

ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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

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

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
REGINA A. McCARTHY, ADMINISTRATOR,
Respondents.

**UNOPPOSED MOTION OF SOUTHEASTERN LEGAL
FOUNDATION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF PETITIONERS**

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Dated: February 19, 2016

Pursuant to Federal Rule of Appellate Procedure 29(b), and D.C. Circuit Rule 29(b), Southeastern Legal Foundation (SLF or *Amicus*), respectfully moves for leave to participate as *amicus curiae* in support of Petitioners in the above-captioned action for review of the final rule promulgated by the United States Environmental Protection Agency (EPA) entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (Clean Power Plan).

Counsel for SLF has consulted with the parties by sending email notice on February 16, 2016, to all designated or liaison counsel for all parties and intervenors, asking them to respond by 3:00 p.m. on Friday, February 19, 2016, whether they consented, objected to, or took no position on SLF's proposed participation, indicating that if no response was received by 3:00 p.m. on Friday, February 19, 2016, counsel for SLF would indicate to the Court that those parties took no position on this motion.

Counsel for Respondents, United States Environmental Protection Agency and Regina A. McCarthy, Administrator, have indicated their clients consent to the proposed *Amicus* filing.

Counsel for Petitioners in Case Nos. 15-1366, 15-1442, 15-1474, 15-1475, 15-1488, Petitioner the State of Missouri in Case No. 15-1363, Petitioners South Texas Electric Cooperative and San Miguel Electric Cooperative in Case No. 15-

1376, and Intervenors Gulf Coast Lignite Coalition, Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company have indicated their clients consent to the proposed *Amicus* filing.

Counsel for Petitioners in Case Nos. 15-1370, 15-1373, 15-1374, 15-1398, 15-1418, 15-1422, 15-1459, 15-1363 (other than the State of Missouri whose counsel indicated it consents and the State of Louisiana whose counsel indicated it does not oppose), 15-1376 (other than Petitioners South Texas Cooperative and San Miguel Electric Cooperative whose counsel indicated they consent), Petitioner Mississippi Public Service Commission in Case No. 15-1409, and Intervenors American Wind Energy Association, Solar Energy Industries Association, and NextEra Energy have indicated their clients take no position to the proposed *Amicus* filing.

Counsel for Petitioners in Case Nos. 15-1380, 15-1393, 15-1451, Petitioner State of Louisiana in Case No. 15-1363 have indicated their clients do not oppose or would not object to the proposed *Amicus* filing.

Because no other responses have been received to date, *Amicus* hereby notifies the Court that they have not taken a position on the motion. Accordingly, this motion has not been opposed by any party or intervenor. This motion is timely under Federal Rule of Appellate Procedure 29(c) and D.C. Circuit Rule 29(b)-(c) because it is filed as soon as practicable after the docketing of the case and before the deadline for *amicus* briefs set by the Court for February 23, 2016.

I. Background.

On October 23, 2015, the EPA published its final version of the Clean Power Plan, which regulates carbon dioxide emissions from existing power plants under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), 80 Fed. Reg. 64,661 (Oct. 23, 2015). Petitioners have filed these nearly forty consolidated cases seeking judicial review of the Clean Power Plan.

II. Legal standard.

Pursuant to the D.C. Circuit Court of Appeals rules, “[a]ny individual or non-governmental entity intending to participate as *amicus curiae* must file either a written representation that all parties consent to such participation, or, in the absence of such consent, a motion for leave to participate as *amicus curiae*.” D.C. Cir. R. 29(b). A motion for leave to participate must state “the movant’s interest, . . . the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(b).

III. SLF has a significant interest in this litigation.

Founded in 1976, Southeastern Legal Foundation is one of the country's oldest and most influential national public interest law firms. For over 40 years, SLF has litigated in the courts of law and public opinion in support of separation of powers and federalism – Constitutional foundational principles that are front and center in the current challenge to the Clean Power Plan. Most recently, SLF represented 14 members of Congress and multiple professional associations and companies in a challenge to the greenhouse gas regulations before the Supreme Court in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). In that case, the Supreme Court issued a unanimous opinion striking down the EPA's greenhouse gas regulations as executive overreach and in doing so, emphasized that the EPA must adhere to the letter of the existing law when it enacts new regulations. *Id.* SLF also filed an *amicus curiae* in *American Electric Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), which addressed greenhouse gas regulations, and has filed public comments regarding several rules proposed by the EPA regarding greenhouse gases.

IV. An *amicus curiae* brief from SLF will be relevant and useful to this Court's consideration of the merits in these consolidated cases.

The Clean Power Plan is substantially and procedurally flawed – violating both the Clean Air Act and the Constitution. Purportedly under the EPA's authority under Clean Air Act § 111(d), the Clean Power Plan places greenhouse gas emission

reduction requirements on states through a combination of requirements that exceed the EPA's authority, such as demand-side controls and redispatching power resources.

Through an *amicus curiae* brief, SLF will show that the EPA's actions are unconstitutional and violate separation of powers principles inherent in the Constitution. The EPA's intention to bypass congressional intent and initiate a unilateral executive agenda creates two parallel but related infirmities. First, the EPA has no authority to regulate outside of the express strictures of the authorizing law enacted by Congress. Second, to the extent executive action finds no warrant in the statute, as is the case here, the measure creates an unconstitutional intrusion into the sole domain of Congress. SLF's brief will not duplicate arguments made by the parties. Rather, it will provide the unique perspective of SLF, shaped largely by its 40 year history of challenging similar executive overreach and its recent experience in *UARG v. EPA*, on the issues presented in these consolidated cases.

V. Conclusion.

For these reasons, SLF respectfully requests that this Court grant its unopposed motion for leave to file an *amicus curiae* brief in support of Petitioners.

This 19th day of February, 2016.

Respectfully submitted,

/s/ Kimberly S. Hermann
Kimberly S. Hermann

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CERTIFICATE OF COMPLIANCE

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

This 19th day of February, 2016.

/s/ Kimberly S. Hermann

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CERTIFICATE AS TO PARTIES AND *AMICI CURIAE*

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), counsel certifies as follows: Except for Southeastern Legal Foundation, all parties, intervenors, and *amici* appearing in this court are, to the best of my knowledge, listed in the Joint Certificate as to Parties, Rulings, and Related Cases (Dec. 18, 2015, Doc No. 1589420), the New York University School of Law's Certificate (Dec. 17, 2015, Doc No. 1589260); the National League of Cities, *et al.*'s Certificate (Dec. 22, 2015, Doc No. 1589943), Pedernales Electric Cooperative, Inc.'s Certificate (Jan. 4, 2016, Doc No. 1591712), the Municipal Electric Authority of Georgia's Certificate (Jan. 11, 2016, Doc No. 1592854), the American Thoracic Society, *et al.*'s Certificate (Jan. 15, 2016, Doc No. 1594036), the Service Employees International Union's Certificate (Feb. 5, 2016, Doc No. 1597552), and Pacific Legal Foundation *et al.*'s Certificate (Feb. 5, 2016, Doc No. 1597462).

This 19th day of February, 2016.

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

Pursuant to Federal Rules of Appellate Procedure 26.1, 29(c) and D.C. Circuit Rule 26.1, Southeastern Legal Foundation, Inc. declares as follows: SLF is a non-profit organization and therefore does not have a parent company. As such, no publicly held corporation owns 10% or greater ownership in SLF.

This 19th day of February, 2016.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 25(c), I hereby certify that, on this 19th day of February 2016, I caused the foregoing document to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.

This 19th day of February, 2016.

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