No. 07-16908

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
EDMUND G. BROWN, JR., ATTORNEY GENERAL,
*Plaintiff-Appellant*,

v.

GENERAL MOTORS CORPORATION, et al.,
*Defendants-Appellees*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HONORABLE MARTIN J. JENKINS, DISTRICT JUDGE
No. C06-05755 MJJ

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**BRIEF OF AMICI CURIAE**
**THE WASHINGTON LEGAL FOUNDATION**
**AND THE ALLIED EDUCATIONAL FOUNDATION**
**IN SUPPORT OF DEFENDANTS-APPELLEES**
**SEEKING AFFIRMANCE OF THE DISTRICT COURT**

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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. The Allied Educational Foundation (AEF) is a non-profit educational and charitable foundation incorporated under the laws of New Jersey. WLF and AEF have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## INTERESTS OF AMICI CURIAE[1]

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. 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*, 127 S. Ct. 1438 (2007), arguing that Congress did not give authority to the EPA under the Clean Air Act to regulate carbon dioxide emissions for climate change purposes. While the Court ruled otherwise, its decision actually underscores the district court's ruling below that this case presents a nonjusticiable political question. More pertinently, WLF filed an amicus brief in a similar global warming action in the Second Circuit, *Connecticut v. American Elec. Power Co. Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal pending,* Nos. 05-5104-cv; 05-5119-cv (2d Cir.), arguing that the case presents a nonjusticiable political question. In addition, WLF's Legal Studies Division has published policy papers and conducted seminars critical of the use of common law public nuisance claims to address global warming and similar public harms.

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

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as amicus curiae before the U.S. Supreme Court in numerous cases as co-amicus with WLF, including *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996) and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), which raise constitutional issues in the tort context. In addition, both WLF and AEF are concerned that if California were to prevail against the automobile makers, many jobs in those industries would be in jeopardy.[2]

[2] While amici's 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 there is no federal common law nuisance claim.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In the interests of judicial economy, amici adopt by reference the Statement of the Case and Facts of the Appellees. *See* Automakers Br. 4-19. In brief, the plaintiff, the State of California, has alleged that global warming is a public nuisance causing environmental damage to the state, that the defendant General Motors Corporation and five other major automakers are allegedly partially responsible for contributing to the global warming, and hence, the court should declare them liable and assess damages for billions of dollars under federal and state common law public nuisance theories. To be more specific, California is alleging that when the owners or operators of the vehicles manufactured by the defendants operate them in the state and elsewhere (with the permission of California and other states), the combustion of the fuel (sold by oil companies to the vehicle's operator) causes carbon dioxide to be emitted that is indistinguishable from other natural and man-made sources of carbon dioxide, and that this emission contributes to global warming, causing compensable environmental damage to California.

California alleges that the operators of motor vehicles emit 20 percent of the carbon dioxide in the United States, which in turn, causes global warming. However, the amount of CO2 emitted in the United States or California from

vehicles expressed as a percentage of emissions from all sources is misleading, if not irrelevant. Global warming, by definition, is global in nature. Hence, "a ton of greenhouse gases emitted in the United States has the same impact as a ton emitted in Malaysia." Norhaus & Danish, *Designing a Mandatory Greenhouse Gas Reduction Program for the U.S.*, Pew Center on Global Climate Change (May 2003) at 2. Thus, the more accurate emissions figure is not the percentage in the U.S. or California, but the amount of CO2 emitted by automobiles expressed as a percentage of all human-induced CO2 emissions worldwide. That much smaller percentage is further dwarfed when one considers that according to the Energy Information Administration, man-made generated CO2 constitutes only about 5 percent of the total amount of carbon dioxide in the atmosphere. See *http://www.eia.doe.gov/oiaf/1605/ gg96rpt/chap1.htm.* Therefore, assuming the percentage of CO2 emissions from the defendants' automobiles is approximately 4 percent of worldwide man-made emissions,[3] defendants' CO2 emissions would constitute only .2% (4% times 5%) of total worldwide CO2 emissions from all sources. And when one factors in natural water vapor which, according to the National Climatic Data Center, "is the most

[3] The 4 percent figure is derived from data presented in Chapter 3 in INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2004 (April 2006) USEPA #430-R-06-002.

abundant greenhouse gas in the atmosphere," and which accounts for almost 95% of the Earth's greenhouse effect, the defendants' contribution to total greenhouse gases is truly minuscule. See *http://www.eia.doe.gov/oiaf/1605/gg/96rpt*. As MIT's Richard Lindzen noted, "water vapor is a far more powerful greenhouse gas than carbon dioxide." Fred Guterl, *The Truth About Global Warming*, Newsweek, July 23, 2001, at 44.

Significantly, California does not allege that the automakers have violated of any of the myriad federal or state environmental laws and regulations that govern their highly-regulated industry. Rather, California claims that this alleged public nuisance is caused by the automakers and actionable under federal and state common law. California seeks billions of dollars for past damages assessed against the automakers due to the CO2 emissions from vehicles they do not own or operate, but instead are owned or operated by third parties, including the State of California.[4]

California mischaracterizes global climate change and its highly complex causes as an actionable public nuisance under federal common law and enlists

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[4] California can mitigate its alleged damages by imposing measures that would reduce the amount of CO2 emitted by vehicles on its roads, such as raising the excise tax on gasoline. But as the Automakers explain, "California fosters a culture and identity that affirmatively encourages the use of automobiles." Automakers Br. at 13.

the federal courts into making nationwide energy and economic policy in the guise of a tort suit. Realizing this, the district court properly dismissed California's claims on the grounds that they raise nonjusticiable political questions.

## ARGUMENT

This lawsuit raises 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 amici will focus on the first three factors addressed by the district court 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. THE POLITICAL BRANCHES HAVE MADE NATIONAL POLICY DECISIONS ON 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 some areas, Congress has specifically declined to legislate, which, in itself, is a policy decision that must be considered. 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 causes and possible effects of increased CO2 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 California may not agree with every decision Congress and Executive have 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.[5] 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 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

[5] 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).

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 mandatory CO2 emissions limitations. 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 CO2 emissions. 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.[6]

As noted in the Automakers Br. at 11-13, Congress enacted the Energy Independence and Security Act of 2007, which would mandate better fuel efficiency standards for passenger automobiles, increasing the average fleet rate of 27.5 miles per gallon to 35 miles per gallon by 2020. In addition, Senators Warner and Lieberman are reintroducing legislation that would impose mandatory caps. *See* H. Josef Hebert, *Bush Floating New Climate Proposal*, Wash. Post (Apr. 14, 2008).

**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. For example, EPA's Energy Star program produces improvements in the efficiency of home appliances, which

[6] Vote No. 148, 151 Cong. Rec. S7029 (daily ed. June 22, 2005).

reduces CO2 emissions from power plants by decreasing electricity demand.[7] 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.*

Moreover, following the Supreme Court's decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the EPA, in response to Executive Order No. 13,432, 72 Fed. Reg. 27717 (May 14, 2007), recently began rulemaking proceedings on regulating CO2. *See* Automakers Br. at 10. In short, both the

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[7] 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.").

Congress and the agencies have chosen to address global climate issues with extensive research and study initiatives, as well as measured and carefully considered changes to fuel economy rules designed to reduce CO2 emission.

**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.[8] Although President Clinton signed this treaty, he never submitted it to the Senate for ratification. Indeed, in a bipartisan

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

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 States economy if unilateral reductions on CO2 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).

Mandatory greenhouse gas emission limitations -- such as those embodied in the Kyoto Protocol and which California effectively seeks to have judicially imposed in the form of monetizing the emissions in the form of damages -- 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.

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. Both the President and Congress are considering several proposals that would limit greenhouse gas emissions. *See* H. Josef Hebert, *Bush Floating New Climate Proposal*, Wash. Post (Apr. 14, 2008).

Congress and the Executive have thus extensively addressed the issue of global climate change. As discussed in the following section, California's lawsuit was correctly dismissed because it presents a nonjusticiable political question.

## II. THE DISTRICT COURT CORRECTLY HELD THAT THIS CASE PRESENTS 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 noted, whether a case presents a nonjusticiable political question "proceeds from the age-old observation of Chief Justice Marshall that `[q]uestions, in their nature political,

or which are, by the constitution and laws, submitted to the executive, can never be made in this court.'" *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803); *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005) (same). *See also Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991) ("the nonjusticiability of political questions is primarily a function of the constitutional separation of powers among the three branches of the federal government."); *cf. Hudson v. Goodwin*, 11 U.S. (7 Cranch) 32, 33-34 (1812) (separation of powers precludes exercise of federal criminal law jurisdiction in common law cases).

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 that "deprives a court of subject matter jurisdiction." *Corrie*, 503 F.3d at 979. While the last three *Baker* factors have sometimes been referred to as "prudential" considerations counseling against the exercise of jurisdiction, "at bottom [the political question doctrine is] a jurisdictional limitation imposed on the courts by the Constitution, and not by the judiciary." *Id*. at 980.

Just because some cases fall within the same generic category or subject matter (e.g., pollution) that were found to be justiciable, that does not mean *all* such cases are justiciable. 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). Courts must "undertake a discriminating case-by-case analysis to determine whether the question posed lies beyond judicial cognizance." *Corrie*, 503 F.3d at 982 (citing *Vatican Bank*, 410 F.3d at 545). Just as this Court in *Corrie* upheld the dismissal of a public nuisance lawsuit against Caterpillar, Inc. for selling vehicles (bulldozers) that were used by third parties that caused harm to the plaintiffs under the political question doctrine, so too should this Court uphold the dismissal of this public nuisance lawsuit against the Automakers under the political question doctrine as articulated by the district

court.

While the district court properly dismissed this case on the basis of *Baker's* third, first, and second factors in that order, amici will address those same factors in the order presented in *Baker*.

### B. This Case Presents 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 the Executive.

The first *Baker v. Carr* factor is whether there is a "textually demonstrable constitutional commitment to a coordinate political department." California's 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, "Plaintiff's nuisance claims sufficiently implicate the political branches' powers over interstate commerce and foreign policy, thereby

raising compelling concerns that warn against the exercise of subject matter jurisdiction on this record." *California v. GMC*, 2007 U.S. Dist. LEXIS 68547, *41 (D. Cal. 2007).

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, the court dismissed on 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

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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).

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 remedies that would undoubtedly affect interstate commerce:

> 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 II, 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.

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. 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.

California argues that this first *Baker* factor does not apply because the adjudication of interstate environmental nuisance claims is committed to the federal judiciary. Calif. Br. at 19-20. While adjudication of any dispute is generally committed to the judiciary, the real issue is whether doing so will

implicate the political question doctrine factors in *Baker*. *See Corrie*, 503 F.3d 974 (9th Cir. 2007) (public nuisance suit against vehicle maker dismissed on political question grounds).

The nature of this particular litigation is nothing short of assessing global or planetary climate change, assessing its causes and effects, and imposing liability and assessing damages in billions of dollars upon an important sector of the U.S. economy. Clearly, the resolution of this dispute is committed to our political departments. Thus, the adjudication of this case is similar to that in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), where this Court ruled that the slave labor tort claims were precluded by the political question doctrine. *Id*. at 562. But even for the non-slave labor claims in *Alperin* that were found to be justiciable, there were no treaties or ongoing international discussions on the subject matter in that case or legislative responses to the conduct being challenged. Here, in sharp contrast, as discussed in Part I of this brief, both the Congress and Executive branches have been very active in exercising their Constitutional powers in this area. Congress's decision not to act in some cases, such as failing to ratify the Kyoto Treaty or place caps on certain emissions, is itself a policy decision that Congress has made that should be respected by the judiciary. California also relies on *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d

44 (2d Cir. 1991), but in that case, "both the Executive and Legislative Branches [had] expressly endorsed the concept of suing terrorist organizations in federal court." *Id*. at 49. In this case, except for the citizen suit provisions found in various environmental statutes, none of which are applicable here, Congress did not provide for or endorse suits to adjudicate claims for damages allegedly caused by global warming.

In short, an adjudication on the merits of California's claim for monetary damages allegedly caused by global warming and by these defendants would involve addressing both domestic and international issues committed to the coordinate branches.

**2. This Case Presents a Political Question Because There Are No Judicially Discoverable and Manageable Standards for a Court to Apply.**

This case is 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. As the district court properly concluded:

> In this case, Plaintiff's global warning nuisance tort claim seeks to impose damages on a much larger and unprecedented scale by grounding the

> claim in pollution originating both within, and well beyond, the borders of the State of California. Unlike the equitable standards available in Plaintiffs cited cases, here the Court is left without a manageable method of discerning the entities that are creating and contributing to the alleged nuisance. In this case, there are multiple worldwide sources of atmospheric warming across myriad industries and multiple countries.

*California v. GMC*, 2007 U.S. Dist. LEXIS 68547, **47-48 (D. Cal. 2007).

California's reliance on early interstate pollution cases such as *Georgia v. Tennessee Copper Co*., 206 U.S. 230 (1907) (discharge of noxious gases) and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (discharge of raw sewage in Lake Michigan) is misplaced. Putting aside the fact that those cases sought equitable remedies, they involved a fairly straightforward public nuisance case where a noxious substance from an identifiable source was a direct cause of the claimed property damage. They do not even begin to provide a legal framework for adjudicating the global warming claims by California. Indeed, even some of those early public nuisance suits demonstrate the difficulties in adjudicating a case such as this. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), the Supreme Court 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. As the district court properly concluded:

> The Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate

> change that admittedly result from multiple sources around the globe. Plaintiff has failed to provide convincing legal authority to support its proposition that the legal framework for assessing global warming nuisance damages is well-established.

*California v. GMC*, 2007 U.S. Dist. LEXIS 68547, *46 (D. Cal. 2007).

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, California alleges 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. Under California's theory of the case, every person or entity that uses fossil fuels, including California itself, is jointly and severally liable for global warming because their carbon dioxide emissions are allegedly a very small part of the cause of it; therefore, any and all of them could be assessed monetary damages by a federal court. If that is true, California could have sued all owners and operators of the CO2 emitting vehicles. According to California, each operator contributes to global warming, no matter how infinitesimally, that is allegedly causing the injuries complained of. 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 definitions of public nuisance and the Restatement on apportioning damages 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. *Cf. Vieth v. Jubelirer*, 541 U.S. 267 (2004).

### 3. This Case Presents a Nonjusticiable Political Question Because It 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. This also was the primary reason for the dismissal of a similar global warming lawsuit against certain power plants. *Connecticut v. American Elec. Power Co. Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). This factor properly takes into account the policy decisions and debates on global warming that have been made by the two political branches of government as outlined in Part I of this brief. The underlying rationale for this third *Baker* factor thus overlaps with the earlier discussion on the first *Baker* factor, namely, the commitment of the issue to the political branches. As the district court observed:

> Plaintiff has failed to provide the Court with sufficient explanation or legal support as to how this Court could impose damages against the Defendant automakers without unreasonably encroaching into the global warming issues currently under consideration by the political branches. Because a comprehensive global warming solution must be achieved by a broad array of domestic and international measures that are yet undefined, it would be premature and inappropriate for this Court to wade into this type of policy-making determination before the elected branches have done so.

*California v. GMC*, 2007 U.S. Dist. LEXIS 68547, *30 (D. Cal. 2007).

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 this case, California seeks to impose billions of dollars of liability on the Automakers without regard to any of the costs to the Nation and its economy. This political question, and all its various sub-questions, should be, has been, and is continuing to be debated and decided by Congress and the Executive as previously discussed. The district court correctly concluded that it lacks jurisdiction to adjudicate this case under the political question doctrine.

## 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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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), counsel for amici curiae certify that this brief contains less than 7,0000 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-point CG Times typeface.

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PAUL D. KAMENAR

## CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2008, two copies of the foregoing Corrected Brief of Amici Curiae Washington Legal Foundation and Allied Educational Foundation were served by first-class mail, postage pre-paid, to each of the following counsel:

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