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February 18, 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 Protectional Agency, et al., No. 20-1531; Westmoreland Mining Holdings LLC v. Environmental Protectional Agency, et al., No. 20-1778; and North Dakota v. Environmental Protectional 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*West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773), EPA reconsidered its interpretation of Section 111(d) and repealed the CPP on the ground that it exceeded EPA's statutory authority, *see* 84 Fed.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 (CADDC 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 were 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 Respondents, *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, largely for the reasons stated in the Brief of Petitioners State of West Virginia, et al., *West Virginia v. EPA*, No. 20-1530 (Dec. 13, 2021).

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

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