05-5104-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA ex rel., ATTORNEY GENERAL BILL LOCKYER, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN, and CITY OF NEW YORK,

Plaintiffs-Appellants,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., and CINERGY CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE
U.S. SENATOR JAMES M. INHOFE
AND THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF DEFENDANTS-APPELLEES AND
SUPPORTING AFFIRMANCE OF THE DISTRICT COURT

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The Washington Legal Foundation (WLF) is incorporated under the laws of the District of Columbia as a non-profit interest law and policy center and is a non-stock corporation.

TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. CONGRESS HAS LEGISLATED NATIONAL POLICY ON POTENTIAL GLOBAL CLIMATE CHANGE 6

A. History of Congressional Action 7

B. EPA's Actions To Address Potential Global Climate Change 10

C. International Efforts 12

II. THE DISTRICT COURT CORRECTLY HELD THAT THESE CASES PRESENT A NONJUSTICIABLE POLITICAL QUESTION. 14

A. Overview of the Political Question Doctrine 14

B. These Cases Present a Political Question under *Baker V. Carr* . . . 16

1. The Assessment of and Response to Global Warming Are Policy Decisions That Are Constitutionally Committed to the Congress and Executive Branches 16

2. These Cases Present a Political Question Because There Are No Judicially Discoverable and Manageable Standards for a Court to Apply 22

3. These Cases Present Nonjusticiable Political Questions Because They Cannot Be Decided Absent Initial Policy Determinations Clearly for Nonjudicial Discretion. 26

4. The Final Three *Baker* Factors Are Present. 29

CONCLUSION 31

TABLE OF AUTHORITIES

CASES:

Baker v. Carr, 396 U.S. 186 (1962) . . . . *passim*

City of New York v. Beretta U.S.A. Corp.,
315 F.Supp. 2d 256 (E.D.N.Y. 2004) 24

Connecticut v. American Electric Power Co.,
406 F.Supp.2d 265 (S.D.N.Y. 2005) 16, 17

DKT Memorial Fund v. AID, 810 F.2d 1236 (D.C. Cir. 1987) 17

Hodel v. Indiana, 452 U.S. 314 (1981) 17

In re African-American Slave Descendants Litigation,
375 F. Supp. 2d 721 (N.D. Ill. 2005) 20

Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221 (1986) 20

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) 21, 22

Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991) 21, 22

Lamont v. Woods, 948 F.2d 825, 831 (2d Cir. 1991) 14

Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) 2, 10

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 22, 23

Oregon Waste Sys. v. Department of Envtl Quality,
511 U.S. 93 (1994) 17

Padavan v. United States, 82 F.3d 23 (2d Cir. 1996) 17

Planned Parenthood v. Agency for International Development,
838 F.2d 649 (2d Cir. 1988) 21, 26

Texas Industries v. Radcliff Materials, 451 U.S. 630 (1981) 18

United States v. Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981) 14

Vieth v. Jubelirer, 541 U.S. 267 (2004) 25

CONSTITUTION, STATUTES, AND REGULATIONS:

U.S. Constitution
Art. I, § 1 17
Art. I, § 8 17
Art. II, § 1 19
Art. II, § 2 19
Art. II, § 3 19

Energy Policy Act, Pub. L. No. 102-486, 106 Stat. 2776 (1992) 8

Energy Policy Act Pub. L. No. 109-58, 119 Stat. 594 (2005) 9
§ 1610(a)(6) 9
§ 1610(b)(1) 9
§ 1610(c)(1) 10
§ 1611 10

Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980) 7

Global Climate Protection Act of 1987
Pub. L. No. 100-204, 101 Stat. 1407 (1987) 7

Global Change Research Act. Pub. L. No. 101-606, 104 Stat. 3096 (1990) . . . 8

National Climate Program Act,
Pub. L. No. 95-367, 92 Stat. 601 (1978) 7

Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998) 13

Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999) 13

Pub. L. No. 106-377, 114 Stat. 1141, 1441A-41 (2000) 13

15 U.S.C. §§ 2901-2908 7
§ 2901 12
§§ 2931-2938 8
§ 2934 8
§ 2936 8
§ 2952 8

42 U.S.C. § 8911(a)(1) 7
§ 13381 8
§ 13382 9
§ 13384 8
§ 13385 9
§ 13385(b) 9

68 Fed. Reg. 52922 (Sept. 8, 2003) 10
52928 28
52931 & n.5 30
52932 10

Fed. R. App. P. 29 1

LEGISLATIVE HISTORY:

149 Cong. Rec. S13598 (daily ed. Oct. 30, 2003) 10

151 Cong. Rec. S21 (daily ed. Jan. 4, 2005) 13

151 Cong. Rec. S6892, 6894 (daily ed. June 21, 2005) 10

151 Cong. Rec. S7029 (daily ed. June 22, 2005) 10

S. Res. 98, 105th Cong. (1997) 13

MISCELLANEOUS:

United Nations Framework Convention on Climate Change ("UNFCCC")
Kyoto Protocol (Dec. 11, 1997) 12

Energy Information Administration, *www.eia.doe.gov/oiaf/1605/gg96rpt* 4

National Climatic Data Center, *http://lwf.ncdc.noaa.gov/oa/cimlate/gases/html* . 4

INTERESTS OF AMICI CURIAE

The Honorable James M. Inhofe, United States Senator for the State of Oklahoma, files this amici curiae brief under Fed. R. App. P. 29 in support of the Appellees, American Electric Power Company, Inc. (AEP), *et al*. As Chairman of the Senate Committee on Environment and Public Works, the Committee with jurisdiction over global climate change issues, Senator Inhofe has a unique interest in ensuring that courts do not interfere with the decisions that Congress has made regarding the complexities of potential global climate change, namely, not to require mandatory reductions in carbon dioxide (“CO_2”) emissions from any domestic source, including power plants such as those owned by Appellees that provide our country's critical energy needs. Rather, Congress and the Executive have undertaken substantial efforts to study and address the complexities of global climate issues, including their causes and effects, as well as to develop carefully crafted strategies at the national and international levels.

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide, including consumers, businesses, and property owners. As more fully discussed in the accompanying motion for leave to file this brief, WLF has participated as an amicus in numerous cases in the U.S. Supreme Court and lower federal courts dealing with environmental issues and the proper role of

federal courts under Article III. In particular, WLF filed an amicus brief in *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), arguing that Congress did not give authority to the EPA under the Clean Air Act to regulate carbon dioxide emissions for climate change purposes.

Amici submit that the injunctive relief sought by the plaintiffs in these cases would not be in the public interest because it would undermine and interfere with vital economic, regulatory, and foreign policies and interests of the United States without any assurance that plaintiffs' speculative *future* injuries from potential global warming would even be redressed. Under these circumstances, amici agree with the district court's judgment that the instant case presents a nonjusticiable political question.[1]

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[1] While this brief will focus on the political question issue, amici agree with the Appellees that the district court's judgment could also be affirmed on the alternative grounds that the plaintiffs lack standing; that there is no federal common law cause of action for this case; and that if there were, it has either been displaced or preempted by federal legislation on the subject. The reasons for these alternative grounds for affirmance are, to a large extent, inter-related to the reasons supporting dismissal under the political question doctrine. While this brief is filed in above-captioned case, amici's arguments are equally applicable to the related and virtually identical appeal in *Open Space Institute (OSI), et al., v. American Electric Power Company, Inc., et al.*, No. 05-5119-cv, and where appropriate, refer to OSI's brief. Parties for counsel in both cases have been served with amici's brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the interests of judicial economy, amici adopt by reference the Statement of the Case of the Appellees. *See* AEP Br. 5-12. In brief, the plaintiffs allege that global warming will cause catastrophic health, environmental and property damage later this century. For example, we are told that sea levels will rise "in the next 100 years" and "will inundate . . . much of New York City's infrastructure, including airports, tunnels, sewers, and subway stations." State Br. at 9. This sea-level rise "will continue for at least *hundreds* of years, even *after* carbon dioxide levels in the atmosphere are stabilized." Compl. ¶ 113 (emphasis added). Plaintiffs allege that these and other speculative "injuries from global warming claimed herein are *imminent*." Compl. ¶ 160 (emphasis added).

Plaintiffs allege that as a legal and factual matter, global warming constitutes a "public nuisance" *today*, and claim that it is partly caused by the worldwide emission of excessive carbon dioxide, a so-called greenhouse gas. They further allege that together, the five power company defendants emit only 2.5% of all the man-made carbon dioxide emissions worldwide.[2] Plaintiffs do

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[2] AEP Br. at 10. But that percentage is further dwarfed when one considers that according to the Energy Information Administration, man-made generated CO_2 constitutes only about 5 percent of the total amount of carbon

not allege that the power companies violate of any of the myriad laws and regulations that govern their highly-regulated operations, nor do they claim a violation of any of their constitutional rights. Rather, plaintiffs claim that this alleged public nuisance is actionable under federal common law, and asked the district court to cap and reduce the CO_2 emissions of the defendants by some unspecified amount, however minor a role those emissions may play in contributing to these alleged "imminent" injuries.

The plaintiffs mischaracterize global climate change and its highly complex causes as an actionable public nuisance under inapplicable federal common law jurisprudence, and enlist the federal courts into making nationwide energy and economic policy in the guise of injunctive relief. Realizing this, the district court properly disposed of plaintiffs' claims on the grounds that they raise nonjusticiable political questions. The issues plaintiffs ask the court to resolve

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dioxide in the atmosphere. See *http://www.eia.doe.gov/oiaf/1605/gg96rpt /chap1.htm.* Therefore, the defendants' CO_2 emissions constitute only .125% (2.5% times 5%) of total worldwide CO_2 emissions. And when one factors in natural water vapor which, according to the National Climatic Data Center, "is the most abundant greenhouse gas in the atmosphere," and which accounts for about 95% of the Earth's greenhouse effect, the defendants' contribution to greenhouse gases is truly minuscule. See *http://www.eia.doe.gov/oiaf/1605/ gg/96rpt.*

in this action are committed to the Legislative and Executive Branches of government because they inherently involve complex policy decisions that should be made on a national and international level. A federal court may not by judicial fiat impose a policy that Congress has considered and consistently rejected, namely, a reduction on power plant CO_2 emissions. In addition, there are no discoverable or manageable legal standards that a court could use to resolve the question and to fashion and supervise an appropriate remedy. In short, plaintiffs would have the court legislate from the bench. For these and other reasons provided by the Appellees in their briefs, this Court should affirm the judgment below.

ARGUMENT

These two related lawsuits raise a political question under each of the six well-known factors outlined by the Supreme Court in *Baker v. Carr*, 396 U.S. 186 (1962), any one of which is sufficient to warrant dismissal of the case as nonjusticiable. While these related factors will be addressed in greater detail in Part II of this brief, amici believe that it is important to first discuss the extensive and ongoing efforts by the political branches to address the complicated issue of global warming. A survey of those efforts will thus serve as a useful and necessary backdrop to inform an analysis of the *Baker v. Carr* factors.

I. CONGRESS HAS LEGISLATED NATIONAL POLICY ON POTENTIAL GLOBAL CLIMATE CHANGE.

Over the last three decades, Congress has addressed and legislated extensively on the highly controversial and complex subject of global climate change. In doing so, Congress has engaged in the kind of extensive study and analysis and the balancing of large-scale societal interests that fall well within the unique competence of the legislature.

Given the continuing uncertainties and disputes regarding the possible effects of increased CO_2 concentrations in the atmosphere, and the effectiveness and economic and societal consequences of any chosen response, Congress has held over 200 hearings, enacted at least a half dozen statutes, and taken other actions establishing a measured course of action for the Nation, designed to address concerns about potential global climate change through a greater understanding of the possible problems and solutions. Although the parties and *amici* may not agree with every decision Congress and Executive has made on this issue, the fact remains that the political branches of government have acted in a responsible manner to assess and establish national policy regarding global climate change and its causes.

A. History of Congressional Action

In 1978, Congress established a climate research program in the National Climate Program Act of 1978 to improve understanding of global climate change through research, data collection, assessments, information dissemination, and international cooperation.[3] In 1980, in the Energy Security Act, Pub. L. No. 96-294, Congress directed the National Academy of Sciences to study "the projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion . . . including an assessment of the economic, physical, climatic, and social effects of such impacts." 42 U.S.C. § 8911(a)(1). By 1987, in response to concerns about potential changes in climate caused by greenhouse gases, Congress passed the Global Climate Protection Act of 1987. Pub. L. No. 100-204, 101 Stat. 1407 (1987). That statute was the first to mandate international negotiations concerning the issue. The Act also established the National Climate Program to research the causes and effects of any global climate change, potential methods for control of emissions, and cooperation in international efforts to address climate concerns. *Id.* § 1103.

In subsequent legislation, Congress continued its policy of requiring and

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[3] National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978), amended by Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1407 (1987) (codified at 15 U.S.C. §§ 2901-2908).

funding further study and research on the issue of global climate change. In 1990, Congress enacted the Global Change Research Act. Pub. L. No. 101-606, 104 Stat. 3096 (codified at 15 U.S.C. §§ 2931-2938). That Act established a global climate change research plan, 15 U.S.C. § 2934; created a national and international research program into the causes and effects of global climate change, *id*. §§ 2934, 2952; provided for research on alternative energy and energy efficiency, *id*.; and required the submission of annual reports to Congress and a quadrennial scientific assessment. *Id*. §§ 2936, 2937. Congress further directed that the United States enter into international discussions to coordinate global climate change research. *Id*. § 2952(a).

Congress again addressed the issue with the passage of the Energy Policy Act of 1992 that directed the Secretary of Energy to conduct assessments related to greenhouse gases and report to Congress. Pub. L. No. 102-486, 106 Stat. 2776 (1992). That Act called for a number of specific actions related to global climate change, including the preparation of a report to Congress on the feasibility of stabilizing greenhouse gas emissions by the year 2005, 42 U.S.C. § 13381, and a comparative assessment of alternative policy mechanisms for doing so. *Id*. § 13384. Those assessments were to include "a short-run and long-run analysis of the social, economic, energy, environmental, competitive, and agricultural costs

and benefits for jobs and competition" as well as the "practicality" of mechanisms such as emission caps, energy efficiency standards, and voluntary incentive programs. *Id.* It also called for the preparation of a "least-cost energy strategy" designed to stabilize and eventually reduce the generation of greenhouse gases. *Id.* § 13382. Notably, this Act required the development of a national inventory of greenhouse gas emissions and a registry for *voluntary* reporting of greenhouse gas emissions and reductions. *Id.* § 13385. Such reportable reductions could be achieved "through any measures" including a variety of voluntary emission reductions, carbon dioxide sequestration, and energy efficiency mechanisms. *Id.* § 13385(b).

By 2005, Congress had made it clear beyond doubt that it had set a national policy addressing global climate change issues, and that this policy precludes the mandatory CO_2 emissions limitations plaintiffs seek. In Title XVI of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), entitled "Climate Change," Congress established additional specific strategies to address this issue, including the following:

- Selection of a metric to evaluate greenhouse gas emissions (*Id.* § 1610(a)(6));
- Authorization of a committee to review and evaluate existing federal climate reports and to coordinate technology development strategies

on greenhouse gas emissions (*Id.* § 1610(b)(1));

- Selection of a policy option: deployment of greenhouse gas reducing technologies, in the United States and in developing countries (*Id.* §§ 1610(c)(1); 1611).

Congress considered and rejected the possibility of imposing binding limits on CO_2 emissions most recently in 2005. During debate on the Energy Policy Act of 2005, Senators McCain and Lieberman offered Amendment No. 826, known as the "Climate Stewardship and Innovation Act," which would have imposed mandatory caps on greenhouse gas emissions. 151 Cong. Rec. S6892, 6894 (daily ed. June 21, 2005). The Senate rejected this amendment by a vote of 38-60.[4]

B. EPA's Actions To Address Potential Global Climate Change

Consistent with Congress's policy choice, the U.S. Environmental Protection Agency ("EPA") also has addressed global climate change concerns through a variety of voluntary programs.[5] For example, EPA's Energy Star

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[4] Vote No. 148, 151 Cong. Rec. S7029 (daily ed. June 22, 2005). The Senate had also rejected a similar proposal in 2003 offered by Senators McCain and Lieberman by a vote of 43-55. 149 Cong. Rec. S13598 (daily ed. Oct. 30, 2003).

[5] Congress has withheld from EPA any authority to regulate or impose binding emission limitations on sources of so-called greenhouse gases. *See* 68 Fed. Reg. 52922 (Sept. 8, 2003); *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

program produces improvements in the efficiency of home appliances, which reduces CO_2 emissions from power plants by decreasing electricity demand.[6] EPA also has entered into "extensive partnerships with industries responsible for emissions of the most potent industrial [greenhouse gases]. . . . Through partnerships with EPA, the aluminum sector has exceeded their goal of reducing [perfluorocarbon] emissions by 45% from 1990 levels by 2000 and is now in discussions about a new, more aggressive goal." *Id*. EPA's voluntary approach has resulted in significant reduction of greenhouse gas emissions, demonstrating the effectiveness of voluntary measures:

> The Federal Government's voluntary climate programs are already achieving significant emissions reductions. In 2000 alone, reductions in [greenhouse gas] emissions totaled 66 [million metric tons of carbon equivalent] when compared to emissions in the absence of those programs.

Id.

In short, both the Congress and the agencies have chosen to address global climate issues with extensive research and study initiatives, including incentivizing voluntary rather than imposing mandatory reductions of carbon dioxide.

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[6] See 68 Fed. Reg. 52932 (Sept. 8, 2003) ("EPA's Energy Star program is another example of voluntary actions that have substantially reduced GHG [Greenhouse Gas] emissions. . . . Reductions in GHG emissions from Energy Star purchases were equivalent to removing 10 million cars from the road last year.").

C. International Efforts

In keeping with Congress's policy that a coordinated global approach is the best way to address potential global climate change, Congress authorized the Executive Branch to engage in negotiations with other countries. As noted in the prior section, the Global Climate Protection Act of 1987 directed the Secretary of State to manage negotiations with other nations for a global response to global climate change. 15 U.S.C. § 2901. Following this directive, the United States became a signatory to the United Nations Framework Convention on Climate Change ("UNFCCC"), which spawned international efforts to understand global climate change.

Ongoing negotiations under the UNFCCC resulted in the proposed Kyoto Protocol which called for mandatory reductions in greenhouse gas emissions, but only by developed countries.[7] Although President Clinton signed this treaty, he never submitted it to the Senate for ratification. Indeed, in a bipartisan resolution approved overwhelmingly by vote of 95-0, the Senate expressed its opposition to the Kyoto Protocol because it excluded major developing countries such as China and India from reductions, and posed a risk of inflicting serious harm to the United

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[7] *See* UNFCCC, *Kyoto Protocol* (Dec. 11, 1997), *available at* http://unfccc.int/resource/docs/ convkp/kpeng.pdf.

States economy if unilateral reductions on CO_2 were mandated. S. Res. 98, 105th Cong. (1997). Indeed, Congress thereafter repeatedly enacted several statutes barring EPA from implementing the Kyoto Protocol via mandatory regulatory controls. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1141, 1441A-41 (2000).

As *amicus* Senator Inhofe pointed out on the floor of the Senate, mandatory greenhouse gas emission limitations -- such as those embodied in the Kyoto Protocol and which plaintiffs seek to have judicially imposed -- would harm the United States, its economy, and its position in the world:

> Kyoto-like policies harm Americans, particularly the poor and minorities, causing higher energy prices, reduced economic growth, and fewer jobs. After all, . . . the real purpose behind Kyoto [is to] "level[] the playing field" for businesses worldwide . . . to restrict America's growth and prosperity. Unfortunately for . . . Kyoto's staunchest advocates, America was wise to the scheme, and it has rejected Kyoto and similar policies convincingly. Whatever Kyoto is about – to some . . . it's about forming "an authentic global governance" – it is the wrong policy and it won't work.

151 Cong. Rec. S21 (daily ed. Jan. 4, 2005) (remarks of Senator Inhofe).

While the Senate properly rejected the Kyoto Protocol, this does not mean Congress has failed to address the issue. To the contrary, congressional action on global climate change has struck a careful balance among this country's policies on

environmental protection, foreign relations, national security, economic growth, and international competitiveness.

Congress has thus extensively legislated on the issue of global climate change, although not in a manner that suits plaintiffs' policy preferences. As discussed in the following section, plaintiffs' lawsuit impermissibly attempts to have a federal court substitute its judgment for the policy decisions committed by the Constitution to the Legislative and Executive branches, and otherwise presents a nonjusticiable political question.[8]

II. THE DISTRICT COURT CORRECTLY HELD THAT THESE CASES PRESENT A NONJUSTICIABLE POLITICAL QUESTION.

A. Overview of the Political Question Doctrine.

The political question doctrine reflects the constitutional scheme of separation of powers by barring the judiciary from deciding cases that exceed its authority or institutional competence. As this Court has observed, "the nonjusticiability of political questions is primarily a function of the constitutional separation of powers among the three branches of the federal government." *Lamont*

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[8] As Appellees have demonstrated, this extensive federal legislation on the subject is more than sufficient to displace any federal common law in this area. AEP Br. at 37 (citing *United States v. Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). Displacement of federal common law is based on the same separation of powers concerns that animate the political question doctrine.

v. Woods, 948 F.2d 825, 831 (2d Cir. 1991).

In determining whether a case raises a nonjusticiable political question, courts analyze the specific case in light of the six related factors outlined by the Supreme Court in *Baker v. Carr*:

> [1] [a] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. If any one of those factors is present, the case is nonjusticiable as a political question.

As defendants correctly note, just because some cases falling within the same generic category or subject matter that may have been found to be justiciable, that does not mean *all* such cases are justiciable. AEP Br. at 49-51. Rather, in evaluating whether a lawsuit presents a nonjusticiable political question, a court must perform a "'discriminating inquiry into the precise facts and posture of *the particular case*.'" *Baker*, 396 U.S. at 217 (emphasis added).

As Part I of this brief made clear, Congress has squarely considered and

repeatedly rejected the imposition of any mandatory caps or reductions on emissions of carbon dioxide in addressing global climate change. While the district court judge focused primarily on the third *Baker* factor, *i.e.*, "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion," she properly recognized that "several of these" other related *Baker* factors "formed the basis for finding that Plaintiffs raise a non-justiciable political question." *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265, 272 (S.D.N.Y. 2005). Amici will now address the *Baker* factors.

B. These Cases Present a Political Question under *Baker v. Carr.*

1. The Assessment of and Response to Global Warming Are Policy Decisions That Are Constitutionally Committed to the Congress and Executive Branches.

The first *Baker v. Carr* factor is whether there is a "textually demonstrable constitutional commitment to a coordinate political department." Plaintiffs' lawsuit would have the district court decide important policy issues that are constitutionally committed to both the Legislative and Executive Branches of government. While it is true that some simple interstate nuisance common-law tort actions may fall within the purview of the judicial branch, the question is whether the issues of *this particular case* -- the extent to which there is global warming, the extent of any harm resulting therefrom, the extent of defendants' responsibility for it, and the

remedy to be imposed -- are issues that are constitutionally committed to the political branches to decide. As the district court correctly observed, "[t]he scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation." *Connecticut*, 406 F.Supp.2d at 272.

Plaintiffs assert that "[t]here is nothing in the Constitution committing interstate pollution cases to Congress or the Executive Branch." Open Space Institute (OSI) Br. at 40. Even assuming, *arguendo*, that carbon dioxide is a pollutant, plaintiffs are mistaken. In the first place, Article I, Section 1 of the Constitution is a textually demonstrable commitment of all legislative power solely to the United States Congress. Article I, Section 8, of the Constitution likewise vests Congress with broad and exclusive power over interstate commerce, including the power to regulate activities that impact the environment and affect interstate and foreign commerce.[9]

The Constitution's delegation of legislative power to Congress is a sufficient textual commitment of the issue to satisfy the first *Baker* factor. In *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996), for example, this Court dismissed on

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[9] *See, e.g., Hodel v. Indiana*, 452 U.S. 314 (1981). At the same time, States are prohibited by the so-called dormant Commerce Clause from regulating interstate or foreign commerce, even with regard to the interstate shipment of solid waste. *Oregon Waste Sys. v. Department of Envtl Quality*, 511 U.S. 93 (1994).

political question grounds claims made by certain counties alleging economic damage caused by the failure of Congress to deal with the migration or influx of illegal immigrants into their jurisdictions. In so holding, this Court relied on the fact that Congress is granted plenary power over immigration by Article I, Section 8, of the Constitution: "[I]t cannot be disputed seriously that there is `a textually demonstrable constitutional commitment' of naturalization and immigration to Congress. Because of this textual commitment, `the power over aliens is of a political character. . . .' " *Id*. at 27 (citation omitted).

Congress has considered the issue of global warming and has taken careful and measured steps to address it, but has consistently rejected mandatory emission caps as a response to the issue. Once Congress acts, courts may not override, alter, or supplement the legislative design. As the Supreme Court observed in *Texas Industries v. Radcliff Materials,* 451 U.S. 630 (1981), in the face of established legislative policy, only Congress, not the judiciary, has authority to order supplemental remedies:

> The choice we are urged to make is 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. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of Government, the

Congress and the Executive, and not to the courts.

Id. at 647.

In addition to Article I's constitutional commitment of the issue to the legislative branch, Article II commits to the President all the executive power of the government (Art II., sec. 1); the power to make and ratify treaties with foreign governments with the approval of the Senate (Art 1I, sec. 2); and the duty to faithfully execute the laws. Art II, sec. 3. The President has exercised all these powers in addressing global warming, not only at the domestic level through Executive branch agencies such as the Environmental Protection Agency (EPA) and the Department of Energy, but also at the international and diplomatic levels through the Departments of State and Commerce, including negotiations under the United Nations Framework Convention on Climate Change.[10]

Thus, both the Congress and the Executive have exercised the powers textually committed to them by the Constitution to address global warming at the national and international levels. As described by the Supreme Court:

> The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as courts are

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[10] *See* discussion, *supra*, at pp. 12-14; *see also* AEP Br. at 44-48.

> fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.

Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 230 (1986).[11]

Thus, the issue of global warming, how to assess its causes and effects, and how to regulate carbon dioxide emissions, is a nonjusticiable political question that has been constitutionally committed to the political branches.

Plaintiffs' mischaracterize this case as fitting within the mold of a simple case of public nuisance against private tortfeasors. As one court aptly observed:

> [A]lthough Plaintiffs couch their claims as *tort* or *property* claims for acts committed by *private* corporate defendants, this alone does not preclude the application of the political question doctrine. The Supreme Court has stated that the identity of the litigants is immaterial to the questions raised by the political question doctrine. Additionally, when determining whether the political question doctrine applies, the court must look to the nature of the underlying litigation, not the specific claims enumerated in the complaint.

In re African-American Slave Descendants Litigation, 375 F. Supp. 2d 721, 757 (N.D. Ill. 2005) (internal citations omitted) (emphasis in original). The nature of this particular litigation is nothing short of assessing global or planetary climate

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[11] It is true that in *Japan Whaling*, the Court concluded that no political question existed because the case presented merely an issue of interpretation of legislation enacted by Congress that reflected policy choices already made. Here, however, no statutory or constitutional claims are presented; rather, the plaintiffs would have the court legislate from the bench on a complicated subject and in policy-laden area, and in a way that Congress already has carefully considered but rejected.

change, assessing its causes and effects, and crafting, imposing, and supervising a judicial remedy. Clearly, the resolution of this dispute is quintessentially committed to our political departments.

The cases relied on by plaintiffs to rebut the presence of the first *Baker* factor are distinguishable. As amici previously noted, while the Court did decide the question in *Japan Whaling,* the case turned on statutory interpretation, a core judicial function. 478 U.S. at 230. Whether courts have authority to construe statutes is not at issue here. Plaintiffs' reliance on *Planned Parenthood v. Agency for International Development*, 838 F.2d 649, 655-56 (2d Cir. 1988), is also misplaced. That case stands for the unremarkable proposition that courts can review legislative actions for violations of constitutional rights. *Id.* at 655-56. Plaintiffs assert no constitutional violations here. Notably, the court in *Planned Parenthood* recognized that "courts are *not* competent to formulate national policy or to review controversies which 'revolve around policy choices and value determinations constitutionally committed' to Congress or the executive branch." *Id.* at 655 (*quoting Japan Whaling*, 478 U.S. at 230) (emphasis added). In this case, the plaintiffs are asking the court to do precisely that.

The courts in both *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995). and *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44 (2d Cir. 1991), also relied on by the

plaintiffs, found no political question in those cases but only because: (1) Congress had authorized the tort action at issue through the Alien Tort Act and the Executive Branch expressly disavowed the existence of a political question, (*Kadic*, 70 F.3d at 249-50); and (2) "both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist organizations in federal court," (*Klinghoffer*, 937 F.2d at 49). Thus, neither of those cases invoked any of the separation of powers concerns that are central to the political question doctrine.

2. These Cases Present a Political Question Because There Are No Judicially Discoverable and Manageable Standards for a Court to Apply.

These cases are also nonjusticiable under the second *Baker* factor because there are no "judicially discoverable and manageable standards for resolving" it. As previously noted, the relevant inquiry is whether standards exist that could be applied to the specifics of this case, not simply to the category of such cases. Properly understood, no such judicially discoverable and manageable standards are available to resolve this case.

Plaintiffs incorrectly suggest that *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), establishes a principle that so-called "interstate nuisance" cases are by definition immune from scrutiny under the political question doctrine, and are always justiciable. In fact, the Supreme Court in *Ohio* merely recognized that

in past cases, it had adjudicated certain interstate nuisance cases, but also noted its refusal "to entertain . . . actions . . . that seek to embroil this tribunal in 'political questions.'" *Id.* at 496 (citations omitted). In that case, the State of Ohio sued three companies which discharged mercury into Lake Erie for allegedly damaging the waters, vegetation, fish and wildlife. In declining to exercise original jurisdiction, the Supreme Court emphasized that the science of mercury pollution was not clear, that other companies discharged mercury in Lake Erie, and that national and international bodies were studying the causes of pollution in Lake Erie:

> [T]his Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extra-ordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of government agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with -- and perhaps not infrequent deference to -- other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise. . . .

Id. at 504-05.

The same factors that caused the Supreme Court to decline to exercise jurisdiction in *Ohio* are, *a fortiori*, applicable here: the presence of novel scientific issues of fact and causation regarding global warming; multiplicity of government and international agencies studying the issue; and a lack of technical expertise to

fashion and supervise an appropriate remedy.[12]

The instant case is qualitatively different from and infinitely more complicated than the simple "interstate pollution" line of cases where a certain pollutant is traceable to a few sources and is alleged to cause a discrete and demonstrable environmental injury that can be abated. Here, plaintiffs allege that universal generation of carbon dioxide -- a gas that is exhaled by every human being, livestock and other animals, and is a byproduct of fossil fuel combustion -- contributes to global warming and constitutes an actionable public nuisance. They further argue that even "if each contributing actor's responsibility individually does not constitute a substantial interference with a public right, defendants may still be found liable for conduct creating in the aggregate a public nuisance if the suit is one for injunctive relief." OSI Br. at 27 (quoting *City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp. 2d 256, 283 (E.D.N.Y. 2004).

Even if this were the correct formulation of liability under federal common law, and as Appellees have shown, it is not, this surely would be an unmanageable standard to apply to the case at bar. Under plaintiffs' theory, every person or entity

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[12] Regardless of whether the Supreme Court in *Ohio* explicitly denominated those reasons as a specific *Baker v. Carr* "political question" factor, the district court in this case correctly declined to adjudicate these cases for similar reasons. *See* discussion, *infra*, with respect to the third *Baker v. Carr* factor.

that uses fossil fuels, including the plaintiffs themselves, is jointly and severally liable for global warming because carbon dioxide is allegedly part of the cause of it; therefore, any and all of them could be enjoined by a federal court to cap or otherwise reduce their respective CO_2 emissions. If that is true, plaintiffs could have sued and enjoined just one of the power companies instead of five, or just a single power plant, or, even for that matter, the owner of a fleet of SUV vehicles or even a single automobile. They all emit CO_2. And according to the plaintiffs, each contributes, no matter how infinitesimally, to global warming that is allegedly causing them injuries. Conventional nuisance law is simply not designed to address this kind of universal activity that causes no direct or identifiable harm. Merely reciting the hornbook definition of public nuisance as an "unreasonable interference with a right common to the general public" simply begs the question and provides no answers. No principles exist to give meaningful legal content to the term "unreasonable" in the context of global warming.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Supreme Court had the opportunity to address the second *Baker* factor in a gerrymandering case and concluded that no judicially discoverable or manageable standards existed. The plaintiffs in *Vieth* offered only general and vague formulations containing proposed legal tests to resolve the case, not unlike the ones plaintiffs advance here.

Plaintiffs try to circumvent this problem by claiming that this case merely presents adjudicatory difficulties similar to those in *Planned Parenthood*. OSI Br. at 47. But the Court in *Planned Parenthood* found that the core of plaintiffs' arguments in that case involved only the "legality of AID's implementation" of a policy and did "not require the court to pass upon the 'political and social wisdom of AID's foreign policy.'" *Planned Parenthood*, 838 F.2d at 656 (*quoting DKT Memorial Fund v. AID*, 810 F.2d 1236, 1236 (D.C. Cir. 1987)). By sharp contrast, plaintiffs called upon the district court below to pass upon the "political and social wisdom" of the government's response to global warming issues, and thus, usurp the role of the democratically elected branches.

3. These Cases Present Nonjusticiable Political Questions Because They Cannot Be Decided Absent Initial Policy Determinations Clearly for Nonjudicial Discretion.

The third *Baker v. Carr* factor, and the one principally relied upon by the district court, is that courts cannot decide cases in the absence of "an initial policy determination of a kind that is clearly for nonjudicial discretion." 369 U.S. at 217. As the district court explained:

> Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage. . . . Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants;

> (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security--all without an "initial policy determination" having been made by the elected branches.

Connecticut, 406 Supp.2d at 272-73.

While amici submit that these reasons support the finding of the second *Baker* factor in the context of fashioning a remedy ("lack of judicially discoverable and manageable standards for resolving" the question), they also underscore the "high policy" nature of the decisions that are inherent in this controversy -- decisions that are exclusively within the province of the elected and accountable political branches of government.

In these cases, plaintiffs seek judicial control and monitoring of many of this country's major power plants without regard to any of the costs to the Nation and its economy. This political question should be, and indeed has been, decided by Congress as previously discussed. The Executive branch concurs in, and is implementing, Congress's decisions. Moreover, as EPA has explained, no environmental policy would have greater economic and political effects on this

nation than imposition of binding CO_2 emissions controls:

> It 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. Virtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change.

68 Fed. Reg. 52928 (Sept. 8, 2003). EPA concluded by stating: "An administrative agency properly awaits congressional direction before addressing a fundamental policy issue such as global climate change[.]" *Id.* So must the federal courts.

Plaintiffs try to counter the fundamental principles by arguing that, where Congress has not acted, federal courts are free to fill the vacuum by providing judicial remedies. OSI Br. at 48. But as the foregoing discussion makes clear, Congress *has* acted, albeit not in the manner preferred by the plaintiffs. Alternatively, plaintiffs argue that it is official policy of the United States to reduce CO_2 emissions, and that the remedy they seek in their common law nuisance case will effectuate that policy. *Id.* They are wrong for two reasons. First, the policies of Congress are expressed in the statutes they enact, and none have required unilateral caps on domestic sources of CO_2 emissions; rather, Congress has consistently rejected mandatory caps. Second, as OSI itself notes, the Global Climate Protection Act of 1987 and other statutes call for a "*slowing rate of increase*

in atmospheric greenhouse gas concentrations over the short-term." *Id*. (emphasis added). Here, plaintiffs seek an immediate cap and reductions of CO_2 emissions by the defendants rather than a "slowing rate of increase" of their CO_2 emissions. Thus, the relief plaintiffs seek to impose would directly counter the approach legislated by Congress.

Accordingly, the district case properly dismissed this case on the grounds that it presents nonjusticiable political questions that are impossible to decide "without an initial policy determination of a kind clearly for nonjudicial discretion."

4. The Final Three Baker Factors Are Present.

For many of the reasons previously discussed in this brief, this case presents nonjusticiable questions because resolving those questions would demonstrate a "lack of respect due coordinate branches of government," frustrate a "political decision already made," and cause "embarrassment from multifarious pronouncements by various departments on one question."

As previously demonstrated, both the Legislative and the Executive branches have since 1978 repeatedly exercised their powers to study, assess, and address global warming; for a court to impose emission caps where Congress has expressly rejected them would surely demonstrate a "lack of respect" to the coordinate branches of government. International negotiations are crucial to

establishing a policy that protects the economic and national security interests of the United States. A unilateral emission cap ordered by a federal court could seriously unravel those negotiations and may even result in additional emissions by other countries and industries to take advantage of the reduced emission requirements placed unfairly on a few power companies.

As EPA has noted with respect to past circumstances, unilateral regulation, such as that which plaintiffs seek to obtain through these suits, has harmed the nation's foreign policy interests:

> Unilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies. . . . Any potential benefit of EPA regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions. The U.S. faced a similar dilemma in its efforts to address stratospheric ozone depletion.
>
> * * *
>
> Early U.S. controls on substances that deplete stratospheric ozone were not matched by many other countries. Over time, U.S. emissions reductions were more than offset by emissions in other countries. The U.S. did not impose additional domestic controls . . . until key developed and developing nations had committed to controlling their own. . . .

68 Fed. Reg. 52931 & n.5 (Sept. 8, 2003).

Accordingly, this case presents nonjusticiable political questions under the remaining three *Baker* factors.

CONCLUSION

For the foregoing reasons and those provided by the Appellees, amici urge this Court to affirm the judgment of the district court.

Respectfully submitted,

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March 2, 2006

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), counsel for amici curiae certify that this brief contains 6843 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). This brief has been prepared using Corel Word Perfect in a proportionally spaced 14-pont CG Times typeface.

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PAUL D. KAMENAR

ANTI-VIRUS CERTIFICATION
Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: State of Connecticut et al., v. American Power Electric Power Co., Inc., et al.

DOCKET NUMBER: 05-5104-cv

I, Paul D. Kamenar, certify that I have scanned for viruses the PDF version of the Brief of Amici Curiae U.S. Senator James M. Inhofe and the Washington Legal Foundation that was submitted in this case as an email attachment to *briefs@ca.2.uscourts.gov* and that no viruses were detected.

The name and the version of the anti-virus detector that was used is Computer Associates eTrust InoculateIT, version 6.0.96.

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PAUL D. KAMENAR

DATE: March 2, 2006

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2006, two copies of the foregoing Brief of Amici Curiae were servied by first-class mail, postage pre-paid, to the following counsel and addresses shown on the attached service list, and by emailing a copy of the brief in portable document format (PDF) to each of the email addresses shown on the following service list.

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