ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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

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

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

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

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

BRIEF OF *AMICI CURIAE* ADOBE, INC., MARS, INCORPORATED, IKEA NORTH AMERICA SERVICES LLC, AND BLUE CROSS AND BLUE SHIELD OF MASSACHUSETTS, INC., IN SUPPORT OF RESPONDENTS

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Dated: April 1, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and Amici

Except for the *amici curiae* on this brief, all parties, intervenors, and *amici* appearing in this Court are, to the best of my knowledge, listed in the Certificate as to Parties, Rulings, and Related Cases to Respondent United States Environmental Protection Agency's Initial Brief [Doc. #1605911].

B. Rulings Under Review

Reference to the rulings under review is listed in the Certificate as to Parties, Rulings, and Related Cases to Respondent United States Environmental Protection Agency's Initial Brief [Doc. #1605911].

C. Related Cases

Reference to the related cases is listed in the Certificate as to Parties, Rulings, and Related Cases to Respondent United States Environmental Protection Agency's Initial Brief [Doc. #1605911].

Dated: April 1, 2016

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

Jerome C. Muys, Jr.

CORPORATE AND FINANCIAL DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, D.C. Circuit Rule 26.1, and Fed. R. App. P. 29(c):

- Adobe, Inc. does not have a parent corporation. No publicly-held corporation owns 10% or more of the company's stock.
- Mars, Incorporated does not have a parent corporation. No publicly-held corporation owns 10% or more of the company's stock.
- INGKA Holding B.V. is the parent corporation of IKEA North America Services LLC. No publicly-held corporation owns 10% or more of the company's stock.
- Blue Cross and Blue Shield of Massachusetts, Inc. does not have a parent corporation. No publicly-held corporation owns 10% or more of the company's stock.

The general nature and purpose of *amici curiae*, insofar as relevant to this litigation, is provided in this brief.

Dated: April 1, 2016

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

Jerome C. Muys, Jr.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Acronym/Abbreviations	Definition
Amici Companies	Adobe, Inc., Mars, Incorporated, IKEA North America Services LLC, and Blue Cross and Blue Shield of Massachusetts, Inc.
Clean Power Plan	Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
CO_2	Carbon Dioxide
EPA	United States Environmental Protection Agency
PPA	Power Purchase Agreement

INTRODUCTION TO THE CLEAN POWER PLAN

This proceeding concerns the United States Environmental Protection Agency's ("EPA") Clean Power Plan, promulgated pursuant to Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), which established final emission guidelines for States to reduce greenhouse gas emissions from existing Electric Utility Generating Units. See Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Clean Power Plan"). Under the Clean Power Plan, each State must submit a plan that establishes standards of performance for power plants and limitations on the emission of carbon dioxide ("CO_2") "achievable though the application of the best system of emission reduction." Id.; see 42 U.S.C. § 7411(a).

EPA determined that the best system of emission reduction consists of three "building blocks" that States may employ to reduce CO_2 emissions: (1) increasing the efficiency of existing coal-fired power plants (80 Fed. Reg. at 64,787); (2) increasing electricity generation from lower-emitting natural-gas fired combined cycle plants (id. at 64,795); and (3) increasing electricity generation from zero-emitting renewable energy sources such as wind and solar energy (id. at 64,803). Thus, the Clean Power Plan is an emissions management program promulgated to secure vital CO_2 reductions from fossil-fuel-fired power plants. To drive these

required reductions, the Clean Power Plan will promote, at least in part, increased electricity generation from low- and zero-emitting sources.

INTERESTS OF *AMICI CURIAE*

The *Amici Companies* Adobe, Inc., Mars, Incorporated, IKEA North America Services LLC, and Blue Cross and Blue Shield of Massachusetts, Inc. are all corporate electricity consumers and purchasers. They represent a diverse set of industries from software product solutions, to furniture and home furnishings, food and other consumer goods, and insurance. These companies are some of this nation's most prominent and most recognizable consumer brands and businesses, and their operations span the entire United States.

Together, the *Amici Companies* use a significant amount of electricity to power their business operations, manufacturing facilities, warehouses, data centers, and other infrastructure in the United States. The emissions associated with this electricity demand represent a considerable percentage of their carbon footprint. It is important to the *Amici Companies* that they reduce their carbon footprints by procuring their electricity from low- and zero-emitting greenhouse gas sources, not only to be good stewards of the environment and of the public health and welfare, but also because it preserves their economic interests. Thus, as the ultimate consumers and purchasers of significant amounts of electricity whose source will

be affected by the implementation, vacatur, or delay of the Clean Power Plan, the *Amici Companies* have a unique perspective that will aid the Court's deliberations.

The *Amici Companies* have a salient interest in the development of sound policy and economically responsible environmental regulations because, as electricity consumers and purchasers, planning strategically and financially for their energy resources needs is critical to business success. The *Amici Companies* will also bear economic[1] and social[2] disruptions as a direct result of inaction on regulating power plant emissions and the vacatur or delay in implementing the Clean Power Plan.

Further, to the *Amici Companies*, climate change poses an economic hazard to business operations and presents a clear business imperative to participate in mitigation strategies, both domestically and internationally, to ensure the successful future of their organizations. Thus, the *Amici Companies* have substantial interests in the greater availability of low- and zero-emitting greenhouse gas energy resources and reducing emissions and other dangerous

[1] Kate Gordon with Michael R. Bloomberg, Henry Paulson & Tom Steyer, Risky Business, *the Economic Risks of Climate Change in the United States* (June 2014), http://riskybusiness.org/reports/.

[2] Id.

pollution from traditional fossil-fuel-fired power plants. Finally, some *Amici Companies* participated in the Clean Power Plan administrative proceeding.[3]

Thus, the *Amici Companies* respectfully submit this brief to explain the consequences to corporate electricity consumers and purchasers and their business operations that would occur if the Court decides to set aside the Clean Power Plan, and the resulting cost of failure to regulate carbon emissions from fossil-fuel-fired power plants.

SUMMARY OF THE ARGUMENT

EPA seeks to mitigate anthropogenic carbon emissions from the nation's largest emitting source sector – fossil-fuel-fired power plants.[4] Although an environmental policy, the solutions outlined in the Clean Power Plan will drive increased electricity generation from low- and zero-emitting sources, an outcome that is crucially important to the *Amici Companies*.

The *Amici Companies* stand together to represent their interests as businesses that consume and purchase electricity to support their business operations, retail stores, manufacturing facilities, warehouses, data center

[3] Ceres, Comment Letter on Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule (Jul. 31, 2015), https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-35717. See Letter from Mars, Inc. et al., United States Governors, Support for State Implementation of Carbon Pollution Standards, Ceres (July 31, 2015), available at http://www.ceres.org/files/clean-power-plan-state-letters/national-cpp-letter. Mars, Incorporated joined a group of 364 companies filing public comments on the Clean Power Plan.

capabilities, and other infrastructure in the United States. Collectively, they have made public commitments to procure their electricity from low- and zero-emitting sources, concluding that good environmental, health, and energy stewardship preserves their economic interests.

Traditionally, utilities have been responsible for providing energy services (i.e., generation, distribution and transmission). For the *Amici Companies*, a factor in siting larger infrastructure projects, upgrading existing facilities, and planning supply chain paths has been the availability, reliability, and price of electricity they could receive from utilities. Today, the generation source of electricity is a growing concern for companies, and the uncertainty that lingers around the future of high-carbon emitting fuel sources, both domestically and internationally,[5] makes assessing long-term business decisions a difficult challenge.

The *Amici Companies* recognize that delaying action to abate climate change will be costly in economic and human terms, while accelerating the transition to a low-carbon economy will produce multiple benefits with regards to sustainable

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[4] EPA, Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2014, http://www.epa.gov/climatechange/emissions/usinventoryreport.html (last visited Mar. 31, 2016).

[5] United Nations Framework Convention on Climate Change, Twenty-First Conference of the Parties, Dec. 11, 2015, 7 U.N.T.S. 7.d., available at http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

economic growth, public health,[6] resilience to natural disasters, and the health of the global environment. Moreover, the cost of doing business without a national carbon mitigation strategy subjects the *Amici Companies* to undesirable risks that are being appraised throughout the investor and insurance communities. As a result, companies are beginning to bear economic and social disruptions from carbon source uncertainty that could be alleviated by the Court in upholding the Clean Power Plan.

[6] Gary Cohen, *What does Climate Change Have to Do With Health Care?*, Forbes, (Apr. 7, 2013), http://www.forbes.com/sites/skollworldforum/2013/04/07/what-does-climate-change-have-to-do-with-health-care/#5196f9263e69.

ARGUMENT

I. Vacatur or Delay of the Clean Power Plan will Negatively Impact *Amici Companies*

A. The *Amici Companies* Have Made Public, Corporate Commitments to Procure Electricity from Low- and Zero-Emitting Generation Sources

A majority[7] of the largest U.S. businesses have established public sustainability and energy goals to increase their use of zero-emitting renewable energy[8] and "billions of kilowatt hours [are] still needed to meet [these] renewable energy goals."[9] The *Amici Companies* are among those businesses setting goals. Their interests stem from the desire not only to be good stewards of the environment and of the public health, but also to invest in zero-emitting renewable energy solutions to cut costs and hedge their risks of relying entirely on

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[7] David Gardiner & Associates, LLC, Why the World's Largest Companies Are Investing in Renewable Energy, Calvert Investments, Ceres & World Wildlife Foundation, Power Forward (2013), available at http://www.worldwildlife.org/publications/power-forward-why-the-world-s-largest-companies-are-investing-in-renewable-energy. See also World Resources Institutes & World Wildlife Foundation, Corporate Renewable Energy Buyer's Principles: Increasing Access to Renewable Energy 2 (2015) available at http://www.wri.org/sites/default/files/Corporate_Renewable_Energy_Buyers_Principles.pdf. 102 companies from the combined 171 companies in the Fortune 100 and Global 100 have set greenhouse gas reduction goals (60 percent). Of those, 24 companies have set specific goals for renewable energy use (14 percent), with others using renewable energy to meet their greenhouse gas reduction goals.

[8] Id.

[9] World Resources Institutes & World Wildlife Foundation, supra note 7.

increasingly volatile fossil fuels.[10] To this end, the *Amici Companies* have made strong and vocal public pledges, commitments, declarations, promises, and stated goals to increase their sustainability efforts, reduce their carbon footprint, and procure their electricity from low- and zero-emitting sources and to otherwise support the advancement of cleaner energy. For example, many of the *Amici Companies* have set emissions reductions goals from their operations of 25-30 percent over the next few years. These public sustainability and renewable energy commitments are not hollow; they are driving global purchasing of electricity.[11]

Further, the *Amici Companies* have incorporated these carbon reduction goals into many of their marketing campaigns, programs, services, and products. Failure to advance these commitments subjects their companies to the increased likelihood of reputational risk,[12] which has become a focus and concern for consumers and investors.[13] Reputational risk is often understood as the probability

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[10] Lori A. Bird, Karlynn S. Cory & Blair G. Swezey, Renewable Energy Price-Stability Benefits in Utility Green Power Programs, National Renewable Energy Laboratory (2010) available at http://apps3.eere.energy.gov/greenpower/resources/pdfs/43532.pdf.

[11] David Gardiner & Associates, LLC, supra note 7.

[12] Hauke Engel, Per-Anders Enkvist & Kimberly Henderson, *How Companies Can Adapt to Climate Change*, McKinsey & Co., (Jul. 2015), http://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/how-companies-can-adapt-to-climate-change.

[13] Max Messervy with Cynthia McHale & Rowan Spivey, *Insurer Climate Risk Disclosure Survey Report & Scorecard: 2014 Findings & Recommendations*,

of lost profits due to the public perception of a company's activity or position. In today's market, many consumers demand that companies incorporate sustainability measures into their day-to-day operations. The *Amici Companies* have attempted to meet these expectations. A poor reputation on climate, such as not achieving their sustainability and emission reduction goals, can hurt sales and damage customer relations.

The Clean Power Plan will help enable the *Amici Companies* to fulfill their energy commitments by sending a widespread signal to stabilize energy prices and emphasize renewable energy investment. It will help reduce CO_2 emissions and other atmospheric pollutants such as sulfur dioxide, nitrogen oxides, and fine particles and help improve public health while shifting utilization of traditional fossil-fuel-fired power to cleaner energy. See 80 Fed. Reg. at 64,670, 64,680-81. The Plan also will build a more sustainable and healthy economy in which their businesses can thrive.

B. Sound Policy that Promotes the Development of Renewable Energy is Beneficial to the *Amici Companies'* Business Models

As corporate electricity consumers and purchasers, the *Amici Companies* must plan strategically and financially for their current and future energy resource needs. Thus, they have a strong interest in the development of sound, measureable,

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Ceres (2014), https://www.ceres.org/resources/reports/insurer-climate-risk-disclosure-survey-report-scorecard-2014-findings-recommendations/view.

reliable, and enforceable emissions management policies for the power sector that also have the effect of reducing uncertainty in the energy marketplace. Today, the *Amici Companies* plan by monitoring the availability of and price of retail and wholesale electricity in a diversity of markets, including, increasingly, the market for renewable energy. Above all, they desire to invest in long-term renewable energy solutions to reduce their own costs and exposure to electricity price fluctuations caused by a reliance on volatile fossil fuels.

The *Amici Companies*' reliance on utilities that employ mainly fossil-fuel-fired generation exposes them to price spikes[14] and variations in fossil fuel costs.[15] Fuel sources play a significant role as the vast majority of costs for electricity producers and providers are attributable to the type of fuel source.[16] Thus,

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[14] New York State Energy Research and Development Authority, *Managing Retail Electricity Price Volatility Through Long-Term Renewable Energy Contracts Between Generators and End Users: A Case Study* (2014), http://www.nyserda.ny.gov/-/media/Files/Publications/Research/Electic-Power-Delivery/Managing-Retail-Electricity-Price.pdf. Depending upon the jurisdiction and utility service territory, the corporate customer may be protected from volatility by tariff or exposed to pricing differentials in the wholesale electricity spot markets, which can be volatile and subject to rapid and severe price fluctuations on hourly to annual timeframes. These fluctuations are usually based upon supply and demand economics, and extreme weather is a variability factor.

[15] Timothy Puko, *Volatility Has Natural-Gas Traders Scrambling*, Wall Street Journal, Feb. 17, 2016, http://www.wsj.com/articles/volatility-has-natural-gas-traders-scrambling-1424199729.

[16] Jason P. Brown, *U.S. Electricity Prices in the Wake of Growing Natural Gas Production*, The Main Street Economist, Issue 2, Federal Reserve Bank of Kansas City (2014), available at https://www.kansascityfed.org/publicat/mse/MSE_0214.pdf.

fluctuations in electricity prices are closely linked to the cost and composition of fuels used to generate electricity.[17] The cost for electricity producers and providers is passed along to corporate consumers; for regulated utilities this price pass-through occurs at each rate case, while unregulated competitive generation providers are only restricted by their customer contracts.[18]

On the other hand, renewable energy such as wind and solar, is a fuel-free option, and greater investment in these resources can provide long-term price certainty.[19] Generation price stability provided through long-term power purchase agreements ("PPA")[20] directly with non-fossil-fuel resources or greater utility

[17] Id.; See Robert Walton, *PJM, New York Electricity Markets Experience Price Spikes*, Utility Dive (May 26, 2015), http://www.utilitydive.com/news/pjm-new-york-electricity-markets-experience-price-spikes/399728/; PJM Market Report, PJM (2015) http://www.pjm.com/sitecore%20modules/web/~/media/committees-groups/committees/mc/20150521/20150521-item-10a-markets-report.ashx. *ERCOT Power Prices Climb to Mid-$250s/MWh as Strong Demand Continues*, Platts (August 7, 2015), http://www.platts.com/latest-news/electric-power/houston/ercot-power-prices-climb-to-mid-250smwh-as-strong-21932318.

[18] Id.

[19] Supra note 10.

[20] Supra note 15. PPA generally commits a corporation to buy or sell renewable energy: for a set period of time; for an understood or certain price; for a set term of usually twenty years. The PPA is usually between the corporation and an un-rate-regulated energy services company. Corporations are choosing to enter PPAs, because the price certainty for a period of twenty years helps the organization understand electricity costs, combat short-term volatility and forecast their energy load profile long-term.

renewable consistency[21] would provide more options for the *Amici Companies* to plan corporate operations long-term, and make other investments.

Moreover, the price of electricity from zero-emitting renewable energy generation would not stifle the *Amici Companies*' financial planning and bottom line. In the U.S. market, gas price acts as the floor for electric generation, and historically coal has been the least expensive resource.[22] Renewable generation has been considered more expensive.[23] However, the price of constructing renewable energy projects has dropped precipitously in recent years. In fact, the *Amici Companies* expect, consistent with historical trends and expert market analysis, that the continued expansion of installed renewable energy capacity will

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[21] Glossary—Contract for Differences, Platts, http://www.platts.com/glossary# (last visited Mar. 30, 2016). To manage fuel volatility, some *Amici Companies* and their facilities enter contracts with utilities or other energy companies to hedge price fluctuations, such as a contract for differences, which contains a period (monthly/quarterly/annual) price agreed between sellers and buyers of commodities for term business. These types of agreements are usually entered by larger electricity consuming facilities, and are generally not available to typical utility commercial customers, which usually fall into the utility's commercial tariff.

[22] Coal Explained—Coal Prices Outlook, Energy Information Administration, http://www.eia.gov/Energyexplained/index.cfm?page=coal_prices (last visited Mar. 30, 2016).

[23] *The Biggest Misconceptions People Have About Renewable Energy*, The Wall Street Journal, Sept, 24, 2013, http://www.wsj.com/articles/SB10001424052702304213904579093702011171762. Scott Nyquist, *Lower Oil Prices But More Renewables: What's Going On?, Mckinsey & Co.*, June 2015, http://www.mckinsey.com/industries/oil-and-gas/our-insights/lower-oil-prices-but-more-renewables-whats-going-on.

reduce the long-term renewable energy prices relative to traditional grid electricity prices over the next few years.

For example, according to the United States Department of Energy, the total cost of utility-scale photovoltaic systems fell from $5.70/watt in 2008 to $2.34/watt in 2014 —a decrease of 59 percent.[24] Additionally, Deutsche Bank recently predicted that the price of solar energy would reach grid parity in most states this year.[25] The *Amici Companies*' interest in the Clean Power Plan results from the uncertain energy market conditions that are hindering the companies' plans to purchase more electricity from renewable energy sources as discussed, or by forcing the *Amici Companies* to obtain the benefits of using more renewable energy at a higher cost.

C. The *Amici Companies* are Corporate, Active Power Purchasers Facing Energy Market Challenges in Fulfilling Their Corporate Commitments and in Their Strategic and Financial Planning

There are several obstacles that the *Amici Companies* face in procuring adequate generation to meet their commitments and to plan for their future energy

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[24] Department of Energy, Revolution…Now The Future Arrives for Five Clean Energy Technologies – 2015 Update (2015), http://energy.gov/sites/prod/files/2015/11/f27/Revolution-Now-11132015.pdf; See Bolinger, M. Seel, J., Utility-Scale Solar 2014: An Empirical Analysis of Project Cost, Performance, and Pricing Trends in the United States, Lawrence Berkeley National Laboratory, September 2015, available at http://go.usa.gov/cYAp4.

[25] Vishal Shah & Jerimiah Booream-Phelps, Solar Grid Parity in a Low Oil Price Era, Deutsche Bank (2015), https://www.db.com/cr/en/docs/solar_report_full_length.pdf.

needs. First, their core business function does not include generating electricity, and they are almost completely reliant on the existing utility energy grid system. As electricity consumers and purchasers, the *Amici Companies* closely monitor the availability and price of retail and wholesale electricity, including for renewable energy, in many jurisdictions. Some *Amici Companies* have incorporated large-scale electricity generation into their corporate strategies; yet, the sheer logistics of completely supplying their operations with self-generation is today impossible.

This impossibility is due to the fact that current energy markets are complicated to navigate and don't deliver the products they, as corporate customers, require. In many instances, they are able to negotiate with utilities for their cost of electricity, yet depending upon the jurisdiction, the utility may not be able to guarantee the generation source. This is due to the utility's obligation to serve its territory and treat all members of its classes of customers similarly.[26] Therefore, utilities cannot always designate renewable generation to be attributed to the *Amici Companies'* facilities.[27] In response to this difficulty, many of the *Amici Companies* have turned to developing their own energy facilities and selling

[26] Id.; see United Fuel Gas Co. v. R.R. Comm'n of Ky., 278 U.S. 300, 309 (1929) (following New York & Queens Gas Co. v. McCall, 245 U. S. 350-351 (1917)).
[27] Id.; Letha Tawney et al., Emerging Green Tariffs in U.S. Regulated Electricity Markets, World Resources Instiute (2016), http://www.wri.org/sites/default/files/Green_Tariffs_US_Electricity_Markets.pdf. A growing number of utilities are offering green tariffs as a part of their service, but their availability is a utility-by-utility inquiry.

electricity from renewable sources into the utility electric grid for use elsewhere, however, due to existing distribution and transmission channels, they cannot direct their generation to all of their core operations. Other *Amici Companies* have committed to purchase Renewable Energy Credits, or RECs, to meet their carbon conscious sustainability goals.[28] Some *Amici Companies* have even incorporated distributed solar at their company locations, yet cannot provide complete electricity self-service.

Thus, as described above, corporate consumers and purchasers in many jurisdictions often must circumvent the traditional utility model to purchase electricity from clean renewable energy sources at competitive prices and at the scale they need, increasing complexity and transaction costs.[29] However, at retail, this option is available only on a state-by-state basis, and some jurisdictions maintain monopoly utilities and have not authorized third parties to offer or enter into PPAs[30] for alternative generation.[31] Thus, as availability of competitive

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[28] Supra note 7. See Richard Martin, *How Corporations Buy Their Way to Green*, MIT Technology Review (Sept. 25, 2015), https://www.technologyreview.com/s/541701/how-corporations-buy-their-way-to-green/.

[29] World Resources Institutes & World Wildlife Foundation, supra note 7.

[30] Lori A. Bird, supra note 10 at V. In this PPA arrangement, a third-party developer finances, constructs, owns, operates, maintains and monitors the renewable energy system, placing risk on the project developer, not the company.

[31] *3rd Party Solar PV Power Purchase Agreement (PPA)*, DSIRE, http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/01/3rd-Party-PPA_0302015.pdf (last visited Mar. 31, 2016). Concerning solar energy, state

generation is patch-work, so too must be the companies' internal energy strategies. For the *Amici Companies* to finance their own generation (known commonly as distributed generation), there must be a justification of cost savings, price certainty, or added reliability. Although distributed generation is an alternative, meeting their energy consumption requirements through total self-generation is today unachievable.

The Clean Power Plan offers a national market solution; it will harmonize the U.S. emissions management policies. The Plan contemplates that States and existing sources will reduce CO_2 emissions, at least in part, by promoting electricity generation from low- and zero-emitting sources, such as wind and solar. The *Amici Companies* believe the Clean Power Plan, when fully implemented, would not cause business harm to their operations. To the contrary, further developing these energy sources provides additional market choices for electricity procurement. Therefore, swift and full implementation of the Clean Power Plan will directly benefit the *Amici Companies*' operations.

II. Implementation of the Clean Power Plan and its Emission Reduction Program will Mitigate Business Risks Due to Climate Impacts

The *Amici Companies* view the Clean Power Plan and its emissions reduction program as a component of their domestic and international business risk

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utility regulators have restricted or not authorized the use of non-utility, third-party PPAs in Florida, Oklahoma, Kentucky, Georgia and North Carolina. In many states, the status of third-party PPAs is unclear.

mitigation strategies, which aim to adapt to the growing consensus on the impacts of climate change on human health and the environment and the associated risks ascribed by the financial and insurance[32] communities. A national and often cited report[33] published by the Risky Business Project, co-chaired by Michael Bloomberg, Henry M. Paulson, Jr., and Thomas F. Steyer, examines the risks to U.S. companies of maintaining the "business as usual" path.[34] This report assumes no new national policy or global action to mitigate climate change and an absence of investments aimed at improving resiliency to future climate impacts.[35]

According to this report, the economic risks faced by domestic businesses are staggering. Companies currently are facing and will face future damage to corporate property and infrastructure stemming from rising sea levels and increased intense weather events.[36] They will also encounter climate-driven impacts to supply chains and agricultural production as well as unreliable energy supply, decreased labor productivity, and threats to public health.[37] Given the range and extent of climate change as a risk factor that poses economic and social

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[32] The Potential Impact of Climate Change on Insurance Regulation, the National Association of Insurance Commissioners (2008), http://www.naic.org/documents/cipr_potential_impact_climate_change.pdf.

[33] Supra note 1.

[34] Id.

[35] Id.

[36] Id.

[37] Id.

disruptions for the *Amici Companies*, the cost of U.S. policy inaction will only increase their exposure.

As a feature of both risk management and environmental stewardship, many of the *Amici Companies* have signed in support of the Paris Agreement that resulted from the United Nations Framework Convention on Climate Change Twenty-First Conference of the Parties ("COP 21").[38] Not only do the *Amici Companies* collectively view the Clean Power Plan as the United States'[39] contribution to the global effort agreed to at COP 21,[40] but also as a domestic climate mitigation policy that directly benefits their organizations by preserving business and investment decisions—whether in their regional and national supply chains, financing decisions, property and long-term infrastructure management, or healthcare expenditures. The following are just a few examples of the risks that the *Amici Companies* face if the Clean Power Plan is vacated or its implementation delayed.

Supply Chain Risk: Supply chains are vitally important to companies. Although different for each company, generally a supply chain is a network of

[38] Letter from Mars et al., to U.S. and Global Leaders (2015), available at http://www.sharedservices.mars.com/assets/225926740.pdf.

[39] *White House Announces Additional Commitments to the American Business Act on Climate Pledge*, White House Briefing Room (Nov. 30, 2015), https://www.whitehouse.gov/the-press-office/2015/11/30/white-house-announces-additional-commitments-american-business-act.

[40] Id.; supra note 38.

organizations, activities, information, and resources required to create a finished product or service and deliver it to an end customer. Companies strive to develop the most efficient and optimized supply chain because it usually translates to lower costs for the company and better service and customer relations.

Climate change is projected to exacerbate supply-chain risk by altering, for example, raw material availability (e.g., water, energy) or disrupting transport routes or scheduling due to extreme weather events.[41] In response to these heightened risks, some *Amici Companie*s are closely examining their respective industry sectors and the concentration of supply to gauge the magnitude of the impact and manage these new challenges, which may include increased fossil-fuel resource disruptions.[42] In light of these looming challenges, the *Amici Companie*s view the Clean Power Plan as a risk management protection because the Plan provides for greater diversified energy resource planning and provides a collaborative strategy for energy markets.[43]

Moreover, the Clean Power Plan may assist the *Amici Companie*s to stabilize and successfully adapt their business practices. For example, KPMG estimates that "the entire profit of food producers is at risk if the industry does not

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[41] Richard Gledhill et al., Business-Not-As-usual: Tackling the Impact of Climate Change on Supply Chain Risk (2013), http://www.pwc.com/gx/en/governance-risk-compliance-consulting-services/resilience/publications/pdfs/issue3/business_not_as_usual.pdf.

[42] Id.

[43] Id.

take steps to mitigate climate change."[44] In 2015, 92 percent of companies in the sector – including some of the biggest global brand names – reported substantive operational risk from physical climate change impacts such as changes in precipitation and temperature, up from 84 percent in 2012.[45] According to a report by Calvert Investments, Oxfam America, and Ceres, the *Amici Companies* "may be subjected to climate change's negative effect on agricultural productivity, decreased availability or less favorable pricing for certain commodities that are necessary for products, such as sugar cane, corn, wheat, rice, oats, potatoes and various fruits. [The *Amici Companies*] may also be subjected to decreased availability or less favorable pricing for water as a result of such change, which could impact our manufacturing and distribution operations. In addition, natural disasters and extreme weather conditions may disrupt the productivity of facilities or the operation of supply chains."[46]

In a "business as usual" scenario and without EPA's emissions reduction program, the *Amici Companies* would face increased risks to core segments of their

[44] CDP, The Forgotten 10% (2015), https://www.cdp.net/Documents/climate-mitigation-in-agricultural-supply-chains.pdf. See Yvo de Boer, Expect the Unexpected: Building Business Value in a Changing World, KPMG (2012), https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/building-business-value.pdf.

[45] Id.

[46] Dave Grossman, Physical Risks of Climate Change, Oxfam America, Calvert Investments & Ceres (2012), http://www.calvert.com/NRC/literature/documents/sr_Physical-Risks-from-Climate-Change.pdf.

business operations. Thus, the Clean Power Plan is an important component of the *Amici Companies'* domestic and international business risk mitigation strategies to protect the integrity and availability of their supply chains.

Financing Risk:[47] Some *Amici Companies* rely on financing for a variety of reasons from running their day-to-day operations, to purchasing additional assets, upgrading current facilities, expanding capacity of existing product lines, entering new markets, and acquiring new businesses. The availability, cost, and accessibility of financing sources are vital to the health of a company.

According to Ceres' Power Forward 2.0 report,[48] institutional investors have been requesting that companies adopt greenhouse gas and other clean energy targets. In the past two years, institutional investors have filed more than 100 clean energy resolutions with companies in the electric power, oil and gas, insurance, manufacturing, and commercial sectors. Investors and stakeholders increasingly expect companies to manage the short- and long-term physical risks (and potential opportunities) posed by climate impacts—and to disclose important

[47] Morgan Stanley et al., The Carbon Principles, Fossil Fuel Generation Financing Enhanced Environmental Diligence Process, Morgan Stanley (2008), https://www.morganstanley.com/about/press/files/1500519_carbon_principles_diligence_2.pdf.

[48] Ceres, Calvert Investments et al., Power Forward 2.0 How American Companies Are Setting Clean Energy Targets and Capturing Greater Business Value (2014), http://assets.worldwildlife.org/publications/685/files/original/Power_forward_portfolio.pdf?1403189801&_ga=1.239087171.1988667687.1458329148.

risks and risk management strategies, including disclosures in U.S. Securities and Exchange Commission filings for the *Amici Companies* publically traded members.[49]

These disclosures should also address the risks posed by climate change to the local communities in which companies operate, as well as the implications of the ways in which companies manage those climate impacts, including the implications for corporate reputations and community relationships.[50] Moreover, banks are beginning to consider the level of environmental risk in their lending models to avoid climate related business risks.[51] Thus, many *Amici Companies* are increasingly hearing investors and lenders express concerns about problems expected from and the absence of sufficient climate change, emissions reductions and clean energy policies, as well as the risks posed by the physical impacts of

[49] Commission Guidance Regarding Disclosure Related to Climate Change, 17 C.F.R. § 211, 231 and 241, Release Nos. 33-9106; 34-61469; FR-82 (February 8, 2010), available at https://www.sec.gov/rules/interp/2010/33-9106.pdf.

[50] Supra note 46.

[51] Id.; Insights: Climate Risk: Rising Tides Raise the Stakes, Standard & Poor's Ratings Services, McGraw Hill Financial (2015), https://www.spratings.com/documents/20184/984172/Insights+Magazine+-+December+2015/cff352af-4f50-4f15-a765-f56dcd4ee5c8. Boston Common Asset Management, *Financing Climate Change: Carbon Risk in the Banking Sector* (2014), http://www.bostoncommonasset.com/documents/ThoughtPiece-2014-07-FinancingClimateChange.pdf.

climate change.[52] The Clean Power Plan and its emission reductions program will help mitigate the risks for these investors and lenders and stabilize the financing marketplace.

Property, Infrastructure, and Insurance Risk:[53] The *Amici Companies* all own and operate property and infrastructure that, as a sound business practice, requires insurance. Property insurance affordability and availability for energy consuming infrastructure already is coming under increasing pressure due to increasing extreme weather losses. For example, Risk Management Solutions, the market leader in catastrophe risk modeling, recognizes that its 100-year database of historical Atlantic hurricane activity is no longer a valid predictor of future risk.[54]

As a result of these trends and their impacts on underwriting losses, overall profitability of the property/casualty insurance sector significantly lags behind other industries. Thus, insurers are responding to the damage already caused by a warming climate, and the continued threat of rising temperatures, by raising

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[52] Statement Signed by 409 Investors, Global Investor Statement on Climate Change (2015), http://www.iigcc.org/files/publication-files/11DecemberGISCC.pdf.

[53] Cynthia McHale & Sharlene Leurig, Stormy Future for U.S. Property/Casualty Insurers: the Growing Costs and Risks of Extreme Weather Events, Ceres (2012), https://www.ceres.org/resources/reports/stormy-future/view.

[54] Id.

insurance premiums.[55] The *Amici Companies* believe that a fully implemented Clean Power Plan would help mitigate the risk of increased insurance costs.

Public Health and Labor Risk:[56] People may be the greatest and most critical assets of the *Amici Companies*. Companies rely heavily on the health and productivity of their labor force to operate productively. However, according to the Risky Business Project, climate change may negatively impact the U.S.'s labor productivity and the public health.[57] Without the predictability of a healthy work force, no business can operate successfully.

The *Amici Companies* believe that the Clean Power Plan will help address the threat to the public health and welfare posed by harmful emissions from fossil-fuel-fired power plants. Researchers at Harvard have concluded that the Plan may help reduce climate-related public health issues, such as higher ozone levels, which can worsen respiratory problems like asthma.[58] Moreover, the Plan, if implemented, could prevent 300,000 lost days of work and school in the year

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[55] Vladimir Stenek et al., Climate Risk and Financial Institutions—Challenges and Opportunities, International Finance Corporation World Bank (2010), http://www.ifc.org/wps/wcm/connect/ed21d4804a830d65860bff551f5e606b/ClimateRisk_FinancialInstitutions.pdf?MOD=AJPERES.

[56] Charles T. Driscoll, *US Power Plant Carbon Standards and Clean Air and Health Co-Benefits*, 5 Nature Climate Change 535–540 (2015), available at http://www.nature.com/nclimate/journal/v5/n6/full/nclimate2598.html.

[57] Supra note 1.

[58] Supra note 55.

2030.[59] Accordingly, the *Amici Companies* support complete and swift implementation of the Clean Power Plan to protect the public health and welfare.

CONCLUSION

For the foregoing reasons, the Clean Power Plan should be fully and swiftly implemented.

Dated: April 1, 2016

Respectfully submitted,

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[59] Letter from American Public Health Association et al. to Governors of the Nation (2015), available at http://www.psr.org/assets/pdfs/governors-letter-on-cpp.pdf.

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 29(c)(7) and 32(a)(7)(C) because it meets the prescribed type-volume limitation of Fed. R. App. P. 29(d) and contains 5,218 words, exclusive of the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Office Word 2010 in 14-point Times New Roman, a proportionally spaced typeface.

Dated: April 1, 2016

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CERTIFICATE REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

No parties have objected to the filing of this brief. Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that a separate brief is necessary because no other *amicus* brief of which we are aware will address the issues raised in this brief: namely that *amici curiae* have an interest in meeting their energy demands by procuring electricity from renewable energy sources and to mitigate the risks climate impacts pose to their business operations, and view the implementation of the Clean Power Plan as critical to achieving both of these interests. In light of *amici curiae*'s position, as discussed more fully herein, *amici* are uniquely positioned to discuss the issues implicated by this case.

Dated: April 1, 2016

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CERTIFICATE FEDERAL RULE OF APPELLATE PROCEDURE 29(c)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* state that no counsel for a party authored the brief in whole or in part, and no party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or their counsel contributed money that was intended to fund the preparation or submission of this brief

Dated: April 1, 2016

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CERTIFICATE OF SERVICE

I certify that on April 1, 2016, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system for service on all registered counsel of record in Case No. 15-1363, and consolidated cases.

Dated: April 1, 2016

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