

July 22, 2022

VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
United States Court of Appeals for the Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408



National Office
125 Broad Street
18th Floor
New York, NY 10004
aclu.org

Deborah N. Archer
President

Anthony D. Romero
Executive Director

RE: Response to Notice of Supplemental Authority, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

Dear Mr. Cayce:

In relying on *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), Plaintiffs continue to confuse a court's Article III power to rule on the legality of existing regulations with a court's Article III power to preemptively enjoin future regulations.

The Court in *West Virginia* held that the EPA's voluntary cessation was not sufficient to moot the case because the EPA failed to demonstrate that the challenged conduct was not reasonably likely to recur: "The case thus remains justiciable, and we may turn to the merits." *Id.* at 2607. The Court then proceeded to the merits and concluded that the EPA did not have statutory power to issue regulations requiring "generation shifting."

Unlike in *West Virginia*, the merits of this case have already been resolved, and the questions on appeal involve the scope of the district court's remedial power. The Supreme Court's precedent in *West Virginia* guarantees as a practical matter that any future attempt by the EPA to require "generation shifting" would be declared invalid. But the Court did not purport to authorize an *injunction* against all hypothetical future regulations requiring "generation shifting." Nothing in *West Virginia* or any other Supreme Court decision empowers a court to issue an injunction against hypothetical regulations that do not yet exist.

Respectfully submitted,

/s/ Joshua A. Block

Joshua A. Block
Counsel for Intervenor Defendants-Appellants

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