05-5104-cv

IN THE

FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN and CITY OF NEW YORK,

Plaintiffs-Appellants,

—against—

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 FOR *AMICI CURIAE* LAW PROFESSORS SUPPORTING DEFENDANTS-APPELLEES' REQUEST FOR AFFIRMANCE OF THE DISTRICT COURT (*AMICI* LISTED ON INSIDE FRONT COVER)

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INTEREST OF AMICI CURIAE

Amici are, or have been, law professors specializing in constitutional law, international law or administrative law. Each has a personal and professional interest in the status and development of the law in these areas. In this regard, amici believe that the questions raised by this case now before the Court are of the highest importance, and that the Court's consideration of this appeal would benefit from amici's views. Their individual affiliations are as follows:

Robert H. Bork is currently a Distinguished Fellow at The Hudson Institute, Washington, D.C.

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The views expressed herein are those of the individual amici, and do not necessarily represent the views of any group or organization with which any of them may be affiliated.

Authority to file this brief is by motion under Fed. R. App. P. 29(b).

I. SUMMARY OF ARGUMENT

This lawsuit opened yet another front in the ongoing political struggle over global climate change ("GCC" or "climate change"). Appellants asked the District Court to cap the carbon dioxide emissions of five public utilities which, they claim, are the largest carbon dioxide emitters in the United States. Appellants characterized their claim, despite the teaching of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as one of federal "common law" public nuisance. In fact, the result of the relief Appellants seek, and the evident purpose of this action, would be to re-make American foreign policy on one of the most important, difficult and controversial issues now before the community of nations. This is not an appropriate role for the courts. The Constitution vests the formulation and implementation of foreign policy in the political branches of government.

American climate change policy is currently embodied in the United Nations Framework Convention on Climate Change ("UNFCCC"), June 12, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, in statutes providing for various research programs on the subject, in the Bush Administration's position statements on the issue, and especially in the U.S. Government's ongoing negotiations with foreign states on how best to meet and address the GCC challenge. Key aspects of U.S. policy are that GCC can be met only by a genuinely global response, including the developing countries which account for the majority of greenhouse gas ("GHG") emissions, and that American industry should not be subjected to arbitrary, mandatory emission limitations. Appellants evidently disagree, and seek to change this policy through litigation in the federal courts, rather than at the ballot box. The District Court was correct to dismiss this case as presenting non-justiciable political questions and its ruling should be affirmed.

II. INTRODUCTION

Climate change is one of the most complex and controversial issues now facing the community of nations. As the U.S. Environmental Protection Agency explained in refusing to regulate GHG emissions under the Clean Air Act, GCC "has enormous political significance. It has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation

in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue." Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

Although the Appellants framed their complaint in terms of "public nuisance," this action is actually a thinly disguised effort to conscript the courts into the ongoing political battle over how GCC should be addressed. The relief they seek would, in fact, directly contravene current federal policy and would severely undercut the President's ability to achieve U.S. climate change goals on the international level. As the President made clear in 2001: "[e]ven with the best science, even with the best technology, we all know that the United States cannot solve this global problem alone. . . . our approach must be based on global participation, including that of developing countries whose net greenhouse gas emissions now exceed those in the developed countries." Statement of the President, June 11, 2001, *available at* http://www.whitehouse.gov/news/releases /2001/06/20010611-2.html [hereinafter "Presidential Statement of June 11, 2001"].

In fact, the Federal Government has been actively engaged in formulating and implementing GCC policy for nearly thirty years – beginning with the National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 (1978).

This law required the establishment of a National Climate Program to assess the climate's environmental effects and to improve Congress' understanding of climate processes, both natural and manmade, § 3, 92 Stat. at 601. The Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, §§ 1103, 101 Stat. 1407, 1408-09 (1987), directed the Secretary of State to coordinate U.S. GCC negotiations, and directed EPA to develop and propose to Congress a coordinated national policy on the issue. The Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 (1990), established a Committee on Earth and Environmental Sciences to coordinate a 10-year research program, § 102, 104 Stat. at 3097, directed the President to establish a U.S. Global Change Research Program to "improve understanding of global change," § 103, *id.* at 2098, and provided for scientific assessments that "analyze[] current trends in global change" every four years, § 106, *id*. at 3101. This law also advised the President to direct the Secretary of State to "initiate discussions with other nations leading toward international protocols and other agreements to coordinate global change research activities," and "the development of energy technologies which have minimally adverse effects on the environment," § 203, *id*., at 3102.[1]

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[1] The Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, 106 Stat. 2999, also required the Secretary of Energy to conduct several assessments relating to

(continue)

Most significantly, however, the United States was among the UNFCCC's original signatories, ratifying that treaty in 1992. The UNFCCC established an international framework to address GCC, with the states-parties agreeing to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change." UNFCCC, *supra*, art. 4, § 1(b). In addition, pursuant to Articles 4 and 12 of the UNFCCC, the United States is committed to submit a national emission inventory annually to the UNFCCC's secretariat. *Id.* arts. 4, 12.

Since the UNFCCC came into force in 1994, annual "conferences of the parties" ("COP") have been held for the purpose of continuing GCC negotiations. *See* John R. Justus & Susan R. Fletcher, Congressional Research

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(continued)
greenhouse gases and report to Congress. In particular, section 1604 called for a report of a "comparative assessment of alternative policy mechanisms for reducing the generating of greenhouse gases," § 1604, 106 Stat. at 3002. The alternative policy mechanisms to be assessed included: (1) "caps for the generation" of such gases from "major sources and emissions trading programs"; (2) "Federal standards for energy efficiency for major sources," including "power plants, industrial processes, automobile fuel economy, appliances, and buildings"; and (3) "[v]arious Federal and voluntary incentives programs." *Id.*

Service, *CRS Issue Brief for Congress: Global Climate Change*, 10 (Sept. 7, 2005) [hereinafter "CRS Issue Brief on GCC"], *available at* http://www.usembassy.it/pdf/other/IB89005.pdf. The most recent such meeting (COP-11) was convened November 28 through December 9, 2005, in Montreal, Canada. Consistent with the controversial nature of the issues surrounding GCC, COP meetings have often been highly charged and contentious events – the 2000 meeting (COP-6) in The Hague was actually suspended for a time – and recent sessions have highlighted the very deep differences in approach that divide the United States from a number of its European allies. *See* CRS Issue Brief on GCC, *supra*, at 10-13.

Those differences largely involve the very "remedy" Appellants now seek from the Court – the imposition of mandatory limits on carbon dioxide emissions applicable to U.S. industry, rather than a more comprehensive solution involving the development of new and more efficient energy technologies, carbon sequestration strategies, and the full participation of developing countries in meeting the GCC challenge. It is well understood that the UNFCCC did not impose binding emissions reductions requirements – although this was a "central issue," 68 Fed. Reg. at 52,926, in the negotiations surrounding that agreement – but mandatory limitations would have resulted if the U.S. had ratified the UNFCCC's "Kyoto Protocol."

The Kyoto Protocol was produced by the 1997 COP meeting (COP-3), in Kyoto, Japan. Unlike the UNFCCC, the Kyoto Protocol requires the industrialized nations that have ratified the agreement to make significant reductions in GHG emissions (including carbon dioxide) by 2012. Although this treaty was embraced by most of Europe, it was rejected by the United States. A principal American objection to Kyoto was – and remains – the fact that developing countries are not required to reduce their GHG emissions under the treaty. *See* Presidential Statement of June 11, *supra*.[2] Indeed, in the months leading up to the Kyoto meeting in 1997, the Senate passed (by a vote of 95-0) S. Res. 98, rejecting any agreement that did not include requirements for emissions limitations by developing countries. S. Res. 98, 105th Cong., (1997). *See also* 68 Fed. Reg. at 52,927. Later legislation affirmatively barred EPA from implementing the Protocol without Senate approval of the treaty. *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, tit. III, 112 Stat. 2461, 2496 (1998) (appropriating funds to EPA on the condition that

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[2] Although President Clinton signed the Kyoto Protocol on November 12, 1998, he did not forward the instrument to the Senate for advice and consent – "out of concern that the Senate would reject the treaty" because of its controversial imposition of carbon dioxide emissions limitation requirements on the United States in the absence of such requirements for developing nations. 68 Fed. Reg. at 52,927.

"none of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol"); Pub. L. No. 106-74, tit. III, 113 Stat. 1047, 1080 (1999) (placing identical conditions on appropriations for fiscal year 2000); Pub. L. No. 106-377, app. A, tit. III, 1441, 1441A-41 (2000) (for fiscal year 2001). *See also* 68 Fed. Reg. at 52,927-28. Congress stopped enacting such legislation only after President George W. Bush announced in 2001 that the United States would not ratify the Kyoto Protocol. *See* Pub. L. No. 107-73, tit. III, 115 Stat. 651, 683 (2002) (for fiscal year 2002).

Today, the Kyoto Protocol is widely viewed as a failure, largely because of the difficult international issues involved. As explained in *The Economist* magazine,

> Kyoto's failure is hardly surprising. Agreeing on how to control carbon emissions is even harder than agreeing on how to promote free trade. Both issues require lots of countries to make political sacrifices to achieve a collective good; but at least in the case of free trade, the benefits accrue swiftly. The costs of cutting carbon emissions, by contrast, pile up in the short term, while the benefits are far-off and uncertain.

"Don't despair: Most of the news on the climate change front is bad, but not all of it," *The Economist*, Dec. 10, 2005, at 11.

Since 2001, the U.S. has pursued a varied international strategy on GCC issues. It has continued to participate (on non-Kyoto Protocol issues) in COP

meetings and initiated a series of bilateral negotiations leading, in July, 2005, to President Bush's announcement of the Asia-Pacific Partnership on Clean Development and Climate. This is an especially important agreement because it includes China, India and South Korea – all major GHG emissions sources that are not required to make reductions under the Kyoto Protocol. The other participants are the United States, Australia and Japan. *See* Office of the Press Secretary, White House Fact Sheet: President Bush and the Asia-Pacific Partnership on Clean Development (July 27, 2005), *available at* http://www.state.gov/g/oes/rls/ fs/50314.htm.

III. ARGUMENT

A. Granting Appellants' Request for Relief Would Require the Court to Make United States Foreign Policy.

As the Supreme Court has explained: "matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Here, granting the relief Appellants seek would require the courts to make, in fact, to remake, U.S. foreign policy. In their complaints below, and in this Court, Appellants acknowledge that the various alleged deleterious impacts on private and public lands that, they allege, will be caused by a hotter climate, are the result of a *worldwide* phenomenon commonly called "global warming." *See* States' Comp. ¶¶ 83, 84, 90, 91, 95-97, J.A. 85-88; States' Brief at 8-9. In fact, almost every

aspect of the GCC issue is open to debate, including whether and to what extent human activity is affecting the Earth's natural climate variations.

Indeed, it is generally recognized that imposition of even the most draconian carbon dioxide emissions limitations, up to and including the closure of Appellees' power plants throughout the United States, would likely have no impact on the Earth's warming – and, hence, on the alleged harms for which Appellants seek redress – unless and until restrictions are also implemented by the world's other developed and developing countries. As EPA, the federal agency with most expertise in the technical aspects of GCC, has explained: "the nature of the global pool [of greenhouse gases] would mean that any CO_2 standard that might be established would in effect be a worldwide ambient air quality standard, not a national standard – the entire world would be either in compliance or out of compliance." 68 Fed. Reg. at 52,927. As the District Court correctly noted, granting Appellants the relief they seek would have required it to make many basic policy choices, including:

> (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 v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272-73 (S.D.N.Y. 2005).

Perhaps even more to the point, it already is United States policy that the solution to GCC *must* be international in breadth. This much was established in the UNFCCC, which states that "change in the Earth's climate and its adverse effects are a common concern of humankind," and "that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." UNFCCC, *supra*, pmbl. To that end, the treaty requires the parties to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes." *Id*. art. 4, § 1(b). Congress has similarly made clear that understanding and addressing climate change is a global issue. As early as 1978, in establishing the National Climate Program, Congress found that: "[c]limate fluctuation and change occur on a global basis, and deficiencies exist in the system for monitoring global climate changes. International cooperation for the purpose of sharing the benefits and costs of a global effort to understand climate is essential." National Climate Program Act of 1978, Pub. L. No. 95-367, § 2(5), 62 Stat. 601, 601 (1978).

The Federal Government is, of course, working towards an international response to GCC, on terms favorable to U.S. interests. As explained above, since the late 1980s, American diplomats – under both Democratic and Republican Administrations – have been engaged in active GCC negotiations, both as part of the UNFCCC COP process, and bilaterally with other nations. To the extent that one or more of the several states, including Appellant Attorneys General here, or various private individuals and organizations, are impatient with the Federal Government's progress, or simply disagree with the federal approach to this aspect of U.S. foreign policy, their remedies do not properly lay with the courts.

B. The Formulation and Implementation of United States Foreign Policy is Reserved to the Political Branches of the Federal Government.

The Constitution's Framers reserved foreign affairs wholly to the Federal Government, and they did so for good and sufficient reasons. In the eleven years between the Declaration of Independence and first meeting of the Constitutional Convention in Philadelphia, the states had persistently ignored or violated the United States' international obligations. Indeed, as Justice Joseph Story noted in his 1833 exposition of the Constitution: "[i]t is notorious, that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the states under the confederation. They were deemed by the

states, not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution." Joseph Story, *Commentaries on the Constitution of the United States* 686 (reprinted with an introduction by Ronald D. Rotunda & John E. Nowak, Carolina Academic Press 1987) (1833).

Not surprisingly, the courts have long ruled that the power to make and implement United States foreign policy is vested in the national government. As the Supreme Court explained in the landmark *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319-20 (1936):

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

As a result, courts defer to the President's authority and decision-making in this area – and this is especially the case when his actions are backed by those of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) ("[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.").

Indeed, this Court itself recently acknowledged "the historic deference due to the Executive in the conduct of the foreign relations of the United States, as highlighted by the Supreme Court's recent guidance in [*Republic of Austria v.*] *Altmann*[, 541 U.S. 677 (2004)] and *Sosa* [*v. Alvarez-Machain*, 542 U.S. 692 (2004)]." *Whiteman v. Dorotheum GMBH & Co. KG*, 431 F.3d 57, 70 (2d Cir. 2005).

C. The Political Question Doctrine Applies Here.

The courts articulated the "political question" doctrine as a means of vindicating the Constitution's fundamental disposition of authority among separate and co-equal branches of government. The metes and bounds of this rule, including its proper characterization, have long been debated. *See, e.g.,* Louis Henkin, *Is There a 'Political Question' Doctrine?,* 85 Yale L.J. 597 (1976). The fundamentals in the foreign policy area, however, are clear. Where adjudication of a case would require the courts to make foreign policy choices otherwise reserved to the Executive Branch or Congress, the matter is nonjusticiable. This is just such a case.

Obviously, as the Supreme Court explained in *Baker v. Carr*, 369 U.S. 186, 210-11 (1962), an issue is not rendered a "political question" merely because it implicates U.S. foreign policy or international relations. Nevertheless, the *Baker v. Carr* Court made clear that "[n]ot only does

resolution of [foreign policy] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." 369 U.S. at 211. In assessing whether a particular matter is non-justiciable on foreign affairs grounds:

> Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Id. at 211-12. When this test is applied to the instant case, it confirms that the District Court's decision must be affirmed. *See also Padavan v. United States*, 82 F.3d 23, 27 (2d Cir. 1996) ("[i]n determining whether an issue is nonjusticiable under the political question doctrine, we apply the analysis set forth by the Supreme Court in *Baker v. Carr* [citation omitted].").

1. <u>The Question Posed in this Case is a Foreign Policy Question.</u>

First, as noted above, GCC is a worldwide problem that can be effectively addressed only by international action. The "public nuisance" of which Appellants complain is "global warming," States' Comp. ¶ 153, J.A. 105, which they concede is a global atmospheric process: "The warming that results from

the increased carbon dioxide concentration to which defendants contribute is a global process and causes impacts in each of the plaintiffs' jurisdictions." States' Comp. ¶ 155, J.A. 106. Indeed, the international character of the GCC phenomena is manifest in Appellants' own description of the "greenhouse" effect: "[W]hen, as a result of global warming, the planet has fewer areas covered with snow, sea ice or glacial ice, the planet reflects less energy from the sun back into space as formerly white snowy or icy areas are transformed into darker areas, which absorb more solar heat. Thus, global warming is expected to accelerate as concentrations of greenhouse gases, and in particular of carbon dioxide, increase." States' Comp. ¶ 90, J.A. 86.

2. <u>The Political Branches are Fully Seized of the GCC Issue.</u>

Second, also as discussed above, both the Executive Branch and Congress are fully engaged on the question of how best to address GCC. The United States is already a party to a treaty on the subject. Although that treaty establishes a policy of international action, it imposes only non-binding emission reduction goals on the parties. The actual measures each treaty-party, including the United States, would undertake to reduce the levels of GHG emissions were deliberately left to future negotiations. The Executive Branch is aggressively pursuing these negotiations with other nations both bilaterally and multilaterally.

3. The Issues Appellants Raise are Not Susceptible to Judicial Resolution.

Third, as the District Court correctly concluded, the nature and posture of the issue raised by Appellants, as well as the relief sought, are not properly susceptible to judicial resolution. Despite Appellants' claims to the contrary, this is not a simple suit in "nuisance" that the Court can resolve with an abatement order. The damage Appellants fear is not the result of Appellees' carbon dioxide emissions. Rather, that damage may result if worldwide temperatures continue to rise, and the atmosphere and oceans do not compensate in some other manner. Even assuming that this phenomenon has been, or can be, affected by human actions, the extent of the emissions reductions that may be necessary to resolve the problem is unknown and – at the present time – unknowable. There are, in short, no standards for the Court to apply here.

Simply stating the claim in common law terms such as "nuisance" cannot eliminate the fundamental foreign policy issues at stake, nor can it avoid application of the political question doctrine. Indeed, the United States Court of Appeals for the District of Columbia Circuit recently rejected just such an effort. In *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), the relatives of a Chilean general, killed during the 1973 coup against Salvador Allende, sought damages against the United States, and its former officials, on various grounds that would ordinarily sound in tort. Although the claimants attempted to avoid

application of the political question doctrine by arguing that the judicial standards for resolving a "wrongful death" claim were well-established, and presented no nonjusticiable political question, the court disagreed, noting that "this formulation of the issues is no help." *Schneider*, 412 F.3d at 196. It reasoned that resolving the dispute would:

> "compel the court, at a minimum, to determine whether actions or omissions by an Executive Branch officer in the area of foreign relations and national security were 'wrongful' under tort law." . . . We agree with the District Court and the Eleventh Circuit in *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997), that recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments.

Id. at 196-97. The *Schneider* Court went on to explain that the resolving the dispute would also require it to determine the "standard for the government's use of covert operations," and "pass judgment on the policy-based decision of the executive to use covert action to prevent . . . [Allende's] government from taking power." *Id*. at 197. The court concluded that "[t]o determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." *Id. See also 767 Third Avenue Assoc. v. Consulate Gen. of Socialist Fed. Republic of Yugo.*, 218 F.3d 152 (2d Cir. 2000) ("landlord-tenant" dispute presented political question

because of the foreign policy choices the court would have been required to make to resolve the dispute).

The same is true here. To grant Appellants the relief they seek, the Court would have both to accept their contentions with respect to GCC and the damage they fear it may cause and to reverse the current foreign policy of the United States – which seeks a comprehensive global solution, including appropriate undertakings by developed and developing countries alike, as well as proper consideration for carbon sequestration efforts and the development of new technologies.

4. Granting the Relief Appellants Seek Would Undercut the President's Negotiating Position and Deprive the Nation of the Opportunity To Speak With One Voice on GCC.

Finally, if the District Court had granted the relief sought by Appellants in the instant case, its action would undercut the United States' GCC negotiating position. This Court has recognized this consideration as sufficient justification for dismissal on political question grounds. *See Can v. United States*, 14 F.3d 160 (2d Cir. 1994). In *Can*, the Court dismissed claims, brought by former citizens of South Vietnam, to South Vietnamese assets frozen in the United States since 1975. In concluding that the matter was nonjusticiable, the Court emphasized that granting the relief sought "would not only decide a question of sovereign succession, but it would interfere with executive foreign policy

prerogatives more generally. In particular, judicial determination of title would interfere with the President's use of the assets as a bargaining chip in negotiations with the current Hanoi regime." *Can*, 14 F.3d at 163.

The concerns that prompted the Court's *Can* ruling were mirrored in the Supreme Court's recent decision in *American Insurance Assoc. v. Garamendi*, 539 U.S. 396 (2003), as well as in the *Whiteman* decision. Both cases involved the desperately complex and difficult issue of Holocaust survivor claims. In *Garamendi*, the Supreme Court struck down a California statute designed to facilitate the identification and prosecution of claims against insurance companies that effectively benefited from the Holocaust. The Nazi regime had, at various times, confiscated, seized, and outright stolen insurance policies and proceeds belonging to Jewish policyholders in Germany and elsewhere in Europe. Even after the war, policies were often dishonored. Accordingly, California enacted a law requiring all insurance companies doing business in the state to disclose information (then placed in a central registry) about policies they had issued in Europe between 1920 and 1945.

At the same time, however, President Clinton had negotiated a different compensation system with Germany, one designed to avoid – rather than to foster – litigation. California's statute conflicted with the President's foreign policy choice in this regard and was therefore invalidated by the Supreme Court.

Quoting its earlier decision in *Zschernig v. Miller*, the Court noted that "state laws 'must give way if they impair the effective exercise of the Nation's foreign policy.'" 539 U.S. at 419 (quoting *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (invalidating state probate statute that disadvantaged certain non-resident aliens)).

In reaching this decision, the Court emphasized that the California statute conflicted with both existing agreements and ongoing diplomatic efforts. It noted that "securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War," and that California's scheme effectively undercut the President's bargaining position vis-à-vis U.S. negotiating partners – "'[q]uite simply, if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.'" *Id*. at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000)).

Similarly, in *Whiteman*, this Court dismissed claims for property confiscated by the Nazi regime in Austria because the Executive Branch had chosen a different compensation policy – one that did not involve litigation. "Mindful of the Supreme Court's recent emphasis (albeit in a different legal context) on preserving the 'capacity of the President to speak for the Nation with one voice,'" 431 F.3d at 60, the Court concluded that allowing the litigation to

proceed would impede resolution of such claims in accordance with a policy already adopted by the Executive Branch and embodied in executive agreements with the relevant successor states. In the instant case, the inevitable consequence of the judicial action Appellants seek would be to undermine the President's bargaining position vis-à-vis the United States' actual and potential treaty partners, depriving the Nation of the opportunity to speak with one voice on the important international issue of climate change.

Today, the national GCC policy of the United States is, first and foremost, embodied in the UNFCCC, which is to develop strategies to address GCC, and the United States continues actively to negotiate with a number of foreign countries on this issue. The means by which GCC should be addressed continues to be the subject of wide disagreement and furious debate – both internationally and nationally. The United States has made clear that imposition of mandatory emission reduction requirements on American industry is unacceptable, particularly in the absence of meaningful participation by developing countries. *See* Presidential Statement of June 11, 2001, *supra*.[3]

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[3] The Administration's overall position has been described by EPA as: "[A] comprehensive approach to global climate change that calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development so that the government may effectively and efficiently address the climate change issue over the long term." 68 Fed. Reg. at 52,931.

However, as was the case in *Garamendi*, the ability to impose carbon dioxide emission limitations on U.S. industry, as well as the level of any such limitations, remain key bargaining chips in the President's efforts to obtain the agreement and cooperation of other countries.

The deleterious effect on the U.S. negotiating position resulting from imposition of any mandatory emissions reductions on U.S. CO_2 sources is obvious. The Executive Branch recognized this when EPA determined that the Clean Air Act does not authorize GCC regulation:

> 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. Considering the large populations and growing economies of some developing countries, increases in their GHG emissions could quickly overwhelm the effect of GHG reduction measures in developed countries. 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.

68 Fed. Reg. at 52,931.

Significantly, the Agency went on to note that this is precisely what occurred with respect to the regulation of substances which deplete the stratospheric ozone layer of the Earth's atmosphere:

> Early U.S. controls on substances that deplete stratospheric ozone were not matched by many other countries. Over time, U.S. emission reductions were more than offset by emission increases in other

> countries. The U.S. did not impose additional domestic controls on stratospheric ozone-depleting substances until key developed and developing nations had committed to controlling their own emissions under the Montreal Protocol on Substances that Deplete Stratospheric Ozone.

Id. at n.5. The judicial imposition of mandatory carbon dioxide emission reductions on companies that account for what Appellants claim is as much as one tenth of the U.S. carbon dioxide emission inventory, States' Brief at 8, would have the exact same effect – depriving the President of a significant portion of his "bargaining chips" and undercutting the Nation's efforts to speak with one voice on this critical foreign policy issue.

D. Cases Where the Courts Have Adjudicated are Fundamentally Different.

The instant case stands in stark contrast to cases where courts have adjudicated issues implicating foreign policy concerns. For example, in *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991), this Court concluded that the political question doctrine did not properly apply. There, plaintiffs challenged the use of federal foreign aid monies to fund certain religious schools overseas. In rejecting application of the political question doctrine, the Court noted that the issue whether federal funding of religious institutions violated the Establishment Clause was routinely adjudicated by the courts, and that the foreign aid aspects of the case did not remove the case from judicial cognizance. It reasoned that,

“[b]ecause AID’s method of implementing the [Federal Government’s] Policy Statement was not itself an expression of foreign policy . . . plaintiffs’ challenge to the legality of that method did not present a nonjusticiable political question.” *Lamont, 948 F.2d at* 832 (citation omitted). Instead, “the instant challenge simply requires the court to apply well-established Establishment Clause standards, a task traditionally vested in the federal courts.” *Id.* at 833.

This also was the case in *Japan Whaling Assoc. v. American Cetacean Society,* 478 U.S. 221 (1986). In that case, the Supreme Court ruled that foreign policy considerations did not render nonjusticiable claims that the Secretary of Commerce had improperly failed to certify Japan as being in violation of certain treaty obligations. At issue, however, were both a treaty establishing specific rights and obligations with respect to whaling by the parties, and a statute requiring the imposition of economic sanctions against a party whose whaling activities diminished the treaty’s effectiveness. As the Court noted, whatever the foreign policy concerns, “the courts have the authority to construe treaties and . . . congressional legislation,” and concluded that “[i]t is also evident that the challenge to the Secretary’s decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory

interpretation." *Japan Whaling*, 478 U.S. at 230. There was, in other words, no policy to make – only treaties and statutes to interpret and enforce.[4]

Here, as the District Court properly held, the Court would need to make several fundamental policy decisions in adjudicating Appellants' claims. First, the Court would have to determine that carbon dioxide emissions reductions by power plants in the United States are an appropriate means of addressing GCC, without regard to the nature and scope of commitments entered into and performed by other countries or the potential role of new technologies and carbon sequestration strategies. Next, the Court would have to determine what level of emissions reductions is necessary and proper to abate the "nuisance," *i.e.,* to abate the global warming which, Appellants claim, threatens to damage them. The Court would, in other words, have to perform the functions normally carried out by, and constitutionally reserved to, the elected political branches.

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[4] Similarly, in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the Ninth Circuit refused to dismiss a series of common law property claims on the ground that they implicated foreign policy considerations merely because they were urged against the Vatican Bank. The court found that there were no policy choices inherent in the case's resolution, *Alperin*, 410 F.3d at 555, that there were no applicable treaties or ongoing negotiations, *id*. at 550-51, and that there was no possibility of judicial interference with a political decision already made. "Indeed, this case is before us not because the Holocaust Survivors disagree with a political decision made regarding their claims, but rather because there simply has been no decision." *Id.* at 557. As the court articulated the question before it, "the Property Claims ultimately boil down to whether the Vatican Bank is wrongfully holding assets. Deciding this sort of controversy is exactly what courts do." *Id.* at 551.

Appellants' efforts to fit their claims into this line of authority are unconvincing. In particular, the States argue that application of the political question doctrine to foreign affairs issues is appropriate only when questions of "international sovereign right" are at stake. States' Brief at 22, 33-35. No such limitation appears in the Supreme Court's jurisprudence or the precedents of this Court. It appears to have been manufactured by Appellant attorneys general – who suggest that only if they were seeking a "declaration of internationally binding obligations" would their claims present a political question. *Id.* at 35. The key consideration here is not the nature of the obligation at issue, but whether in adjudicating the claim the court would have to make decisions about U.S. foreign policy that are reserved to the political branches.

Thus, in *767 Third Avenue Assoc.,* this Court concluded that a "garden-variety landlord-tenant dispute" presented a political question because the dispute's adjudication would have required the Court to make foreign policy choices. 218 F.3d at 152. That case involved the leasehold rights and obligations, with respect to office space in New York City, of the former Socialist Federal Republic of Yugoslavia ("SFRY"), a state which had dissolved in 1991. Although, unlike GCC, "state succession" questions are governed by a

detailed body of law,[5] the Court deferred to the Clinton Administration's decision to allocate the SFRY's assets and liabilities through international negotiations. The Court noted as follows:

> Thus, the executive branch has apparently made the initial policy determination that resolution of issues such as debt allocation among successors to the SFRY must be resolved in an international forum. . . . A determination by this court of the allocation of debt among the successors might hinder or prejudice the future resolution of this issue through negotiations or another determination by the Executive. Such an outcome would directly "interfere with executive foreign policy prerogatives," *Can*, 14 F.3d 163.

218 F.3d at 160 (quoting *Can*, 14 F.3d at 163).

This is exactly the case here. The Executive Branch has determined that the U.S. response to GCC must involve an integrated program, including the development of new technologies and appropriate recognition of the value of carbon sequestration, with developing nations undertaking real and meaningful programs to address emissions. *See* Presidential Statement of June 11, *supra*. The court order sought by Appellants imposing carbon dioxide emission reduction requirements would undercut the President's policy as surely as a judicial determination of successor state rights and liabilities in *767 Third*

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[5] *See generally,* D.P. O'Connell, *State Succession in Municipal Law and International Law* (1967); Restatement (Third) of the Foreign Relations Law of the United States §§ 208-210 (1987).

Avenue would have undermined the Executive Branch foreign policy determination at stake there.

In this connection, it is important to note that what barred the courts from adjudicating the claims in *767 Third Avenue* was not any failure by the President to determine which states were "successors" to the SFRY. Rather, it was his policy decision that resolution of that issue should occur in the context of continuing international negotiation. The same is, of course, true here. The Executive Branch has made a policy decision – a political determination – that the United States' approach to the GCC challenge, including potential mandatory emissions limitations imposed on American industry, will involve international negotiation and agreement. The courts may not undercut this decision by granting Appellants' request and imposing mandatory emissions limitations on the Appellees.

IV. Conclusion

For the reasons stated above, Amici Law Professors – not all of whom support the policy approach being pursued by the President on the question of climate change – urge the Court to affirm the decision of the District Court,

dismissing Appellants' claims as nonjusticiable.

Respectfully Submitted,

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Certificate of Compliance with Type-Volume Limitation

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,874 words, excluding the parts of the brief exempted from word limitations by Fed. R. App. P. 32(a)(7)(B)(iii).

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This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is comprised of a proportionally spaced typeface, i.e., the Microsoft Word version of Times New Roman 14 point type.

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ANTI-VIRUS CERTIFICATION

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I, Natasha R. Monell, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 3/1/2006) and found to be VIRUS FREE.

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