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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, ex**  
 16 **rel. EDMUND G. BROWN JR., ATTORNEY**  
 17 **GENERAL**

Plaintiff,

18 v.

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

Defendants.

Case No.3:06-cv-05755 MJJ

**CALIFORNIA'S**  
**SUPPLEMENTAL BRIEF RE:**  
**MASSACHUSETTS V.**  
**ENVIRONMENTAL**  
**PROTECTION AGENCY**

Judge: Hon. Martin J. Jenkins

1 In their Supplemental Brief re: *Massachusetts et al v. Environmental Protection Agency et*  
2 *al*, No. 05-1120, 2007 WL 957332 (Apr. 2, 2007), defendants try to put a positive spin on a case  
3 they lost.<sup>1/</sup> While the Supreme Court’s decision speaks for itself, in light of defendants’ brief,  
4 California feels compelled to present the State’s view. California, of course, is prepared to  
5 submit a more in-depth analysis should the Court so order.

6 In *Massachusetts*, the Supreme Court holds that (1) states have standing to sue the  
7 Environmental Protection Agency (“EPA”) to challenge its decision not to regulate greenhouse  
8 gases, slip op. at 15-23; (2) the Clean Air Act gives EPA the authority to regulate emissions of  
9 greenhouse gases as pollutants, *id.* at 25-30; and (3) because greenhouse gases are pollutants,  
10 EPA must decide whether greenhouse gases cause or contribute to climate change; EPA’s  
11 “laundry list of reasons not to regulate” does not amount to a “reasoned explanation” for the  
12 agency’s refusal to address greenhouse gas emissions. *Id.* at 30-32. Due to the nature of the  
13 claim at issue in *Massachusetts* (review of an agency’s denial of a rule making petition),  
14 questions of justiciability and displacement that defendants raised in their motion to dismiss  
15 were not before the Supreme Court. Nonetheless, aspects of the Supreme Court’s reasoning bear  
16 on issues before this Court and support California’s claim against the automakers.<sup>2/</sup>

#### 17 Existence of the Federal Common Law of Nuisance

18 The Supreme Court in *Massachusetts* rejects the idea that there is something anomalistic  
19 about greenhouse gases and global warming. It holds that, plain and simple, carbon dioxide and  
20 other greenhouse gases are “pollutants” that cause concrete harms such as sea level rise and  
21 reduction in the winter snow pack. Slip op. at 18, 26. Defendants’ argument that global  
22 warming is so unusual that it falls completely outside the law of public nuisance similarly must  
23 be rejected.

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25 1. Four of the defendants are members of the Alliance of Automobile Manufacturers,  
26 which intervened in *Massachusetts* to support EPA. Slip op. at 7 n.6; *see also*  
27 <http://www.autoalliance.org/about/> (visited on April 4, 2007).

28 2. Since this Court need not reach state law preemption, and since the *Massachusetts*  
case sheds no light on the issue, California will not address it in this supplemental brief.

1 The Supreme Court acknowledges that greenhouse gases are “unquestionably” agents of air  
2 pollution, slip op. at 26 n.26, and that “[j]udged by any standard, U.S. motor-vehicle emissions  
3 make a meaningful contribution to greenhouse gas concentrations . . . .” *Id.* at 22. The Court  
4 finds that the “harms associated with climate change are serious and well recognized.” *Id.* at 18.  
5 Moreover, in holding that Massachusetts has standing, the Court also notes that states have a  
6 “special position and interest” in protecting their resources and citizens from global warming.  
7 Slip op. at 15. For this it relies principally on *Georgia v. Tennessee Copper Co.*, 206 U.S. 230  
8 (1907), demonstrating the continued vitality of the case that is central to California’s nuisance  
9 claim. Slip op. at 15-16. The Supreme Court also makes clear that a state’s interest in protecting  
10 its citizens from global warming is not minimized even though the risks of climate change are  
11 “widely shared.” *Id.* at 19.

12 Together, these determinations illustrate that California is entitled to seek a remedy in  
13 federal court for damages caused by global warming, that California reasonably has selected this  
14 set of defendants, and that its claim fits into the well-established paradigm of public nuisance.

#### 15 Justiciability

16 Defendants assert that *Massachusetts* “expressly confirms that global warming must be  
17 addressed in the first instance by federal policymakers (as opposed to the federal courts).” (Def.  
18 Supp. Mem. at 1-2, citing slip op. at 16.) The Supreme Court places no such limit on the role of  
19 courts. In the cited passage, which mirrors a passage in *Tennessee Copper*,<sup>3/</sup> the Supreme Court  
20 affirms that a state has standing to pursue its claim *in federal court* for injuries related to global  
21 warming. That is precisely what California seeks to do here. Federal court is the proper forum  
22 to address California’s interstate tort claim.<sup>4/</sup>

23 Defendants also assert that California “would have this Court make the very policy  
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25 3. *See Tennessee Copper*, 206 U.S. at 237.

26 4. If the Court reaches the merits of California’s tort claim, it will have discretion to  
27 exercise its equitable powers in determining liability and damages. As discussed in California’s  
28 opposition to defendants’ motion to dismiss and at oral argument, there are available precedents  
to guide the Court.

1 determinations that the Supreme Court, in Massachusetts, indicated should be made (and then  
2 explained) by EPA.” (Def. Supp. Mem. at 2.) In support, defendants quote, out of context, the  
3 Supreme Court’s statement that it has “neither the expertise nor the authority to evaluate these  
4 policy judgments.” (Def. Supp. Mem. at 2, citing slip op. at 31-32.) In the cited statement, the  
5 phrase “these policy judgments” refers to the list of purported reasons EPA proffered to refuse to  
6 regulate greenhouse gases – that “voluntary executive branch executive programs already  
7 provide an effective response”; that “regulating greenhouse gases might impair the President’s  
8 ability to negotiate with ‘key developing nations’”; and that regulating motor vehicles would  
9 “reflect an inefficient, piecemeal approach to address the climate change issue.” Slip op. at 31  
10 (internal citations omitted). The Court holds that these considerations have “nothing to do with  
11 whether greenhouse gas emissions contribute to climate change.” *Id.* In this case, defendants’  
12 similar arguments also have nothing to do with whether the automakers’ contributions to climate  
13 change have caused damage to California. California’s damage claim does not call upon the  
14 Court to make a policy judgment whether to regulate greenhouse gases under the Clean Air Act,  
15 but rather to determine whether California is entitled to damages for harm it has suffered. This  
16 question is justiciable.

17 More relevant to this case is that fact that the Supreme Court *rejects* the list of reasons the  
18 EPA offered for not addressing global warming under the Clean Air Act. According to the  
19 Court, none of these considerations justifies the EPA’s refusal to apply domestic law. *Id.* In a  
20 similar vein, the Supreme Court rejects the argument that addressing global warming would  
21 impermissibly interfere with the Department of Transportation’s mandate to promote energy  
22 efficiency under the Energy Policy and Conservation Act. *Id.* at 29. The defendants here have  
23 advanced the same “laundry list” of reasons why the Court should not exercise jurisdiction over  
24 California’s public nuisance claim. As in *Massachusetts*, these reasons do not provide a basis to  
25 ignore domestic law – in this case, the federal common law of public nuisance.

#### 26 Displacement

27 Defendants contend that California’s public nuisance claim has been displaced because the  
28 Supreme Court concludes that the Clean Air Act authorizes federal regulation of greenhouse gas

1 emissions. Displacement, however, is by no means automatic, but rather requires a  
2 comprehensive statutory and regulatory scheme that directly addresses the particular issue. The  
3 *Massachusetts* decision highlights the absence of any comprehensive federal regulatory scheme  
4 governing greenhouse gas emissions or global warming, or any remedy for the damages that  
5 California already is experiencing. California consistently has argued, and in *Massachusetts* the  
6 Supreme Court affirms, that the Clean Air Act authorizes federal regulation of greenhouse gas  
7 emissions. That statute, however, provides no comprehensive response or remedy, and, of  
8 course, no regulation exists currently, and may not for a period of years.<sup>5/</sup>

9 As we noted in our opposition brief, the situation today is thus similar to what the Supreme  
10 Court faced in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee I*”). At the  
11 beginning of 1972, when the Court decided *Milwaukee I*, Congress had enacted “numerous laws  
12 touching interstate waters,” but the absence of “comprehensive legislation or *authorized*  
13 *administrative standards*” meant that federal law did not displace the plaintiff state’s federal  
14 common law nuisance claim. *Id.* at 101-02, 108 n.9 (citation omitted) (emphasis added). From  
15 its very inception in 1948, the Federal Water Pollution Control Act authorized the implementing  
16 agency to “prepare and adopt comprehensive programs for eliminating or reducing the pollution  
17 of interstate waters . . . .” Water Pollution Control Act, Pub. L. No. 845, preamble, 1948  
18 U.S.C.A.N. (62 Stat. 1155) 843. Such unexercised regulatory authority is not sufficient to  
19 cause displacement of the federal common law. As the Supreme Court ruled in *Milwaukee II*,  
20 displacement of interstate water pollution nuisance claims occurred only after an  
21 “all-encompassing program of water pollution *regulation*” was in place – which the Supreme  
22 Court found when it revisited the issue in 1981 after the 1972 amendments. *Milwaukee v.*  
23 *Illinois and Michigan*, 451 U.S. 304, 318 (1981) (emphasis added).

24 As the Supreme Court explained in *Milwaukee I*, “[i]t may happen that new federal laws  
25 and *new federal regulations* may in time preempt the field of federal common law of nuisance.  
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27 5. To be sure, there is no guarantee that EPA will enact regulations to address global  
28 warming in the wake of *Massachusetts*. See slip op. at 30 (recognizing that with the proper  
findings EPA can avoid taking further action.)

1 But until that comes to pass, federal courts will be empowered to appraise the equities of the  
2 suits alleging creation of a public nuisance by [interstate] pollution.” *Milwaukee I*, 406 U.S. at  
3 107 (emphasis added). While the *Massachusetts* ruling may prod the EPA to address global  
4 warming in a manner that provides the State with a meaningful remedy for harms related to  
5 future greenhouse gas emissions, until that comes to pass, the Court must apply the federal  
6 common law to California’s claim.

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8 Dated: April 12, 2007

9 Respectfully submitted,

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