

ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

No. 15-1363, consolidated with Nos. 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-1488

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

State of West Virginia, *et al.*,
Petitioners,

v.

**United States Environmental Protection Agency, and Regina A.
McCarthy, Administrator,**
Respondents.

**UNOPPOSED MOTION OF PACIFIC LEGAL FOUNDATION, TEXAS
PUBLIC POLICY FOUNDATION, MORNING STAR PACKING COMPANY,
MERIT OIL COMPANY, THE LOGGERS ASSOCIATION OF NORTHERN
CALIFORNIA, AND NORMAN R. "SKIP" BROWN FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS**

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**CERTIFICATE AS TO PARTIES
AND *AMICI CURIAE***

Parties and *Amici*

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel certifies as follows: to the best of my knowledge, all parties, intervenors, and *amici* appearing in this Court to date are listed in the Joint Certificate as to Parties, Rulings, and Related Cases [1587532], the Unopposed Motion of the Institute for Policy Integrity at New York University School of Law to File *Amicus Curiae* Brief in Support of Respondents [1589260], the Unopposed Motion by the American Thoracic Society, the American Medical Association, the American College of Preventive Medicine, and the College of Occupational and Environmental Medicine for Leave to Participate as *Amici Curiae* [1594036], and the Unopposed Motion by William K. Reilly, William D. Ruckelshaus, the Institute for Policy Integrity, the American Thoracic Society, the American Medical Association, the American College of Preventive Medicine, the American College of Occupational and Environmental Medicine, the National League of Cities, the United States Conference of Mayors, Baltimore, Maryland, Coral Gables, Florida, Grand Rapids, Michigan, Houston, Texas, Jersey City, New Jersey, Los Angeles, California, Minneapolis, Minnesota, Pinecrest, Florida, Portland, Oregon, Providence, Rhode Island, Salt Lake City, Utah, San Francisco, California, West Palm Beach, Florida, and Boulder County, Colorado, and prospective *amici* the

American Sustainable Business Council, the South Carolina Small Business Chamber of Commerce, and the Service Employees International Union [1595470].

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(b), and D.C. Circuit Rule 29(b), Pacific Legal Foundation, Texas Public Policy Foundation, Morning Star Packing Company, Merit Oil Company, Loggers Association of Northern California, and Norman R. “Skip” Brown, collectively “*Amici*,” respectfully move for leave to participate as *amicus curiae* in the above-captioned case in support of Petitioners.

Counsel for the *Amici* have consulted with the parties by sending email notice on January 29, 2016, to all designated or liaison counsel for all parties and intervenors, asking them to respond by Friday, February 5, 2016, whether they consented, objected to, or took no position on *Amici*’s proposed participation, indicating that if no response was received by Friday, February 5, 2016, counsel for *Amici* would indicate to the Court that those parties took no position on this motion. Counsel for Respondents United States Environmental Protection Agency and Regina A. McCarthy, Administrator, have indicated that their clients consent to the proposed *Amici* filing. Responses from the Petitioners received to date have also indicated their consent to the *Amici* filing. Because no other responses have been received to date, *Amici* hereby notify the Court that they have not taken a position on the motion. Accordingly, this motion has not been opposed by any party or intervenor.

This motion is timely under Federal Rule of Appellate Procedure 29(e) and Circuit Rule 29(b)-(c) because it is filed as soon as practicable after the docketing of the case and well before the filing deadline for *amicus* briefs recently set by the Court for February 23, 2016. In addition, this motion is being filed as soon as practicable after co-counsel for *Amici* Pacific Legal Foundation and Texas Public Policy Foundation entered into an agreement to serve as co-counsel for the *Amici* identified herein seeking to file a brief in these proceedings in support of Petitioners.

I

BACKGROUND

On October 23, 2015, the Environmental Protection Agency (EPA) published its final version of the Clean Power Plan, which regulates carbon dioxide emissions from existing power plants under section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), 80 Fed. Reg. 64,661 (Oct. 23, 2015). Petitioners have filed these nearly forty consolidated cases seeking judicial review of the Clean Power Plan. Among other issues, the consolidated cases allege that the EPA's actions in promulgating the Clean Power Plan were arbitrary and capricious, in excess of its statutory authority under section 111(d), and a violation of the Tenth Amendment's federalism principles.

II

INTEREST OF PROPOSED AMICUS CURIAE AND RELEVANCE

Pacific Legal Foundation is the most experienced nonprofit litigation-oriented public interest foundation of its kind in the United States. For over 40 years, PLF has litigated in support of a reasonable balance between regulatory efforts to protect the environment and the guarantees of individual freedom and property rights that form the foundations of liberty. PLF submitted *amicus* briefs in several Supreme Court cases addressing greenhouse gas regulations, including *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), *American Electric Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), and *Massachusetts v. EPA*, 549 U.S. 497 (2007). In addition, Pacific Legal Foundation was a petitioner in this Court in the consolidated cases challenging the first round of EPA regulation of greenhouse gases under the Clean Air Act, known as the Endangerment Finding, *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). Pacific Legal Foundation's attorneys also served as lead counsel in this Court in challenges to EPA's mobile source greenhouse gas regulations, *California Construction Trucking Association, Inc. v. EPA*, No. 13-1076 (D.C. Cir. filed Mar. 25, 2013), and *Dalton Trucking, Inc. v. USEPA*, 808 F.3d 875 (D.C. Cir. 2015).

Texas Public Policy Foundation is a nonprofit, nonpartisan research institution based in Austin, Texas. The Foundation's mission is to promote and defend liberty,

personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach. The Foundation's guiding principles have led it to speak out and oppose federal abuse and overreach in the area of environmental policy.

Morning Star Packing Company (Morning Star) is a bulk processor of tomato products with locations in California. Morning Star relies on natural gas boilers for production of their tomato products. Its emissions of carbon dioxide are heavily regulated by California's Cap and Trade Regulation governing greenhouse gas emissions. The Clean Power Plan will increase Morning Star's costs of securing fuels for its boilers.

Merit Oil Company (Merit Oil) is a family business that has operated in California for three generations. Merit Oil stores, transports and wholesales a variety of petroleum products, including gasoline, diesel fuels, solvents, and kerosene. Merit Oil's costs of doing business will increase as a result of the Clean Power Plan.

Loggers Association of Northern California (LANC) is a California nonprofit trade association whose mission is to support, promote, and advocate for the economic interests of its members, who are businesses involved in the logging industry in Northern California. LANC has 160 members, including many family logging businesses that have operated in California for generations. LANC is concerned that

the Clean Power Plan will increase energy costs for its members, thereby adversely impacting their economic interests.

Norman R. “Skip” Brown is an individual residing in California who does not want his electric bills to increase as a result of the Clean Power Plan and who is concerned about the likelihood that the Clean Power Plan will create brownouts and blackouts adversely impacting his quality of life.

III

DESIRABILITY OF PARTICIPATION

The Clean Power Plan violates both the Clean Air Act and The United States Constitution. *Amici* will show that the Clean Power Plan’s attempt at regulating emissions of carbon dioxide from power generating facilities is illegal, for three reasons: (1) carbon dioxide is emitted from numerous and diverse stationary sources into the ambient air of the nation and must be regulated, if at all, as a criteria pollutant under section 108 of the Clean Air Act and not on a category-by-category basis under section 111, which is the regulatory foundation of the Clean Power Plan; (2) EPA failed to make a proper endangerment finding for stationary source emissions of carbon dioxide; and (3) existing power plants cannot be regulated under section 111(d) because power plants as a category of sources are already regulated under section 112 of the Act. Proposed *Amici* will also address the ways in which the Clean Power Plan usurps powers reserved to the states under the Tenth Amendment

of the United States Constitution, especially under precedents that have been established by the United States Supreme Court and this Court.

Amici's brief will not duplicate arguments made by the parties but will provide the unique perspectives of the *Amici* on the issues facing the Court.

CONCLUSION

For these reasons, the unopposed motion for leave to file an *amicus curiae* brief in support of Petitioners should be granted.

DATED: February 5, 2016.

Respectfully submitted,

THEODORE HADZI-ANTICH
Pacific Legal Foundation

ROBERT HENNEKE
Texas Public Policy Foundation

/s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rules of Appellate Procedure 27(d)(1) & (2) and 29(b) and D.C. Circuit Rule 29(c) because it meets the prescribed format requirements, does not exceed 20 pages, and is being filed as promptly as practicable after the case was docketed in this Court. This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface using WordPerfect X7 in 14-point Times New Roman.

DATED: February 5, 2016.

/s/ Theodore Hadzi-Antich

THEODORE HADZI-ANTICH

**CORPORATE AND FINANCIAL DISCLOSURE
STATEMENT PURSUANT TO FEDERAL RULES OF
APPELLATE PROCEDURE 26.1, 29(c) AND
D.C. CIRCUIT LOCAL RULE 26.1**

Proposed *Amici* for Petitioners Pacific Legal Foundation, Texas Public Policy Foundation and Loggers Association of Northern California are nonprofit organizations and therefore do not have parent corporations. Proposed *Amici* Morning Star Packing Company and Merit Oil Company do not have parent corporations. Proposed *Amicus* Norman R. “Skip” Brown is an individual resident of California. No publicly held corporation owns 10% or more of the stock of the Proposed *Amici*.

DATED: February 5, 2016.

/s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2016, I filed the foregoing document through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users. I also caused the foregoing to be served via U.S. First Class Mail on counsel for the following parties at the following addresses.

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DATED: February 5, 2016.

/s/ Theodore Hadzi-Antich

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