ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016
No. 15-1363 (and consolidated cases) (complex)

In the
United States Court of Appeals
for the District of Columbia

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

AMERICAN WIND ENERGY ASSOCIATION, *et al.*,
Intervenors.

On Petitions for Review of a Final Action of the United States Environmental Protection Agency 80 Fed. Reg. 64,662 (Oct. 23, 2015)

BRIEF OF *AMICI CURIAE* 60PLUS ASSOCIATION, FEDERALISM IN ACTION, HISPANIC LEADERSHIP FUND, INDEPENDENT WOMEN'S FORUM, NATIONAL TAXPAYERS UNION, AND TAXPAYERS PROTECTION ALLIANCE IN SUPPORT OF PETITIONERS URGING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Counsel for *Amici Curiae* certifies the following:

(A) Parties and Amici

All parties, intervenors, and *amici* appearing in this Court are listed in the lead docket sheet for these consolidated petitions.

(B) Ruling under Review

The decision on review is found at 80 Fed. Reg. 64,662 (October 23, 2015), and is entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (the "Plan").

(C) Related Cases

This case was not previously before this Court or any other court. It has been 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. There are no other related cases.

February 23, 2016

Respectfully submitted,

/s/ J. Carl Cecere

J. Carl Cecere

RULE 26.1 STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1(a), *amici* the 60Plus Association, Federalism in Action, the Hispanic Leadership Fund, the Independent Women's Forum, the National Taxpayers Union, and the Taxpayers Protection Alliance, each states that it is not a publicly-held corporation, does not issue stock, and does not have a parent corporation.

Pursuant to Circuit Rule 26.1(b):

Amici are organizations that represent women, minorities, and seniors, and those who advocate for free-market solutions to help these vulnerable populations. The 60Plus Association promotes solutions to seniors' issues that are grounded in free markets, less government, and fewer taxes.

Federalism in Action is a national public policy organization that promotes American federalism and the notion that individual liberty is best protected through a proper balance of authority between the national and state governments.

The Hispanic Leadership Fund works to strengthen working families by promoting common-sense public policy solutions that foster liberty, opportunity, and prosperity, with a particular interest in issues affecting the Hispanic community.

The Independent Women's Forum's mission is to improve the lives of Americans by building support for free markets, limited government, and individual responsibility.

The National Taxpayers Union is a non-partisan organization dedicated to informing and mobilizing Americans on behalf of lower taxes, limited government spending, less burdensome regulations, and economic freedom for consumers.

The Taxpayers Protection Alliance is a non-partisan organization dedicated to educating the public through the research, analysis and dissemination of information on the government's effects on the economy.

RULE 29 STATEMENTS

The following petitioners and intervenors have indicated their consent to the filing of this brief:

American Coalition for Clean Coal Electricity
American Lung Association
Basin Electric Power Cooperative
Calpine Corporation
Center for Biological Diversity
City of Austin d/b/a Austin Energy
City of Los Angeles, by and through its Department of Water and Power
City of Seattle, by and through its City Light Department
Clean Air Council
Clean Wisconsin
Coal River Mountain Watch
Competitive Enterprise Institute
Conservation Law Foundation
Denbury Resources, Inc.
Environmental Defense Fund
Kanawha Forest Coalition
Kansas City Board of Public Utilities
Keepers of the Mountains Foundation
Mon Valley Clean Air Coalition
Murray Energy Corporation
National Grid Generation, LLC
Natural Resources Defense Council
North American Coal Corporation
Ohio Environmental Council
Ohio Valley Environmental Coalition
Pacific Gas and Electric Company
Sacramento Municipal Utility District
Sierra Club
Southern California Edison Company
State of Missouri
State of Oklahoma
United States Environmental Protection Agency
West Virginia Coal Association

West Virginia Highlands Conservancy

All remaining petitioners and intervenors take no position on the filing of this brief.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party or party's counsel authored this brief in whole or in part, and that no other person besides *amici* or their counsel contributed money that was intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. R. 29(d), *amici* state that a separate brief is necessary for the following reasons: *Amici* are organizations whose mission is to promote the interests of women, minorities, and seniors, or advocate for free-market solutions on behalf of these vulnerable populations, many of whom must make do on meager or fixed incomes. *Amici* thus have a different perspective from any other party or *amicus*. Although we understand that other *amici* will consider the impact of the Clean Power Plan on consumers generally, our brief is unique in focusing on the distinct and significant harms the Clean Power Plan will impose on the particularly vulnerable populations they represent. Accordingly, *amici* expect that the focus of this brief is not likely to be duplicated by any other party or *amicus*.

February 23, 2016

Respectfully submitted,

/s/ J. Carl Cecere

J. Carl Cecere

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*Authorities upon which we chiefly rely are marked with asterisks.

*CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014 (2015) 7, 9

ALANA EICHNER & KATHERINE GALLAGHER ROBBINS, NAT'L WOMEN'S LAW CENTER, NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES, 2014 (2015) 8

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GLOSSARY OF ABBREVIATIONS

The Plan	The "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015).

INTRODUCTION, STATEMENT OF INTEREST, AND SUMMARY OF THE ARGUMENT

Amici are organizations devoted to the economic empowerment and vitality of women, minorities, and seniors in this country. *Amici* thus represent those who will be hardest-hit by the increased consumer electricity costs that all agree will occur after its implementation, making up a disproportionate number of those that must make do on meager or fixed-incomes. Middle- and high-income families may think little of paying more for power, because it makes up only a small portion of their overall budget. But many within the communities *amici* represent pay an exorbitant portion of their earnings on electricity, sometimes topping 23 percent of after-tax income. And they are often forced by economic circumstance into stark choices over whether to heat their homes or put food on the table. These people simply cannot afford to have their economic circumstances stretched even thinner by increased electricity costs imposed by the Plan. Yet these people's voices have largely gone unheard in the Plan's formulation.

EPA was statutorily required to consider the Plan's impact on these vulnerable populations in formulating its performance standards. And EPA administrators have acknowledged that the Plan's greatest adverse impact will be felt by "low-income" and "minority" communities. But the Plan offers very little to offset this acknowledged harm. The Plan includes some

measures that may someday lead to modest savings for some in these marginalized communities, such as its "Clean Energy Incentive Program" which hopes to prompt investments in renewable energy projects in low-income communities. But that offers little solace to those who lose their jobs in traditional energy industries upon the Plan's implementation, or for the millions of women, seniors and minorities living in fixed- and low-income families, whose pressing survival needs today eclipse any potential benefit they receive from long-term energy savings, especially when those savings may never materialize.

Accordingly, *amici* agree with petitioners that the EPA exceeded its statutory authority in enacting the Plan, making its imposition arbitrary, capricious, and an abuse of discretion, and urge that it be set aside. *See* 42 U.S.C. § 7607(d)(9)(A).

STATUTES AND REGULATIONS

42 U.S.C. § 7607(d)(9)(A): In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

42 U.S.C. § 7411(a)(1): The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

ARGUMENT

I. The Clean Power Plan Disproportionately Harms Women, Minorities, and Seniors Living in Low-Income, and Fixed-Income Families.

In its Federal Register notice unveiling the Plan, EPA acknowledges its basic statutory obligation to consider the "cost of achieving" the performance standards it imposed, and the "nonair quality health and environmental impact" they would have. 42 U.S.C. § 7411(a)(1); *see also* 80 Fed. Reg. 64,664 (Oct. 23, 2015) (describing EPA objectives to include "ensuring . . . reliable and affordable electricity"). EPA also acknowledges its broader societal obligation "to help ensure that vulnerable communities are not disproportionately impacted by this rulemaking." *Id.* at 64,914; *see also id.* at 64,940 (elaborating on same). It goes on to discuss the effects of climate change on "[l]ow income communities and communities of color already overburdened with pollution," and heralds the Plan's allegedly "broad benefit to communities across the nation" in terms of forestalling "storms, flooding, droughts and . . . conventional air pollution" that might eventually result from climate change. *Id.* at 64,914. But EPA fails to acknowledge the Plan's immediate adverse impact on many fixed- and low-income heads of households, who will be forced to pay more for electricity when they can barely provide basic necessities for their families.

A. The closure of coal units, new infrastructure investments, and energy-efficiency measures required under the Clean Power Plan will lead to immediate price increases for electricity consumers.

As EPA acknowledges, the Plan will impose increased costs for producers and suppliers of electricity. Electricity generators will have to incur substantial capital expenditures to meet the Plan's emissions standards, including both costs to retrofit old facilities, as well as to replace certain sources, like coal-fired power plants, with new units utilizing alternative fuel sources. *See id.* at 64,728. Considerable infrastructure costs would be incurred to bring additional renewable energy capacity onto the grid. *See id.* at 64,927-64,928. And similarly large investments would have to be made to increase energy efficiency to meet targeted standards. *See id*. These costs are hard to quantify, because it is uncertain how states will ultimately fulfill their obligations under the Plan, but EPA itself projects that billions annually will have to be spent to meet the Plan's compliance standards. *See id.* at 64,928.

These increased production costs will eventually be passed onto consumers. For its part, EPA predicts a 3 percent increase in retail electricity prices during the year 2020. *Id.* at 64,927. Economists at NERA Economic Consulting are less optimistic, and expect an even greater consumer impact to result from the anticipated $220-to-$292 billion (in

today's dollars) they expect to be incurred in compliance over slightly more than a decade. NATIONAL ENERGY RESEARCH ASSOCIATES, ENERGY AND CONSUMER IMPACTS OF EPA'S CLEAN POWER PLAN 5 (2015).[2] As a result, NERA expects that average retail electricity rates could rise from 11 percent to 14 percent over that period. *Id.* And certain states will incur even heftier rate hikes—with 10 states experiencing average annual electricity price increases of 30 percent or more, and 7 more experiencing "peak" retail electricity price increases of 40 percent or more. *Id.* at 7.

B. These immediate price increases will fall most heavily on women, minorities, and seniors, who disproportionately live in low-income and fixed-income families.

As Administrator McCarthy has publicly acknowledged, low-income and minority families will be "hardest hit" by the price increases that will flow from the Plan's implementation.[3] EPA expects that "over the long run"—meaning a decade after implementation—average utility bills (although not necessarily electricity *rates*) could drop by a modest $7 a

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[2] *Available at* http://www.americaspower.org/wp-content/uploads/2015/11/NERA-CPP-Final-Nov-7.pdf.

[3] Nicolas Loris, *Head of EPA Admits Climate Regulations Will Hit Low-Income Minority Families Hardest*, THE DAILY SIGNAL (Aug. 19, 2015), *available at* http://dailysignal.com/2015/08/19/head-of-epa-admits-climate-regulations-will-hit-low-income-minority-families-hardest/.

month. EPA, CLEAN POWER PLAN KEY TOPICS.[4] But the Plan does virtually nothing to overcome the financial strain that will immediately follow in the wake of the Plan's implementation for the most politically and economically vulnerable groups in American society.

1. Low-income and fixed-income families already spend an excessive and disproportionate amount of income on their energy needs.

The implementation of the Plan will have immediate effects on the working poor—a population that disproportionately includes minority families. *See* Kate Davidson, *Working Minority Families Are Twice As Likely To Be Low-Income As Whites*, THE WALL STREET JOURNAL (March 15, 2015).[5] According to the U.S. Census Bureau, in 2014, 46.7 million people—or 14.8 percent of the population—were at or below the poverty line, supporting a family of four on roughly $24,000 a year. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, 12 (2015); 79 Fed. Reg.

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[4] *Available at* http://www.epa.gov/cleanpowerplan/clean-power-plan-key-topics.

[5] *Available at* http://blogs.wsj.com/economics/2015/03/16/working-minority-families-are-twice-as-likely-to-be-low-income-as-whites/.

3593 (Jan. 22, 2014) (setting forth poverty guidelines).[6] An even greater percentage of African Americans—26.2 percent—live below the poverty line. *Id.* at 14. Hispanics also experience poverty in numbers higher than the general population—with 23.6 percent living in poverty in 2014. *Id.* at 15. More than one-in-seven women lived in poverty in 2014—nearly half of them at or below 50 percent of the poverty level. ALANA EICHNER & KATHERINE GALLAGHER ROBBINS, NAT'L WOMEN'S LAW CENTER, NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES, 2014 (2015).[7]

Many of those who live above the poverty line are still struggling financially, and women, minorities, and seniors are disproportionately among their number. Median pre-tax income for African American households is estimated at 33 percent below the national rate. AMERICAN COALITION FOR CLEAN COAL ELECTRICITY, ENERGY COST IMPACTS ON AMERICAN FAMILIES 6 (2015) [hereinafter "ACCCE"].[8] Income for seniors aged 65 and over is 31 percent lower than the national median, while

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[6] *Available at* https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf.

[7] *Available* at http://nwlc.org/wp-content/uploads/2015/08/povertysnapshot2014.pdf.

[8] *Available at* http://americaspower.org/sites/default/files/Trisko-National-Family-Energy-Costs-June-2015-FINAL.PDF.

Hispanics take home 21 percent less. *Id.* The gender income gap is near-universal, with women earning on average 78.3 cents on the dollar as compared to men. INSTITUTE FOR WOMEN'S POLICY RESEARCH, STATUS OF WOMEN IN THE STATES 43 (2015) (discussing 2013 figures).[9] This gap widens even further for people aged 65 or older. *See* DENAVAS-WALT & PROCTOR, *supra*, at 15.

For these economically disadvantaged populations, energy costs already consume larger portions of household income than for middle- to upper-income Americans. A household earning $50,000 or more per year might spend an estimated 7 percent of annual income on energy costs. ACCCE, *supra*, at 1. While that is still a significant percentage of a family's budget, it is small enough that marginally increasing energy costs might not affect their daily lives that much. But for households earning less than $30,000—nearly a third of the U.S. population—it is estimated that energy consumes a whopping 23 percent of after-tax income. *Id.* at 1, 6. This disparity results not only because the poor have fewer economic resources *overall* to meet their energy needs, but it also because "[l]ow income families typically reside in housing which has not been adequately

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[9] *Available at* http://www.iwpr.org/publications/pubs/the-status-of-women-in-the-states-2015-full-report.

weatherized from wind, cold and precipitation," meaning that their energy consumption is sometimes proportionately higher than that of high-income earners. W.M. Theisen, *Public Policy and the Energy Needs of Low Income Families,* 20 J. OF SOCIOLOGY & SOC. WELFARE, Iss. 3, Article 7, 94 (April 2015). Hence, even small increases in baseline energy costs could have huge impacts on the well-being of minority, fixed- and low-income families.

2. These families cannot afford the price increases imposed by the Clean Power Plan.

Compounding this difficulty, the government's own poverty statistics indicate that many low- and fixed-income Americans have virtually no ability to absorb the inevitable electricity-rate hikes that the Plan will necessitate. Seniors living on $30,000 or less a year keep only an average of $17,034 in after-tax income. And working families earning less than $30,000 per year take home even less: living on an average of $15,003. ACCCE, *supra*, at 3. After 23 percent of that average figure goes to energy costs, that leaves only $11,553 for *all* of their other expenses. And "[u]nlike other consumer goods, a family can not shop for a secondhand cubic foot of gas or a slightly used kilowatt of electricity. All a poor family can do is try to consume less energy," or go without other basic necessities to pay for electricity. Theisen, *supra*, at 94-95.

This forces low-income and fixed-income families into stark choices about how to make ends meet. A 2011 survey revealed that 33 percent of respondents opted to rely on their kitchen stove or oven to heat their homes, unable to pay the bill to keep the heat on. ACCCE, *supra*, at 7. Twenty-four percent of low-income individuals reported going without food for at least one day in order to pay their energy bills. *Id.* at 2. Another 37 percent went without medical or dental care. *Id.* Accordingly, many of these vulnerable families may have to foot the bill for the Plan with missed meals and other essentials of daily living—yet another "nonair quality health and environmental impact" the EPA failed to consider. 42 U.S.C. § 7411(a)(1). *Amici* urge the Court to do what EPA did not, and reflect on the profound implications that the Plan portends for the day-to-day lives of millions of economically disadvantaged and minority families in determining whether the Plan exceeds the EPA's statutory authority.

II. The Clean Power Plan Fails to Protect Economically Disadvantaged Families from the Harms It Imposes.

Despite the government's own poverty statistics, the Plan does virtually nothing to counteract the harsh economic realities that low- and fixed income families will face if the Plan goes into effect. EPA hopes to encourage families to apply for existing state and federal assistance programs, which may mitigate the harm for a few people, but will do little to

stem the overall economic harm imposed by the Plan. EPA also plans to encourage investments in renewable energy projects for low-income communities, but any far-off benefit provided by these programs is cold comfort to someone who loses their jobs as the result of a plant closure, and offers no solution to the grinding, day-to-day deprivations that increased energy costs will mean for low- and fixed-income people.

A. Existing assistance programs will not do enough to offset price increases for low-income and fixed-income families.

In the Plan, EPA highlights a number of existing state, local and federal sponsored programs that help low-income households pay their energy bills. *See* 80 Fed. Reg. 64,916-64,917. EPA pledges "[i]n the coming months, [to] continue to provide information and resources for communities and states on existing federal, state, local, and other financial assistance programs." *Id.* at 64,917. EPA also catalogs existing programs that encourage energy efficiency and renewable-energy measures, which it suggests "can also help low-income households reduce their electricity consumption and bills." *Id.* While these efforts to encourage access to existing programs may be laudable, and may encourage a few additional qualified people to obtain benefits, they will do little to overcome the economic harms visited on vulnerable populations by the Plan.

Importantly, many of those who will suffer greatly will not qualify for assistance. And it is simply unrealistic to rely on people to purchase an energy-saving appliance or winterize their homes to overcome increased electricity costs. EPA forgets that many cost-conscious people are already taking these measures. For those who have not, these devices and measures can be very expensive, especially for those of meager means. Moreover, purchases of energy-efficient products do not always translate into the promised energy savings, because of flaws in the way the economic benefits from those demand-side energy saving measures are calculated. Indeed, a Department of Energy analysis of its own program that uses energy efficiency measures to help low-income families revealed that one-in-five consumers were "*worse off*" after undertaking energy "savings" measures, because the promised benefits did not materialize, or did not outweigh the hefty investment required for such measures. *See* SHERZOD ABDUKADIROV, MERCATUS CENTER AT GEORGE MASON UNIVERSITY, EXPERT COMMENTARY: DEBATE OVER FURNACE EFFICIENCY STANDARDS HEATS UP THE HILL (2015).[10] Accordingly, encouraging a few more people to access these

[10] *Available at* http://mercatus.org/expert_commentary/debate-over-furnace-efficiency-standards-heats.

existing programs and cost-cutting measures will simply not do enough to overcome the increased energy prices likely to result from the Plan.[11]

B. EPA's plans to incentivize investment in low-income communities will do nothing to help those communities facing immediate increases in electricity rates.

EPA also hopes that the monetary harms from the Plan on low- and fixed-income families will be offset through the so-called "Clean Energy Incentive Program"—a voluntary "matching fund" program designed to encourage states to invest in wind and solar projects and energy-efficiency projects in low-income communities. EPA, FACT SHEET: CLEAN ENERGY INCENTIVE PROGRAM.[12] But this provides only a patchwork solution for a few communities—the program is only available to states that buy-in to a federal plan for emissions reductions, rather than fashioning their own. *Id.* The program's financial incentives are also contingent upon states achieving certain milestones, including target reductions in 2020 or 2021. *Id.* Moreover, given the inherently speculative nature of quantifying the future

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[11] EPA's failure to meaningfully account for the Plan's immediate and inevitable financial impact on low-income individuals could justify remanding the Plan on the grounds that it is arbitrary and capricious. *See generally Motor Vehicle Mfrs. Ass'n. v. State Farm Mut.*, 463 U.S. 29 (1983).

[12] *Available at* http://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-ceip.pdf.

benefit of these uncertain projects, it is not at all clear that the Clean Energy Incentive Program will *ever* translate into actual dollars in the pockets of families in need, even for communities in which the programs are implemented. And even then, the benefits themselves would not be felt, at a minimum, until five years from now. The program thus falls well-wide of targeting the budgetary needs of fixed- and low-income families in the years immediately following the Plan's implementation.

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Amici do not dispute that pollution is a serious problem—one with its own terrible consequences for the communities they represent. But those people, as well as millions of other Americans, have indicated through enactment of a careful legislative scheme that this problem must be attacked through careful, combined, and sustained effort, one that respects and utilizes the input and expertise of states and other local government entities, who work closer with their communities, and better know their individualized needs. In exceeding its statutory powers, and imposing mandates in the face of opposition from the majority of the states seeking the best interests of their citizens, EPA once again ignores the needs and wishes of millions in low-income families, for whom the problems of energy costs are very real, and very serious. Accordingly, the Court should vacate the

rule to undo the acute financial pressures fixed-income and low-income families would face as the result of EPA's regulatory overreach.

CONCLUSION

The Court should hold unlawful and set aside the rule.

February 23, 2016

Respectfully submitted,

/s/ J. Carl Cecere

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ J. Carl Cecere

J. Carl Cecere

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 29 because this brief contains 3,521 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief has been prepared using Microsoft Word 2013 in 14-point Times New Roman font, which is a proportionately spaced typeface.

/s/ J. Carl Cecere

J. Carl Cecere