No. 15-599

In the
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF LEBANON COUNTY, PENNSYLVANIA, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

NOWELL D. BERRETH
Alston & Bird LLP
One Atlantic Center
1201 W. Peachtree St.
Atlanta, GA 30309
(404) 881-4481
nowell.berreth@alston.com

PAUL J. BEARD II
Counsel of Record
Alston & Bird LLP
1115 11th Street
Sacramento, CA 95814
(916) 498-3354
paul.beard@alston.com

BRIAN D. BOONE
Alston & Bird LLP
101 S. Tryon Street
Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS - CONTINUED

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – CONTINUED

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES – CONTINUED

Page(s)

TABLE OF AUTHORITIES – CONTINUED

Page(s)

IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Amici curiae are seventeen county governments from Pennsylvania and New York, and the Fauquier County Farm Bureau in Virginia. All amici are located, and represent constituencies who live and work, in the Chesapeake Bay watershed.

A. Amicus Counties

The amicus counties from Pennsylvania are: Berks County, Blair County, Bradford County, Cambria County, Clearfield County, Columbia County, Fulton County, Lancaster County, Lebanon County, Perry County, Snyder County, Somerset County, Susquehanna County, Tioga County, and Wayne County. The amicus counties from New York are: Schuyler County and Madison County.

The Third Circuit Court of Appeal's decision upholding the "Total Maximum Daily Load" ("TMDL") established by the Environmental Protection Agency ("EPA") for the Chesapeake Bay adversely affects Bay counties in two significant ways. *See* Petition for Writ of Certiorari, Appendix A Pet. App.), 1a-50a (Court of Appeals opinion). First, the decision sanctions EPA's usurpation of local governments' traditional authority to make local

---

[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from Amici Curiae, made any monetary contribution toward the brief's preparation and submission. All counsel for parties to this action have obtained timely notice of intent to file and consented to the brief's filing in letters that are on file with the Clerk's office.

land-use decisions. Instead of simply establishing the "total loads" of three pollutants allowed in the Chesapeake Bay, EPA purports to tell States and counties how to allocate their respective shares of those total loads among different point *and* non-point sources across different water segments in their jurisdictions. EPA, Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment ("TMDL") ES-8 (Dec. 29, 2010); Pet. App. 24a, 28a. And EPA purports to command States and counties to achieve those allocations on a specific timeline, backed by federal "backstop" penalties for noncompliance. TMDL ES-8; Pet. App. 29a-31a.

In other words, the Third Circuit's decision authorizes a massive transfer of power from local elected officials to an unelected federal bureaucracy in Washington D.C. In so doing, the decision upsets the "cooperative federalism" that the Clean Water Act embodies, and sacrifices the political transparency and accountability that decision-making by locally elected officials provides in the creation and implementation of land-use planning. And the decision sanctions EPA's efforts by applying *Chevron* deference—in contravention of this Court's precedents counseling against *any* agency interpretation that intrudes upon the constitutionally protected prerogatives of State and local governments.

Second, the decision authorizes EPA, through its TMDL, to impose significant regulatory costs on amicus counties at a time when they can least afford it, and without any consideration of those costs or whether the TMDL's mandates are the most efficient

means of achieving water quality. The primary responsibility for carrying out EPA's specific load restrictions, under its specific timeframe, lies with local governments and their citizens. EPA's TMDL requires many, including the amicus counties, to dramatically increase their manpower in the areas of planning, monitoring, and enforcement, and to finance costly and extensive changes to their zoning and other land-use laws and regulations—requirements that counties simply cannot afford. *See, e.g.*, Joint Appendix ("JA") 900 (New York explaining that the TMDL's "source reductions mean[] that farms will go out of business in order for NY to meet its proposed allocation").

B. Amicus Fauquier County Farm Bureau (Virginia)

Founded in 1953, Fauquier County Farm Bureau is a non-governmental, nonpartisan, voluntary organization whose mission is to protect Fauquier County's farms, and ensure a safe, fresh, and locally grown food supply for the State and the Nation. It has 527 producer members—*i.e.*, "farm families"—who live and work in the Chesapeake Bay watershed. Members own, lease or operate farms and livestock and poultry operations that provide safe, affordable and locally grown food. Fauquier County Farm Bureau represents the concerns of the County's farmers in all levels of government and, as appropriate, participates in litigation such as the present case when the interests of its members are seriously affected.

Fauquier County Farm Bureau is part of and actively supports a large network of 88 county Farm Bureaus that constitute the Virginia Farm Bureau. Virginia Farm Bureau is affiliated with 50 other state Farm Bureaus, including Puerto Rico, to form the American Farm Bureau Federation. With 35,000 producer members and 125,000 members overall, Virginia Farm Bureau is the State's largest farmers' advocacy group.

Fauquier County Farm Bureau shares the Bay counties' interest in ensuring that land-use decisions are made at the local level. And it shares the Bay counties' concern about burdening local governments with the significant costs of carrying out EPA's water-quality rules. After all, Fauquier County Farm Bureau's constituencies are among the landowners and taxpayers who will suffer the consequences of the federalized land-use scheme that the Third Circuit's decision authorizes.

In addition, Fauquier County Farm Bureau is uniquely harmed by the lower court's decision. EPA's TMDL will deal a serious blow to the local agricultural sector in the Chesapeake Bay watershed, including in Fauquier County. It will require Fauquier County producers to undertake unnecessary and especially costly measures to meet the TMDL's draconian mandates targeting farmers, and—with respect to the entire Bay—push hundreds of thousands of acres of farmland out of production. As one example, about 20 percent of cropped land in the watershed (approximately 600,000 acres) will have to be converted to grassland or forest just to achieve EPA's required loading reductions.

LimnoTech, *Comparison of Draft Load Estimates for Cultivated Cropland in the Chesapeake Watershed* at 15 (prepared on Dec. 8, 2010, for Agricultural Nutrient Policy Council), *available at* http://www.wheatworld.org/wp-content/uploads/envir o-limnotech-usda-epa-load-estimate-20101209.pdf (last visited on Dec. 8, 2015) As the representative of the agricultural sector in Fauquier County, Fauquier County Farm Bureau has a significant interest in and unique perspective on this case.

SUMMARY OF THE ARGUMENT

Amici curiae urge the Court to grant the petition for three reasons.

First, the Third Circuit's decision raises an important question about whether the Clean Water Act and background constitutional concerns bar the federal take-over of local land-use decision-making. Since the Nation's founding, decisions about whether and how property can be used have been left to the elected representatives who are closest to the people—States and local governments. Local control over the use and development of land is grounded in the Clean Water Act's premise of "cooperative federalism" and in the Constitution itself, which grants only limited powers to the federal government and leaves all other powers to the States and local governments—*especially* those State and local powers deeply rooted in this Nation's history and tradition. U.S. Const. art. I; *id.* amend. X; *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2586 (Roberts, C.J.) ("[S]ometimes the most telling indication of [a] severe constitutional

problem . . . is the lack of historical precedent" for the government action." (internal citation and quotation marks omitted)). By upholding an unprecedented transfer of traditional State and local power over land use to an unelected federal bureaucracy, the court of appeal's decision deals a blow to both congressional and constitutional intent.

Second, the Third Circuit's decision results in substantial costs on States and counties in the Bay. This comes at a time when local budgets in particular, including the budgets of amicus counties, already are stretched far too thin and simply cannot support the massive financial obligations to which EPA's TMDL commits them. The costs of planning for, monitoring, and enforcing the inflexible source-specific load reductions constitute an intolerable burden on counties, but the Third Circuit's decision gives EPA free rein to saddle them with that burden now and for the foreseeable future.

Third, the Third Circuit upheld a federal scheme that will wreak havoc on many industries that must comply with EPA's specific load-reduction requirements—including, perhaps most significantly, agriculture—without any promise of actually improving water quality. Farmers in the Chesapeake Bay watershed have made great strides in reducing their environmental footprint, crop inputs have dramatically declined, no-till farming has reduced soil erosion and resulted in more carbon being stored in the soil, fewer cows are producing more milk, and significant improvements in nitrogen-use efficiency have been made. Notwithstanding the agricultural community's

substantial progress in the Bay, EPA's TMDL dictates how farmers raise crops and livestock, and takes farmland out of production—much of it converted into grassland or forest. The effect on local food supply and the numerous local businesses that support the agricultural industry cannot be overstated. The Bay TMDL affects the livelihood of farmers only in the Bay—*for now*. If the Third Circuit's decision stands, EPA has made clear that it plans to use the Bay TMDL as a template for watersheds across the country, making this Court's review especially critical. *See* Executive Order 13508, §301(e), 74 Fed. Reg. 23099, 23101 (May 12, 2009) (calling for Chesapeake Bay strategies that "can be replicated" in "other bodies of water"); Federal Leadership Committee for Chesapeake Bay, *Strategy for Protecting and Restoring the Chesapeake Bay* 14 (May 12, 2010).

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION ABOUT WHETHER THE FEDERAL GOVERNMENT IS BARRED FROM USURPING THE TRADITIONAL POWER OF STATE AND LOCAL GOVERNMENTS TO MAKE LAND-USE DECISIONS

A. The Third Circuit's Decision Is at Odds with the Clean Water Act's "Cooperative Federalism," Which Preserves State and Local Power to Regulate Land Use

In writing the Clean Water Act, Congress could not have been clearer about its intent: EPA is to play

a limited role in the regulation of water pollution, with States and local governments preserving their traditional land-use and water-resource authority: The Act declares, in no uncertain terms, "Congressional recognition, preservation, and protection of primary responsibilities and rights of the States." 33 U.S.C. § 1251(b). The Act goes on to say:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and *rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources*, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (emphasis added).

Thus, the Act upholds the fundamental principle of "cooperative federalism," whereby the state and local governments take on the primary role of deciding how to most efficiently achieve the statute's goals. That principle is best articulated in the Act's mandate that "Federal agencies *shall co-operate with State and local agencies* to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.* § 1251(g) (emphasis added). It is *cooperation*—not federal threats, mandates, and decrees—that must characterize the relationship between EPA, on the one hand, and State and local governments, on the other.

The "cooperative federalism" required by the Clean Water Act is consistent with this Nation's historical record and constitutional tradition: Land use has always been the primary responsibility of state and local governments. Indeed, this Court has recognized time and again that history and tradition in a number of cases. As the Court plainly stated in *Hess v. Port. Auth. Tran-Hudson Corp.*, 513 U.S. 30, 44 (1994), "regulation of land use [is] a function traditionally performed by local governments." *See also FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61. 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad . . . . [C]ourts generally have emphasized the breadth of municipal power to control land use[.]").

So sensitive has this Court been to protecting State and local governments' authority over land use that it recently split 5-4 even over the outermost limits of their near-plenary power to make land-use decisions. In *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013), the Court considered whether that power is cabined by the *constitutional* obligation to demonstrate an "essential nexus" and "rough proportionality" between a monetary exaction imposed in a land-use permit and the public harm allegedly caused by the proposed use of land. A majority ruled in the affirmative. *Id.* at 2603.

In dissent, Justice Kagan, joined by Justices Breyer, Ginsberg, and Sotomayor, lamented the

ruling's "intrusion into *local* affairs" and "*localities'* land-use authority." *Id.* at 2608 (emphasis added). In the dissenting Justices' view, the majority decision "deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development," and interferes with "the most everyday local government activity." *Id.* at 2612. If a procedural[2] constraint on local land-use authority can be cause for such concern, then surely an appellate decision that sanctions EPA's usurpation of that authority—and deprives State and local governments of the "flexibility they need" in everyday land-use planning—justifies this Court's review.

Concerns for protecting local land-use decision-making are well-placed. At stake is nothing less than democratic values, and the choice is stark: Either an unelected and unaccountable federal bureaucracy in Washington D.C. will decide whether and how citizens in hundreds of localities can use their land, or the decision will remain in the hands of the elected and accountable officials in those localities. In the former case, the landowner,

---

[2] *Koontz* does not prohibit local governments from imposing monetary conditions on land-use permits. It merely requires them to show how the conditions they seek to impose are necessary. In this sense, *Koontz* articulates a *procedural* limitation on local land-use decision-making. Local governments remain free to decide the *substantive* questions of what land uses are allowed, and whether and the extent to which a particular use should be conditioned. This is a far cry from the federal take-over of land-use decision-making that EPA's TMDL purports to effect.

business owner, or farmer has little to no say in creating and implementing the rules that will affect his way of life and his livelihood; in the latter case, he does. Indeed, *local* land-use planning and decision-making typically entail (often multiple) public hearings, the opportunity for affected parties to be heard, and local officials held to account for their plans and decisions. It is participatory democracy at work. And it is this cherished American tradition that *local* land-use decision-making protects—and that the Third Circuit's decision upholding EPA's TMDL eviscerates. *See, e.g.*, Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 Wash. U. J.L. & Pol'y 445, 452-53 (2000) ("Another explanation of the absence of national land-use planning is the preference many individuals appear to express for local control over their lives. Some observers argue that smaller, i.e., local governments, are inherently more responsive to citizens than larger, far-away governments.").

The lower court's decision authorizes nothing short of a federal government take-over of land use decision-making in the 64,000-square mile Chesapeake Bay that is home to 17 million people. EPA's TMDL for the Bay is its most far-reaching regulatory program under the Act. Unless this Court intervenes, EPA likely will use the Bay TMDL as a model for other water bodies across the country.

First, the Bay TMDL establishes pollutant limits for individual sources and types of sources, rather than simply a "total" limit that would leave it to the traditional discretion of local governments to

allocate among sources in their jurisdictions. TMDL ES-1, ES-3. Second, the TMDL sets deadlines to implement control measures and to achieve those limits. Third, the TMDL demands "reasonable assurances" that the source limits will be achieved by the target dates. And fourth, EPA imposes an "accountability framework" that threatens "specific federal contingency actions if the jurisdictions do not meet their commitments." TMDL ES-8.

Local governments have their marching orders. Based on the allocations that the TMDL mandates, States are forced to subdivide, on a local level, the reductions that will be required to meet the allocations. JA 1007. These subdivided loads are reflected in county "planning targets" for each pollutant. *Id.* Significantly, the planning targets encompass, not just regulated point sources, but also unregulated land-based nonpoint sources such as agricultural lands, forest lands, onsite septic systems, and non-regulated urban areas. *Id.* States and counties are forced to curtail or even prohibit certain land uses in order to achieve the reductions mandated by the TMDL. The TMDL dictates which lands may be used for farming or development, which other lands must be "retired" out of productive use (to make room for EPA's required riparian buffers), how much fertilizer a farmer may apply to his working lands, and how State and local governments must allocate the burden of pollutant reductions between different source sectors, and even between individual fields, factories and sewage treatment plants. JA 1596.

Worse, unless the Court intervenes, the States' and counties' hands will be permanently tied, with little-to-no hope of recovering their sovereignty over land-use decision-making. The reason is that the Bay TMDL *locks in* EPA's 2010 decisions about load limitations—indefinitely. It thereby eliminates the discretion of States and counties to accommodate their plans through adaptive management to the changing priorities and needs of their particular communities, to new technologies, and to improved science and other information.

Further, unlike the deliberate, accountable and transparent way in which counties typically develop their land-use plans, EPA—a notoriously overweening and politically insulated agency—rushed to develop the TMDL without the benefit of robust public participation or debate. Robert H. Nelson, *How to Save the Chesapeake Bay TMDL: The Critical Role of Nutrient Offsets*, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 319, 332 (2014) ("[I]n the process of TMDL development, [EPA] never formally released the results of . . . consultations [with States] for public review, or gave any clear explanation for the methods of disaggregating required nutrient reductions from the top down. There was in general a lack of transparency in the setting of TMDL nutrient load reduction targets by EPA.").

EPA's TMDL for the Chesapeake Bay is the exact opposite of "cooperative federalism." It is command-and-control nationalization. It runs afoul of the letter and spirt of both the Clean Water Act and the many precedents that have upheld State and local government authority over land-use decisions.

And it deprives the 17 million people in the Chesapeake Bay the ability to shape—through those governments closest to them and most responsive to their needs—the destinies of their communities.

B. The Third Circuit's Decision Conflicts with This Court's Decisions Requiring Courts To Test Agency Interpretations Against Federalism Concerns

In blessing EPA's power grab, the Third Circuit ignored the Clean Water Act's plain text. The Act authorizes EPA to establish a "total maximum daily load" (33 U.S.C. 1313(d)(2)), not to regulate down to the drop the pollutant limits for particular water sources, much less to establish an oversight regime under which States and counties must provide the agency with "reasonable assurance" about how they are complying with the agency's micromanagement of lakes and rivers from (in many cases) hundreds of miles away.[3] Congress has spoken clearly—"total" means total, not "totals" or "subparts of a total"—and "that is the end of the matter." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The

[3] "Total" means "comprising the whole number or amount." Oxford English Dictionary Online (last visited Dec. 7, 2015), at http://www.oxforddictionaries.com/us/definition/american_english/total. The word focuses on the aggregate, not on the aggregate's constituent parts. That is no clearer than in the Clean Water Act, which pairs "total" with the words "maximum" and (the singular) "load." Congress empowered the EPA to establish a total load at a level necessary to meet existing water-quality standards. It left the attendant details to the States and counties.

statute's plain language leaves no room for the EPA's contrary interpretation.

But even if the phrase "total maximum daily load" admitted of some ambiguity, the Third Circuit erred in affording *Chevron* deference to the EPA's creative interpretation of that phrase, which dramatically encroaches on States' and local governments' primary responsibility for regulating land-and-water use.

Just last year, this Court reaffirmed that when "ambiguity derives from the improbably broad reach of [a] key statutory definition," "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve [that] ambiguity." *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014). Indeed, the Court has often relied on federalism principles to construe federal statutes that touch areas of traditional state and local concern. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 459–61 (1991) (qualifications for state officers); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (titles to real estate); *Bond*, 134 S. Ct. at 2090 (punishment of local criminal activity). In many cases, the Court did so based solely on background constitutional considerations and without the benefit of a federal statute expressly preserving State and local government control over an area of traditional concern to them.

Here, of course, there is both. The Tenth Amendment to the United States Constitution—reserving all unenumerated powers to the States and or the people—stands against the EPA's efforts to federalize water regulation across the Chesapeake

Bay watershed. U.S. Const. amend. X. But so does the Clean Water Act. "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [through the Clean Water Act] to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (quoting 33 U.S.C. § 1251(b)). Given Congress's clear intent to leave to the States primary responsibility for regulating land-and-water use, the Third Circuit should have rejected the EPA's interpretation precisely *because* it so drastically alters the federal-state balance.

Chevron deference does not counsel for a different result. On the contrary, because this Court has encouraged lower courts to refer to basic principles of federalism when construing ambiguous federal statutes that touch on areas of traditional state and localconcern (*Bond*, 134 S. Ct. at 2090), the Third Circuit should have tailored its *Chevron* analysis to fit those constitutional restraints. Indeed, in *Solid Waste*—a case about the Clean Water Act—this Court "reject[ed] the request for administrative deference"_"to avoid the significant constitutional and federalism questions raised by [the agency's] interpretation." 531 U.S. at 174.[4]

---

[4] The Third Circuit dismissed *Solid Waste* as a case about "'jurisdiction' in the administrative law sense of the word." *See* Pet. App. 32a-33a. But in the same breath, the circuit court acknowledged that the case was about the Army Corps of Engineers' "authority to regulate." *Id.* at 32a. This case, like *Solid Waste*, is about an agency's "authority to regulate." In any

Calibrating *Chevron*'s second step to account for federalism concerns makes good sense. If it is "incumbent on the federal courts to be certain of *Congress*' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers'" (*Bond*, 134 S. Ct. at 2089 (emphasis added) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)), then it surely follows that courts must not permit administrative agencies to displace state and local power when Congress has made certain its intent to avoid such a result (even if a particular section of the statute admits of some ambiguity). *See also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L. J. 64, 124 (1998) (suggesting that courts can address federalism concerns at *Chevron*'s second step).

The point is this: An agency's interpretation of an ambiguous federal statute that touches an area of traditional state and local concern is not worthy of judicial deference if the interpretation takes a meat axe to state and local sovereignty. The Third Circuit did not properly adjust its *Chevron* analysis to account for those federalism concerns. If it would have, it would have been constrained to reject the EPA's interpretation as unreasonable. The agency's interpretation turns the Clean Water Act's promise of "cooperative federalism" into a euphemism for the arrogation of federal regulatory power.

---

event, whether the issue is styled as one about "administrative jurisdiction" or "interpretive deference," the question is the same: Is the agency's position reasonable?

II. THE REGULATORY COSTS IMPOSED ON STATE AND LOCAL GOVERNMENTS BY EPA'S CHESAPEAKE BAY TMDL ARE SIGNIFICANT

The Third Circuit's decision authorizing EPA's Bay TMDL imposes a significant financial burden on State and local governments. The costs associated with TMDL implementation come as no surprise. The TMDL was developed with little consideration given to the actual costs that local governments would be asked to bear to implement pollutant limits within their jurisdictions. *See* 76 Fed. Reg. 549 (Jan. 5, 2011); *see also* Nelson, *supra*, at 335-36. The Bay TMDL provides no estimate of the total costs of achieving its 2017 and 2025 pollution reduction targets for nitrogen, phosphorus and sediments. County governments in particular were not consulted and ultimately were blindsided by the obligations that *they* would be commanded to carry out.

Since EPA established the Bay TMDL in December 2010, States have estimated the financial burden associated with its implementation—predominantly, by localities. For example, the total TMDL implementation costs for Maryland from 2010 to 2025 (final pollution target date) has been estimated at $14.4 billion. TMDL implementation costs for Virginia, over the same period, have been estimated at between $13.6 billion and $15.7 billion. Pennsylvania is expected to see implementation costs in the same range, while Delaware, New York, and West Virginia combined potentially face about $5

billion in implementation costs. Nelson, *supra*, at 339.

Those estimates do not reflect the additional unseen costs associated with the TMDL, which applies in large sections of six States and the District of Columbia. Local budgetary priorities will be sacrificed to make room for the TMDL's expensive implementation, even if those implementation measures are not the most efficient means of improving water quality. Farms will go out of production, and local food supplies will be jeopardized. Industrial and other business activity will diminish. Local employment prospects will dim.

Late in EPA's development of the TMDL, States already were sensing (though did not fully appreciate) the massive costs of implementation. For example, a month before EPA formally announced the Bay TMDL, Virginia submitted to EPA its proposed plan for implementation and ominously warned:

> It is important to emphasize again that this plan is being developed during *the worst economy in generations*. Virginians have already invested billions of dollars in Chesapeake Bay water quality improvement to date. Full implementation of this plan will likely cost more than $7 billion new dollars which would be *another federal unfunded mandate on the state, localities, private industries, and homeowners*. In addition to the new health care law and other new regulatory burdens, *it is placing enormous*

> *new fiscal stress on state budgets*. However as a show of good faith, the Governor will include $36.4 million new dollars in our Water Quality Improvement Fund in his 2011 budget amendments. In these austere times, we cannot guarantee what additional funding will be provided by our General Assembly. It is our position that the success of the [Watershed Implementation Plan] may be subject to the *provision of sufficient federal funding to assist in covering these massive new unfunded mandates*.

Commonwealth of Virginia, *Chesapeake Bay TMDL Phase I Watershed Implementation Plan Revision of the Chesapeake Bay Nutrient and Sediment Reduction Tributary Strategy* at iii (November 29, 2010), *available at* http://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/Baywip/vatmdlwipphase1.pdf (visited on Dec. 5, 2015) (emphasis added).

Similarly, Pennsylvania's 2012 Watershed Implementation Plan bemoans the extreme financial difficulties that counties will face in implementing the Bay TMDL. For example, Amici Berks, Lancaster, and Lebanon Counties—among others—reported that TMDL reductions were "very ambitious" and "not achievable under existing sources." Pennsylvania Department of Environmental Protection, *Pennsylvania Chesapeake Watershed Implementation Plan Phase 2* at 64 (Mar. 30, 2012), available at https://www.dep.state.pa.us/river/iwo/chesbay/docs/refmaterials/PAChesapeakeWIPPhase2_3-30-12.pdf

(visited on Dec. 5, 2015). Other counties expressed concerns that "[t]here are staffing and funding gaps which will make it difficult to achieve [Best Management Practices] planning targets" required by the Bay TMDL. *Id.* at 12.

The Bay TMDL unilaterally imposes unprecedented and unfunded liabilities on the States and local governments that have been consigned to implement it. It affects those jurisdictions' financial ability to provide basic services and carry out the most important community priorities to 17 million people, at a time when budgets already are severely strained. The adverse and widespread socioeconomic impact of the Bay TMDL makes this case—and this Court's review—all the more essential.

III. THE IMPACTS OF EPA'S CHESAPEAKE BAY TMDL ON AGRICULTURAL PRODUCERS AND THE BUSINESSES THAT SUPPORT THEM WILL BE DEVASTATING

In addition to violating State and local government sovereignty over land-use planning and imposing unfunded liabilities on counties, EPA's Bay TMDL causes irreparable harm to the landowners, businesses, and farmers whose point and nonpoint sources must comply with its inflexible and hard-to-achieve load restrictions. But perhaps no sector is more adversely affected than the agricultural sector, a linchpin of the economies of many Bay communities. EPA's TMDL—if preserved and replicated elsewhere—will require unprecedented sacrifices from farmers and agriculture-related

businesses, and will put many out of business without necessarily achieving water-quality goals.

Consider Amicus Lancaster County, Pennsylvania. It has over 400,000 thousand acres of productive farmland, including dairy, poultry, and swine farms, of which 100,000 acres are in agricultural preserve. Thanks to the Bay TMDL, the County will be forced to bear the brunt of the agricultural requirements, because it is so farmland intensive. The County's farmlands must achieve a 35% nitrogen-load reduction, a 27% phosphorus-load reduction, and a 39% sediment-load reduction. Because the TDML fails to adequately account for the agricultural sector's significant and costly investments over the last several decades to reduce its environmental footprint, those targets will be especially difficult for many County farmers to meet, particularly smaller operations. Pennsylvania Draft County Level Planning Targets for Chesapeake Bay Phase II WIPs, 128 (2012).

Amicus Clearfield County, Pennsylvania is primarily rural, with most of the developed lands being dedicated to agricultural production, resource production and extraction, and residential and commercial activities. Most of the County's rural land uses are subject to the Bay TMDL and will be affected by EPA's allocation of loading within and among these land uses. As a result of the reductions mandated by the Bay TMDL, the County will be forced to make changes in those land uses, including taking agricultural lands out of production.

Yet another example is Amicus Tioga County, Pennsylvania, which is a rural community whose lands are primarily in agricultural production, with croplands occupying 18% of total lands. The County must achieve a 21% nitrogen-load reduction, a 29% phosphorus-load reduction, and a 27% sediment-load reduction. *Id.* at 203. With the added demands on agriculture, Tioga County will be faced with additional riparian buffers and an obligation to shore up creek banks with tress, further limiting the acres of land authorized for agricultural production.

The load-reductions demanded of the agricultural sector are substantial, requiring producers to make significant investments or changes to their operations. The TMDL mandates where the load reductions should occur, rather than allowing States and counties to exercise their expert judgment based on their jurisdictions' particular socioeconomic circumstances and needs. Other agricultural producers and supporting businesses across the Nation are vulnerable to the same micromanagement from Washington D.C., unless the Third Circuit's decision authorizing the Bay TMDL is reviewed.

CONCLUSION

EPA has promised to replicate the Bay TMDL for waters across the country. The Third Circuit's decision serves only to legitimize EPA's blueprint. This Court should stop the federalization of land-use decision-making and the massive socioeconomic costs that it imposes, and grant the petition.

Respectfully submitted,

NOWELL D. BERRETH
Alston & Bird LLP
One Atlantic Center
1201 W. Peachtree St.
Atlanta, GA 30309
(404) 881-4481
nowell.berreth@alston.com

PAUL J. BEARD II
Counsel of Record
Alston & Bird LLP
1115 11th Street
Sacramento, CA 95814
(916) 498-3354
paul.beard@alston.com

BRIAN D. BOONE
Alston & Bird LLP
101 S. Tryon Street
Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com

Counsel for *Amici Curiae*

December 2015