No. 09-17490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Native Village of Kivalina; City of Kivalina,

Plaintiffs-Appellants

v.

ExxonMobil Corporation, et al.,

Defendants-Appellees

On Appeal from the United States District Court
For the Northern District of California
District Court Case No. 08-cv-01138 SBA

[PROPOSED] BRIEF OF *AMICUS CURIAE*, THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Association of International Automobile Manufacturers ("AIAM"), a Virginia not for profit corporation, states pursuant to Federal Rule of Appellate Procedure 26.1, that it has no parent company, and that no publicly held corporation has a 10% or greater ownership interest in AIAM.

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INTEREST OF AMICUS CURIAE

The Association of International Automobile Manufacturers (AIAM) is a trade association representing international manufacturers and distributors of motor vehicles. Some of AIAM's members were sued for damages in a climate change nuisance action similar to the case at bar, and that action was dismissed on political question grounds. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (*General Motors*). The district court below expressly relied on the holding of *General Motors* and held that Plaintiffs' claims for damages based on Defendants' greenhouse gas (GHG) emissions presented nonjusticiable political questions. Because a tort action is not the proper vehicle for determining legal and financial responsibility for global climate change and the reasonableness of GHG-emitting activities, AIAM offers this Brief in Support of Defendants-Appellees. The source of the authority to file this brief is Federal Rule of Appellate Procedure 29(a).

ARGUMENT

I. Introduction

Plaintiffs in this action seek monetary compensation for mankind's impact on the climate. Despite the fact that global climate change has been attributed to industrial activities throughout the entire developed world since the engines of industry started churning over a hundred years ago, Plaintiffs are seeking to hold

the 22 Defendants named in their lawsuit jointly and severally liable for all of their damages allegedly caused by climate change. Because the questions raised in this lawsuit are fraught with the types of wide-ranging social, economic, and political decisions that are reserved for the elected branches of government, the district court correctly dismissed this action on political question grounds.

In their appeal, Plaintiffs argue that they have alleged a viable cause of action under the federal common law of nuisance and that this action is justiciable because, they claim, the court may award them damages from these defendants without engaging in any sort of balancing that would implicate the political question doctrine. In essence, they argue that if the conduct complained of results in a "severe" invasion of their interest in the use and enjoyment of their property, then all contributors to that conduct are strictly liable without regard to fault or the reasonableness of the conduct. *See* Plfs.' Opening Br. at 51.

Plaintiffs' arguments are fundamentally flawed in a number of respects. First, Plaintiffs' claims under the federal common law of nuisance fail as a matter of law because that doctrine applies only where a state is suing to abate pollution originating entirely from outside the state. Plaintiffs here are not state sovereigns. Moreover, climate change is not the sole result of interstate pollution; rather, sources of GHG emissions within a state are just as responsible for climate change as are sources in other states.

Second, despite Plaintiffs' arguments to the contrary, a court adjudicating any climate-related nuisance claim would be required to draw seemingly arbitrary lines between those GHG emitters that may be held legally responsible for climate change and those that may not, and between those GHG-producing activities that were reasonable under the circumstances and those that were not. Drawing such lines, however, requires the balancing of a number of competing social and economic interests, a task which properly rests with the elected branches of government and not with the Article III courts.

The political question doctrine was developed to prevent courts from wading into such policy-laden thickets. That doctrine is implicated where there is "a lack of judicially discoverable and manageable standards for resolving" the dispute before the court, or where the action presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Allowing this case to proceed would require the courts of this Circuit to make policy-laden judgments concerning how this nation has met—and will continue to meet—its growing energy needs. Any decision on this question will inevitably conflict with actions being undertaken at the federal level to address GHG emissions and climate change. The decision of the district court dismissing this action on political question grounds properly applied *Baker* and should therefore be affirmed.

II. Plaintiffs cannot invoke the federal common law of nuisance to seek compensation for their climate-related damages.

A. The federal common law of nuisance applies only where a state sovereign sues to abate pollution originating outside its borders.

Plaintiffs argue that they have "stated a proper claim of public nuisance under federal common law." Plfs.' Opening Br. at 18. They have not.

It is axiomatic that a plaintiff seeking relief in federal court must establish that "a cause of action is available." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983). Because Congress has not created any cause of action authorizing these Plaintiffs to sue lawfully operated businesses on account of their past carbon dioxide emissions, Plaintiffs invoke the federal common law of public nuisance. However, this Circuit has recognized the heavy presumption against the recognition of federal common law claims and causes of action by the judiciary:

> Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. We start with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law.

Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles, 869 F.2d 1196, 1201 (9th Cir. 1988) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 312-13, 317 (1981) (internal quotation marks omitted).[1]

Accordingly, the Supreme Court has held that federal courts may create common law in only a "few and restricted" instances. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citation omitted). Those instances "fall into essentially two categories": first, where "Congress has given the courts the power to develop substantive law"; and second, where "a federal rule of decision is necessary to protect uniquely federal interests." *Id.* (citations and internal quotation marks omitted). Here, Congress has not given the courts the power to develop substantive law concerning global climate change. Nor is there "'a uniquely federal interest' in global warming" that would allow any plaintiff to sue any defendant, as Plaintiffs claim. Plfs.' Opening Br. at 22. "Not all federal interests fall into this restricted category." *Nat'l Audubon Soc'y*, 869 F.2d at 1202.

> Rather, a "uniquely federal interest" exists "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting

[1] This reluctance to create federal common law reflects the overarching principle that "a decision to create a private right of action is one better left to the legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). *See also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("private rights of action to enforce federal law must be created by Congress").

> rights of states or our relations with foreign nations, and admiralty cases."

Id. (quoting *Tex. Indus.*, 451 U.S. at 641).

It is therefore not surprising that in the 70 years since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court has recognized a federal common law cause of action for an interstate nuisance only once, when in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("Milwaukee I"), it authorized one state to seek injunctive relief against a source in another state to enjoin water pollution when such pollution produced a "simple type" of nuisance. *Id.* at 106 n.8 (citation omitted). As this Circuit has recognized, the Supreme Court has applied the federal common law of nuisance "only [to] those interstate controversies which ***involve a state suing sources outside of its own territory*** because they are causing pollution within the state to be inappropriate for state law to control." *Nat'l Audubon Soc'y*, 869 F.2d at 1205 (emphasis added).[2]

Neither the Supreme Court nor this Circuit has ever authorized non-state litigants to pursue a damages action against non-governmental defendants for

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[2] The *National Audubon* court noted that in *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907), the "Court focused on the facts that the plaintiff was a state and the injury was interstate," and that in *Illinois v. Milwaukee*, 406 U.S. 91 (1972), "the case [again] centered on an interstate controversy which involved a state suing sources outside its domain which were causing pollution within the state." *Nat'l Audubon Soc'y*, 869 F.2d at 1204-05.

activities not involving simple cross-boundary pollution. *See Cal. Tahoe Reg'l Planning Agency v. Jennings,* 594 F.2d 181, 193-194 (9th Cir. 1979) (emphasizing the limited scope of "the federal common law of nuisance," which at most "permits one state to enjoin damaging activities carried on in another" and "bestows upon us no power to root out that which happens to offend . . . a vigorous plaintiff"); *see also Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976) ("the doctrine . . . has not been extended beyond the abatement of public nuisances in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm."). These plaintiffs, therefore, cannot invoke the federal common law of nuisance to recover damages from these defendants.

B. The federal common law of nuisance is fundamentally unsuited to address greenhouse gas emissions and global climate change.

The federal common law of nuisance is also fundamentally unsuited to global climate change because that doctrine is limited to pollution that originates entirely from outside of the complaining state. Climate change, however, is not solely the result of interstate pollution; it also results from activities that occur within the complaining state. Intrastate emissions of carbon dioxide fall outside the reach of the federal common law. It would therefore be a misuse of the federal common law for states to use it to either enjoin or seek damages on account of carbon dioxide emissions from other states while emissions from within their own

borders would be immune from such claims.

As discussed above, this Circuit has held that the federal common law of nuisance encompasses "only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control." *Nat'l Audubon Soc'y*, 869 F.2d at 1205. "[The] federal common law was originally recognized to fill a void in the law applicable to suits seeking abatement of pollution originating within the domain of one state sovereign and exerting adverse effects in the domain of another." *Massachusetts v. U.S. Veterans Admin.*, 541 F.2d 119, 123 (1st Cir. 1976). Thus, courts have applied federal common law only in cases involving a limited number of out-of-state actors causing a traceable and identifiable harm to discrete in-state victims. *See, e.g., Georgia v. Tenn. Copper Co.,* 206 U.S. 230, 236 (1907) (factories located in Tennessee produced noxious gas that wafted over the Tennessee border and into Georgia); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (holding that injunctive relief might be proper to protect Illinois from "improper impairment by sources outside its domain").

Climate change and greenhouse gas emissions are fundamentally different because the sources of the alleged nuisance are not restricted to a limited set of out-of-state actors. Any anthropogenic climate change in California is arguably equally traceable to motor vehicles, power plants, and industrial facilities located

within that state as it is to countless sources outside the state. Although courts have allowed state sovereigns[3] to invoke the federal common law to enjoin pollution arising in another state, courts have also held that a state may not enjoin out-of-state activities that are allowed within its own borders. *See, e.g., Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (denying injunction request where "the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains"); *New York v. New Jersey*, 256 U.S. 296, 310 (1921) (denying a request for an injunction barring New Jersey from discharging sewage into harbor "when it is considered that for many years all of the sewage from the great population of New York City and its environs . . . has been discharged into the harbor").[4] Federal common law is not a tool for one state, or for residents in a state, to impose economic burdens on businesses in other states.[5]

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[3] Neither plaintiff in this action is a state sovereign.

[4] In *Illinois v. City of Milwaukee*, for example, the district court noted that while Milwaukee is the largest point source of sewage in the lake, "[t]he Illinois communities on Lake Michigan do not discharge their sewage effluent into the lake, but, rather, into a system of water courses connecting to the Illinois River." *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at *15 (N.D. Ill. 1973), *aff'd in relevant part and rev'd in part on other grounds*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds*, 451 U.S. 304 (1981).

[5] Because emissions of carbon dioxide are a direct function of energy production and use, effectively taxing out-of-state businesses by requiring them to pay compensation for climate-related damages, would give in-state businesses an unfair competitive advantage, thus implicating the Commerce Clause. States may not mandate "differential treatment of in-state and out-of-state economic

[Footnote continued on next page]

III. Determining legal and financial responsibility for global climate change and the reasonableness of GHG-emitting activities presents nonjusticiable political questions.

Not only do Plaintiffs fail to state a viable cause of action under the federal common law of nuisance, but any claim seeking damages for alleged climate-related injuries also presents a nonjusticiable political question. A court adjudicating such a damages claim would have to decide two overarching policy-laden questions. First, because every participant in the world economy shares some responsibility for the concentration of GHGs in the atmosphere, which emitters of GHGs should be held liable for global climate change? Plaintiffs do not dispute that a court must make this determination, but fail to articulate a workable standard for doing so. Second, because the basic actions creating GHG emissions (the burning of carbon-based fuels) are commonplace and ubiquitous, how should the "reasonableness" standards found in nuisance law be applied to GHG-emitting conduct to determine which activities are actionable as a retroactively unreasonable interference? Plaintiffs wrongly suggest that a court need not make this determination, because, they argue, the focus in a nuisance

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[Footnote continued from previous page]

interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994); *see also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978) (noting that a statute would violate the Commerce Clause if it "raised the cost of doing business for out-of-state dealers, and . . . favored the in-state dealer in the local market").

action is whether the interference to the plaintiff's enjoyment of his property is unreasonable, and not whether the defendant's conduct is reasonable. *See* Plfs.' Opening Br. at 25-28. This argument fundamentally misconstrues the analysis a court must undertake in adjudicating their claims.

A. The line between parties that must compensate others for climate-related damages and parties that escape financial responsibility is not governed by any judicially discernable standard and entails a policy decision not suited to the courts.

Plaintiffs are asking an Article III court to determine which among the billions of world-wide GHG emitters should be responsible for global climate change, but they have not provided any discernable standard for differentiating between liable GHG emitters and non-liable GHG emitters. The district court correctly found that drawing that line "requires the judiciary to make a policy decision about who should bear the cost of global warming" and who should not—an exercise in policymaking with profound national and international implications. *Kivalina*, 663 F. Supp. 2d at 876-77.

Because carbon dioxide emissions are the unavoidable result of burning carbon-based fuel, every participant in the world economy is partially responsible for the concentration of GHGs in the atmosphere. In this way, climate change actions are distinguishable from the nuisance cases involving transborder pollution that the Supreme Court has previously recognized. *See* Plfs.' Opening Br. at 18-19 and n.2 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Georgia v.*

Tenn. Copper Co., 206 U.S. 230, 236 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901)). As discussed above, those cases involved a limited number of actors causing a traceable and identifiable harm to discrete victims. Enjoining the Tennessee Copper facility's emissions of noxious gas, or declaring that the discharge of sewage into Lake Michigan constitutes a public nuisance, did not require any court to engage in quasi-legislative policymaking in drawing the line between liable parties and non-liable parties.

Here, Plaintiffs do not dispute that they have named but a small fraction of the parties contributing to the greenhouse gas emissions that have allegedly brought about global climate change. However, they are seeking to hold only the 22 defendants named here jointly and severally liable for all of their damages. *See* Plfs' Opening Br. at 33 n.8. (pointing out that "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit") (quoting *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990)).[6] But "a defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365,

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[6] *See also* Plfs.' Opening Br. at 31 ("'[W]here there are multiple tortfeasors and the separate and independent acts of codefendants 'concurred, commingled and combined' to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury.'") (quoting *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003)).

374 n.17 (1978). The list of joint tortfeasors that have contributed to GHG emissions is endless, ranging from the operator of a large coal-fired power plant right down to the individual driving 50 miles to and from work each day in a gasoline-powered car. Plaintiffs have not offered any standard that is "principled, rational, and based upon reasoned distinctions" for determining where the line should be drawn along this continuum between those who may properly be held liable for climate-related damages and those who may not. *Vieth*, 541 U.S. at 278.[7] Simply put, "[t]he 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[s] from multiple sources around the globe." *General Motors*, 2007 WL 2726871, at *15. As the *General Motors* court concluded:

[7] Plaintiffs' bald assertion that "tort law is capable of separating major industrial GHG emitters from ordinary citizens" is entirely unavailing. Plfs.' Opening Br. at 34. First, the case cited for the proposition that a contributor whose "pollutants did not contribute more than background contamination" may defeat liability was limited to the specific federal statute before that court. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 717 (2d Cir. 1993) (basing its holding on the statute's "plain meaning, its legislative history, and the case law construing it.") Moreover, even if liability for climate-related damages were limited to parties whose emissions of carbon dioxide contribute more than background levels, it is entirely unclear where that line should be drawn. Arguably, background levels of carbon dioxide would include only carbon dioxide generated through biological processes such as respiration, and any source of anthropogenic carbon dioxide would contribute more than background.

> Plaintiff's global warming 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 Plaintiff's 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.

Id.

The district court here correctly agreed with the holding in *General Motors* and rejected the contrary reasoning in *Connecticut v. American Electric Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009). "[T]he allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Kivalina,* 663 F. Supp. 2d at 877. Whether legal liability for climate change should be imposed only on the operators of large coal-fired power plants and industrial facilities, or should extend to manufacturers of gasoline-powered vehicles and the producers of the fuels that run those vehicles, or should go so far as to include the individual who commutes to work in a luxury SUV instead of a compact hybrid, is not a matter that an Article III court is equipped to resolve.

B. Resolving this dispute would require the Court to determine the reasonableness of GHG-emitting activities, and there are no judicially discoverable standards for doing so.

In an attempt to avoid the obvious implications of the political question doctrine, Plaintiffs baldly claim that "[a] public nuisance claim does not require a balancing of interests" because, they argue, the question of "unreasonableness in a damages action is … not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct." Plfs.' Opening Br. at 25, 49.

The district court correctly rejected that argument. Deciding Plaintiffs' claims for public and private nuisance will require a court to make a policy determination concerning which GHG-emitting activities pose an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979). Whether the interference is unreasonable under the circumstances turns on weighing "the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e. As the Restatement clearly states, in each category of public nuisance—whether intentional, negligent or reckless—"some aspect of the concept of unreasonableness is found." *Id.*

Plaintiffs rely on Section 829A of the Restatement, which provides that "[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the

other should be required to bear without compensation." Restatement (Second) of Torts § 829A (1979). But in order to avail themselves of that provision, Plaintiffs would have to establish that industrial emissions of GHGs by these defendants cause harm that is "so severe as to require a holding of unreasonableness as a matter of law …" *Id.* § 829A cmt. b. "If it is doubtful whether the facts of a case bring it within the rule here stated, the unreasonableness of the invasion is determined by the trier of fact under the general weighing process stated in § 826." *Id.*

Plaintiffs have supplied no basis for a finding that emissions of GHG constitute a nuisance as a matter of law. Indeed, such a finding would open Pandora's box, because any plaintiff alleging a "severe" climate-related injury could recover from each and every contributor to the alleged nuisance of GHG emissions without regard to the reasonableness of the GHG-producing activity. Because the application of Restatement § 829A is "doubtful" here, adjudicating this climate-related nuisance claim will require a court to "make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of harm to the plaintiff must be weighed against the utility of the defendant's conduct." *Fla. E. Coast Props., Inc. v. Metro. Dade County*, 572 F.2d 1108, 1112 (5th Cir. 1978).

Applying the reasonableness determination required by public nuisance law to global climate change presents a nonjusticiable political question for two reasons. First, as the district court correctly found, Plaintiffs have not offered any "judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." *Kivalina*, 663 F. Supp. 2d at 875.

> Applying the above-discussed principles here, the factfinder will have to weigh, inter alia, the energy producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level. . . . The factfinder would then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale.

Id. at 874-75 (citations omitted). There is simply no rational standard that a court could apply in making this determination.

Second, drawing the line between those GHG-emitting activities that result in an "unreasonable interference with a right common to the general public" and those that do not, entails an initial policy determination requiring nonjudicial discretion.

> The adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court.

General Motors, 2007 WL 2726871, at *8 (citations omitted).

Determining what GHG-emitting activities are reasonable under the circumstances, and what activities are not, requires the type of quasi-legislative balancing that properly belongs with the elected branches of government. For example, resolution of a climate-related nuisance claim necessarily "entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants." *Kivalina*, 663 F. Supp. 2d at 876. Plaintiffs do not claim that Defendants' activities should have resulted in zero emissions of carbon dioxide, but rather contend that the levels of carbon dioxide emitted from Defendants' activities were unreasonably high under the circumstances. Deciding the optimum level of carbon dioxide emissions from a particular activity requires a broad analysis of the relative social and economic costs and benefits of more stringent standards. A standard-setting authority—whether it be an expert agency or Congress—has the constitutional competence to set the appropriate level of emissions at the point where the benefits of additional stringency are outweighed by the additional costs to society. This is the sort of policy-laden question that must be resolved by the elected branches of government, and not by the courts.

IV. Climate-related lawsuits would conflict with actions by the political branches at the federal level to address GHG emissions.

Both Congress and the Obama Administration are currently addressing these policy questions. Balancing the relevant social and economic considerations, these elected branches are considering which sectors of the economy should bear the burden of reducing GHG emissions and what the appropriate level of emissions from specific sources should be. A tort judgment requiring some sources of GHGs to pay damage claims because their emissions were judged by a court to be unreasonable under the circumstances would certainly conflict with these actions.

Acting on the Supreme Court's mandate in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Environmental Protection Agency recently worked with the National Highway and Traffic Safety Administration (NHTSA) to finalize a joint national program governing both motor vehicle GHG emissions and fuel economy. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).[8] In crafting this program, the expert agencies, consistent with their enabling statutes, considered and balanced a number of competing policy concerns. The Energy

[8] "Fuel consumption and CO_2 emissions from a vehicle are two 'indissociable' parameters" such that "fuel economy is directly related to emissions of greenhouse gases such as CO_2." Average Fuel Economy Standards For Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17,566, 17,659 (Apr. 6, 2006).

Policy and Conservation Act (EPCA) requires NHTSA to set corporate average fuel economy (CAFE) standards at the "maximum feasible" level, taking into account technological feasibility, economic practicability, the effect of other motor vehicle standards of the government on fuel economy, and the need of the United States to conserve energy. 49 U.S.C. § 32902(f). Similarly, Section 202(a) of the Clean Air Act requires EPA to set motor vehicle emissions standards that "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7521(a).

Both NHTSA and EPA worked together to balance the relevant considerations in adopting the joint fuel economy and GHG emissions program. For instance, EPA "considered many factors, such as cost, impacts on emissions (both GHG and non-GHG), impacts on oil conservation, impacts on noise, energy, safety, and other factors, and has, where practicable, quantified the costs and benefits of the rule." Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,404 (May 7, 2010).

Recently, EPA has made clear its position that the GHG emissions program for motor vehicles has the effect of making GHG emissions from stationary sources also subject to regulation under the Clean Air Act, and that such regulation

will begin for large stationary sources on January 2, 2011. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,020 (Apr. 2, 2010). EPA has determined that the burden of reducing GHG emissions will fall initially on stationary sources that emit at least 75,000 tons of carbon dioxide equivalent per year and would otherwise require a preconstruction permit for a non-GHG pollutant. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010).[9] Beginning on July 1, 2011, these requirements will apply to any source that emits at least 100,000 tons of carbon dioxide equivalent per year. *Id.*

Separately, both houses of Congress are considering legislation that would cap emissions of GHGs across the entire economy. For example, the American Clean Energy and Security Act of 2009 (H.R. 2454) was passed by the full House of Representatives in June 2009. That bill would reduce GHG emissions to 17% below 2005 levels by 2020 and to 83% below 2005 levels by 2050, and would apply to any "covered entity," which is defined to include any source of electricity,

[9] This rule "resets" the Clean Air Act's current statutory thresholds for regulating pollutants under PSD from 100 or 250 tons per year, depending on the source, to 75,000 or 100,000 tons per year for GHGs. EPA has determined that the stated statutory thresholds are not feasible for GHGs, which are emitted in much larger quantities than are non-GHG pollutants. *Id.* at 31,514.

any stationary source that produces at least 25,000 tons per year of carbon dioxide equivalent emissions, and any source in specific industrial sectors such as petroleum refiners, aluminum producers, and cement producers. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). Separately, Senators Kerry and Lieberman introduced a draft form of The American Power Act of 2010, which would reduce economy-wide GHG emissions 17% in 2020 and by over 80% in 2050. *See* American Power Act of 2010, Discussion Draft, (May 11, 2010), http://kerry.senate.gov/work/issues/issue/?id=7f6b4d4a-da4a-409e-a5e7-15567cc9e95c. Congress recently amended EPCA in the Energy Independence and Security Act of 2007 (EISA) to ensure that fuel economy of the industry-wide combined fleet of new passenger cars and light trucks reaches at least 35 mpg by the 2020 model year.

These actions by the expert agencies and Congress seek to balance all of the competing policy concerns implicated by global climate change, such as which sectors of the economy should be required to reduce their GHG emissions, how fast these reductions will occur, and at what cost to the economy. A climate-related tort action would invariably chart a different and conflicting course. An action against the automobile industry, for instance, would ask an Article III court to determine what constitutes a "reasonable" level of motor vehicle GHG

emissions. But this is precisely the question that EPA and NHTSA have addressed in their recent joint rulemaking, while balancing the overall cost of the standards against their benefits. Similarly, an action against stationary sources would require a court to decide which sources are emitting an unreasonable amount of GHGs and what a proper level of emissions would be—essentially, the very same questions which EPA and Congress are currently addressing. These determinations rest exclusively with the elected branches in our system of government.

CONCLUSION

Climate-related nuisance actions present quintessential political questions. Adjudicating such claims will undoubtedly require a court to decide which segments of society—along the broad spectrum of contributors to worldwide GHG emissions—should be held legally liable and which should be excused. A court also will be required to determine under what circumstances GHG emissions are reasonable and under what circumstances they are not. Resolving these questions will require a non-judicial policy determination, and courts lack any discernable standard for resolving this dispute. The district court therefore properly dismissed this action on political question grounds.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure, counsel for Plaintiff-Appellant, the Association of International Automobile Manufacturers, certifies that the foregoing brief is set in proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point type and contains 5,586 words as determined by the word count function of Microsoft Word 2003 (excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32).

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I hereby certify that, on July 7, 2010, the foregoing Proposed Brief of Amicus Curiae, the Association of International Automobile Manufacturers in Support of Appellees' was electronically filed with the United States Court of Appeals for the Ninth Circuit via the Court's Electronic Case Filing System.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also hereby certify that on July 7, 2010, I served two true and correct copies of the foregoing brief by First-Class Mail, postage prepaid, for delivery to the following non-CM/ECF participants:

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