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15 NISSAN NORTH AMERICA, INC.

16 UNITED STATES DISTRICT COURT

17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18
19 PEOPLE OF THE STATE OF CALIFORNIA,
ex rel. EDMUND G. BROWN, JR.,
20 ATTORNEY GENERAL,

21 Plaintiff,

22 v.

23 GENERAL MOTORS CORPORATION, a
Delaware Corporation, TOYOTA MOTOR
24 NORTH AMERICA, INC., a California
Corporation, FORD MOTOR COMPANY, a
25 Delaware Corporation, HONDA NORTH
AMERICA, INC., a California Corporation,
26 CHRYSLER MOTORS CORPORATION, a
Delaware Corporation, NISSAN NORTH
27 AMERICA, INC., a California Corporation,

28 Defendants.

CASE NO. C06-05755 MJJ

**DEFENDANTS' SUPPLEMENTAL BRIEF
RE: MASSACHUSETTS V. EPA**

1 On April 2, 2007, the United States Supreme Court issued its decision in *Massachusetts v.*
2 *EPA*, No. 05-1120 (“*Massachusetts*”). As shown below, *Massachusetts* directly supports defendants’
3 arguments in favor of dismissal in this case.

4 **A. Overview Of *Massachusetts*.**

5 In October 1999, a group of private environmental organizations filed a rulemaking petition
6 asking the U.S. Environmental Protection Agency (“EPA”) to regulate CO₂ emissions from new
7 motor vehicles. EPA denied the petition in September 2003, explaining (1) that the agency lacked
8 authority under the Clean Air Act (“CAA”) to regulate such emissions, and (2) that even if the
9 agency possessed the necessary statutory authority it would decline to exercise it. A group of States,
10 local governments, and private organizations (including California) thereafter sought judicial review
11 of EPA’s decision. The D.C. Circuit rejected this challenge in 2005, finding that EPA had properly
12 denied the rulemaking petition, and the Supreme Court granted certiorari.

13 In a 5-4 decision, the Supreme Court reversed. Writing for the majority, Justice Stevens held
14 (1) that the plaintiffs had standing under Article III to challenge EPA’s denial of rulemaking, *see slip*
15 *op.* at 12-23; (2) that EPA possesses authority under the CAA to regulate new motor vehicle CO₂
16 emissions, *see id.* at 24-30; and (3) that EPA failed to provide a “reasoned explanation” for its
17 conclusion that it would not regulate such emissions even if it possessed the authority to do so. *See*
18 *id.* at 30-32.

19 **B. The Supreme Court’s Decision In *Massachusetts* Further Supports Dismissal Of This**
20 **Action.**

21 *Massachusetts* powerfully underscores that the nuisance claims advanced in this case are
22 improper and should be rejected.

23 • Justiciability. The defendants previously established that this lawsuit is nonjusticiable
24 because the claims asserted by the Attorney General raise quintessentially political questions that
25 must be resolved by the Executive and Legislative branches of the federal government. *Massachusetts*
26 supports this position, and in fact expressly confirms that global warming must be addressed in the
27 first instance by federal policymakers (as opposed to the federal courts). The very premise of the
28 Court’s standing analysis was that States should be afforded “special solicitude” when seeking
judicial review of decisions by federal regulatory agencies because the States have “surrendered”

1 their right to engage in certain forms of regulation (including, specifically, the unauthorized
2 regulation of CO₂ emissions) to the federal government:

3 When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts
4 cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot
5 negotiate an emissions treaty with China or India, and in some circumstances the exercise of
6 its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. ***These
7 sovereign prerogatives are now lodged in the Federal Government***, and Congress has
8 ordered EPA to protect Massachusetts (among others) by [regulating air pollutants]. Congress
9 has moreover recognized a concomitant procedural right to challenge the rejection of its
10 rulemaking petition as arbitrary and capricious. Given that procedural right and
11 Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled
12 to special solicitude in our standing analysis.

13 Slip op. at 16 (emphasis added) (citations omitted).

14 This passage makes clear that the Attorney General’s resort to nuisance litigation as a means
15 of addressing global warming is improper. *Massachusetts* teaches two things: first, that the authority
16 to regulate greenhouse gas emissions lies with the federal government; and second, that to the extent
17 any State—including California—is dissatisfied with the direction forged by federal policymakers in
18 addressing global warming, that State has a “procedural right” to advance its interests and views
19 through administrative channels (e.g., filing a rulemaking petition) and, if necessary, to “challenge
20 the rejection of its rulemaking petition as arbitrary and capricious.”¹ This approach not only ensures
21 that key policy choices are made in the first instance by democratically-accountable actors, but
22 provides a robust and clearly-defined framework for obtaining judicial review of those choices (i.e.,
23 application of the traditional “arbitrary and capricious” standard for review of agency action).

24 By contrast, the Attorney General would have this Court make the very policy determinations
25 that the Supreme Court, in *Massachusetts*, indicated should be made (and then explained) by EPA.
26 See slip op. at 31-32 (acknowledging that “we have neither the expertise nor the authority to evaluate
27 these policy judgments” bearing on vehicular CO₂ regulation, and thus holding that “[w]e need not
28 and do not reach the question . . . whether policy concerns can inform EPA’s actions in the event that
it makes [an endangerment] finding. We hold only that EPA must ground its reasons for action or

¹ California may also seek a waiver from EPA under section 209(b) of the CAA, see 42 U.S.C. § 7543(b), for permission to promulgate and enforce its own emissions standards and regulations. In fact, California has sought such a waiver, and its request remains pending.

1 inaction in the statute.”). And the Attorney General still has not attempted to explain how this Court
 2 would possibly go about making those policy choices. (There is, for example, no underlying policy
 3 choice for the Court to evaluate under the “arbitrary and capricious” standard.) In short,
 4 *Massachusetts* provides no support for the resolution of such issues through the guise of tort
 5 litigation.

6 • Displacement: The Attorney General has argued that his federal common law nuisance
 7 claim is not displaced by federal law because “[n]o federal statute speaks directly to the particular
 8 problem of global warming, to greenhouse gas emissions, or to a state’s remedies.” Opp. at 1. At
 9 oral argument, the Attorney General went even further, claiming that this lawsuit was necessary
 10 because “common law tools” provided “the only way that California can have its voice heard.” *See*
 11 Transcript at 48-49.

12 *Massachusetts* directly refutes these claims. The Supreme Court held, among other things,
 13 that “greenhouse gases fit well within the Clean Air Act”; that “EPA has the statutory authority to
 14 regulate the emission of such gases from new motor vehicles”; and that States have an explicit
 15 “procedural right” to challenge the decisions of EPA with respect to such regulation. Slip op. at 16-
 16 17 (citing 42 U.S.C. § 7607(b)(1)), 29-30. Because the Supreme Court concluded that the CAA *does*
 17 authorize federal regulation of greenhouse gas emissions and *does* provide California with a remedy
 18 in the event it is dissatisfied with federal regulatory efforts, it follows that the CAA unquestionably
 19 displaces any federal common law nuisance claim for global warming.²

20 • Preemption: Finally, while the Attorney General has largely abandoned his state-law
 21 nuisance claim, *Massachusetts* supports the defendants’ preemption arguments. The Supreme Court
 22 emphasized that the power to regulate global warming is “lodged in the Federal Government,” having

23
 24 ² *Massachusetts* also undermines the Attorney General’s contention that there exists a claim for
 25 money damages under the federal common law of nuisance. In dissent, Chief Justice Roberts
 26 emphasized that *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), was “a case that . . .
 27 draw[s] a distinction . . . with respect to available remedies.” Slip op. at 3 (Roberts, C.J.,
 28 dissenting). The Chief Justice continued: “The [*Tennessee Copper*] Court explained that . . .
 while a complaining private litigant would have to make do with a *legal* remedy—one ‘for
 pay’—the State was entitled to *equitable* relief.” *See* slip op. at 4 (Roberts, C.J., dissenting)
 (emphases in original). The majority did not quarrel with Chief Justice Roberts’ analysis of
 the remedies available under *Tennessee Copper*, confining its discussion of *Tennessee Copper*
 to standing issues. *See* slip op. at 17 n.17.

