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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14

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

18 Plaintiff,

19 v.

20 **GENERAL MOTORS CORPORATION, a**
Delaware Corporation, TOYOTA MOTOR
NORTH AMERICA, INC., a California
21 **Corporation, FORD MOTOR COMPANY, a**
Delaware Corporation, HONDA NORTH
22 **AMERICA, INC., a California Corporation,**
CHRYSLER MOTORS CORPORATION, a
23 **Delaware Corporation, NISSAN NORTH**
AMERICA, INC., a California Corporation
24 Defendants.
25

Case No.3:06-cv-05755 MJJ

**CALIFORNIA’S MEMORANDUM
OF LAW IN OPPOSITION TO
DEFENDANTS’ MOTION TO
DISMISS**

Date: March 6, 2007
Time: 9:30 a.m.
Judge: Hon. Martin J. Jenkins

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1 **INTRODUCTION**

2 The People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General
3 (“California”), seek recovery of damages resulting from, and related to, global warming in
4 California caused in significant part by defendants’ greenhouse gas emissions. As California has
5 alleged in its complaint, the transportation sector accounts for approximately thirty percent of all
6 carbon dioxide emissions in the United States, and the six defendants in this case account for the
7 vast majority of those emissions. Global warming, right now, is costing California tens of
8 millions of dollars to address significant harm to its infrastructure and natural resources,
9 including flood control system degradation, coastal erosion, snow pack depletion, species
10 impacts, and harm to public health.

11 Defendants contend that this case requires the Court to create a new federal common law
12 claim of interstate environmental public nuisance that would raise judicially unmanageable
13 “political questions.” But defendants’ contention ignores a century of precedent beginning with
14 *Georgia v. Tennessee Copper Company*, 206 U.S. 230, 231 (1907) in which federal courts have
15 routinely recognized and adjudicated interstate nuisance claims, applying traditional legal tools
16 to reach principled, rational rulings.

17 The Supreme Court has determined that a federal common law claim of nuisance to redress
18 claims related to harmful air emissions exists and can be adjudicated. Thus, the question here is
19 whether an intervening federal statute has displaced the common law. No federal statute speaks
20 directly to the particular problem of global warming, to greenhouse gas emissions, or to a state’s
21 remedies. In the absence of such comprehensive federal legislation, federal common law
22 applies, and California has a right to proceed.

23 **STANDARD OF REVIEW**

24 **Lack Of Subject Matter Jurisdiction**

25 Federal Rules of Civil Procedure, Rule 12(b)(1) governs defendants’ contentions that this
26 case presents a nonjusticiable political question and that the federal common law of nuisance has
27 been displaced. A Rule 12(b)(1) motion may be either “facial, confining the inquiry to the
28 allegations in the complaint, or factual, permitting the court to look beyond the complaint.”

1 *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). If a court elects to resolve a fact-based
2 Rule 12(b)(1) motion without an evidentiary hearing, it must accept the factual allegations of the
3 complaint as true. *McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001).

4 In this case, the jurisdictional questions presented are legal matters that the Court must
5 answer by examining the governing case law and statutes. Accordingly, the Court need not
6 resolve any disputed factual issues to determine whether it possesses subject matter jurisdiction.

7 **Failure To State A Claim**

8 Motions to dismiss for failure to state a claim under Federal Rules of Civil Procedure, Rule
9 12(b)(6) are viewed with disfavor, and, accordingly, dismissals for failure to state a claim are
10 “rarely granted.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation
11 omitted). In deciding a motion to dismiss, the court must accept as true the allegations of the
12 complaint and draw reasonable inferences in the plaintiff’s favor. *Doe v. United States*, 419 F.3d
13 1058, 1062 (9th Cir. 2005). Inquiry into the adequacy of the evidence is improper. *Enesco Corp.*
14 *v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). A court may not dismiss a complaint
15 “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his
16 claims which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

17 **FACTS**

18 The following facts, as set forth in California’s complaint, establish California’s nuisance
19 claim and this Court’s subject matter jurisdiction.

20 **Defendants’ Products Emit Greenhouse Gases**

21 The six defendant automakers produce vehicles that emit over 289 million metric tons of
22 carbon dioxide, the primary global warming or greenhouse gas, in the United States. (Second
23 Amended Complaint for Damages (“Compl.”) 9, ¶ 40.) These emissions constitute over twenty
24 percent of human-generated carbon dioxide emissions in the United States. (*Id.*) Defendants’
25 carbon dioxide emissions account for over thirty percent of such emissions in California. (*Id.*)

26 **Greenhouse Gases Cause Global Warming**

27 Human-induced emissions of carbon dioxide, such as those from motor vehicles, are
28 causing global warming. (Compl. at 5, ¶ 19.) There is a scientific consensus that global

1 warming has begun, and that emissions from fossil fuel combustion, primarily carbon dioxide,
2 cause most of the global warming. (*Id.*, ¶ 23.) The Intergovernmental Panel on Climate Change,
3 a collaborative scientific effort among the nations of the world, concluded in its 2001 report that
4 “most of the observed warming over the last 50 years is likely to have been due to the increase in
5 greenhouse gas concentrations.” (*Id.* at 5-6, ¶ 24.) In 2005, the National Academies of Science
6 for Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, the United Kingdom,
7 and the United States jointly concluded that “there is now strong evidence that significant global
8 warming is occurring.” (*Id.* at 6, ¶ 25.)

9 Carbon dioxide is the most significant greenhouse gas emitted by human activity. (*Compl.*
10 at 6, ¶ 27.) Energy from the sun heats the Earth, which re-radiates the energy into the Earth’s
11 atmosphere. Carbon dioxide traps heat in the Earth’s atmosphere that would otherwise escape
12 into space. (*Id.*, ¶ 28.) Carbon dioxide levels have increased thirty-five percent since the
13 beginning of the industrial revolution in the 1880s, with more than one-third of that increase
14 occurring since 1980. (*Id.* at 7, ¶ 30.) Currently, the level of carbon dioxide in the atmosphere is
15 higher than it has been at any time in the last 650,000 years. (*Id.*) The global average surface
16 temperature of the Earth increased about 1.26 degrees Fahrenheit between the late 1800s and
17 2000, with over one degree of that warming occurring in the last three decades. (*Id.*, ¶ 32.) The
18 hottest years on record, since temperature records began in 1861, are, in order, 2005, 1998, 2002
19 (tied), and 2003 (tied). (*Id.*, ¶ 33.) Scientists have determined that there is a causal connection
20 between emissions of greenhouse gases and rising temperatures. (*Id.* at 8, ¶ 35.)

21 **Global Warming Is Real And Causes Substantial Harm**

22 Global warming causes sea levels to rise through thermal expansion of ocean water and
23 melting of land-based snow and ice. Satellite measurements of the oceans have detected an
24 acceleration of sea level rise consistent with the fundamental physics of a warming world.
25 (*Compl.* at 8, ¶ 36.) Other clear indicators of global warming include rapid and severe climate
26 change in the Arctic (such as the thawing of permafrost, later freezing and earlier breakup of ice
27 on rivers and lakes, and the retreat of mountain glaciers); melting and breakup of ice sheets on
28 Greenland and Antarctica; the retreat of mountain glaciers worldwide; increased ocean

1 temperatures worldwide; bleaching of coral reefs from increased ocean temperatures; and
2 changes in plant and animal ranges towards higher latitudes and altitudes all over the world.
3 (*Id.* at 8-9, ¶¶ 37, 38, 39.)

4 **Global Warming Is Causing, And Will Continue To Cause, Harm To California**

5 California has spent millions of dollars to study, plan for, monitor, and respond to impacts
6 already caused by global warming and impacts likely or certain to occur. (*Compl.* at 10, ¶ 44.)
7 In California, the winter average temperature in the Sierra Nevada region has risen by almost
8 four degrees Fahrenheit during the second half of the twentieth century. As a result, snow pack
9 in the Sierra has been reduced. (*Id.* at 10, ¶ 47.) The Sierra snow pack serves as a vital water
10 storage and supply system for California, supplying approximately thirty-five percent of the
11 State's water. The State is spending substantial money studying, planning and responding to
12 these impacts. (*Id.* at 10, ¶ 48.)

13 As a result of increased temperatures, the Sierra snow pack now melts earlier in the spring,
14 resulting in increased risk of flooding. For example, Folsom Dam on the American River was
15 designed in 1950 based on historic flow records to protect against a 500-year flood. Now,
16 because of the increased snow melt, there have been five floods on the American River larger
17 than the pre-1950 recorded maximum flood, and the dam can now protect against only a fifty-
18 year flood. (*Id.* at 11, ¶ 51.)

19 Rising sea levels are increasing erosion along California's approximately 1,075 miles of
20 coastline. The State has expended millions of dollars responding to erosion at State beaches and
21 the impacts of storm surges, and has suffered damages from beach closures and natural resource
22 degradation. (*Compl.* at 11, ¶ 52.) The State is also addressing the threat, resulting from sea
23 level rise, of salt infiltration to the fresh water of the San Francisco Bay-Delta, by, for example,
24 reinforcing and increasing the height of levees. (*Id.* at 11-12, ¶ 54.)

25 Global warming is also having severe impacts on the health and well-being of California's
26 residents and the State's health system, through the increase in the frequency, duration, and
27 intensity of extreme heat events. (*Compl.* at 12, ¶ 55.) Other impacts of global warming include
28 increased risk and intensity of wildfires, loss of moisture due to earlier snow pack melt, and

1 change in the ocean ecology. All of these impacts are the subject of State study and planning,
2 and have cost California millions of dollars. (*Id.* at 12, ¶ 56.)

3 ARGUMENT

4 **I. CALIFORNIA’S NUISANCE CLAIM PRESENTS A COGNIZABLE AND 5 JUSTICIABLE FEDERAL QUESTION**

6 Defendants advance three primary arguments in support of their motion to dismiss
7 California’s federal claim for common law nuisance. Defendants argue that (1) there is no
8 applicable federal common law, and the Court should not create a common law federal cause of
9 action for public nuisance in the form of global warming; (2) any applicable federal common law
10 has been displaced by the Energy Policy and Conservation Act (“EPCA”), 42 U.S.C. § 6201, *et*
11 *seq.*, and the Clean Air Act, 42 U.S.C. § 7401, *et seq.*; and (3) even assuming there is a federal
12 common law nuisance claim, it would raise nonjusticiable “political questions” that federal
13 courts cannot address.

14 As set forth below, the Supreme Court has long recognized a federal cause of action for the
15 type of interstate, environmental public nuisance California alleges. Congress has not enacted
16 anything that approaches the kind of comprehensive statute speaking directly to the particular
17 problem of global warming that would be required to displace the federal common law. The
18 extensive history of federal common law public nuisance underscores that adjudicating interstate
19 public nuisance claims, even those that are complex, falls squarely within the competence of
20 federal courts. And nothing in this case interferes with political decisions or policies existing
21 under any law, treaty, or agreement. For these reasons, the Court should deny defendants’
22 motion and allow California’s claim to proceed.

23 **A. More Than A Century Of Federal Precedent Recognizes Federal Common Law 24 Claims For Interstate Public Nuisances**

25 According to the defendants, “there is no federal cause of action to sue for global
26 warming,” requiring this Court to create one “out of whole cloth.” (Defendants’ Notice of
27 Motion and Motion to Dismiss, Memorandum of Points and Authorities (“Def. Mem.”) at 12,
28 15.) In fact, the Supreme Court has long recognized a federal cause of action for nuisances that
cross state lines. *See, e.g., Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (water pollution);

1 *Tennessee Copper*, 206 U.S. at 231 (air pollution). One hundred years ago the State of Georgia
2 sued various companies to enjoin them “from discharging noxious gas from their works in
3 Tennessee over [Georgia’s] territory.” *Tennessee Copper*, 206 U.S. at 231. Justice Holmes,
4 writing for the Court, determined that a federal court was the proper forum for Georgia’s claim:

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

10 *Id.* at 237. Indeed, federal courts have a “duty of providing a remedy” in interstate nuisance
11 suits. *Missouri v. Illinois*, 180 U.S. at 241. As the Supreme Court more recently reaffirmed,
12 “[w]hen we deal with air and water in their ambient or interstate aspects, there is federal
13 common law.” *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (“*Milwaukee I*”); *see also*
14 *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 487-488 (1987).

15 The federal common law of public nuisance encompasses a multitude of environmental and
16 resource-related wrongs committed against a state and its citizens. *See, e.g. Milwaukee I*, 406
17 U.S. at 103 (water pollution); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (ocean
18 dumping); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution); *North Dakota v.*
19 *Minnesota*, 263 U.S. 365 (1923) (flooding); *Tennessee Copper*, 206 U.S. at 238-239 (air
20 pollution); *Missouri v. Illinois*, 200 U.S. 496 (1906) (water pollution); *Missouri v. Illinois*, 180
21 U.S. at 241 (water pollution); *Wisconsin v. City of Duluth*, 96 U.S. 379 (1877) (drying of a
22 river); *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851) (interference
23 with river navigation); *Mayor, etc. of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91,
24 97 (1838) (river siltation).

25 Defendants correctly note that federal common law exists only in “few and restricted”
26 instances (Defs. Mem. at 13), citing non-environmental cases such as *Texas Industries, Inc. v.*
27 *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). But since one of those instances in which
28 common law exists is interstate nuisance, defendants’ citations do not advance their argument.
Indeed, in *Texas Industries*, the Court acknowledged that interstate water pollution disputes
“involve especial federal concerns to which federal common law applies.” 451 U.S. at 641 n.13.

1 Defendants also cite *National Audubon Society v. Dep't of Water*, 869 F.2d 1196 (9th Cir. 1988),
2 in which the Ninth Circuit declined to apply federal common law to the plaintiff's claim that lake
3 bed dust created a public nuisance. In *Audubon*, however, the court held that federal common
4 law did not apply only because the air pollution was from a source "wholly within the State of
5 California." *Id.* at 1198. In contrast, in this case, the emissions from defendants' automobiles
6 cross state lines. (Compl. at 13, ¶ 60.)

7 In sum, this Court does not need to create a new "cause of action to sue for global
8 warming," as defendants claim. Federal common law already exists to remedy the type of
9 interstate pollution that California has alleged in the complaint.^{1/}

10 **B. Congressional Action Has Not Displaced California's Claim That Defendants'
11 Contributions To Global Warming Are A Public Nuisance Under Federal Law**

12 The Supreme Court has established that federal common law applies to a cause of action for
13 interstate air pollution. Accordingly, the question presented to this Court is whether Congress
14 has displaced the common law by subsequent statute. Displacement is not "automatic" simply
15 because Congress has enacted a statute that arguably touches on the issue encompassed by the
16 federal common law. *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315 n.8 (1981)
17 ("*Milwaukee II*"). "[S]tatutes which invade the common law . . . are to be read with a
18 presumption favoring the retention of long-established and familiar principles, except when a
19 statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993)
20 (quotation omitted) (alteration in original). Because no comprehensive federal statute directly
21 addresses greenhouse gas emissions or global warming, California's federal common law claim

23 1. In a footnote, defendants concede that the Supreme Court has recognized a federal
24 common law nuisance action for interstate pollution, but then argue that it is limited to nuisances
25 of a "simple type." (Def. Mem. at 14 n.6 (citing *Milwaukee v. Illinois and Michigan*, 451 U.S.
26 304, 315 n.8 (1981) ("*Milwaukee II*").) Defendants imply that federal courts cannot decide
27 complex nuisance claims. (See Def. Mem. at p. 14 n.6.) The language of *Milwaukee II* cannot
28 be stretched so far. There is absolutely no authority that distinguishes between "simple" and
"complex" nuisances, or holds that federal common law applies only to the former. Read
reasonably, "simple" as used by the Court means merely that nuisance based on pollution is a
type of claim that is ordinary and common in the law.

1 is not displaced.^{2/}

2 **1. To Displace Federal Common Law, Congress Must Pass A Comprehensive**
3 **Statute That Speaks Directly To The Particular Question Formerly**
4 **Governed By Federal Common Law**

4 To displace the federal common law, Congress must enact a “comprehensive” statutory
5 solution that “speaks directly” to the “particular issue” otherwise governed by the common law.
6 *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-237
7 (1985) (summarizing *Milwaukee II*, 451 U.S. at 313-315). The starting point for determining the
8 substance of this test is the Supreme Court’s pair of decisions in *Milwaukee I* and *Milwaukee II*.

9 In *Milwaukee I* (1972), Illinois brought suit in federal court for abatement of discharges of
10 sewage into Lake Michigan from out-of-state sources. *Milwaukee I*, 406 U.S. at 93. The Court,
11 based on the longstanding case law, recognized a federal common law cause of action for
12 nuisance claims involving “air and water in their ambient or interstate aspects[.]” *Id.* at 103.
13 “Until the field has been made the subject of comprehensive legislation or authorized
14 administrative standards, only a federal common law basis can provide an adequate means for
15 dealing with such claims as alleged federal rights.” *Id.* at 107 n.9 (quotation omitted). While by
16 1972, Congress had enacted environmental protection statutes such as the Clean Water Act, the
17 Court held that no federal statute then in effect was sufficient to displace the federal common
18 law of nuisance as applied to interstate water pollution, and, therefore, Illinois could proceed
19 with its claim. *Id.* at 102-103, 106-107.

20 Nine years later, in *Milwaukee II* (1981), the Supreme Court considered the issue a second
21 time. In the intervening years, Congress had engaged in a “total restructuring” and “complete
22 rewriting” of the Clean Water Act through its 1972 Amendments. *Milwaukee II*, 451 U.S. at
23 317. In the Court’s words, the amendments established an “all-encompassing program of water

25 2. Even though courts on occasion have used the term “preemption” to describe it, the
26 test for displacement of federal common law by federal statute (a separation of powers analysis)
27 is not the same as the test for federal preemption of state laws (a Supremacy Clause analysis).
28 *Milwaukee II*, 451 U.S. at 316.

1 pollution regulation.” *Id.* at 318. Finding no basis “to impose more stringent limitations than
2 those imposed under the regulatory regime[,]” the Court held that Congress had displaced the
3 plaintiffs’ common law nuisance claim for interstate water pollution. *Id.* at 317, 320.

4 The Court in *Milwaukee II* began with the “assumption that it is for Congress, not federal
5 courts, to articulate the appropriate standards to be applied in a matter of federal law.”
6 *Milwaukee II*, 451 U.S. at 316 (quotation omitted). But, as Justice Blackmun noted, “the fact
7 that Congress can properly check the courts’ exercise of federal common law does not mean that
8 it has done so in a specific case. . . . To say that Congress ‘has spoken’ . . . is only to begin the
9 inquiry; the critical question is what Congress has said.” *Id.* at 339 n.8 (Blackmun, J.,
10 dissenting).

11 The fact that a statute covers the same general subject matter as a federal nuisance action is
12 not sufficient to displace federal common law. In *Milwaukee I*, the Court noted that Congress
13 had passed numerous laws “touching” interstate waters, such as the Clean Water Act and, in
14 addition, the Rivers and Harbors Act, the National Environmental Policy Act, the Fish and
15 Wildlife Act, and the Fish and Wildlife Coordination Act, without displacing federal common
16 law. *Milwaukee I*, 406 U.S. at 101-102. Instead, Congress must “establish a *comprehensive*
17 long-range policy for the elimination of” the particular problem at issue. *Milwaukee II*, 451 U.S.
18 at 318 (quotation omitted, emphasis in original). In *Milwaukee II*, the Court found that the intent
19 of the 1972 Clean Water Act Amendments “was clearly to establish an all-encompassing
20 program of water pollution regulation.” *Id.* (quotation omitted).

21 A significant indication that Congress has displaced federal common law through
22 comprehensive legislation is the presence of an all-encompassing permitting scheme. The Court
23 in *Milwaukee II* noted that after the 1972 Amendments, “[e]very point source discharge is
24 prohibited unless covered by a permit, which directly subjects the discharger to the
25 administrative apparatus established by Congress to achieve its goals.” *Milwaukee II*, 451 U.S.
26 at 318 (quotation omitted, emphasis in original); *see also Middlesex County Sewerage Auth. v.*
27 *Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 11-12 (1981) (holding that Clean Water Act and Marine
28 Protection, Research, and Sanctuaries Act, both of which require permits for discharges,

1 displaced federal common law nuisance for discharges to ocean).

2 In addition to being comprehensive, a displacing federal statute must speak directly to the
3 particular question otherwise answered by federal common law. *Oneida*, 470 U.S. at 236-237;
4 *Milwaukee II*, 451 U.S. at 313-315. In *Milwaukee II*, the Court held that Congress in the
5 amended Clean Water Act had spoken directly to the subject matter of effluent and sewerage
6 overflows at issue because defendants’ permits contained “specific effluent limitations”;
7 “explicitly address[ed] the problem of overflows”; and contained requirements for defendants to
8 come into compliance. *Id.* at 320-321. The Court thus concluded, after the 1972 Amendments
9 to the Clean Water Act, “[t]here is no ‘interstice’ here to be filled by federal common law[.]” *Id.*
10 at 323.

11 To speak “directly to the question” and displace federal common law, a federal statute must
12 provide some recourse for the problem at issue in the federal common law claim. In *Milwaukee*
13 *II*, the Court found it relevant that the amended Clean Water Act allowed Illinois to participate in
14 the permit issuing process, so it was not left without a federal forum in which to protect its
15 interests in clean water. *Milwaukee II*, 451 U.S. 325; *see also Int’l Paper Co. v. Ouellette*, 479
16 U.S. 481, 490-491, 498 n.18 (1987) (noting that state can apply to federal agency to disapprove
17 Clean Water Act permit based on undue impact and can bring a citizen suit action to enforce
18 permit after issuance); *cf.*, *Oneida*, 470 U.S. at 237 (holding that Nonintercourse Act did “not
19 speak directly to the question of remedies for unlawful conveyances of Indian land”; federal
20 common law claim for unlawful possession and damages not displaced); *United States v. Texas*,
21 507 U.S. at 534-535 (holding that Debt Collection Act did “not speak directly” to the federal
22 government’s right to collect pre-judgment interest on debts owed to it by a state; federal
23 common law claim not displaced).

24 As *Milwaukee I* and *Milwaukee II* demonstrate, while Congress has the authority to displace
25 California’s federal common law claim that interstate pollution from automobile emissions
26 contributes to a public nuisance, it can do so only through all-encompassing, comprehensive
27 legislation that speaks directly to greenhouse gas emissions and global warming. Because there
28 is no such legislation, there is no displacement of California’s claim.

1 **2. Neither The Clean Air Act Nor The Energy Policy and Conservation Act**
2 **Displaces California’s Common Law Action Seeking Damages For The**
3 **Nuisance Of Global Warming**

4 Defendants contend that California’s federal common law claim has been displaced. (Def.
5 Mem. at 15-19.) The federal government, however, has established no restrictions of any kind
6 on emissions of carbon dioxide or other greenhouse gases in any form under any statute or
7 administrative standard, and has no affirmative plan to address global warming. In fact, the
8 agency that one reasonably would expect to have taken the lead on control of greenhouse gas
9 emissions, the United States Environmental Protection Agency (“U.S. EPA”), states that it is
10 precluded from regulating greenhouse gas emissions under the Clean Air Act. *See* Control of
11 Emissions From New Highway Vehicles and Engines (“Control of Emissions”), 68 Fed. Reg.
12 52,922-59,933 (Sept. 8, 2003).

13 Defendants attempt to cobble together a “comprehensive program” from passing references
14 to the Clean Air Act and EPCA. (Def. Mem. at 15-19.) This Court must, however, apply the test
15 set forth in *Milwaukee II* to determine whether either of these Acts constitutes the type of
16 comprehensive statute that speaks directly to the particular issue at the heart of California’s
17 nuisance claim. On examination, neither statute serves to displace California’s claim.

18 **a. The Clean Air Act Is Not Comprehensive, And U.S. EPA Has Stated**
19 **That It Cannot Address The Issue Of Global Warming**

20 In their displacement argument, defendants mention the Clean Air Act only in passing and,
21 in a footnote, refer the Court to a Clean Air Act provision that preempts certain state law. (Def.
22 Mem. at 16 n.7.) But defendants say absolutely nothing about any effect on federal common
23 law. (*See id.*) The Clean Air Act does not displace California’s federal common law nuisance
24 claim for two important reasons.

25 First, U.S. EPA, the agency charged with implementing the Clean Air Act, has taken the
26 position that it cannot regulate carbon dioxide emissions. “In a memorandum to the Acting
27 Administrator dated August 29, 2003, the General Counsel concluded that the Clean Air Act
28 does not authorize U.S. EPA to regulate for global climate change purposes, and accordingly that
 carbon dioxide and other GHGs cannot be considered ‘air pollutants’ subject to the Clean Air

1 Act’s regulatory provisions for any contribution they may make to global climate change.”
2 Control of Emissions, 68 Fed. Reg. at 52,925.^{3/} U.S. EPA’s interpretation precludes a finding of
3 displacement.

4 Second, even without U.S. EPA’s interpretation, the Clean Air Act is not a
5 “comprehensive” statute that addresses all sources of air pollution. The Clean Air Act thus
6 differs significantly from the post-1972 amended Clean Water Act, which the Supreme Court in
7 *Milwaukee II* found sufficiently “comprehensive” to displace water pollution nuisance claims.
8 In brief, unlike the amended Clean Water Act, the Clean Air Act does not regulate emissions
9 from every source and does not contain a comprehensive permitting program. *See Audubon*, 869
10 F.2d at 1212-1213 (Reinhardt, J., dissenting from majority’s holding, reaching displacement
11 issue, and reasoning that Clean Air Act does not displace federal common law nuisance claims
12 based on air pollution); *accord New England Legal Found. v. Costle*, 666 F.2d 30, 32 n.2 (2d
13 Cir. 1981). The Clean Air Act, like the pre-amendment Clean Water Act, relies on national
14 standards that are implemented through state plans, rather than the source-specific permit system
15 of the amended Clean Water Act. *Id.* Even in the Clean Air Act’s mobile source provisions,
16 “the Act does not use a comprehensive permit system like the one that applies to water
17 pollution.” *Id.* at 1213 n.14 (citing 42 U.S.C. §§ 7411, 7521 (1982)).^{4/}

18 For these reasons, the Clean Air Act – the federal statute that would be the most natural
19 source for a comprehensive scheme displacing federal common law claims based on air pollution
20 – does not displace California’s claim.

21 ///

23 3. California has joined other states challenging U.S. EPA’s interpretation of the Clean
24 Air Act in *Massachusetts v. EPA*, No. 05-1120 (U.S. Supreme Court, 2006).

25 4. Two out-of-circuit district court cases that have found that the Clean Air Act
26 displaces federal common law claims for nuisance have done so largely without analysis. In
27 *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982), the court with virtually no
28 analysis simply states that federal common law is displaced. *Reeger v. Mill Service, Inc.*, 593 F.
Supp. 360, 363 (W.D. Pa. 1984), is similarly devoid of any substantial statutory analysis. These
cases are not consistent with *Milwaukee I* and *Milwaukee II*, which establish that there is no
automatic displacement of federal common law.

1 **b. The Energy Policy And Conservation Act Is An Energy Conservation**
2 **Statute, Does Not Address Greenhouse Gas Emissions Or Global**
3 **Warming, And Provides No Relevant Remedy**

4 Because the Clean Air Act falls short as support for defendants’ displacement argument,
5 defendants cite EPCA as the centerpiece of what they describe as the federal government’s
6 “detailed, multifaceted approach to address the issue of global warming.” (Def. Mem. at 15.)
7 But by no stretch is EPCA a comprehensive statute that speaks directly to the particular issue
8 behind California’s public nuisance claim – damages caused by interstate greenhouse gas
9 pollution.

10 Congress did not intend EPCA to be a comprehensive environmental or global warming
11 statute. The purpose of EPCA, enacted in 1975 in the wake of the Arab oil embargo, is to
12 address “serious long-term economic and national security problems that continuing dependence
13 on foreign sources of energy would create.” *Natural Res. Def. Council, Inc. v. Herrington*, 768
14 F.2d 1355, 1364 (D.C. Cir. 1985); *see also* 42 U.S.C. § 6201 (setting forth purposes). Congress’
15 intent in passing EPCA was to increase the domestic supply of petroleum, conserve energy, and
16 decrease the nation’s vulnerability to interruptions in petroleum imports. *See* H.R. Rep. No. 94-
17 340, at 1 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1763. Moreover, EPCA does not in any
18 way regulate or “permit” the emissions of carbon dioxide or greenhouse gases. Instead, EPCA,
19 through the Department of Transportation, establishes fleet-wide average fuel economy
20 standards for new vehicles, commonly called CAFE (“corporate average fuel economy”)
21 standards. 49 U.S.C. § 39904(a)(1)(B).

22 Defendants contend that because EPCA preempts states from setting fuel economy
23 standards (*see* 49 U.S.C. § 32919), and because fuel economy standards and carbon dioxide
24 emission standards are, in defendants’ view, “functionally equivalent” (Def. Mem. at 17), EPCA
25 displaces California’s federal common law public nuisance action. There are two primary
26 defects in this argument. First, California brings its nuisance claim under federal, not state law.
27 Therefore, a provision that preempts state law is not relevant to the question of whether a federal
28 common law nuisance claim has been displaced. *See Milwaukee II*, 451 U.S. at 316.

 Second, and more fundamentally, defendants’ argument is relevant to the displacement

1 analysis only if fuel economy standards are so inextricable from the control of greenhouse gases
2 that a statute directly addressing fuel economy standards necessarily also directly and
3 comprehensively addresses global warming. The fallacy in this argument is apparent in the
4 answer to the question: Is increasing mileage standards in gas-burning passenger vehicles –
5 which is the approach Congress adopted in EPCA to improve fuel conservation – the only way to
6 address global warming? The answer to this question clearly is “no.” If Congress were to pass a
7 statute intended comprehensively to address global warming, it could, for example, require the
8 use of alternative fuels, the development and use of new technologies to capture or sequester
9 emissions, and the reduction of emissions upstream in the manufacturing process, and utilize
10 various other strategies to reduce greenhouse gas emissions. Therefore, applying the
11 displacement test of *Milwaukee II*, while EPCA’s conservation of petroleum-based fuels may
12 have indirect benefits in the fight against global warming, EPCA does not speak directly to the
13 particular environmental problem of global warming.^{5/}

14 Moreover, there is no provision in EPCA that affords any kind of remedy related in any way
15 to global warming. *See Oneida*, 470 U.S. at 238 (stating rule that to displace federal common
16 law, Congress must regulate the conduct at issue and provide a remedy). While defendants cite
17 an enforcement provision in EPCA imposing civil penalties for failure to meet CAFE standards,
18 (Defs. Mem. at 16 (citing 49 U.S.C. § 32912)), there is no cause of action under EPCA that
19 California or any other person or entity could bring to address harm caused to natural resources
20 as the result of emissions of greenhouse gases, and certainly nothing under EPCA that provides
21 for damages. The remedy California seeks is not within the precise scope of remedies prescribed
22 by Congress in EPCA, which is further evidence that California’s claim is not displaced by
23 EPCA. *See Milwaukee I*, 406 U.S. at 103; *Oneida*, 470 U.S. at 238.

24 ///

25
26
27 5. California objects to defendants’ citations to the views of federal agencies, as set forth
28 in the Federal Register, in support of their “functional equivalency” argument. (*See California’s*
Objection to Def. Req. for Judicial Notice.) At a minimum, defendants’ argument raises a
disputed factual issue that cannot be addressed in a motion to dismiss.

1 **3. Since There is No Existing Federal Detailed, Multifaceted Statutory**
2 **Approach To Address The Issue Of Global Warming, Federal Common Law**
3 **Continues To Exist To Address This Interstate Nuisance**

4 Defendants present no comprehensive statute or scheme, and fail to deliver the promised
5 detailed, multifaceted approach addressing the issue of global warming. Neither the Clean Air
6 Act nor EPCA provides any limits of any kind on any greenhouse gas emissions, creates any
7 permitting process, purports to address greenhouse gases or global warming in any direct
8 manner, or provides any remedy for harms of any kind caused by global warming. Because
9 these circumstances do not meet the *Milwaukee II* requirements for displacement, California’s
10 federal claim is not displaced.

11 **C. California’s Federal Common Law Nuisance Claim Presents A Justiciable**
12 **Controversy That, Although Complex, Is The Kind Of Case That Courts**
13 **Routinely Resolve**

14 Defendants contend that California’s federal common law nuisance claim requires this
15 Court to make policy determinations; would interfere with foreign affairs; and lacks judicially
16 discoverable and manageable standards. (Def. Mem. at 5-12.) All of these arguments are
17 challenges to the justiciability of California’s federal claim under the “political question”
18 doctrine of *Baker v. Carr*, 369 U.S. 186 (1962).^{6/}

19 The fact that global warming has political and international aspects does not convert the
20 issues presented in this tort damages case into nonjusticiable political questions. California’s
21 federal common law claim for public nuisance fits within a long line of interstate nuisance cases
22 brought by states in federal court and is well within this Court’s ability to adjudicate. Nothing in
23 this case will interfere with the limited actions related to global warming taken by the political

24 6. Defendants argue that this case would interfere with foreign affairs under a separate
25 heading, citing cases where state laws were challenged, thereby suggesting that the analysis is
26 different from the political question justiciability analysis. In fact, where the claim at issue is a
27 federal law-based claim, rather than a state law-based claim, the analysis of interference with
28 foreign policy or foreign commerce properly focuses on the appropriate separation of powers
 between the federal branches applying the *Baker* factors. *Alperin v. Vatican Bank*, 410 F.3d 532,
 549-550 (9th Cir. 2005) (addressing the “foreign affairs” argument under the first *Baker* prong);
 see also *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 229 (1986) (applying *Baker*
 factors to determine that claim against the Secretary of Commerce related to the enforcement of
 international whaling quotas was justiciable).

1 branches, or prevent those branches from taking action in the future.^{7/}

2 **1. Legal Standard: The Rule Of *Baker v. Carr* Governs Justiciability**

3 Because of the judiciary’s important role in the tripartite federal system, the Supreme Court
4 and the Ninth Circuit have roundly rejected a broad or simplistic application of the political
5 question doctrine. In *Baker*, the Supreme Court warned that it is “error to suppose that every
6 case or controversy which touches foreign relations lies beyond judicial cognizance.” *Baker*,
7 369 U.S. at 211. Similarly, the Ninth Circuit has emphasized that “[s]imply because . . . the case
8 arises out of a ‘politically charged’ context does not transform the [claims] into political
9 questions.” *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005), *cert. denied*, *Order of*
10 *Friars Minor v. Alperin*, __ U.S. __, 126 S.Ct. 1141 (2006). “The justiciability inquiry is limited
11 to ‘political questions,’ not . . . ‘political cases,’ and should be made on a ‘case-by-case’ basis.”
12 *Alperin*, 410 F.3d at 537 (quoting *Baker*, 369 U.S. at 211, citations omitted).

13 In making its case-by-case determination of justiciability, a court must consider the six
14 formulations set forth in *Baker*. *Alperin*, 410 F.3d at 544. As summarized in *Alperin*, these
15 formulations are as follows:

16 [1] a textually demonstrable constitutional commitment of the issue to a coordinate
17 political department; or [2] a lack of judicially discoverable and manageable standards
18 for resolving it; or [3] the impossibility of deciding without an initial policy
19 determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a
20 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.

21 *Id.* The formulations are “‘probably listed in descending order of both importance and
22 certainty.’” *Alperin*, 410 F.3d at 545 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)
23 (plurality opinion)). “Dismissal on the basis of the political question doctrine is appropriate only

24
25 7. As defendants note, in the *American Electric Power Company* case, the district court
26 dismissed the plaintiff states’ common law nuisance claim against power companies finding that
27 the claim for injunctive relief raised nonjusticiable political questions. *Connecticut v. Am. Elec.*
28 *Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). Appeal of the district court decision is
pending before the Second Circuit. As California has argued to the Second Circuit, the district
court erred by failing to follow controlling precedent, including *Baker v. Carr*. This case, unlike
American Electric Power Company, seeks only damages.

1 if one of these formulations is ‘inextricable’ from the case.” *Alperin*, 410 F.3d at 544 (citing
2 *Baker*, 369 U.S. at 217).

3 Since none of the *Baker* factors is inextricable from California’s federal common law claim,
4 the Court should reject defendants’ argument that this case is nonjusticiable.^{8/}

5 **2. None Of The *Baker v. Carr* Factors Is Inextricable From California’s Claim**

6 **a. The Constitution Has Not Committed Adjudication of California’s
7 Claim To Congress Or The Executive Branch**

8 As set forth in the first *Baker* factor, a political question exists where the Constitution
9 expressly dictates that the decision is committed to the political branches to the exclusion of the
10 federal judiciary. In *Nixon v. United States*, 506 U.S. 224 (1993), for example, the Court held
11 that a federal judge’s claim that he had been improperly impeached presented a political question
12 where the constitution conferred on the Senate “sole” authority to “try all Impeachments.” *Id.* at
13 229-231. This case stands in marked contrast to cases such as *Nixon*. As discussed below, there
14 is no “textually demonstrable constitutional commitment” of California’s federal common law
15 nuisance claim to a coordinate branch. Rather, the responsibility to adjudicate such claims falls
16 squarely within the federal courts’ core powers.

17 **(1) Adjudication Of Tort Claims, Including Interstate Environmental
18 Nuisance Claims, Is Committed To The Federal Judiciary**

19 As *Tennessee Copper* and similar cases establish, adjudication of nuisance claims is well
20 within a federal court’s power. That a case may, arguably, have larger implications does not
21 remove it from the courts’ traditionally recognized jurisdiction. In *Alperin*, for example, the
22 Ninth Circuit found that the claims of Holocaust survivors against the Vatican Bank for
23 conversion, unjust enrichment, restitution and accounting related to wartime confiscation of
24 property were, at bottom, “garden variety” legal and equitable claims. *Alperin*, 410 F.3d at 548;
25 *see also Klinghoffer v. S.N.C. Achille Lauro, etc.*, 937 F.2d 44, 49 (2d Cir. 1991) (holding that
26 for ordinary tort suits, “the department to whom [the] issue has been ‘constitutionally

27 8. Defendants argue that the second and third *Baker* factors bar this case. (Def. Mem. at
28 9-11.) Because the factors are related, overlapping, and “more discrete in theory than in
practice,” *Alperin*, 410 U.S. at 544, California will address all six.

1 committed' is none other than . . . the Judiciary”). This case, similarly, presents a “garden
2 variety” interstate nuisance claim, notwithstanding its technical and scientific complexity or the
3 scope of the environmental problem.

4 **(2) Nothing In The Case Would Require The Court To Inject Itself**
5 **Into Foreign Affairs**

6 As in *Alperin*, this Court is “not faced with analyzing a specific clause in the Constitution”
7 that commits the question to another branch, “but rather proceed[s] from the understanding that
8 the management of foreign affairs predominantly falls within the sphere of the political branches
9 and the courts consistently defer to those branches.” *Alperin*, 410 F.3d at 549. Both the
10 Supreme Court and the Ninth Circuit have “cautioned against ‘sweeping statements’ that imply
11 all questions involving foreign relations are political ones.” *Id.* at 544-45 (citing *Baker*, 369 U.S.
12 at 211). Not every case that “touches” on foreign affairs raises a political question. *Id.* at 537
13 (quoting *Baker*, 369 U.S. at 211); *see also Klinghoffer*, 937 F.2d at 49 (holding tort suit against
14 the Palestine Liberation Organization justiciable despite serious and complex international
15 implications).

16 The Court in *Alperin*, in applying the first *Baker* factor, found it important that the
17 plaintiffs’ property claims against the Vatican Bank were not the subject of any treaty or
18 executive agreement. *Alperin*, 410 F.3d at 550. The Ninth Circuit noted further that the
19 plaintiffs’ claims did not require, for example, court proceedings against expelled diplomats,
20 determinations about whether another country was an enemy of the United States, or questioning
21 the recognition of a foreign government. *Id.* In the Court’s words, the claims “ultimately boil
22 down to whether the Vatican Bank is wrongfully withholding assets. Deciding this sort of
23 controversy is exactly what courts do.” *Id.* at 551.

24 In this case, similarly, no executive agreement or treaty addresses California’s global
25 warming nuisance claim. This case does not, of course, involve foreign diplomats, states of war,
26 or recognition of governments. This case seeks redress only for that part of an environmental
27 crisis that has adverse effects in California. While this case, at most, might “touch” on foreign
28 affairs, this attribute does not render the case nonjusticiable.

1 Defendants cite three cases where courts dismissed claims that had the potential to interfere
2 with foreign policy established by the political branches. (Def. Mem. at 11-12.) All three cases,
3 however, involved state law claims that the Supreme Court dismissed under the Supremacy
4 Clause or the Commerce Clause. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003)
5 (striking down under the Supremacy Clause a California state law that compelled European
6 insurance companies to disclose Holocaust-era policy data, where there was a “clear conflict”
7 between state law and an executive branch agreement); *Crosby v. Nat’l Foreign Trade Council*,
8 530 U.S. 363, 376 (2000) (striking down under the Supremacy Clause a Massachusetts state law
9 that imposed sanctions against the Burmese government because it would “blunt the
10 consequences of discretionary Presidential action” under a federal sanctions law with the same
11 objective); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (striking down
12 under the Commerce Clause a California state law that taxed Japanese shipping containers
13 because it would conflict with Congress’ power to regulate commerce with foreign nations).
14 Because this case involves a federal law claim, the cases on which defendants rely are
15 inapposite.

16 California’s claim “boils down” to whether defendants have contributed to the interstate
17 nuisance of global warming. *See Alperin*, 410 F.3d at 551. Deciding this sort of controversy is
18 exactly what courts have done since the time of *Tennessee Copper*. In short, California’s claim
19 presents an ordinary tort suit that is committed to the judiciary.

20 **b. There Are Judicially Discoverable And Manageable Standards For**
21 **Resolving California’s Federal Common Law Nuisance Claim**

22 The second *Baker* factor, which requires judicially manageable standards, ensures that a
23 court will not be required to “move beyond areas of judicial expertise[.]” *See Goldwater v.*
24 *Carter*, 444 U.S. 996, 998 (1979) (mem.) (Powell, J., concurring). “The crux of this inquiry is
25 not whether the case is unmanageable in the sense of being . . . difficult to tackle from a
26 logistical standpoint.” *Alperin*, 410 F.3d at 552. A claim – even a large, complicated claim – is
27 justiciable where the court has “the legal tools to reach a ruling that is ‘principled, rational, and
28 based upon reasoned distinctions.’” *Id.* at 552 (quoting *Vieth*, 541 U.S. 267, 278 (2004)); *see*

1 *also id.* at 554 (holding claims justiciable while acknowledging that court faced “behemoth of a
2 case”).

3 Defendants contend that this Court lacks the tools to make two determinations in this case.
4 First, defendants argue, this Court will be unable to determine the level at which emissions
5 become “unreasonable.” Second, defendants contend, the Court will not be able to evaluate
6 causation and injury because global warming is scientifically complicated. (Def. Mem. at 10.)
7 As discussed below, defendants’ first contention mischaracterizes California’s nuisance claim,
8 its second underestimates this Court’s ability to handle complex litigation, and both ignore the
9 fact that the legal framework for adjudicating California’s claim is well-established.

10 **(1) The Legal Framework For Adjudicating Nuisance Claims Is Well-**
11 **Established**

12 Courts have been adjudicating interstate environmental public nuisance claims from the
13 beginning of the common law. The elements of a claim based on the federal common law of
14 nuisance are simply that the defendant is carrying on an activity that is causing an injury or
15 threat of injury to some cognizable interest of the plaintiff. *Illinois v. City of Milwaukee*, 599
16 F.2d 151, 165, (7th Cir. 1979), *vacated on other grounds, Milwaukee II*, 451 U.S. 304 (1981). A
17 public nuisance is “an unreasonable interference with a right common to the general public.” *In*
18 *re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981) (quotation omitted); *see also*
19 *Restatement (Second) of Torts* § 821B(1) (1979).

20 Whatever “policy” determinations this Court may be called upon to make, they are the types
21 of policy determinations that courts routinely face in ruling on and fashioning remedies for
22 nuisances. As Justice Blackman noted:

23 A public nuisance involves unreasonable interference with a right common to the
24 general public. . . . Whether a particular interference qualifies as unreasonable,
25 whether the injury is sufficiently substantial to warrant injunctive relief, and what form
26 that relief should take are questions to be decided on the basis of particular facts and
27 circumstances. The judgments at times are difficult, but they do not require courts to
28 perform functions beyond their traditional capacities or experience.

26 *Milwaukee II*, 451 U.S. 304, 348-349 (Blackmun, J., dissenting from holding that federal
27 common law claim for interstate water pollution had been displaced) (internal citations omitted);
28 *see also* *Restatement (Second) of Torts* § 821B (1979) (describing test for “unreasonable

1 interference” with a public right as “[w]hether the conduct involves a significant interference
2 with the public health, the public safety, the public peace, the public comfort or the public
3 convenience”).

4 The Court will not be required to determine whether defendants’ actions have been
5 unreasonable, but whether the interference suffered by California is unreasonable. As a leading
6 treatise explains:

7 Confusion has resulted from the fact that the intentional interference . . . can be
8 unreasonable even when the defendant’s conduct is reasonable. . . . Thus, an industrial
9 enterpriser who properly locates a cement plant or a coal-burning electric generator,
10 who exercises utmost care in the utilization of known scientific techniques for
11 minimizing the harm from the emission of noxious smoke, dust and gas and who is
serving society well by engaging in the activity may be required to pay for the
inevitable harm caused to neighbors. This is simply a decision that the harm thus
intentionally inflicted should be regarded as a cost of doing the kind of business in
which the defendant is engaged.

12 W. Prosser, P. Keeton, et al., *Law of Torts* 629 (5th ed. 1984).

13 With respect to causation and injury, federal courts routinely decide nuisance cases of all
14 sorts, including interstate claims involving injury to state interests. Such determinations lie
15 squarely within the expertise of federal courts. As were the property claims in *Alperin*,
16 California’s nuisance claim is governed by “well-established case law provid[ing] concrete legal
17 bases for courts to reach a reasoned decision.” *Alperin*, 410 F.3d at 553; *see also id.* (noting that
18 the focus of second *Baker* factor is whether courts are “capable of granting relief in a reasoned
19 fashion,” not “logistical obstacles” to doing so). The Supreme Court’s assessment of the
20 competence of federal courts in *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990), is apt
21 here: “Surely a judicial system capable of determining when punishment is ‘cruel and unusual,’
22 when bail is ‘[e]xcessive,’ when searches are ‘unreasonable,’ and when Congressional action is
23 ‘necessary and proper’ for executing an enumerated power” is capable of adjudicating
24 California’s claim.

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1 *Hale*, 118 F.3d 1371, 1378 (9th Cir. 1997); *see also Powell v. McCormack*, 395 U.S. 486, 548
2 (1969) (holding that senator’s claim that he had been unconstitutionally excluded from his seat
3 did not present political question but fell within the “traditional role accorded courts to interpret
4 the law”). Furthermore, an otherwise justiciable claim does not fall outside of the court’s
5 jurisdiction simply because an alternative resolution crafted by the political branches arguably
6 would be preferable. *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083 (2d
7 Cir. 1982) (holding that although legislative solution to the native American land claims may be
8 preferable, the “claims are justiciable notwithstanding the complexity of the issues involved and
9 the magnitude of the relief requested”).

10 California does not seek from this Court – and is not obliged to await – a comprehensive
11 solution to global warming. California alleges that defendants, the six largest domestic emitters
12 of carbon dioxide in the transportation sector in the United States, are contributing to an
13 interstate nuisance and causing concrete injuries to California which are compensable in
14 damages. Consideration and resolution of this case requires only that the Court apply traditional
15 legal tools. It does not require any prior nonjudicial, discretionary policy determination related
16 to the national or international economy, or the development of specific control measures for
17 emissions of greenhouse gases. Contrary to defendants’ assertions, the Court will not need to
18 decide whether controlling emissions from vehicles or any other source is good or bad policy,
19 the levels at which emissions should be set, how quickly emissions should be reduced, or any
20 other question requiring the exercise of “nonjudicial discretion.” Therefore, the third *Baker*
21 factor does not apply.

22 **d. Resolution Of California’s Claim Will Not Result In A Lack Of Respect**
23 **For The Coordinate Branches Of Government**

24 The fourth prong of the *Baker* analysis applies where it is “impossible” for the court to
25 resolve the claim “without expressing a lack of respect for the political branches.” *Alperin*, 410
26 F.3d at 555; *see United States v. Stahl*, 792 F.2d 1438, 1440 (9th Cir. 1986) (holding that judicial
27 review of ratification of Sixteenth Amendment would have required decision about whether
28 Secretary of State’s certification was fraudulent, showing lack of respect to coordinate branch).

1 Here, judicial action on California’s nuisance claims will not call into question a decision
2 by the legislative or executive branches. Moreover, allowing California’s nuisance claim to
3 proceed would in no way “shut out” the political branches from participating in this case as it
4 develops, should they choose to do so. *See Alperin*, 410 F.3d at 557 (noting that Court would
5 “respect the political branches’ right to weigh in and play a role in the resolution of the
6 Holocaust Survivors’ claims”). Accordingly, nothing in the case would show a lack of respect
7 for the legislative or executive branches.

8 **e. There Is No Unusual Need For Unquestioning Adherence To A Political**
9 **Decision Because No Decision Addressing Global Warming Has Been**
10 **Made**

11 The fifth *Baker* factor controls where there is an unusual need for unquestioning adherence
12 to a political decision already made. As was the case with the justiciable property claims in
13 *Alperin*, this case is before this Court “not because [the plaintiffs] disagree with a political
14 decision made regarding their claims, but rather because there has been no decision.” *See*
15 *Alperin*, 410 F.3d at 557.

16 Currently, the federal government has no restrictions of any kind on emissions of carbon
17 dioxide or other greenhouse gases under any treaty, executive order, statute, or administrative
18 standard. At most, the political branches have elected to study the problem, to gather evidence,
19 to develop a policy some time in the future, and to wait for other countries to take action to
20 reduce their greenhouse gas emissions. Certainly, no decisions at the federal level suggest that
21 states cannot sue or take other action related to global warming. There simply is no existing
22 global warming policy nor relevant pronouncements about global warming with which
23 California’s nuisance case could interfere.

24 **(1) California’s Claim Will Not Conflict With Any Actions Taken by**
25 **Congress**

26 Defendants cite miscellaneous Congressional Acts authorizing scientific research into
27 global warming for the proposition that “competing policy considerations . . . inhere in this
28 topic.” (Def. Mem. at 7, 11-12.) On examination, none of these Acts conflicts with the judicial
determination California seeks here. As defendants acknowledge, the National Climate Program

1 Act of 1978 directed research and data collection; the Energy Security Act of 1980 ordered a
2 study; the Global Climate Protection Act of 1987 directed U.S. EPA to develop a policy for
3 submission to Congress (which has not yet been done); the 1990 Global Change Research Act
4 established a 10-year research program; and the 1992 Energy Policy Act directed the Secretary
5 of Energy to conduct still more assessments related to greenhouse gases. (*See* Def. Mem. at 7-
6 8.) And while the Senate ratified the United Nations Framework Convention on Climate Change
7 in 1992, the Senate took *no action* on the resulting Kyoto Protocol, a framework that would have
8 effected mandatory reductions of greenhouse emissions in developed nations, including the
9 United States. In fact, one of the statutes defendants cite, the 1990 Global Change Research Act,
10 may be read to encourage this federal common law nuisance action. “Nothing in this subchapter
11 shall be construed, interpreted, or applied to preclude or delay the planning or implementation of
12 any Federal action designed, in whole or in part, to address the threats of stratospheric ozone
13 depletion or global climate change.” 15 U.S.C. § 2938(c). Moreover, the Global Climate
14 Protection Act, another statute cited by defendants, establishes a general U.S. policy in favor of
15 limiting greenhouse gas emissions. *See* 15 U.S.C. § 2901, note.

16 The set of Congressional Acts cited by defendants constitutes a vacuum with respect to
17 control of greenhouse gas emissions, and therefore, there is no danger that allowing California’s
18 nuisance case to proceed would interfere with decisions already made by Congress or conflict
19 with any Congressional pronouncements.

20 (2) California’s Claim Will Not Interfere With Foreign Policy Related 21 To Global Warming

22 Defendants describe what they call a “well-established policy” to refrain from any
23 commitment to reduce greenhouse gas emissions domestically unless developing nations make a
24 similar commitment. (Def. Mem. at 9, 12.) In support, defendants cite to a letter from President
25 Bush stating his opposition to the Kyoto Protocol because it exempts developing nations. (Def.
26 Mem. at 9.) In addition, defendants cite U.S. EPA’s “denial of petition for rulemaking,” which
27 is currently the subject of Supreme Court review in *Massachusetts v. EPA*, No. 05-1120 (U.S.
28 Supreme Court, 2006). The agency in its denial concluded that the Clean Air Act does not

1 authorize regulation to address global climate change and, in addition, took a foray into foreign
2 policy, stating that “[u]nilateral EPA regulation of motor vehicle [greenhouse gas] emissions
3 could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity
4 of their economies.” Control of Emissions, 68 Fed. Reg. at 52,924, 52,931, 52,926.

5 This does not constitute evidence of a “well-established” executive policy that would
6 implicate the fifth *Baker* factor. The President’s statement does not announce a global warming
7 policy at all, but rather is his opinion that the Kyoto Protocol should have been more
8 comprehensive. And U.S. EPA’s statement, even if the Court were inclined to give it some
9 weight, cannot convert a short list of instances where the federal government has declined to take
10 action to curb greenhouse gas emissions, or deferred action, into a global warming policy that
11 would prohibit any action within the United States until there is action by developing countries.
12 *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1081 (9th Cir. 2006) (holding tort claim against
13 foreign mining company justiciable even after giving weight to State Department’s formal, filed
14 opinion that suit would interfere with foreign affairs). The so-called “policy” cited by
15 defendants has even less substance than the political branches’ “stated intent to resolve claims
16 arising out of World War II by way of inter-governmental negotiations and diplomacy” – which
17 the Ninth Circuit found did not defeat the justiciability of Holocaust survivors’ property claims.
18 *Alperin*, 410 F.3d at 558. As in *Alperin*, “[n]o ongoing government negotiations, agreements, or
19 settlements are on the horizon.” *Id.* Therefore, California’s lawsuit, which addresses only
20 domestic greenhouse gas emissions and seeks only damages, does not undermine any federal
21 policy.

22 **f. There Is No Potentiality Of Embarrassment From Multifarious**
23 **Pronouncements**

24 Turning to the final *Baker* factor, addressing the risk of multifarious pronouncements, the
25 political branches have expressly rejected a need to speak with one voice on the issue of global
26 warming. For example, in his testimony before Congress, the Chairman of the White House
27 Council on Environmental Quality identified as a positive development that “[m]any of our
28 states and cities are experimenting with . . . portfolios of voluntary measures, incentives, and

1 locally relevant mandatory measures.” Testimony of James L. Connaughton before the U.S.
2 House of Representatives Committee on Government Reform (July 20, 2006) at 4.^{10/} And in his
3 statement to the United Nations Framework Convention on Climate Change, the Head of the
4 U.S. Delegation, Dr. Harlan Watson, stated:

5 I would like to highlight the efforts being made by State and local governments in the
6 United States to address climate change. Geographically, the United States
7 encompasses vast and diverse climatic zones representative of all major regions of the
8 world – polar, temperate, semi-tropical, and tropical – with different heating, cooling,
9 and transportation needs and different energy endowments. Such diversity allows our
10 State and local governments to act as laboratories where new and creative ideas and
11 methods can be applied and shared with others and inform federal policy – a truly
12 bottom-up approach to addressing climate change.

13 Statement of Dr. Harlan Watson, Senior Climate Negotiator and Special Representative and
14 Head of U.S. Delegation, Ninth Session of the Conference of the Parties, U.N. Framework
15 Convention on Climate Change (Dec. 4, 2003).^{11/} This case thus presents no risk of multifarious
16 pronouncements.

17 **3. This Case Will Not Require The Court to Do More Than Interpret The Law**

18 In sum, despite defendants’ “cataclysmic and speculative projections about the sweep” of
19 California’s common law nuisance claim, this case “boils down to letting the common law []
20 claim[] proceed to the next stage[.]” *See Alperin*, 410 F.3d at 539 (allowing claims to proceed).
21 To do so, this Court need do no more than “stick to [its] role of interpreting the law.” *See id.*
22 This case is justiciable.

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29 10. [http://www.whitehouse.gov/ceq/JLC2006_07_20_House_Govt_Reform_](http://www.whitehouse.gov/ceq/JLC2006_07_20_House_Govt_Reform_Final_WAc_2.pdf)
30 [Final_WAc_2.pdf](http://www.whitehouse.gov/ceq/JLC2006_07_20_House_Govt_Reform_Final_WAc_2.pdf)

31 11. <http://www.state.gov/g/oes/rls/rm/2003/26894.htm>

1 **II. DEFENDANTS’ ARGUMENTS RELATED TO CALIFORNIA’S ALTERNATIVE**
2 **STATE LAW CLAIM ARE WITHOUT MERIT**

3 **A. If This Court Were To Hold That There Is No Cognizable, Justiciable Federal**
4 **Common Law Public Nuisance Claim, This Case Should Be Dismissed Without**
5 **Reaching Issues Of State Law**

6 California has pleaded a federal common law claim for public nuisance and, in the
7 alternative, a state law claim for public nuisance. These federal and state claims cannot,
8 however, coexist.^{12/} If a federal common law claim for interstate public nuisance is cognizable
9 and justiciable, then there is no state law claim. *See Milwaukee II*, 451 U.S. at 314 n.7;
10 *Ouellette*, 479 U.S. at 487-488. If, on the other hand, this Court were to grant defendants’
11 motion to dismiss California’s federal common law nuisance claim for lack of subject matter
12 jurisdiction, there would be no jurisdictional basis for the Court to rule on any other issue in this
13 case. On this point, then, California agrees with defendants: “in the absence of any substantial
14 federal claim, there is no jurisdictional predicate for this case to be heard in federal court.” (Def.
15 Mem. at 13 (citing *Opera Plaza Residential Parcel Homeowners Ass’n v. Hoang*, 376 F.3d 831
16 (9th Cir. 2004); *see also* Defs. Mem. at 19 n.9 (citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417,
17 421 (9th Cir. 1991)). Accordingly, if the Court holds that there is no federal common law claim,
18 it should dismiss the state law claim without prejudice without reaching any other issue.

19 **B. California Has Stated A Valid Claim Against Defendants Under State Law**

20 As stated, the Court should dismiss this case if it holds there is no federal nuisance claim.
21 Accordingly, while California notes its strong disagreement with defendants’ rendition of state
22 law, California responds to defendants’ state law arguments only briefly.

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26 12. California pled in the alternative to avoid a contention, should the federal cause of
27 action be dismissed, that it had engaged in claim splitting. California did not allege a violation
28 of state public nuisance law in this federal action because it believed that a federal court has
jurisdiction to rule upon a state law-based nuisance claim where there is no other federal claim
and no diversity.

1 **1. California Civil Code Section 3482 In No Way Bars the Action Because No**
2 **Statute Expressly Authorizes Defendants’ Emissions of Greenhouse Gases**

3 California Civil Code section 3482 provides that “[n]othing which is done or maintained
4 under the *express authority* of a statute can be deemed a nuisance.” (Emphasis added.)

5 Defendants contend that because California regulates auto emissions through the California
6 Clean Air Act and California has sanctioned the sale of autos, California has in effect expressly
7 authorized any nuisance caused by automobiles, and, therefore, California Civil Code section
8 3482 precludes a state law-based nuisance action.

9 As interpreted by the California courts, section 3482 bars a state nuisance action only where
10 “the acts complained of are authorized by the express terms of the statute under which the
11 justification is made, or by the plainest and most necessary implication from the powers
12 expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of
13 the very act which occasions the injury.” *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 291
14 (1977) (quotation omitted). As the California Supreme Court held, the requirement of “‘express
15 authorization’ . . . insures that an unequivocal legislative intent to sanction a nuisance will be
16 effectuated, while avoiding the uncertainty that would result were every generally worded statute
17 a source of undetermined immunity from nuisance liability.” *Id.*

18 A defendant cannot obtain the protection of section 3482 simply because the defendant’s
19 activity is in compliance with the law. *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App.
20 3d 116, 129 (1971) (holding that compliance with regulations of local air district did not protect
21 against nuisance claim); *see also Ileto v. Glock*, 349 F.3d 1191, 1214 (9th Cir. 2003) (holding that
22 legality and regulation of occupation did not protect against public nuisance claim). Defendants’
23 reliance on *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 888 (9th Cir. 2001) is
24 misplaced. In that case, the Ninth Circuit, exercising supplemental jurisdiction and interpreting
25 California law, found that defendant’s permit explicitly authorized defendant to discharge storm
26 water containing pollutants, including the pollutant that was alleged by plaintiff to be a nuisance.
27 The Ninth Circuit held that because the permit expressly authorized the discharge of the
28 pollutant, and there was no evidence that the pollutant was discharged before the permit was in

1 place, there could be no state claim for nuisance related to the discharge. *Id.* at 888. In this case,
2 in contrast, there is no permit, statute, or regulation of any kind that expressly permits
3 automobiles to emit carbon dioxide, or establishes a permissible level of such emissions.
4 Accordingly, the safe harbor rule of *Carson Harbor*, and the protections of California Civil Code
5 section 3482, are inapplicable.

6 **2. California’s So-Called “Enthusiastic Consent” To The Sale Of Motor**
7 **Vehicles Does Not Preclude A Public Nuisance Action**

8 California has participated in creating the infrastructure for use of autos in the state. As
9 defendants note, California purchases and uses vehicles in its governmental capacity and derives
10 tax revenue from auto sales. Defendants cite to a 1872 Maxim of Jurisprudence,^{13/} contending
11 that California by these acts has consented to the impacts of global warming and greenhouse gas
12 emissions. Consent is a defense to a nuisance claim, however, only where the plaintiff expressly
13 consents to the particular activity and to the particular resulting nuisance or hazard. *See Magnini*
14 *v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1140 (1991) (holding that lessee’s defense of
15 consent to lessors’ hazardous waste nuisance claim not established merely because lease stated
16 that lessors “covenant that they will acquiesce in any nuisance or hazard caused by Lessee”).

17 Under defendants’ formulation, any time California supports, through infrastructure or other
18 actions, a product in the marketplace, it is precluded from seeking recovery for any harm that
19 product may ultimately cause. That is not the law. Simply stated, California supports the
20 purchase and use of motor vehicles; it has not thereby expressly consented to defendants’
21 greenhouse gas emissions that cause substantial harm to the State.

22 **3. Defendants Manufacture And Sell Products That Result In Significant**
23 **Contributions To Global Warming And Damage In California, Giving Rise**
24 **To A Public Nuisance Claim**

25 Defendants, relying on *County of Santa Clara v. Atlantic Richfield Co.*,¹³⁷ Cal. App. 4th
26 292 (2006), argue that the “mere sale and distribution” of a product does not give rise to public
27 nuisance liability. (Def. Mem. at 25.) In *Santa Clara*, defendant lead paint manufacturers
28 argued that only a product liability cause of action can apply where the cause of the nuisance

13. “He who consents to an act is not wronged by it.” Cal. Civ. Code § 3515.

1 alleged is a product. The court rejected that contention, finding that public nuisance can apply to
2 products. *Id.* at 305-06. “[T]he critical question is whether the defendant *created or assisted in*
3 *the creation of the nuisance.*” *Id.* at 306 (quoting *City of Modesto Redevelopment Agency v.*
4 *Superior Court*, 119 Cal. App. 4th 28, 38 (2004), emphasis in original); *see also City of Modesto*
5 *Redevelopment Agency*, 119 Cal. App. 4th at 41-42 (holding that manufacturer of waste
6 discharge equipment could be held to answer in nuisance). Here, California alleges that
7 defendants manufacture motor vehicles designed to discharge greenhouse gases in a manner that
8 creates a nuisance and that defendants knew or should have known of the emissions and their
9 impacts. (Compl. at 13, ¶ 61.) As such, the complaint squarely alleges a public nuisance under
10 California law.

11 **4. California May Seek Damages As A Remedy For Public Nuisance Under**
12 **California Law**

13 Defendants, citing *Santa Clara*, argue that under state law, California may not seek
14 damages as a remedy for public nuisance in a case where the nuisance results from a product.
15 Their reliance on *Santa Clara*, where the plaintiff was a county, is misplaced. Under California
16 nuisance law, “[w]here the State has a property interest which has been injuriously affected by a
17 nuisance, the State can, like any property owner, seek damages.” *Selma Pressure Treating Co.,*
18 *Inc. v. Osmose Wood Preserving Co. of Am., Inc.*, 221 Cal. App. 3d 1601, 1614 (1990). Here, if
19 it must resort to state law, California will seek damages related to its usufructuary interests in
20 natural resources, its legal interests for the benefit of the People, and its *parens patriae* interest
21 in the air, land and water, *see Selma Pressuring Treating*, 221 Cal. App. 3d at 1617-1618,
22 interests which are uniquely the State’s. Therefore, the *Selma Pressure Treating* decision rather
23 than *Santa Clara* applies, and California may recover damages under a state public nuisance
24 claim.

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1 **5. Federal Law Recognizes Rather Than Preempts California’s State Public**
2 **Nuisance Cause Of Action**

3 Finally, defendants contend that both the Clean Air Act and EPCA preempt California’s
4 state public nuisance claim.^{14/} A preemption analysis begins with “the assumption that the
5 historic police powers of the States were not to be superseded by the Federal Act unless that was
6 the clear and manifest purpose of Congress.” *City of Columbus v. Ours Garage & Wrecker*
7 *Serv., Inc.*, 536 U.S. 424, 432-33 (2002) (quotation omitted). The party claiming preemption
8 bears the burden of demonstrating that federal law preempts state law. *Silkwood v. Kerr-McGee*
9 *Corp.*, 464 U.S. 238, 255 (1984). Defendants cannot meet their burden.

10 **a. The Clean Air Act Explicitly Exempts, Rather Than Preempts,**
11 **California’s State Law Action**

12 The Court must reject defendants’ preemption argument. Defendants cite *Cipollone v.*
13 *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) for the proposition that common law damages
14 claims are “standards” and therefore preempted. (Def. Mem. at 30.) First, defendants fail to
15 note that the *Cipollone* holding they cite is in the plurality portion of the opinion. Second, and
16 more importantly, the preemption language construed by the plurality preempted “requirement[s]
17 or prohibition[s] . . . imposed under State law,” and contained no savings clause similar to
18 section 104(e) of the Clean Air Act (42 U.S.C. § 7604(e)). *Id.* at 520. In addition, in the portion
19 of the case constituting the Court’s holding, the Court ruled that “there is no general, inherent
20 conflict between federal pre-emption of state warning requirements and the continued vitality of
21 state common-law damages actions.” *Id.* at 518.

22 Clean Air Act section 209(a) (42 U.S.C. § 7543(a)) does not have the broad preemption
23 language at issue in *Cipollone*. Rather, it preempts the adoption by a state of “any standard

24 14. Defendants in *Central Valley Chrysler Jeep v. Witherspoon*, CV F 04-6663 (E.D.
25 Cal.) argue that carbon dioxide is not a “pollutant” as defined by the Clean Air Act. Their
26 argument in this case that a preemption provision that applies only to “pollutants” should apply
27 to bar a state law nuisance claim related to carbon dioxide is inconsistent. Arguably, defendants
28 should be estopped from making these irreconcilable arguments. But, since the Clean Air Act
 exempts rather than preempts any state law nuisance claim, California will address defendants’
 preemption argument on its merits.

1 relating to the control of emissions” of pollutants from new vehicles, 42 U.S.C. § 7543(a), and
2 section 104(e) preserves “any right which any person (or class of persons) may have under any
3 statute or common law to seek enforcement of any emission standard or limitation or to seek any
4 other relief.” 42 U.S.C. § 7604(e). Thus, other relief, including common law remedies that do
5 not constitute standards relating to the control of emissions for new vehicles, are not preempted.
6 While, arguably, common law injunctive remedies could result in “standards,” *see Ouellette*, 479
7 U.S. at 493-94, damages do not constitute “standards,” and are therefore exempted under the
8 Act. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63-64 (2002) (holding that savings clause
9 similar to Clean Air Act section 104(e) preserves common law damages remedies to ensure
10 compensation for accident victims); *see also Bates v. Dow Agrosciences, LLC*, 544 U.S. 431,
11 445 (2005) (holding that a jury verdict under a state tort law is not a “requirement” under express
12 preemption provision that applies to “any requirements”).

13 Defendants also argue that California’s state law damages action is not expressly
14 preempted, it is subject to conflict preemption, citing *Geier v. Am. Honda Motor Co., Inc.*, 529
15 U.S. 861, 973 (2000). (Def. Mem. at 31.) Defendants’ conflict preemption argument repeats the
16 express preemption argument and fails for the same reasons. If California must resort to a state
17 forum, its state public nuisance action is authorized by and consistent with the Clean Air Act.

18 **b. California’s Alternative State Law Claim For Damages Is Not**
19 **Preempted By EPCA Because It Is Not Related To A Fuel Economy**
20 **Standard**

21 Defendants also contend that EPCA preempts California’s state common law action
22 because, they argue, a state greenhouse gas emission standard is really a fuel economy standard
23 in disguise. EPCA’s preemption provision reads: “a State . . . may not adopt or enforce a law or
24 regulation related to fuel economy standards or average fuel economy standards[.]” 49 U.S.C. §
25 32919(a). This provision is almost identical to the preemption language in *Sprietsma*, which the
Supreme Court read as not encompassing common-law claims for two reasons:

26 First, the article “a” before “law or regulation” implies a discreteness – which is embodied
27 in statutes and regulations – that is not present in the common law. Second, because a work
28 is known by the company it keeps, the terms “law” and “regulation” used together in the
pre-emption clause indicate that Congress pre-empted only positive enactments. If “law”
were read broadly so as to include the common law, it might also be interpreted to include

1 regulations, which would render the express reference to “regulation” in the pre-emption
2 clause superfluous.

3 537 U.S. at 63 (internal quotation and citation omitted). The same result holds in this case.

4 Additionally, defendants base their EPCA preemption claim on the notion that California’s
5 state public nuisance action for damages creates a “standard.” This damage action does not
6 constitute a standard. Further, as noted above in section I.B.2.b., EPCA is not aimed at pollution
7 or emissions at all. There is simply no evidence that Congress intended EPCA to preempt a state
8 action directed at the impacts of emissions.^{15/}

9 CONCLUSION

10 Under longstanding Supreme Court jurisprudence, a state’s claim for redress of interstate
11 pollution arises under federal common law. No federal statute provides an all-encompassing,
12 comprehensive Clean Water Act-like scheme for addressing greenhouse gas emissions or global
13 warming, or provides a remedy for the same, and, as a result, no federal statute displaces federal
14 common law. While the issue of global warming broadly touches on foreign policy, California’s
15 claim concerns domestic actors, domestic actions, and domestic impacts, and is well within the
16 Court’s tort expertise. The case meets none of the *Baker* criteria for a political question, and is
17 therefore justiciable.

18 California alleges significant harms to the State resulting from defendants’ substantial
19 contributions to global warming. As such, California presents a case squarely within the Court’s

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23 15. Defendants cite to a statement by the National Highway Traffic Safety
24 Administration (“NHTSA”), found in the preamble to the Light Truck Standard, in which
25 NHTSA sets forth its view that state standards for carbon dioxide emissions are preempted by
26 EPCA. Defendants contend that NHTSA’s view should be granted deference. (Def. Mem. at
27 33.) Because NHTSA’s view is only relevant if the state law damages action creates a standard,
28 we simply note that NHTSA’s view and the deference it may or may not be owed is currently
contested in both *Central Valley Chrysler Jeep v. Witherspoon*, CV F 04-6663 (E.D. Cal.), and
People of the State of California, et al. v. NHTSA, 06-72317 and 06-72641 (9th Cir.) (multi-state
challenge to NHTSA light truck standards and its preamble preemption statements). Suffice it to
say, California strongly disputes NHTSA’s view and believes deference is not appropriate.

1 purview. We return to Justice Holmes in *Tennessee Copper*:

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

8 206 U.S. at 238. Like Georgia in 1907, California in 2007 must be afforded a federal forum to
9 present its interstate nuisance claims.

10 Dated: February 1, 2007

11 Respectfully submitted,

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