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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Appellant,

Case No. 07-16908

v.

**GENERAL MOTORS CORPORATION, et  
al.,**

Appellees.

On Appeal from the United States District Court  
for the Northern District of California, Case No. 06-cv-05755 MJJ  
Hon. Martin J. Jenkins, Judge

**APPELLANT'S OPENING BRIEF**

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## INTRODUCTION

The harm to California from global warming is unprecedented, but California's public nuisance claim against the six largest automobile manufacturers for contributing to that harm is not. For more than one hundred years, federal courts under the common law of nuisance have provided a forum and redress for states suffering harm to their environment, their natural resources, and the public health and welfare from pollution crossing state lines.

This appeal challenges the district court's decision to close the federal courthouse doors to California at the earliest stage, on the ground that its claim presents a nonjusticiable political question. In the district court's view, if the gravity of the harm is too great, the chosen defendant too entrenched in the national economy, or the matter so complex that a political solution would be preferable, the court is divested of jurisdiction. By this rule, a state must wait for whatever solution the political branches might, in time, devise.

The district court erred. California's public nuisance claim, seeking damages and declaratory relief, presents a justiciable controversy that fits squarely within a federal court's traditional role of adjudicating torts – even complex, politically charged torts. California acknowledges that there is no existing body of case law specifically addressing interstate greenhouse gas

pollution and global warming as a public nuisance. But the very strength of the common law is its ability to evolve to meet the exigencies of the present.

Arguably, there is no greater environmental problem facing California today than global warming. Global warming's exigency does not transform the tort; adjudicating such important and novel interstate common law claims is exactly what federal courts do.

The district court did not reach the issue of whether California's federal common law claim is displaced by a comprehensive statutory or regulatory scheme. California requests that this Court reach this jurisdictional issue, which the parties fully briefed below and which presents a question of law.

To displace the federal common law, there must be an existing comprehensive statutory or regulatory scheme that speaks directly to the particular issue and provides adequate redress. It is undisputed that the Clean Air Act addresses air pollution, and that under the Act, the Environmental Protection Agency ("EPA") has authority to regulate greenhouse gas pollution. But EPA has yet to exercise this authority. The mere potential for a comprehensive scheme at some time in the future does not speak directly to California's claim today. Unless and until Congress or EPA establishes a comprehensive scheme that speaks directly to greenhouse gas emissions and

provides remedies for interstate greenhouse gas pollution, the common law continues to provide a basis for federal jurisdiction.

California therefore requests that this Court hold that the district court has jurisdiction over its federal common law claim and that California's case be allowed to proceed.

### **JURISDICTIONAL STATEMENT**

On September 20, 2006, the People of the State of California, *ex rel.* the Attorney General ("California") sued the six largest United States automakers ("Automakers") under the federal common law of public nuisance for interstate air pollution. Where a state brings an action to address interstate pollution, it presents a federal question. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) ("*Milwaukee I*"); *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992); 28 U.S.C. § 1331.

California appeals from the district court's final order and judgment granting the Automakers' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief May be Granted, dated September 17, 2007. California timely filed this appeal on October 17, 2007. This Court has jurisdiction. 28 U.S.C. § 1291.

## ISSUES PRESENTED

1. Does California's tort claim – which seeks monetary damages and declaratory relief for harms to its quasi-sovereign interests under the long-standing federal common law of nuisance – present a nonjusticiable political question reserved exclusively to Congress or the Executive Branch?
  - a. Does an interstate nuisance claim involve matters that the Constitution expressly commits to Congress merely because the claim may touch interstate commerce?
  - b. Does an interstate nuisance claim, brought by a state against domestic companies based on their conduct within the United States, involve matters that the Constitution expressly commits to the political branches merely because the claim may indirectly touch foreign affairs?
  - c. Does a district court lack judicially discoverable, manageable standards to resolve an interstate nuisance claim where it has at its disposal a substantial body of tort law and a distillation of that law in the form of the Restatement?
  - d. Where a state seeks redress under the long-standing federal common law of nuisance for harm to its quasi-sovereign interests, does the claim require an initial policy determination of a kind clearly for

nonjudicial discretion such that the state is without federal forum or remedy unless and until Congress or a federal agency chooses to act?

2. Does the Clean Air Act, which offers the mere potential for a comprehensive regulatory scheme that would speak directly to the particular issue of interstate greenhouse gas pollution and provide an adequate remedy, displace California's federal common law nuisance claim, where no such scheme actually exists, and where displacement would leave California without a federal forum or redress?

### **STATEMENT OF THE CASE**

California sued the Automakers under the long-standing federal common law of nuisance for harms to California's quasi-sovereign interests caused by the Automakers' substantial domestic greenhouse gas emissions. California seeks damages and declaratory relief, not injunctive relief. The Automakers – General Motors, Toyota, Ford, Honda, DaimlerChrysler, and Nissan – are the six largest automobile companies in the United States. California alleges that, collectively, the Automakers are responsible for approximately 20 percent of the carbon dioxide emissions in the United States; greenhouse gas emissions cause global warming; and global warming is causing serious harm to California's environment, resources, and public health and welfare.

The Automakers filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim on December 15, 2006. On September 17, 2007, the district court granted the Automakers' motion, dismissing the case at its earliest stage, on the ground that California's case presented a nonjusticiable political question.<sup>1/</sup>

### **DISTRICT COURT'S RULING**

The district court, applying the first three of the six tests set forth in *Baker v. Carr*, 369 U.S. 186 (1962), held that California's tort claim presented a nonjusticiable political question. Appellant's Excerpts of Records ("ER") at 14-30.

The district court held that California's interstate nuisance claim involved matters that, by the text of the Constitution, are committed to the political branches to the exclusion of the judiciary (see first *Baker* test). In making its determination, the district relied on an out-of-circuit district court case, *Connecticut v. Am. Elec. Power Co.* ("AEP"), 406 F. Supp. 2d 265 (S.D.N.Y. 2005). *AEP* is fully briefed on appeal and has been submitted to the Second Circuit for decision.

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1. California pleaded in the alternative a nuisance claim under California law. The district court dismissed the state law claim without prejudice. The state law claim is not an issue on this appeal.

The district court found that adjudicating California’s nuisance claim would have interstate commerce implications and deferred to Congress’s power to regulate commerce. ER 25-27. The district court also found, based in part on the statements of EPA, that California’s claim might impede the Executive Branch’s “diplomatic objective” to obtain reciprocal emission reduction commitments from developing nations. ER 27.

The district court also determined that it would have no judicially discoverable, manageable standards to guide it in adjudicating California’s public nuisance claim (see second *Baker* test). The court held that it would be without a “legal framework or applicable standards” to “discern[] the entities that are creating and contributing to the alleged nuisance” (ER 28-29), notwithstanding more than one hundred years of precedent addressing nuisances from interstate pollution.

The district court stated that the third *Baker* test, whether the claim requires making an “initial policy determination” reserved for nonjudicial discretion, “largely control[led]” the analysis. ER 16. According to the district court, California’s claim would require it “to make the precise initial carbon dioxide policy determinations that should be made by the political branches . . . .” ER 23.

The district court did not reach the issue of whether the federal common law governing interstate air pollution has been displaced by a comprehensive statutory and regulatory scheme speaking directly to California's claim. ER 30.

### **STATEMENT OF FACTS**

For purposes of this appeal, California's allegations are presumed true. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977 (9<sup>th</sup> Cir. 2007). In relevant part, California alleges:

#### **The Automakers Contribute Substantially to Greenhouse Gas Pollution.**

The Automakers produce vehicles that emit over 289 million metric tons of carbon dioxide in the United States each year. ER 42, ¶ 40. The Automakers' emissions constitute approximately twenty percent of the carbon dioxide emissions in the United States. *Id.* Carbon dioxide is the most significant human-generated greenhouse gas. ER 39, ¶ 27.

#### **Greenhouse Gas Pollution Causes Global Warming.**

Human-generated emissions of carbon dioxide and other greenhouse gases have caused, and are causing, global warming by greatly increasing concentrations of these gases in the atmosphere. ER 38, ¶ 19; ER 39-40, ¶¶ 28-29. Higher concentrations of greenhouse gases trap heat, causing a rise in the Earth's temperatures. ER 6, ¶ 28. Currently, the level of carbon dioxide in the

atmosphere is higher than it has been at any time in the last 650,000 years. ER 40, ¶ 30. As a result, the global average surface temperature is increasing; the hottest years on record, since temperature records began in 1861, are 2005, 1998, 2002, and 2003. ER 40-41, ¶ 33.

There is a scientific consensus that global warming has begun, and that emissions of greenhouse gases, primarily carbon dioxide, have caused most of the observed warming. ER 38, ¶ 23. This consensus is expressed in the 2001 report of the Intergovernmental Panel on Climate Change (“IPCC”). ER 38-39, ¶ 24. The IPCC reports that “most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations.” *Id.* The National Academies of Science for Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, the United Kingdom, and the United States agree, jointly concluding that “there is now strong evidence that significant global warming is occurring.” ER 39, ¶ 25.

**Global Warming Is Harming California’s Environment, Resources, and the Health and Well-Being of Its Citizens.**

The impacts to California from global warming are significant. To take one critical example, in California, the winter average temperature in the Sierra Nevada region has risen by almost four degrees Fahrenheit during the second half of the twentieth century, and the Sierra snow pack has, in turn, shrunk by

about ten percent. ER 43, ¶ 47; ER 44, ¶ 50. The Sierra snow pack serves as a vital water storage and delivery system for California, supplying approximately thirty-five percent of the State's water. ER 43, ¶ 47. The State is spending substantial money to address the shrinking Sierra snow pack and anticipated further impacts to this natural reservoir system. ER 43, ¶ 48.

In addition, as a result of increased temperatures, the Sierra snow pack now melts more quickly and earlier in the spring, thereby impacting essential flood control projects. ER 44, ¶ 49. For example, Folsom Dam was designed to protect against a 500-year flood. *Id.* at ¶ 51. Because of the increased snow melt, the dam can now protect against only a fifty-year flood. *Id.*

And rising sea levels caused by global warming are increasing erosion along California's approximately 1,075 miles of coastline. ER 44, ¶ 52. The State has spent millions of dollars responding to erosion at State beaches and to the impacts of increased storm surges. *Id.* The State must also expend funds to address the threat of salt infiltration into the fresh water of the San Francisco Bay-Delta resulting from sea level rise. ER 44-46, ¶ 54.

Global warming also is severely impacting the health and well-being of California's residents and the State's health system, through the increased frequency, duration, and intensity of extreme heat events. ER 45, ¶ 55. Other

impacts of global warming in California include increased risk and intensity of wildfires and changes in the ocean ecology and fisheries. *Id.* at ¶ 56.

California has spent millions of dollars to study, plan for, monitor, and respond to the current and projected impacts of global warming, and must continue to do so. ER 43, ¶ 44.

### **SUMMARY OF ARGUMENT**

In 1907, the Supreme Court recognized the State of Georgia's right to make a "fair and reasonable demand" for redress for harms caused by interstate air pollution under the federal common law of nuisance. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907). Georgia established that copper smelters in Tennessee were emitting large quantities of sulphur dioxide which, on mixing with the air, formed sulphurous acid that rained down on great tracts of Georgia's lands and forests, causing it harm. *Id.* at 238-240. Georgia sought an injunction, and the Court held that the State was entitled to redress for these harms to its quasi-sovereign interests. *Id.*

Similarly, in this case, California alleges that the Automakers have released and are releasing large amounts of carbon dioxide – approximately 20 percent of the U.S. emissions – and in so doing are liable for contributing to a public nuisance. The Automakers' emissions contribute to increased

greenhouse gas concentrations in the atmosphere and global warming, which already is causing the State serious and profound harms – from a shrinking Sierra snow pack, to eroding beaches, to longer and more severe heat waves. As the State of Georgia did one hundred years ago in *Tennessee Copper*, California makes a fair and reasonable demand, here that the Automakers be held liable in nuisance for the substantial harm they have caused and are causing to California’s quasi-sovereign interests.

Federal courts have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. *Alperin v. Vatican Bank*, 410 F.3d 532, 539 (9th Cir. 2005). It against this backdrop that the Court must evaluate justiciability.

California’s claim does not present a nonjusticiable political question under the relevant tests set forth in *Baker v. Carr*. First, adjudicating torts falls squarely within the federal courts’ traditional role, even where such a claim “touch[es] on foreign relations and potentially controversial political issues[.]” *Alperin*, 410 F.3d at 537. Second, while California’s claim is complex, it is not “unmanageable” in the sense of being without judicial standards. If California’s case is allowed to proceed, while the district court will not have a body of global warming case law on which to rely, it will have more than one

hundred years of analogous, flexible tort precedent and resources such as the Restatement at its disposal. Lastly, while the district court may be called upon to make “policy determinations,” they are only those that are inherent in ruling on any tort claim, and not of a kind reserved exclusively for nonjudicial discretion.

The district court’s dismissal of California’s claim runs directly counter to a long line of Supreme Court precedent. For more than a century, the Court has recognized and reaffirmed that each state, on entering the Union and ceding its sovereignty, retained a quasi-sovereign interest in its environment, resources, and the public health and well-being of its citizens. *Mass. v. EPA*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1438, 1454 (2007) (citing *Tennessee Copper*, 206 U.S. at 237). Where harms to such fundamental interests are caused by pollution arising outside of a state’s borders, the state – no longer sovereign – cannot take direct action to abate or fashion an appropriate remedy under its own tort laws enforceable in its own courts. *Id.* But the state is not without recourse. Where interstate pollution is at issue, a state can seek redress in the federal courts. *Id.* In these circumstances, the doors to the federal court are not opened grudgingly – indeed, states are entitled “special solicitude” in this forum. *Id.* at 1454-1455. California – which is suffering serious harms today as a result of global

warming and of the Automakers' contribution to the problem – is entitled to its day in federal court.

The district court did not determine whether the actions of Congress and administrative agencies have displaced the federal common law of nuisance for interstate air pollution.<sup>2/</sup> Displacement of the federal common law occurs only when there is a comprehensive statutory and regulatory scheme that speaks directly to the particular issue previously governed by the common law and provides an adequate remedy. *Milwaukee I*, 406 U.S. at 101-103, 107; *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312-317, 332 (1981) (“*Milwaukee II*”).

EPA has authority under the Clean Air Act to control greenhouse gases, including greenhouse gas emissions from motor vehicles, but, to date, EPA has exhibited only a “steadfast refusal to regulate . . . .” *Mass. v. EPA*, 127 S. Ct. at 1455. Thus, while there is the potential that EPA may at some point devise a comprehensive scheme speaking directly to the particular issue at the center of California’s nuisance claim and providing the State a remedy, no such scheme

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2. The test for displacement of federal common law by federal statute (a separation of powers analysis) is not the same as the test for federal preemption of state laws (a Supremacy Clause analysis). *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 316 (1981). To avoid confusion, in this brief, California uses the term “displacement” rather than “preemption.”

exists today. Unless and until such a scheme exists, the federal district court under the federal common law is empowered – and indeed is obligated – to provide California a federal forum and redress for harms to its environment, its resources, and its public health and welfare from the Automakers’ interstate greenhouse gas pollution.

### **STANDARD OF REVIEW**

The existence of a nonjusticiable political question deprives a federal court of subject matter jurisdiction. *Corrie v. Caterpillar, Inc.*, 503 F.3d at 980. In ruling on a motion to dismiss based on the existence of a political question, the Court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Id.* at 977. This Court reviews a district court’s dismissal for lack of subject matter jurisdiction *de novo*. *Id.*

California requests that the Court also reach the jurisdictional issue of displacement so that its case may proceed. This Court can reach the issue, as it has been fully briefed and argued below and would, in any event, be reviewed *de novo*. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1096 n.5 (9th Cir. 2003).

## ARGUMENT

### **I. California’s Federal Common Law Nuisance Claim Presents a Justiciable Controversy, Adjudication of Which Is Squarely Within the Court’s Traditional Role.**

The district court erred in determining that, under *Baker v. Carr*, the federal courthouse doors must be closed to California because its claim presents a nonjusticiable political question. The Constitution commits adjudication of torts, even complicated ones, to the judiciary and not the political branches.

#### **A. Legal Standard: The Court Determines Justiciability Pursuant to the *Baker v. Carr* Tests on a Case-by-Case Basis.**

The decision to deny access to judicial relief on the basis of a political question is not one a federal court makes lightly; any other result would be to shirk the courts’ obligation to decide cases and controversies properly presented to them. *Alperin*, 410 F.3d at 539. Such restraint is especially appropriate where a state seeks redress, since, as the Supreme Court recently held, “[s]tates are not normal litigants for the purposes of invoking federal jurisdiction.” *Mass. v. EPA*, 127 S. Ct. at 1454 (citing *Tennessee Copper*, 206 U.S. at 237).

In *Baker*, the Supreme Court warned that it is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Baker*, 369 U.S. at 211. Similarly, the Ninth Circuit has emphasized that “[s]imply because . . . the case arises out of a ‘politically

charged’ context does not transform the [claims] into political questions.”

*Alperin*, 410 F.3d at 548. In *Alperin*, the Ninth Circuit found that the politically charged tort claims of Holocaust survivors against the Vatican Bank related to wartime confiscation of property were, at bottom, “garden-variety” legal and equitable claims for recovery of property and therefore justiciable. *Id.*; *see also Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49-50 (2d Cir. 1991) (holding tort suit against the Palestine Liberation Organization justiciable despite international implications).

As illustrated by *Alperin*, in making a determination of justiciability, a court does not pass judgment on the “potential procedural and substantive pitfalls of the claims” or the “difficulties that may lie ahead.” *Alperin*, 410 F.3d at 539. Even a “behemoth of a case” that may require a court to break new ground and fashion “innovative solutions” can be justiciable. *Id.* at 554. The “spectre of difficulty down the road does not inform [a court’s] justiciability determination at this early stage of the proceedings.” *Id.* 539.

The justiciability inquiry must be made on a case-by-case basis employing the six tests set forth in *Baker*. *Alperin*, 410 F.3d at 537, 544. As summarized in *Alperin*, the *Baker* tests are as follows:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 544. Dismissal is appropriate only if one of the tests is “inextricable” from the case. *Id.* (citing *Baker*, 369 U.S. at 217).

**B. None of the *Baker v. Carr* Tests Is Inextricable from California's Federal Common Law Claim for Interstate Nuisance.**

The six *Baker* tests are “probably listed in descending order of both importance and certainty.” *Alperin*, 410 F.3d at 545 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)). Accordingly, although the district court placed the most emphasis on the third test, California addresses them in order.

**1. The Constitution Has Not Committed Adjudication of California's Tort Claim to the Legislative or Executive Branches.**

There is no constitutional commitment of California's federal common law nuisance claim to a coordinate branch. Rather, the responsibility to adjudicate such claims falls squarely within the federal courts' core powers.

**a. Adjudication of Interstate Environmental Nuisance Claims Has Long Been Committed to the Federal Judiciary.**

While the scientific understanding of the causes and serious effects of global warming is relatively new, the judge-made doctrine on which California's case rests is not. In a long line of cases, federal courts have recognized a federal common law of nuisance that safeguards each state's right to be free from unreasonable interference with its environment, natural resources, and public health and welfare from sources outside its borders. *See, e.g., Milwaukee I*, 406 U.S. at 103 (recognizing claim for discharge of sewage into interstate waters); *New Jersey v. City of New York*, 283 U.S. 473, 482 (1931) (recognizing claim for dumping of garbage into ocean affecting out-of-state property); *Tennessee Copper*, 206 U.S. at 238-239 (recognizing claim for interstate air pollution by sulphur dioxide); *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906) (recognizing claim for discharge of typhus bacillus-laden sewage

into interstate river; denying claim on failure of proof that bacillus survived downstream); *Missouri v. Illinois*, 180 U.S. 208, 241-242 (1901) (recognizing claim for discharge of untreated sewage into interstate river).

The case of *Georgia v. Tennessee Copper* is illustrative. In that case, Georgia sued various Tennessee companies to enjoin them from discharging “large quantities of sulphur dioxid[e] which becomes sulphurous acid by its mixture with the air.” *Tennessee Copper*, 206 U.S. at 238. Georgia proved “that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case” of interstate nuisance. *Id.* at 238-239. The Court held that it had “not quite the same freedom to balance the harm . . . that it would have in deciding between two subjects of a single political power” and, accordingly, was required to grant the relief requested by Georgia in its quasi-sovereign capacity – in that case, an injunction. *Id.* at 238. In this case, while California seeks only damages and declaratory relief, it is entitled to the opportunity, as Georgia had, to prove its case.

**b. The Commerce Clause Does Not Commit All Issues Touching Interstate Commerce Exclusively to Congress.**

Under the first *Baker* test, the district court held that California's interstate nuisance claim would infringe upon Congress's constitutional power to regulate interstate commerce because "recognizing such a new and unprecedented federal common law nuisance claim for damages would likely have commerce implications in other States . . . ." ER 26.

Where the Constitution expressly commits a matter to a coordinate branch of government to the exclusion of the judiciary, the matter is nonjusticiable. *See Nixon v. United States*, 506 U.S. 224, 229-231 (1993) (holding that claim of improper impeachment presented a political question where the Constitution conferred on the Senate "sole" authority to "try all Impeachments"). But, in this case, there is no constitutional commitment of tort adjudication to Congress. "Deciding this sort of controversy is exactly what courts do." *See Alperin*, 510 F.3d at 551.

In support of its ruling, the district court cited several dormant Commerce Clause cases. ER 25-26 (citing *Gibbons v. Ogden*, 9 Wheat. 1 (1824); *Healy v. Beer Institute*, 491 U.S. 324 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)). But these cases address

the limits on states to take actions that affect interstate commerce under their own laws. They do not address the ability of a state to bring a federal claim in federal court.

Here, California seeks relief under long-standing federal precedent that allows states to seek remedies in interstate matters in federal court; relief in virtually every such case necessarily impacts out-of-state commerce. *See, e.g., Tennessee Copper*, 206 U.S. at 239 (holding that Georgia was entitled to injunction notwithstanding “possible disaster” to the affected out-of-state copper companies). These cases make clear that while the Constitution empowers Congress to regulate interstate commerce, it does not do so to the exclusion of the Judicial Branch’s concurrent and traditional authority to adjudicate interstate pollution disputes that may affect interstate commerce.

**c. Nothing in the Case Would Require the District Court to Inject Itself into Foreign Affairs.**

This Court must proceed from the understanding that, under the Constitution, “the management of foreign affairs predominantly falls within the sphere of the political branches . . . .” *Alperin*, 410 F.3d at 549 (citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 422 n.12 (2003)) . While “the courts consistently defer to those branches” in matters of foreign affairs, *id.*, on the issue of justiciability, both the Supreme Court and the Ninth Circuit have

required a “case-by-case inquiry because ‘it is error to suppose that every case or controversy which touches foreign relations’” presents a nonjusticiable political question. *Id.* at 549 (quoting *Baker*, 369 U.S. at 211).<sup>3/</sup>

In determining whether claim falls within the sphere of foreign affairs to the exclusion of the judiciary, a court must first examine any relevant treaties or executive agreements to see if the claims are “expressly barred.” *Alperin*, 410 F.3d at 549-550. Where the claim is not barred under treaty or executive order, a court must next determine whether the claim is similar to those found nonjusticiable in other cases, or, instead, “boil[s] down” to the types of claims typically handled by federal courts. *Alperin*, 410 F.3d at 550-551.

The district did not apply this test. Rather, the district court, relying in part on EPA’s speculation that unilateral regulation of domestic emissions could “weaken U.S. efforts to persuade key developing countries to reduce”

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3. California requests relief from a federal court under federal law. The political question doctrine, grounded in principles of separation of powers, therefore applies. *See Baker*, 369 U.S. at 217. The foreign policy preemption doctrine, applied in cases such as *Garamendi*, is grounded principles of federal supremacy and applies to state actions. *See, e.g., Garamendi*, 539 U.S. at 420 (holding preempted a California law compelling European insurance companies to disclose Holocaust-era policy data); *see also Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 376-377 (2000) (holding preempted a Massachusetts state law that imposed sanctions against the Burmese government). In this brief, California will focus on the political question doctrine and cases applying that doctrine.

their emissions, ER 18 (citing 68 Fed. Reg. 52928), determined that “[t]he political branches have deliberately elected to refrain from any unilateral commitment to reducing such emissions domestically unless developing nations make a reciprocal commitment.” ER 27; ER 18 (citing 68 Fed. Reg. at 52931).

As a threshold matter, the district court erred in finding such a policy. As the Court held in *Massachusetts v. EPA*, “Congress authorized the State Department – not EPA – to formulate United States foreign policy with reference to environmental matters relating to climate.” *Mass. v. EPA*, 127 S. Ct. at 1463. Two other district courts that have examined the issue by going beyond EPA’s assertion have found no such policy. *Compare Central Valley Chrysler-Jeep, Inc. v. Goldstone*, No. CV F 04-6663 AWI LJO, 2007 WL 4372878, at \*37 (E.D. Cal. Dec. 11, 2007) and *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396 (D. Vt. 2007) with *AEP*, 406 F. Supp. 2d at 273 (relying on EPA’s statement of foreign policy). Indeed, the State Department has praised local and state efforts to reduce domestic emissions of greenhouse gases. *See Green Mountain*, 508 F. Supp. 2d at 393-394 (citing the July 27, 2007, Fourth U.S. Climate Action Report).

Turning back to the test set forth in *Alperin*, the first step requires an examination of treaties and executive agreements. Here, the most relevant

documents are the United Nations Framework Convention on Climate Change (“UNFCCC”), the Kyoto Protocol, and the recent Bali Action Plan. *See* California’s Request for Judicial Notice (“RJN”) at Exhs. 2, 3, and 5.

The UNFCCC, signed by more than 150 nations including the United States, RJN at Exh. 4, identifies as a goal stabilization of greenhouse gas concentrations in the atmosphere, but does not set any binding emission limitations. The Kyoto Protocol, which the United States signed but did not ratify,<sup>4/</sup> assigned mandatory greenhouse gas emissions reduction targets for the industrialized nations through 2012. And the recent Bali Action Plan sets an agenda and schedule for future negotiations with foreign countries. Therefore, while it may be fair to conclude, as the district court did, that the Administration seeks “‘international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change[,]’” ER 14 (quoting 68 Fed. Reg. at 52933), this intent does not amount to a treaty or executive agreement that bars California’s claim for interstate nuisance based on domestic greenhouse gas pollution.

Since no treaty or executive order bars California’s claim, the Court

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4. *See Mass. v. EPA*, 127 S. Ct. at 1449 (citing S. Res. 98, 105th Cong., 1st Sess. (July 25, 1997) (as passed)).

must determine whether the claim bears similarity to those found nonjusticiable in other cases. It does not. California's claim does not, for example, involve claims against foreign diplomats; the freezing of foreign assets based on a declaration that another country is an enemy of the United States; the United States' involvement in a foreign coup; or questioning the recognition of a foreign government. *See Alperin*, 410 F.3d at 551. In resolving this case, the district court would be required to address only domestic emissions by domestic companies and domestic harms, and to apply only domestic law. California's claim thus boils down to a traditional, though complex, domestic tort claim.

**2. There Are Judicially Discoverable and Manageable Standards for Resolving California's Federal Common Law Nuisance Claim.**

The second *Baker* factor, which requires judicially manageable standards, ensures that a court will not be required to move beyond areas of judicial expertise. *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005); *see also Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Brennan, J., concurring). "The crux of this inquiry is not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint." *Alperin*, 410 F.3d at 552. A claim – even a large, complicated claim – is justiciable where the court has "the legal tools to reach a ruling that is

‘principled, rational, and based upon reasoned distinctions.’” *Id.* at 552 (quoting *Vieth*, 541 U.S. at 278).

In this case, the district court found that if it allowed California’s case to proceed, it would have no “manageable method of discerning the entities that are creating and contributing to the alleged nuisance” and no “legal framework or applicable standards upon which to allocate fault or damages” given the “multiple worldwide sources . . . .” ER 28, 29. California acknowledges that its case, like the case found justiciable in *Alperin*, may present what appears to be a “Sisyphean task.” *Alperin*, 410 F.3d at 555. But, as discussed below, despite its apparent complexity and magnitude, and the novelty of treating global warming as a public nuisance, California’s case requires only that the court apply well-established (if flexible) legal principles. These principles will guide the court in determining whether the Automakers are liable for contributing to the public nuisance of global warming, whether the Automakers can be held liable to pay damages, and, if so, whether and how to apportion such damages.

**a. While Global Warming is Unprecedented, the Common Law Is Designed to Meet New Exigencies.**

The district court appeared concerned that, because the subject matter of California's case was novel, it would have no precedent directly on all fours. This undoubtedly is true in many cases presenting environmental problems previously unknown to the law. In *Tennessee Copper*, for instance, the Court addressed what likely was a novel issue at the time – sulphur dioxide reacting with the air to cause interstate acid rain. The very strength of the common law is that it is flexible, adapts itself to varying conditions, *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996), and expands to meet the exigencies of the times, *Hilton v. Guyot*, 159 U.S. 113, 123 (1895). The federal common law is fully able to meet the exigencies of global warming and the challenges presented by California's case.

**b. There Is an Established Legal Framework for Adjudicating the Existence of, and Liability for, Public Nuisance.**

“A public nuisance is an unreasonable interference with a right common to the general public.” Restatement (Second) of Torts § 821B (1979);<sup>5/</sup> *see also In re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981). California has alleged that global warming is affecting water supplies, causing coastal erosion, increasing wildfire risk, and impacting human health. The impacts of global warming are more serious and far-reaching than sewage pollution, acid rain, or obstructions to navigable waters, which the Court has found to constitute nuisances in other cases. As the Court recently noted, “[t]he harms associated with climate change are serious and well recognized.” *Mass. v. EPA*, 127 S. Ct. at 1455.

Assuming that global warming and its effects in California constitute a public nuisance, the more difficult question for the district court will be whether the Automakers can be held liable for the nuisance based on their conduct.

Taking California’s allegations as true, the Automakers substantially contribute to the nuisance of global warming, accounting for approximately

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5. Federal courts may look to the Restatement in determining the federal common law. *See United States v. Burlington Northern & Santa Fe Ry. Co.*, 502 F.3d 781, 795 (9th Cir. 2007).

twenty percent of emissions in the United States. As the Supreme Court noted in *Massachusetts v. EPA*, “[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations . . . .” *Id.* at 1458.

California acknowledges that the Automakers are not the sole cause of global warming. Clearly, there are many other sources of greenhouse gas pollution emissions, some of which are tortious, and some of which are not. But “the fact that other persons contribute to a nuisance is not a bar to the defendant’s liability for his own contribution.” Restatement (Second) of Torts § 840E (1979); *see also New Jersey v. City of New York*, 283 U.S. 473, 477, 483 (issuing injunction against City of New York’s dumping of garbage into ocean even though others also dumped garbage).

In assessing whether the Automakers can be held liable, the court will not be without guidance. More than one hundred years of case law provides case studies for how nuisance liability is determined. *See supra*, Section I.B.1.a. Moreover, as a distillation of the common law, the Restatement provides standards by which to judge whether the conduct of one who contributes to a nuisance is tortious. For example, the district court may consider whether the Automakers’ “conduct is of a continuing nature or has produced a permanent or

long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.” Restatement (Second) of Torts § 821B (1979). Further, as the Restatement notes:

Situations may arise in which each of several persons contributes to a nuisance to a relatively slight extent, so that his contribution taken by itself would not be an unreasonable one and so would not subject him to liability; but the aggregate nuisance resulting from the contributions of all is a substantial interference, which becomes an unreasonable one. In these cases the liability of each contributor may depend upon whether he is aware of what the others are doing, so that his own conduct becomes negligent or otherwise unreasonable in the light of that knowledge. It may, for example, be unreasonable to pollute a stream to only a slight extent, harmless in itself, when the defendant knows that pollution by others is approaching or has reached the point where it causes or threatens serious interference with the rights of those who use the water. . . .

Restatement (Second) Torts § 840E cmt. b (1979).

In light of these substantial legal guideposts, California should be allowed to proceed to the next stage of its claim and prove that the Automakers are contributing to, and should be held liable for, the nuisance of global warming in California.

**c. There Is an Established Legal Framework for Assessing Damages in Complex Tort Cases.**

California, through this lawsuit, seeks damages and declaratory relief for harm caused by the Automakers' emissions.<sup>6/</sup> As this Court has noted, “[d]amage actions are particularly judicially manageable” and “particularly nonintrusive” into the political branches. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992). The district court nonetheless questioned its ability to address “who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe.” ER 29.

The question presented by California's claim is whether the Automakers can be held liable in damages for the nuisance and, if so, to what extent. While the claim undoubtedly presents difficult factual and legal issues, there is a well-established legal framework for assessing damages for harms caused by multiple sources.

California has pleaded that, because of the aggregate, cumulative nature

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6. Damages are a permissible remedy for public nuisance. *See City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1019 (7<sup>th</sup> Cir. 1979) (holding that “a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution”); *United States v. Illinois Terminal Ry. Co.*, 501 F. Supp. 18, 21 (D.C. Mo. 1980) (finding “nothing to support the railroad's conclusion that equitable relief is the exclusive remedy under a public nuisance theory”; citing *Evansville*, 605 F.2d. at 1019, n.32).

of the harm, joint and several liability should apply. But California acknowledges that, under some circumstances, “liability may be apportioned among those who contribute [to the nuisance], either in proportion to the contribution of each or upon some other reasonable basis afforded by the evidence.” Restatement (Second) Torts § 840E cmt. b; *see also* Restatement (Second) Torts § 433A (1965) (apportionment of harm for negligence); Restatement (Third) of Torts § 17 cmt. (2000) (discussing five different “tracks” or approaches for allocating damages where the independent tortious conduct of two or more persons is a legal cause of an indivisible injury). “[T]he burden rests upon the defendant to produce sufficient evidence to permit the apportionment to be made.” Restatement (Second) Torts § 840E cmt. b.

In multi-tortfeasor cases, even complex or novel ones, courts are fully competent to determine whether and how to apportion damages and have fashioned innovative solutions where necessary. *See, e.g., United States v. Burlington Northern & Santa Fe Ry. Co.*, 502 F.3d 781, 795 (9th Cir. 2007) (looking to Section 433A of the Restatement of Torts for guidance in determining federal common law apportionment as applied to claims under the Comprehensive Environmental Responsibility, Compensation, and Liability Act); *California Orange Company v. Riverside Portland Cement Co.*, 50 Cal.

App. 522, 524 (1920) (holding that where the dust from two different cement companies commingled and damaged plaintiff's orange trees, trial court was "at liberty to estimate as best it could" how much damage should be attributed to each); *see also In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 447 F. Supp. 2d 289, 304-305 (S.D.N.Y. 2006) (holding in pollution suit against more than fifty gasoline market defendants, plaintiff could proceed on theories of alternative liability, including market share and commingled product liability); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611-612 (1980) (holding that although specific manufacturer of drug that harmed plaintiff could not be identified, each company that produced a substantial percentage of the drug could be held liable for the proportion of the judgment represented by its share of the drug market).

Without conceding the point, if the district court were to determine that allocation in this case is appropriate, and that individual emitters of greenhouse gases proportionately cause the resulting harms, then one option for allocation might be to determine the Automakers' fractional share of total emissions, and multiply this percentage by California's total damages. Alternatively, another option therefore might be to multiply the Automakers' total tons of emissions by a per ton cost reflecting California's harms. This Court has held that, at least

in some circumstances, a per-ton figure reflecting externalized damages can be assigned to greenhouse gas emissions. *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.* 508 F.3d 508, 533-534 (9th Cir. 2007). While these possible approaches are hypothetical, and may or may not ultimately be appropriate in this case, they illustrate that existing law allows the district court to “reach a reasoned decision.” *See Alperin*, 410 F.3d at 553. The second *Baker* factor therefore does not apply.

**3. California’s Claim Will Not Require the Court to Make Initial Policy Determinations Exercising Nonjudicial Discretion.**

The district court, relying heavily on the New York district court’s decision in *AEP*, stated that the third *Baker* factor – whether the court can decide the case without making an initial policy determination of a kind that is reserved to nonjudicial discretion – was the “the most relevant on the current record.” ER 16. The district court believed that California’s case would require it to assume the role of a regulatory agency and set a generally applicable “standard” for greenhouse gas emissions from motor vehicles; that it could not rule on California’s claim unless and until EPA had set a standard; and that the issuance of such a standard was more properly assigned to the political branches. *Id.* at 18-25.

As discussed below, California seeks adjudication of the particular dispute, framed by its complaint, that exists between California and the defendant Automakers. California does not seek, and its claim does not require the court to establish, a generally applicable regulatory “standard.” As *Milwaukee I* illustrates, the absence of an existing congressionally established emissions “standard” does not prevent a federal court from applying the federal common law of nuisance. California has a right today to seek redress for harms to its quasi-sovereign interests in a federal forum. It is not obliged to wait for whatever comprehensive scheme Congress or EPA may, one day, construct to address the problem of interstate greenhouse gas pollution.

**a. Adjudicating California’s Tort Action Will Not Require the Court to Assume Administrative Functions Beyond the Court’s Province.**

The district court held that adjudicating California’s claim would require it to “create a quotient or standard in order to quantify any potential damages” flowing from the Automakers’ actions. ER 18. In fact, this case will require the court only to decide whether global warming constitutes a nuisance, whether the Automakers’ conduct renders them liable for contributing to the nuisance, California’s damages, and the Automakers’ liability for such damages. In short, the court will be required to rule on the elements of the tort, not establish a

generally applicable emissions standard. *See Equal Employment Opportunity Comm'n v. Peabody Western Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) (holding that a “political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature rather than resolving the dispute through legal and factual analysis”).

The district court appeared concerned that adjudicating California’s nuisance claim would require it to assume administrative functions that are more appropriately assigned to the political branches. Such a narrow view of the federal courts’ function under the federal common law has been expressly rejected by the Supreme Court. *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945). The Court’s assessment in that case of its obligation to undertake a detailed and highly technical apportionment of the waters of the North Platte River as between Nebraska, Wyoming and Colorado, is apt here:

There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province. . . . [T]hese controversies between States over the waters of interstate streams involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. . . . The gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.

*Id.* (internal quotation omitted). Similarly here, any difficulties the district court may face are no justification to refuse to perform the important function entrusted federal courts – to provide states a forum for redress for harms to their quasi-sovereign interests where there is no other federal remedy.

**b. Congressionally Established Emissions Standards Are Not a Prerequisite to the Courts’ Exercise of Jurisdiction over Interstate Air Pollution Cases.**

The district court ruled that it was powerless to adjudicate California’s public nuisance claim without express guidance from the political branches. ER 18-19. Relying on the out-of-circuit district court decision in *AEP*, the district court reasoned:

As the Supreme Court has recognized, to resolve typical air pollution cases, courts must strike a balance “between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs.” *AEP*, 406 F. Supp. 2d at 272 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 . . . (1984)). Balancing those interests, together with the other interests involved, is impossible without an “initial policy determination” first having been made by the elected branches to which our system commits such policy decisions, namely, Congress and the President. *Id.*

ER 17 (parallel citations omitted).

The district court, as did the court in *AEP*, misapplied the language of *Chevron*. In the cited *Chevron* passage, the Court merely notes the political

struggles surrounding Congress's legislative attempts in the mid-1970s to deal with areas that were in non-attainment of national ambient air quality standards. *Chevron*, 467 U.S. at 847. The Court in *Chevron* was not presented with the question whether, and did not hold that, interstate air pollution can be addressed only through federal legislation. *Chevron* did not overrule implicitly *Georgia v. Tennessee Copper* and *Milwaukee I*, which hold that in the absence of a statutory or regulatory scheme, the federal courts have the authority and the obligation to apply federal common law to interstate pollution disputes. *Tennessee Copper*, 206 U.S. at 237-238; *Milwaukee I*, 406 U.S. at 107. These cases make clear that federal statutory or regulatory standards are not a prerequisite to the federal courts' jurisdiction to decide the interstate pollution cases presented to them.

The district court may be correct that a "comprehensive global warming solution . . . achieved by a broad array of domestic and international measures" would be preferable as a policy matter to individual nuisance suits. ER 21. But an otherwise justiciable claim does not fall outside of the court's jurisdiction simply because an alternative resolution crafted by the political branches would be preferable. *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982) (holding that although legislative solution to the native

American land claims may be preferable, the “claims are justiciable notwithstanding the complexity of the issues involved and the magnitude of the relief requested”). The lack of existing federal greenhouse gas standards does not render California’s claim nonjusticiable.

**c. States Harmed by Interstate Nuisances Are Not Obligated to Wait for Comprehensive Statutory or Regulatory Solutions; They are Entitled to a Federal Forum and Redress Under the Common Law.**

In effect, the district court held that whatever grave harms California suffers as a result of the Automakers’ contribution to global warming, California must wait for the political branches to craft a solution. The district court reasoned that EPA is “the agency in which ‘Congress has vested administrative authority’ over the ‘technically complex area of environmental law,’” and EPA “has been grappling with the proper approach to the issue of global climate change for a number of years.” ER 17-18 (quoting *AEP*, 406 F. Supp. 2d at 273). While the district court acknowledged that existing laws “do not directly address the issue of global warming and carbon dioxide emission standards[,]” the court held that when they are “read in conjunction with the prevalence of international and national debate” and “policy actions and inactions,” adjudicating California’s claim would draw the court into a

“geopolitical debate more properly assigned to the coordinate branches . . . .”

ER 21.

The district court’s determination runs directly counter to Supreme Court precedent assigning federal courts the responsibility and authority to provide the states a forum and remedy in interstate pollution cases. In the words of Justice Holmes, writing for the Court in *Georgia v. Tennessee Copper*:

When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.

*Id.* at 237 (emphasis in original); *see also Mass. v. EPA*, 127 S. Ct. at 1454 (holding that Massachusetts’ “well-founded desire to preserve its sovereign territory” from the harms of global warming supported federal jurisdiction).

California does not seek from the court – and is not obliged to await – a comprehensive solution to global warming. California seeks a ruling that the Automakers, the six largest domestic emitters of carbon dioxide in the transportation sector in the United States, are contributing to an interstate nuisance and causing concrete injuries to California, which are compensable in damages. Stated simply, California seeks only a ruling in tort against identified defendants. This falls squarely within the courts’ province.

**4. Allowing California’s Federal Common Law Interstate Nuisance Claim to Proceed Will Not Result in a Lack of Respect for the Political Branches, Conflict with a Need to Adhere to a Political Decision Already Made, or Give Rise to Embarrassment from Multifarious Pronouncements.**

Having worked through the three more significant *Baker* tests, *see Vieth*, 541 U.S. at 278, the remaining three tests add nothing to suggest that this case is nonjusticiable. The district court did not discuss these remaining factors and, accordingly, California addresses them only briefly.

The fourth *Baker* test applies where it is “impossible” for the court to resolve the claim “without expressing a lack of respect for the political branches.” *Alperin*, 410 F.3d at 555. Here, as discussed above under the first three *Baker* factors, the district court’s adjudication of California’s nuisance claim will not call into question any decision already made by the Legislative or Executive Branches or “shut out” the political branches from participating in this case as it develops, should they choose to do so. *See Alperin*, 410 F.3d at 557 (noting that Court would “respect the political branches’ right to weigh in and play a role in the resolution of the Holocaust Survivors’ claims”). Accordingly, nothing in the case would show a lack of respect for the Legislative or Executive Branches.

The fifth *Baker* test controls where there is an unusual need for

unquestioning adherence to a political decision already made. *Id.* at 544, 557.

As was the case with the justiciable property claims in *Alperin*, this case is before this Court “not because [the plaintiffs] disagree with a political decision made regarding their claims, but rather because there simply has been no decision.” *See id.* at 557.

Turning to the final *Baker* test, addressing the risk of embarrassment from multifarious pronouncements, as was the case in *Alperin*, “this case is marked by the absence of ‘pronouncements’ by the political branches regarding the resolution” of the claims at issue (*see* 410 F.3d at 558) – here, redress for harms caused to California’s quasi-sovereign interests caused by large domestic contributors to the nuisance of global warming. Moreover, a court “fulfilling [its] constitutionally-mandated role to hear controversies properly before [it]” does not run afoul of the sixth *Baker* factor. *Id.* Because federal courts have a positive “duty of providing a remedy” in interstate nuisance suits, *Missouri v. Illinois*, 180 U.S. at 241; *see also Tennessee Copper*, 206 U.S. at 237, adjudicating California’s claim does not present a risk of multifarious pronouncements.

Accordingly, none of the final *Baker* factors applies to this dispute.

**B. This Case Will Not Require the Court to Do More Than Interpret the Law.**

As established above, none of the *Baker* factors is inextricable from California's interstate public nuisance claim. California acknowledges that this case is complex. Notwithstanding the undeniably significant legal and factual hurdles the parties and the court will face, a decision by this Court that California's claim is justiciable would boil down to allowing the State's common law tort claim to proceed to the next stage. *See Alperin*, 410 F.3d at 539 (allowing property claims against Vatican Bank to proceed). Going forward, the district court would be required to do no more than "stick to [its] role of interpreting the law." *Id.* California's case is justiciable.

**II. No Comprehensive Federal Statute or Regulatory Scheme Has Displaced California's Federal Common Law Nuisance Cause of Action Based on Interstate Greenhouse Gas Pollution.**

Because displacement is a jurisdictional issue that must be resolved before this case can go forward, California requests that the Court reach the issue and rule that the federal common law has not been displaced.<sup>7/</sup>

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7. California notes that the district court employed some of the language of the displacement test in its analysis of the political question doctrine (*see, e.g.*, ER 19), but also acknowledged that existing statutes "do not directly address the issue of global warming and carbon dioxide emission standards." ER 21.

By its federal claim, California today, as Georgia did in 1907, makes a “fair and reasonable demand” for a remedy addressing harms to its quasi-sovereign interest caused by persons outside of its control. Just as the copper smelters’ sulphurous gas emissions in Tennessee were harming Georgia then, so are the Automakers’ greenhouse gases emissions throughout the United States harming California today. As was Georgia, California is entitled to relief. The only question is whether such relief can now be found in federal statute and regulation, or whether the federal common law of interstate nuisance for air pollution, and its remedies, must continue to be available to California.

As discussed below, while EPA has the authority under the Clean Air Act to regulate interstate greenhouse gas emissions, including those from motor vehicles, to date, it has not taken action. Until EPA has heeded Congress’s order “to protect Massachusetts (among) others,” including California, from greenhouse gas pollutants, *see Massachusetts v. EPA*, 127 S. Ct. at 1454, and until a federal court has such regulations before it to determine whether they speak directly to the issue presented by this case and provide adequate redress, California must be afforded recourse to the federal common law.

**A. Legal Standard: Displacement of the Federal Common Law of Nuisance for Interstate Pollution Requires a Comprehensive Regulatory or Statutory Scheme That Speaks Directly to the Particular Issue and Provides an Adequate Remedy.**

**1. The Federal Common Law Continues to Exist Until Displaced.**

Throughout the Nation’s history, as new and competing demands on the states’ natural resources emerged, and conflicts between states over those resources arose, the federal judiciary has established a body of federal law, the interstate common law, to resolve those disputes. From the beginning, federal common law has applied for two reasons.

First, in this area, there is “an overriding federal interest in the need for a uniform rule of decision . . . .” *Milwaukee I*, 406 U.S. 105, n.6; *id.* at 107, n.9. Second, the special “character of the parties” as states demands a federal forum. *Milwaukee I*, 406 U.S. 105, n.6 (citing *Georgia v. Tennessee Copper*, 206 U.S. at 237). As the Supreme Court repeatedly has recognized, the right of each state to a federal forum and remedy for injuries to its quasi-sovereign interests from sources outside of its control was a condition of joining the Union. *Tennessee Copper*, 206 U.S. at 237; *Milwaukee I*, 406 U.S. at 104; *Mass. v. EPA*, 127 S. Ct. at 1454.

Congress, of course, has the ability to regulate in this area, and, if it

chooses, “to articulate the appropriate standards to be applied as a matter of federal law.” *Milwaukee II*, 451 U.S. at 317. But not every congressional foray into the area of interstate pollution will effect displacement. Rather, to displace the federal common law, there must exist a “comprehensive” congressional solution that “speaks directly” to the “particular issue” otherwise governed by the common law. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-237 (1985) (summarizing *Milwaukee II*, 451 U.S. at 313-315). “Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such [interstate pollution] claims.” *Milwaukee I*, 406 U.S. at 108 n.9.

**2. To Displace the Common Law of Nuisance for Interstate Pollution, the Statutory or Regulatory Scheme Must Be Comprehensive in Scope and Relevant Detail, and Provide a State With a Federal Forum and Redress for Harms to Its Quasi-Sovereign Interests.**

The starting point for determining whether California’s claim for interstate air pollution nuisance has been displaced is the Supreme Court’s pair of decisions in *Milwaukee I* and *Milwaukee II*. These cases mark the evolution of the Clean Water Act from a statute with a broad goal of controlling water pollution that coexisted with the federal common law, to a comprehensive,

detailed and specific statutory and regulatory scheme for regulation of every point source of water pollution sufficient to displace the common law.

In *Milwaukee I*, Illinois brought suit in federal court for abatement of out-of-state discharges of sewage into Lake Michigan. *Milwaukee I*, 406 U.S. at 93. The Court first noted the long-standing federal common law cause of nuisance governing “air and water in their ambient or interstate aspects[.]” *Id.* at 103. The Court next examined whether that common law had been displaced. It observed that Congress had passed numerous laws “touching” interstate waters, such as the Rivers and Harbors Act, the National Environmental Policy Act, the Fish and Wildlife Act, the Fish and Wildlife Coordination Act, and the Federal Water Pollution Control Act (now the Clean Water Act). *Id.* at 101-103. In the latter statute, the Court noted, Congress had “tighten[.]ed control over discharges into navigable waters so as not to lower applicable water quality standards.” *Id.* at 101. But, as the Court found, none of these federal laws or their supporting regulations reached the precise issue presented by Illinois’ nuisance claim. *Id.* at 101-104. Finding no comprehensive statutory or regulatory scheme, the Court held that, as of 1972, Illinois’ federal common law claim was not displaced. *Id.* at 107.

Nine years later, in *Milwaukee II*, the Court considered the issue a second

time. In *Milwaukee II*, the same plaintiff sought the same injunctive relief against out-of-state sewage discharges as in 1972. But, since *Milwaukee I*, Congress had engaged in a “total restructuring” and “complete rewriting” of the Clean Water Act. *Milwaukee II*, 451 U.S. at 317. In the Court’s words, the amended Act was no longer “merely another law ‘touching interstate waters[.]’” *Id.* at 317. The Court held that the amendments established an “all-encompassing program of water pollution regulation.” *Id.* at 318.

The Court found three aspects of the Clean Water Act, as amended, relevant to its finding that claims for injunctive relief under the common law of nuisance for interstate water pollution had been displaced.

First, the amended Act was comprehensive in its scope and reach. “Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.” *Milwaukee II*, 451 U.S. at 318 (footnote omitted, emphasis in original). The Court stated that under these circumstances, there was “no room for courts to attempt to improve” on the “self-consciously comprehensive program . . . .” *Id.* at 319.

Second, the amended Act spoke directly to the details of authorized discharges. Every permit, including defendants’, contained “specific effluent

limitations”; “explicitly address[ed] the problem of overflows”; and contained requirements for defendants to come into compliance. *Id.* at 320-321. The Court found no basis “to impose more stringent limitations than those imposed under the regulatory regime . . . .” *Id.* at 320.

Third, and most importantly, the amended Act was comprehensive and spoke directly to remedies for states affected by out-of-state water pollution. *Milwaukee II*, 451 U.S. 325. As the Court noted, it was “concerned in [*Milwaukee I*] that Illinois did not have any forum in which to protect its interests unless federal common law were created .” *Id.* at 325; *see also Arkansas v. Oklahoma*, 503 U.S. at 99 (summarizing the holding of *Milwaukee II*, noting remedies available to state); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 490-491, 498 n.18 (1987) (noting that state can apply to federal agency to disapprove Clean Water Act permit based on undue impact and can bring a citizen suit action to enforce permit after issuance). In the amended Clean Water Act, in contrast, “Congress provided ample opportunity for a State affected by decisions of a neighboring State’s permit-granting agency to seek redress.” *Milwaukee II*, 451 U.S. at 325-326. Under the amended Act, a state that may be affected must receive notice, an opportunity to participate in the hearing process and make recommendations, and a statement of reasons if its

recommendations are not adopted by the out-of-state permitting authority. *Id.* at 326. In addition, a state may request that EPA veto the permit on the ground that the state's waters may be affected by out-of-state discharges. *Id.* at 326. The availability of such redress was "significant" in the Court's determination that the common law of interstate water pollution had been displaced. *Id.* at 325. The Court concluded that, after the 1972 Amendments to the Clean Water Act, "[t]here is no 'interstice' here to be filled by federal common law[.]" *Id.* at 323.

Other cases confirm that an adequate remedy by statute or regulation is essential to displacement of the federal common law. *See, e.g., Oneida*, 470 U.S. at 237 (holding that Nonintercourse Act did "not speak directly to the question of remedies for unlawful conveyances of Indian land"; federal common law claim for unlawful possession and damages not displaced); *United States v. Texas*, 507 U.S. 529, 534-535 (1993) (holding that Debt Collection Act did "not speak directly" to the federal government's right to collect pre-judgment interest on debts owed to it by a state; federal common law claim not displaced).

Applying these considerations, no comprehensive scheme to regulate interstate greenhouse gas pollution and provide adequate remedies exists.

**B. There is No Existing Comprehensive Regulatory or Statutory Scheme That Speaks Directly to Interstate Air Pollution Caused by Greenhouse Gas Emissions and Provides an Adequate Remedy for Harms to California’s Quasi-Sovereign Interests.**

**1. Currently, There Is No Scheme Under the Clean Air Act That Regulates Greenhouse Gas Pollution or Provides Remedies for Resulting Harms.**

The natural place to look for a comprehensive program regulating interstate greenhouse gas emissions and providing remedies for harms is in the Clean Air Act and its supporting regulations. As discussed below, EPA’s initial determination that greenhouse gases were not air pollutants, only recently held to be unlawful, has ensured that under the Clean Air Act, there is not even the beginning of a regulatory program to control greenhouse emissions, let alone the comprehensive and detailed program providing adequate redress that is required for displacement.

Before analyzing specific provisions of the current Clean Air Act, California first notes that two circuit court cases have discussed whether the Act displaces the federal common law of nuisance for interstate air pollution. In *National Audubon Society v. Dep’t of Water*, 869 F.2d 1196 (9th Cir. 1988), this Court declined to apply federal common law to the plaintiff’s nuisance claim because the offending dust was from a source “wholly within the State of

California.” *Id.* at 1198. Judge Reinhardt, dissenting from majority’s holding, held that the federal common law would apply, reached the displacement issue, and determined that the Clean Air Act does not displace federal common law nuisance claims based on air pollution, noting that the Clean Water Act has a comprehensive permitting scheme while the Clean Air Act does not. And in *New England Legal Foundation v. Costle*, 666 F.2d 30 (2d Cir. 1981), the Second Circuit, while finding the claim before it displaced because it amounted to a challenge of an EPA-approved variance, declined to hold that the Clean Air Act displaced every federal common law claim, noting the substantial differences between the Clean Air Act and the Clean Water Act. *Id.* at 32, n.2. While both of these cases pre-date the 1990 amendments to the Clean Air Act, the reasoning of these cases continues to apply.<sup>8/</sup>

A comparison of the current Clean Water Act to the Clean Air Act illustrates the fundamental differences between these two water pollution

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8. Two out-of-circuit district court cases have found that the Clean Air Act displaces federal common law claims for nuisance, but they offer little useful analysis. In *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982), the court focused erroneously on the Act’s intent, rather than on the substance of the statute and regulations as required by *Milwaukee I* and *Milwaukee II*. And *Reeger v. Mill Service, Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984), is devoid of any substantial statutory analysis, disregarding the rule in *Milwaukee I* that displacement is not “automatic.”

control laws. As discussed extensively in *Milwaukee II*, the post-1972 Clean Water Act centers on a comprehensive permitting scheme. 451 U.S. at 318; *see also Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984) (applying Clean Water Act to discharge of ballast water from vessels). The centerpiece of the Clean Air Act, in contrast, is the national ambient air quality standard (“NAAQS”) program, contained in Title I of the Act. *See Sierra Club v. Costle*, 657 F.2d 298, 315, n.23 (1981); 42 U.S.C. §§ 7401-7515. NAAQSs are achieved not through a comprehensive permitting scheme, but through State Implementation Plans (“SIPs”) that specify the manner in which NAAQS will be achieved and maintained within each region. 42 U.S.C. § 7407(a).

The NAAQS program contains provisions affording states some remedies touching on interstate harms, *see, e.g.*, 42 U.S.C. § 7410(a)(2)(D) (requiring that SIPs prohibit emissions that “contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [NAAQS]”); *id.* at § 7426 (requiring that SIPs include provisions to notify neighboring states of major new or modified sources that may contribute to nonattainment of NAAQS in that state); *id.* at § 7413 (authorizing EPA to order compliance with SIP); *id.* at § 7604(a), (f)(3) (authorizing citizen suits for, *e.g.*, violation of SIPs). But, currently, the NAAQS program addresses only six criteria

pollutants: sulphur oxides; particulate matter; carbon monoxide; ozone; nitrogen dioxide; and lead. 40 C.F.R. pt. 50; *see* RJN at Exh. 8.

Since EPA has not listed a single criteria air pollutant based its greenhouse effect, and does not regulate carbon dioxide as a criteria air pollutant (nor has it expressed any intent to do so), whatever remedies may be available for interstate air pollution under the NAAQS program are not available to California for the harms to its quasi-sovereign interests as alleged in its complaint. In sum, there is nothing in Title I that speaks directly to the particular issue in California's complaint and provides California with redress.

The Automakers may point to Title V of the Clean Air Act, the integrated permitting program which Congress added in 1990, as being analogous to the permitting program in the Clean Water Act. *See* 42 U.S.C. §§ 7661-7661f. But there are substantial differences in these programs. While Title V instituted a centralized permitting program, it applies only to specified stationary sources. *See* 42 U.S.C. § 7661a; *see also Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 282 (9th Cir. 1996). Title V provides remedies related to interstate emissions, but they relate only to emissions from sources operating with Title V permits. *See, e.g.,* 42 U.S.C. § 7661d (requiring permitting authority to notify all states whose air quality may be affected of each permit application and to

provide opportunity for such states to submit written recommendations).

Mobile sources, such as vehicles – at the center of the “particular issue” in this case – are not governed by Title V permitting requirements. And, while greenhouse gases are air pollutants under the Clean Air Act, there are no specific provisions in Title V expressly regulating carbon dioxide or other greenhouse gas emissions. Accordingly, nothing in Title V displaces California’s common law claims and remedies.<sup>9/</sup>

Mobile sources are governed by Title II of the Act. 42 U.S.C. §§ 7521-7590. For mobile sources, “the Act does not use a comprehensive permit system like the one that applies to water pollution.” *Audubon*, 869 F.2d at 1213, n.14 (Reinhardt, J., dissenting). Rather, for these sources, the Act relies largely on emissions standards. For motor vehicles, the Clean Air Act provides that EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new

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9. Also in 1990, Congress added Title IV, 42 U.S.C. §§ 7671-7671g, to phase out by specific dates the production and consumption of substances that contribute to the depletion of stratospheric ozone. The amendments made it unlawful for “any person” to produce ozone depleting substances in excess of a set percentage of that person’s established baseline year, and directed EPA to establish regulations governing consumption of these substances. 42 U.S.C. §§ 7671c(a)-(c), 7671d(a)-(c). Congress could, in theory, pass similar, targeted amendments addressing the control of greenhouse gases, but, to date, it has not done so.

motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). Currently, the only emissions regulated under Title II are hydrocarbons, non-methane organic gases, nitrogen oxides, and carbon monoxide. RJN at Exh. 9. As the Court held in *Massachusetts v. EPA*, while the agency has authority under the Act to regulate greenhouse gas emissions from motor vehicles, 127 S. Ct. at 1460, EPA’s actions in this area have been marked by a “steadfast refusal[,]” *id.* at 1455.

Moreover, there are no provisions in Title II that speak directly to redress for states harmed by interstate emissions. *Cf.* 42 U.S.C. § 7523(a) (authorizing the Administrator of EPA to bring an action to enjoin various specific acts prohibited by Title II); 42 U.S. § 7543(b) (allowing California to adopt its own standards for new cars sold within California subject to EPA’s waiver of preemption).<sup>10/</sup>

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10. To date, EPA has acted even to prevent California from applying its own greenhouse gas emission standards within its own borders, as California is authorized to do under Section 209 of the Clean Air Act (42 U.S.C. § 7543(b)(1)), by denying its request for waiver of preemption. RJN at Exh. 6.

The Automakers may also point other parts of the Act,<sup>11/</sup> such as Congress's recent amendments to Title II's renewable fuels program. *See* Energy Independence and Security Act of 2007 ("2007 Energy Act"), Pub. L. No. 110-140 (H.R. 6), 121 Stat. 1492 (2007).<sup>12/</sup> At best, however, these amendments indicate that Congress is beginning to address global warming through the Clean Air Act, albeit in piecemeal fashion and indirectly. The amendments do not speak directly to the greenhouse gas emissions that vehicles already have emitted, and will continue to emit, nor do they provide California with any remedy for the harms to its environment, resources, and the public health and welfare it is suffering and will continue to suffer.

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11. There are other provisions of the Clean Air Act that touch at the edges of the greenhouse gas pollution problem, but do not attempt directly to regulate it, and do not provide remedies for interstate harms. *See, e.g.*, Pub. L. No. 101-549, § 821, 104 Stat. 2399, 2699 (1990) (uncodified) (requiring sources subject to the Act's Title V to monitor carbon dioxide emissions); 42 U.S.C. § 7403(g)(1) (requiring program to develop, evaluate, and demonstrate nonregulatory strategies and technologies for reducing multiple air pollutants, including carbon dioxide, from stationary sources (Title I)).

12. By the 2007 amendments, Congress expanded the renewable fuels program to increase the use of fuels that reduce greenhouse gas emissions compared to conventional fuels, and it instructed EPA to analyze the impacts of renewable fuels on climate change (among other things) when the agency sets renewable fuel standards in the future. *See* 2007 Energy Act, tit. II. For the Court's convenience, a copy of the 2007 Energy Act is attached as Exhibit 7 to the Appellant's RJN.

Stated simply, there is nothing in the Clean Air Act or its regulations addressing interstate global warming pollution and providing a remedy of any kind for California's harms.

**2. The Clean Air Act's Mere Potential for Future Greenhouse Gas Regulations of Unknown Scope and Unknown Remedy Cannot Effect Displacement of California's Federal Common Law Claim for Damages to Its Quasi-Sovereign Interests.**

Under the Clean Air Act, EPA has the authority to regulate greenhouse gases, including emissions from motor vehicles. But it is entirely uncertain whether or when EPA will exercise its authority. *See Mass. v. EPA*, 127 S. Ct. at 1462 (“EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations”). And it is entirely uncertain what the scope of EPA's hypothetical, future regulations, or the adequacy of any provided remedy, might be.

The Clean Air Act, with its broad grant of authority to regulate air pollutants, is thus very closely analogous to the Clean Water Act before the 1972 amendments, as it existed at the time of *Milwaukee I*.

The pre-1972 Clean Water Act included a general grant of authority to the agency's Administrator to create regulatory mechanisms to address water pollution, similar to the NAAQS program in the Clean Air Act: “[t]he

Administrator shall . . . prepare or develop comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries thereof and improving the sanitary condition of surface and underground waters.” 33 U.S.C. § 1153 (1970) (emphasis added).<sup>13/</sup> The Act further contemplated enforcement through SIPs. *See* 33 U.S.C. § 1160(c)(1) (1970). Because of the breadth of the pre-amendment Clean Water Act, the federal regulatory agency arguably could have issued regulations speaking directly to the issue between Illinois and the out-of-state discharger defendants. As the holding of *Milwaukee I* makes clear, however, the agency had not done so and, therefore, the common law was not displaced.

As established by *Milwaukee II*, only substance, not potential, can displace. The Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, actually addressed the rights and duties of the parties of Illinois and Milwaukee in their dispute over interstate sewage. By these amendments, Congress explicitly decided the legality of water pollution discharges: the amendments made it “illegal for anyone to discharge pollutants into the Nation’s waters except pursuant to a permit.” 451 U.S. at 310-311

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13. For the Court’s convenience, a true and correct copy of the entire Federal Water Pollution Control Act as it existed through January 17, 1972 is attached to as Exhibit 1 to the Appellant’s Request for Judicial Notice.

(citing 33 U.S.C. §§ 1311(a), 1342). And by the time of *Milwaukee II*, EPA had “promulgated regulations establishing specific effluent limitations,” which were “incorporated as conditions” of all permits issued under the Act. *Id.* at 311. Furthermore, a permit system already was in place and, in fact, the discharges at issue in the dispute between Illinois and Milwaukee were subject to statutorily required permits and had been subject to statutory enforcement actions. *Id.* Finally, the amended Act contained explicit provisions authorizing states to challenge water pollution from other states. *Id.* at 325-26 (reviewing provisions for resolution of interstate disputes).

Thus, it may happen in the future that Congress through amendments the Clean Air Act, or EPA through comprehensive regulations, speaks directly to the particular issue presented by California’s nuisance claim and provides adequate remedies. “But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance . . . .” *Milwaukee I*, 406 U.S. at 107.

**3. A Comprehensive Scheme Cannot Be Cobbled Together from Statutes That Speak Only Indirectly to the Matter at Issue in California’s Claim and Provide No Remedy for Harms to California’s Quasi-Sovereign Interests.**

In the district court, the Automakers attempted to cobble together a “comprehensive scheme” from bits and pieces of existing statutes that relate indirectly to greenhouse gas emissions from vehicles. Any attempt to do so here must fail.

Clearly, there are other laws “touching” emissions from motor vehicles. To take one example, pursuant to the Energy and Policy Conservation Act (“EPCA”), 42 U.S.C. §§ 6201-6892, the Department of Transportation through the National Highway Transportation Safety Administration (“NHTSA”) sets fuel economy standards. The purpose of EPCA, however, is to “promote energy efficiency,” *Mass. v. EPA*, 127 S. Ct. at 1462; *see also Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d at 514. This purpose is reflected in the factors that NHTSA must consider in setting fuel standards, which include technological feasibility, economic practicability, and the need to conserve energy. *Id.* at 515. EPCA thus does not “speak directly” to interstate air pollution caused by vehicle emissions.<sup>14/</sup>

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14. The 2007 Energy Act requires NHTSA to increase fuel economy standards for cars and light trucks. *See* RJN at Exh. 7, § 102. However,

The Automakers also may claim that other parts of the 2007 Energy Act displace California's common law nuisance claim. *See* RJN at Exh. 7. Among other things, the 2007 Energy Act instructs federal agencies to establish a program to provide consumers with information about automobiles' greenhouse gas emissions (§ 105); to establish an Office of Climate Change and Environment to "plan, coordinate, and implement" actions to "mitigate the effects of climate change" (§ 1101); and to study issues related to carbon sequestration (tit. VII), energy efficiency in appliances and buildings (tits. III-V), alternative sources of energy (tit. VI), and national and international energy policies (tits. VIII-IX). But committing resources to further study and develop policies addressing global warming does not constitute a comprehensive program that is capable of displacing federal common law; rather it underscores that a comprehensive scheme at the federal level does not yet exist.

As *Milwaukee I* and *Milwaukee II* make clear, a set of laws "touching" an issue falls far short of a "self-consciously comprehensive scheme" speaking directly to that particular issue as is required to displace the federal common law. *Milwaukee I*, 406 U.S. at 101; *Milwaukee II*, 451 U.S. at 319. Laws such

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nothing in the new law transforms the purpose of EPCA or provides relevant remedies.

as EPCA and various provisions of the 2007 Energy Act that merely “touch” in various ways on global warming or the operation of motor vehicles cannot serve to displace the federal common law.

## CONCLUSION

We return to Justice Holmes’ statement in *Tennessee Copper*:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

206 U.S. at 238. Like Georgia in 1907, California in 2008 is entitled to a federal forum to present its federal interstate air pollution claim. California seeks its remedy in federal court under a doctrine long recognized as squarely within the authority of the judiciary. Without a judicial remedy, California has no recourse. In these circumstances, neither a broad relationship between the issues raised by California in its litigation and issues of national and foreign policy, nor Congress’s bare grant of broad authority under the Clean Air Act paired with a mere hope for future comprehensive federal regulation, should preclude California’s recourse to the Judicial Branch and the federal common law for redress for harms to her quasi-sovereign interests.

Dated: January \_\_\_\_, 2008

Respectfully submitted,

FOR THE PEOPLE OF THE STATE OF  
CALIFORNIA, ex rel. EDMUND G.  
BROWN JR., ATTORNEY GENERAL

EDMUND G. BROWN JR.  
Attorney General  
JANET GAARD  
Chief Assistant Attorney General  
THEODORA BERGER  
Assistant Attorney General

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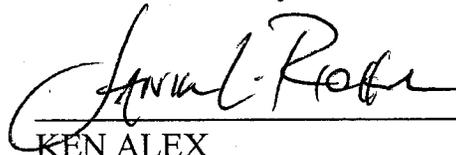
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Dated: January 31, 2008

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Janill Richards", written over a horizontal line.

KEN ALEX  
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Deputy Attorneys General

**STATEMENT OF RELATED CASES**

Pursuant to Rule 28-2.6, California states that there are no known related cases pending in this Court.

**CERTIFICATE OF COMPLIANCE**

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,846 words.

Dated: January \_\_\_\_, 2008

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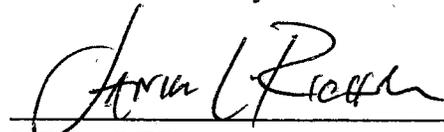
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