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May 23, 2017

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Re: Communication from the Attorneys General of the States of West Virginia, Alabama, Arkansas, Kansas, Louisiana, Missouri, Nebraska, South Carolina, Texas, and Wisconsin Supporting Withdrawal of the United States from the Paris Agreement

Dear President Trump:

As the chief legal officers of our States, we write to support withdrawing the United States from the agreement of the 2015 United Nations Framework Convention on Climate Change (“Paris Agreement”). Though we believe that the Paris Agreement does not legally require the United States to take any action, we nevertheless believe there are many important reasons for withdrawing formally from the Agreement. Among those reasons are: the potential for legal actions seeking to enforce the Agreement; the use of the Agreement to challenge your Administration’s efforts to revise or rescind unlawful or unnecessary regulations issued under President Obama; reliance on the Agreement as an alleged trigger for regulation under Section 115 of the Clean Air Act; and, finally, the critical message that withdrawal sends to Americans who are counting on the regulatory and policy changes you promised to bring to the White House.

Let us be clear at the outset: We do not believe the Paris Agreement legally binds the United States to take any action. As even the prior administration acknowledged, the Paris Agreement is

at most “politically binding.”¹ It has not been ratified by the Senate, as a treaty must be.² Nor is there any other preexisting legal authority that would have allowed President Obama to make the Agreement binding on the United States without Senate approval as a treaty.³

But the Agreement’s non-binding nature does not mean there are no consequences to remaining in or withdrawing from the Agreement. *First*, so long as the United States remains in the Agreement, there is a risk that some individual or organization will attempt to enforce its terms. The recent debate over the meaning of Article 4.11 highlights just one possible provision that could form the basis for such a challenge.⁴ While we do not believe that such an enforcement lawsuit should prevail, we cannot be sure that the judge who might decide such a claim would necessarily rule that way.

Second, participation in the Agreement could be used to challenge your Administration’s welcome efforts to revise or rescind regulations promulgated by President Obama, including the so-called “Clean Power Plan.”⁵ For example, the United States’ reduction of carbon emissions under the Paris Agreement is premised on the Clean Power Plan going into effect.⁶ Advocates of the Clean Power Plan could argue that the United States’ continued commitment to the Paris Agreement makes any effort to revise or rescind the Clean Power Plan arbitrary and capricious. Again, while we do not believe this argument has any merit, it is nevertheless an unnecessary risk of remaining in the Paris Agreement.

Third, a number of environmental law scholars have argued that the involvement of the United States in the Paris Agreement triggers Section 115 of the Clean Air Act, 42 U.S.C. § 7415, which the scholars believe can be used by EPA to force States to reduce carbon dioxide emissions

¹ See, e.g., Demetri Sevastopulo & Pilita Clark, *Paris climate deal will not be a legally binding treaty*, The Financial Times (Nov. 11, 2015), <https://www.ft.com/content/79daf872-8894-11e5-90de-f44762bf9896>; *CEI Releases New Report on Serious Economic and Legal Consequences of Remaining in Paris Climate Agreement*, Competitive Enterprise Institute (May 3, 2017), <https://cei.org/content/cei-releases-new-report-serious-economic-and-legal-consequences-remaining-paris-climate>; see also Samantha Page, *No, The Paris Climate Agreement Isn’t Binding. Here’s Why That Doesn’t Matter*, ThinkProgress (Dec. 14, 2015), <https://thinkprogress.org/no-the-paris-climate-agreement-isnt-binding-here-s-why-that-doesn-t-matter-62827c72bb04> (arguing that the Paris Agreement’s power comes exclusively from social pressure).

² U.S. Const. art. II, § 2, cl. 2.

³ See Letter from Patrick Morrisey, Att’y Gen. of W. Va. & Ken Paxton, Att’y Gen. of Tx., to Hon. John F. Kerry (Nov. 23, 2015) (attached).

⁴ See, e.g., John Schwartz, *Debate Over Paris Climate Deal Could Turn on a Single Phrase*, The New York Times (May 2, 2017), https://www.nytimes.com/2017/05/02/climate/trump-paris-climate-accord.html?_r=0.

⁵ See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

⁶ See, e.g., Ben Wolfgang, *Trump’s executive action on Clean Power Plan signals U.S. exit from Paris climate treaty*, The Washington Times (Mar. 27, 2017), <http://www.washingtontimes.com/news/2017/mar/27/paris-climate-treaty-faces-us-exit-after-donald-tr/>; Marianne Lavelle, *Trump Repeal of Climate Rules Means U.S. Paris Target Now Out of Reach*, Inside Climate News (Mar. 20, 2017), <https://insideclimatenews.org/news/20032017/paris-climate-agreement-donald-trump-global-warming-clean-power-plan>; see also *Paris Climate Agreement Crosses Final Threshold*, Nuclear Energy Institute (Oct. 6, 2016), [https://www.nei.org/News-Media/News/News-Archives/Paris-Climate-Agreement-Crosses-Final-Threshold-\(1\)](https://www.nei.org/News-Media/News/News-Archives/Paris-Climate-Agreement-Crosses-Final-Threshold-(1)) (“A major contributor to meeting th[e] [United States’] goal [in the Paris Agreement] will be the U.S. Environmental Protection Agency’s Clean Power Plan.”).

that affect other countries.⁷ Section 115 (governing “International air pollution”) requires: (1) a finding that “any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country”; and (2) a finding of reciprocity, *i.e.*, the foreign country extends the U.S. “essentially the same rights with respect to the prevention or control of air pollution occurring in that country” as the foreign country enjoys under Section 115. 42 U.S.C. § 7415. These scholars argue that the Paris Agreement fulfills the reciprocity requirement. We disagree, because the Paris Agreement provides the United States no enforceable rights against air pollution occurring in other countries.⁸ Still, this argument illustrates yet another negative consequence of remaining in the Paris Agreement.

Fourth, and finally, withdrawing from the Paris Agreement is an important and necessary step toward reversing the harmful energy policies and unlawful overreach of the Obama era. Like the Clean Power Plan, the Paris Agreement is a symbol of the Obama Administration’s “Washington knows best” approach to governing. Indeed, despite the unprecedented stay by the United States Supreme Court of the Clean Power Plan, President Obama pushed forward with the Paris Agreement, and made the presumptively unlawful Clean Power Plan the linchpin of the United States’ carbon reduction commitment. We applaud your commitment to returning power to the States and the American people, and the steps you have already taken to that end, including your Executive Order to promote energy independence and requiring EPA to review the Clean Power Plan.⁹ We urge you to continue to that much-needed change in policy, which many Americans are counting on, by withdrawing from the Paris Agreement.

* * *

Thank you for your consideration of our concerns. We respect the President’s power and discretion to determine appropriate policies for the United States. But the continued participation of the United States in the Paris Agreement creates significant practical and legal concerns of great importance to our States and our constituents, which we ask you to take into account as you consider whether to remain in or withdraw from the Agreement.

⁷ See Michael Burger et. al, Legal Pathways to Reducing Greenhouse Gas Emissions under Section 115 of the Clean Air Act, available at http://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal_pathways_to_reducing_ghg_emissions_under_section_115_of_the_caa.pdf.

⁸ Nor has there been the requisite endangerment finding. Those who support the use of Section 115 have relied on EPA’s endangerment finding for greenhouse gas emissions from cars issued after *Massachusetts v. EPA*. See, e.g., Bob Sussman, *The essential role of Section 115 of the Clean Air Act in meeting the COP-21 targets*, The Brookings Institution (Apr. 29, 2016), <https://www.brookings.edu/blog/planetpolicy/2016/04/29/the-essential-role-of-section-115-of-the-clean-air-act-in-meeting-the-cop-21-targets/>. But that finding concerned a particular combination of pollutants in a particular context and cannot simply be bootstrapped to meet any and all statutorily mandated endangerment findings. See, e.g., State Pet’rs’ Final Opening Br., *North Dakota et al. v. EPA*, No. 15-1381 (and consolidated cases) 34, ECF 1659341 (D.C. Cir. Feb. 3, 2017) (arguing that EPA failed to meet its statutorily mandated endangerment and significant contribution findings required by Section 111(b) of the Clean Air Act).

⁹ See Presidential Executive Order on Promoting Energy Independence and Economic Growth (Mar. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1>.

Sincerely,



Patrick Morrisey
West Virginia Attorney General



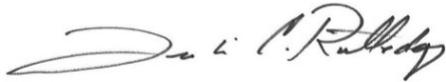
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November 23, 2015

The Honorable John F. Kerry
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United States Department of State
2201 C Street N.W.
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Re: Communication from the Attorneys General of the States of West Virginia and Texas Regarding 2015 United Nations Climate Change Conference in Paris

Dear Secretary Kerry:

As the chief legal officers of States leading a court challenge against the President's unlawful CO₂ reduction program—the so-called “Clean Power Plan”¹—we write to convey two points critical to our States with respect to the participation of the United States in the 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21/CMP11), otherwise known as “Paris 2015.” *First*, we believe you have a duty to acknowledge to negotiating nations at Paris 2015 that the centerpiece of the President's domestic CO₂ reduction program is being challenged in court by a majority of States and will likely be struck down. *Second*, in order to be legally binding, any agreement arising from Paris 2015 must be submitted to the United States Senate for ratification under clear constitutional requirements.

The President's Commitment To Reduce CO₂ Emissions Is Premised On An Unlawful Regulation That Is Unlikely To Survive Judicial Review

The President's representations regarding his Administration's CO₂ emission reduction plans are based on unilateral executive action that is unlikely to be the law for very long. The Power Plan—which was never voted on by Congress—has been under withering scrutiny from both Republicans and Democrats since it was proposed, and the chorus calling for its overturning

¹ See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

grows by the day. A bipartisan majority of States, including the signatories to this letter, has filed a lawsuit asking the federal court of appeals in Washington, D.C., to put an end to the illegal Power Plan.²

The legal arguments against the Power Plan are strong and numerous. We summarize only three here³:

First, the Power Plan was promulgated by the Environmental Protection Agency (EPA) under Section 111(d) of the Clean Air Act, but it is clear under U.S. Supreme Court case law that the EPA's reliance on that provision is mistaken. EPA's Power Plan seeks to force States to reduce CO₂ emissions by fundamentally reorganizing their energy generation from coal- and fossil fuel-fired generation to renewable energy. But those are indisputably questions of wide-reaching economic and political import, and as our Supreme Court recently said in a ruling against EPA, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism."⁴ Congress, the Supreme Court explained, is expected to "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."⁵ Nothing in Section 111(d) of the Clean Air Act comes close to clearly assigning the EPA—an *environmental* regulator—the power it claims over the nation's energy policy.

Second, even if the EPA were authorized to force States to reorder their energy policy, which it is not, Section 111(d) includes an independent prohibition of the Power Plan. That provision expressly bars the EPA from regulating a source category that is already "regulated under [Section 112]"⁶—a separate section of the Clean Air Act concerning emissions of hazardous air pollutants from certain stationary sources. Because the EPA has already chosen to regulate fossil fuel-fired power plants under Section 112,⁷ it cannot also regulate those same power plants under Section 111(d)—as it is attempting to do under the Power Plan.

Third, the Power Plan raises serious constitutional concerns under the Tenth Amendment to the U.S. Constitution. At its core, the Power Plan will require changes to intrastate energy production. But that is an area over which the States have exclusive authority.⁸ As a result, the States will have no choice under the Power Plan but to take certain actions, which violates the

² See *State of West Virginia, et al. v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.).

³ These and other detailed legal arguments brought against the Clean Power Plan may be found here: <http://www.ago.wv.gov/publicresources/epa/Pages/D-C--Circuit%2c-No--15-1363.aspx>.

⁴ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

⁵ *Id.* (quotations omitted).

⁶ 42 U.S.C. § 7411(d)(1)(A).

⁷ See 77 Fed. Reg. 9,304 (Feb. 16, 2012).

⁸ *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); 16 U.S.C. § 824(a).

Tenth Amendment's prohibition on the federal government commandeering the States to carry out federal law.⁹

Any Agreement Arising From Paris 2015 Must Be Submitted To United States Senate For Ratification

We also write to emphasize that any agreement arising from Paris 2015 will be legally non-binding unless it is submitted to and ratified by the U.S. Senate. As you know, the Treaty Clause of the U.S. Constitution requires any treaty to be approved by two-thirds of the Senate.¹⁰ Moreover, treaties are “not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified [by the Senate] on these terms.”¹¹

The ratification process is of special importance to the States, as a lawful treaty takes precedence over all State laws and constitutions.¹² Unlike the U.S. House of Representatives, the Senate represents the States as equals in the federal legislative branch, with two members from each State regardless of population. The involvement of the Senate in the treaty process thus preserves some power for the States, which gave up as part of the Constitution the ability to make treaties.¹³

We understand from recent press reports that the President intends that any Paris 2015 agreement will “not [include] legally binding reduction targets” and thus will “definitely not . . . be a treaty.”¹⁴ We hope this is a candid recognition that the President’s agenda lacks support at home, and is not intended to suggest that the President will instead attempt to ratify a Paris 2015 accord through an executive agreement, as we believe that would be clearly unlawful. The President may only conclude an executive agreement that is authorized by a preexisting treaty, covers matters within his executive power under the Constitution, or is made pursuant to an act of Congress.¹⁵ None of these preconditions are present here. Neither a preexisting treaty nor the Constitution authorizes the President to make an executive agreement mandating domestic CO₂ emission reductions. Nor does the President have authorization under an act of Congress such as the Clean Air Act, as discussed above.

* * *

⁹ *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

¹⁰ U.S. Const. art. II, § 2, cl. 2.

¹¹ *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (internal quotations omitted).

¹² U.S. Const. art. VI, cl. 2.

¹³ U.S. Const. art. I, § 10, cl. 1.

¹⁴ Demetri Sevastopulo & Pilita Clark, *Paris climate deal will not be a legally binding treaty*, The Financial Times (Nov. 11, 2015), <http://www.ft.com/cms/s/0/79daf872-8894-11e5-90def44762bf9896.html>.

¹⁵ See Restatement (Third) of Foreign Relations Law § 303 (1987).

Thank you for your consideration of our concerns. We respect the President's power and discretion to negotiate international agreements with foreign nations. But there are significant legal limits on his ability either to carry out the promises he has made in advance of Paris 2015 or to enforce any agreement arising out of the summit. These serious legal questions are of great importance to the States, which under our constitutional system "possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."¹⁶ We expect our federal representatives to respect that system of dual sovereignty both here at home and in negotiations abroad.

Sincerely,



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cc:

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¹⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (internal quotations omitted).

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The Hon. John F. Kerry
November 23, 2015
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