

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

COPIES

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

Appellant,

v.

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

Appellees.

Case No. 07-16908

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U.S. COURT OF APPEALS**

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 REPLY BRIEF**

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## INTRODUCTION

By its Complaint, California alleges that appellee Automakers' greenhouse gas emissions have resulted in interstate pollution that harms California's quasi-sovereign interests in its natural resources, environment, lands and infrastructure, contributing to a public nuisance cognizable under the federal common law. The Automakers present three arguments in support of the district court's decision to dismiss California's claim at the earliest stage. They argue first that the district court correctly determined that the case raises nonjusticiable political questions outside of the jurisdiction of the courts. And, they contend, even if the district court erred in dismissing on that ground, this Court should affirm dismissal because the federal common law of interstate nuisance does not recognize a claim for damages or one that involves the precise facts of this case. Alternatively, they argue, California's public nuisance action is displaced by federal statute.

On the issue of political question, California in its Opening Brief set out in detail why none of the six factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962) establishes that this case, sounding in tort, has been committed to the coordinate political branches. In response, the Automakers contend that the legislative or executive branches could address the matter; that these branches have begun to look at the matter and likely will address it eventually; and that it

would be better if these branches addressed the Automakers' greenhouse gas emissions. The Automakers may well be right. But a non-existent, purely hypothetical alternative solution from the political branches, preferable or not, does not preclude a state's otherwise justiciable federal common law claim.

The Automakers also suggest that there are no judicially manageable standards for deciding this case, positing a series of difficult decisions that, they assert, the district court might have to make in ruling on the merits of this case. The Automakers misstate and overstate the issues that will be presented at trial. More fundamentally, they confuse the issue of complexity with that of judicial manageability. This case is judicially manageable, notwithstanding its complexity, because the court will be guided by case law and the Restatement and its own sound judgment and powers of equity.

Requesting that this Court affirm the dismissal on alternative grounds, the Automakers contend that there is no subject matter jurisdiction because California has not pleaded a claim that arises under the federal common law. Since, however, California has pleaded facts supporting each required element of a federal claim for interstate public nuisance as set forth in cases such as *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), the only issue is whether subsequent federal statute and regulation have displaced the common law.

Finally, the Automakers contend that the Clean Air Act (“CAA”) and the Energy Policy and Conservation Act (“EPCA”) have displaced the common law. But Supreme Court case law is clear: displacement requires that the federal statute and an existing and operating regulatory scheme address directly the harm that plaintiff alleges and provide redress. Today, there is no federal regulation of greenhouse gas emissions. Only the federal common law can provide California with the federal redress to which it is entitled under the rule of *Tennessee Copper*.

This Court should therefore reverse the district court decision and remand so that California may have its day in court.

**I. California’s Public Nuisance Claim Does Not Present a Political Question.**

In their Answer Brief, the Automakers focus on the first three factors from *Baker v. Carr*. They are: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving the case; and [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005) (citing *Baker*, 369 U.S. at 217). California addresses these factors below, in the same order as the Automakers. Answer Brief (“AB”) 21.

**A. California's Claim Will Require the Court Only to Rule on the Elements of the Tort, Not to Make Initial Policy Determinations Reserved to the Political Branches.**

**1. California's Claim Does Not Seek a Court-Established Greenhouse Gas Emissions Standard for Vehicles, But Rather Redress for Nuisance.**

The Automakers begin their justiciability argument by making various assertions about California's claim. As they characterize it, the Complaint alleges

that the Automakers' vehicles, as designed, emit too much CO<sub>2</sub> and other greenhouse gases; that their vehicles should be designed to produce some unspecified lesser amount of those emissions; and that the Automakers engaged in misconduct by failing to design their vehicles to conform to this as-yet articulated emissions limit.

AB 21-24.

Whatever the justiciability of the straw claim presented by the Automakers, it is not California's claim. As set out in its Opening Brief, California alleges that the sum of each Automaker's domestic emissions to date has substantially contributed to global warming, which has caused and is causing specific harm to California. Opening Brief ("OB") 8-11. These harms include a shrinking Sierra snow pack, reduced flood protection by existing infrastructure, coastal erosion, and increased extreme heat events and risk of

wildfire. In addition, because of California's quasi-sovereign responsibilities and its interest in these resources, California must expend significant sums to study, plan for, monitor and respond to these harms. *Id.*

The relevant question for the district court will be whether the Automakers' interference with these interests is unreasonable, not whether it is unreasonable to sell cars that emit greenhouse gases at one emissions level instead of at a different emissions level. California seeks only the opportunity to argue and to prove that the Automakers' massive emissions of greenhouse gases have contributed to global warming, significantly interfering with California's quasi-sovereign and proprietary interests and causing it compensable harm. *See* Restatement (Second) of Torts § 821B (1979) (describing a test for unreasonable interference as "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience").

The Automakers correctly observe that in determining whether each Automaker's emissions to date are tortious, the district court may be required in some sense to decide "how much CO<sub>2</sub> is too much CO<sub>2</sub>." AB 22. But the underlying question in a nuisance case based on pollution always is how much of the interfering agent is too much – be it smoke, sewage, or sulphurous gas. Answering this question, posed in the context of the tort, is squarely within the

province of the courts.

**2. That the Coordinate Branches Are Considering the Issue of Global Warming Does Not Divest the Court of Jurisdiction.**

According to the Automakers, “[d]eciding the threshold question of tort liability in this case would . . . require the courts to inject themselves into . . . ongoing political and regulatory debates and make the exact policy determinations that the political branches are actively addressing.” AB 24. As discussed above, this argument is premised on the Automakers’ mischaracterization of California’s claim as requesting an emissions standard, and it can be rejected on this ground alone. More fundamentally, however, the argument presumes that if the coordinate political branches have expressed any interest or considered taking action on an issue, the federal courts immediately must close their doors to all claims that even touch on that issue. The judicial branch does not occupy such a subordinate role.

As this Court has noted, the decision to deny access to judicial relief on the basis of a political question is not one a federal court makes lightly. *Alperin*, 410 F.3d at 539. Any other result would be to shirk the courts’ obligation to decide cases and controversies properly presented to them. *Id.* Moreover, the courts and the political branches can and do routinely operate in

parallel and complementary ways. *See, e.g., United States v. Texas*, 507 U.S. 529, 534-535 (1993) (holding that Congress did not displace common law remedy of prejudgment interest for debts owing to the United States, even though Congress had enacted the Debt Collection Act to enhance the government's ability to collect its debts); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 249 (1985) (rejecting political question bar to federal common law claim relating to Indian lands, notwithstanding Congress's clear power to regulate under Indian Commerce Clause).

The very cases the Automakers cite illustrate why the potential political implications of this lawsuit do not defeat federal jurisdiction. AB 24. In *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980), for instance, the Supreme Court was presented with the question of whether a genetically engineered bacterium capable of breaking down crude oil was patentable. The parties opposing the patent urged the Court to consider the “gruesome parade of horrors” that genetic research and other candidate organisms for patent not before the Court could present. *Id.* at 316. The Court, however, differentiated between the larger, general policy issues raised by genetic research, which were for the political branches, and which Congress was, in fact, considering at the time, and the specific legal issue before the Court, upon which it ruled. *Id.* at

317 & n.11; *see also Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (court cannot shirk responsibility to interpret the law merely because “our decision may have significant political overtones”).

In this case, California does not ask for a solution to the larger, general problem of global warming. It seeks a ruling on its nuisance claim against an identified set of defendants based on their quantifiable domestic emissions to date, which cause specific harm to California. The Automakers’ own manufactured parade of horrors does not excuse the federal courts from their responsibility to consider California’s claim.

**B. Ruling on an Interstate Public Nuisance Claim is Constitutionally Committed to the Judiciary and Not to the Coordinate Political Branches.**

**1. Nothing in *Massachusetts v. EPA* Suggests That All Claims Relating to Global Warming Have Been Committed to the Environmental Protection Agency to the Exclusion of the Judiciary.**

The Automakers contend that California has “conspicuous[ly] fail[ed] to square its position with *Massachusetts v. EPA*.” AB 28; *see also* AB 25.

According to the Automakers, even as the *Massachusetts* Court cites *Tennessee Copper* for the proposition that injuries to a state’s quasi-sovereign interests support federal jurisdiction, it overrules that part of *Tennessee Copper* that

gives rise to a right of action under the federal common law. AB 28-29 (citing *Massachusetts v. EPA*, \_\_ U.S. \_\_, 127 S. Ct. 1438, 1454 (2007)).

In *Massachusetts*, the Court held only that the states' "sovereign prerogatives" to address interstate nuisances "are now lodged in the Federal Government . . . ." *Massachusetts*, 127 S. Ct. at 1454. This is the teaching of *Tennessee Copper* – that the states on entering the Union surrendered their sovereign prerogatives to address nuisances outside of their borders. *Tennessee Copper*, 206 U.S. at 237. It is why California has filed its claim in federal court.

The *Massachusetts* Court in the same sentence states that "Congress has ordered EPA to protect [the states] by prescribing standards applicable to the 'emission of any air pollutant from any class or classes of new 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.'" *Massachusetts*, 127 S. Ct. at 1454 (citing 42 U.S.C. § 7521(a)(1)). California does not dispute this point; indeed, it was a petitioner in *Massachusetts* and has long argued that EPA should regulate greenhouse gases under the CAA. But this language cannot be read to hold that the Constitution has committed all issues related to vehicular air pollution exclusively to Congress and the EPA. The relevant legal question is whether the CAA and its

supporting regulations have displaced the common law with a comprehensive scheme that speaks directly to the harm that California is suffering, and that provides a remedy. *See* OB 46-47; Section II.C, below. This issue does not inform the political question inquiry. Nothing in *Massachusetts* suggests that the federal courts no longer are the proper branch of the government to resolve California's tort claim.

**2. The Political Question Doctrine Does Not Bar Claims That May Affect Commerce.**

The Automakers argue that a trial on the merits would infringe upon Congress's authority under the Commerce Clause by "thrust[ing]" policy decisions and alleged regulatory effects onto other states. AB 30. The cases the Automakers cite in support of this argument are grounded, in relevant part, on restrictions that the Commerce Clause places on state action; they are not political question cases. AB 30-31. The cases reflect the Constitution's "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Institute*, 491 U.S. 324, 335-336 (1989).

A claim under the federal common law does not implicate these concerns. Indeed, the federal common law of interstate pollution exists to

provide a remedy to one state when it is harmed by pollution from outside its borders. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) (“*Milwaukee I*”). Applying state law for that purpose is not an option, and the federal common law provides uniformity that would be lacking were the laws of the individual states to control, *Id.* at 105 n.6.

In fact, the Automakers’ proposed rule – that a case becomes nonjusticiable if it has potential interstate effects – proves too much. Under it, no interstate nuisance claim would be justiciable because of its very nature of being interstate. And there would be no occasion to determine whether a federal statutory or regulatory scheme displaced the federal common law (*see* Section II.C, below), as any matter that could be addressed legislatively would be outside the federal courts’ jurisdiction. This Court should reject the Automakers’ reliance on restrictions that the Constitution places on states applying their own laws as a basis to dismiss this federal claim.

### **3. Ruling on California’s Nuisance Claim Will Not Interfere With Foreign Policy.**

The Automakers argue that a ruling against them will interfere with the conduct of foreign policy by imposing unilateral emissions standards. AB 33-36. They argue that the political branches have, “to date, firmly rejected calls to impose unilateral limitations on CO<sub>2</sub> emissions in the U.S.” AB 34.

As California established in its Opening Brief, there is no foreign policy that forbids addressing domestic emissions, and certainly no foreign policy against providing remedies for domestic pollution. OB 23-25. The Automakers identify no law, treaty, or executive agreement with which a ruling would interfere. *Cf. Alperin*, 410 F.3d at 549-550 (noting that courts first examine whether claims are expressly barred by any relevant treaties or executive agreements). This case stands in stark contrast to cases such as *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007), where the court found a political question based on interference with specific and identifiable executive and congressional decisions to provide foreign assistance to Israel. *Id.* (“[t]he decisive factor here is that Caterpillar’s sales to Israel were paid for by the United States”); *see also Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421-422 (2003) (invalidating state law that interfered with foreign policy in executive agreements). Here, the district court will not be called upon to question any federal action or decision.<sup>1/</sup>

Under these circumstances, it is inconceivable that a judicial finding of liability against six domestic companies, based solely on emissions in the

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1. *Amici* argue that a decision not to act in some cases is a policy choice to which the court must defer. Wash. Legal Foundation *et al.*, Br. at 6, 22. They identify no case in which a political branch’s inaction is a basis for finding a political question. Adjudicating California’s claim will not prevent the political branches from taking action if they choose to do so.

United States,<sup>2</sup> and seeking redress only for injuries in California, will interfere with the foreign policy prerogatives of the political branches.

**C. The Court Will Apply Judicially Manageable and Discoverable Tort Principles, Not Make Political Judgments, in Adjudicating California's Nuisance Claim.**

Finally, the the Automakers argue that there are no judicially manageable or discoverable standards with which to “balanc[e] the wide array of environmental, commercial, foreign policy, and consumer interests implicated by CO<sub>2</sub> regulation.” AB 38. Again, this case is not about CO<sub>2</sub> regulation. *See* Section I.A.1, above. It is a tort case, requiring the court to determine the relationship between the Automakers’ emissions to date and actual injuries to California.

In its Opening Brief, California explained in detail how the common law of nuisance, as summarized and distilled in the Restatement, would provide manageable and discoverable standards to guide the district court in determining liability and fashioning appropriate redress. OB 26-35. The Automakers cursorily reject this substantial body of guiding law and principles

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2. The Automakers repeatedly state that California seeks redress for worldwide greenhouse gas emissions. AB 2, 4, 15, 18, 25, 30, 36, 46, 53. The Automakers mischaracterize the Complaint, which identifies only emissions in the United States as the actionable source of harm to California. Excerpts of Record (“ER”) 35, ¶¶ 2-3; *id.* 42, ¶¶ 40-42.

in two sentences and one footnote, arguing that the Restatement would require the district court to make a “policy judgment” on whether and when each Automakers’ conduct became tortious. AB 39 & n.13, 42. But the political question doctrine does not bar a court from making decisions that could be deemed as reflecting “policy” – otherwise, virtually every claim that involves weighing different factors or application of principles of equity would be barred.

The Automakers also claim that imposing liability for activities that California has, in their view, “long welcome and encouraged” would require the court to make a “retroactive political judgment” for which there are no manageable standards.<sup>3/</sup> AB 39 (quoting *Alperin*, 410 F.3d at 548). The Automakers’ selective quote from *Alperin* substantially misstates the holding of that case. In *Alperin*, this Court held that a tort claim alleging labor abuse during the Second World War presented a political question because it would require the court to “indict the Ustasha regime for its wartime conduct.” *Alperin*, 410 F.3d at 561. The slave labor claims thus would require the court to make a “retroactive political judgment as to the conduct of war.” *Id.* at 548 (emphasis added). It was not the retrospective nature of the inquiry that created

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3. California will address the Automakers’ argument that its purported encouragement of automobiles forecloses a federal common law nuisance claim in Section III.D, below.

the political question. Rather, it was that the claim would require a court to pass judgment on a foreign government's actions during wartime. *Id.*

California's claim presents no such question.

The Automakers also cite two Supreme Court cases that, they maintain, demonstrate lack of manageable standards to adjudicate a nuisance case where the plaintiff may have contributed to the nuisance. AB 38-39. In both cases, the Court ruled against the plaintiffs on the merits because, on the evidence before it, the Court could not distinguish between sewage discharges by the plaintiffs and by the defendants. *Missouri v. Illinois*, 200 U.S. 496, 522 (1906) ("*Missouri II*") and *New York v. New Jersey* 256 U.S. 296, 310 (1921). These cases demonstrate that courts are capable of analyzing even complex facts involving novel scientific issues and reaching a reasoned decision.<sup>4</sup>

In sum, the political question doctrine does not bar the district court from adjudicating California's claim.

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4. The Automakers speculate that if this case proceeds, "every man woman and child on the globe" may soon be before the court. AB 41. Courts, of course, are perfectly capable of differentiating between tortious and non-tortious conduct, and between de minimis contributors and substantial contributors to a tort. *See, e.g., NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 456 (E.D.N.Y. 2003) (gun sellers with de minimis impact on alleged public nuisance caused by sale of handguns dismissed for lack of personal jurisdiction).

**II. There is Federal Question Jurisdiction Over California’s Claim Because it Arises Under the Federal Common Law of Public Nuisance, Which Has Not Been Displaced.**

The Automakers contend that this Court can affirm dismissal on the alternative ground that there is no subject matter jurisdiction because there is no federal claim. AB 44. But California has pleaded a claim for federal common law nuisance. By definition, the claim arises under federal law. Furthermore, neither the CAA nor EPCA, nor their respective regulatory schemes, are sufficient to displace the common law in this area.<sup>5f</sup>

**A. California’s Federal Common Law Claim Satisfies the Minimum Threshold for Establishing Federal Question Jurisdiction.**

As this Court has observed, “[t]he vast majority of cases that come within [federal jurisdiction] are covered by Justice Holmes’ statement that a suit arises under the law that creates the cause of action.” *Opera Plaza Residential Parcel Homeowners Association v. Hoang*, 376 F.3d 831 (9th Cir. 2004) (quoting *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). Courts perform only a “minimum degree of analysis” to determine whether a claim arises under federal law. *Poulos v. Caesars World*,

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5. Although styled as addressing subject matter jurisdiction, many of the Automakers’ arguments about whether California has stated a federal claim are more properly analyzed in the context of a Rule 12(b)(6) motion to dismiss for failure to state a claim. California addresses these non-jurisdictional arguments in Section III, below.

*Inc.*, 379 F.3d 654, 662 n.2 (9th Cir. 2004). Provided that the federal claim is not immaterial or frivolous, federal question jurisdiction exists. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1200 (9th Cir. 2007).

California's first cause of action arises entirely under the federal common law. Subject matter exists because California has pleaded a federal claim that is not immaterial or frivolous. Whether California is entitled to relief under the common law is a matter for the courts to address in due course. *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) (court must assume jurisdiction before reaching merits).

**B. *Erie* Did Not Extinguish All Existing Federal Common Law Claims.**

In *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court held that “[t]here is no federal general common law.” The Automakers use this statement to suggest that there is no longer any federal common law of nuisance. AB 45-46. The case law does not support this conclusion.

While *Erie* established that there is no all-encompassing, “transcendental body” of federal common law, *Erie*, 304 U.S. at 79, subsequent cases have confirmed that the common law continues to exist in particular areas where it is necessary. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (holding that “post *Erie* understanding has identified limited enclaves in which

federal courts may derive some substantive law in a common law way”). Few enclaves of federal common law are better established than the federal common law of nuisance by interstate pollution. *Milwaukee I*, 406 U.S. at 103 (“[w]hen we deal with air and water in their ambient or interstate aspects, there is federal common law”); see also *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *National Audubon Society v. Dep’t of Water*, 869 F.2d 1196, 1205 (9th Cir. 1988). This Court and the Supreme Court were well aware of *Erie* in deciding these cases. See *Milwaukee I*, 406 U.S. at 105 n.7 (citing *Erie*); *Ouellette*, 479 U.S. at 488 (citing *Erie*); *National Audubon Society*, 869 F.2d at 1201 (citing *Erie*). The Court should reject the Automakers’ suggestion that *Erie* extinguished the federal common law of interstate nuisance.

**C. Congress Has Not Displaced the Federal Common Law of Nuisance as Applied to Interstate Greenhouse Gas Emissions.**

In its Opening Brief, California discussed in detail the standard for displacement of the federal common law by a comprehensive statutory and regulatory scheme. OB 44-64. California applied the test for displacement presented in the Supreme Court’s seminal pair of interstate water pollution cases, *Milwaukee I* and *Milwaukee II*. California explained how the underlying Clean Water Act and its supporting regulations had changed from the time of the first case to that of the second, and that the CAA, while broad, is not

comprehensive in the sense of speaking directly to the particular matter presented by this case and providing a remedy for the harm at issue. *Id.*

The Automakers do not address displacement in any detail. Instead, they offer a series of cursory arguments asserting that displacement can be effected by the mere potential of a comprehensive scheme that would address greenhouse emissions from automobiles, and that provides only procedural remedies for the failure to enact such regulation. California addresses each of the Automakers' arguments below.

**1. While the Clean Air Act is Complex and Broad, This Fact, Standing Alone, Does Not Effect Displacement.**

The Automakers focus on the wide scope of the CAA, and on the broad authority it grants EPA to regulate greenhouse gas emissions. AB 55-60. EPA clearly has the power to regulate greenhouse gas emissions from vehicles. But this authority to date has not been exercised. Nor is it clear that the agency will exercise its authority. More than one year after *Massachusetts*, EPA's only response to the Supreme's Court's mandate has been to announce that it will issue an Advanced Notice of Proposed Rulemaking at some unspecified time in the future. *See* AB 10-11.

The CAA today is thus like the pre-1972 Clean Water Act, which the Supreme Court held did not displace the common law in *Milwaukee I*; it

includes a general grant of authority to regulate discharges that the agency has not exercised. See OB 59-61. If the Automakers' view of displacement were the law, the Court in *Milwaukee I* would have ruled that the mere potential for comprehensive regulation of water pollution displaced the common law. And there would have been no occasion for the Court in *Milwaukee II* to examine the post-1972 statutory overhaul of the Clean Water Act, particularly its permitting provisions, or the newly promulgated effluent limits and newly issued permits, to determine that Congress had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee v. Illinois et al.*, 451 U.S. 304, 317-320 (1981) ("*Milwaukee II*"). As the *Milwaukee* cases establish, displacement requires an existing, not a potential, comprehensive scheme.<sup>6</sup>

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6. Contrary to the Automakers' suggestion, cases such as *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), which deal with complaints about the manner in which a comprehensive regulatory scheme addresses an issue, are not on point. AB 57. In *Mattoon*, the First Circuit held that the Safe Drinking Water Act, which regulated the safety of water used for drinking purposes in a highly detailed manner, displaced a federal common law claim for nuisance based on a pathogen not specifically covered by the Act. The court held that, provided that EPA regulates drinking water contaminants to protect the public health, "it was in the province of the agency, not the courts, to determine which contaminants will be regulated." *Mattoon*, 980 F.2d at 5. In this case, EPA has not, for example, decided to regulate only some greenhouse gases to control global warming and not others. It has taken no action to address such emissions at all.

**2. California's Procedural Right Under the Clean Air Act to Request That EPA Devise a Comprehensive Scheme to Address Greenhouse Gas Pollution from Automobiles Does Not Provide a Substantive Remedy for Interstate Pollution.**

As set forth in California's Opening Brief, the existence of an adequate remedy addressing the harm otherwise governed by the common law is essential to displacement. OB 50-51. The Automakers contend that California has adequate remedies, specifically, its "procedural right" to challenge EPA's regulatory decisions not to regulate greenhouse gas emissions in court, and California's "special right" to petition EPA for permission to promulgate its own automotive emissions standards. AB 58-60. The provisions cited by the Automakers give California the ability to request of EPA that it construct a regulatory scheme that, if it were to take a sufficiently comprehensive form, might address interstate greenhouse gas pollution and provide an adequate remedy. As evidenced by EPA's recent denial of California's waiver request, however, 73 Fed. Reg. 12156 (Mar. 6, 2008), California's exercise of its procedural rights have yet to bear any substantive fruit. Since no existing statutory or regulatory scheme addresses and provides a remedy for the substance of California's nuisance claim – harms caused by global warming caused in part by the Automakers' emissions – there can be no displacement.

**3. At Most, the Energy Policy and Conservation Act Merely Touches on Greenhouse Gas Emissions.**

As California noted in its Opening Brief, EPCA, which authorizes the National Highway Transportation Association to set mileage standards for motor vehicles and is focused on energy conservation, not pollution control, at most touches on greenhouse gas emissions. OB 62-64. This is not sufficient to effect displacement. *See Milwaukee I*, 406 U.S. at 101-103 (finding no displacement even though 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)).

The Automakers claim that fuel economy standards are the “functional equivalent” of greenhouse gas regulations. AB 60. The only courts to have ruled on this argument (in a different legal context) have rejected it, as vehicle emissions can in fact be reduced through measures other than increasing mileage. *See Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1158 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 353 (D. Vt. 2007). But more fundamentally, mileage standards are not equivalent to a remedy for the harm that the

Automakers' substantial contributions to global warming have caused to California's interests in its resources, environment, lands and infrastructure.

In sum, EPCA does not "speak directly" to the "particular issue" here: harm to California from Appellees' greenhouse gas emissions. It cannot, therefore, displace the common law.

### **III. California Has Stated A Claim for Relief Under the Federal Common Law of Public Nuisance.**

Much of the Automakers' argument about subject matter jurisdiction focuses on whether California adequately has pleaded the elements of an interstate nuisance claim. AB 46-54. Since the district court did not address the Automakers' Rule 12(b)(6) motion, this Court need not reach these non-jurisdictional arguments. ER 8, 30. If it does, however, the Court should rule that California has alleged facts sufficient to state a claim for public nuisance. There is no basis to dismiss under Rule 12(b)(6).

#### **A. California Has Pleaded Facts Necessary to Support the Elements of Its Claim.**

Motions to dismiss for failure to state a claim under Federal Rules of Civil Procedure, Rule 12(b)(6) are viewed with disfavor and are "rarely granted." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). In deciding a motion to dismiss, the court accepts as true the allegations of the complaint and draws reasonable inferences in the plaintiff's

favor. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Inquiry into the adequacy of the evidence is improper. *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). A court may not dismiss a complaint “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A public nuisance is an unreasonable interference with a right common to the general public. *In re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981); Restatement (Second) of Torts § 821B(1) (1979). The elements of a claim based on the federal common law of nuisance are simply that the defendant has taken an action that causes injury or threat of injury to a cognizable interest of the plaintiff.<sup>7</sup> *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979), *vacated on other grounds, Milwaukee II*, 451 U.S. at 332. Where the injury is caused by interstate pollution, a plaintiff may avail

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7. Contrary to what the Automakers and *Amicus* suggest, no case restricts the common law to so-called “simple” nuisances. AB 45; Br. Chamber of Commerce at 8-10. In the few instances where courts have used the term, it is to describe the proximity of the allegedly harmful activity to the harm, not to establish a new element of the tort. *See Missouri II*, 200 U.S. at 522 (plaintiff did not meet burden of proving that upstream sewage discharges contributed to downstream cases of typhoid; alleged nuisance was not a “simple” nuisance that could be “detected by the unassisted senses”); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (describing the nuisance created by flooding farmlands as a “simple” nuisance).

itself of the federal common law. *Tennessee Copper*, 206 U.S. at 237; *Milwaukee I*, 406 U.S. at 103. By pleading that the Automakers substantially have contributed to global warming through their nationwide, domestic emissions to date, and that global warming is causing unreasonable harm to California's natural resources and environment, California has pleaded the necessary elements of its federal common law nuisance claim.

**B. That Some Emissions Occur In California Does Not Require Dismissal.**

The Automakers suggest that California's claim is defective because the Automakers emit greenhouse gases inside of California as well as outside of its borders. AB 47-49. The relevant question, however, is whether the source of pollution is beyond California's control. In the words of Justice Holmes, "[i]t 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 the act of persons beyond its control[.]" *Tennessee Copper*, 206 U.S. at 238 (emphasis added).

No case holds that a state fails to state a claim if some of the pollution originates from within the state. *Cf. National Audubon Society*, 869 F.2d at 1205 (granting summary judgment against plaintiffs where the interstate nuisance claim was "essentially a domestic dispute," appropriate for state law); *Comm. for the Consideration of the Jones Falls Sewage Systems v. Train*, 539

F.2d 1006, 1009 (4th Cir. 1976) (declining to apply federal common law to an “intrastate controversy [that] is entirely local”); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 521 (8th Cir. 1975) (declining to apply federal common law where there was “no evidence of any interstate health hazard”).

Nor is there a basis to hold that California must endure the harmful effects of the Automakers’ emissions because it purportedly has encouraged, or consented to, the use of automobiles. AB 49. Such arguments, which are based on facts outside of the Complaint (*see* AB 14), arguably may become relevant at trial on the merits, but they do not defeat California’s claim as a matter of law. *See, e.g., Magnini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1140 (1991) (consent is a defense to a nuisance claim under California state law, but only where the plaintiff expressly consents to the particular hazardous activity or to the particular resulting nuisance); Restatement (Second) of Torts § 840E cmt. d (1979) (plaintiff’s contribution to a nuisance does not bar recovery if harm is capable of apportionment).

**C. That California Seeks Damages Does Not Require Dismissal.**

There is no “longstanding rule that only equitable remedies are available under federal nuisance law,” as the Automakers assert. AB 49, 51. The only reported cases squarely to address the issue concluded that a plaintiff’s choice to seek damages rather than injunctive relief does not preclude the exercise of

federal jurisdiction over a common law public nuisance claim. *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1019 (7th Cir. 1979); *United States v. Illinois Terminal Ry. Co.*, 501 F. Supp. 18, 21 (D.C. Mo. 1980). In *Evansville*, the Seventh Circuit carefully analyzed the question, and rejected the defendant's contention that a request for equitable relief is a "criterion" for maintaining an interstate pollution claim. *Evansville*, 604 F.2d at 1019 n.32. The Automakers point to no subsequent case that imposes such a requirement.<sup>8/</sup>

Moreover, in *Tennessee Copper*, the Supreme Court implicitly recognized that a state has the right to choose between damages and injunctive relief when bringing a public nuisance action. The Court described a state's decision to request abatement as a "choice," which might be influenced, in part, by "the difficulty of valuing [the state's quasi-sovereign interests] in money." *Id.* This implies that damages are among the choices the state can make, which is consistent with the common understanding that the plaintiff may recover

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8. The Automakers argue that *Evansville* is "outdated." AB 51. While it is now clear that the federal common law for interstate water pollution has been displaced by federal statute, *see Milwaukee II*, 451 U.S. at 1792, no case identified by the Automakers calls into question the Seventh Circuit's statement in *Evansville* that "[t]he remedies appropriate for the violation of duties imposed under the federal common law of water pollution will necessarily depend upon the facts in a particular case." *Evansville*, 604 F.2d at 1019.

damages for a nuisance, even if the plaintiff does not seek to abate the nuisance. *See, e.g.,* 58 Am.Jur.2d *Nuisances* § 258; *see also City of Harrisonville v. Dickey Clay Mfg. Co.*, 289 U.S. 334, 341 n.4 (1933) (listing states that allow damages for permanent nuisances that cause injuries to property, if the prospective damages to property can be estimated with reasonable certainty).

The Automakers rely on a short excerpt from a law review article for the proposition that a state cannot recover damages for a public nuisance. AB 52. The article suggests that the Restatement impliedly supports this view. *Id.* But the Restatement expressly affirms that a party particularly harmed by a nuisance, including the state, may recover damages. Restatement (Second) Torts § 821B cmt. d (1979).

Even if, however, this Court were to hold for the first time that a state cannot recover damages under the federal common law of interstate public nuisance, this would not require dismissal of California's claim. "It need not appear that plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted." *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985); *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (courts have discretion to "mould each decree to the necessities of the particular case").

In any case, damages would appear to be the most appropriate relief based on the facts alleged. The Automakers cannot simply remove their share of atmospheric pollution, and thereby end their contribution to the problem, because emissions will persist in the atmosphere for several centuries and will thus have a lasting effect on climate. ER 40, ¶ 29. Even if all Automakers ceased emitting greenhouse gases today, California would continue to experience harmful effects.<sup>9/</sup>

Thus, California's prayer for damages is wholly appropriate and does not require dismissal.

**D. That Automobiles Are "Lawful" And Can Be Deemed a "Product" Does Not Require Dismissal.**

Finally, the Automakers attempt to distinguish this case from other common law nuisance cases because automobiles are a "lawful product." AB 52-53. First, there is no requirement that a nuisance lies only for that which is unlawful. In *Tennessee Copper*, for example, there was no suggestion that the out-of-state copper smelters were in any way operating illegally, aside from the nuisance they were creating.

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9. The case cited by the Automakers at AB 53, *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292 (2006), is distinguishable because it involved local governments seeking damages for nuisances causing harm to private property that could be abated. *See id.* at 309-311. Here, the nuisance is not readily abatable, and the harm is to California's interests in its natural resources, environment, lands and infrastructure.

Second, there is no support for the Automakers' assertion that the federal common law is unavailable if the offending interstate source is a product, or that the plaintiff must plead the additional element of "affirmative conduct" under these circumstances. AB 53. The very case the Automakers cite establishes that products can constitute nuisances. *Santa Clara*, 137 Cal. App. 4th at 305 (holding that local governments had pleaded nuisance where lead paint caused contamination of private properties). Even if this Court rules that California must plead "affirmative conduct beyond the mere manufacture and distribution of a product," see AB 53, California is entitled to amend the Complaint. Fed. R. Civ. Proc. 15(a)(1)(A); *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

Accordingly, the Court should reject the Automakers' Rule 12(b)(6) arguments or, in the alternative, grant California leave to amend the Complaint.

### CONCLUSION

The Supreme Court made clear in *Tennessee Copper* that where a state claims harm to its quasi-sovereign interests in its resources and its environment, it is entitled to a forum, and to a remedy, in federal court. *Tennessee Copper*, 206 U.S. at 237. These fundamental rights were part of the bargain struck when each state ceded its sovereign right and entered the federal system of government. *Id.* Nothing in any subsequent case suggests that this

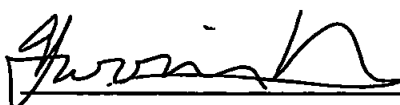
fundamental right can be removed from a state simply because an administrative agency could, in theory and at some future date, create a comprehensive scheme that speaks directly to the state's interests and provides an adequate remedy. California fully supports a comprehensive federal scheme regulating greenhouse gases. But until that comes to pass, the federal courts are empowered to rule on California's public nuisance claim.

Dated: May 1, 2008

Respectfully submitted,

FOR THE PEOPLE OF THE STATE OF  
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**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**

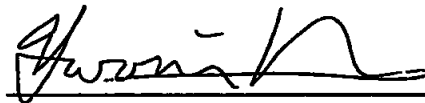
I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,985 words.

Dated: May 1, 2008

Respectfully submitted,

FOR THE PEOPLE OF THE STATE OF  
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**DECLARATION OF SERVICE BY FIRST-CLASS U.S. MAIL**

Case Name: People of the State of California,  
ex rel. Edmund G. Brown Jr., Attorney General  
v. General Motors Corporation, et al.

Case No.: United States Court of Appeals for the Ninth Circuit  
Case No. 07-16908  
[On Appeal from the United States District Court  
for the Northern District of California,  
Case No. 06-cv-05755 MJJ]

I declare:

I am employed in the County of Alameda, Oakland, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, P. O. Box 70550, Oakland, California 94612-0550.

On **May 5, 2008**, I served the attached

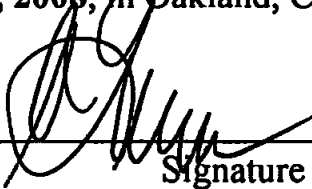
**APPELLANT'S REPLY BRIEF**

by placing one (1) true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the First Class United States Mail at Oakland, California; in a sealed envelope, each addressed as follows:

**(SEE ATTACHED SERVICE LIST)**

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on **May 5, 2008**, in Oakland, California.

ANN LAUBER

  
\_\_\_\_\_  
Signature

SERVICE LIST

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**SERVICE LIST** (continued)

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