

ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1140 (and consolidated cases)

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

AMERICAN LUNG ASS'N, *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
84 Fed. Reg. 32,520 (July 8, 2019)

**BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES;
THE U.S. CONFERENCE OF MAYORS; AND 23 CITIES, COUNTIES
AND MAYORS IN SUPPORT OF STATE AND MUNICIPAL, PUBLIC
HEALTH AND ENVIRONMENTAL, POWER COMPANY, AND CLEAN
ENERGY TRADE ASSOCIATION PETITIONERS**

Michael Burger (*counsel of record*)
Columbia Environmental Law Clinic
Morningside Heights Legal Services
Hillary Aidun
Sabin Center for Climate Change Law
Columbia Law School
435 W. 116th St.
New York, NY 10027
(212) 854-2372

DATED: April 24, 2020

Counsel for Local Government Coalition

Additional counsel are listed on the following pages

Carolyn Berndt
Legislative Director, Sustainability
Federal Advocacy
National League of Cities
660 North Capitol St. NW
Washington, DC 20001
(202) 626-3101
Counsel for National League of Cities

Judy M. Sheahan
Assistant Executive Director
The U.S. Conference of Mayors
1620 I St. NW
Washington, D.C. 20006
(202) 293-7330

Esteban A. Aguilar, Jr.
Albuquerque City Attorney
P.O. Box 2248
Albuquerque, NM 87103
Counsel for City of Albuquerque

Brad Branham
City Attorney
70 Court Plaza
Asheville, NC 28801
(828) 259-5610
Counsel for the City of Asheville

Dana P. Moore
Acting City Solicitor
Baltimore City Law Department
100 N. Holliday St., Suite 101
Baltimore, MD 21146
*Attorney for Mayor and City Council
of Baltimore*

Eugene O'Flaherty
Corporation Counsel
City of Boston
One City Hall Square, Room 615
Boston, Massachusetts 02201
(617) 635-4034

David Hughes
Deputy County Attorney
Boulder County, Colorado
PO Box 471
Boulder, Colorado 80306
Counsel for County of Boulder

Ralph D. Karpinos
Town Attorney
405 Martin Luther King Jr. Blvd.
Chapel Hill, North Carolina
27514
(919) 968-2746
Counsel for Town of Chapel Hill

Miriam Soler Ramos
City Attorney
405 Biltmore Way, 2nd Floor
Coral Gables, FL 33134
(305) 460-5084
Counsel for City of Coral Gables

Mitchell A. Bierman
Town Attorney
10720 Caribbean Boulevard,
Ste. 105
Cutler Bay, Florida 33189
(305) 234-4262
Counsel for Town of Cutler Bay

Eli Savit
Senior Legal Counsel
City of Detroit
2 Woodward Avenue
Detroit, MI 48226
(313) 237-1737
*Counsel for Detroit Mayor Mike
Duggan*

Mayor Steve Schewel
City of Durham
101 City Hall Plaza
Durham, North Carolina 27701
(919) 560-4333
Mayor of City of Durham

Kristine Morieko
Mayor of Glen Rock
1 Harding Plaza
Glen Rock, NJ 07452
Phone: (201) 670-3956
Mayor of the Borough of Glen Rock

Vince Ryan
Harris County Attorney
Sarah Jane Utley
Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 274-5124
Counsel for Harris County

Ronald C. Lewis
City Attorney
Suzanne Chauvin
Sr. Assistant City Attorney II
Collyn Peddie
Sr. Assistant City Attorney
900 Bagby, 4th Floor
Houston, Texas 77002
(832) 393-6491
Counsel for the City of Houston

Jennifer Vega-Brown
City Attorney
City Attorney's Office
700 N. Main
Las Cruces, NM 88004
(575) 541-2128
Counsel for City of Las Cruces

Erik Nilsson
Interim City Attorney
Jocelyn E. Bremer
Assistant City Attorney
350 South Fifth Street, Suite 210
Minneapolis, MN 55415
(612) 673-2078
Counsel for the City of Minneapolis

Sunni J. LeBeouf
City Attorney
City of New Orleans
1300 Perdido Street
City Hall Room 5E03
New Orleans, LA 70112
(504) 658-9800
Counsel for the City of New Orleans

Cris Meyer
City Attorney
200 W. Washington St., 13th Floor
Phoenix, AZ 85003
602-262-6761
Counsel for the City of Phoenix

Yvonne S. Hilton
City Solicitor
City of Pittsburgh Department of Law
414 Grant Street
Pittsburgh, PA 15219-2453
Counsel for the City of Pittsburgh

Tracy Reeve
City Attorney
1221 SW 4th Avenue
Portland, OR 97204
Counsel for City of Portland

Jeffrey Dana
City Solicitor
City of Providence
444 Westminster Street, Suite 220
Providence, RI 02903
Counsel for the City of Providence

Lyndsey M. Olson
City Attorney
City of Saint Paul
400 City Hall and Court House
15 West Kellogg Boulevard
Saint Paul, Minnesota 55102
Counsel for the City of Saint Paul

Erin Mendenhall
Mayor of Salt Lake City
451 S. State Street, Rm. 306
Salt Lake City, Utah 84111
(801) 535-7704
Mayor of Salt Lake City

Erin K. McSherry
City Attorney
City of Santa Fe
200 Lincoln Avenue
Santa Fe, New Mexico 87504
505-231-6512
Counsel for the City of Santa Fe

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for those listed in the Identities and Interests section below, all parties, intervenors, and *amici* appearing in this case are listed in the brief for State and Municipal Petitioners.

References to the rulings under review and related cases appear in State and Municipal Petitioners' brief.

**STATEMENT REGARDING SEPARATE BRIEFING,
AUTHORSHIP, AND MONETARY CONTRIBUTIONS**

The Local Government Coalition files this separate *amicus* brief in compliance with the word limits set forth in the Court’s Order of January 31, 2020 (Doc. 1826621). *See* Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i). A single joint brief is not practicable in this case because the other *amicus* briefs do not address the unique perspective of the Local Government Coalition as the entities responsible for local responses to climate change. *See* D.C. Circuit Rule 29(d).

Under Federal Rule of Appellate Procedure 29(a)(4)(E), the Local Government Coalition states that no party’s counsel authored this brief in whole or in part, and no party or party’s counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amici curiae* or their counsel—contributed money intended to fund the preparation or submission of this 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.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES v

CORPORATE DISCLOSURES.....vii

TABLE OF CONTENTS viii

TABLE OF AUTHORITIESix

GLOSSARYxvi

IDENTITIES AND INTERESTS OF *AMICI CURIAE* 1

 1. Cities Are Already Grappling with the Effects of Climate Change
 2

 2. EPA’s Action Frustrates Cities’ Efforts to Address and Adapt to
 Climate Change 8

ARGUMENT..... 16

 1. The Repeal of the Clean Power Plan and Replacement with the
 ACE Rule Are Arbitrary and Capricious and Contrary to Law.
 16

CONCLUSION.....28

TABLE OF AUTHORITIES

Cases

| | |
|---|------------|
| <i>Am. Elec. Power Co., Inc. v. Conn.</i> , 564 U.S. 410 (2011) | 22, 23, 24 |
| <i>Am. Petroleum Inst. v. EPA</i> , 661 F.2d 340 (5th Cir. 1981) | 25 |
| <i>Bureau of Alcohol, Tobacco and Firearms v. Fed. Labor Relations Auth.</i> , 464 U.S. 89 (1983) | 17 |
| <i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962) | 20 |
| <i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984) | 19 |
| <i>Coal. for Responsible Regulation, Inc. v. EPA</i> , 694 F.3d 102 (D.C. Cir. 2012) | 19 |
| <i>Encino Motorcars, LLC v. Navarro</i> , 136 S.Ct. 2117 (2016) | 26, 27 |
| <i>Fox Television v. FCC</i> , 556 U.S. 502 (2009) | 22, 27, 29 |
| <i>Friends of Buckingham v. State Air Pollution Control Bd.</i> , 947 F.3d 68 (4th Cir. 2020) | 27 |
| <i>Gamefly, Inc. v. Postal Regulatory Comm’n</i> , 704 F.3d 145 (D.C. Cir. 2013) | 22 |
| <i>Gresham v. Azar</i> , 950 F.3d 93 (D.C. Cir. 2020) | 17, 18, 19 |
| <i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007) | 19, 25 |
| <i>Mid States Coal. for Progress v. Surface Transp. Bd.</i> , 345 F.3d 520 (8th Cir. 2003) | 28 |
| <i>Michigan v. EPA</i> , 135 S. Ct. 2699 (2015) | 19 |
| <i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. Ruckelshaus</i> , 719 F.2d 1159 (D.C. Cir. 1983) | 17 |
| <i>Nat’l Cable & Telecomms. Ass’n v. Brand X.</i> , 545 U.S. 967 (2005) | 26 |

TABLE OF AUTHORITIES, CONT.

| | |
|---|------------|
| <i>Nat’l Asphalt Pavement Ass’n v. Train</i> , 539 F.2d 775 (D.C. Cir. 1976)..... | 17 |
| <i>NLRB v. Brown</i> , 380 U.S. 278 (1965) | 17 |
| <i>NRDC v. EPA</i> , 808 F.3d 556 (2d Cir. 2015)..... | 25 |
| <i>Sierra Club v. EPA</i> , 884 F.3d 1185 (D.C. Cir. 2018)..... | 20, 22, 23 |
| <i>Sw. Elec. Power Co. v. United States</i> , 920 F.3d 999 (5th Cir. 2019)..... | 25 |
| <i>U.S. Sugar Corp. v. EPA</i> , 830 F.3d 579, 629 (D.C Cir. 2016)..... | 17, 22 |
| <i>Utility Air Regulatory Grp v. EPA</i> , 573 U.S. 302 (2014)..... | 19 |
| <i>Wagner v. Fed. Elec. Comm’n</i> , 717 F.3d 1007 (D.C. Cir. 2013)..... | 17 |

STATUTES

| | |
|-----------------------|--------|
| 42 U.S.C. § 7411..... | 19, 24 |
| 42 U.S.C. § 7607..... | 23 |

RULES

| | |
|---|----------------|
| 42 Fed. Reg. 53,657 (Oct. 3, 1977)..... | 24 |
| 80 Fed. Reg. 64,510, 64,620 (Oct. 23, 2015) | 24 |
| 80 Fed. Reg. 64,661, 64,943 (Oct. 23, 2015) | 18 |
| 84 Fed. Reg. 32,520, 32,523 (Sept. 6, 2019) | 18, 23, 25, 27 |
| 40 C.F.R. pt. 60, subpt. TTTT, tbl. 2 | 24 |

OTHER AUTHORITIES

| | |
|---|------|
| <i>Andrew Freedman, Widespread, oppressive and dangerous heat to roast much of the U.S. through the weekend</i> , THE WASHINGTON POST, July 17, 2019..... | 5 |
| Alliance for a Sustainable Future, MAYORS LEADING THE WAY ON CLIMATE (Jan. 2020), https://bit.ly/2T4tMpY | 3, 8 |

TABLE OF AUTHORITIES, CONT.

| | |
|--|--------|
| Boston Climate Preparedness Task Force, <i>Climate Ready Boston: Municipal Vulnerability to Climate Change</i> (Oct. 2013) | 11 |
| Boulder County, 2013 <i>Flood Recovery</i> , bit.ly/1T5t1Ho (visited Feb. 27, 2020) | 4 |
| Boulder County, Colorado, Budget 2019, https://bit.ly/2J60EJb | 4 |
| Boulder County Sustainability Plan (2018), https://bit.ly/2T1CbKP | 13 |
| City of Albuquerque, <i>Sustainability</i> (visited Feb. 26, 2020), https://bit.ly/2I022g4 | 15 |
| City of Asheville Resolution No. 20-25 (Jan. 28, 2020), https://bit.ly/382IfY3 | 14 |
| City of Baltimore, Disaster Preparedness and Planning Project (Oct. 2013) | 11 |
| City of Coral Gables, <i>Sea Level Impact</i> (visited Feb. 27, 2020), https://bit.ly/2I0aX19 | 3 |
| City of Houston, Draft Climate Action Plan (July 29, 2019), https://bit.ly/2wQgogJ | 14 |
| City of Minneapolis, Minneapolis Climate Action Plan: A Roadmap to Reducing Citywide Greenhouse Gas Emissions (June 2013), https://bit.ly/2UfxjTg | 13 |
| City of Minneapolis Resolution No. 2018R-121, Establishing a 100% Renewable Electricity Goal for Minneapolis (May 5, 2018), https://bit.ly/2vkUNwj | 15 |
| City of Pittsburgh, Climate Action Plan (2017), https://bit.ly/3cBs8Ux | 13 |
| City of Saint Paul, Climate Action & Resilience Plan (Dec. 2019), https://bit.ly/2TnhRUG | 12 |
| City of Santa Fe, Resolution No. 2019-47 (Sept. 11, 2019)..... | 14 |
| Climate Action for a Resilient New Orleans (July 2017) https://bit.ly/2RH4mhd | 14 |
| Comments submitted by Steph Tai on behalf of Climate Scientists..... | 20 |
| Clean Power Plan Final Regulatory Impact Analysis (2015)..... | 10, 21 |

TABLE OF AUTHORITIES, CONT.

| | |
|---|----------------|
| Climate Action Plan for Portland and Multnomah County (June 2015), https://bit.ly/2R0WO8C | 13 |
| <i>Climate Mayors Submit Comments on Proposed Repeal of Clean Power Plan</i> (March 27, 2018), https://bit.ly/3a7V6ta | 9 |
| David Gochis et al., <i>The Great Colorado Flood of September 2013</i> , Bulletin Am. Meteorological Soc’y, Sept. 2015 | 4 |
| Don Hopey, <i>County seeks new air quality regulations to combat unhealthy smog</i> , PITTSBURGH POST-GAZETTE, Jan. 2, 2020..... | 6 |
| Email from Sarah Utley, Managing Attorney, Environmental Group, Harris County Attorney (Mar. 17, 2020, 5:13PM) | 4 |
| EPA. 2015. Climate Change in the United States: Benefits of Global Action. United States Environmental Protection Agency, Office of Atmospheric Programs, EPA 430-R-15-001, https://bit.ly/2Ine0jX | 5, 7, 9 |
| <i>Fourth National Climate Assessment</i> . U.S. Global Change Research Program, Washington, DC, USA (2018) | 3, 4, 6, 9, 20 |
| <i>Glen Rock Adopts 100 Percent Renewable Energy Plan for Residents</i> , ENERGY CENTRAL, Mar. 22, 2019. | 15 |
| <i>Heat wave melts records across East Coast</i> , NBC NEWS, June 8, 2011..... | 6 |
| H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. 1, 5 (1970), U.S. Code Cong. & Admin. News 1970..... | 17 |
| IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. (Masson- Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield, eds.) | 8 |
| Jack Brook, <i>Cutler Bay imposes moratorium on development to study impact of sea level rise</i> , MIAMI HERALD, Oct. 9, 2019..... | 3 |

TABLE OF AUTHORITIES, CONT.

| | |
|--|------|
| Jason Vogel et al., Boulder County Climate Change Preparedness Plan (May 2012), bit.ly/1ZhBfg8 | 12 |
| Joseph B. Treaster, <i>Early Estimates of Storm’s Cost Are Just a Fraction of Katrina’s</i> , NEW YORK TIMES, Sep. 26, 2005..... | 4 |
| Juliet Eilperin & Brady Dennis, <i>Trump EPA finalizes rollback of key Obama climate rule that targeted coal plants</i> , WASHINGTON POST (June 19, 2019)..... | 22 |
| Kai Zhang et al., <i>Impact of the 2011 heat wave on mortality and emergency department visits in Houston, Texas</i> , <i>Envtl. Health</i> , Jan. 17, 2015, bit.ly/1M8xozN | 6 |
| Kate Gordon et al., <i>Risky Business: The Economic Risks of Climate Change in the United States</i> (2014)..... | 7 |
| Katie Choe et al., <i>Climate Resilient Design Standards & Guidelines</i> (October 2018), https://bit.ly/3a69cLS | 11 |
| Kevin E. Trenberth et al., <i>Attribution of climate extreme events</i> , <i>5 Nature Climate Change</i> 725 (2015) | 4 |
| <i>Mayor Turner Launches the Resilient Houston Strategy and Signs Historic Executive Order to Prepare the City for Future Disasters</i> (Feb. 12, 2020), https://bit.ly/3c3Wgrs | 12 |
| Moving to 100 Percent: Renewable Energy Transition Pathways Analysis for Buncombe County and the City of Asheville (July 31, 2019), https://bit.ly/33HuCNh | 15 |
| Minneapolis, Climate Change Resiliency (visited Feb. 26, 2020), https://bit.ly/2T18Xf4 | 12 |
| Minneapolis Health, Env’t & Community Engagement Comm., <i>Setting a Long-term Carbon Reduction Goal for Minneapolis</i> (Apr. 2014) | 13 |
| National Academies of Sciences, <i>Attribution of Extreme Weather Events in the Context of Climate Change</i> (2016) | 4, 5 |

TABLE OF AUTHORITIES, CONT.

| | |
|---|--------------------|
| National Oceanic and Atmospheric Admin., <i>Assessing the U.S. Climate in 2018</i> , (Feb. 6, 2019) | 4 |
| “One of the densest fogs.” <i>Pittsburgh, trapped by inversion, begins to clear</i> , PITTSBURGH POST-GAZETTE, Dec. 25, 2019. | 6 |
| Planning for Climate Resilience: City of Asheville, North Carolina (Apr. 2018), https://bit.ly/2VpRLS4 | 12 |
| Regulatory Impact Analysis for the Repeal of the Clean Power Plan and the Emissions Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units (June 2019) | 10, 18, 21, 22, 24 |
| Resilient New Orleans (Aug. 2015), https://bit.ly/2ydShJv | 3 |
| Rogers, Karin, Matthew Hutchins, James Fox, and Nina Flagler Hall. <i>Triangle Regional Resilience Assessment: Technical Report for the Triangle Regional Resilience Partnership</i> . Asheville, NC: UNC Asheville’s National Environmental Modeling and Analysis Center, October 2018, https://bit.ly/2UucItb | 12 |
| Salt Lake City, <i>Climate Positive 2040</i> (March 2017), https://bit.ly/2Tz5FyS | 15 |
| Santa Fe Watershed Association, <i>Forest and Water Climate Adaptation: A Plan for the Santa Fe Watershed</i> (Oct. 14, 2014), https://bit.ly/2TgqHSN | 12 |
| Sonia Khaleel, <i>Detroit passes ordinance seeking to reduce greenhouse gas emissions by 30 percent in 5 years</i> , DETROIT METRO TIMES, July 25, 2019..... | 13 |
| Southeast Florida Regional Compact, <i>Regional Impacts of Climate Change and Issues for Stormwater Management</i> (Oct. 2015), bit.ly/1RvtCfR | 11 |
| Sustainable Santa Fe 25-Year Plan (Oct. 2018), https://bit.ly/2Pt4sb3 | 14 |
| <i>Story to remember, 2014: August flooding in metro Detroit</i> , CRAIN’S DETROIT BUSINESS, Dec. 22, 2014. | 5 |
| The Impact of Climate Change: Projected Adaptation Costs for Boulder County, Colorado (Apr. 2018), https://bit.ly/2SZ1Tjb | 11 |

TABLE OF AUTHORITIES, CONT.

| | |
|--|----|
| Town of Chapel Hill, A Resolution to Transition to a Clean, Renewable Energy Community by 2050 (2019-09-25/R-11) (Sep. 25, 2019). | 15 |
| We Are Still In, “ <i>We Are Still In</i> ” Declaration (visited Feb. 26, 2020), https://bit.ly/2VnQx9Y | 8 |
| We Are Still In, <i>Who’s In</i> (visited Feb. 26, 2020), https://bit.ly/39APYxh | 8 |
| William V. Sweet & John J. Marra, Nat’l Oceanographic & Atmospheric Admin., 2014 State of Nuisance Tidal Flooding (2015) | 3 |

GLOSSARY

| | |
|-----------------|---|
| ACE | Affordable Clean Energy |
| CAA | Clean Air Act |
| CO ₂ | Carbon Dioxide |
| CPP | Clean Power Plan |
| EPA | United States Environmental Protection Agency |
| RIA | Regulatory Impact Analysis |

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Local Government Coalition consists of the nation's leading local government associations as well as individual cities, counties, towns, and mayors 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 23 individual members include:

Albuquerque, New Mexico; Asheville, North Carolina; Baltimore, Maryland; Boston, Massachusetts; Boulder County, Colorado; Chapel Hill, North Carolina; Coral Gables, Florida; Cutler Bay, Florida; Glen Rock, New Jersey; Harris County,

Texas; Houston, Texas; Las Cruces, New Mexico; Minneapolis, Minnesota; New Orleans, Louisiana; Pittsburgh, Pennsylvania; Phoenix, Arizona; Portland, Oregon; Providence, Rhode Island; Saint Paul, Minnesota; Salt Lake City, Utah; Santa Fe, New Mexico; and the Mayors of Durham, North Carolina; and Detroit, Michigan. They represent over 12 million residents.

Local Government Coalition members are the first responders to climate change, have taken great strides to mitigate and adapt to the impacts of a changing climate. As discussed *infra*, the repeal of the Clean Power Plan and issuance of the Affordable Clean Energy (ACE) Rule hamstring those efforts.

1. Cities Are Already Grappling with the Effects of Climate Change

Over 80 percent of Americans live in urban areas—and even more work in cities—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, activity, and infrastructure in cities makes them uniquely valuable economically, but also concentrates the adverse impacts of a host of climatic changes, such as increased heat-related deaths, dirtier air, damaged and disappearing coastlines, longer droughts and other strains on water quantity and quality, and increasingly frequent and severe storms. Indeed,

virtually all cities report feeling the effects of a changing climate.¹ Climate change can also exacerbate cities' existing challenges, including social inequality, aging and deteriorating infrastructure, and stressed ecosystems.²

Members of the Local Government Coalition present their arguments to this Court because they are experiencing these impacts today. Coastal communities such as **Coral Gables**, **Cutler Bay** and **New Orleans** are responding to the devastating effects of sea level rise, and the associated high costs of infrastructure corrosion and general disruption to daily life resulting from shrinking coastlines.³ In **Baltimore**, nuisance flooding is already routine and is only expected to increase in frequency and depth as seas rise and the city's land subsides.⁴ For these coastal communities and others, on top of this grinding, expensive nuisance looms the

¹ Alliance for a Sustainable Future, *MAYORS LEADING THE WAY ON CLIMATE 2* (Jan. 2020), <https://bit.ly/2T4tMpY>.

² See Maxwell, K., et al., *Ch. 11: Built Environment, Urban Systems, and Cities in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart, eds. 2018). U.S. Global Change Research Program, Washington, DC, USA, pp. 439 [hereinafter "4th National Climate Assessment"].

³ See City of Coral Gables, *Sea Level Impact* (visited Feb. 27, 2020), <https://bit.ly/2I0aX19>; Jack Brook, *Cutler Bay imposes moratorium on development to study impact of sea level rise*, *MIAMI HERALD*, Oct. 9, 2019; Resilient New Orleans (Aug. 2015), <https://bit.ly/2ydShJv>.

⁴ William V. Sweet & John J. Marra, Nat'l Oceanographic & Atmospheric Admin., *2014 State of Nuisance Tidal Flooding* (2015), <https://bit.ly/2QWyiph>.

enormous threat of destructive storm surges like those that accompanied Hurricanes Maria, Isabel, Katrina, Rita, Harvey, Florence, Michael and Sandy. These and similar events caused billions of dollars of damage to **New Orleans, Harris County, Houston, Glen Rock**, and dozens of other communities.⁵ Since 2015, **Harris County** has seen six federal disaster declarations due to rain events.⁶

Storms impacting inland and riverine areas, like the one that set new rainfall records in **Boulder County** in September 2013, are also increasingly fueled by climate change.⁷ Boulder County expects County-sponsored recovery projects to cost \$271 million over an excess of six years⁸—one estimate puts total losses at \$2

⁵ See, e.g., National Oceanic and Atmospheric Admin., *Assessing the U.S. Climate in 2018*, (Feb. 6, 2019), <https://bit.ly/37ZecAo>; Joseph B. Treaster, *Early Estimates of Storm's Cost Are Just a Fraction of Katrina's*, NEW YORK TIMES, Sep. 26, 2005.

⁶ Email from Sarah Utley, Managing Attorney, Environmental Group, Harris County Attorney (Mar. 17, 2020, 5:13PM).

⁷ 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.

⁸ Boulder County, Colorado, Budget 2019 at 31, <https://bit.ly/2J60EJb>.

billion.⁹ In 2014, flooding due to extreme rainfall in **Detroit** cost over \$1 billion in damages, causing almost 10 billion gallons of sewage overflows.¹⁰

Heat waves made more frequent, hotter, and longer by climate change similarly injure members of the Local Government Coalition.¹¹ As Coalition members know well, heat waves are the deadliest type of extreme weather.¹² Because urban “heat islands” heat up faster and stay hotter than suburban and rural areas, city dwellers are disproportionately affected by heat waves.¹³ News of heat wave-related deaths and hospitalizations has become a tragic annual event,¹⁴ and the Environmental Protection Agency (“EPA”) estimates that failure to mitigate climate change will result in an additional 12,000 deaths per year from extreme

⁹ David Gochis et al., *The Great Colorado Flood of September 2013*, BULLETIN AM. METEOROLOGICAL SOC’Y, Sept. 2015; *see also* Boulder County, *2013 Flood Recovery*, <https://bit.ly/2T65H2k> (visited Feb. 27, 2020).

¹⁰ *Story to remember, 2014: August flooding in metro Detroit*, CRAIN’S DETROIT BUSINESS, Dec. 22, 2014.

¹¹ *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).

¹² Andrew Freedman, *Widespread, oppressive and dangerous heat to roast much of the U.S. through the weekend*, THE WASHINGTON POST, July 17, 2019.

¹³ John Balbus & George Luber, et al., *Ch. 14, Human Health*, in 4th National Climate Assessment at 554.

¹⁴ *Id.* at 554.

temperature by 2100 in 49 major U.S. cities.¹⁵ The impacts of heat waves are felt in **Pittsburgh, Phoenix, and Albuquerque**, to name but a few affected cities—and temperatures are on track to keep rising.¹⁶ In **Salt Lake City**, higher temperatures exacerbate air pollution that already threatens public health,¹⁷ and **Pittsburgh** has seen an uptick in weather inversions like the one that grounded flights and spiked pollution levels for six days in December.¹⁸ Heat waves often do costly damage to infrastructure as well as to human health. The 2011 heat wave in **Houston** burst pipes and water mains,¹⁹ and in **Minneapolis** extreme heat has caused roads to buckle.²⁰ Additionally, “[m]ore frequent and severe heat waves in many parts of the United States would increase stresses on electric power, increasing the risk of

¹⁵ EPA. 2015. Climate Change in the United States: Benefits of Global Action. United States Environmental Protection Agency, Office of Atmospheric Programs, EPA 430-R-15-001 at 8, <https://bit.ly/2xc5uC0>.

¹⁶ Maxwell, K., *supra* note 2 at 441 (projecting increases in the number of very hot days in Phoenix, Pittsburgh, and other cities); Theresa Davis, *Late-summer heat wave breaks records* ALBUQUERQUE JOURNAL (Aug. 26, 2019).

¹⁷ Salt Lake City, Climate Adaptation Plan for Public Health (2017) at 6, 32.

¹⁸ “One of the densest fogs.” *Pittsburgh, trapped by inversion, begins to clear*, PITTSBURGH POST-GAZETTE (Dec. 25, 2019); Don Hopey, *County seeks new air quality regulations to combat unhealthy smog*, PITTSBURGH POST-GAZETTE, Jan. 2, 2020.

¹⁹ 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.

²⁰ *Heat wave melts records across East Coast*, NBC NEWS, June 8, 2011.

cascading failures within the electric power network that could propagate into other sectors.”²¹

Cities’ cost to recover from damage caused by climate change will be enormous. Without emissions reductions, the annual cost of coastal storm damage is expected to climb from \$3 billion to as high as \$35 billion by the 2030s and \$5 trillion through 2100; coastal property valued at \$66 to \$106 billion is expected to be underwater by 2050.²² By 2100, every year, unmitigated climate change could cause 57,000 pollution-related deaths, at a cost of \$930 billion; lead to 1.2 billion lost labor hours, valued at \$110 billion; and result in hundreds of billions of dollars in infrastructure, water supply and other costs.²³

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. Notably, this puts multiple Local Government Coalition members at odds with their state governments, which have intervened in support of EPA in this case. Educated by their experiences and anticipating the still more dramatic climatic

²¹ Leah Nichols & Robert Vallario, *Ch. 17: Sector Interactions, Multiple Stressors, and Complex Systems*, in 4th National Climate Assessment at 652.

²² KATE GORDON ET AL., *RISKY BUSINESS: THE ECONOMIC RISKS OF CLIMATE CHANGE IN THE UNITED STATES* 3–4 (2014) bit.ly/1QBbFfv; EPA, *supra* note 15 at 7.

²³ EPA, *supra* note 15 at 78.

changes looming in the foreseeable future, *amici* write in support of the petitioners challenging the Clean Power Plan repeal and the ACE Rule.

2. EPA's Action Frustrates Cities' Efforts to Address and Adapt to 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. In fact, in 2019, 60% of U.S. cities launched or significantly expanded an initiative to address climate change, such as a green vehicle procurement program or new energy policy.²⁴ Yet, local governments have little ability to regulate the circumstances imposed on them by the wider world. The need for broader efforts led 289 local governments to declare their support for climate action to meet the goals of the 2015 Paris Agreement after President Trump announced that the United States would withdraw.²⁵ For the same reason, 244 U.S. mayors

²⁴ Alliance for a Sustainable Future, *supra* note 1 at 2.

²⁵ We Are Still In, “*We Are Still In*” Declaration (visited Feb. 26, 2020), <https://bit.ly/2VnQx9Y>; We Are Still In, *Who's In* (visited Feb. 26, 2020), <https://bit.ly/39APYxh>. Although holding global temperature increase to 2 degrees Celsius was a commonly stated goal before 2015, the Paris Agreement seeks to limit warming to 1.5 degrees. “Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C.” IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. (Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, (continued...)

representing over 52 million Americans asked EPA not to repeal the Clean Power Plan, explaining “our local efforts to address climate change are highly sensitive to national policies like the Clean Power Plan, which shape markets, steer state action, and have large direct impacts on nationwide emissions.”²⁶

“Decisions made today determine risk exposure for current and future generations and will either broaden or limit options to reduce the negative consequences of climate change.”²⁷ By failing to take climate change seriously now, EPA will cause cities to shoulder greater adaptation costs over the coming decades and centuries.²⁸ Moreover, EPA’s impermissibly narrow reading of the Clean Air Act could render the statute far less effective at reducing emissions from existing stationary sources by binding the hands of future administrations.

EPA’s actions also hamstring cities’ mitigation efforts in at least three ways. First, repealing the Clean Power Plan disrupts the regulatory and financial certainty that markets crave, complicating cities’ efforts to invest in mitigation measures.

(...continued)

X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield, eds.) at 9.

²⁶ *Climate Mayors Submit Comments on Proposed Repeal of Clean Power Plan* (March 27, 2018), <https://bit.ly/3a7V6ta>.

²⁷ David Reidmiller, et al., *Ch. 1: Overview*, in 4th National Climate Assessment at 34.

²⁸ EPA, *supra* note 15 at 78-79 (describing range of avoided adaptation costs that would result from reducing greenhouse gases consistent with a 2-degree target).

Second, whereas the Clean Power Plan would have expanded renewable energy capacity by 24-27% by 2030, the ACE Rule will cause such capacity to increase very little if at all. *See* Regulatory Impact Analysis for the Repeal of the Clean Power Plan and the Emissions Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units (“ACE Rule RIA”) at 3-24, EPA-HQ-OAR-2017-0355- 26743; CPP Final RIA 2015 (CPP RIA) at 3-25, 3-32, 3-33, EPA-HQ-OAR-2017-03550011. Slowing the growth of renewable energy will make it more difficult and costlier for cities to meet their greenhouse gas reduction and clean energy targets—especially those located in states without ambitious renewable energy programs. Third, the Clean Power Plan’s Clean Energy Incentive Program would have provided direct incentives for increasing demand-side energy efficiency in environmental justice communities. *See* 80 Fed. Reg. 64661, 64943 (Oct. 23, 2015). By repealing the Clean Power Plan, EPA hobbles cities’ work to increase the equitable distribution of their cost-saving, emissions-reducing efficiency efforts.

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 would be undermined by the Clean Power Plan repeal and the ACE Rule.

A. Adaptation Efforts

The adaptation plans devised by Local Government Coalition members reflect earnest efforts to deal with the new climate norm. **Boston**, acutely aware of rising sea levels, has been investing in adaptation since forming a Climate Preparedness Task Force in 2013.²⁹ Similarly, **Coral Gables**, **Cutler Bay**, and others in the Southeast Florida Regional Climate Compact have worked to reshape facilities for managing stormwater, wastewater, and drinking water in anticipation of hydrology reshaped by higher sea levels.³⁰ **Coral Gables** has also created a Stormwater Sea Level Rise Resiliency Fund to finance capital infrastructure improvement and resilience programs. 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.³¹

Boulder County has been integrating adaptation into its operations since adopting its 2012 Climate Change Preparedness Plan, and has conservatively estimated the cost of adaptation measures through 2050 to be \$96 million to \$157

²⁹ Boston Climate Preparedness Task Force, *Climate Ready Boston: Municipal Vulnerability to Climate Change* (Oct. 2013); Katie Choe et al., *Climate Resilient Design Standards & Guidelines* (October 2018), <https://bit.ly/3a69cLS>.

³⁰ See Southeast Florida Regional Compact, *Regional Impacts of Climate Change and Issues for Stormwater Management* (Oct. 2015), bit.ly/1RvtCfR.

³¹ City of Baltimore, *Disaster Preparedness and Planning Project* (Oct. 2013), bit.ly/1T3S0e3.

million.³² In 2014, **Santa Fe** created a climate adaptation plan for the Santa Fe watershed.³³ In April 2018 **Asheville** released a final assessment report on planning for climate resilience.³⁴ This February saw the release of **Resilient Houston**, a framework to mitigate flooding risks and improve climate readiness.³⁵ **Minneapolis** has produced a Climate Change Vulnerability Assessment,³⁶ and last year, **Saint Paul** adopted a Climate Action & Resilience Action Plan.³⁷ **Chapel Hill** and **Durham** participate in the Triangle Regional Resilience Partnership, which analyzes and builds resilience to climate threats.³⁸

Cities are making significant strides in adapting to climate change, but they should not be forced to shoulder ballooning costs in a world of unmitigated climate

³² Jason Vogel et al., Boulder County Climate Change Preparedness Plan (May 2012), bit.ly/1ZhBfg8; The Impact of Climate Change: Projected Adaptation Costs for Boulder County, Colorado (Apr. 2018), <https://bit.ly/2SZ1Tjb>.

³³ Santa Fe Watershed Association, Forest and Water Climate Adaptation: A Plan for the Santa Fe Watershed (Oct. 14, 2014), <https://bit.ly/2TgqHSN>.

³⁴ Planning for Climate Resilience: City of Asheville, North Carolina (Apr. 2018), <https://bit.ly/2VpRLS4>.

³⁵ *Mayor Turner Launches the Resilient Houston Strategy and Signs Historic Executive Order to Prepare the City for Future Disasters* (Feb. 12, 2020), <https://bit.ly/3c3Wgrs>.

³⁶ Minneapolis, Climate Change Resiliency (visited Feb. 26, 2020 at 4:08PM), <https://bit.ly/2T18Xf4>.

³⁷ City of Saint Paul, Climate Action & Resilience Plan (Dec. 2019) at 26-27, <https://bit.ly/2TnhRUG>.

³⁸ Rogers, Karin, Matthew Hutchins, James Fox, and Nina Flagler Hall. *Triangle Regional Resilience Assessment: Technical Report for the Triangle Regional Resilience Partnership*. Asheville, NC: UNC Asheville's National Environmental Modeling and Analysis Center, October 2018 at 15, <https://bit.ly/2UucItb>.

change. The burdens of adaptation are likely to overwhelm cities without federal action to significantly reduce greenhouse gas emissions.

B. 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.

Many coalition members have made specific emissions reduction commitments. For instance, **Minneapolis** set greenhouse gas emissions reduction targets of 30% below 2005 levels by 2025³⁹ and 80% below by 2050.⁴⁰ **Pittsburgh** plans to reduce emissions 20% by 2023, 50% by 2030, and 80% by 2050, as compared to 2003 levels.⁴¹ **Portland** plans to reduce emissions by 80% from 1990 levels by 2050,⁴² and **Boulder County** set out to reduce emissions by 90% from 2005 levels by 2050.⁴³ **Detroit** committed to carbon neutrality in municipal operations by 2050 and reducing citywide emissions by 30% by 2025 from 2012

³⁹ City of Minneapolis, Minneapolis Climate Action Plan: A Roadmap to Reducing Citywide Greenhouse Gas Emissions (June 2013), <https://bit.ly/2UfxjTg>.

⁴⁰ Minneapolis Health, Env't & Community Engagement Comm., Setting a Long-term Carbon Reduction Goal for Minneapolis (Apr. 2014), <bit.ly/1QPbFbT>.

⁴¹ City of Pittsburgh, Climate Action Plan (2017) at 18, <https://bit.ly/3cBs8Ux>.

⁴² Climate Action Plan for Portland and Multnomah County (June 2015) at 7, <https://bit.ly/2R0WO8C>.

⁴³ Boulder County Sustainability Plan (2018) at 41, <https://bit.ly/2T1CbKP>.

levels.⁴⁴ **Houston, Saint Paul, and Providence** have committed to achieving citywide carbon neutrality by 2050.⁴⁵ **Santa Fe** has resolved to make the city carbon neutral by 2040;⁴⁶ and **Asheville** has decided to end citywide greenhouse gas emissions as quickly as possible and no later than 2030.⁴⁷

Coalition members that have made commitments like these tend to draw on energy efficiency and renewable energy as cost-effective means of reducing emissions that can be implemented at the municipal level. **Santa Fe's** 25-Year Sustainability Plan envisions shifting to 50% renewable energy by 2050 and reducing electricity consumption.⁴⁸ **Houston, Saint Paul, New Orleans, Providence, and Boulder County** have issued climate plans that highlight efforts to increase local renewable energy.⁴⁹ Similarly, **Chapel Hill** seeks to chart a path

⁴⁴ Sonia Khaleel, *Detroit passes ordinance seeking to reduce greenhouse gas emissions by 30 percent in 5 years*, DETROIT METRO TIMES, July 25, 2019.

⁴⁵ City of Houston, Draft Climate Action Plan (July 29, 2019) at 4, <https://bit.ly/2wQgogJ>; City of Saint Paul, *supra* note 37 at 7; City of Providence, Climate Justice Plan (Fall 2019) at 8, <https://bit.ly/3aqmEdv>.

⁴⁶ City of Santa Fe, Resolution No. 2019-47 (Sept. 11, 2019).

⁴⁷ City of Asheville Resolution No. 20-25 (Jan. 28, 2020), <https://bit.ly/382IfY3>.

⁴⁸ Sustainable Santa Fe 25-Year Plan (Oct. 2018), <https://bit.ly/2Pt4sb3>.

⁴⁹ City of Houston, *supra* note 45 at 4-5, <https://bit.ly/2wQgogJ>; City of Providence, *supra* note 45 at 69-71; City of Saint Paul, *supra* note 37 at 29; Boulder County, *supra* note 43 at 43-44; Climate Action for a Resilient New Orleans (July 2017) at 28-29, <https://bit.ly/2RH4mhd>.

towards 80% renewable energy by 2030 and 100% by 2050,⁵⁰ and **Glen Rock** has launched a program to allow residents to access 100% renewable energy.⁵¹ **Salt Lake City** is partnering with other communities and the local utility to ensure that 100% of community energy is derived from renewable resources by 2030.⁵² **Albuquerque**'s mayor committed to using 100% renewable energy for municipal operations,⁵³ **Minneapolis** has resolved to use 100% renewable energy at municipal facilities by 2022,⁵⁴ and **Asheville** will transition municipal operations to 100% renewable energy by 2030.⁵⁵ The Clean Power Plan would have buoyed these efforts by providing incentives to increase renewable energy capacity; the ACE Rule fails to ensure such support.

These and other Local Government Coalition members contribute to global efforts to combat climate change while also improving their local air quality and

⁵⁰ Town of Chapel Hill, A Resolution to Transition to a Clean, Renewable Energy Community by 2050 (2019-09-25/R-11) (Sep. 25, 2019).

⁵¹ *Glen Rock Adopts 100 Percent Renewable Energy Plan for Residents*, ENERGY CENTRAL, Mar. 22, 2019.

⁵² Salt Lake City, Climate Positive 2040 (March 2017), <https://bit.ly/2Tz5FyS>.

⁵³ City of Albuquerque, *Sustainability* (visited Feb. 26, 2020), <https://bit.ly/2I022g4>.

⁵⁴ City of Minneapolis Resolution No. 2018R-121, Establishing a 100% Renewable Electricity Goal for Minneapolis (May 5, 2018), <https://bit.ly/2vkUNwj>.

⁵⁵ Moving to 100 Percent: Renewable Energy Transition Pathways Analysis for Buncombe County and the City of Asheville (July 31, 2019), <https://bit.ly/33HuCNh>.

resiliency to extreme weather events. However, their innovative, disparate forays have wanted for the support and certainty that only a comprehensive federal framework for reducing the power sector's greenhouse gas emissions can ensure. The Clean Power Plan provided just that framework; the ACE Rule sets cities back by failing to advance renewable energy or energy efficiency, disrupting markets, and making meager if any emissions reductions.

ARGUMENT

1. The Repeal of the Clean Power Plan and Replacement with the ACE Rule Are Arbitrary and Capricious and Contrary to Law.

As demonstrated in greater detail in Petitioners' briefs, EPA's repeal of the Clean Power Plan rests entirely on an unsupported and unreasonable statutory interpretation. *See* State Pet. Br. Part I; Power Co. Pet. Br. Part I-III. The Local Government Coalition argues further that EPA has acted unlawfully by failing to consider congressional intent, neglecting to seriously grapple with the threats of climate change, declining to regulate emissions from natural gas-fired power plants, and ignoring its own findings on power plants' inequitable impacts.

A. EPA Acted Arbitrarily and Capriciously By Failing to Consider the CAA's Purpose of Reducing Pollution.

In replacing the Clean Power Plan with a rule that will achieve minimal, if any, emissions reductions, EPA has acted arbitrarily and capriciously by failing to

consider Congress's clear intent. *See Gresham v. Azar*, 950 F.3d 93, 104 (D.C. Cir. 2020).

Congress enacted the Clean Air Act (CAA) “to speed up, expand, and intensify the war against pollution.” *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.”)); *see also Nat’l. Asphalt Pavement Ass’n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976) (CAA aims “to reduce existing levels of air pollution.”). By failing to identify a best system of emission reduction that will achieve meaningful emissions reductions, EPA has unlawfully embraced a reading of the CAA that “threatens to make that interest illusory.” *Wagner v. Fed. Elec. Comm’n*, 717 F.3d 1007, 1014 (D.C. Cir. 2013); *see also Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) (courts “must not ‘rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute’”) (quoting *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965)).

EPA’s actions “will [not] accomplish what the statute plainly requires.” *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 628 (D.C. Cir. 2016). The ACE Rule will increase carbon dioxide (CO₂) emissions from existing power plants as compared

to the regulation that it replaces, and is expected to achieve only very minimal if any emissions reductions when compared to a baseline with no regulation at all. *See* Regulatory Impact Analysis for the Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units at 3-14, EPA-HQ-OAR-2017-035521182; ACE Rule RIA at 3-11.⁵⁶ Moreover, EPA was aware of this “important aspect of the problem” in crafting the ACE Rule, *Gresham*, 950 F.3d at 100, both because its own calculations concluded that the regulation would reduce emissions very little, and because commenters warned that the identified best system of emission reduction “does not enable significant emissions reductions,” 84 Fed. Reg. 32,520, 32,526 (July 8, 2019). EPA responded to these comments by asserting that the system identified is consistent with the CAA. *Id.* “Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking.” *Gresham*, 950 F.3d at 103.

⁵⁶ Unlike the Clean Power, the ACE Rule does not set emissions reduction targets. *Compare* 80 Fed. Reg. 64,661, 64,824 (Oct. 23, 2015) *with* 84 Fed. Reg. 32,520, 32,536 (July 8, 2019). EPA estimates that under the ACE Rule, CO₂ emissions will fall by 0.7% by 2030 and 0.5% by 2035 based on an “illustrative policy scenario [that] represents potential outcomes of state determinations of standards of performance, and compliance with those standards by affected coal-fired [electric generating units].” ACE Rule RIA at 1-5, 3-11.

“[T]he intent of Congress is clear” that the CAA’s objective is to reduce pollution, “and, as a result, the [EPA] ‘must give effect to that unambiguously expressed intent of Congress.’” *Gresham*, 950 F.3d at 100 (quoting *Chevron, U.S.A, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (internal alterations omitted)). Disregard for the “statutory purpose” of waging a “war against pollution” renders EPA’s actions arbitrary and capricious. *Id.* at 104; *Motor Vehicle Mfrs.*, 719 F.2d at 1165 .

B. The ACE Rule Is Arbitrary and Capricious Because EPA Failed to Consider the Need to Address Climate Change.

EPA must regulate greenhouse gas emissions because of its 2009 finding, upheld by this Court, that “anthropogenically induced climate change threatens both public health and public welfare.” *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 121 (D.C. Cir. 2012), *rev’d in part on other grounds*, *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302 (2014); *see also Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). However, in repealing the Clean Power Plan and issuing the ACE Rule, EPA has not, consistent with its obligations under the CAA, grappled with the serious threats posed by climate change or examined whether its actions will meaningfully mitigate those threats. “[A]n agency may not ‘entirely fail to consider an important aspect of the problem.’” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut.*

Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Here, EPA has not merely failed to consider an important aspect of the problem—EPA has entirely failed to consider the problem itself. This obvious oversight is fatal to the agency’s policy shift. *See Sierra Club v. EPA*, 884 F.3d 1185, 1189 (D.C. Cir. 2018) (“EPA did not adequately justify its change of direction . . . because it failed to explain how the revised [standards] would minimize the targeted pollutants to the extent the Clean Air Act requires.”).

Moreover, “[t]he agency must explain the evidence which is available, and must offer a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The record before EPA overwhelmingly establishes that climate change represents a grave threat and can only be addressed through rapid and significant greenhouse gas reductions. *See, e.g.*, Comments submitted by Steph Tai on behalf of Climate Scientists (“Climate Scientists Letter”) at 7, EPA-HQ-OAR-2017-035525881 (“[C]limate change can lead to catastrophic societal effects.”); David Reidmiller, et al., *Ch. 1: Overview*, in 4th National Climate Assessment at 34, EPA-HQ-OAR-2017-035526762 (“Climate-related risks will

continue to grow without additional action.”⁵⁷ EPA does not dispute the existence or severity of climate change; on the contrary, EPA acknowledges that greenhouse gas emissions lead to negative health and welfare impacts, and that future emissions are expected to produce larger incremental damage. *See* ACE Rule RIA at 1-3, 4-3. Moreover, as EPA acknowledged in promulgating the Clean Power Plan, “[b]ecause [CO₂] in the atmosphere is long lived, it can effectively lock Earth and future generations into a range of impacts, some of which could become very severe.” CPP RIA at 1-2 (internal citations omitted). EPA has not rescinded this finding, and “cannot simply disregard contrary or inconvenient factual determinations that it made in the past.” *Mozilla Corp. v. FCC*, 940 F.3d 1, 55 (D.C Cir. 2019) (quoting *Fox Television v. FCC*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring)). Nor can it disregard those before it in the present.

However, as discussed *supra*, emissions will rise due to the EPA’s actions, and even compared to a baseline with no regulation at all, the ACE Rule will

⁵⁷ *See also* David Reidmiller, et al., *Ch. 1: Overview*, in 4th National Climate Assessment at 36 (“[T]he impacts of climate change are intensifying across the country, and . . . climate-related threats to Americans’ physical, social, and economic well-being are rising.”); *id.* at 37 (“High temperature extremes and heavy precipitation events are increasing. . . . Seas are warming, rising, and becoming more acidic. . . . Flooding is becoming more frequent along the U.S. coast-line. . . . These and many other changes are clear signs of a warming world.”); CPP RIA 2015 at 1-12, EPA-HQ-OAR-2017-03550011 (“[E]mission reduction choices made today matter in determining impacts experienced not just over the next few decades, but in the coming centuries and millennia.”).

achieve little if any emissions reductions. EPA also expects the ACE Rule to increase coal-generated electricity, the largest stationary source of greenhouse gas emissions. *See* ACE Rule RIA at 3-22. EPA weakened greenhouse gas regulations without providing a “reasonable connection to the facts in the record,” *Sierra Club*, 884 F.3d at 1189 (quoting *U.S. Sugar Corp.*, 830 F.3d at 629), which demonstrate the risks of failing to achieve significant emissions reductions. Where an agency’s decision is “illogical on its own terms” it is arbitrary and capricious. *Gamefly, Inc. v. Postal Regulatory Comm’n*, 704 F.3d 145, 149 (D.C. Cir. 2013) (internal citations omitted).

While EPA need not and cannot halt climate change through Section 111(d) alone, the CAA “‘speaks directly’ to emissions of carbon dioxide from [fossil fuel-fired power] plants,” *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 424 (2011), and the ACE Rule falls far short of EPA’s statutory mandate. The U.S. electricity sector needs to cut its emissions by 74% by 2030 in order to facilitate broader efforts to avoid 2 degrees Celsius of warming, according to the International Energy Agency.⁵⁸ The ACE Rule does nothing to achieve that goal; in fact, as Petitioners further describe, it is grossly counter-productive. *See* State Pet. Br. at 61-69; Pub.

⁵⁸ Juliet Eilperin & Brady Dennis, *Trump EPA finalizes rollback of key Obama climate rule that targeted coal plants*, WASHINGTON POST (June 19, 2019). This figure was calculated based on data in the International Energy Agency’s World Energy Outlook 2018 report, available at <https://bit.ly/39t8I2r>.

Health and Env. Pet. Br. at 21-24. EPA acted arbitrarily and capricious by failing to consider the need to achieve meaningful greenhouse gas reductions or draw a “reasonable connection” between its actions and the clear threats posed by climate change. *State Farm*, 463 U.S. at 43; *Sierra Club*, 884 F.3d at 1189.⁵⁹

C. The ACE Rule Is Arbitrary and Capricious and Contrary to Law Because It Fails to Regulate Natural Gas-Fired Power Plants.

The Supreme Court has declared that “EPA may not decline to regulate carbon-dioxide emissions from [natural gas] power plants if refusal to act would be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Am. Elec. Power*, 564 U.S. at 424 (quoting 42 U.S.C. § 7607(d)(9)(A)). Yet, in addition to insufficiently reducing greenhouse gas emissions from coal-fired power plants, the ACE Rule does not cover existing fossil fuel-fired stationary combustion turbines—in other words, existing natural gas power plants. *See* 84 Fed. Reg. at 32,523.

⁵⁹ EPA's inadequate consideration of climate change risks is compounded by its use of an unrealistically low social cost of carbon, following the Trump Administration's rescission of scientifically credible estimates that were developed through a lengthy process of interagency consultation and peer review. *See* ACE Rule RIA at 4-3; E.O. 13783 (Mar. 28, 2017); Interagency Working Group on the Social Cost of Greenhouse Gases, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (May 2013, Revised August 2016).

This aspect of the ACE Rule is plainly contrary to law. Section 111(b) of the CAA instructs EPA to identify, or “list,” stationary sources that significantly contribute to dangerous air pollution and set performance standards for new sources in the listed categories. 42 U.S.C. § 7411(b). Section 111(d) requires EPA to set emissions guidelines for existing sources in the listed categories for any pollutant that is regulated under Section 111(b). *Id.* § 7411(d)(1); *see also Am. Elec. Power*, 564 U.S. at 424.⁶⁰ In 1977 EPA listed natural gas plants as stationary sources that contribute to dangerous air pollution, 42 Fed. Reg. 53,657, 53,657 (Oct. 3, 1977), and EPA currently regulates CO₂ emissions from new natural gas-fired power plants under Section 111(b), 40 C.F.R. pt. 60, subpt. TTTT, tbl. 2; 80 Fed. Reg. 64,510, 64,620 (October 23, 2015). EPA’s failure to regulate greenhouse gas emissions from existing natural gas plants is in direct conflict with the requirements of Section 111(d), and therefore contrary to law.

EPA has also acted arbitrarily and capriciously by failing to consider an important aspect of the problem: natural gas plants’ greenhouse gas emissions. *See State Farm*, 463 U.S. at 43. EPA acknowledges that electricity generation from natural gas has increased significantly. ACE Rule RIA at 2-7; *see also id.* at 2-9 (acknowledging an “abundance of natural gas supply . . . that is increasingly being

⁶⁰ This requirement does not apply to hazardous air pollutants or criteria pollutants, exceptions that are not relevant here. 42 U.S.C. § 7411(d)(1).

relied upon by the power sector”). Natural gas plants emit huge quantities of carbon pollution; the U.S. Energy Information Administration estimates that natural gas contributes 33% of U.S. electricity-related CO₂ emissions.⁶¹ But EPA has unlawfully failed to provide a “reasoned explanation for its refusal” to regulate greenhouse gases from existing natural gas plants. *Massachusetts*, 549 U.S. at 534.

As justification, EPA offers only that it lacks sufficient information to determine the best system of emission reduction for such facilities. 84 Fed. Reg. at 32,523. This assertion is false, *see* Pub. Health and Ev. Pet. Br. at 42-43, and in any event, courts have repeatedly rejected “EPA’s argument that an asserted lack of ‘sufficient data’ justified the agency’s failure to regulate,” *Sw. Elec. Power Co. v. United States*, 920 F.3d 999, 1020 (5th Cir. 2019) (citing *NRDC v. EPA*, 808 F.3d 556, 573 (2d Cir. 2015); *Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 357 (5th Cir. 1981)); *see also Massachusetts*, 549 U.S. at 533 (“Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation for why it cannot or will not exercise its discretion to do so.”). EPA’s failure to regulate greenhouse gas emissions from natural gas plants is arbitrary, capricious, and contrary to law.

⁶¹ U.S. E.I.A., *How much of U.S. carbon dioxide emissions are associated with electricity generation?* (last updated Oct. 25, 2019), <https://bit.ly/384DSLS>.

D. EPA Arbitrarily and Capriciously Failed to Consider the Need to Address Power Plant Pollution’s Inequitable Impacts.

The ACE Rule is also arbitrary and capricious because EPA failed to consider its earlier findings that low-income communities and communities of color (“environmental justice communities”) are disproportionately affected by both climate change and the conventional pollutants emitted by power plants. “[A] reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy.” *Fox Television*, 566 U.S. at 516. “It follows that an ‘unexplained inconsistency’ in agency policy” can render an agency action arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X*, 545 U.S. 967, 981 (2005) (internal alterations omitted)).

In promulgating the Clean Power Plan, EPA found—as cities well know—that environmental justice communities are more vulnerable to climate change impacts, and also disproportionately located close to power plants that emit conventional pollutants, which pose even more immediate threats to local public health. 80 Fed. Reg. at 64,670.⁶² The Clean Power Plan sought to mitigate these

⁶² See, e.g., City of Minneapolis, *supra* note 39 at 6 (racial and economic disparities may be exacerbated by climate change); City of Providence, *supra* note (continued...)

impacts with the Clean Energy Incentive Program and by requiring states to engage with vulnerable communities in developing their plans to limit power plant pollution. *Id.* In promulgating the ACE Rule, EPA has not rescinded these earlier findings, and yet fails to adequately analyze the ACE Rule’s impact on environmental injustice. Moreover, the ACE Rule will *increase* pollution as compared to the Clean Power Plan, and, as EPA recognizes, will likely lead to higher emissions at individual coal plants that remain in operation because improved efficiency incentivizes usage. 84 Fed. Reg. at 32,542. Given EPA’s determination that environmental justice communities are more likely to be located near power plants, this “rebound effect” should be expected to accentuate current inequities. EPA has not acknowledged the existing disproportionate burden on environmental justice communities, let alone considered the likelihood that the ACE Rule will exacerbate the problem.

EPA contends that the ACE Rule will improve environmental justice communities’ health because overall power plant pollution will decrease. *See* 84 Fed. Reg. at 32,574. This conclusory assertion is insufficient—EPA ignores the fact that such communities are already disproportionately affected by pollution and

(...continued)

45 at 7 (burning fossil fuels “emits co-pollutants that are disproportionately impacting the health of low-income communities of color in Providence”).

the prospect that some will experience higher levels of pollution. *Cf. Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020) (“The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations.”) (quoting *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003)). EPA has acted arbitrarily and capriciously by failing to address its findings regarding current disparities in exposure to climate change and conventional pollution, or the likelihood that the ACE Rule will worsen those disparities. *Fox Television*, 566 U.S. at 516; *Encino Motorcars*, 136 S.Ct. at 2126.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the petitions for review.

Dated: April 24, 2020

Respectfully Submitted,

/s Michael Burger

Michael Burger (*counsel of record*)
Columbia Environmental Law Clinic
Morningside Heights Legal Services
Hillary Aidun
Sabin Center for Climate Change Law
Columbia Law School
435 W. 116th St.
New York, NY 10027
(212) 854-2372
michael.burger@law.columbia.edu
haidun@law.columbia.edu

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 6499 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 24, 2020

/s Michael Burger

CERTIFICATE OF SERVICE

I certify that the foregoing brief was served today on all registered counsel in these consolidated cases via the Court's CM/ECF system.

Dated: April 24, 2020

/s/ Michael Burger