar sanctions for the Automakers’ lawful worldwide sales activities. *Cf. Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003) (“The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that . . . the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the

National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress.") (citation omitted).<sup>12</sup>

**C. There Are No Judicially Discoverable Or Manageable Standards For Resolving California's Novel And Unprecedented Tort Claim.**

Finally, the district court also looked to "[t]he second *Baker* indicator"—which asks “whether there are judicially discoverable or manageable standards available to resolve the question”—in finding California's lawsuit nonjusticiable. ER 27-29 (citing *Baker*, 369 U.S. at 217). As shown below, this test amply warrants dismissal.

**1. There are no judicially manageable or discoverable standards for assessing liability.**

As established (pages 21-29 *supra*), adjudicating the threshold issue of tort liability in this case would require the courts to make an initial determination, on an issue of commercial and foreign policy that is textually committed to other branches of government, as to the point at which automotive CO<sub>2</sub> emissions cease being permissible and start being tortious. There is simply no legal framework

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<sup>12</sup> California argues that *Garamendi* and other cases applying the “foreign policy preemption doctrine” only embody federalism principles and are not concerned with the separation of powers. Br. 23 n.3. This distinction is unconvincing. This lawsuit represents a bald attempt by California to second-guess the political branches' policy and approach toward global warming through the guise of tort litigation—something *Garamendi* forbids. That California relies on a non-existent “federal” tort cause of action to do so, rather than a state-law nuisance claim, hardly changes the analysis.

available that would allow the courts to grant “relief in a reasoned fashion.”

*Alperin*, 410 F.3d at 553.

California claims otherwise, arguing that “[m]ore than one hundred years of case law provides case studies for how nuisance liability is determined.” Br. 26-30. But California’s claim for billions of dollars in money damages for lawful, closely regulated, in-state and international conduct differs radically from those pre-*Erie* nuisance cases involving simple injunctive relief (ER 28-29), and raises a whole different set of issues for which no standards or rules of law exist. Nothing in *Tennessee Copper* or the other cases cited by California remotely provides a “standard” or template for balancing the wide array of environmental, commercial, foreign policy, and consumer interests implicated by CO<sub>2</sub> regulation. As the district court specifically found, those cases “do not provide . . . [a] legal framework or applicable standards upon which to allocate fault or damages, if any. The Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth’s atmosphere.” ER 28-29.

Indeed, those cases suggest that even simple injunctive relief may be inappropriate in cases where the plaintiff has participated in the challenged behavior. *Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (denying injunction request where “the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains”); *New York v. New Jersey*, 256

U.S. 296, 310-11 (1921) (denying request for injunction barring New Jersey from discharging sewage into harbor “when it is considered that for many years all of the sewage from the great population of New York City and its environs . . . has been discharged into the harbor”). Here, California has long welcomed, encouraged, and participated in the use of the Automakers’ products (pages 13-14 *supra*), yet now claims that the combined effect of emissions legally produced within its borders, in other States, and in other countries shows that the Automakers’ conduct was “tortious.” Br. 30. Imposing liability under these circumstances would require “a retroactive political judgment . . . [and] [s]uch judgment calls are, by nature, political questions.” *Alperin*, 410 F.3d at 548.

California also suggests that the courts could look to the Restatement (Second) of Torts to derive a liability standard. Br. 30-31. But under the Restatement, the courts would still be required to determine the point at which automotive CO<sub>2</sub> emissions cease being reasonable and become tortious.<sup>13</sup> As

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<sup>13</sup> Under the Restatement, only tortious conduct by a defendant can give rise to public nuisance liability. *See, e.g.*, Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 780 (2003) (“[C]ourts [must] remember that defendant’s conduct must be otherwise tortious.”) (citing Rest.2d Torts § 821A cmt. c). As the Eighth Circuit has observed, any contrary rule authorizing liability “regardless of the defendant’s degree of culpability” would transform nuisance into “a monster that would devour in one gulp the entire law of tort.” *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

shown above, this is a policy judgment of the highest order for which no judicially-discoverable standards exist.

**2. There are no judicially manageable or discoverable standards for allocating fault and damages.**

California's quest for past and future money damages makes this case even more impossible to adjudicate. California has not identified a single case in the history of American jurisprudence to award money damages under the federal common law of nuisance—simply put, there is no framework or “standard” for affixing or apportioning damages in this context. *See also* ER 28 (“[T]hese cases are distinguishable because the remedies sought therein were equitable remedies to enjoin or abate the nuisance, rather than the legal remedy of monetary damages sought in the current case.”).<sup>14</sup>

Indeed, if the courts were to accept California's argument that “joint and several liability should apply” (ER 36, Br. 32-33), the six targeted defendants would be forced to join as defendants all other automobile manufacturers and

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<sup>14</sup> Imposing retroactive money damages in this context—rather than prospective injunctive relief—would also raise deep due process concerns. *See, e.g.,* Gifford, 71 U. CIN. L. REV. at 787 (“When . . . a state's attorney general . . . selects an industry and files a massive legal action seeking recoupment for hundreds of millions of dollars against a defendant alleging liability under a particularly vague tort, the principles behind the void for vagueness doctrine are implicated. . . . [W]hen legislative and regulatory agencies have decided not to regulate or prohibit the manufacture or sale of the products in question . . . [d]efendant manufacturers are not given fair warning.”).

vehicle operators, plus the companies who provide the fossil fuels used in vehicles. Those entities would then be forced to join utility companies who use fossil fuels and electricity. Those companies would then be forced to join the homebuilders who produce large homes that must be heated and cooled and the appliance makers whose products are powered by electricity. And so on and so on until every company, municipality, and individual who either creates products that use energy, utilizes those products, or simply breathes and exhales air, *see* ER 39 (complaint, acknowledging that “[c]arbon dioxide is . . . emitted by human activity”), were joined as a co-defendant. And after every man, woman, and child on the globe were so joined, the courts would then be asked to decide who is entitled to damages, who must pay them, and how to allocate the payments and receipts. This, apparently, is California’s idea of a “garden variety” tort claim (SER 8) that can be resolved through “a well-established legal framework.” Br. 32. As the district judge aptly put it, “the Court is left without a manageable method of discerning the entities that are creating and contributing to the alleged nuisance. In this case, there are multiple worldwide sources of atmospheric warming across myriad industries and multiple countries.” ER 29.

No doubt recognizing the impossibility of such a lawsuit, California suggests for the first time that, instead of imposing joint-and-several liability, the courts could employ other “innovative” methods for allocating and apportioning

damages. Br. 33-35.<sup>15</sup> However, none of California's proposed methodologies would cure the justiciability and manageability concerns recognized by the district court, and indeed many of these new proposals would *add* to the problem.

For example, California asserts that the courts could “look[] to Section 433A of the Restatement of Torts for guidance” in deciding how to apportion damages. Br. 33. But that provision simply provides that damages “are to be apportioned” between multiple causes if “there is a reasonable basis for determining the contribution of each cause to [the] harm.” Rest.2d Torts § 433A(1)(b). Here, the whole point is that judges and juries *lack* a reasonable basis for determining how to apportion damages between the countless sources of CO<sub>2</sub> emissions across the country and around the world. In short, Section 433A provides no guidance at all on the crucial question of apportionment.

Next, California claims that a court could simply “estimate as best it could” how to allocate damages between the Automakers and every other source of CO<sub>2</sub> emissions. Br. 33-34. But such a standardless, ad hoc “estimate” is the antithesis of what the second *Baker* test requires—that is, a principled, manageable, and discoverable *standard* for adjudication. *Alperin*, 410 F.3d at 552 (second *Baker*

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<sup>15</sup> California did not propose any of these “innovative” alternatives to joint-and-several liability during the proceedings below. SER 9-13.

test requires courts to “ask whether they have the legal tools to reach a ruling that is ‘principled, rational, and based upon reasoned distinctions’”).

California also suggests that the courts could impose “market share and commingled product liability” against the Automakers. Br. 34. But those controversial theories of liability can apply, if at all, only when the defendants’ product is the sole cause of the plaintiff’s injury. Here, because California concedes that “the Automakers are not the sole cause of global warming” and that there are “[c]learly . . . other sources of greenhouse gas pollution emissions” (Br. 30), those theories of liability are inapplicable. *White v. Celotex Corp.*, 907 F.2d 104, 106 (9th Cir. 1990) (market-share liability is “entirely inappropriate” in cases where injury not caused by a “single, fungible product”).

Finally, California suggests several other “hypothetical” approaches to apportionment that “may or may not ultimately be appropriate,” including multiplying the Automakers’ “fractional share of total emissions” by “California’s total damages.” Br. 34-35. But this approach would raise countless other problems. For example, what timeframe would judges and juries employ when aggregating these “total emissions”? Five years? One hundred? One thousand? One million? Because California seeks money damages for alleged injuries caused by *past* emissions, the courts would need to determine the historical point at which the worldwide emission of carbon dioxide began causing global warming and then

begin counting the “total emissions” from that point forward. Nowhere does *Tennessee Copper* or any other case suggest a manageable and discoverable standard for that sort of unfathomable calculation.

## **II. THE COMPLAINT FAILS TO STATE ANY VALID FEDERAL CLAIM.**

Although the district court looked solely to the political question doctrine in ordering dismissal (ER 30), the court also lacked subject matter jurisdiction for the additional reason that California’s “federal common law” nuisance claim—the only possible predicate for federal jurisdiction—simply does not exist. This infirmity provides an independent reason for affirming the judgment. *Hoang*, 376 F.3d at 840 (9th Cir. 2004).

### **A. The “Federal Common Law” Of Nuisance Does Not Authorize A Damages Claim For Global Warming.**

#### **1. There is no federal common law of torts.**

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court famously announced that “[t]here is no federal general common law.” *Id.* at 78. As the Court explained, “no clause in the Constitution purports to confer . . . power upon the federal courts” to “declare substantive rules of common law . . . be they commercial law or a part of the law of torts.” *Id.* at 78.

Since *Erie* was decided, it has been hornbook law that “[f]ederal courts, unlike state courts, are not common law courts and do not possess a general power to develop and apply their own rules of decision.” *National Audubon Society v.*

*Dept. of Water & Power of the City of Los Angeles*, 869 F.2d 1196, 1201 (9th Cir.

1988) (citation omitted). As this Court has noted:

The enactment of a federal rule in an area of national concern . . . is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. We start with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law.

*Id.* (citation omitted).

Here, Congress has not created any cause of action—much less a tort cause of action for billions of dollars in damages—authorizing litigants to sue automobile manufacturers under federal law because their vehicles generate CO<sub>2</sub> emissions. Nevertheless, California purports to rely on the “federal common law” of public nuisance as providing the basis for its lawsuit. California argues that “a long line of cases,” including *Tennessee Copper*, supports the existence of such a federal claim. Br. 19-20.

California is wrong. All but one of the cases on which California relies were decided before *Erie*—during a time when federal courts had considerably more leeway to create common law causes of action. In fact, in the 70 years since *Erie* was decided, the Supreme Court has recognized a federal nuisance cause of action exactly once, in 1972, when in *Milwaukee I* it authorized one State to seek injunctive relief against another State to enjoin a “simple type” of transboundary water pollution. 406 U.S. at 106 n.8.

Nine years later, in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (“*Milwaukee II*”), the Court further pruned back the reach of federal common law in the nuisance context, declaring “that a federal court could not generally apply a federal rule of decision . . . in the absence of an applicable Act of Congress.” *Id.* at 313. Thus, it is entirely unclear that the Supreme Court would reach the same result it reached in *Tennessee Copper* and the other pre-*Erie* cases cited by California if the issue were presented again today—particularly in light of the multiple comprehensive federal statutory and regulatory schemes that now exist.

**2. In any event, California’s global warming claim does not fall within the federal common law of nuisance.**

But more fundamentally, even the cases on which California relies—assuming they remain good law—at most permit one State to seek equitable relief enjoining pollution originating from a stationary source in a neighboring State. By contrast, here California seeks money damages against product manufacturers for engaging in lawful conduct, both within California and around the world, that is central to our economy and that California itself has long approved and encouraged. None of the cases cited by California remotely supports such a vast and literally unprecedented expansion of the federal common law of nuisance.

**a. In-state conduct that the plaintiff has affirmatively authorized and promoted.**

In all of the cases cited by California, the state plaintiff sought to enjoin conduct by *non-residents* committed *outside* its borders. Resort to federal law was believed necessary because, in those narrow circumstances, the plaintiff had no jurisdiction over the defendants and thus could not rely on its own nuisance and criminal laws to control the defendants' conduct. *E.g., Massachusetts v. U.S. Veterans Admin.*, 541 F.2d 119, 123 (1st Cir. 1976) (“[T]he federal common law . . . was originally recognized to fill a void in the law applicable to suits seeking abatement of pollution originating within the domain of one state sovereign and exerting adverse effects in the domain of another.”). As the Supreme Court explained in *Tennessee Copper*: “[A] sovereign . . . should not be . . . destroyed or threatened by the act of persons beyond its control.” 206 U.S. at 238. *See also Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992) (federal common law of nuisance encompassed “controversies between a State that introduces pollutants to a waterway and a downstream State that objects. In such cases, this Court . . . applied principles of common law tempered by a respect for the sovereignty of

States.”); *Milwaukee I*, 406 U.S. at 108 n.9 (relying on federal common law to protect Illinois from “improper impairment by sources outside its domain”).<sup>16</sup>

The corollary, of course, is that resort to federal common law is unnecessary where a State seeks to regulate conduct by *residents* occurring in part *within* its own borders. For example, in *National Audubon*, the plaintiff asserted a “federal common law nuisance claim” seeking to enjoin a water diversion project “within the State of California” that allegedly polluted the air in both California and Nevada. 869 F.2d at 1198, 1204. This Court rejected that claim, holding that the federal common law of nuisance encompasses “only those interstate controversies which involve a state suing sources *outside of its own territory* because they are causing pollution within the state to be inappropriate for state law to control.” *Id.* at 1205 (emphasis added).<sup>17</sup>

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<sup>16</sup> *Cf. Massachusetts*, 127 S.Ct. at 1454 (“When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . . .”).

<sup>17</sup> *See also Comm. for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008-09 (4th Cir. 1976) (the “body of federal common law . . . has not been extended beyond the abatement of public nuisances in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm”); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 520-21 (8th Cir. 1975) (“reject[ing] the federal common law of nuisance as a basis for relief” where Minnesota sought to enjoin conduct of mining company operating within Minnesota).

Here, because California seeks to sue the Automakers—three of whom are incorporated in California—for conduct occurring in part within California’s own borders, there can be no federal claim. *U.S. Veterans Administration*, 541 F.2d at 123 (“Whether the common law [of nuisance] so recognized extends to suits involving pollution originating within the territorial jurisdiction of the plaintiff sovereign is doubtful.”); ER 29 (district court’s finding that California’s attempt to “impose damages on . . . pollution originating both within, and well beyond, [its] borders” is a “critical distinction” from other federal common law cases).

This is particularly true because California has long approved, promoted, and certified the very conduct—the sale and use of defendants’ products—that it now challenges. *E.g., Missouri*, 200 U.S. at 522; *New York*, 256 U.S. at 310-11. *See also* Rest.2d Torts § 821B(2)(b) & cmt. f (no nuisance liability if defendant’s conduct complied with applicable regulations).

**b. Money damages.**

In each and every one of the “long line of cases” on which California relies (Br. 19-20), the plaintiff sought injunctive relief. No case involved a claim for money damages. ER 28 (district court, observing same).

This is another key distinction. In fact, the Supreme Court has repeatedly emphasized that the federal common law of nuisance permits only *equitable* remedies. *E.g., Middlesex County Sewerage Auth. v. National Sea Clammers*

*Ass'n*, 453 U.S. 1, 10-12 & n.17 (1983) (not reaching the issue “whether the federal common law of nuisance could *ever* be the basis of a suit for damages by a private party,” but remarking that such “monetary relief” would go “*considerably beyond*” its past precedents) (emphasis added); *Milwaukee I*, 406 U.S. at 108 n.10 (“[T]he kind of *equitable* relief to be accorded lies in the discretion of the chancellor . . . .”) (emphasis added); *Tennessee Copper*, 206 U.S. at 237-38 (noting that “[s]ome peculiarities necessarily” distinguish a federal common law nuisance claim from a “private law” claim, including “the difficulty of valuing such rights in money”); *Missouri v. Illinois*, 180 U.S. 208, 244 (1901) (“The grounds of this jurisdiction, in cases of . . . public nuisances, is the ability of *courts of equity* to give a more speedy, effectual and permanent remedy *than can be had at law.*”) (emphases added).<sup>18</sup>

So, too, has this Court. In *California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181 (9th Cir. 1979), this Court observed that “federal common

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<sup>18</sup> *Massachusetts* further underscores this point. In dissent, Chief Justice Roberts emphasized that *Tennessee Copper* was “a case that . . . draw[s] a distinction . . . with respect to available remedies.” 127 S.Ct. at 1465. He continued: “The [*Tennessee Copper*] Court explained that . . . while a complaining private litigant would have to make do with a *legal* remedy—one ‘for pay’—the State was entitled to *equitable* relief.” *Id.* (emphases in original). The majority did not quarrel with this analysis, confining its discussion of *Tennessee Copper* to standing issues. *Id.* at 1455 n.17.

law nuisance actions” may be “instituted by one state to *enjoin* damaging activities carried on in another” and cautioned that “[t]he exercise of these *equitable powers* . . . requires great certainty.” *Id.* at 193 (emphases added). Simply put, “[t]here is some justification for limiting any right of action . . . to private parties seeking injunctive relief rather than damages.” *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281-82 (D. Conn. 1976).

Despite all of this, California insists that “[d]amages are a permissible remedy for public nuisance.” Br. 32 n.6. In support of its claim, California identifies two decisions—one from 1979, the other from 1980—in which lower courts did not actually award money damages but indicated that such damages could potentially be recovered. *Id.* (citing *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979), and *United States v. Illinois Terminal Railway Co.*, 501 F. Supp. 18 (E.D. Mo. 1980)).

This argument is unpersuasive. Even at the time *Evansville* and *Illinois Terminal* were decided, their purported recognition of a money-damages remedy improperly extended the federal common law of nuisance far beyond anything ever authorized or approved by the Supreme Court or this Court. Moreover, these cases predate the Supreme Court’s decisions in *Milwaukee II*, *Middlesex County*, and *Massachusetts*, which reaffirmed the longstanding rule that only equitable remedies are available under federal nuisance law. Such outdated, aberrational,

and out-of-jurisdiction dicta is a thin reed, indeed, on which to base an unprecedented multi-billion dollar federal tort claim.

Moreover, even if money damages were theoretically available under the federal common law of nuisance—and they are not—California would be barred from seeking such damages in this case because it is a governmental plaintiff suing in its sovereign and *parens patriae* capacity (ER 36):

Historically, public nuisance most often was not regarded as a tort, but instead as a basis for public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct. Only in limited circumstances was a tort remedy available to an individual, and apparently never to the state or municipality.

Gifford, 71 U. CIN. L. REV. at 745-46. Simply put, “[t]here is no historical evidence . . . that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance. The state’s remedies were restricted to prosecution or abatement, or both. . . . Support for this conclusion is found in the Restatement (Second) of Torts section 821C . . . .” *Id.* at 782.

**c. Lawful products.**

Finally, the federal nuisance claim asserted here also differs sharply from the claims at issue in *Tennessee Copper*, *Milwaukee I*, and the other cases cited by California in that it does not target “a source-certain nuisance originating in a neighboring state.” ER 29. Instead, California seeks to impose liability against the

Automakers for their manufacture and design of a lawful product that, when operated by third parties (including California's employees and agents) within California and around the country and world, generates greenhouse gas emissions.

Courts have held that a public nuisance claim will not lie against a product manufacturer absent allegations that the manufacturer engaged in some form of "affirmative conduct" *beyond* the "mere manufacture and distribution of a product." *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 309-10 (2006). After all, "allowing a nuisance action" to proceed without such a showing "would convert almost every product liability action into a nuisance claim." *City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App.4th 575, 586 (1994) (citation omitted). Thus, "[t]he courts have enforced the boundary between the well-developed body of product liability law and public nuisance law." *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).<sup>19</sup>

California has failed to allege anything remotely resembling such "affirmative conduct" here. California simply complains that the Automakers

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<sup>19</sup> *Accord Iletto v. Glock*, 349 F.3d 1191 (9th Cir. 2003) (allowing state-law nuisance claim to proceed against firearm manufacturers because the "nuisance claim . . . [was] not about the manufacture" and design of firearms and, instead, centered on the "affirmative conduct on the part of the manufacturers" in creating an illegal secondary market).

make lawful products that contribute to global warming “when operated as designed.” ER 37-38 (complaint). To endorse such a claim would effectively create a federal product liability cause of action. If *Erie* stands for anything, it is that such a radical expansion of the federal common law is impermissible.

**B. Any Federal Common Law Claim Has Been Displaced.**

California devotes nearly half of its Argument to the claim that Congress has not “displaced” federal common law with respect to global warming. Br. 44-64. The Court, however, need not even reach the issue of displacement. Because there is no such thing as a federal nuisance claim for money damages against product manufacturers based on lawful, in-state conduct, there is no “law” to displace. *Milwaukee II*, 451 U.S. at 315 (displacement concerns “whether a *previously available federal common-law action* has been displaced”) (emphasis added).

California’s displacement arguments fail on the merits in any event. As established below, both the Clean Air Act (“CAA”) and the Energy Policy and Conservation Act (“EPCA”) create comprehensive statutory frameworks for regulating CO<sub>2</sub> and other greenhouse gas emissions from automobiles. And where Congress “has occupied [a] field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,” “there is no basis for a federal court to impose more stringent limitations than those imposed

under the regulatory regime by reference to federal common law.” *Milwaukee II*, 451 U.S. at 317-20.

### 1. CAA Displacement.

As a threshold matter, it bears emphasizing that there is a strong presumption in *favor* of finding displacement: “[T]he very concerns about displacing *state* law which counsel against finding pre-emption of state law in the absence of clear [congressional] intent actually suggest a willingness to find congressional displacement of *federal* common law.” *Milwaukee II*, 451 U.S. at 317 n.9. *See also National Audubon*, 869 F.2d at 1201.

According to California, two conditions must be satisfied for displacement to occur: “[T]here must exist [1] a ‘comprehensive’ congressional solution that [2] ‘speaks directly’ to the ‘particular issue.’” Br. 47. The CAA easily satisfies both prongs of this purported test.

Comprehensiveness. The CAA is more than sufficiently “comprehensive” to displace any federal common law claim. In fact, the CAA is widely considered to be the most comprehensive environmental statute ever enacted. *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 848 (1984) (describing 1977 amendments to CAA as “a lengthy, detailed, technical, complex, and comprehensive response to a major social issue”); *MVMA v. N.Y. State Dep’t of Env’tl Conservation*, 17 F.3d 521, 524-25 (2d Cir. 1994) (describing CAA as

“one of the most comprehensive pieces of legislation in our nation’s history” and noting that “the 1990 amendments beggar[] description. Congress . . . took what was widely perceived as an ‘unapproachable piece of legislation’ and tripled the Act’s length and ‘geometrically increased its complexity.’”). Indeed, in *National Audubon*, this Court flatly declared: “In the [CAA], Congress established a comprehensive state and federal scheme to control air pollution in the United States.” 869 F.2d at 1201. *See also id.* (characterizing CAA as “this comprehensive scheme”); ER 19 (CAA is “a comprehensive state and federal scheme to control air pollution”).

As these authorities demonstrate, any complaint about the CAA’s lack of comprehensiveness must be rejected. California itself concedes that multiple federal courts “have found that the [CAA] displaces federal common law claims for nuisance.” Br. 53 n.8. And it tellingly fails to identify a single decision ever to reach the opposite conclusion.<sup>20</sup>

Nevertheless, California urges this Court to break new ground and become the first court ever to do so. In support of its claim, California identifies a number

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<sup>20</sup> Instead, California cites the dissent in *National Audubon*—which, in any event, was penned two years *before* the 1990 amendments to the CAA. Br. 52-53. California also cites *New England Legal Foundation v. Costle*, 666 F.2d 30 (2d Cir. 1981), but that case (which also evaluated the CAA in its pre-1990 form) expressly *declined* to reach the issue of displacement. *Id.* at 32 n.2.

of technical differences between the CAA and the Clean Water Act and complains, among other things, that the CAA's "permitting program" for regulating air pollution is not identical to the Clean Water Act's permitting program. Br. 52-59. But this approach "misapprehend[s] the nature of the comprehensiveness inquiry . . . , which turns on 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" *Mattoon v. City of Pittsfield*, 980 F.2d 1, 11 (1st Cir. 1992) (citation omitted). As the Seventh Circuit has explained, it would be "meaningless" to view the comprehensiveness inquiry "as a mandate to dissect the [statute] section-by-section, with a view to finding that parts of it are not 'comprehensive.'" *Illinois v. Outboard Marine Corp., Inc.*, 680 F.2d 473, 478 n.8 (7th Cir. 1982).

"Speaks Directly" to "Particular Issue." Similarly, it is beyond reasonable dispute that the CAA "speaks directly" to the "particular issue" underlying California's common law claim. In *Massachusetts*, the Supreme Court held that (a) the CAA requires EPA to regulate greenhouse gas emissions from automobiles if it makes an "endangerment finding," and (b) any State disagreeing with EPA's regulatory efforts in this area has a "procedural right" to challenge those decisions in federal court. 127 S.Ct at 1454, 1459, 1462. It is difficult to imagine a more straightforward example of a congressional scheme "speak[ing] directly" to—and

hence displacing—a federal common law against automobile manufacturers premised on a State’s injuries from global warming.

California complains that, notwithstanding *Massachusetts*, it still lacks an adequate remedy, and it argues that “an adequate remedy by statute or regulation is essential to displacement.” Br. 51-61. But in *Massachusetts*, the Supreme Court expressly confirmed that the States’ “procedural right” to challenge EPA’s regulatory decisions in federal court is a meaningful remedy. The Court held, as part of its standing analysis, that Massachusetts could challenge EPA’s regulatory decisions because a favorable judicial decision would “redress” its asserted injuries from global warming. Among other things, the Court emphasized that Massachusetts’ injuries “*would be reduced* to some extent if [it] received the relief [it] seek[s]” and that “[t]here is . . . a ‘substantial likelihood that the judicial relief requested’ *will . . . reduce that risk.*” *Id.* at 1455, 1458 (emphases added).

At bottom, then, California’s complaint is not that States lack *any* remedy under the CAA, but that the statute does not provide the *specific* type of remedy—a tort claim for money damages from past emissions (Br. 58)—that it would prefer. But this, again, is not the test for displacement. *Middlesex County*, 453 U.S. at 15 (“In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.”); *Outboard Marine*, 680 F.2d at 478 (“Illinois . . . urge[s] us . . . to

find that Congress has not ‘addressed the question’ because it has not enacted a remedy against polluters. Adopting this distinction, however, would be no different from holding that the solution Congress chose is not adequate. This we cannot do. . . . [O]ur fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution.”).

In short, Congress has identified its preferred process for allowing States to advance their views and interests with respect to automotive emissions and global warming—that is, States can petition EPA through administrative channels and, if necessary, challenge EPA’s decisionmaking as arbitrary and capricious in federal court under 42 U.S.C. § 7607(b)(1). California must work within this “framework for judicial review” (ER 23) rather than seeking to side-step it through the guise of a federal common law tort claim, which would completely disrupt Congress’s chosen framework. As this Court has explained: “Nothing in the Clean Air Act suggests Congress intended to rely for enforcement of this Act upon a federal common law remedy.” *National Audubon*, 869 F.2d at 1202.

Finally, California’s claim that it lacks any remedies under the CAA is particularly misplaced given California’s unique status under that statute. As noted (page 11 *supra*), California enjoys a special right—not shared by any other State—to petition EPA for permission to promulgate its own automotive emissions

regulations. Through this process, California has asked for permission to enforce its own automotive CO<sub>2</sub> regulations, but EPA recently denied California's waiver petition—a decision California is now challenging in this Court (08-70011).

Whatever the merits of the parties' respective arguments in that litigation, it is clear that *that process*—not common law tort litigation—is the appropriate one for determining whether California should be allowed to impose different emissions requirements on automakers than required by federal law. Indeed, it would be “perverse” to allow California to use tort litigation to impose the very regulatory standards that it has been expressly barred from enacting through administrative or legislative channels. *Cf. Riegel*, 128 S.Ct. at 1008 (concluding it would be “perverse” and “implausible” to allow state-law tort litigation challenging adequacy of manufacturer's warnings when Congress had affirmatively barred “state officials acting through state administrative or legislative lawmaking processes” from adopting state-law warnings requirements); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

## 2. EPCA Displacement.

Because the CAA so obviously displaces California's claim, the Automakers will address the issue of EPCA displacement only briefly. As noted (pages 11-13 *supra*), the fuel economy regulations promulgated under EPCA are functionally equivalent to CO<sub>2</sub> emissions regulations, and the Supreme Court has expressly

recognized that NHTSA's regulatory duties under this statute "overlap" with EPA's regulatory duties under the Clean Air Act. *Massachusetts*, 127 S.Ct. at 1461-62. Simply put, fuel economy regulations "represent[] a major" component of the political branches' efforts to "confront[] global climate change" (FACT SHEET, at 1) and "affect the level of the nation's greenhouse gas emissions and impact global warming." *Center for Biological Diversity*, 508 F.3d at 547.

This necessarily forecloses the assertion of any federal common law claim. Such a claim would have the effect of enforcing a different fuel economy standard than that established by Congress and NHTSA. Separation-of-powers principles preclude this approach. *Milwaukee II*, 451 U.S. at 326 ("The basic grievance of respondents is that the . . . Act do[es] not impose stringent enough controls on petitioners' discharges. The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies . . . . It would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law . . . ."); *Jensinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1132 (9th Cir. 1994) ("Federal courts lack authority to impose more stringent [standards] under federal common law than those imposed by the agency charged by Congress with administering the comprehensive scheme.") (citation omitted).

## CONCLUSION

California has identified an admittedly important global environmental issue—climate change associated with greenhouse gas emissions. And it has selected a single one of the innumerable sources of such gases—internal combustion engines in motor vehicles—on which to focus its attention in seeking a partial solution to the problem. But this is the wrong place, and the wrong process, for achieving California’s objectives. The issue California wishes to resolve is so vast and complex that it can only be addressed by governments acting through treaties, legislation, and political compromise. It simply cannot be resolved through standardless, ad hoc, and unprecedented multi-billion dollar tort litigation. This Court should affirm.

DATED: April 2, 2008

GIBSON, DUNN & CRUTCHER LLP

By: 

Theodore J. Boutrous, Jr.

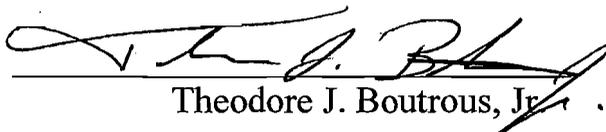
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**CERTIFICATE OF COMPLIANCE  
FRAP 32(A)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the Automakers' Answer Brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,988 words.

DATED: April 2, 2008

GIBSON, DUNN & CRUTCHER LLP

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## **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Defendants and Appellees General Motors Corporation, Toyota Motor North America, Inc., Ford Motor Company, American Honda Motor Co., Inc., DaimlerChrysler Corporation (now Chrysler LLC), and Nissan North America, Inc. (collectively, “Automakers”) state that they are not aware of any related cases pending in this Court.

## PROOF OF SERVICE

I, Susan Dreger, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State. On April 2, 2008, I served the following document(s), which were printed on recycled paper:

1. APPELLEES' ANSWER BRIEF; and
2. APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD

on the parties stated below, by the following means of service:

**See Attached Service List**

- BY MAIL:** I placed two true copies in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business.
- BY PERSONAL SERVICE:** I placed a true copy in a sealed envelope addressed to each person[s] named at the address[es] shown and giving same to a messenger for personal delivery during normal business hours on the above-mentioned date.
- I am employed in the office of Dominic Lanza, a member of the bar of this court.
- (FEDERAL)** I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Proof of Service was executed at Los Angeles, California on April 2, 2008.

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