ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

No. 15-1363
(and consolidated cases)

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, ET AL.,

Respondents.

On Petitions for Review of Final Action
by the United States Environmental Protection Agency

BRIEF *AMICI CURIAE* OF CURRENT MEMBERS OF CONGRESS AND BIPARTISAN FORMER MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

Elizabeth B. Wydra
Brianne J. Gorod
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* current and former members of Congress represents that all parties have been sent notice of the filing of this brief. All parties have either consented or taken no position; no party has objected to the filing of the brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are current and former members of Congress who are familiar with the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (CAA). Indeed, many *amici* were sponsors of CAA legislation, participated in drafting the 1990 CAA amendments, serve or served on key committees with jurisdiction over the CAA and Environmental Protection Agency (EPA), and supported the passage of the CAA. They are thus familiar not only with the law as enacted, but also with how the law evolved as it moved through the legislative process. *Amici* are thus particularly well-situated to provide the Court with insight into the authority Congress conferred on EPA in the CAA, why Congress would confer such authority on an expert agency, and the important role that such agencies often play in achieving policy objectives established by Congress. Further, as current and former members of Congress, *amici* are uniquely well-positioned to re-

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

spond to assertions made by *amici* members of Congress in support of petitioners and to explain why EPA's ability to promulgate the rule at issue facilitates, rather than undermines, Congress's ability to make policy for the nation. Moreover, because some *amici* served in Congress when the CAA was amended in 1990, they can also provide particular insight into the effect those amendments were understood to have at the time of their enactment.

In short, because of their service in Congress and, in the case of many *amici*, their specific participation in drafting the CAA and overseeing EPA's implementation of that Act, *amici* know that the CAA not only specifies meaningful criteria for developing and implementing emission standards for pollutants, but also gives EPA, as the delegated expert agency, the discretion necessary to elaborate on those criteria, resolve ambiguities in them, and to apply them to specific new problems as they arise. They also know that the agency's ability to exercise that authority is critical to the effective operation of the CAA. *Amici* therefore have a strong interest in preserving the regulatory scheme for combatting air pollution that Congress put in place when it enacted the CAA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* current and former members of Congress who are signatories to this brief and any other *amici* who had not yet entered an appearance in this case as of the filing of Respondent's brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Respondents.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Respondents.

III. RELATED CASES

Reference to consolidated cases pending before this Court that challenge a related agency action appears in the Brief for Respondents.

Dated: March 31, 2016

By: /s/ Elizabeth Wydra
Counsel for Amici Curiae

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES vi

GLOSSARY ix

STATUTES AND REGULATIONS x

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 9

I. CONGRESS ENACTED THE CAA TO WAGE A "WAR AGAINST AIR POLLUTION," AND IT CONFERRED BROAD AUTHORITY ON EPA TO HELP EPA ACHIEVE THE ACT'S BROAD OBJECTIVES 9

II. THE CLEAN POWER PLAN RULE IS CONSISTENT WITH THE TEXT, STRUCTURE, AND HISTORY OF THE CAA 17

CONCLUSION 27

APPENDIX: LIST OF *AMICI* 1A

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Elec. Power Co. v. Connecticut
131 S. Ct. 2527 (2011) 7, 13, 14, 19

Cent. Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 16

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 9

Currin v. Wallace,
306 U.S. 1 (1939) 9

**FDA v. Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 19, 22, 23, 26

Five Flags Pipe Line Co. v. Dep't of Transp.,
854 F.2d 1438 (D.C. Cir. 1988) 26

**King v. Burwell*,
135 S. Ct. 2480 (2015) 18

**Massachusetts v. EPA*,
549 U.S. 497 (2007) 7, 13, 14

Morton v. Ruiz,
415 U.S. 199 (1974) 9

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 16

Train v. Natural Res. Def. Council, Inc.,
421 U.S. 60 (1975) 3, 11

Union Elec. Co. v. EPA,
427 U.S. 246 (1976) 3

United States v. Welden,
377 U.S. 95 (1964) 25

* Authorities on which *amici* chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES – cont'd

Page(s)

STATUES

42 U.S.C. §§ 7401-7671q 1
42 U.S.C. § 7401(b)(1)..... 17
42 U.S.C. § 7408..... 13, 17, 26
42 U.S.C. § 7409..... 17
42 U.S.C. § 7410..... 17
* 42 U.S.C. § 7411.....4, 12, 13, 17, 18, 21
42 U.S.C. § 7412..... 17, 26, 27
42 U.S.C § 7491(b)(2)..... 26
42 U.S.C. § 7617(c) 11
Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. § 7401)... 3

OTHER AUTHORITIES

* 40 Fed. Reg. 53,340 (Nov. 17, 1975) 4, 17, 19
69 Fed. Reg. 4652 (Jan. 30, 2004)..... 23
80 Fed. Reg. 64,510 (Oct. 23, 2015)..... 20
80 Fed. Reg. 64,662 (Oct. 23, 2015)..... 5
*Debate on S. 4358 (Sept. 21, 1970) (statement of Sen. Muskie), *cited in* 136 Cong. Rec. S2826 (Mar. 21, 1990) 10, 11
H.R. Rep. No. 91-1146 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356..... 3
H.R. 910, 112th Cong. (2011)..... 16
H.R. 1487, 114th Cong. (2015)..... 16
H.R. 2454, 111th Cong. (as placed on Senate calendar, July 7, 2009)..... 15
H.R. 3030, 101st Cong. § 108(g) (1990) 24
H.R. 3030, 101st Cong. § 301, *reprinted in* 2 *A Legislative History of the Clean Air Act Amendments of 1990*, at 3737, 3937 (1993) 23

TABLE OF AUTHORITIES – cont'd

Page(s)

H.R. 3895, 113th Cong. (2014)..... 16

H.R. 4036, 114th Cong. (2015)..... 16

H.R. 4286, 113th Cong. (2014)..... 16

H.R. 4304, 113th Cong. (2014)..... 16

H.R. 4344, 111th Cong. (2009)..... 16

H.R. 4808, 113th Cong. (2014)..... 16

H.R. 4850, 113th Cong. (2014)..... 16

S. 1630, 101st Cong. § 301, *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1990* at 4119, 4407 (1993)..... 23

*S. Rep. No. 91-1196, at 3 (1970)..... 3, 4, 11

S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385 ..... 24, 25

GLOSSARY

CAA	Clean Air Act
CO_2	Carbon Dioxide
EPA	Environmental Protection Agency

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to Respondent's Brief filed with this Court on March 28, 2016.

INTEREST OF *AMICI CURIAE*

Amici are current and former members of Congress who are familiar with the Clean Air Act, 42 U.S.C. §§ 7401-7671q (CAA), and the authority it confers on the Environmental Protection Agency (EPA). Indeed, many *amici* were sponsors of CAA legislation, participated in drafting the 1990 CAA amendments, serve or served on key committees with jurisdiction over the CAA and EPA, and supported the passage of the CAA. Based on their experience serving in Congress, *amici* understand that Congress often confers discretion on expert administrative agencies to determine how best to implement the law, especially in technical areas in which knowledge is constantly evolving. Indeed, *amici* know that the CAA not only specifies meaningful criteria for developing and implementing emission standards for pollutants, but also gives EPA, as the delegated expert agency, the discretion necessary to elaborate on those criteria, resolve ambiguities in them, and apply them to specific new problems as they arise. Moreover, there are also provisions of the CAA in which Congress intentionally used broad language so EPA could play a key role in shaping the approach to developing and setting standards for specific sources and pollutants. Indeed, this delegation reflects Congress's considered decision that the Act must not only address known pollution problems, but also equip EPA with the tools necessary to respond to new pollution problems as scientific knowledge evolves and additional dangers are identified.

Amici recognize that EPA's ability to promulgate regulations pursuant to the discretion granted in the statute is critical to the effective operation of the statutory scheme Congress put in place, particularly insofar as the statute was specifically intended to address pollution problems that Congress did not know about at the time of the law's enactment. *Amici* thus have an interest in ensuring that EPA is permitted to exercise the discretion that the drafters of the CAA conferred on it, and *amici* submit this brief to address, in part, the assertion made by *amici* members of Congress in support of petitioners that the rule at issue "seek[s] to usurp the role of Congress to establish climate and energy policy for the nation." Members of Congress *Amici* Br. in support of Pet'rs (Members Br.) at 1. To the contrary, this rule is one means by which EPA effectuates the robust clean air and public health policy that Congress established in the CAA.

As *amici* well know, the CAA establishes a comprehensive regulatory regime, and the statutory provision that provides the authority for the rule at issue is critical to that regime because it provides a mechanism to address pollution that endangers human health and welfare that would otherwise go unaddressed. Indeed, Congress delegated EPA particularly broad authority with respect to that provision because it knew EPA would be using it to address diverse sources and pollutants, including ones that would arise in the future. The rule that petitioners challenge is entirely consistent with the text, structure, and history of the CAA and,

in fact, advances the objectives Congress set out to accomplish in the CAA. If this Court were to accept petitioners' argument, it would fundamentally undermine the statutory program that Congress put in place when it enacted the CAA.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

Over 50 years ago, Congress enacted the first CAA, a law dedicated to "protect[ing] the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Pub. L. No. 88-206, § 1(b)(1), 77 Stat. 392, 393 (codified as amended at 42 U.S.C. § 7401(b)(1)). In 1970, Congress amended that law to "speed up, expand, and intensify the war against air pollution in the United States." H.R. Rep. No. 91-1146 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356; *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) ("the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution").

To intensify the war against air pollution, Congress "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 64 (1975); *see also* S. Rep. No. 91-1196, at 3 (1970) [hereinafter S. Rep.] ("The extent of Federal involvement in the development and maintenance of air pollution control programs would be broadened. The pace and degree of enforcement will be quickened."). Congress

also wrote the CAA not just to address pollutants that were known at the time, but also to equip EPA with tools to respond to new problems as scientific knowledge evolved and new dangers were identified.

To that end, Congress established a comprehensive program in which it gave EPA three authorities that, among them, would cover all dangerous pollutants emitted from stationary sources. The goal, in other words, was to ensure that there would be "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. at 20; *id.* at 4 ("this bill would extend the Clean Air Act of 1963 as amended in 1965, 1966, and 1967 to provide a much more intensive and comprehensive attack on air pollution"). To achieve that goal, the third of these three categories was designed to fill gaps left by the other two, covering "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [the programs designed to address the other two categories of pollutants]." *See* 40 Fed. Reg. 53,340 (Nov. 17, 1975); *see also* 42 U.S.C. § 7411. In establishing this scheme, Congress specified meaningful criteria that EPA would need to follow in developing and implementing emission standards for new pollutants, but also gave EPA discretion, as the delegated expert agency, to elaborate upon those criteria, to resolve ambiguities in them, and to apply them to specific new problems as they arose. Congress also intentionally drafted certain provisions with broad language

so EPA could play a key role in shaping the approach to developing and setting standards for specific sources and pollutants. Indeed, Congress conferred particularly broad authority on EPA with respect to the gap-filling provision, because it understood that EPA would need flexibility in implementing a provision designed to address such a diverse array of pollutants and sources, both known and unknown.

Pursuant to that authority, EPA published two rules addressing CO_2 emissions from power plants. The second of those rules, the one petitioners challenge, is the Clean Power Plan, which establishes emission guidelines for States to follow in developing plans to limit CO_2 emissions from existing power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015). As EPA explained, "[t]hese final guidelines, when fully implemented, will achieve significant reductions in CO_2 emissions by 2030, while offering states and utilities substantial flexibility and latitude in achieving these reductions." *Id.* at 64,663; *see* Resp'ts' Br. 10 ("[f]ossil-fuel-fired power plants are by far the highest-emitting stationary sources of CO_2").

Petitioners and their *amici* challenge the rule on the ground that, under their reading of the CAA, EPA's decision to regulate hazardous pollutants emitted from power plants deprives it of the authority to regulate CO_2 emissions from those same power plants. Pet'rs' Br. on Core Legal Issues (Core Br.) 62-74. Indeed, *amici* members of Congress in support of petitioners argue that the new rule "fails

to 'conform' to clear congressional instructions and is seeking to usurp the role of Congress to establish climate and energy policy for the nation." Members Br. 1. This argument fundamentally misunderstands the CAA and the authority it confers on EPA. Indeed, by promulgating rules that are (as this one is) consistent with the text, structure, and history of the CAA, EPA conforms to clear congressional instructions and facilitates Congress's ability to enact a robust clean air and public health policy for the nation.

As *amici* well understand from their time serving in Congress, it is often impossible to anticipate in advance every problem that laws must address, or for Congress to include in laws every detail regarding how a problem should be addressed. That is particularly true in the context of environmental issues, where the issues are complicated and technical, and understanding of the precise nature of the problem is often evolving. When Congress amended the CAA in 1970, it was acutely aware of the serious and evolving problem posed by air pollution. The law Congress passed in response to that problem was designed to effect a major change in the way the nation dealt with it.

Indeed, the CAA, as amended, retained its fundamental cooperative federalism approach. But it also conferred significant new powers on the federal government and, while providing meaningful guidelines for the development and implementation of policies to control air pollution, it also conferred discretion on EPA,

an expert administrative agency, to resolve ambiguities in those guidelines and to apply them to new problems as they arose. Indeed, there are also provisions of the CAA in which Congress intentionally used broad language so EPA could play a key role in shaping the approach to developing and setting standards for specific sources and pollutants. It was of critical importance to the Congress that enacted the CAA that the law be forward-looking, capable of addressing not only those pollutants that Congress specifically contemplated, but new ones that might arise in the future.

By enacting a gap-filling provision that would give EPA flexibility to address new pollution problems, Congress ensured that the federal government would be able to respond to new and diverse challenges not anticipated at the time the law was enacted, and that EPA could tailor regulations to the specific nature of the pollutant and source. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (Congress understood that "without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete"); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2531 (2011) ("Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants"). Thus, when EPA exercises the authority that Congress granted it, in a manner consistent with statutory guidance, that exercise of authority helps to effectuate the policy Congress set out for the nation in the CAA.

The rule at issue effectuates the policy Congress established in the CAA because it is consistent with the text, structure, and legislative history of the Act. Most significantly, it reflects Congress's considered decision to establish a comprehensive regulatory regime that could address all pollutants, both known and unknown. Congress enacted § 7411(d)—the provision authorizing EPA to promulgate the rule at issue—to serve a gap-filling function, directing EPA to regulate air pollutants that endanger human health and welfare that would otherwise go unaddressed. Petitioners and *amici* members of Congress in support of petitioners argue that the 1990 amendments to the CAA intentionally eliminated this gap-filling function, but as those *amici* who were serving at the time of the amendments well know, that was neither the intent nor the effect of those amendments. Section 7411(d) continues to authorize EPA to regulate those air pollutants that pose a substantial threat to the public health and welfare, and the rule is an exercise of that authority. To hold otherwise would critically undermine the statutory structure that Congress put in place in the CAA. The Court should uphold the rule.

ARGUMENT

I. CONGRESS ENACTED THE CAA TO WAGE A "WAR AGAINST AIR POLLUTION," AND IT CONFERRED BROAD AUTHORITY ON EPA TO HELP EPA ACHIEVE THE ACT'S BROAD OBJECTIVES

As *amici* well know from their time serving in Congress, it is often impossible to anticipate in advance every problem that a law must address, or for Congress

to specify every detail regarding how a problem should be addressed. *See, e.g.*, *Currin v. Wallace*, 306 U.S. 1, 15 (1939) ("legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly"). Thus, the Supreme Court has long recognized that Congress may establish broad policy goals and provide guidance about how those policy goals should be effectuated, while leaving it to expert administrative agencies to determine how best to achieve those goals in a manner consistent with the guidance provided by statute. Were it otherwise, "'we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.'" *Id.* (quoting *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935)); *cf. Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations" (quotation omitted)).

Reflecting these considerations, when Congress enacted and amended the CAA, it established policy goals, provided meaningful guidance about how those goals should be effectuated, and conferred discretion on EPA to elaborate on those guidelines, resolve ambiguities in them, and apply them to new problems as they arose. Congress also drafted certain provisions, like the one at issue here, to give EPA the flexibility it would need to address a diverse array of pollutants that were not addressed in more specific terms elsewhere in the law. It bears emphasis that when Congress acted in 1970, Congress was well aware of the serious threat to the national welfare posed by air pollution, as well as the deficiencies of prior efforts to address the problem. As Senator Muskie explained on the Senate floor, the nation "seem[ed] incapable of halting the steady deterioration of our air, water, and land," and the consequences of that deterioration were tremendous. As he explained, "[t]he costs of air pollution can be counted in death, disease and debility; it can be measured in the billions of dollars of property losses; it can be seen and felt in the discomfort of our lives." *See, e.g.*, Debate on S. 4358 (Sept. 21, 1970) (statement of Sen. Muskie), *cited in* 136 Cong. Rec. S2826, S2833 (Mar. 21, 1990); *see id.* at S2834 ("we have learned that the air pollution problem is more severe, more pervasive, and growing faster than we had thought").

The extent of the problem—and the need for immediate action to address it—prompted Congress to take significant action when it amended the CAA in

1970. *Id.* (1970 amendments to the CAA "face[] the environmental crisis with greater urgency and frankness than any previous legislation"); *id.* ("It is a tough bill, because only a tough law will guarantee America clean air.").[2] Perhaps most relevant here, Congress gave the federal government much greater responsibility for the fight against air pollution, including conferring discretion on EPA to ensure that it could apply the guidance Congress provided in the statute to the problem as it then existed, and as it would exist in the future. *See, e.g.*, S. Rep. at 3 ("The extent of Federal involvement in the development and maintenance of air pollution control programs would be broadened. The pace and degree of enforcement will be quickened."); *Natural Res. Def. Council, Inc.*, 421 U.S. at 64 (Congress "sharp-

[2] Petitioners' *amici* argue that the rule is unlawful because it "transform[s] the nation's electricity sector" and that Congress would have spoken in more "detailed" fashion had this been its intent. Members Br. 3. As an initial matter, it bears emphasis that the rule "follows existing industry trends without resulting in any fundamental redirection of the energy sector." Resp'ts' Br. 3. Moreover, even were the rule as transformative as petitioners and their *amici* suggest (which it is not), their argument is still misplaced because they fundamentally misunderstand the CAA, which directed EPA to take significant action when necessary to address the significant problem of air pollution, even though doing so might have a significant impact on the energy industry and national economy. Numerous provisions of the CAA reflect Congress's awareness that regulation under the Act might have such an impact. *Cf., e.g.*, 42 U.S.C. § 7617(c) (directing EPA to conduct an economic impact assessment prior to publishing a notice of proposed rulemaking under § 7411(d)). Thus, it is unsurprising that a rule promulgated pursuant to the CAA might have a significant effect on the country and the economy; the CAA plainly authorizes EPA to promulgate such rules. What matters is whether the rule is consistent with the Act. This one is. *See infra* at 17-27; *see also* Resp'ts' Br. 25-98.

ly increased federal authority and responsibility in the continuing effort to combat air pollution").[3]

In fact, these aspects of the CAA are apparent on the face of the statute itself. The Act, for example, requires the EPA Administrator to use his or her "judgment" to determine what pollutants to regulate consistent with the guidance provided in the statute. *See, e.g.*, 42 U.S.C. § 7411(b)(1)(A) (EPA Administrator shall "publish ... a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."). The Act also delegates authority to EPA to determine how best to regulate those pollutants in light of the factors that Congress specified that it should take into account. *See, e.g.*, *id.* § 7411(d)(1) (EPA shall "prescribe regulations which shall establish a procedure ... under which each State shall submit to the Administrator a plan which ... establishes standards of performance for any existing source for any air pollutant [which meets specified criteria]" and "provides for

[3] While Congress gave substantial new authority to EPA, it nonetheless retained a core cooperative federalism approach. Although petitioners and their *amici* argue that the rule violates the Tenth Amendment and federalism principles because, in part, it would require states to restructure their electricity sectors, it is in fact a "[t]extbook [e]xample of [c]ooperative [f]ederalism," Resp'ts' Br. 98. As the government explains, "the Rule … giv[es] [states] the opportunity to design an emissions-reduction plan that makes sense for their citizens. If states choose not to avail themselves of that opportunity, they face no sanctions and they are not compelled to take action to implement the resulting federal standards." *Id.* at 101.

the implementation and enforcement of such standards of performance"); *see also Am. Electric Power Co.*, 131 S. Ct. at 2537-38.

Moreover, reflective of Congress's desire to ensure that EPA could use the CAA's mandate to address new air pollution challenges, the CAA expressly confers on EPA the discretion necessary to revise the lists of pollutants and sources that may be regulated. *See, e.g.*, 42 U.S.C. § 7408(a)(1) (EPA Administrator "shall from time to time thereafter revise" a list of pollutants that meet specified criteria); *id.* § 7411(b)(1)(A) (EPA Administrator shall "from time to time ... revise" the list of categories of stationary sources).

The Supreme Court has previously recognized that Congress drafted the CAA to provide the flexibility necessary to address new and evolving problems, and that EPA is at the front line in determining when and how, consistent with statutory guidance, to address those problems. As the Supreme Court recognized in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the CAA—and its definition of "air pollutant"— "unquestionably" and "unambiguous[ly]" encompassed greenhouse gases, and the 1970 Act specifically addressed threats to climate. *Massachusetts*, 549 U.S. at 528-29, 532, 506. Thus, even while in 1970 Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming," it made the conscious choice to draft parts of the CAA in broad language—language that "confer[red] the flexibility necessary to forestall ... obsolescence."

Massachusetts, 549 U.S. at 532. Indeed, Congress understood that "without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete." *Id.*

The Supreme Court has also recognized the critical role that EPA plays in giving meaning to the terms in the CAA and determining how best to implement the guidance the CAA provides about how to effectuate its goal of addressing harmful air pollution. As the Court explained in *American Electric Power*, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." 131 S. Ct. at 2538. The reasons why Congress would delegate such decisionmaking to an expert agency like EPA were obvious; as the Court explained, "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required." *Id.* at 2539. According to the Court, "[t]he Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators." *Id.*; *see id.* ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.").[4]

[4] To be sure, administrative agencies, including EPA, cannot contravene guidance provided in the legislation Congress passes. *See, e.g.*, *Am. Elec. Power Co.*, 131 S. Ct. at 2539. But where the expert agency is acting in a manner that is

In the face of this overwhelming evidence that the CAA confers significant authority on EPA, petitioners and their *amici* seek to focus not on what the CAA says, but on what proposed legislation that was never passed says. *Amici* members in support of petitioners, for example, argue that the rule is unlawful because Congress considered, but failed to pass, legislation that would "have instituted a broad cap-and-trade program for CO_2." Members Br. 20. This argument is without merit.

As an initial matter, *amici* members in support of petitioners focus particular attention on H.R. 2454, the American Clean Energy and Security Act of 2009 (ACES), and suggest that ACES was an attempt to give EPA authority it did not otherwise have, *i.e.*, the authority to promulgate a rule like the Clean Power Plan. Members Br. 20. But they ignore the fact that ACES itself recognized EPA's preexisting authority under the CAA to regulate CO_2. *See* H.R. 2454, 111th Cong. §§ 811, 831-35 (as placed on Senate calendar, July 7, 2009). Moreover, as many *amici* well know from their consideration of that legislation, that bill was markedly broader than the rule.[5]

---

consistent with the statute, its action promotes, rather than undermines, Congress's ability to make policy for the nation.

[5] Among other things, ACES would have established a national renewable portfolio standard, instituted a national economy-wide cap and trade program, built energy efficiency standards, established a self-sustaining Clean Energy Deployment Administration, and developed worker training programs.

In any event, it is immaterial what legislation Congress has not passed; what matters are the laws Congress *has* passed. *See, e.g.*, *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) ("failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute" (quotation omitted)); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" (quotation omitted)). And the CAA gives EPA the authority to regulate CO_2 emissions from existing sources. Congress can, of course, pass legislation to limit or otherwise circumscribe EPA's authority, but notably a number of bills have been introduced in the House to limit EPA's authority in that regard, *see, e.g.*, H.R. 4036, 114th Cong. (2015); H.R. 1487, 114th Cong. (2015); H.R. 3895, 113th Cong. (2014); H.R. 4304, 113th Cong. (2014); H.R. 4850, 113th Cong. (2014); H.R. 4808, 113th Cong. (2014); H.R. 4286, 113th Cong. (2014); H.R. 910, 112th Cong. (2011); H.R. 4344, 111th Cong. (2009), and none has been enacted into law. *Amici* members of Congress in support of petitioners are trying to achieve in the courts a major rollback of the CAA that they have not been able to achieve through the legislative process. This Court should not countenance that effort.

In sum, Congress's failure to pass legislation does not change the authority EPA already has. That authority is significant, and the rule at issue is a valid and reasonable exercise of that authority, as the next Section discusses.

II. THE CLEAN POWER PLAN RULE IS CONSISTENT WITH THE TEXT, STRUCTURE, AND HISTORY OF THE CAA

As noted earlier, the CAA's express goal is to "protect ... the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). To achieve that goal, Congress recognized three general categories of pollutants emitted from existing stationary sources: (1) criteria pollutants (covered by the National Ambient Air Quality Standards (NAAQS) program, *id*. §§ 7408-7410); (2) hazardous air pollutants (covered by the National Emission Standards for Hazardous Air Pollutants (NESHAP) program, *id.* § 7412); and (3) other "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [the NAAQS or NESHAP programs]" (covered by the New Source Performance Standards (NSPS program), *id.* § 7411), *see* 40 Fed. Reg. 53,340 (Nov. 17, 1975). Taken together, these categories establish a comprehensive regulatory regime designed to leave "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. at 20.

To address pollutants that fall within the third category, the Act requires EPA to "establish a procedure" by which States can set standards of performance

for existing sources for, in pertinent part, "any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title [i.e., regulated as part of the NAAQS program] or emitted from a source category which is regulated under section 7412 of this title [i.e., regulated as part of the NESHAP program]." 42 U.S.C. § 7411(d)(1). Petitioners argue that this provision's reference to "source categor[ies] ... regulated under section 7412" leaves EPA without authority to regulate CO_2 emissions from the "source category" of power plants because EPA already regulates *other* pollutants emitted from that "source category" under § 7412. In other words, according to petitioners, EPA's decision to regulate hazardous pollutants emitted from power plants deprives it of the authority to regulate any other non-hazardous pollutants emitted from power plants, including CO_2. This is wrong. The rule is a valid exercise of EPA's authority because it is consistent with the text, structure, and history of the CAA.

Most important, petitioners' argument that, because EPA has identified power plants as a source category whose emissions of *hazardous* pollutants are regulated under § 7412, EPA cannot regulate *other* power plant emissions under § 7411(d), would undermine the "legislative plan" Congress put in place when it enacted the CAA. *See King v. Burwell*¸ 135 S. Ct. 2480, 2496 (2015) ("we must respect the role of the Legislature, and take care not to undo what it has done. A

fair reading of legislation demands a fair understanding of the legislative plan"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (words must be interpreted "in their context and with a view to their place in the [law's] overall statutory scheme" (quotation omitted)).[6]

As noted earlier, Congress enacted the 1970 amendments to the CAA to put in place a comprehensive regulatory regime that would govern all air pollutants that EPA determined were harmful to the public health or welfare. Section 7411 was a critical component of that comprehensive program because it directed EPA to regulate "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [the NAAQS or NESHAP programs]." 40 Fed. Reg. 53,340 (Nov. 17, 1975). If petitioners were to prevail, EPA would not be able to do what Congress directed it to do in the CAA, that is, comprehensively regulate harmful air pollutants. Indeed, under petitioners' view, there is a category of serious pollutants—non-hazardous, non-criteria pollutants that are emitted by

[6] Petitioners and their *amici* argue that the Supreme Court spoke to this question in footnote seven of *American Electric Power*, where the Court said that "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the 'hazardous air pollutants' program, § 7412," 131 S. Ct. at 2537 n.7. *See* Core Br. 62; Members Br. 2. But footnote seven is best read to mean simply that § 7411(d) does not authorize regulation of a pollutant that is already regulated under the NAAQS or NESHAP programs. After all, petitioners' reading of that footnote would suggest that EPA cannot regulate pollutants emitted by a source that also emits criteria pollutants that are regulated under the NAAQS, a reading that is at odds with the text of the statute. In any event, the statement was merely dictum.

existing sources whose emission of hazardous pollutants is regulated—that are subject to no CAA regulation at all.

It bears emphasis that § 7411 speaks in broad terms precisely because it was enacted to serve a gap-filling function, potentially reaching a diverse array of pollutants that necessitate a diversity of responses. Indeed, Congress has repeatedly revised the language describing the emission reduction approaches that EPA could consider, *see* 80 Fed. Reg. 64,510, 64,537 n.124 (Oct. 23, 2015), and it has consistently used broad language to give EPA the flexibility it would need to address a broad spectrum of pollutants. *Id.* at 64,764 ("This history strongly suggests that Congress intended to authorize the EPA to consider a wide range of measures in calculating a standard of performance for stationary sources."). Thus, the argument made by *amici* members in support of petitioners that the rule is invalid because "Congress spoke clearly when it intended to authorize the creation of cap-and-trade programs elsewhere in the CAA" (Members Br. 20) misses the mark in two respects. First, Congress provided specific guidance in contexts where it knew exactly what the problem was and how best to deal with it; in contexts where the exact nature of the pollutant and the problem it posed was unclear, Congress spoke in broad terms and conferred authority on EPA to determine how best to address the problem. It is unsurprising that Congress would give EPA maximal flexibility in the context of § 7411 given that it is a gap-filling provision that would likely be

used to address pollutants that Congress might not have specifically contemplated. Second, if anything, Congress's authorization of emissions allowance trading regimes elsewhere in the CAA only confirms what *amici* well know: Congress views such market based mechanisms as a flexible, cost-effective approach to dealing with pollution and one that is well within its authority to use in addressing CO_2 emissions from power plants.[7] Moreover, the rule does not mandate the use of such mechanisms; it simply makes them one option for compliance.

Importantly, petitioners' argument that § 7411 does not authorize the rule relies on legislative language adopted during the 1990 amendments to the CAA. Before those amendments, § 7411(d) plainly applied to existing sources of any air pollutant "for which air quality criteria have not been issued [under the NAAQS program] or which is not included on a list published under [S]ection 7408(a) [also under the NAAQS program] or 7412(b)(1)(A) [under the NESHAP program]." 42 U.S.C. § 7411(d)(1) (1988). In other words, § 7411 played a critical gap-filling function, permitting EPA to regulate non-hazardous and non-criteria pollutants emitted by existing sources. Petitioners and *amici* members in support of petition-

[7] Other arguments petitioners' *amici* make miss the mark for similar reasons. For example, *amici* members fault the rule for "impos[ing] measures that affect a wide range of other facilities and activities beyond the regulated source." Members Br. 17. But EPA's decision to reduce emissions in a way that is cost-effective and responsive to realities on the ground is exactly what Congress intended EPA to do when it used broad language to give EPA flexibility to deal with a broad array of pollutants. *See* Resp'ts' Br. 25-40 (explaining that generation shifting is consistent with the CAA).

ers argue that the 1990 amendments intentionally eliminated this gap-filling function, but they point to no evidence—*none*—that supports this claim. As just noted, the amended language on which petitioners rely should, when read "in [its] context and with a view to [its] place in the [CAA's] overall statutory scheme," *Brown & Williamson*, 529 U.S. at 133 (internal quotation & citation omitted), be read to preserve EPA's long-standing authority to use § 7411 to address dangerous pollutants that could not otherwise be addressed.

Significantly, the interpretation offered by petitioners and their *amici* also directly contradicts the unambiguous text of § 302(a) of the 1990 amendments. As the government explains, when Congress amended the Act in 1990, it redrafted the provision governing the § 7412 program, which in turn meant the cross-references in § 7411(d)(1)(A) needed to be updated. Resp'ts' Br. 77. In attempting to update that cross-reference, Congress inadvertently enacted into law two inconsistent amendments: § 108(g) (the House approach), which replaced the cross-reference to "[Section] [74]12(b)(1)" with the phrase "or emitted from a source category which is regulated under [S]ection [74]12," *and* § 302(a) (the Senate approach), which replaced the cross-reference with a new cross-reference, i.e., "[Section] [74]12(b)," thus plainly preserving § 7411's preexisting gap-filling authority.[8] It is well-

[8] A brief account of the drafting history of the relevant provisions demonstrates the utter lack of support for the idea that § 108(g) was intended to eliminate § 7411(d)'s gap-filling function. When Congress was considering how to amend

established that when two inconsistent provisions are enacted into law, the courts should "fit, if possible, all parts into a harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (quotation omitted). In this case, it is easy to "fit ... all parts into a harmonious whole" because both provisions can be read to preserve § 7411's preexisting authority.

Recognizing, however, that § 302 is at odds with their preferred interpretation of the CAA, petitioners and their *amici* act as if § 302 were never enacted into law at all. *Amici* members in support of petitioners argue that § 302 should be ig-

---

the Act, the House and Senate initially adopted different approaches to amending § 7412. The House bill as introduced did not mandate EPA regulation of hazardous pollutants sources, instead allowing EPA to decline to regulate under § 7412 if it found that regulation was not "warrant[ed]." H.R. 3030, 101st Cong. § 301, *reprinted in* 2 *A Legislative History of the Clean Air Act Amendments of 1990*, at 3737, 3937 (1993). Thus, there was the potential for a regulatory gap—one that would have been at odds with Congress's intent to establish a comprehensive regulatory scheme—and so the conforming amendment in the House bill (§ 108(g)) was intended to avoid that gap, making clear that EPA could address a hazardous air pollutant under § 7411(d) if it were emitted from a source that was not being regulated under § 7412. *See* 69 Fed. Reg. 4652, 4685 (Jan. 30, 2004) (noting the possibility that "the House did not want to preclude EPA from regulating under section [7411(d)] those pollutants emitted from source categories which were not actually being regulated under section [7412]"). Importantly, it was not intended to prevent EPA from regulating under § 7411(d) non-hazardous pollutants emitted from sources regulated under § 7412. The Senate bill included a list of pollutants, a list of source categories, and a mandate for EPA to set standards covering all such pollutants from all such sources. S. 1630, 101st Cong. § 301, *reprinted in* 3 *id.* at 4119, 4407. Thus, the conforming amendment in the Senate bill (§ 302) needed to make no corresponding change because regulation under § 7412 remained mandatory, and it simply updated the cross-reference. In the end, the bill that passed the House adopted the mandatory version of § 7412, but with no change to its conforming amendment, and both the House and Senate conforming amendments were inadvertently enacted into law.

nored because § 108(g) was a substantive provision enacted to eliminate § 7411's historic gap-filling function so as to avoid "duplicative regulation of the same source categories," while § 302 was a mere "conforming amendment," and that "[t]he Senate then expressly receded to the House with respect to this substantive provision." Members Br. 9; *see id.* at 2. In support of this argument, they place great weight on a letter from the Law Revision Counsel explaining the Counsel's decision to incorporate § 108(g), and not § 302, into the code. *Id.* at 9-12.

Amici members in support of petitioners are wrong on all counts. *First*, they offer no support for their argument that § 108(g) was enacted to eliminate § 7411(d)'s historic gap-filling function. Indeed, § 108(g) was identified as a "miscellaneous provision[]," H.R. 3030, 101st Cong. § 108(g) (1990), hardly the way one would expect a provision that was intended to radically alter the way the CAA operates to be labeled. Tellingly, as *amici* (some of whom were serving at the time of those amendments) know, no one at the time the CAA was amended in 1990 understood those amendments to make a radical change in the law, depriving EPA of the authority to regulate emissions of *non-hazardous* pollutants simply because it regulated *hazardous* pollutants from that source under a different provision of the law. When the CAA was amended, Congress recognized that air pollution remained a serious problem—a "public health crisis," as a Senate Report put it at the time, S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3388;

see id. at 3389 ("The health problem is serious and it is pervasive.")—and that "[t]o protect this resource a strong national control strategy is needed," *id.* It would be stunning for Congress to have made such a major change to the law without any express mention at the time. Indeed, as those *amici* who were serving then well know, the decision to eliminate this critical gap-filling function would have occasioned significant opposition had anyone at the time understood that to be the effect of the § 108(g) amendment. So far as *amici* are aware, there is no evidence of such opposition.

Second, as the government argues, "'recedes' means simply that a chamber is withdrawing an objection, and that term was used here only in regard to section 108 [the House amendment], and thus tells us nothing about Congress's intent for section 302 (containing the Senate's amendment)." Resp'ts' Br. 85 n.64. In other words, nothing in the history to which *amici* members in support of petitioners point suggests that Congress intended to remove § 302 from the enacted law.

Third, it is irrelevant which provision the Law Revision Counsel codified, or why it codified it. Both provisions were in the law passed by Congress and signed by the President and thus appear in the Statutes at Large. It is well-established that "the [U.S.] Code cannot prevail over the Statutes at Large when the two are inconsistent," *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943)) (internal citation omitted), unless the

Code has been "enacted into positive law," which has not happened here. *See Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("Thus, where the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls."). Thus, both provisions are enacted law, and this Court must "fit, if possible, all parts into a harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (quotation omitted). In this case, "all parts" of the statute can be fit into "a harmonious whole" by viewing both provisions as preserving EPA's longstanding authority to use § 7411 as a means of addressing pollutants that endanger human health and welfare, but would otherwise go unaddressed.

Fourth, there is no support for the argument that § 7411's gap-filling function was eliminated so as to avoid "duplicative regulation." Members Br. 2. As an initial matter, it is not "duplicative regulation" when *different* pollutants are regulated, simply because they are emitted from the same source. And in any event, the Act regulates power plants in multiple ways. *See, e.g.*, 42 U.S.C. § 7408; *id.* § 7412; *id.* § 7491(b)(2). The only provision addressing duplicative regulation in the 1990 amendments is § 112(n), which provides that before regulating hazardous air pollutants from power plants, EPA must study whether those emissions would be adequately curbed by certain other control measures imposed by the law. 42

U.S.C. § 7412(n). There was no *general* policy against duplicative regulation considered or adopted in 1990.

In sum, § 7411 was enacted to serve a critical gap-filling function as part of the CAA's comprehensive program to ensure that all dangerous pollutants can be addressed, and nothing in the 1990 amendments changed that. The rule is a valid exercise of that authority, and one that helps effectuate the policy that Congress set for the nation in the CAA. To hold otherwise would critically undermine not only the nation's fight against air pollution, but also the statutory scheme that Congress put in place when it enacted the CAA. This Court should uphold the rule.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court uphold the rule.

Respectfully submitted,

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra
Brianne J. Gorod
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
Counsel for Amici Curiae

Dated: March 31, 2016

APPENDIX:

LIST OF *AMICI*

U.S. House of Representatives

Pallone, Jr., Frank
Representative of New Jersey

Huffman, Jared
Representative of California

Pelosi, Nancy
Representative of California

Hoyer, Steny H.
Representative of Maryland

Clyburn, James E.
Representative of South Carolina

Becerra, Xavier
Representative of California

Crowley, Joseph
Representative of New York

Conyers, Jr., John
Representative of Michigan

Cummings, Elijah E.
Representative of Maryland

DeFazio, Peter A.
Representative of Oregon

Engel, Eliot L.
Representative of New York

LIST OF *AMICI* – cont'd

Grijalva, Raúl M.
Representative of Arizona

Johnson, Eddie Bernice
Representative of Texas

Levin, Sander
Representative of Michigan

Lewis, John
Representative of Georgia

Lowey, Nita M.
Representative of New York

McDermott, Jim
Representative of Washington

Neal, Richard E.
Representative of Massachusetts

Price, David
Representative of North Carolina

Rangel, Charles B.
Representative of New York

Rush, Bobby L.
Representative of Illinois

Serrano, José E.
Representative of New York

Slaughter, Louise M.
Representative of New York

LIST OF *AMICI* – cont'd

Adams, Alma S.
Representative of North Carolina

Aguilar, Pete
Representative of California

Bass, Karen
Representative of California

Bera, Ami
Representative of California

Beyer, Jr., Donald S.
Representative of Virginia

Blumenauer, Earl
Representative of Oregon

Bonamici, Suzanne
Representative of Oregon

Boyle, Brendan F.
Representative of Pennsylvania

Brady, Robert A.
Representative of Pennsylvania

Brown, Corrine
Representative of Florida

Brownley, Julia
Representative of California

Bustos, Cheri
Representative of Illinois

LIST OF *AMICI* – cont'd

Butterfield, G.K.
Representative of North Carolina

Capps, Lois
Representative of California

Cárdenas, Tony
Representative of California

Carney, Jr., John C.
Representative of Delaware

Carson, André
Representative of Indiana

Cartwright, Matt
Representative of Pennsylvania

Castor, Kathy
Representative of Florida

Castro, Joaquin
Representative of Texas

Chu, Judy
Representative of California

Cicilline, David N.
Representative of Rhode Island

Clark, Katherine M.
Representative of Massachusetts

Cleaver, II, Emanuel
Representative of Missouri

LIST OF *AMICI* – cont'd

Cohen, Steve
Representative of Tennessee

Connolly, Gerald E.
Representative of Virginia

Courtney, Joe
Representative of Connecticut

Davis, Danny K.
Representative of Illinois

Davis, Susan A.
Representative of California

DeGette, Diana L.
Representative of Colorado

Delaney, John K.
Representative of Maryland

DeLauro, Rosa L.
Representative of Connecticut

DelBene, Suzan K.
Representative of Washington

DeSaulnier, Mark
Representative of California

Deutch, Theodore E.
Representative of Florida

Dingell, Debbie
Representative of Michigan

LIST OF *AMICI* – cont'd

Doyle, Michael F.
Representative of Pennsylvania

Duckworth, Tammy
Representative of Illinois

Edwards, Donna F.
Representative of Maryland

Ellison, Keith
Representative of Minnesota

Eshoo, Anna G.
Representative of California

Esty, Elizabeth H.
Representative of Connecticut

Farr, Sam
Representative of California

Fattah, Chaka
Representative of Pennsylvania

Foster, Bill
Representative of Illinois

Frankel, Lois
Representative of Florida

Gallego, Ruben
Representative of Arizona

Garamendi, John
Representative of California

LIST OF *AMICI* – cont'd

Grayson, Alan
Representative of Florida

Gutierrez, Luis V.
Representative of Illinois

Hahn, Janice
Representative of California

Hastings, Alcee L.
Representative of Florida

Heck, Denny
Representative of Washington

Higgins, Brian
Representative of New York

Himes, Jim
Representative of Connecticut

Honda, Michael M.
Representative of California

Israel, Steve
Representative of New York

Jackson Lee, Sheila
Representative of Texas

Jeffries, Hakeem
Representative of New York

Johnson, Henry C. "Hank"
Representative of Georgia

LIST OF *AMICI* – cont'd

Keating, William R.
Representative of Massachusetts

Kelly, Robin L.
Representative of Illinois

Kennedy, III, Joseph P.
Representative of Massachusetts

Kildee, Daniel T.
Representative of Michigan

Kilmer, Derek
Representative of Washington

Kuster, Ann McLane
Representative of New Hampshire

Langevin, James R.
Representative of Rhode Island

Larson, John B.
Representative of Connecticut

Lawrence, Brenda L.
Representative of Michigan

Lee, Barbara
Representative of California

Lieu, Ted W.
Representative of California

Lipinski, Daniel
Representative of Illinois

LIST OF *AMICI* – cont'd

Loebsack, Dave
Representative of Iowa

Lofgren, Zoe
Representative of California

Lowenthal, Alan
Representative of California

Luján, Ben Ray
Representative of New Mexico

Lujan Grisham, Michelle
Representative of New Mexico

Lynch, Stephen F.
Representative of Massachusetts

Maloney, Carolyn B.
Representative of New York

Maloney, Sean Patrick
Representative of New York

Matsui, Doris
Representative of California

McCollum, Betty
Representative of Minnesota

McGovern, James P.
Representative of Massachusetts

McNerney, Jerry
Representative of California

LIST OF *AMICI* – cont'd

Meeks, Gregory W.
Representative of New York

Meng, Grace
Representative of New York

Moore, Gwen
Representative of Wisconsin

Moulton, Seth
Representative of Massachusetts

Murphy, Patrick E.
Representative of Florida

Nadler, Jerrold
Representative of New York

Napolitano, Grace F.
Representative of California

Norcross, Donald
Representative of New Jersey

Norton, Eleanor Holmes
Representative of District of Columbia

O'Rourke, Beto
Representative of Texas

Pascrell, Jr., Bill
Representative of New Jersey

Payne, Jr., Donald M.
Representative of New Jersey

LIST OF *AMICI* – cont'd

Perlmutter, Ed
Representative of Colorado

Peters, Scott H.
Representative of California

Pingree, Chellie
Representative of Maine

Pocan, Mark
Representative of Wisconsin

Polis, Jared
Representative of Colorado

Quigley, Mike
Representative of Illinois

Rice, Kathleen M.
Representative of New York

Richmond, Cedric L.
Representative of Louisiana

Roybal-Allard, Lucille
Representative of California

Ruiz, Raul
Representative of California

Ruppersberger, C.A. Dutch
Representative of Maryland

Sablan, Gregorio Kilili Camacho
Representative of Northern Mariana Islands

LIST OF *AMICI* – cont'd

Sánchez, Linda T.
Representative of California

Sanchez, Loretta
Representative of California

Sarbanes, John P.
Representative of Maryland

Schakowsky, Jan
Representative of Illinois

Schiff, Adam B.
Representative of California

Schrader, Kurt
Representative of Oregon

Scott, Robert C. "Bobby"
Representative of Virginia

Sherman, Brad
Representative of California

Sires, Albio
Representative of New Jersey

Smith, Adam
Representative of Washington

Speier, Jackie
Representative of California

Swalwell, Eric
Representative of California

LIST OF *AMICI* – cont'd

Takai, Mark
Representative of Hawaii

Takano, Mark
Representative of California

Thompson, Mike
Representative of California

Titus, Dina
Representative of Nevada

Tonko, Paul D.
Representative of New York

Tsongas, Niki
Representative of Massachusetts

Van Hollen, Chris
Representative of Maryland

Vargas, Juan
Representative of California

Wasserman Schultz, Debbie
Representative of Florida

Waters, Maxine
Representative of California

Watson Coleman, Bonnie
Representative of New Jersey

Welch, Peter
Representative of Vermont

LIST OF *AMICI* – cont'd

Wilson, Frederica S.
Representative of Florida

Yarmuth, John
Representative of Kentucky

U.S. Senate

Baldwin, Tammy
Senator of Wisconsin

Bennet, Michael F.
Senator of Colorado

Blumenthal, Richard
Senator of Connecticut

Booker, Cory A.
Senator of New Jersey

Boxer, Barbara
Senator of California

Brown, Sherrod
Senator of Ohio

Cantwell, Maria
Senator of Washington

Cardin, Benjamin L.
Senator of Maryland

Carper, Thomas R.
Senator of Delaware

LIST OF *AMICI* – cont'd

Casey, Jr., Robert P.
Senator of Pennsylvania

Coons, Christopher A.
Senator of Delaware

Durbin, Richard J.
Senator of Illinois

Feinstein, Dianne
Senator of California

Franken, Al
Senator of Minnesota

Gillibrand, Kirsten E.
Senator of New York

Heinrich, Martin
Senator of New Mexico

Hirono, Mazie K.
Senator of Hawaii

Kaine, Tim
Senator of Virginia

King, Jr., Angus S.
Senator of Maine

Klobuchar, Amy
Senator of Minnesota

Leahy, Patrick J.
Senator of Vermont

LIST OF *AMICI* – cont'd

Markey, Edward J.
Senator of Massachusetts

Menendez, Robert
Senator of New Jersey

Merkley, Jeff
Senator of Oregon

Murray, Patty
Senator of Washington

Peters, Gary C.
Senator of Michigan

Reed, Jack
Senator of Rhode Island

Reid, Harry
Senator of Nevada

Sanders, Bernard
Senator of Vermont

Schatz, Brian
Senator of Hawaii

Schumer, Charles E.
Senator of New York

Shaheen, Jeanne
Senator of New Hampshire

Stabenow, Debbie
Senator of Michigan

LIST OF *AMICI* – cont'd

Warner, Mark R.
Senator of Virginia

Whitehouse, Sheldon
Senator of Rhode Island

Wyden, Ron
Senator of Oregon

Former Members of Congress

Boehlert, Sherwood
Representative of New York (retired)

Carr, Milton "Bob"
Representative of Michigan (retired)

Daschle, Thomas A.
Senator and Representative of South Dakota (retired)

Downey, Thomas
Representative of New York (retired)

Durenberger, David
Senator of Minnesota (retired)

Harkin, Tom
Senator and Representative of Iowa (retired)

Hughes, Bill
Representative of New Jersey (retired)

Kerrey, J. Robert
Senator of Nebraska (retired)

LIST OF *AMICI* – cont'd

Levin, Carl
Senator of Michigan (retired)

Lieberman, Joseph I.
Senator of Connecticut (retired)

Miller, George
Representative of California (retired)

Mitchell, George J.
Senator of Maine (retired)

Moran, Jim
Representative of Virginia (retired)

Waxman, Henry
Representative of California (retired)

Wirth, Timothy E.
Senator and Representative of Colorado (retired)

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief 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)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 31st day of March, 2016.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on March 31, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 31st day of March, 2016.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amici Curiae