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,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Honorable Martin J. Jenkins, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, and the National Association of Manufacturers, a corporation organized under the laws of New York, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

United States Constitution

Page

Federal Statutes

California Statutes

Rules of Court

Page

Miscellaneous

Page

INTEREST OF AMICI CURIAE

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Pacific Legal Foundation (PLF) and the National Association of Manufacturers (NAM) submit the following Brief Amicus Curiae in Support of Defendants-Appellees General Motors Corp., et al. This brief is filed with the consent of all parties.

Founded 35 years ago, PLF is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues in state and federal courts, representing the views of thousands of supporters nationwide, who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality and the legal burdens imposed on American businesses. PLF attorneys have litigated in this Court in defense of economic liberty, *see Merrifield v. Lockyer*, No. 05-16613 (9th Cir. filed Aug. 25, 2005), and PLF has appeared in state and federal courts across the country in cases involving business-related tort issues including "public nuisance" claims brought against businesses to recover damages for alleged pollution. *See, e.g., Rhode Island v. Lead Indus. Ass'n Inc.*, No. 07-121-A (R.I. Sup. Ct. filed 2007); *In re Lead Paint Litigation*, 886 A.2d 662 (N.J. 2005). In addition, PLF staff have published articles on the effects of tort liability on the business community. *See*, *e.g.*, Deborah J.

La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006).

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM began advising the courts as amicus curiae in 2001 about the danger of the expansive use of public nuisance theory in place of traditional product liability remedies, and has filed briefs in 10 major cases outlining its continuing concern about this attempt to develop new law through the judicial branch.

PLF and NAM attorneys have reviewed the briefs in this case and are familiar with the arguments before the Court. They believe their public policy and litigation experience will provide a useful additional viewpoint in this case. Specifically, PLF and NAM will argue that the tort of public nuisance is dangerously vague and that

this Court should resist expanding it to encompass activity that was reasonable and lawful when it occurred.

SUMMARY OF ARGUMENT

The dismissal of this case should be affirmed because it presents a political question. But even if it is not barred by the political question doctrine, this case does not involve a claim for which relief can be granted.

First, contrary to the state's characterization in its appellate brief, the complaint in this case alleges intra-state injuries by in-state defendants, which makes this case unsuitable for federal common law nuisance analysis. *Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976).

Second, even if the complaint were construed as involving interstate nuisance claims, a nuisance cause of action cannot be sustained where the activity complained of does not offend any sovereignty and is entirely consistent with applicable federal and state laws, which the manufacture and sale of automobiles certainly is. *See Missouri v. Illinois*, 200 U.S. 496, 518 (1906).

Third, and most importantly, the concept of "public nuisance" is so vague that to expand it as the state is asking this Court to do in this case—so that it encompasses perfectly lawful actions—would threaten Due Process values. Due Process requires that the law—both statutory and common law causes of action—be reasonably definite so that a person can know beforehand what acts are or are not proscribed and

what punishment will apply. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). But no legal consensus has developed as to the definition of a public nuisance, and to expand that doctrine beyond traditional common law limits would pose a significant risk of violating the Due Process Clause's prohibition on vague law. *Cf. In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007). Thus both the federal and state claims should be dismissed.

ARGUMENT

I

THE STATE IS NOT ENTITLED TO ASK THIS COURT TO ESTABLISH A NEW "FEDERAL PUBLIC NUISANCE" AGAINST IN-STATE ACTIONS OR ACTIONS WHICH DO NOT OFFEND ANY SOVEREIGNTY

Because it dismissed this case on political question grounds, the district court declined to reach the questions of whether the government had stated a cause of action for public nuisance under federal or state law. *People of the State of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007). However, if this Court does find that the case is justiciable, it should nevertheless affirm dismissal because, as a matter of law, the government failed to state a cause of action under either federal or state "public nuisance" law. *Am. Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1039 (9th Cir. 2007).

A. The State Is Not Entitled to Assert Federal Jurisdiction Over This Alleged Intra-State Tort

Federal courts approach the formulation of common law standards carefully, because unlike state courts, their jurisdiction is limited by the Constitution's enumeration of powers. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 899 (1986):

> [S]tate courts of general jurisdiction . . . can fill in any gap, as long as no directive to the contrary exists. Federal judges by contrast . . . can fill in a gap only if some enactment permits them to do so; otherwise the area is not one for federal rule at all, but is left to the states.

Federal courts are limited in almost all cases to interpreting the Constitution or existing statutes. There are two reasons for such limits: first, the federalist structure protects state autonomy by limiting the federal government to enumerated powers. *See United States v. Lopez*, 514 U.S. 549, 552 (1995). Second, federal courts are presided over by life-tenured judges who are "purposefully insulated from democratic pressures," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981), and lack the capacity for balancing interests in the way legislatures are able. As the Supreme Court recognized,

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision . . . . *Erie* [*R. Co. v. Tompkins*, 304 U.S. 64 (1938)] recognized as much in ruling that a federal court could not generally

> apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress.

Illinois & Michigan, 451 U.S. at 312-13.

There are "'few and restricted' instances" in which federal courts may exercise the sort of common law creativity usually reserved for state courts. *Atherton v. FDIC*, 519 U.S. 213, 225 (1997) (citation omitted). But these instances (1) are rooted in the express constitutional authority of federal courts, (2) exist only when Congress has not acted on a particular issue, and (3) occur only where there is a conflict "'between some federal policy or interest and the use of state law.'" *Id.* at 218 (citation omitted). When Congress or its administrative agencies have acted, however, the "need for such an unusual exercise of lawmaking by federal courts disappears." *Illinois & Michigan*, 451 U.S. at 314. All three elements weigh against the exercise of common law authority here.

First, the federal common law of nuisance is rooted in federal courts' express authority to hear cases "between two or more States" or "between a State and Citizens of another State." U.S. Const. art. III, § 2; *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91, 93 (1972). *See also Illinois & Michigan*, 451 U.S. at 304 (recognizing "the existence of a federal 'common law' which could give rise to a claim for abatement of a nuisance caused by *interstate* water pollution" (emphasis added)). Although the State now characterizes its case as one sounding in diversity jurisdiction

between the State and citizens of another state, the complaint actually cited 28 U.S.C. § 1331.[1] There is no reported instance of a federal court exercising jurisdiction over a common law nuisance in a case involving *intra*-state parties and *intra*-state injuries. This stands in contrast to allegations of an *inter*state nuisance, which federal courts have sometimes heard. *See, e.g., City of Milwaukee*, 406 U.S. at 97-98; *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 112 n.2 (1972) (offering multiple state plaintiffs opportunity to amend their complaint to include a count of public nuisance per the decision in *City of Milwaukee*).

In cases alleging intra-state injuries by same-state plaintiffs, federal courts decline to engage in common-law nuisance analysis. *See, e.g., Pennsylvania v. Gen. Pub. Utilities Corp.*, 710 F.2d 117, 122 (3d Cir. 1983); *Sylvane v. Whelan*, 506 F. Supp. 1355, 1360 (E.D.N.Y. 1981) (finding no federal common law of public nuisance applicable to nude sunbathers in a federal park located in New York); *New York v. DeLyser*, 759 F. Supp. 982, 990-91 (W.D.N.Y. 1991) (finding no federal common law of public nuisance that the state could assert against a property owner who built an unauthorized dock and boathouse on state public trust land). The Fourth

[1] The complaint alleged in-state acts by in-state defendants. *See* Complaint ¶¶ 13-18. For example, the complaint asserted that venue was proper in the Northern District of California because "a substantial part of the events or omissions giving rise to the claims occurred in this judicial district," *id.* ¶ 10, and alleged against each defendant that it had sold cars "in California." *Id.* ¶¶ 13-18.

and Eighth Circuits also reject the use of federal common law powers in cases involving intra-state actors and intra-state harms. *See Comm. for the Consideration of the Jones Falls Sewage Sys.*, 539 F.2d at 1009; *see also Reserve Mining Co. v. EPA*, 514 F.2d 492, 521 (8th Cir. 1975) ("The pleadings indicate that Minnesota's claim rests on Reserve's violation of Minnesota laws by creating an alleged danger to the health of its citizens. We construe Minnesota's complaint as asserting a state nuisance law violation.").[2] While the Attorney General obviously claims that global warming has a global impact, he alleged only injuries *within California to California*, and brought suit against *in-state* defendants. *See, e.g.*, Second Amended Complaint ¶ 58. Thus the first factor of the *Illinois & Michigan* case is not met.

Second, if federal legislative authorities have preempted the field, courts are not free to address a matter through common law analysis. "When the question is whether federal statutory or federal common law standards should control the field, we 'start with the assumption' that Congress, not the courts, must decide." *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4 (1st Cir. 1992) (citation omitted). *See also* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl.

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[2] In *People of the State of Illinois v. Outboard Marine Corp., Inc.*, 619 F.2d 623, 630 (7th Cir. 1980), the Seventh Circuit, in acknowledged conflict with the Eighth and Fourth Circuits, held that the state government could use federal common law nuisance claims against an in-state polluter even in the absence of intra-state environmental effects, but that decision was summarily reversed by the Supreme Court. 453 U.S. 917 (1981).

L. 293, 311-16 (2005) (explaining why field preemption bars federal judicial common law intrusion on a subject matter). Of course, even where Congress has not acted, its choice not to act is often itself a decision which ought to be respected by courts. *Cf. Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983). Only where federal inaction is not a deliberate decision may a court proceed to consider whether to exercise its common law powers.

Here, Congress and the President have deliberately chosen to address global warming in some ways and, in other ways, have chosen to refrain from acting. For example, both Presidents Clinton and Bush explicitly chose not to submit the Kyoto Protocol to the Senate for ratification. *Gen. Motors Corp.*, 2007 WL 2726871, at *5; *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 269-70 (S.D.N.Y. 2005).[3] Given the decision of the elected branches to proceed with caution in this area, the scientific, economic, and political considerations involved in the global warming debate are simply too complicated to be resolved by federal courts. *Id.* at 272. As the state's own brief reveals, Appellants' Opening Brief (AOB) at 25, the federal legislative and executive branches as well as the federal administrative agencies have undertaken extensive research and debate to address this enormously

[3] The Senate nonetheless announced its opposition to the Protocol. *See* Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997); *Remarks by the President on Global Climate Change*, 2001 WL 637709, at *3 (June 11, 2001) (stating ninety-five members of United States Senate disapproved of Kyoto approach).

complicated problem, but have consciously chosen not to impose any single solution so far. It is inappropriate for the judiciary to do so. Thus the second requirement for the exercise of federal common law power is not met.

Finally, there is no evident conflict between legal regimes that would require federal courts to address the issue through their common law powers. *Cf. Atherton*, 519 U.S. at 218 (citation omitted) ("such a 'conflict' is normally a 'precondition'" of the exercise of common law power). The Attorney General "has identified *no* significant conflict with an identifiable federal policy or interest," *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994), but on the contrary alleges a claim under federal nuisance law identical to the state law claim. The only conceivable conflict might be a need for national uniformity in regulating emissions, or the fact that California nuisance law does not favor the Attorney General in this case. But the Supreme Court rejected both of these arguments in *O'Melveny & Myers*, noting that a need for uniformity alone cannot suffice—otherwise "we would be awash in 'federal common-law' rules," *id.*—and that "there is no federal policy that [some party] should always win." *Id.* Not having identified any conflict between state and federal interests in this regard, the case should be dismissed for failure to meet any of the requirements for the exercise of federal common law jurisdiction.

B. Even if Federal Jurisdiction Is Proper, Federal Common Law Nuisance Analysis Is Not

In its brief before this Court, the state relies on several Supreme Court decisions regarding interstate nuisances, most notably *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907), in which the Court allowed the State of Georgia to proceed against a Tennessee company whose operations emitted noxious fumes into the air over Georgia. These cases are not applicable here.

First, as noted above, this complaint was brought under federal question jurisdiction; the complaint alleges in-state acts by in-state defendants. *Tenn. Copper* was a diversity case in which a state sued citizens of another state for committing out-of-state torts which injured Georgia.

But, secondly, even if the complaint were construed as raising the sort of intra-state nuisance claim that federal courts have considered in cases like *Tenn. Copper*, the allegations here still fall short because the complaint does not allege a unique injury not shared by all other states. In inter-state public nuisance claims brought in federal courts, states appear not as enforcers of a common right shared by the general public—the way they do when bringing intra-state public nuisance suits in their own courts—but instead appear in a position similar to that of a private litigant alleging a private nuisance. As Professor Merrill contends, "when public officers bring *parens patriae* actions in the courts of some other sovereign, they

should be subject to the same Article III and prudential standing limitations that apply to suits by aggrieved citizens." Merrill, *supra*, at 304-05. It is hornbook law that a plaintiff in a nuisance case must allege some unique injury not shared by all members of the public. W. Page Keeton, *Prosser & Keeton on the Law of Torts* 646 (5th ed. 1984). Yet global warming is anything but a particular, special, or unique injury to the State of California.

In a federal public nuisance case like *Tenn. Copper*, the state stands in a position similar to a private party. In that case, Georgia alleged that the Tennessee company's noxious fumes were causing a unique injury to Georgia's plant life, not a general injury shared by all mankind. Indeed, in *Missouri v. Illinois*, on which *Tenn. Copper* relied, the Court made clear that states must allege a particular kind of special injury which the State of California cannot allege in this case:

> [A] nuisance might be created by a state upon a navigable river like the Danube, which would amount to a *casus belli* for a state lower down . . . . If such a nuisance were created by a state upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court.

200 U.S. at 520-21. Federal courts have jurisdiction in such cases because the activity at issue might otherwise be a justification for armed conflict between sovereigns. *Accord*, *Tenn. Copper*, 206 U.S. at 237 ("[T]he alternative to force is a suit in this court."). But the conduct complained of in this case—the lawful sale of a legal product in a manner consistent with applicable federal and state laws and

treaties—does not rise to such a level and no such alternative is appropriate. The fact that cars are bought and sold in California and other states is not analogous to an act of aggression or despoiling of California by an outside entity.

Thus the Appellants here can allege no unique injury, either to itself as a sovereign or to the people of California collectively, that is not shared with every other person and every other sovereignty on the planet. This is fatal to the state's case.

Thirdly, the claim of a federal public nuisance is fatally undermined by the state's own conduct. In *Tenn. Copper*, Justice Holmes called attention to his earlier opinion for the Court in *Missouri v. Illinois* as indicating the reasons for caution in federal public nuisance suits. In *Missouri v. Illinois* the Court rejected a state's public nuisance claim because "the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains." 200 U.S. at 522. *Missouri v. Illinois*, in turn, cited *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851), noting that a bridge constructed over the Ohio River was not a nuisance because it did not offend the laws of any sovereign. 200 U.S. at 518. The laws of Virginia in that case "purported to authorize" the construction of the bridge, *id.*, and the absence of federal legislation barring its construction also meant that the

bridge could not be a public nuisance.[4] Likewise, the conduct complained of here does not offend any sovereign, because the manufacture and sale of cars is legal in California[5]—compulsory in some circumstances, *see* Cal. Veh. Code § 11713.3—and legal (as well as heavily regulated for air pollution) as a matter of federal law. Given the *Tenn. Copper* Court's express acknowledgment of the difficult considerations raised in *Missouri v. Illinois* and in *Wheeling & Belmont Bridge*—considerations that apply to this case—the *Tenn. Copper* rationale cannot warrant characterizing the lawful manufacture and sale of lawful products as a federal public nuisance.

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[4] The *Wheeling & Belmont Bridge* case was somewhat more complicated than Justice Holmes' summary might suggest. The Court found that congressional regulations did bar the construction of the bridge, and therefore that the bridge was a nuisance. When this legislation was later repealed, the Court in subsequent litigation over the bridge found that it could not be characterized as a nuisance any longer. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1855). Together, these cases support Holmes' point in *Missouri v. Illinois* that obstructing the navigation of the river could not be a public nuisance if it did not offend the law of any sovereign.

[5] Indeed, shortly before this brief was filed, the state announced that it was reducing by 70% the number of zero-emission electric and hydrogen fuel-cell vehicles that it would require automakers to sell in the state by the year 2014. *See* The Associated Press, *California Lowers Goal for Zero-Emission Vehicles*, CNN.com, *available at* http://www.cnn.com/2008/TECH/science/03/28/zero.emission.ap/index.html (last visited Apr. 2, 2008). Thus even while prosecuting these companies for selling cars that emit harmful pollutants, the state was dramatically lowering the number of cleaner cars that these same companies would be compelled to offer to the public.

II

THIS COURT SHOULD ALSO AFFIRM THE DISMISSAL OF THE PENDENT STATE "PUBLIC NUISANCE" CLAIMS

In addition to dismissing the federal claim, this Court should dismiss the pendent state claim. Because this case is not brought in diversity, the state law cause of action is attached on the basis of judicial economy, but where the federal claims are dismissed, state claims generally should be dismissed as well. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (*per curiam*); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties."). This case deserves to be dismissed in its entirety.

A. There Is No Legal Consensus on the Definition of a "Public Nuisance"

The legal concept of "public nuisance" is so vague that commentators describe it as "contested, and perhaps confused beyond repair," Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Envtl. Aff. L. Rev. 89, 96 (1998), and note that "no judicial consensus has emerged on some of the core issues that should establish the parameters of the tort of public nuisance." Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 748 (2003). *See further City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 585 (1994) ("Nuisance has

been described as an 'impenetrable jungle . . . has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.' " (quoting Keeton, *supra*, at 616)).

A " muddled and confusing doctrine," Halper, *supra*, at 89, public nuisance was poorly defined at common law. According to the Restatement (Second) of Torts § 821B (1979), a public nuisance was "an unreasonable interference with a right common to the general public." Definitions in case law have been unhelpful, often amounting to little more than a legal prohibition on bad conduct. In fact, Justice Blackmun once commented that courts "search[] in vain . . . for anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). Commentators have found "inconsistent judicial understandings of the core elements of the tort." Gifford, *supra*, at 748.

California Civil Code sections 3479 and 3480 are not much help. They simply declare that a public nuisance is "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property" and which "affects at the same time an entire community or neighborhood, or any considerable number of persons." It would be difficult to frame more ambiguous language. *Cf. United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (finding "offensive" an unconstitutionally vague term); *Chaplinsky v. New Hampshire*,

315 U.S. 568, 573 (1942) (construing the term "offensive" narrowly to avoid unconstitutional vagueness). Perhaps the clearest modern definition is that provided by section 821B of the Restatement, which defines a public nuisance as "an unreasonable interference with a right common to the general public." *Id.* Although this is a very broad definition, it contains at least two relatively clear elements: unreasonableness and interference with a common right. *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105 (1997).

The Restatement authors provided explanations and notes in an attempt to clarify what they admitted was a "vague" definition. *See* Restatement (Second) of Torts § 821B cmt. c (1979). They defined the "unreasonableness" element as meaning action which is "intentional or . . . unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities." *Id.* at cmt. e. They were especially sensitive to the fact that the "unreasonableness" requirement must be carefully applied, because without such a requirement, "the court [would be] acting without an established and recognized standard," which would be dangerous "[i]n view of the potentially widespread damage liability for a public nuisance." *Id.*

The authors further defined a "common right" or a "public right" as a right which is "common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be . . . injured." *Id.* at cmt. g.

They made clear that a "public right" is more than just an aggregate of private rights by a large number of injured persons. *See id.* ("[T]he pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance."). Instead, "public right" refers to the right to a public good—meaning, a nonrivalrous, common resource such as the air or the ocean.

In addition to these elements, the Restatement authors drew another boundary: government officials could employ the public nuisance cause of action only to obtain an injunction. *See* Restatement (Second) of Torts § 821C (1979). This section, entitled "Who Can Recover For Public Nuisance," declares that private individuals may "recover damages in an individual action for a public nuisance" under certain circumstances. *Id.* § 1. It also contemplates public authorities maintaining "proceeding[s] to enjoin to abate a public nuisance." *Id.* § 2. Nowhere does the Restatement suggest that public officials may maintain suits for damages for public nuisances, and in fact "[t]here is no historical evidence, however, that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance. The state's remedies were restricted to prosecution or abatement, or both." Gifford, *supra,* at 782.

Thus, the law of public nuisance—a doctrine which has been alternately described as a "'wilderness' of law," H.G. Wood, *A Practical Treatise on the Law of*

Nuisances in Their Various Forms iii (2d ed. 1883); a "mystery," Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 Harv. L. Rev. 984, 984 (1952); a "legal garbage can" full of vagueness, uncertainty and confusion, William L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942); a "mongrel" doctrine "intractable to definition," F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. Rev. 480, 480 (1949); a "sprawling doctrine," *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82, 88 (3d Cir. 1969); and a "quagmire," John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972)—was nevertheless limited by some, possibly inadequate, legal standards.

This is profoundly important because the goal of common law case development is to develop and set out understandable parameters for tort law, both to ensure the success of the government's mission of remedying and deterring wrongs, and also to limit government's power and protect innocent behavior from interference.

B. California Courts Have Refused to Obscure the Few Clear Guidelines Surrounding the Concept of "Public Nuisance"

"The handful of principles governing the tort of public nuisance were never intended to govern any unreasonable harm that might result from human interaction, nor are they adequate for such a daunting task." Gifford, *supra*, at 833. Nevertheless,

some state courts have attempted to do just this, essentially erasing the "handful of principles" which define and limit liability for the tort of public nuisance. In this case, the government asked the district court to do likewise, but the court lacked that authority, and this Court should therefore affirm the dismissal.

Limitations on the reach of tort liability are exceedingly important in the law. Since "[t]he consequences of any act can be traced indefinitely," courts have sought logical ways to limit liability to those harms which are fairly traceable to a defendant's wrongful actions, rather than holding defendants liable for remote or general effects. Harvey S. Perlman, *Interference With Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982). There are two primary reasons for such limitations. First, it would be wrong to allow parties to bring damages claims for innocent, reasonable, or socially acceptable behavior. The tort system exists to remedy and deter wrongs, not simply to redistribute resources to the party with the best litigators. Second, if tort law is to accomplish its goal of deterring wrongdoing and remedying victims, the signals courts send by awarding damages and punishing wrongdoers must be clear; arbitrary damages awards tend to obscure the message and handicap the law's ability to delineate permissible activity.

In 1971, in a case very similar to this one, the California Court of Appeal rejected an attempt by environmental activists to sue automobile manufacturers for

causing air pollution. *Diamond v. Gen. Motors Corp.*, 20 Cal. App. 3d 374 (1971). As is true of this case, the plaintiff in *Diamond* sought damages on the grounds that the companies manufactured pollution-causing devices and thus harmed the environment. Noting that the plaintiff sought "judicial regulation of the processes, products and volume of business of the major industries of the county," *id.* at 383, the court concluded that "Plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court." *Id.* at 382-83. This was plainly inappropriate, and the court dismissed the case.

Only two years ago, in rejecting a nuisance lawsuit against gun manufacturers, the California Court of Appeal noted that "[m]erely engaging in what plaintiffs deem to be a risky practice, without a connecting causative link to a threatened harm, is not a public nuisance." *In re Firearm Cases*, 126 Cal. App. 4th 959, 988 (2005). The court warned that if the nuisance tort were broadened in the way the Attorney General advocates here,

> [a]ny manufacturer of an arguably dangerous product that finds its way into California can be hauled [*sic*] into court . . . . The manufacturers liability will turn not on whether the product was defective, but whether

> its legal marketing and distribution system somehow promoted the use of its product by criminals and underage end users.

Id. at 991 (quoting *Ileto v. Glock Inc.*, 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting from denial of rehearing)). The court was particularly concerned about the vagueness of public nuisance, describing such cases as "'a peculiarly blunt and capricious method of regulation, depending . . . on the vicissitudes of the legal system, which make results highly unpredictable in probability and magnitude.'" *Id.* (quoting *Ileto*, 370 F.3d at 868 (Kozinski, J., dissenting from denial of rehearing)).

The *Firearm Cases* are controlling with regard to the state law claims in the government's complaint. The district court lacked authority to expand the tort of public nuisance in a manner that would render it unconstitutionally vague, and the court's dismissal of the complaint can be affirmed on these grounds.

C. The Manufacture and Sale of Automobiles Is Not Unreasonable Behavior

Although public nuisance has never been well defined, California courts have declared that it applies only to "unreasonable" activity. *Acuna*, 14 Cal. 4th at 1105 ("To qualify [as a nuisance] . . . the interference must be both *substantial* and *unreasonable*."). It is questionable whether the unreasonableness element was definite enough to satisfy Due Process requirements, since "the word unreasonable [is] the negative counterpart to 'the greatest weasel-word in the legal lexicon.' The word reasonable encourages case-by-case analysis which, at its best, promotes

flexibility in judicial decision-making. At its worst, however, it invites a standardless standard." Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 Am. Bus. L.J. 625, 656-57 (1992). But terms such as "unreasonable" are at least subject to "principled and intellectually rigorous common law development," Gifford, *supra*, at 746, which can develop standards allowing a party to know what conduct is "unreasonable," and California courts have taken pains to avoid the expansion of public nuisance liability. *See*, *e.g.*, *Acuna*, 14 Cal. 4th at 1107:

> [T]he courts lack power to extend the definition of the wrong or to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a public nuisance. This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a "public nuisance."

The authors of the Restatement described the common law standards for determining unreasonableness, including "[w]hether the conduct involves a significant interference with the public health, the public safety," or is "proscribed by a statute, ordinance or administrative regulation." Restatement (Second) of Torts § 821B(2) (1979). *See also Acuna*, 14 Cal. 4th at 1104 ("With the publication of the Restatement Second of Torts in 1965, the law of public nuisances had crystallized to such an extent that its features could be clearly delineated."). The Restatement's authors went on to indicate that "unreasonableness" was to be judged by reference to

the standards of conduct laid out in other areas of tort law. *See* Restatement (Second) of Torts § 821B cmt. e (indicating "principles governing negligent or reckless conduct, or abnormally dangerous activities"). Moreover, "[i]f a defendant's conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance . . . the court is acting without an established and recognized standard." *Id.* In such cases, "the potentially widespread damage liability for a public nuisance" suggests that courts should refer to standard tort definitions of unreasonableness. *See id.* (directing courts to the standards of unreasonableness set out in Restatement (Second) of Torts §§ 826-831 (1979)).

In other words, conduct is not unreasonable solely because of its negative consequences, even if those consequences are severe; to hold otherwise would be, essentially, to illegalize "bad action" or "improper conduct." *Cf. Junction 615, Inc. v. Ohio Liquor Control Comm'n*, 732 N.E.2d 1025, 1032-33 (Ohio Ct. App. 1999) (finding legal prohibition of "improper conduct" unconstitutionally vague); *In re Davis*, 242 Cal. App. 2d 645, 647 (1966) (finding statute that prohibited "any act 'which openly outrages public decency' " unconstitutionally vague).

In this case, the Attorney General sought a judgment that conduct which was and remains *lawful and nontortious* was an unreasonable violation of public right. The automobiles sold in this case were sold within the parameters of the law, without fraud or misrepresentation. It was entirely lawful to sell cars at the time and in the

manner that the Defendants are alleged to have done so—and it remains legal today. It is not unreasonable for a manufacturer of a legal product to make and sell that product in a legal and nontortious manner.

D. This Court Should Not Expand the Already Dangerously Vague Tort of "Public Nuisance"

The Attorney General's attempt to gut the "unreasonableness" element would blur the already vague boundaries of the public nuisance tort so far that people and businesses could be held liable for virtually any behavior later found to have deleterious effects. Widening the reach of public nuisance law to such a vague and unpredictable breadth would violate the Due Process Clause. *Bouie v. City of Columbia*, 378 U.S. 347, 356-57, 361 (1964); *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 713 (C.D. Cal. 1993); *Grove Press*, 418 F.2d at 88. "Courts are not free to pick undefined words from statutes and define them in a way to reach conduct which they disapprove." *State ex rel. Clemens v. Toneca, Inc*., 265 N.W.2d 909, 914 (Iowa 1978). This Court should therefore affirm the dismissal of the complaint for failing to state a claim on which relief can be granted.

While the state advances its public nuisance theory in the language of protecting the public welfare, the fact is that expanding that tort in such a way would be contrary to sound public policy and would pose a significant threat to the Due Process requirement that the law be reasonably clear. In *In re Lead Paint Litigation*,

924 A.2d 484, the New Jersey Supreme Court was asked to find paint manufacturers liable for a public nuisance due to the fact that they had sold lead paint in the past, which allegedly deteriorated over time and become a health hazard. The state sought compensation for the costs they claimed the government was forced to undertake in order to care for those who already had or would eventually develop lead-related illnesses. *Id.* at 487-88. The court, however, rejected these arguments. Public nuisance, the court noted, is "'vaguely defined' and 'poorly understood,'" although common law tradition did at least create some standards which "define it as a cognizable theory of tort law." *Id.* at 494 (citation omitted). If defendants could be found liable for the making and selling of an "ordinary, unregulated consumer product that [they] sold in the ordinary course of commerce," *id.* at 501, then the public nuisance theory "'would become a monster that would devour in one gulp the entire law of tort.'" *Id.* at 505 (quoting *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001)).

This conclusion is not unique to New Jersey. California, as explained above, repeatedly rejected calls for expanding the public nuisance tort. *Diamond*, 20 Cal. App. 3d at 382-83; *Firearm Cases*, 126 Cal. App. 4th at 991. Similarly, the Illinois Court of Appeals refused to find defendants liable under this theory for lawfully promoting and selling a legal product. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 139 (Ill. App. Ct. 2005) ("[T]he conduct of defendants in promoting

and lawfully selling lead-containing pigments decades ago, which was subsequently lawfully used by others, cannot be a legal cause of plaintiff's complained-of injury.").

The vagueness that these courts have recognized is a serious threat to the principles of Due Process. Courts have long recognized that the law must be clear enough that a reasonable person can know what acts are or are not legal and what punishments will be meted out for illegal activities—whether the infraction be criminal or civil. *See, e.g., BMW of North America*, 517 U.S. at 574. Where the law is so vague that a person cannot know what actions are or are not proscribed, the law cannot be said to provide due process. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) ("A statute can be impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits . . . [or] if it authorizes or even encourages arbitrary and discriminatory enforcement."). This rule applies not only to private individual defendants but also to defendants that are businesses. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005). If the state were given the authority virtually at will to prosecute reasonable and lawful business activities as "public nuisances," those businesses would not be able to understand what conduct is prohibited and would be subject to arbitrary and discriminatory enforcement in violation of the principles of Due Process.

Federalism considerations counsel just as strongly against expanding state-law tort theories in federal court. *See generally* Thomas W. Merrill, *The Common Law*

Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 13-19 (1985). A federal public nuisance tort enforceable within states by intra-state plaintiffs against intra-state defendants would allow plaintiffs to avoid the decisions of state courts, which are generally considered the final authority on matters of everyday tort law. *See id.* at 13-14 ("[A]ny assertion by the judiciary of a general power to make law would encroach upon the powers reserved to the states."). California court decisions that plaintiffs may not bring public nuisance suits against defendants for their past, legal activities would be significantly weakened by a federal appellate decision permit such suits. The constitutional reservation of powers to the states was designed precisely to avoid such conflicts. Where problems of nationwide importance might lead to a conflict between state and federal governments, those issues should be dealt with by the people's elected representatives.

CONCLUSION

Even if the district court erred in holding that this case presents a non-justiciable political question, the Appellants have not asserted a cause of action for which relief may be granted. There is no public nuisance doctrine which covers

the conduct at issue in this case. The manufacture and sale of legal products legally produced and legally sold is not a tort. The judgment should be *affirmed*.

DATED: April 8, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 07-16908

Form Must Be Signed By Attorney or Unrepresented Litigant *and Attached to the Back of Each Copy of the Brief*

I certify that: **(check appropriate option(s))**

✓ 4. *Amicus Briefs*

☑ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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DATED: April 8, 2008.

_____
TIMOTHY SANDEFUR

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLEES was filed with the Clerk this 8th day of April, 2008, via Federal Express. I further certify that two copies of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLEES were served this day via first-class mail, postage prepaid, upon each of the following:

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