No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF REPRESENTATIVE FRED UPTON, REPRESENTATIVE ED WHITFIELD, AND SENATOR JAMES M. INHOFE IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE* [1]

Representative Fred Upton is a Member of Congress from the State of Michigan. He is Chairman of the Committee on Energy and Commerce which has jurisdiction in the U.S. House of Repre-

[1] The parties have filed blanket consents to the filing of *amicus* briefs in support of either or neither party in this case. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

sentatives over the generation and marketing of power, national energy policy generally, the regulation of energy resources, and other matters.

Representative Ed Whitfield is a Member of Congress from the State of Kentucky. He is Chairman of the Committee on Energy and Commerce's Subcommittee on Energy and Power which has jurisdiction over national energy policy generally, energy regulation and utilization, utility issues, the Clean Air Act, and other matters.

Senator James M. Inhofe is a Member of Congress from the State of Oklahoma. He is Ranking Member of the Senate Committee on Environment and Public Works which has jurisdiction in the U.S. Senate over air pollution and environmental policy.

These Members of Congress have been actively involved in the legislative process relating to climate change policies and legislation. Each has strong institutional and policy interests in preserving Congress' plenary role in determining climate change policy for the nation.

SUMMARY OF ARGUMENT

The plaintiffs in this case request that a federal court establish carbon dioxide emissions standards for certain electric utilities based on federal common law nuisance claims. *Amici* submit this brief in support of Petitioners in order to address the issue of whether this case presents a non-justiciable political question. *Amici* do not address other issues raised by the parties in this case.

This case involves political and public policy matters that are being resolved by the Legislative and Executive branches of government. These public

policy determinations are necessarily within the purview of the Congress and the Executive branch, not the Judicial branch, because of the complexity and significance of the environmental and economic issues that they raise.

Amici respectfully submit that Article III courts are not equipped to make judgments about the appropriate emissions standards for utilities located throughout the country. Judicial establishment of such standards would violate decades of Supreme Court precedent and unconstitutionally interfere with Congressional and Executive branch efforts to address climate change-related matters.

ARGUMENT

I. CONGRESS AND THE EXECUTIVE BRANCH HAVE BEEN ACTIVELY ADDRESSING CLIMATE CHANGE MATTERS.

This Court has long recognized that there are certain judgments that are reserved for the political branches of government because they involve a "political question." *See Baker v. Carr,* 369 U.S. 186, 217 (1962); *see also Vieth v. Jubelirer,* 541 U.S. 267, 277 (2004). This case presents such a question because it directly addresses exceedingly complex and controversial national and international climate change issues. These issues have been the subject of extensive legislative and regulatory activity by both the Congress and the Executive branch, and have been at the forefront of Congressional environmental debates for the past decade.

A. Congressional Actions.

Congress originally passed the Clean Air Act in 1963 and has been revisiting that statute ever since, including with the enactment of major amendments in 1970, 1977, and 1990.[2] In 2005, Congress passed legislation to amend the Clean Air Act to establish a renewable fuel program to reduce greenhouse gas emissions, and in 2007 Congress further amended the Act to revise these regulations.[3] Congress in 2007 also directed the Environmental Protection Agency (EPA) to require mandatory reporting of greenhouse gases for certain emission thresholds for all sectors of the U.S. economy.[4]

Congress has also passed statutes over the past three decades relating to understanding and identifying the potential long-term risks of climate change, whether from natural or manmade causes, and responses.[5] During the 110th and 111th Congresses,

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[2] *See* Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, Clean Air Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

[3] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1067; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1519.

[4] Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128.

[5] National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978), amended by the Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1407 (1987), and the Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; *see also* the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776; Energy Policy Act of 2005, Title XVI ("Climate Change"), Pub. L. No. 109-58, 119 Stat. 594 (2005).

the U.S. House of Representatives went so far as to establish a "Select Committee on Energy Independence and Global Warming."

Congress has also appropriated tens of billions of dollars to federal agencies and departments to research and otherwise address climate change-related matters. From 1998 to 2008, total annual appropriations for federal agencies' work related to climate change ranged from $4.0 billion (1998) to $6.4 billion (2008). *See* Congressional Budget Office Report, *Federal Climate Change Programs: Funding History and Policy Issues* (March 2010) at p. 5 [*available at* http://www.cbo.gov/ftpdocs/112xx/doc11224/03-26-ClimateChange.pdf]. In 2009, climate change spending increased to $45 billion, including $37.5 billion appropriated as part of the American Recovery and Reinvestment Act. *Id.* at pp. 1-2; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

Most recently, in 2009, the U.S. House of Representatives passed the "American Clean Energy and Security Act of 2009" which would have instituted a "cap-and-trade" program to reduce greenhouse gas emissions. H.R. 2454, 111th Cong. (2009). The House only narrowly passed the measure (219-212), and it was never considered by the Senate. In fact, cap-and-trade legislation was never considered in large measure because of the intense political opposition to the increased energy costs and job losses caused by the legislation's mandates. *See*, *e.g.*, The American Clean Energy and Security Act of 2009, Report of the Committee on Energy and Commerce Together with Minority and Additional Views To Accompany H.R. 2454, Rept. 111-137, Part I, June 5, 2009, at pp. 725-726, 732 [*available at* http://democrats.energy

commerce.house.gov/Press_111/20090609/hr2454_committeereport.pdf]; CRA International, *Impact on the Economy of the American Clean Energy and Security Act of 2009 (H.R. 2454)* [*available at* http://www.crai.com/uploadedFiles/Publications/impact-on-the-economy-of-the-american-clean-energy-and-security-act-of-2009.pdf].

Despite this opposition, the Senate Committee on Environment and Public Works reported the "Clean Energy Jobs and American Power Act" on November 5, 2009. Clean Energy Jobs and American Power Act, Report of the Committee on Environment and Public Works to Accompany S.1733 together with Additional and Minority Views, United States Senate, Rep. 111-121, February 2, 2010 [*available at* http://www.gpo.gov/fdsys/pkg/CRPT-111srpt121/html/CRPT-111srpt121.htm]. Neither H.R. 2454 nor S.1733, however, was put to a vote on the Senate floor, again because of political concerns over impacts on jobs and the economy. *Id.*, Additional Views of Senator Max Baucus (Montana), Senate Rep. 111-121, pp. 90-91.

A. Executive Branch Actions.

No one can seriously question that the Executive branch, acting through the EPA, the Department of State, and various other departments and agencies, has aggressively employed its various statutory authorities in acting on climate change. *Amici* believe strongly that many of these efforts, particularly over the last two years, may well exceed the authorities Congress has vested in the Executive, and are at a minimum extremely misguided. Those kinds of debates, however, firmly establish that the Legislative and Executive branches are aggressively resolving what United States policy on climate change should be.

In just the last two years, the Obama Administration has unleashed a torrent of greenhouse gas regulations designed to address climate change, basing its regulatory assault primarily on the authority of the Clean Air Act and this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). EPA's proposed and final regulations in this area will have an effect on virtually every aspect of the American economy. They include everything from greenhouse gas reporting rules[6] to unprecedented permitting requirements.[7] Because of the profound effects of these

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[6] Mandatory Reporting of Greenhouse Gases; Final Rule, 74 Fed. Reg. 56,260 (October 30, 2009); Mandatory Reporting of Greenhouse Gases From Magnesium Production, Underground Coal Mines, Industrial Wastewater Treatment, and Industrial Waste Landfills, 75 Fed. Reg. 39,736 (July 12, 2010); Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems, 75 Fed. Reg. 74,458 (November 30, 2010); Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated GHGs, 75 Fed. Reg. 74,774 (December 1, 2010); Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide, 75 Fed. Reg. 75,060 (December 1, 2010).

[7] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed Reg. 66,496 (December 15, 2009); Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (April 2, 2010); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010); Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (December 13, 2010); Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration

regulations on the economy, Congress has been and will continue to be engaged in oversight of the EPA as it seeks to implement these regulations under the Clean Air Act.

This frenetic regulatory activity has been preceded by two decades of Congressionally authorized international climate change policy negotiations. *See* Global Climate Protection Act of 1987, 15 U.S.C. 2901. For example, in 1992 the United States became a signatory to the United Nations Framework Convention on Climate Change (UNFCCC). While the President did not submit and the Senate never ratified the Kyoto Protocol that resulted from UNFCCC negotiations (Kyoto Protocol To the United Nations Framework Convention on Climate Change (Dec. 11, 1997)) [*available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf)],[8] the Executive branch under both

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Program to Sources of Greenhouse Gas Emissions; Federal Implementation Plan, 75 Fed. Reg. 82,246 (December 30, 2010); Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Regarding Texas Prevention of Significant Deterioration Program Interim Final Rule, 75 Fed. Reg. 82,430, and Proposed Rule, 75 Fed. Reg. 82,365 (December 30, 2010); Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting—Sources in State Implementation Plans, 75 Fed. Reg. 82,536 (December 30, 2010); Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule, 75 FR 82,254 (December 30, 2010).

[8] As reflected in a bipartisan resolution approved by a vote of 95-0, the Senate opposed the Kyoto Protocol because it excluded major developing countries such as China and India from emissions reduction requirements and because mandating unilateral reductions on carbon dioxide would pose the risk of inflicting serious harm to the United States economy. S. Res. 98, 105th Cong. (1997).

Republican and Democratic administrations has continued to participate in international climate change talks.

Pursuant to other Congressional directives, the Executive branch has undertaken a wide range of climate change research over the past two decades. The U.S. Global Change Research Program (USGCRP), formerly known as the U.S. Climate Change Science Program, coordinates and integrates federal research for *thirteen* federal departments and agencies, including the U.S. Departments of State, Energy, Interior, Agriculture and Transportation, EPA and other departments and agencies. United States Global Change Research Program, *Program Overview* [http://globalchange.gov/about/overview].

II. THE COMPLEXITY OF CLIMATE CHANGE ISSUES CAN ONLY BE RESOLVED AS A MATTER OF PUBLIC POLICY

Climate change issues are extraordinarily complex, both because of the climate science itself and because any proposed solutions to address climate change have enormous domestic, international, and economic implications.

The Intergovernmental Panel on Climate Change (IPCC) has stated "the complexity of the climate system and multiple interactions that determine its behavior impose limitations on our ability to understand fully the future course of Earth's global climate." *See* IPCC, *Climate Change 2007: The Physical Science Basis*, at p. 21 (2007). It has further stated that "[t]here is still an incomplete physical understanding of many components of the climate system and their role in climate change." *Id.*

Assumptions that future climate change can be traced to anthropogenic or manmade emissions raise extremely complex scientific questions given current scientific understanding. The IPCC's own definition of climate change underscores this point, noting that "*[c]limate change* in the IPCC usage refers to any change in climate over time, whether due to natural variability or as a result of human activity." *Id.* at p. 2, n. 1.

As difficult as questions relating to climate science are, calibrating an appropriate response to long-term climate change risks is equally complex. Extensive Congressional hearings have examined the broad range of economic issues associated with proposed "solutions," including their impact on energy prices, markets, household incomes, and American competitiveness, and on specific industries and regions of the country particularly dependent on fossil-fuels, including coal, for electricity generation. Both House[9] and Senate[10] hearings have delved into these

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[9] Report on the Activity of the Committee on Energy and Commerce for the One Hundred Eleventh Congress, 2d Session, Report 111-706 at p. 94 [*available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr706.pdf]. For example, eleven hearings were held prior to passage of the cap-and-trade legislation, including hearings on "The Future of Coal Under Climate Legislation" (March 10, 2009), "Consumer Protection Provisions in Climate Legislation (March 12, 2009), "Competitiveness and Climate Policy: Avoiding Leakage of Jobs and Emissions" (March 18, 2009), "The American Clean Energy and Security Act of 2009" (April 21-24, 2009), and "Allowance Allocations Policies in Climate Legislation: Assisting Consumers, Investing in a Clean Energy Future, and Adapting to Climate Change" (June 9, 2009).

[10] *See* U.S. Senate Committee on Environment & Public Works, Hearings, 111th Congress [*available at* http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Home] listing eight hear-

matters. Indeed, one hearing focused directly on concerns about regulations affecting coal-fired generators of electricity, the very industry at issue in the present litigation.[11] House *amici* will be holding yet another hearing in the Energy and Commerce Committee soon after this brief is filed. These economic matters were thoroughly debated in the legislative process on the American Clean Energy and Security Act of 2009.[12]

III. THE REGULATION OF CARBON DIOXIDE EMISSIONS AND THE DETERMINATION OF CLIMATE CHANGE POLICY CAN ONLY BE RESOLVED BY THE LEGISLATIVE AND EXECUTIVE BRANCHES

The Supreme Court has long recognized that there are cases that raise political questions that should be reserved for the political branches of government. *See Baker,* 369 U.S. at 217; *Vieth,* 541 U.S. at 277. This Court has identified a number of tests for such cases, including whether the case would require courts to make "an initial policy determination of a

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ings held from July through October 2009 relating to climate change and related legislation.

[11] Climate Change: Perspectives of Utility CEOS: Hearing Before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce, House of Representatives, One Hundred Tenth Congress, First Session, Serial No. 110-22 (March 20, 2007) [*available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:36921.pdf].

[12] *See, e.g.* The American Clean Energy and Security Act of 2009, Report of the Committee on Energy and Commerce Together with Minority and Additional Views To Accompany H.R. 2454, Rept. 111-137, Part I, June 5, 2009 at pp. 725-726, 732.

kind clearly for nonjudicial discretion," as well as whether there is a lack of "judicially discoverable and manageable standards" for resolving the case. *Baker,* 369 U.S. at 217.

This case calls for determinations that are not appropriate for judicial discretion. The specific relief requested by the plaintiffs here is that federal courts find a federal common law nuisance cause of action for contributing to climate change, and establish carbon dioxide emissions standards for defendant utilities. Plaintiffs contend that the defendants could meet such emissions standards using various "options," including fuel switching, alternative sources of energy such as wind and solar power, and other measures affecting plant operations. Jt. App. 58, 119. These potential "options" however, assuming the courts were to grant the relief requested, would raise fundamental issues of cost and technological feasibility. They also have implications for the production, supply, transmission, reliability and cost of energy in the United States. As such, they raise public policy issues that necessarily should be determined by the Congress and the Executive branch precisely because they are so complex and controversial.

Further, in this case there are not judicially discoverable and manageable standards by which a court could institute any kind of coherent emissions regime. As discussed above, this case addresses matters which have been the subject of intense and ongoing scrutiny by the Congress and the Executive branch, and that involve complex issues with proposed solutions that have significant economic policy implications. If a federal court were to provide the relief requested in this case, it would have to address these issues, including issues relating to

technology, the impacts of carbon dioxide emissions standards on controls of criteria pollutants, the impacts on the price, supply and reliability on electricity generation, international implications and other matters. Moreover, if the Court were to grant the relief requested, Article III judges could not possibly oversee the inevitable flood of ensuing litigation.

The Legislative and Executive branches are doing their jobs in the way that the Constitution envisions. Indeed, *amici* have made the continuation of their activities on these extremely complex, highly charged policy questions a central priority in the 112th Congress. The Court should allow these legislative and Executive branch processes to continue without using the judicial process to resolve what are purely political questions.

CONCLUSION

For the reasons set forth above, the judgment of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

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