



**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*

**Jason S. Miyares**  
Attorney General

202 North Ninth Street  
Richmond, Virginia 23219  
(804) 786-2071  
Fax (804) 786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

January 19, 2022

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

Re: West Virginia, et al. v. Environmental Protection Agency, et al., No. 20-1530; North American Coal Corporation v. Environmental Protection Agency, et al., No. 20-1531; Westmoreland Mining Holdings LLC v. Environmental Protection Agency, et al., No. 20-1778; and North Dakota v. Environmental Protection Agency, et al., No. 20-1780.

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*West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773), EPA reconsidered its interpretation of Section 111(d) and repealed the CPP on the ground that it exceeded EPA's statutory authority, *see* 84 Fed.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 (CA DC 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).

As this Court again recognized last week, “Congress does not usually ‘hide elephants in mouseholes.’” *Nat’l Fed’n of Indep. Bus. v. Occupational Health & Safety Admin.*, 595 U.S. \_\_\_, slip op. at 5–6 (Gorsuch, J., concurring) (2022) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). Instead, the Court “‘expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.’” *Id.* at 6 (per curiam) (quoting *Alabama Assn. of Realtors v. Dep’t of Health & Human Servs.*, 594 U.S. \_\_\_, \_\_\_, 141 S. Ct. 2485, 2489 (2021) (per curiam)). Indeed, this Court has previously rejected EPA’s “claim[] to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’” requiring instead that Congress “speak clearly if it wishes to assign to an agency decisions of ‘vast economic and political significance.’” *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

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.

Andrew Michael Grossman  
Baker & Hostetler LLP  
1050 Connecticut Avenue, N.W.  
Suite 1100  
Washington, DC 20036  
202-861-1697  
agrossman@bakerlaw.com  
*Counsel for Westmoreland Minings Holdings LLC*

Jacob Moshe Roth  
Jones Day  
51 Louisiana Avenue NW  
Washington, DC 20001  
202-879-7658  
yroth@jonesday.com  
*Counsel for The North American Coal Corporation*

Paul Martin Seby  
Greenberg Traurig LLP  
1144 15th Street  
Suite 3300  
Denver, CO 80202  
303-572-6500  
sebyp@gtlaw.com  
*Counsel for the State North Dakota*

Lindsay Sara See  
Office of the West Virginia Attorney General  
1900 Kanawha Blvd E, Bldg 1 Rm 26E  
Charleston, WV 25305  
304-558-2021  
lindsay.s.see@wvago.gov  
*Counsel for the State of West Virginia, et al.*

Beth Susan Brinkmann  
Covington & Burling LLP  
850 Tenth Street, NW  
Washington, DC 20001-4956  
202-662-5312  
bbrinkmann@cov.com

*Counsel for Consolidated Edison, Inc., Exelon Corporation, National Grid USA,  
New York Power Authority, Power Companies Climate Coalition, and Sacramento  
Municipal Utility District*

Sean Hoe Donahue  
Donahue, Goldberg & Littleton  
1008 Pennsylvania Avenue, SE  
Washington, DC 20003  
202-277-7085  
sean@donahuegoldberg.com

*Counsel for Non-Governmental Organization and Trade Association Respondents*

Elbert Lin  
Hunton Andrews Kurth LLP  
951 E. Byrd Street  
Riverfront Plaza, East Tower  
Richmond, VA 23219-4074  
804-788-7202  
elin@HuntonAK.com  
*Counsel for America's Power*

Elizabeth B. Prelogar  
Solicitor General  
United States Department of Justice 950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
202-514-2217  
SupremeCtBriefs@USDOJ.gov  
*Counsel for U.S. Environmental Protection Agency, et al.*

Emily Church Schilling  
Holland & Hart LLP  
901 K Street NW Suite 850  
Washington, DC 20001  
202-393-6500  
ecschilling@hollandhart.com

*Counsel for Basin Electric Power Cooperative*

Misha Tseytlin  
Troutman Pepper Hamilton Sanders LLP  
227 W. Monroe St.  
Suite 3900  
Chicago, IL 60606  
(608) 999-1240  
misha.tseytlin@troutman.com  
*Counsel for National Mining Association*

Barbara Dale Underwood  
Solicitor General  
Office of the Attorney General  
28 Liberty Street  
New York, NY 10005-1400  
212-416-8016  
Barbara.underwood@ag.ny.gov  
*Counsel for State of New York, States and Municipalities*

Steven Chiajon Wu  
New York Office of the Attorney General  
28 Liberty Street  
New York, NY 10005  
212-416-6312  
steven.wu@ag.ny.gov  
*Counsel for State of New York*