

[ORAL ARGUMENT NOT YET SCHEDULED]

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

STATE OF WEST VIRGINIA, <i>et al.</i> ,)	
)	
Petitioners	)	No. 15-1363
	)	(consolidated with Nos.
	)	15-1364, 15-1365,
	)	15-1366, 15-1367,
	)	15-1368, 15-1370,
v.	)	15-1371, 15-1372,
	)	15-1373, 15-1374,
	)	15-1375, 15-1376,
	)	15-1377, 15-1378,
	)	15-1379, 15-1380,
	)	15-1382, 15-1383,
UNITED STATES ENVIRONMENTAL	)	15-1386, 15-1393,
PROTECTION AGENCY, and REGINA A.	)	15-1398, 15-1409,
MCCARTHY, Administrator	)	15-1410, 15-1413,
	)	15-1418, 15-1422,
Respondents.	)	15-1432, 15-1442,
	)	15-1451, 15-1459)

**UNOPPOSED MOTION OF THE INSTITUTE FOR POLICY INTEGRITY
AT NEW YORK UNIVERSITY SCHOOL OF LAW FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS**

Pursuant to Fed. R. App. P. 29(b) and D.C. Circuit Rule 29(b), the Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law,¹

¹ This motion does not purport to represent the views of New York University School of Law, if any.

by and through its undersigned counsel, moves this Court for leave to participate as *amicus curiae* in the above-captioned case in support of Respondents. Proposed *amicus curiae* has consulted with the parties. Counsel for Federal Respondents have indicated that their clients consent to Policy Integrity's filing of an *amicus* brief. Counsel for a number of Movant-Intervenors in support of Respondents, including State and Municipal Intervenors; Calpine Corporation; City of Austin d/b/a Austin Energy; City of Seattle by and through its City Light Department; National Grid Generation, LLC; New York Power Authority; Pacific Gas & Electric Company; Sacramento Municipal Utility District; Southern California Edison Company; Environmental Non-Government Organizations; Sierra Club; Center for Biological Diversity; the American Wind Energy Association; the Solar Energy Industries Association; and NextEra Energy, Inc. have indicated that their clients consent to Policy Integrity's filing of an *amicus* brief. Counsel for Petitioner in case 15-1442 have also responded that their client consents to Policy Integrity's participation as *amicus curiae*. Counsel for Petitioners in cases 15-1363, 15-1364, 15-1380, 15-1398, and 15-1409, 15-1422, 15-1451, and 15-1459 have advised that their clients take no position on Policy Integrity's filing of an *amicus* brief. No other counsel for any parties or movant-intervenors in the case responded to notice sent to designated or liaison counsel, as applicable, asking whether they consented,

objected, or took no position on Policy Integrity's proposed participation. That notice was sent to designated or liaison counsel, as applicable, on Friday, December 11, 2015 and provided that if no response was received by Tuesday, December 15, 2015, counsel for Policy Integrity would indicate that those parties took no position on this motion.

This motion is timely under Federal Rule of Appellate Procedure 29(e) and Circuit Rule 29(b)-(c) because it is filed as soon as practicable after the docketing of the case and before Respondents' brief is filed—therefore, before seven days following the filing of the principal brief of the party being supported.

In support of this Motion, proposed *Amicus Curiae* states as follows:

I. Nature of the Case

On October 23, 2015, the Environmental Protection Agency (“EPA”) promulgated the Clean Power Plan, which limits 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. 64,510 (Oct. 23, 2015). Petitioners have filed these consolidated cases, seeking judicial review of the Clean Power Plan.

Petitioners argue that EPA's approach to regulation under the Clean Power Plan is unprecedented insofar as the emissions limits cannot necessarily be met by

individual power plants through design or operational changes alone.² However, the history of EPA's regulatory actions under section 111(d) and other relevant Clean Air Act provisions tells a different story.

In fact, Clean Air Act regulatory programs—over decades and under administrations of both parties—have looked beyond the four walls of a source to achieve emission reductions.³ Policy Integrity proposes to draw on its expertise regarding the regulatory history and economic reasoning underlying flexible, cost-minimizing Clean Air Act regulatory approaches in order to draft an *amicus curiae* brief that can assist the Court in its review of Petitioners' challenge.

II. Interest of Proposed Amicus Curiae and Relevance and Desirability of Participation

Policy Integrity is a nonprofit organization dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the

² See, e.g., Doc. No. 1587531, at 6-7 (Dec. 8, 2015).

³ See, e.g., Richard L. Revesz & Jack Lienke, *Struggling for Air: Power Plants and the "War on Coal"* (2016); Richard L. Revesz, et al., *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan* (Inst. for Policy Integrity, Working Paper No. 2015/2, 2015), available at <http://policyintegrity.org/files/publications/FamiliarTerritory.pdf>; *Regulations for New and Existing Power Plants: Legal Perspectives, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 114th Cong. (Oct. 22, 2015) (testimony of Richard Revesz); *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 114th Cong. (Mar. 17, 2015) (testimony of Richard Revesz).

fields of administrative law, economics, and public policy, with a particular focus on environmental issues. Policy Integrity is a collaborative effort of faculty at New York University School of Law; a full-time staff of attorneys, economists, and policy experts; law students; and a Board of Advisors comprised of leaders in public policy, law, and government. Policy Integrity has produced scholarship on and has expertise in the regulation of greenhouse gases and other pollutants under the Clean Air Act, regulatory impact analysis, and rulemaking under the Administrative Procedure Act.⁴ Among other relevant works, Policy Integrity staff have authored the book *Struggling for Air: Power Plants and the “War on Coal,”* which describes how the Clean Power Plan is the natural extension of decades of Clean Air Act policies under administrations of both parties to limit the harmful effects of the Act’s partial grandfathering of existing power plants.

Policy Integrity has previously filed *amicus curiae* briefs in a number of significant cases in this Court and the Supreme Court involving EPA’s authority to regulate pollutants, including greenhouse gases, under the Clean Air Act. Policy Integrity filed an *amicus curiae* brief discussing the history of interpretations of

⁴ See, e.g., Richard L. Revesz, et al., *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan* (Inst. for Policy Integrity, Working Paper No. 2015/2, 2015), available at <http://policyintegrity.org/files/publications/FamiliarTerritory.pdf>; Inimai M. Chettiar & Jason A. Schwartz, *The Road Ahead: EPA’s Options and Obligations*

EPA's authority under section 111(d) in an earlier challenge to the proposed Clean Power Plan.⁵ Policy Integrity's director, Richard Revesz, has also testified twice before Congress regarding the legality of the Clean Power Plan.⁶

Policy Integrity has a significant interest in the outcome of the legal issues presented in this case. In particular, Policy Integrity has an interest in ensuring that EPA has the authority to promulgate flexible standards to reduce carbon pollution, such as the Clean Power Plan standards under section 111(d). Policy Integrity has participated extensively in rulemaking proceedings to support EPA's use of flexible mechanisms to reduce externalities from greenhouse gas pollution, including submitting comments to EPA with regard to the Clean Power Plan at issue in this case.

Policy Integrity proposes to file an *amicus curiae* brief discussing the extensive regulatory precedent for flexible Clean Air Act regulatory mechanisms that reach beyond the four walls of a source, as well as economic and legal

for Regulating Greenhouse Gases (2009).

⁵ Br. of Amicus Curiae Institute for Policy Integrity, *West Virginia v. EPA*, Case No. 14-1146 (Jan. 30, 2015).

⁶ *Regulations for New and Existing Power Plants: Legal Perspectives*, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce, 114th Cong. (Oct. 22, 2015) (testimony of Richard Revesz); *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues*, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce, 114th Cong. (Mar. 17, 2015) (testimony of Richard Revesz).

scholarship supporting this approach to regulation.⁷ Policy Integrity has written and advocated extensively on these issues in the past, and its expertise on these issues may assist the Court in analyzing Petitioners' arguments.

If permitted to file an *amicus curiae* brief, Policy Integrity would file its brief in accordance with the briefing schedule and any formatting requirements established by the Court, including word count limitations.

CONCLUSION

For the foregoing reasons, the unopposed motion for leave to file an *amicus curiae* brief in support of Respondent should be granted.

Respectfully submitted on December 17, 2015.

/s/ Richard L. Revesz

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⁷ The precise scope of Policy Integrity's brief will depend on issues briefed by parties, intervenors, and other *amici*, with an emphasis on covering topics that would benefit from additional briefing, rather than topics that are adequately briefed elsewhere.

CIRCUIT RULE 28(a)(1) CERTIFICATE AS TO PARTIES AND AMICI

Except for the following, all parties, intervenors, and amici appearing in this court are, to the best of my knowledge, listed in the listed Joint Certificate as to Parties, Rulings and Related Cases filed by liaison counsel for Petitioners on December 8, 2015:

- (1) The Kansas City Board of Public Utilities—Unified Government of Wyandotte County/Kansas City, Kansas is Petitioner in case 15-1442;
- (2) The North American Coal Corporation is Petitioner in case 15-1451;
- (3) Indiana Utility Group is Petitioner in case 15-1459;
- (4) Philip Zoebisch is *Amicus Curiae* in support of Petitioner.

/s/ Richard L. Revesz
Richard L. Revesz

Counsel for the Institute for Policy Integrity

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity (“Policy Integrity”) is a not-for-profit organization at New York University School of Law. Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has no parent companies. No publicly-held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

/s/ Richard L. Revesz
Richard L. Revesz

Counsel for the Institute for Policy Integrity

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2015, I filed the foregoing Unopposed Motion of the Institute for Policy Integrity at New York University School of Law for Leave to File an *Amicus Curiae* Brief in Support of Respondent and Rule 26.1 Disclosure Statement through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users. I also caused the foregoing to be served via Federal Express on counsel for the following parties at the following addresses:

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