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 Petition for Review of Final Agency Action of the United States Environmental Protection Agency

BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES; THE U.S. CONFERENCE OF MAYORS; AND 54 CITIES, COUNTIES, AND MAYORS IN SUPPORT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(i) Parties, Intervenors, and *Amici*.

Except for those listed in the Identities and Interests section below, all parties, intervenors, and *amici* appearing before this Court are listed in Respondent EPA's Initial Brief.

(ii) Rulings.

References to the rulings at issue appear in Respondent EPA's Initial Brief.

(iii) Related Cases.

References to related cases to appear in Respondent EPA's Initial Brief.

CORPORATE DISCLOSURES

The undersigned counsel for *amici* certifies that no corporation among *amici* has ever issued stock, and that none has a parent company whose ownership interest is 10 percent or greater.

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Local Government Coalition consists of the nation's leading local government associations as well as individual cities and counties located throughout the country. The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live. Its Sustainable Cities Institute provides NLC members with resources on climate mitigation and adaptation. The U.S. Conference of Mayors, founded in 1932, is the official nonpartisan organization of the more than 1,400 U.S. cities that are home to 30,000 people or more. The Conference of Mayors established its Climate Protection Center to assist with implementation of the 2005 Mayors Climate Protection Agreement, which over 1,000 mayors have joined, each pledging to reduce their city's greenhouse gas emissions levels to below 1990 levels. The Local Government Coalition's 54 individual members include Ann Arbor, Michigan; Arlington County, Virginia; Aurora, Illinois; Baltimore, Maryland; Bellingham, Washington; Berkeley, California; Bloomington, Indiana; Boise, Idaho; Boston, Massachusetts; Boulder County, Colorado; Carmel, Indiana; Clarkston, Georgia; Coral Gables, Florida; Cutler Bay, Florida; Elgin, Illinois;

Eugene, Oregon; Evanston, Illinois; Fort Collins, Colorado; Grand Rapids, Michigan; Henderson, Nevada; Highland Park, Illinois; Hoboken, New Jersey; Houston, Texas; Jersey City, New Jersey; King County, Washington; Los Angeles, California; Madison, Wisconsin; Miami, Florida; Miami Beach, Florida; Milwaukie, Oregon; Minneapolis, Minnesota; Missoula, Montana; Newburgh Heights, Ohio; Oakland, California; Pinecrest, Florida; Pittsburgh, Pennsylvania; Portland, Maine; Portland, Oregon; Providence, Rhode Island; Reno, Nevada; Rochester, New York; Salt Lake City, Utah; San Francisco, California; Tucson, Arizona; Washburn, Wisconsin; West Chester, Pennsylvania; West Hollywood, California; West Palm Beach, Florida; and the Mayors of Dallas, Texas and Knoxville, Tennessee, and Orlando, Florida. They are home to over 18 million residents.

Cities like those in the Local Government Coalition are America's "first responders" to climate change.[1] Over 80 percent of Americans live in urban areas, and even more of them work there, meaning that the Local Government Coalition's members are responsible for understanding the risks to and planning for the wellbeing of the great majority of Americans. The concentration of people,

[1] Cynthia Rosenzweig, Cities as First Responders to Climate Change: A First Look at the Second Assessment Report (ARC3-2) of the Urban Climate Change Research Network (June 2015), bit.ly/1OBbaRe; National League of Cities, Local Governments are Climate Change First Responders, Jan. 11, 2010, bit.ly/1R80R9p.

activity, and infrastructure in cities makes them uniquely valuable economically. It also serves to concentrate the adverse impacts of a host of climatic changes, such as increased heat-related illnesses and deaths, dirtier air, damaged and disappearing coastlines, longer droughts and other strains on water quantity and quality, increasingly frequent and severe storms and wildfires, and degraded ecosystems.[2]

Members of the Local Government Coalition present their arguments to this Court because they are experiencing these impacts today. Faced with flooding propelled by rising sea levels, **Miami Beach** is investing $400 million in an adaptation strategy that includes pumping stations, raised roads, and seawalls.[3] Rising seas likewise put **Miami** at risk for "losing insurability," and threaten drinking water supplies across southeast Florida.[4] While Miami Beach, Miami, and neighboring **Coral Gables**, **Cutler Bay**, **Pinecrest** and **West Palm Beach** offer extreme examples of the devastating effects of sea level rise, they are not unique: coastal communities along the Gulf of Mexico and the East Coast, as well as in the

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[2] *See* S.L. Cutter, et al., *Ch. 11: Urban Systems, Infrastructure, and Vulnerability* in *Climate Change Impacts in* Climate Change Impacts in the United States: The Third National Climate Assessment 195 (J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, eds. 2014) [hereinafter "3rd National Climate Assessment"].

[3] Joey Flechas & Jenny Staletovich, *Miami Beach's battle to stem rising tides*, Miami Herald, Oct. 23, 2015, hrld.us/1OMhuLF (reporting that steps being taken now are expected to provide "a 30- to 40-year buffer").

[4] Miami-Dade Sea Level Rise Task Force Report and Recommendations 9, 11 (July 2014), 1.usa.gov/1qO57mj.

Northwest, have similar stories to tell about the high costs of infrastructure corrosion, land erosion, and general disruption to daily life resulting from rising seas. Consider **San Francisco**, where not just neighborhoods but also port facilities, highways, wastewater treatment plants, and runways at two major airports are under regular and growing threat from rising seas.[5] Or **Baltimore**, where nuisance flooding is already routine and is only expected to increase in frequency and depth as seas rise and the city's land subsides.[6] For these cities and others, on top of this grinding, expensive nuisance looms the enormous threat of destructive storm surges like those that accompanied Hurricanes Ike, Isabel, Katrina, Rita, and Sandy. These events did billions of dollars of damage to **Baltimore**, **Hoboken**, **Jersey City**, **Houston**, and dozens of other coastal communities.

Heat waves made more frequent, hotter, and longer by climate change injure members of the Local Government Coalition no less directly than rising sea

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[5] City and County of San Francisco Civil Grand Jury 2013-2014, Rising Sea Levels … At Our Doorstep 7–8, App. C (June 2014), bit.ly/1zHWFrk (describing runway closures during heavy rains and high tides); San Francisco Bay Conservation & Development Commission, Living with a Rising Bay: Vulnerability and Adaptation in San Francisco Bay and on its Shoreline Oct. 2011), bit.ly/1Pap4Kv (anticipating inundation of 72% of airport acreage by 2050 without significant countermeasures).

[6] William V. Sweet & John J. Marra, Nat'l Oceanographic & Atmospheric Admin., 2014 State of Nuisance Tidal Flooding (2015), 1.usa.gov/1LkEx9s.

levels.[7] As Coalition members know well, heat waves are now deadlier to Americans than any other form of extreme weather,[8] and, because urban "heat islands" heat up faster and stay hotter than suburban and rural areas, city dwellers feel heat waves to a disproportionate degree.[9] News of heat wave-related deaths and hospitalizations has become a tragic annual event in American cities, with impacts felt in **Baltimore**, **Chapel Hill**, **Dallas**, **Minneapolis**, **Portland** (Oregon), **Providence**, and **Reno**, to name but a few affected cities.[10] Furthermore, heat waves often do costly damage to water, transportation, and electricity infrastructure as well as to human health. The 2011 Texas heat wave not only filled hospital emergency departments in **Houston** but also burst pipes and water mains, draining 18 billion gallons of drinking water and with it millions in revenue for the city.[11] Disruptive heat waves in **Grand Rapids**, **Los Angeles**, and **Pittsburgh** have caused electricity brownouts and blackouts; in **Arlington County, Evanston**,

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[7] *See* National Academies of Sciences, Attribution of Extreme Weather Events in the Context of Climate Change (2016), bit.ly/1S2JHgf (concluding that attribution of particular heat waves to climate change is scientifically well-supported).

[8] U.S. Centers for Disease Control & Prevention, *Climate Change: Extreme Heat*, 1.usa.gov/1mxlFeo (updated July 2014).

[9] George Luber & Kim Knowlton, *Ch. 9: Human Health*, *in* 3rd National Climate Assessment, at 232.

[10] *Id.* at 224.

[11] Kai Zhang et al., *Impact of the 2011 heat wave on mortality and emergency department visits in Houston, Texas*, Envtl. Health, Jan. 17, 2015, bit.ly/1M8xozN.

Dallas, **Minneapolis**, and **Salt Lake City** they have compromised an airport runway, buckled roads, and warped rails. Because infrastructure systems are interdependent, "especially … on electricity and communications and control infrastructures,"[12] heat waves can cause "cascading" breakdowns, starting with blackouts that are followed by failures in wastewater management, drinking water provision, or transit system operation.[13] Cascading disruptions make it harder to care for populations at risk from persistent heat.[14] And, in the West—as the residents of **Boulder County**, **Eugene**, **Fort Collins**, **Missoula**, and **Portland**, Oregon can attest—heat waves lengthen and intensify wildfires,[15] to destructive and sometimes deadly effect.

Storms impacting inland and riverine areas, like the one that set new rainfall records in **Boulder County** in September 2013, are being strengthened by features

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[12] Gregg Garfin & Guido Franco et al., *Ch. 20: Southwest, in* 3rd National Climate Assessment, at 486.

[13] Oak Ridge National Laboratory, Climate Change and Infrastructure, Urban Systems, and Vulnerabilities (Thomas J. Wilbanks & Steven J. Fernandez, eds. 2014); *see also* Luber & Knowlton et al., *Ch. 9: Human Health, in* 3rd National Climate Assessment, at 230.

[14] *See* U.S. Department of Health & Human Services, Primary Protection: Enhancing Health Care Resilience for a Changing Climate 17 (Dec. 2014) ("rolling electrical blackouts often accompany extended heat waves, which can compromise health care delivery.").

[15] Daniel G. Brown & Colin Polsky, et al., *Ch. 13: Land Use and Land Cover Change, in* 3rd National Climate Assessment, at 323.

of the changing climate and are wreaking havoc on Local Government Coalition members with increasing regularity.[16] The Boulder County government expects to spend $217 million to rebuild from the 2013 flood[17]—one estimate puts total losses, including the hundreds of homes lost and hundreds more damaged, at $2 billion.[18] In 2015, **Houston** and **Dallas** saw unprecedented rains and flash floods, which left a trail of damage behind them. On May 25th, after 10 consecutive days of rain, another 11 inches of rain fell on Houston, spurring floods that damaged over 4,000 homes. And after the December 2015 floods, the Insurance Council of Texas reported losses of $1.2 billion for the Dallas metro area.[19] More than half of **Madison**'s record-setting rainfalls since 1879 occurred after 2000. The 100-inch snowfall of 2007/08 (the prior record was 75 inches) was followed by record rainfalls in March, June, and September. In June, floods triggered by the rain

[16] Kevin E. Trenberth et al., *Attribution of climate extreme events*, 5 Nature Climate Change 725 (2015) (describing relationship between aberrant severity of 2013 Boulder rains and ocean water temperature); National Academies of Sciences, Attribution of Extreme Weather Events in the Context of Climate Change 85–86 (2016), bit.ly/1S2JHgf.

[17] Boulder County, 2013 Flood Recovery Financial Summary (Sept. 30, 2015), bit.ly/1ZpjE63.

[18] David Gochis et al., *The Great Colorado Flood of September 2013*, Bulletin Am. Meteorological Soc'y, Sept. 2015; *see also* Boulder County, *Flood Recovery: Community Resiliency*, bit.ly/1T5t1Ho (visited Mar. 22, 2016).

[19] Shawn Selby, *December storms cost insurers more than $4 billion*, PropertyCasualty360.com, Jan. 6, 2016, bit.ly/1JuKiGR.

overwhelmed wastewater treatment plans and caused tens of millions of dollars of damage citywide. The steady precipitation contaminated some Madison residents' drinking water by introducing pathogens into even deep residential wells.[20]

Although it is difficult to estimate with precision what it will cost cities to deal with events like those described above, there is broad agreement that the cost will be enormous. On our current emissions trajectory, the annual cost of coastal storm damage is expected to climb from $3 billion to as high as $35 billion by the 2030s; coastal property valued at $66 to $106 billion is expected to be underwater by 2050.[21] What's more, greenhouse gas emissions reductions are essential to keeping impacts and costs—which will in any event be extraordinary—to a minimum. Indeed, a peer reviewed study conducted by EPA projected stark differences between a world in the year 2100 where global warming averages 2 degrees Celsius—a goal to which the Clean Power Plan is critical—and one in which global warming averages 4 degrees Celsius: 57,000 fewer domestic deaths per year due to poor air quality; 12,000 fewer domestic deaths per year from

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[20] Wisconsin Initiative on Climate Change Impacts, Wisconsin's Changing Climate: Impacts and Adaptation 46, 52–54, 58 (2011), bit.ly/1UNqSjs; *see also* City of Madison, *Flood Waters and Runoff Create Health Challenges: Possible Chemical and Bacterial Contamination Requires Attention*, June 28, 2013, bit.ly/1Slp7YL (describing risk in relation to local floods generally).

[21] Kate Gordon et al., Risky Business: The Economic Risks of Climate Change in the United States 3–4 (2014) bit.ly/1QBbFfv.

extreme heat and cold in 49 U.S. cities; $50 million to $6.4 billion in avoided annual adaptation costs from severe precipitation in 50 U.S. cities; $3.1 billion in avoided annual damages and adaptation costs from sea level rise and storm surge on the coasts; and $32 million to $2.5 billion in avoided damages from inland flooding.[22]

The acute relevance of anthropogenic climate change to cities' responsibilities has focused Local Government Coalition members' attention on the dangers of failing to mitigate climate change, as well as on the pressing need to adapt to it. Notably, this puts 25 Local Government Coalition members at odds with their state governments, which have filed as petitioners in this case. Educated by their experiences and anticipating the still more dramatic climatic changes looming in the foreseeable future, *amici* write in support of EPA and of the Clean Power Plan.

ARGUMENT

The Clean Air Act, as interpreted by the Supreme Court, requires EPA to regulate greenhouse gas emissions, *Massachusetts v. EPA*, 549 U.S. 497 (2007), *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), and precludes several other paths to such regulation. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct.

[22] U.S. EPA, Office of Atmospheric Pgms., *Climate Change in the United States: Benefits of Global Action*, EPA 430-R-15-001 (2015).

2527, 2527 (2011) ("The Clean Air Act and the Environmental Protection Agency action the Act authorizes . . . displace the [common law] claims the plaintiffs seek to pursue"); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012) (EPA action authorized by Clean Air Act "displaces Kivalina's claims"), *cert. denied*, 133 S. Ct. 2390 (2013); *Alec L. v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014) (holding Supreme Court precedent precludes federal public trust cause of action concerning climate change). The Clean Power Plan, which calls on states to reduce greenhouse gas emissions from existing fossil-fueled power plants—the country's largest source of such emissions—is therefore a legally necessary step toward addressing the extraordinary threat posed by climate change. Petitioners nonetheless urge the Court to ignore the basic imperative of the Clean Air Act that animates the Clean Power Plan, namely averting harm to Americans by reducing air pollution. Petitioners' view cannot be squared with principles of statutory interpretation or with the meaning of the Act, as these have been explained by this Court and the Supreme Court.

1. Clean Air Act § 111(d) Must Be Interpreted in a Way that Makes It Effective

It is axiomatic that "[c]ourts should not render statutes nugatory through construction." *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011). Indeed, "[t]he presumption against interpreting a statute in a way which

renders it ineffective is hornbook law." *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975). *See also Bird v. United States*, 187 U.S. 118, 124 (1902) (establishing presumption against construing a statute so as to render it ineffective); *Wilderness Soc'y, Envtl. Def. Fund v. Morton*, 479 F.2d 842, 855 (D.C. Cir. 1973) (if the text does not provide guidance on the issue, courts should avoid interpreting a statute in a way that renders it ineffective). Thus, a statute should ordinarily be read so as to effectuate its purposes, not to frustrate them. *See Wagner v. Federal Election Comm'n*, 717 F.3d 1007, 1014 (D.C. Cir. 2013); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) ("our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment"). As this Court has observed, the intent of Congress in enacting the Clean Air Act was "to speed up, expand, and intensify the war against pollution"—not to slow down, narrow and weaken it. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C. Cir. 1983) (quoting H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. 1, 5 (1970), U.S. Code Cong. & Admin. News 1970, p. 5356 (noting that progress in controlling air pollution "has been regrettably slow.")).

This essential tenet of statutory interpretation should guide the Court's review of EPA's interpretation of Section 111(d) of the Clean Air Act in at least two ways: First, the Court should defer to EPA's interpretation of the "best system of emission reduction" language in Section 111(d). *See also* Respondent EPA's Initial Brief at 25–76. Second, the Court should not read Section 111(d) as prohibiting regulation of air pollution from sources already regulated under Section 112. *See also id.* at 76–98.

In the Clean Power Plan EPA has interpreted Section 111(d) in such a way as to take meaningful action to combat climate change by reducing emissions from the nation's single largest source category. The Clean Power Plan is designed to achieve necessary GHG emissions reductions from power plants, and to allow states the ability to develop plans that advance the long-term transition to a clean energy economy. Interpreting the "best system of emission reduction" in the manner proposed by petitioners would limit EPA's options to heat-rate improvements and technological fixes that are more costly and less effective, essentially erasing the word "best" from the statute. Interpreting Section 111(d) and Section 112 as mutually exclusive provisions would erase EPA's ability to regulate GHG emissions from existing power plants altogether—an unacceptable option that runs directly counter to the purposes of the Act.

The case of *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus* is instructive. There, industry petitioners urged this Court to reject an interpretation of Section 207(b) of the Clean Air Act that allowed EPA to establish certain limited tests for in-use motor vehicle emissions—the key limitation being that the tests demonstrated only noncompliance with federal standards, and not compliance. 719 F.2d at 1165. The Court found EPA's interpretation reasonable, noting that industry petitioners' proposed interpretation, which would require that tests demonstrate both compliance and noncompliance, "would make it impossible to establish any [such] tests for the foreseeable future," and that EPA had reasonably concluded that it was preferable to prevent the worst violators from continuing to pollute than to wait for a perfect solution that would capture all violations. *Id. See also Motor & Equipment Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1108 (D.C. Cir. 1979) (upholding EPA grant of Section 209 waiver to California in-use vehicle maintenance standards because they were effective means to achieve statute's policies) .

Similarly, here, petitioners posit interpretations of both the "best system of emission reduction" and the relationship between Sections 111(d) and 112 which would frustrate the purposes of the Clean Air Act and prevent EPA from effectively addressing air pollution contributing to climate change. EPA's interpretations, by contrast, although perhaps not a "perfect solution," reconcile

diverse interests in a way that achieves substantial emissions reductions. Indeed, given its consistency with the underlying purposes of the Clean Air Act, and because it will help governments at all levels—federal, state, and local—realize the Act's core goal of preventing adverse effects of air pollution, EPA's well-reasoned interpretation is entitled to deference under *Chevron*.

Chevron deference is, at its heart, a recognition of the effort and expertise an agency puts into administering its delegated authority in a manner that effectuates the purposes of the underlying legislation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (concluding that the agency's "interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies . . . [that] Congress intended to accommodate. . . ."). Accordingly, where language in the Clean Air Act—or other environmental laws—is ambiguous, EPA should strive to interpret the ambiguity, and fill the legislative gap, so as to effectuate the purposes of the statute. *See General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1571 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074, 1075 (1985). Where the agency does this, and where its interpretation is reasonable and consistent with the statutory purpose, the court must uphold it. *See, e.g., Hazardous Waste Treatment Council v. Reilly*, 938

F.2d 1390, 1395 (D.C. Cir. 1991); *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162–63 (D.C. Cir. 1990).

The Supreme Court's decisions in *Chevron* and *EPA v. EME Homer City Generation, L.P.* should be determinative of the outcome in this case. In *Chevron*, EPA had interpreted the term "source," as used in the 1977 Amendments to the Clean Air Act, to refer to an entire plant, rather than an individual smokestack, thereby "treat[ing] all of the pollution-emitting devices within the [plant] as though they were encased within a single 'bubble.'" *Chevron* at 840. This interpretation allowed plant operators to install new pollution-emitting "sources" and yet avoid certain additional requirements, so long as there was not a net emission increase from the plant. *Id.* The Supreme Court, of course, deferred to EPA's interpretation.

In *EPA v. EME Homer City Generation, L.P.*, state and industry petitioners challenged EPA's interpretation of the Good Neighbor Provision, Section 110(a)(2)(D)(i) of the Clean Air Act. *See* 134 S. Ct. 1584 (2014). The Good Neighbor Provision requires SIPs to "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any . . . [NAAQS]." 42 U.S.C. § 7410(a)(2)(D)(i). The Act is silent on the question of what it means for one state to "contribute significantly" to another state's air quality in

these circumstances, but Congress, EPA and the courts have long been aware of the extraordinary complexity involved in figuring it out. *See* 134 S. Ct. at 1593–98 (recounting legislative revisions, regulatory efforts and litigation surrounding the Good Neighbor Provision). Recognizing that "[t]he realities of interstate air pollution . . . are not so simple," *id.* at 1605, and that solving the interstate pollution problem requires application of technical expertise, the Supreme Court "conclude[d] that the Good Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in *Chevron*." *Id.* at 1603. Accordingly, the Court rejected narrow interpretations that would have dictated a particular approach to allocating emissions reductions among states—an approach that would have proved less cost-effective and likely less effective overall—and accepted EPA's interpretation as a reasonable one.

Here, as in *Chevron* and *EME Homer City Generation*, Congress has left a critical term—"best system of emission reduction"—undefined. EPA has, as in those earlier cases, interpreted the statutory term in a similarly balanced way, designed both to achieve the goals of the Clean Air Act and to do so in a way that is cost-effective. Similarly, EPA has interpreted the ambiguity created by competing versions of Section 111(d), and by the language of the House version of that Section, to allow for regulation of air pollutants from sources that are also regulated under Section 112—though not for regulation of the same pollutants

from those sources. These interpretations fall firmly into *Chevron*'s domain, and warrant deference.

2. The Clean Power Plan Would Enable—and Its Vacatur Would Hobble—Cities' Efforts to Adapt to and Mitigate Climate Change

Cities are not only on the front lines of climate impacts—they are also at the forefront of climate change adaptation and mitigation efforts nationwide. Yet, local governments have little ability to regulate the circumstances imposed on them by the wider world. Because cities' legal authority generally extends only as far as their state governments allow, cities' efforts to adapt to a changing climate and to mitigate its causes are highly sensitive to national policies like the Clean Power Plan, which shape national markets, steer state action, and have large direct impacts on nationwide emissions. As more than two dozen mayors (including 11 mayors of Local Government Coalition cities) declared in a letter to President Obama last year: "[W]e cannot act alone. We need the federal government to provide a path forward to making meaningful reductions in carbon pollution while preparing for the impacts of climate change."[23]

A world where the federal government further delays regulating greenhouse gases from the nation's largest source of emissions is one where the climate

[23] *See* Mayors National Climate Action Agenda, 27 Mayors' Letter to President Obama, June 18, 2015, bit.ly/1TUMUlo.

changes faster and to a greater degree, and thus one where adaptation costs more. *See* 80 Fed. Reg. 64662, 64684 (Oct. 23, 2015) (noting that the Third National Climate Assessment and IPCC's 5th Integrated Assessment Report "emphasize the urgency of reducing GHG emissions due to their projections that show GHG concentrations climbing to ever-increasing levels in the absence of mitigation.").[24] Cities working to shoulder the burdens of adaptation would therefore face an ever harder—and ever more expensive—task in the absence of the Clean Power Plan.

As for mitigation, cities' efforts are sensitive to the Clean Power Plan in at least three ways. First, under the Clean Power Plan states may submit plans that limit reliance on emissions-intensive power sources and make way for cleaner resources to replace them. Thus, under the Clean Power Plan, cities that have set emissions reduction targets would likely be working *with* state policymakers toward the reformation of electricity infrastructure.[25] Second, the emissions reductions required by the Clean Power Plan, whether achieved through efficiency

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[24] *See also* EPA, *Climate Change in the United States: Benefits of Global Action*, *supra* note 23 (finding dramatic differential in impacts and costs associated with emissions scenarios consistent with limiting global warming to approximately 2 degrees Celsius as versus 4 degrees Celsius).

[25] *See*, *e.g.*, Danielle M. Bergner & Todd E. Palmer, *Property Assessed Energy Finance Is Picking Up Steam*, Law360, Nov. 18, 2015, bit.ly/21zh0Kw (explaining compatibility of Clean Power Plan requirements with Wisconsin law authorizing municipalities to use real estate as collateral for investments in renewable energy and energy efficiency).

and technology improvements at individual power plants or through an emissions trading scheme developed under a state or federal plan, would effectively make emissions intensity a factor in the price of electricity. This, in turn, would create the sort of regulatory and financial certainty that markets crave—whether those markets trade in electricity infrastructure financing, clean energy financing, or energy efficiency services—and would thereby reduce the costs of action for cities investing in climate mitigation. Third, the Clean Energy Incentive Program provides direct incentives for increasing demand-side energy efficiency in environmental justice communities. These incentives will help increase the equitable distribution of cost-saving, emissions-reducing efficiency efforts in cities around the country. The Plan's vacatur would force those same cities to climb steeper hills toward their goals.

The following summaries of Local Government Coalition members' adaptation and mitigation efforts demonstrate cities' grasp of the need to act, as well as the scale of efforts currently underway that could be either buttressed by the Clean Power Plan or undermined by its vacatur.

i. Adaptation Efforts

The adaptation plans devised by Local Government Coalition members reflect earnest efforts to deal with the new climate norm, which, to an increasingly

obvious degree, costs more to ignore than it does to address.[26] These plans are carefully considered guidelines for how to allocate scarce resources, devised to protect the health and welfare of city residents and the integrity of the assets and infrastructure they rely upon.

In 2013, **Baltimore** developed comprehensive responses—touching infrastructure, building codes, natural coastal barriers, and public services—to threats from rising seas, heat waves, and storms.[27] **Berkeley**'s 2009 and **San Francisco**'s 2004 Climate Action Plans assess vulnerabilities to various infrastructure systems and populations down to the neighborhood level, and recommend responsive measures.[28] Just this year, San Francisco published a detailed Sea Level Rise Action Plan, which specifies a host of responses to the 55-inch-rise expected in this century.[29] In 2013 and 2014, **Boston** saw a flurry of adaptation planning activity by public and private entities, including the latest

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[26] *See* President's State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience: Recommendations to the President 4 (Nov. 2014), 1.usa.gov/229qC0I ("Anticipating and planning for these impacts now can reduce the harm and long-term costs of climate change to communities.").

[27] City of Baltimore, Disaster Preparedness and Planning Project (Oct. 2013), bit.ly/1T3S0e3.

[28] City of Berkeley, Climate Action Plan (June 2009), bit.ly/1SbJ5VI; San Francisco Department of the Environment and Public Utilities Commission, Climate Action Plan for San Francisco (Sept. 2004), bit.ly/25dTDuH.

[29] City and County of San Francisco, San Francisco Sea Level Rise Action Plan (Mar. 2016), bit.ly/1pxpnuD.

triennial update of the city's 2007 Climate Action Plan, formation of a Climate Preparedness Task Force, and recommendations by the Boston Society of Architects for changes to building codes and infrastructure design parameters.[30] **Boulder County**'s 2012 Climate Change Preparedness Plan "focuses on four key sectors: water supply, emergency management[], public health, and agriculture and natural resources," and aims "to assist county and city departments that manage climate-sensitive resources and assets" by reorienting planning parameters to "the climate system of the future"—meaning a county beset by more, and more severe, floods, heat waves, droughts, wildfires, and vector-borne diseases.[31] **Coral Gables**, **Cutler Bay**, **Miami**, **Miami Beach**, **Pinecrest**, **West Palm Beach**, and other cities and towns in the Southeast Florida Regional Climate Compact have been working to reshape facilities for managing stormwater, wastewater, and drinking water in anticipation of hydrology reshaped by higher sea levels.[32] **Dallas** has set out a list of objectives—relating to everything from transit to wastewater treatment—for

[30] Boston Climate Preparedness Task Force, Climate Ready Boston: Municipal Vulnerability to Climate Change (Oct. 2013); Boston Society of Architects, Building Resilience in Boston (July 2013), bit.ly/1LzxOiO.

[31] Jason Vogel et al., Boulder County Climate Change Preparedness Plan (May 2012), bit.ly/1ZhBfg8.

[32] *See* Southeast Florida Regional Compact, Regional Impacts of Climate Change and Issues for Stormwater Management (Oct. 2015), bit.ly/1RvtCfR; Southeast Florida Regional Compact, A Region Responds to a Changing Climate: Regional Climate Action Plan (Oct. 2012), bit.ly/1WB1MTS.

improving air and water quality amid the growing stresses that a warming climate places on both.[33] In **Eugene**, adaptation efforts follow from the 2010 Community Climate and Energy Action Plan, as well as the 2015 Eugene/Springfield Multijurisdictional Natural Hazards Mitigation Plan, which identify and prioritize vulnerabilities for address by officials responsible for maintaining drinking water and natural systems resources.[34] **Evanston**, located just north of Chicago, has invested $210 million in an overhaul of its sewer system that makes it more robust to heavy precipitation, and has budgeted for green infrastructure and electric distribution grid projects that will adapt the city's stormwater and energy systems to a stormier climate.[35] **Fort Collins**' adaptation planning efforts to date identify and prioritize dozens of vulnerabilities arising from climatic changes, and spell out how responses should inform revisions to the City Plan and the Transportation Master Plan.[36] **Grand Rapids** has adopted a suite of measures—such as denser and greener development, and a halt to new road building—to respond to the warming

[33] City of Dallas, Sustainability Plan Progress Report (Mar. 2014), bit.ly/1SdolNa.

[34] Eugene/Springfield Multi-Jurisdictional Natural Hazards Mitigation Plan (2015), bit.ly/1R8qbjo; City of Eugene, A Community Climate and Energy Action Plan for Eugene (2010), bit.ly/1pRMQGK.

[35] City of Evanston, *Sustainability*, bit.ly/1TZCKzS (visited Mar. 23, 2016) (listing links to climate-oriented planning documents issued each year from 2006 to 2010, as well as 2012, 2014, and 2016).

[36] City of Fort Collins, Summary of Current Efforts & Next Steps: Climate Change Adaptation (Aug. 2014), bit.ly/1XFVQcz.

temperatures and greater precipitation that threaten existing transportation infrastructure.[37] **Hoboken** and **Jersey City**, having endured and rebuilt after Hurricane Sandy, are adapting in earnest: Hoboken has overhauled its building code with an eye to resilience to flood damage.[38] It has also undertaken a wide-ranging green infrastructure initiative to improve stormwater controls and thereby reduce the threat posed by various forms of flooding.[39] Jersey City continues to explore possible combinations of 27 flooding countermeasure design elements that can preserve it from future coastal storms.[40] **King County**, Washington, has made a comprehensive plan to prepare for rising seas, wetter winters, dryer summers, and the floods and wildfires that attend them.[41] This integrated plan includes changes to wastewater conveyance systems, increased recycled water use, improvements to storm- and floodwater controls, increased wildfire risk reduction efforts, and development of a public health stakeholder engagement agenda to

[37] West Michigan Environmental Action Council, Grand Rapids Climate Resiliency Report (Dec. 2013), bit.ly/1XFZGSV.

[38] City of Hoboken, Resilient Building Design Guidelines (Oct. 2015), bit.ly/1Rb2ZQo.

[39] City of Hoboken, Green Infrastructure Strategic Plan (Oct. 2013), bit.ly/1o0pzAL

[40] City of Jersey City, Visualizations of Adaptation Scenarios and Next Steps White Paper (Feb. 2015), bit.ly/1RtZrfg.

[41] King County, Strategic Climate Action Plan (Nov. 2015), 1.usa.gov/1PwXw7S.

prioritize resource allocation.[42] With its 2007 *Green LA* report and its 2008 *ClimateLA* implementation agenda, **Los Angeles** began identifying appropriate responses to its vulnerability to heat waves, sea level rise, and other climatic changes and assigning roles and deadlines to adaptation agenda items—for instance, greater energy efficiency and resiliency in electric grid and wastewater treatment facilities.[43] Those early efforts have burgeoned into a well-organized plethora of coordinated regional initiatives.[44] **Minneapolis** is now working to integrate climate change adaptation into planning for a range of city responsibilities, for instance by developing an annex to the Minneapolis All Hazards Plan for extreme heat events, partnering with local watershed management organizations to assess the potential flood impacts of increasingly frequent heavy rain events, and assembling multidisciplinary teams of City staff to integrate

[42] *Id.* at 105, 107–08, 111–12.

[43] City of Los Angeles, Green LA: An Action Plan to Lead the Nation In Fighting Global Warming (May 2007), bit.ly/1T49dE6; City of Los Angeles, ClimateLA: Municipal Program Implementing the GreenLA Climate Action Plan (2008), bit.ly/1T4bDmp.

[44] *See* Los Angeles Regional Collaborative for Climate Action and Sustainability, bit.ly/1pXNUJ5 (visited Mar. 21, 2016); *see also* Los Angeles Regional Water Quality Control Board, Los Angeles Region Framework for Climate Change Adaptation and Mitigation (July 2015), bit.ly/25fW3sI.

climate change into long range planning.[45] **Pittsburgh**, which has lately seen colder winters, hotter summers, and more extreme precipitation and riverine floods, named a Chief Resilience Officer in June 2015 to coordinate, among other things, changes to the city's transportation networks that would make them more robust to extreme weather events.[46] In 2014, **Portland**, Maine commissioned an investigation of what rising, warming, acidifying, and stormier seas would mean for its economy, which centers on port- and ocean-related industries like tourism, fishing, and marine services.[47] That investigation yielded a bevy of recommendations, ranging from practical near-term steps—protecting port facilities and energy and electricity infrastructure against storm surges—to longer-term ones—diversifying the port economy in anticipation of adverse climate change impacts on fisheries.[48] Across the country, **Portland**, Oregon has been working for years to better respond to heat waves and flooding—the first Portland

[45] *See* City of Minneapolis, *Sustainability Indicators*, bit.ly/1RvtlQk (updated June 2014).

[46] Press Release, Mayor Peduto, Pittsburgh Sustainability Manager Grant Ervin Named Chief Resilience Officer, June 5, 2015, bit.ly/25gCbpi.

[47] Waterfronts of Portland and South Portland Maine: Regional Strategies for Creating Resilient Waterfronts (May 11–16, 2014), 1.usa.gov/1Rvv9sy.

[48] *Id.* at 16, 23–27.

climate action plan was adopted in 1993.[49] Portland's 2015 Climate Action Plan provides a detailed summary of goals, deadlines, and programmatic efforts for all sectors of city government.[50] **Providence** has tasked various city agencies with particular roles as it works to address the infrastructure and public health impacts it expects to see as a result of longer heat waves and more damaging storms and storm surges.[51] In **Reno**, which sits near Nevada's mountainous border with California, drought, severe weather, and wildfire rank high on the list of vulnerabilities the city and its surrounding county have identified as being likely to worsen as the climate changes.[52] **Salt Lake City**'s Sustainable Code Revision Project, which has proceeded incrementally since 2009, amounts to a reweaving of city ordinances and policies with an eye to greater sustainability and resilience to climate change impacts.[53] It builds in part on the city's examination of climate

[49] City of Portland, Carbon Dioxide Reduction Strategy (Nov. 1993), bit.ly/1ohvulb.

[50] City of Portland & Multnomah County, 2015 Climate Action Plan (June 2015), bit.ly/1RdLheY.

[51] City of Providence, Sustainable Providence (Sept. 2014), bit.ly/1RwhUlh; City of Providence, Building Resilience to the Public Health Impacts of Climate Change: A Review of Existing Strategies and Recommendations for the City of Providence (2014), bit.ly/1QI1Uzo.

[52] Washoe County Regional Hazard Mitigation Plan (2015), bit.ly/25gCAYK; Washoe County Regional Resiliency Study (May 2014).

[53] Salt Lake City, Sustainable Code Revision Project, bit.ly/1SdJMOm (visited Mar. 21, 2016).

vulnerabilities and prioritization of issues such as water conservation and air quality maintenance.[54] **Tucson**—no stranger to hot, dry weather—is working to respond to heat waves of unprecedented intensity and water supplies strained by recurrent drought and falling groundwater levels.[55]

These efforts would be undercut by an interpretation of the Clean Air Act that eliminates or drastically reduces EPA's authority to achieve substantial greenhouse gas emissions reductions from the power sector. As the U.S. Global Change Research Program noted: "Adaptation and mitigation are closely linked; adaptation efforts will be more difficult, more costly, and less likely to succeed if significant mitigation actions are not taken."[56]

ii. Mitigation Efforts

Local Government Coalition members' responses to climate change include efforts to reduce their contributions to greenhouse gas emissions by investing in energy efficiency, committing to the use of clean energy resources, and reducing reliance on fossil-fueled energy sources. Forty-three Coalition members, following rubrics established by the Mayors Climate Compact or the International Council

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[54] Salt Lake City, Sustainable Salt Lake – Plan 2015 (Dec. 2015), bit.ly/1UJBIab.

[55] City of Tucson, Planning for Climate Change in the City of Tucson (Dec. 2012), bit.ly/1pY6h0p

[56] Rosina Bierbaum, et al., *Ch. 28: Adaptation in* 3rd National Climate Assessment, at 671.

for Local Environmental Initiatives, have made specific emissions reduction commitments. For instance, **Minneapolis** gave itself greenhouse gas emissions reduction targets of 15 percent below 2005 levels by 2015, 30 percent below by 2025,[57] and 80 percent below by 2050.[58] **Eugene** has committed to even broader and more aggressive targets: a reduction of community-wide greenhouse gas emissions to 10 percent below 1990 levels by 2020, and a 75 percent reduction by 2050; a 50 percent reduction in community-wide fossil fuel use by 2030; and carbon-neutral city operations by 2020.[59] **Ann Arbor's** 2012 Climate Action Plan, which sets reduction targets of 25 percent below 2000 levels by 2025 and 90 percent below by 2050, expressly recognizes that these targets cannot be reached unless regional electric utilities reduce their reliance on fossil fuels.[60]

Coalition members that have made commitments like these tend to draw on energy efficiency and distributed renewable energy generation as cost-effective

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[57] City of Minneapolis, Minneapolis Climate Action Plan: A Roadmap to Reducing Citywide Greenhouse Gas Emissions (June 2013), bit.ly/1Sm18ug.

[58] Minneapolis Health, Env't & Community Engagement Comm., Setting a Long-term Carbon Reduction Goal for Minneapolis (Apr. 2014), bit.ly/1QPbFbT.

[59] City of Eugene, A Community Climate and Energy Action Plan for Eugene (2010), bit.ly/1pRMQGK; *see also* Oregon Department of Land Conservation and Development, Target Rule Review Report (May 2015), 1.usa.gov/1nDKR77.

[60] City of Ann Arbor, Climate Action Plan 5 (2012), bit.ly/1qcshVE ("Whether by state or national regulations . . . the 2050 GHG reductions targeted here are only possible through a massive rethinking of the country's electricity, heating, and transportation fuel source system and supporting infrastructure.").

means of compliance that can be encouraged at the municipal level. **Grand Rapids**, for one, has assembled a large coalition of public and private entities to support a "building efficiency district" that will be home to buildings and infrastructure designed to meet energy efficiency and resiliency goals.[61] Similarly, **San Francisco**'s Green Building Ordinance, phased in from 2008 to 2013, and its 2011 Existing Commercial Buildings Energy Performance Ordinance, help to achieve emissions reduction goals by reducing energy consumption.[62] **Fort Collins** has paved the way for increased distributed generation with its Renewable and Distributed System Integration project; it's 2015 Energy Policy that sets 2020 goals for efficiency, renewables, and demand response; its partial ownership of the generation provider (Platte River Power Authority) that serves four cities; and its 2015 Climate Action Plan Framework that sets an emissions reduction goal of 80 percent below a 2005 baseline by 2030.[63] **Berkeley** is also working steadily

[61] City of Grand Rapids, Office of Energy & Sustainability, Fourth Year Progress Report: FY2011–FY2015 Sustainability Plan 38 (2015), bit.ly/1Yo3ahG. ("GHG emissions have been reduced by over 550 metric tons since FY13 simply due to energy efficiency").

[62] *See* SFEnvironment, *San Francisco Green Building Code*, bit.ly/1RlsHSk (visited Mar. 23, 2016); SFEnvironment, *Existing Commercial Buildings Energy Performance Ordinance: San Francisco Environment Code Chapter 20*, bit.ly/22Gi0Pl (visited Mar. 27, 2016).

[63] City of Fort Collins, 2015 Climate Action Plan Framework, 11–12, 27–28 (Mar. 2015), bit.ly/1LHFnDY.

towards its ambitious emissions reduction goals by promoting distributed solar generation, which it does by offering free residential or commercial site assessments through its SmartSolar Program, and by creating a streamlined solar photovoltaic permitting process,[64] among many other initiatives.

Through investments in energy efficiency and distributed generation these and other Local Government Coalition members contribute to global efforts to combat climate change while also improving their local air quality and resiliency to extreme weather events.[65] However, their innovative, uncoordinated forays have wanted for the support and certainty that only a more comprehensive federal framework for reducing the power sector's greenhouse gas emissions can provide. The Clean Power Plan provides just such a framework, and will enhance ongoing local efforts and enable new local initiatives to reduce greenhouse gas emissions through energy innovation.

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[64] City of Berkeley, Building Energy Use – SmartSolar Program (June 2014), bit.ly/1U9WfWK; City of Berkeley, Energy & Sustainable Development: Solar Photovoltaic (PV) Permitting and Submittal Requirements, bit.ly/1MmwkIO (visited Mar. 23, 2016).

[65] *See, e.g.*, National Renewable Energy Laboratory, Distributed Solar PV for Electricity System Resiliency: Policy and Regulatory Considerations (Nov. 2014), 1.usa.gov/1MwcDyh.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reject Petitioners' arguments and uphold the EPA's Clean Power Plan.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e)(2)(C), I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and D.C. Cir. R. 32(e)(3) because it contains 6,950 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1). Further, this brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared using 14-point Times New Roman font, a proportionately spaced typeface.

Dated: April 1, 2016 s/ Michael Burger

CERTIFICATE OF SERVICE

I certify that the foregoing BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES; THE U.S. CONFERENCE OF MAYORS; AND 54 CITIES, COUNTIES, AND MAYORS IN SUPPORT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY was served today on all registered counsel in these consolidated cases via the Court's CM/ECF system, and email.

Dated: April 1, 2016 s/ Michael Burger