Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
Washington, D.C. 20543


Dear Mr. Harris:

This case involves Section 111(d) of the Clean Air Act (CAA), 42 U.S.C. § 7411(d), pursuant to which the Environmental Protection Agency (EPA) previously promulgated the Clean Power Plan (CPP). See 80 Fed. Reg. 64,662 (Oct. 23, 2015). EPA claimed in the CPP that Section 111(d) conferred on it the authority to determine which sources of energy power plants could use to generate the nation's electricity, with an express intention of eliminating coal as a lawful means of energy generation. After this Court stayed the implementation of the CPP, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (No. 15A773), EPA reconsidered its interpretation of Section 111(d) and repealed the CPP on the ground that it exceeded EPA's statutory authority, see 84 Fed. Reg. 32,520, 32,523 (July 8, 2019). It further promulgated the Affordable Clean Energy (ACE) Rule to replace the CPP. See id. at 32,532.

Virginia and other States challenged EPA's repeal of the CPP and its replacement with the ACE Rule. See Am. Lung Ass'n v. EPA, 985 F.3d 914, 941 (CADC 2021) (per curiam). The D.C. Circuit granted the petitions for review, vacated the repeal of the CPP and the ACE Rule, and remanded them to EPA. Id. at 995.

West Virginia, other States, and private parties that had intervened in the D.C. Circuit to defend the CPP repeal and the ACE Rule petitioned this Court for certiorari. Virginia joined a group of States and municipalities in opposition to the
petition, arguing in part that the D.C. Circuit’s rejection of the CPP repeal and ACE Rule was correct. Br. States Municipalities in Opp. at 1, 30, West Virginia v. EPA, No. 20-1530 (Aug. 5, 2021). This Court granted the petition. West Virginia v. EPA, 142 S. Ct. 420 (Oct. 29, 2021) (No. 20-1530). On January 18, 2022, the group of States and municipalities filed their merits brief in this Court. Br. New York & Other State Municipal Resp’ts, West Virginia v. EPA, No. 20-1530 (Jan. 18, 2022). Virginia did not join that brief, nor has it filed a merits brief of its own. The purpose of this letter is to explain why Virginia did not file a merits brief.

Following the change in Administration on January 15, 2022, the Attorney General has reconsidered Virginia’s position in this case. Virginia is no longer of the view that EPA's repeal of the CPP was unlawful. Virginia is now of the view that Section 111(d) did not grant EPA authority to issue the CPP, and its repeal was therefore required. Thus, although Virginia remains a respondent pursuant to Supreme Court Rule 12, it supports the petitioners’ arguments in this case.

The text of Section 111(d) is limited, contemplating only regulation within a specific source’s fence line. It was historically understood to be a minor provision of the CAA and gave rise to only seven EPA regulations in the 40 years before the rules at issue in this case. See, e.g., Clean Air Act Amendments of 1987: Hearings on S.300, S.321, S.1351 & S.1384 before the Subcomm. on Env’t Pro. of the S. Comm. on Env’t & Pub. Works, 100th Cong. 13 (1987) (referring to Section 111(d) as an “obscure, never-used section of the law”). EPA nevertheless relied on Section 111(d) to issue “arguably one of the most consequential rules ever proposed by an administrative agency,” imposing “unfathomable” costs on the national economy. Am. Lung Ass’n, 985 F.3d at 1000 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The CPP would have had vast economic and political consequences had it ever taken effect. *See Am. Lung Ass’n*, 985 F.3d at 1000 (opinion of Walker, J.). The narrow text of Section 111(d) is not a clear Congressional statement authorizing the broad assertion of regulatory power embodied in the CPP. Accordingly, the CPP was not a lawful exercise of EPA’s power because Congress did not “plainly authorize[]” it in the CAA. *Nat’l Fed’n of Indep. Bus.*, slip op. at 6. EPA was therefore required to repeal it.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

/s/ Andrew N. Ferguson

Andrew N. Ferguson
Solicitor General of Virginia

cc: See attached service list.
20-1530, 20-1531, 20-1778, 20-1780
STATE OF WEST VIRGINIA, ET AL.,
THE NORTH AMERICAN COAL CORPORATION,
WESTMORELAND MINING HOLDINGS LLC,
STATE OF NORTH DAKOTA,

v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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