No. 07-16908

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF
CALIFORNIA, EX REL. EDMUND G. BROWN
JR., ATTORNEY GENERAL,

Appellant,

v.

GENERAL MOTORS CORPORATION,
ET AL.

Appellees.

On Appeal from the United States District Court
for the Northern District of California
in Case No. 06-cv-05755-MJJ

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States states that is has no parent corporation and that no publicly held company owns 10 percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the nation's largest federation of businesses and associations, with an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographic region. The Chamber often represents its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The proper response to global warming is an issue of profound concern to the Chamber's members.

The Chamber believes that measures taken to address the challenges of climate change must not harm the nation's economy. Accordingly, the Chamber works to discourage ill-conceived climate change policies and measures that could severely damage the security and economy of the United States, and instead encourages positive measures, such as long-term technological innovation and long-term clean technology deployment. The Chamber believes that lawsuits such as this one, which seeks to impose damages against a subset of U.S. industry for contributing to global warming, are an especially ill-conceived—and illegitimate—response to climate change. A meaningful, rational and politically legitimate response must be national in nature, and must be fashioned by the politically accountable branches of the federal government. The Chamber thus has a vital

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[1] All parties have consented to the filing of this brief.

interest in ensuring that courts do not usurp the roles of the executive and legislative branches by entertaining lawsuits such as this one.

SUMMARY OF ARGUMENT

Through this lawsuit, California asks the federal courts to establish a piecemeal response to an environmental issue with sweeping implications for the nation's economy, security and foreign relations. The district court properly dismissed this suit because it inescapably raises non-justiciable political questions. In addition, two other related separation-of-powers principles bar this suit. First, California's extraordinary nuisance claim falls outside the scope of the federal common law cause of action to abate interstate nuisances, and courts have no authority to expand that cause of action. Second, to the extent any federal common law cause of action could have encompassed California's claim, it has been displaced. Not only do these principles provide additional bases for affirmance, they bolster the district court's decision to dismiss the case on political question grounds.

I.A. Even in the pre-*Erie* heyday of federal common law, the Supreme Court justified the creation of a federal common law cause of action for transboundary pollution as an act of constitutional necessity, compelled by Congress's supposed inability to address such problems. Moreover, the Court carefully cabined this cause of action, refusing to extend it to all nuisances that

would be actionable in suits between private parties. Since then, the constitutional justification for recognizing the cause of action has been eviscerated, and the Court has repeatedly ruled that creating causes of action is a task for Congress, not the courts. For over 25 years, it has steadfastly refused to create any new causes of action or to expand any previously recognized ones.

Thus, even assuming that the cause of action California invokes has survived the constitutional sea changes of the past century, that action must be restricted to the narrow circumstances in which it was recognized. Courts can entertain interstate nuisance claims only for *injunctive* relief, and only to abate nuisances *of simple type*—*i.e.*, those involving immediately noxious or harmful substances that cause severe localized harms directly traceable to an out-of-state source. California's claim—an action for damages based on injuries allegedly caused by countless emissions from every state in the nation and every nation on earth—falls entirely outside the scope of the cause of action it invokes. And expanding that cause of action to encompass California's extraordinary claim would require precisely the kind of high policy decisions that courts cannot make using their limited federal common lawmaking powers.

I.B. To the extent any federal common law cause of action could have encompassed California's claim, it has been displaced by the various statutes that the defendant automakers cite. California claims that judge-made causes of action

can be displaced only if Congress enacts a comprehensive regulatory scheme that includes an adequate remedy. This is plainly wrong. The very reason courts cannot decide to create or expand causes of action is because such decisions call for policy judgments that courts have no authority to make. Yet, under California's test, courts would make precisely these types of judgments, arrogating to themselves the final say on whether Congress's response to a national problem like global warming is sufficiently comprehensive and includes remedies that courts deem adequate. As other circuits have recognized, separation-of-powers principles require courts to presume that legislation addressing the same subject displaces a federal common law remedy unless Congress expresses a contrary intent. Under that test, California's claim is plainly displaced.

II. Finally, even if California could state a cognizable federal common law nuisance claim, that claim raises non-justiciable political questions. Because the mere act of emitting carbon dioxide is not actionable, this suit necessarily requires a court to determine that some greenhouse gas emissions are more blameworthy than others, and that emissions beyond a certain level are societally unreasonable. Courts cannot make such judgments, however, without determining the proper balance between a host of complex and competing societal interests. For example, a court could not declare the emissions from defendants' products unreasonable, and thus tortious, without determining that the potential benefits of significantly

reduced emissions from U.S. vehicles outweigh (a) the costs and economic dislocations that would be caused by a fundamental change in the design and manufacture of U.S. vehicles and (b) the risk that such reductions would be offset by increased emissions elsewhere. Determining the proper balance of such broad-gauged and multifaceted interests is not a fact question for a court or jury. It is a fundamental policy determination "of a kind clearly for nonjudicial discretion," that is committed by the Constitution to the legislative and executive branches, and for which there are no judicially discoverable and manageable standards.

I. CALIFORNIA HAS FAILED TO STATE A CLAIM FOR RELIEF.

A. No Federal Common Law Cause Of Action Encompasses California's Claim.

1. Federal Common Law Causes of Action for Resolving Disputes Between States Were Justified, and Limited, by Principles of Constitutional Necessity.

Contrary to California's mistaken claim, the Supreme Court did not hold, in cases such as *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) ("*Tennessee Copper I*"), that courts and Congress possess "*concurrent*" authority over interstate pollution. Br. at 22 (emphasis added). In fact, the Court reached exactly the opposite conclusion: that because Congress lacked authority to address such problems, the Court had to create a remedy. An accurate understanding of the origins of this cause of action fatally undermines California's view that federal courts have a "responsibility," *id.* at 41, to entertain any "'fair and reasonable

demand' for a remedy addressing harms to [a State's] quasi-sovereign interest caused by persons outside of its control," *id.* at 45.

The cause of action California invokes traces its orgins to *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838). There, the Court relied on the Constitution's grant of jurisdiction over cases involving states to create a cause of action for boundary disputes. The Court explained that states had surrendered their rights to make treaties or wage war, and that Congress had no authority to adjust boundaries because it could only approve or disapprove compacts proposed by the states. *Id.* at 724-26. Because "a resort to the judicial power is the *only* means left for legally adjusting . . . a controverted boundary," the Court found it necessary to provide a remedy. *Id.* at 726-27 (emphasis added).

The Court recognized a cause of action for water apportionment disputes based on the same theory of constitutional necessity. It noted that Congress' power over navigable waterways did not extend to a dispute between Kansas and Colorado, because the relevant portion of the Arkansas River was not navigable. *Kansas v. Colorado*, 206 U.S. 46, 86 (1907). Congress likewise could not control apportionment based on a power to reclaim arid lands, because no such power existed. *Id.* at 87-92. Consequently, "[a]s Congress cannot make compacts between the states, as it cannot, in respect to certain matters, by legislation compel

their separate action, disputes between them must be settled either by force or else by appeal" to the Court. *Id.* at 97.

These same principles led to recognition of the cause of action for interstate nuisances. In *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), the Court recognized a claim to enjoin discharges of sewage into interstate waterways. *Id.* at 241. After canvassing its earlier cases, including *Rhode Island*, *see* 180 U.S. at 225-26, the Court concluded that it had to provide a remedy. The state's "[d]iplomatic powers and the right to make war [had] been surrendered to the general government." *Id.* at 241. And Congress was understood to lack any power to regulate intra-state activities such as sewage discharges: six years before *Missouri I*, the Court had held "that Congress could not regulate activities such as 'production,' 'manufacturing,' and 'mining.'" *United States v. Lopez*, 514 U.S. 549, 554 (1995) (citing *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)). Indeed, prior to 1937, the Court used "formalistic notions of 'commerce' to invalidate federal social and economic legislation." *Id.* at 605 (Souter, J., dissenting).

In *Tennessee Copper I*, the Court extended this cause of action to interstate discharges of noxious gas. Once again, this exercise of judicial lawmaking power was justified by necessity. *See* 206 U.S. at 237 ("[w]hen the states by their union made the forcible abatement of outside nuisances impossible to each, they did not

thereby agree to submit to whatever might be done"). At the same time, the Court stressed the "caution with which demands of this sort . . . must be examined," and held only that "*some* such demands must be recognized." *Id.* (emphasis added).

Thus, even before *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court felt constrained to justify the creation of causes of action for interstate pollution as acts of constitutional necessity. And, far from creating a broad cause of action that states can invoke whenever quasi-sovereign interests are injured by out-of-state sources, the Court examined state demands for a judicial remedy with great "caution," *Tennessee Copper I*, 206 U.S. at 237, and adopted "*exacting standards* of judicial intervention." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951) (emphasis added).

2. The Court Created a Federal Common Law Cause of Action Only for "Simple Type" Nuisances.

In light of these principles, the Court has never held that states, like private citizens, can sue anyone who "contributes to a nuisance to a relatively slight extent," even if "his contribution taken by itself would not be an unreasonable one." Br. at 31 (internal quotation marks omitted). To the contrary, the Court expressly stated that courts cannot create a judicial remedy for "every matter which would warrant a resort to equity by one citizen against another in the same

jurisdiction." *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906) ("*Missouri II*").[2] Instead, it is only "a public nuisance of *simple type* for which a state may *properly* ask an injunction." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (emphases added).

The Court's cases make clear that "simple type" nuisances are those where immediately noxious or harmful substances cause severe localized harms directly traceable to an out-of-state source. *See Tennessee Copper I*, 206 U.S. at 236 (discharges of "noxious gas" that destroyed forests, orchards and crops); *Missouri II*, 200 U.S. at 517 ("poisonous filth" into waterways used for drinking and agriculture); *New Jersey v. New York*, 283 U.S. 473, 476-77 (1931) (ocean-dumping of "noxious, offensive and injurious materials" that caused "great and irreparable injury" to New Jersey beaches); *North Dakota*, 263 U.S. at 371-72 (flood waters that destroyed crops and arable land). These "simple type" nuisances, the Court explained, entitled an injured state to "stand[] upon her extreme rights," regardless of the "possible disaster to those outside the state." *Tennessee Copper I*, 206 U.S. at 239.

These "exacting standards" ensured that the Court would not "take[] the place of a legislature" and decide difficult questions for which the words of the

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[2] California repeatedly quotes the "fair and reasonable demand" language from Justice Holmes's opinion in *Tennessee Copper I*, *see* Br. at 11, 45, 64, but Justice Holmes stressed in *Missouri II* that states did not have the same broad right as private citizens to abate nuisances.

Constitution provide no guidance. *Missouri II*, 200 U.S. at 519-20. They also ensured that states could not obtain, through a federal lawsuit, power over out-of-state activities that they never possessed before joining the Union, and did not acquire by ratifying the Constitution. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (Commerce Clause bars states from regulating "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State") (internal quotation marks and citation omitted).

In short, each element of an interstate nuisance of "simple type"—an immediately harmful substance, severe localized harms, and direct traceability to an out-of-state source—is essential to the cause of action California invokes. These elements justified recognition of that cause of action, and ensured that the Court neither exceeded its limited ability to deal with multi-faceted problems nor enlarged the states' circumscribed regulatory powers.

3. Subsequent Legal Developments Preclude Any Expansion of the Cause of Action to Abate "Simple Type" Nuisances.

Subsequent sweeping changes in the Supreme Court's understanding of the relative authority of the judicial and political branches to address problems of transboundary pollution require courts to adhere strictly to the "exacting standards" and narrow scope of the federal common law cause of action for interstate nuisances.

First, the theory of constitutional necessity that underlies the cause of action has been vitiated. In 1937, the Court "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress." *Lopez*, 514 U.S. at 556. Congress possesses plenary authority to regulate intrastate activities affecting interstate air and water quality. Most notably, Congress possesses the power that California mistakenly ascribes to federal courts to address contributions to larger societal ills. *See id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)); *see also Gonzales v. Raich*, 125 S. Ct. 2195, 2206-07 (2005).

Second, in light of the fundamental changes wrought by *Erie*, federal courts have only "limited" and "restricted" authority to formulate federal common law, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), and cannot use it to make significant policy decisions properly made by the political branches. Thus, federal courts could not create a federal common law right to contribution in antitrust actions because recognition of such a right was:

> "a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives."

Id. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). For these same reasons, the Court refused to create federal common law tort standards for

professionals advising federally-insured thrifts: creating such standards required weighing and appraising a host of considerations, which are tasks "'for those who write the laws, rather than for those who interpret them.'" *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (internal quotation marks omitted).

Third, the Supreme Court has repeatedly held that federal courts should no longer create or expand causes of action, as that is a quintessentially legislative task. Thus, while the "implication of a private federal cause of action from a statute" is an exercise of federal common lawmaking power, Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421 (1964), the Court has emphatically "abandoned th[e] understanding" that courts may use this power to supplement statutory remedies, *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). And it has just as consistently refused to expand previously implied causes of action. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (refusing to expand right of action implied from federal securities laws); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (same). Similarly, while the Court relied on decisions "implying private damages actions [under] federal statutes" to create the *Bivens* action for violations of the Fourth Amendment, since 1980 it has "consistently refused to extend *Bivens* liability to *any* new context or new category of defendants." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61,

67-68 (2001) (emphasis added). Most recently, the Court declined to recognize a federal common law cause of action for violations of certain international legal norms, even though the Alien Tort Statute authorized such judicial lawmaking. "[A] decision to create a private right of action," the Court emphasized, "is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

These profound changes in the legal landscape completely undermine the rationale for continued recognition of any federal common law cause of action for interstate nuisances. Such recognition is no longer compelled by constitutional necessity, and is utterly inconsistent with the Court's wholesale repudiation of judicially-created causes of action. To be sure, in 1972, shortly before it "swor[e] off the habit" of creating causes of action, *Alexander*, 532 U.S. at 287, the Court re-affirmed the existence of the federal common law cause of action for nuisances of "simple type." *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.8 (1972) ("*Milwaukee I*") (internal quotation marks omitted). But even assuming *Milwaukee I* remains good law,[3] the dramatic change in the relative authority of

[3] *Milwaukee I* relied on the theory that statutory remedies "are not necessarily the only federal remedies available," 406 U.S. at 103—a theory the Court has abandoned. *Alexander*, 532 U.S. at 287. Moreover, the Court's 1981 ruling that amendments to the Clean Water Act displaced the federal common law cause of action, *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), obviated any need for the Court to consider the continuing vitality of that cause of action.

courts and Congress to address complex social problems requires that this cause of action be limited to claims to enjoin "simple type" nuisances.

4. California Seeks an Impermissible Expansion of the Federal Common Law Cause of Action for Interstate Nuisances.

California's extraordinary claim does not remotely fall within the scope of the federal common law cause of action for interstate nuisances of "simple type." Instead, California seeks an impermissible expansion of that cause of action.

First, the Supreme Court has never recognized a right to recover damages for interstate nuisances. The interstate nuisance cases that begin with *Missouri I* and end in *Milwaukee I* all involved injunctive relief. Indeed, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1983), the Court emphasized that a federal nuisance claim for damages would go "considerably beyond [*Milwaukee I*], which involved purely prospective relief." *Id.* at 10.

Moreover, the Court's antipathy towards judicial creation or expansion of causes of action has been aimed primarily at *damages* actions. The Court has stressed that "bedrock principles of separation of powers foreclose[] judicial implication of a new substantive liability," even where "existing remedies do not provide complete relief." *Malesko*, 534 U.S. at 69 (internal quotation marks omitted). This is because creating damages actions "raises issues beyond the mere consideration whether underlying primary conduct should be allowed"—issues "better left to legislative judgment." *Sosa*, 542 U.S. at 727; *see also Texas Indus.*,

451 U.S. at 646-47 (recognizing right of contribution in antitrust raises "policy questions" properly resolved by the legislature); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 98-99 (1981) (denying federal common law right of contribution under Title VII for same reasons). The previously-recognized cause of action for injunctive relief, by contrast, limits judicial consideration to "whether underlying primary conduct should be allowed." Thus, California's request for damages would expand the scope of the cause of action, and require courts to address difficult legal issues, such as apportionment of damages, Br. at 32. These are precisely the types of policy questions that militate conclusively against judicial implication of damage remedies.[4]

Second, California has not pled a nuisance of "simple type." Far from alleging that immediately noxious or harmful substances are causing severe localized harms directly traceable to an out-of-state source, California claims that defendants are contributing to an unprecedented worldwide problem that is caused by countless activities in every state (including California) and every nation on earth, and that is harming, or threatening to harm, every sovereign. The Supreme Court has never entertained a suit in which a state alleged that a defendant

[4] California cites decisions by the Seventh Circuit and a district court for the proposition that the federal common law interstate nuisance action includes a right to damages. Br. at 32 n.6. These decisions, however, are non-binding and plainly wrong, as they predate—and cannot be reconciled with—the Supreme Court authority discussed above.

contributed, along with countless others, to a global process. Instead, it has deemed actionable only those claims in which a state alleges that the defendants' conduct *alone* caused "great and irreparable injury," *New Jersey*, 283 U.S. at 476.[5]

Indeed, California admits that its claim is "novel" and "complex," Br. at 2, 12, that there is "no existing body of case law" addressing it, *id.* at 1, and that the district court will therefore have "to make 'policy determinations,'" *id.* at 13, "break new ground and fashion 'innovative solutions,'" *id.* at 17. California nevertheless argues that courts are "obligated" to use their limited federal common lawmaking powers to address this unprecedented claim. *Id.* at 15. This is so, California claims, because federal common law "expands to meet the exigencies of the times," *id.* at 28, the policy issues raised by the case "are only those that are inherent in ruling on any tort claim," and "states are entitled [to] 'special solicitude,'" *id.* at 13. California is wrong on all counts.

Courts *cannot* "adapt[]" and "expand[]" federal common law causes of action "to meet the exigencies of the times." Br. at 28. To the contrary, federal

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[5] Citing *New Jersey* California suggests that contributions by others do not defeat a federal interstate nuisance claim, Br. at 30, but the amount of ocean waste not attributable to New York "was negligible." *New Jersey*, 283 U.S. at 481. More fundamentally, New Jersey did not allege that contributions by millions of non-parties were *essential* to its claim of harm. It alleged direct harm from New York's actions, and New York argued in defense that ocean dumping by others, not New York, caused New Jersey's harms. *See id.* at 477. Nothing in *New Jersey* suggests that a valid interstate nuisance claim is stated by allegations that a defendants' conduct contributes, along with countless other activities, to a global process.

courts are "obligated" to confine judicially-implied causes of action to their original scope, and to leave decisions about their expansion to Congress. *See, e.g., Malesko*, 534 U.S. at 69; *Stoneridge*, 128 S. Ct. 761. The previously recognized federal common law nuisance action does not encompass "every matter which would warrant a resort to equity by one citizen against another," *Missouri II*, 200 U.S. at 520-21, and cannot be expanded to encompass California's unprecedented claim.

Such an expansion, moreover, would force federal courts to make the types of "high" policy decisions they cannot make using federal common law. To decide that emissions from defendants' products are "unreasonable," as California urges, Br. at 31, a court would have to determine the proper balance between broad, inter-related, and competing societal interests. Among other things, a court would have to determine the feasibility and increased costs of manufacturing vehicles that emit significantly less carbon dioxide, and then determine the implications of such costs on (a) the competitiveness of the U.S. auto industry, (b) the workers and myriad industries that depend on that industry, and (c) the many industries and consumers that purchase defendants' vehicles. *Cf.* 42 U.S.C. § 13381 (stabilizing and reducing U.S. carbon dioxide levels has "economic, energy, social, environmental, and competitive implications, including implications for jobs"); *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,928

(Sept. 8, 2003) ("[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change"). Moreover, to the extent such redesigned vehicles require alternative fuel, a court would have to consider the availability, reliability and costs of that fuel; the societal implications of a major shift in fuels; and the global warming implications of such fuels.[6] The court would then have to balance these multifaceted costs against the potential benefits of reduced emissions from U.S. vehicles, and the risk that such reductions would be offset by increased emissions elsewhere.

These are not issues that arise in "any tort claim," Br. at 13, and federal courts cannot resolve them by invoking "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *Milwaukee II*, 451 U.S. at 317. Instead, resolving the question of fault that this case poses inescapably requires a "balancing of competing values and interests, which in our democratic system is the business of elected representatives." *Texas Indus., Inc.*, 451 U.S. at 647 (internal quotation marks omitted); *see also O'Melveny & Myers*, 512 U.S. at 89; *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) ("[t]he responsibilities for assessing the wisdom of . . . policy choices and

[6] For example, electric cars could increase electricity demand, which could increase carbon dioxide emissions by utilities. *See also* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (directing EPA to analyze climate change impacts of renewable fuels) (H.R. 6).

resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches'") (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)). Because courts cannot use federal common law to resolve the policy issues that underlie questions such as whether to recognize a right of contribution in antitrust cases, *Texas Indus., Inc.*, 451 U.S. at 647, or what standard of care governs professionals who advise federally-insured thrifts, *O'Melveny & Myers*, 512 U.S. at 89, it follows *a fortiori* that they cannot use federal common law to resolve the far more sweeping and fundamental issues raised by California's unprecedented "nuisance" claim.

Finally, no "'special solicitude'" for states permits, let alone obligates, courts to make such policy determinations. Br. at 13 (quoting *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455 (2007). In *Massachusetts*, the Court concluded only that the state's sovereign interests, coupled with a statutory procedural right, entitled Massachusetts "to special solicitude in our *standing analysis*." 127 S. Ct. at 1454-55 (emphasis added). Whether a plaintiff has standing, however, is legally distinct from whether it has a cause of action. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Moreover, *Massachusetts* confirmed that the policy issues raised by global warming are beyond the competence of federal courts to address. In concluding that it should not exercise any regulatory authority the Clean Air Act might confer, EPA relied on various policy reasons, including its view "that

regulating greenhouse gases might impair the President's ability to negotiate with key developing nations to reduce emissions, . . . and that curtailing motor-vehicle emissions would reflect an inefficient, piecemeal" response to climate change. *Id.* at 1462-63 (internal quotation marks and citation to EPA Decision omitted). The Court recognized that the judiciary has "*neither the expertise nor the authority to evaluate these policy judgments.*" *Id.* at 1463 (emphasis added).[7] *Massachusetts* thus confirms that it would be improper to expand the previously recognized federal common law cause of action to encompass California's novel claim, because doing so would require the district court to make policy judgments it has no authority to make.

B. Any Federal Common Law Cause Of Action That Could Have Encompassed California's Claim Has Been Displaced.

If a federal common law cause of action ever could have encompassed California's extraordinary claim, it has been displaced. *Amicus* will not repeat defendants' showing that, even under the test for displacement suggested by California, the various statutes defendants cite are sufficient to displace the cause of action California invokes. Instead, *amicus* addresses the errors in California's

[7] In light of this recognition, the Court's willingness, six decades ago, to tackle the complexities of water apportionment cases, *see* Br. at 37-38, plainly does not establish the judiciary's competence to create remedies for global warming. Even in water disputes, which fall within the Court's original jurisdiction, the Court has acted with "great and serious caution," and refused to recognize claims for every matter cognizable between private parties. *Colorado v. Kansas*, 320 U.S. 383, 393 (1943).

displacement test—errors inextricably linked to its mistaken understanding of the origins of that cause of action.

California argues that a cause of action that rests on thoroughly repudiated theories of constitutional necessity and federal common lawmaking, *see supra* at 11-14, cannot be displaced unless Congress adopts "a comprehensive statutory and regulatory scheme that . . . provides an adequate remedy." Br. at 14. This is not—and cannot be—the law. Courts cannot create or expand causes of action because they do not share Congress's authority or ability to decide significant policy issues. Yet, under California's misguided test, courts become co-equal policy-makers, free to decide that Congress's response to an environmental issue with sweeping implications for the nation's economy, security and foreign relations is not sufficiently comprehensive, or provides an insufficient remedy, to displace a cause of action that courts could not create today. Governing law does not authorize this inversion of lawmaking responsibilities; instead, courts must presume Congress has displaced federal common law unless it reveals a contrary intent.

California derives its displacement test from a statement in *Milwaukee I*, where the Court opined that federal common law operates "'[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards.'" Br. at 47 (quoting *Milwaukee I*, 406 U.S. at 108 n.9). Reliance on this statement—and on *Milwaukee I* itself—is misplaced. *Milwaukee I*'s discussion of

the pre-1972 Clean Water Act ("CWA") is dicta. Prior to its amendment in 1972, the CWA stated that "'[s]tate and interstate action to abate pollution of interstate or navigable waters . . . *shall not . . . be displaced by Federal enforcement action.*'" 406 U.S. at 104 (quoting statute) (emphasis added). Because Congress had disclaimed any intent to displace the existing "interstate action," the case presented no occasion to discuss displacement standards. More fundamentally, *Milwaukee I*'s statement is based on the now-discredited view, *see supra* at 11-13 & n.3, that statutory remedies "are not necessarily the only federal remedies available." *Id.* at 103.

Contrary to California's claim, moreover, the Court did not apply *Milwaukee I*'s "occupy the field" test to determine whether the amended CWA displaced the federal common law cause of action. The Court explained that, because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," courts should have a "*willingness* to find congressional displacement" whenever "Congress addresses [a] problem formerly governed by federal common law." *Milwaukee II*, 451 U.S. at 317 & n.9, 315 n.8 (emphasis added). "The lesson of *Milwaukee II* is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution" or "holding that the solution Congress chose is not adequate." *Illinois v.*

Outboard Marine Corp., 680 F.2d 473, 478 (7th Cir. 1982); *see also United States v. Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) ("separation of powers concerns create a presumption *in favor of [displacement] of federal common law* whenever . . . Congress has legislated on the subject") (emphasis added).

In claiming that *Milwaukee II* requires comprehensive regulation, California confuses what Congress did in amending the CWA with what it *must* do to displace federal common law. The Court could have made "comprehensiveness" or "complete occupation of the field" the touchstones of displacement. Such standards, however, are incompatible with a "willingness to find congressional displacement," *Milwaukee II*, 451 U.S. at 316-17 & n.9. Instead, they are used to determine preemption of state law,[8] where there is no presumption in favor of preemption. *Id.* Indeed, comprehensiveness cannot be necessary for displacement, otherwise the distinction between preemption of state law and displacement of federal common law (and the presumption in favor of the latter) would be destroyed.

Similarly, courts cannot pass judgment on the adequacy of statutory remedies in deciding whether Congress has displaced a judicially-created one. In *Outboard Marine*, the Seventh Circuit refused "to find that Congress has not 'addressed the question' because it has not enacted a remedy against polluters."

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[8] *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

680 F.2d at 478. "Adopting this distinction . . . would be no different from holding that the solution Congress chose is not adequate. This [a court] cannot do." *Id.* Instead, the court found that "Congress has 'addressed the question', since it has addressed the broader problem of pre-1972 pollution, *even if it has not done so by means of remedies against the polluters themselves.*" *Id.* at 477 (emphasis added).

Outboard Marine's analysis is indisputably correct and should be followed here. Courts lack authority to judge the adequacy of Congress's response to national problems when deciding whether to create or expand judicially-implied causes of action. *See Schweiker v. Chilicky*, 487 U.S. 417, 423, 425 (1988) (declining to create remedy where statute did not provide "complete relief" because Congress had "provided what *it* considers adequate remedial mechanisms") (emphasis added); *Bush v. Lucas*, 462 U.S. 367, 388, 390 (1983) (declining to create remedy despite absence of "complete relief" because "Congress is in a better position to decide whether or not the public interest would be served by creating it"). Courts cannot possess greater policymaking authority when deciding whether to *retain* a judicially-implied cause of action. Decisions to create, expand or retain a judge-made remedy all require a judgment about what "policy . . . is most advantageous to the whole" of society, *Bush*, 462 U.S. at 380 (internal quotation marks omitted). That is a judgment "better left" to Congress. *Sosa*, 542 U.S. at 727.

Simply put, where Congress "addresses [a] problem," *Milwaukee II*, 451 U.S. at 317, courts cannot decide that its response is insufficiently comprehensive, or its remedial scheme inadequate, to displace a federal common law remedy. Instead, courts must presume that judicially-created remedies are displaced unless Congress demonstrates a contrary intent.[9] As California has made no such showing with respect to the various statutes defendants have cited, any federal common law cause of action it could have possibly asserted has been displaced.

* * *

In short, California can state no claim for relief. Its claim falls outside the cause of action it invokes, that cause of action cannot be expanded to encompass its claim, and any cause of action that could have encompassed that claim has been displaced.

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[9] Both *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), and *United States v. Texas*, 507 U.S. 529 (1993), *see* Br. at 51, involved statutes that demonstrated Congress's intent not to displace federal common law. The statute at issue in *County of Oneida* codified a common law rule that Indian property rights cannot be extinguished without the consent of the United States, and later statutes "contemplated suits by Indians asserting their property rights." *Oneida*, 470 U.S. at 239-40. Congress thus made clear that it did not intend to displace the very cause of action in which the rule it was codifying would apply. Similarly, in *Texas*, a statute requiring private debtors to pay interest to the government did not displace the states' federal common law duty to pay pre-judgment interest, because the purpose of the law was "to *enhance* the Government's debt collection efforts." 507 U.S. 529, 537-38 (1993) (emphasis added).

II. EVEN IF CALIFORNIA COULD HAVE PLED A CLAIM FOR RELIEF, THAT CLAIM WOULD BE NON-JUSTICIABLE.

For many of the same reasons discussed above, California's nuisance claim raises non-justiciable political questions. This is so not because the case is "large" and "complicated," or presents "environmental problems previously unknown to the law." Br. at 26, 28. It is because courts cannot resolve the issue of fault without making fundamental policy decisions that they have no constitutional authority, institutional competence, or meaningful standards to make.

California acknowledges that "there are many other sources of greenhouse gas" emissions besides those from defendants' products, "some of which," it claims, "are tortious, and some of which are not." *Id.* at 30. Contrary to California's assertion, however, "vague and indeterminate nuisance concepts," *Milwaukee II*, 451 U.S. at 317, provide no "principled, rational, and . . . reasoned" basis, *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality), for determining which of the countless worldwide emissions of greenhouse gases are tortious and which are not. Instead, such a determination inescapably calls for an inherently political judgment.

Tort liability "turns on a finding that the defendant was at fault in some important sense," *i.e.*, that its conduct can be deemed "wrong." Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation* 5 (3d ed. 1997). The act of emitting a naturally occurring, ubiquitous substance such as carbon dioxide, however, is not

morally culpable; if it were, every person on the planet would be engaged in a "wrong" by virtue of breathing. This fact fundamentally distinguishes this case from the traditional "slight" contribution cases California invokes: a defendant can be held liable for "pollut[ing] a stream to only a slight extent," Br. at 31 (quoting *Restatement (Second) of Torts* § 840E cmt. b (1979)), because very the act of polluting is "morally culpable" or "wrong," even if it is insufficient to cause injury. But that principle cannot apply here, for it would mean that every individual on earth could be held liable for the effects of global warming.

This absurd result can be avoided only by determining that certain carbon dioxide-producing activities are more blameworthy than others, or that emissions above a certain level are "unreasonable." A court cannot decide that emissions from defendants' products were unreasonable, however, without deciding the proper balance between the societal costs of significantly reducing carbon dioxide emissions from motor vehicles, on the one hand, and the risk of the global warming-related injuries California alleges, on the other. Given the ubiquity and indispensability of motor vehicles in modern American life, it is unthinkable that a court could hold that defendants had a duty to stop producing all carbon-dioxide emitting vehicles—even if the scientific evidence showed that California's injuries could not otherwise have been avoided. Because such drastic action would have profound consequences for millions of citizens, only a legislature has the authority

to make such a judgment. *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[Decisions that affect the safety or security of the nation] should be undertaken only by those directly responsible to the people whose welfare they advance or imperil").

The necessity of making such a political judgment cannot be obviated merely by claiming that defendants had a duty to avoid contributing to global warming in some less drastic manner, such as by designing cars that emit significantly less carbon dioxide. As noted above, such a claim would still raise a host of issues about the costs of such alternatives, the impacts of those costs on consumers and various sectors of the national economy, and, potentially, the availability and reliability of alternative fuels. *See supra* at 17-18. Thus, before concluding that defendants breached a tort-based duty—*i.e.*, that they acted negligently or unreasonably by failing to build different types of vehicles—a court or jury would have to study and understand the myriad societal effects and implications of such alternatives, and would then have to balance these multitudinous societal consequences against the risk that defendants' emissions would contribute to global warming in a manner that led to California's injuries. In addition, they would have to compare this balance of societal costs and benefits against the cost/benefit calculus associated with reducing other sources of greenhouse gases, because defendants' alleged failure to reduce their emissions

cannot be unreasonable if there were less costly or less disruptive ways of avoiding California's alleged injuries.

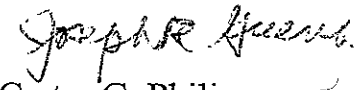
There is no single, objectively determinable "right" or "correct" balance of these types of broad-gauge societal interests. Instead, the "correct" balance is an inherently political judgment reflecting a societal consensus.[10] Thus, a decision that certain emission levels are acceptable and others are not is necessarily an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Such a decision is committed to the legislative branch by the Commerce Clause and to the executive branch under its Foreign Affairs power or through a delegation of authority from Congress. And there are no judicially discoverable and manageable standards for determining the societally acceptable level of greenhouse gas emissions. The district court, therefore, correctly dismissed this case as raising non-justiciable political questions.

[10] Because the question of fault requires such inherently political judgments, the fact that California seeks damages, Br. at 32, in no way renders its claim justiciable.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the brief of the defendant automakers, the decision below should be affirmed.

Respectfully submitted,



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April 9, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and this Court's Rule 32-1, I hereby certify that this brief is proportionately spaced, has a typeface of 14 points and contains 6987 words, excluding portions exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I, Joseph R. Guerra, hereby certify that on April 9, 2008, I served the foregoing Brief of the Chamber of Commerce of the United States as *Amicus Curiae* on counsel for General Motors Corp., and counsel for the State of California by causing two true copies to be delivered via Federal Express for next business day delivery to the following:

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