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**ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016**

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**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, 15-1398, 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)

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**United States Court of Appeals  
for the District of Columbia Circuit**

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STATE OF WEST VIRGINIA, ET AL.,  
*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY and REGINA A MCCARTHY,  
Administrator, United States Environmental Protection Agency,  
*Respondents.*

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On Petition for Review of a Final Rule of the United States  
Environmental Protection Agency

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**MOTION OF STATE OF NEVADA AND CONSUMERS' RESEARCH  
FOR LEAVE TO FILE CONSOLIDATED BRIEF AS AMICI CURIAE**

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February 23, 2016

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Pursuant to Fed. R. App. P. 29(b) and D.C. Circuit Rule 29(b), the State of Nevada and Consumers' Research, by and through counsel, jointly move for leave to file the attached consolidated brief as amici curiae in support of the petitioners in the above-captioned consolidated cases.

The petitions at issue challenge the decision of the Environmental Protection Agency ("EPA") to regulate power plants and other existing sources under Section 111(d) of the Clean Air Act ("CAA"). *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. (Oct. 23, 2015). For reasons explained below, Amici agree with petitioners that EPA's decision is unlawful and will impose costly harms on the public. In support of this Motion, Amici state as follows:

### **LEGAL STANDARD**

D.C. Circuit Rule 29(b) provides that "governmental" entities, defined to include States of the United States, need not seek leave of Court or the consent of parties before filing as amicus curiae. Rule 29(d) provides that, although amici curiae on the same side must generally "join in a single brief to the extent practicable," this

requirement “does not apply to a governmental entity.” Accordingly, Nevada may as of right file its own brief as *amicus curiae*.

Nonetheless, mindful of the Court’s admonitions in favor of consolidated briefing, and the congruence of its views with those of Consumers’ Research, Nevada hereby seeks leave to submit the attached consolidated brief. Allowing Consumers’ Research to join in this consolidated filing with Nevada—in light of Nevada’s right to file its own brief—reduces burdens on the Court and parties without prejudice to anyone. The Court accordingly should permit this consolidated submission.

## **BACKGROUND**

These petitions concern EPA’s interpretation of Section 111 of the CAA, which is entitled “standards of performance for new stationary sources.” 42 U.S.C. § 7411. Section 111’s focus is on emissions from “new stationary sources.” *See Porter v. Nussle*, 534 U.S. 516, 527-28 (2002) (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.”) (quotation omitted). In enacting the statute, Congress empowered EPA with significant authority to regulate emissions from such new sources.

*See, e.g.*, 42 U.S.C. § 7411(b)(1)(B).

Despite its focus on new sources, Section 111 also contains a subsection directed at existing sources: *Id.* § 7411(d). Under that subsection, EPA may, under certain tightly constrained circumstances, require States to establish “standards of performance” for existing sources. *See id.* § 7411 (d)(1)(B). Citing Subsection 111(d) as its authority, EPA on October 23, 2015, promulgated a sweeping set of regulations imposing unprecedented types and degrees of burdens on existing electric generating units. Following EPA’s rule, representatives of 25 States, as well as numerous other parties, petitioned for review in this Court.

After consideration, the Nevada Department of Conservation and Natural Resources, through its Division of Environmental Protection, concluded that Nevada is differently situated as compared to other States participating as petitioners in this litigation, and therefore Nevada has not joined this litigation as a State petitioner.

But Nevada and Nevadans are still harmed by EPA’s unlawful and economically unwise regulations in at least two distinct ways. *First*, EPA’s unprecedented regulations harm energy consumers across

the nation, thus threatening harm to the overall national economy and in turn to Nevada's vital tourism industry. *Second*, EPA's final rule contravenes basic principles of administrative law, separation of powers, and federalism. It thus opens the door to further rounds of discretionary EPA regulations—regulations that may well aim directly at Nevada utilities, businesses, and consumers.

Founded in 1929, Consumers' Research is an independent educational organization whose mission is to increase the knowledge and understanding of issues, policies, products, and services of concern to consumers and to promote the freedom to act on that knowledge and understanding. Consumers' Research believes that the cost, quality, availability, and variety of goods and services used or desired by American consumers—from both the private and public sectors—are improved by greater consumer knowledge and freedom. To that end, Consumers' Research pioneered product testing to provide consumers with unbiased, reliable, scientific information. Moreover, to protect consumers, Consumers' Research examines the effects of government programs, laws, and regulations. Consumers' Research seeks leave to file an amicus brief in this litigation because it is concerned that the

decision on review will substantially increase the price and decrease the reliability of the electricity service used by the vast majority of American consumers.

### ARGUMENT

Amici have unique perspectives that will aid the Court's deliberations, while avoiding a proliferation of amicus briefs. Although consistent with, and supportive of, arguments advanced by petitioners, the attached brief elaborates a unitary and distinct strand of argument that should be given careful consideration in deciding this case.

Here, EPA has set out to transform how the nation produces electricity. EPA's rule, if allowed to stand, will force producers to overhaul power production, close existing plants, and impose immense costs on consumers. But, as explained in the attached brief, EPA's regulatory regime is inconsistent with the plain terms of the Clean Air Act and foundational constitutional principles.

In defense of its regulations, EPA argues that an unprecedented expansion of its authority is supported by *Chevron*. But, as the brief also explains, this argument misunderstands the *Chevron* doctrine. *Chevron* commands courts to apply plain statutory text; it does not give

agencies broad authority to rewrite the law. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

More fundamentally, this case arises in an especially delicate constitutional context; namely, EPA's attempt to regulate, via the sovereign authority of the States, a vast domain of private, domestic, economic activity. If these EPA regulations are upheld, there is nothing to prevent the agency from ratcheting up their stringency in future rulemakings, thus controlling at its own discretion the fortunes of private utility companies and the ultimate price paid for indispensable electricity service by nearly all Americans.

For the above reasons, Nevada seeks leave to join with Consumers' Research and file the attached consolidated brief explaining problems entailed by EPA's unlawful action—especially as they pertain to energy prices and reliability, the national economy, and the rule of law.

## CONCLUSION

Amici respectfully request that this motion be granted.

Respectfully submitted,

*/s/Lawrence VanDyke*

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February 23, 2016

**CERTIFICATE AS TO PARTIES AND AMICI CURIAE**

Pursuant to D.C. Circuit Rule 28(a)(1)(A), all parties, intervenors, and amici are, to the best of my knowledge, listed in the Opening Brief of Petitioners on Core Legal Issues filed on February 19, 2016, with the exception of amici curiae State of Nevada and Consumer's Research and the following amici curiae in support of Petitioners:

- Amici curiae Scientists in Support of Petitioners, listed at pages *i-iii*, of Brief of Amici Curiae Scientists in Support of Petitioners Supporting Reversal [Doc.# 1600166];
- Amici curiae Former State Public Utility Commissioners, listed at pages 1-2 of Brief of Amici Curiae Former State Public Utility Commissioners [Doc. # 1600328];
- Amici curiae 60Plus Association, Federalism in Action, Hispanic Leadership Fund, Independent Women's Forum, National Taxpayers Union, and Taxpayers Protection Alliance;
- Amicus curiae Landmark Legal Foundation.

/s/ Robert R. Gasaway  
Robert R. Gasaway

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amici curiae the State of Nevada and Consumers' Research certify (i) that Nevada is a sovereign State of the Union and (ii) Consumers' Research has no outstanding shares or debt securities in the hands of the public, and has no parent company. No publicly held company has a 10% or greater ownership interest in Consumers' Research.

**CERTIFICATE OF SERVICE**

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that on this 23rd day of February, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

*/s/ Robert R. Gasaway*

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Robert R. Gasaway