Nos. 16-2432 (L), 17-1093, 17-1170

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Murray Energy Corporation, et al.
Plaintiffs-Appellees,

v.

Administrator, United States Environmental Protection Agency,
Defendant-Appellant,

Mon Valley Clean Air Coalition, et al.
Applicants-in-Intervention-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Case No. 5:14-cv-00039 (Hon. John Preston Bailey)

BRIEF OF *AMICI CURIAE* THE STATE OF WEST VIRGINIA AND 15 OTHER STATES SUPPORTING PLAINTIFFS-APPELLEES

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INTEREST AND IDENTITY OF *AMICI*

As Appellees ("Murray Energy") have demonstrated, the Appellant Administrator of the Environmental Protection Agency ("EPA") has failed to comply with the mandatory duty under Section 321 of the Clean Air Act ("CAA"), 42 U.S.C. § 7621(a), to evaluate the harm the agency's regulations exact on the American workforce. The plain terms of Section 321 and all relevant legislative history foreclose EPA's contention that it may disregard the Section 321 mandate. And the scattershot assortment of regulatory impact analyses, economic impact analyses, and "associated memoranda" that EPA presented to the District Court are not sufficient to comply with Section 321. 42 U.S.C. § 7621(a).

The States of West Virginia, Arizona, Arkansas, Georgia, Kansas, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, Texas, Utah, Wisconsin, and Wyoming ("*Amici* States") will not repeat these arguments. Rather the *Amici* States highlight the unique challenges they face resulting from the job-loss information vacuum caused by EPA's unlawful refusal to comply with Section 321.[1] First, States need Section 321 information to assist in advancing their sovereign interest in promoting economic prosperity among their citizens, particularly when EPA's CAA actions may negatively impact state economies. The type of information evaluated by EPA under Section 321 is important because it

[1] A State may "file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a).

can help States anticipate and mitigate those negative impacts. Second, Section 321 job-loss information can be useful for preparing state budgets. Unexpected declines in those industries affected by CAA regulations and the resulting tax revenue shortfalls threaten to leave States facing difficult decisions about how best to prioritize competing public interests.

ARGUMENT

I. THE STATES NEED SECTION 321 JOB-LOSS INFORMATION IN DEVELOPING ECONOMIC POLICY.

In our federal system, States "retain a significant measure of sovereign authority." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). While the Constitution grants few and defined powers to the federal government, it "reserv[es] a generalized police power to the States. . . ." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (quotation marks omitted); *see also Farley v. Graney*, 119 S.E.2d 833, 843 (W. Va. 1960) ("[T]he police power is an inherent attribute of sovereignty. . . ."). This grants to the States the authority "to provide for the protection of the safety, health, morals and general welfare of the public. . . ." *City of Princeton v. Stamper*, 466 S.E.2d 536, 538 (W. Va. 1995); *accord City of Akron v. Pub. Utilities Comm'n*, 78 N.E.2d 890, 895 (Ohio 1948); *Lexington Fayette Cnty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cnty. Gov't*, 131 S.W.3d 745, 752 (Ky. 2004).

That authority extends not just to the physical well-being of a State's residents, but also their economic welfare. As the Supreme Court has said, "a state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). "A state's concern for the 'continuing prosperity of [its] economy[y]' falls within the "recognized category of quasi-sovereign interests." *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 150 (D.D.C. 2002) (quoting *Com. v. Kleppe*, 533 F.2d 668, 674 (D.C. Cir. 1976)).

Thus, in advancing "the public interest and promot[ing] the general welfare," States have made it an explicit priority to "encourage[] economic growth and development." W. Va. Code § 11-13C-2; *accord* Ohio Rev. Code Ann. § 166.02 ("[I]t is declared to be the public policy of the state . . . to assist in and facilitate the establishment or development of eligible [economic development] projects or assist and cooperate with any governmental agency in achieving such purpose.").[2] The West Virginia Legislature, for instance, established the West Virginia Development Office in 1992 to create "a comprehensive economic development strategy for West Virginia." W. Va. Code § 5B-2-3. This plan sets critical goals—*i.e.*, the formation of "strategies and activities designed to continue,

[2] *See also Munn v. Horvitz Co.*, 196 N.E.2d 764, 768 (Ohio 1964) (recognizing state interest in "foster[ing] economic growth and development"); *Child World, Inc. v. South Towne Centre, Ltd.*, 634 F. Supp. 1121, 1129 (S.D. Ohio 1986) (same).

diversify or expand the economic base of the state as a whole; create jobs; develop a highly skilled workforce; facilitate business access to capital, including venture capital; . . . [and] improve the business climate generally. . . ." *Id*. To accomplish these goals, West Virginia has committed "public financing support" "to attract new business, commerce and industry to this state, to retain existing business and industry providing the citizens of this state with economic security and to advance the business prosperity of this state and the economic welfare of the citizens of this state." *Id*. § 29-22-18a(e). Other States have undertaken similar strategies.[3]

But federal regulation, including Clean Air Act regulation, can have both direct and indirect impacts on these economic policies. When EPA considers whether to promulgate emission limits under the CAA that will dramatically reduce the consumption of coal, for example, the effects on a State that produces coal can be far-reaching. Such regulations affect not only the coal miners, but also the jobs and communities that rely on the coal mining business, including the doctors, educators, and retail establishments in and around those businesses. They

[3] *See, e.g.*, Ky. Rev. Stat. Ann. § 154.12-210 ("The [Cabinet for Economic Development] shall be the primary industrial and commercial development agency of the Commonwealth of Kentucky in matters relating to the private sector of the state's economy. The cabinet shall carry out programs relating to industrial and commercial development, research and planning, community and industrial services, marketing development, small and minority business enterprise, international trade and reverse investment, and other programs designated by the board.").

also impact utilities that are regulated by the States, the jobs associated with those utilities, and the availability of reliable and affordable energy for their citizens.

In recent years, EPA has promulgated several rules with precisely these effects. Under Section 111(d) of the Clean Air Act, EPA has issued its so-called "Clean Power Plan," which aims to shift electricity generation away from existing fossil-fired power plants to sources like wind or solar. *See* 80 Fed. Reg. 64,662 (Oct. 23, 2015). Under Section 111(b), EPA has targeted new coal-fired power plants, requiring the installation of control technology that makes it effectively impossible to build new such plants. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015) ("New Source Rule"). And finally, under CAA Section 112, *id*. § 7412, EPA promulgated the Mercury Air Toxics Rule, *see* 77 Fed. Reg. 9,363 (Feb. 16, 2012) ("MATS Rule"), which has already forced coal-fired power plants to spend significant sums to remain open. These are just a few examples that relate to regulation of fossil-fuel-fired power plants, but other CAA rules, to which Section 321 also applies, likewise have direct and indirect economic impacts on States.

Section 321 job-loss information can thus be critical for the States. Evaluating EPA's Section 321 data in conjunction with their own statistical collection, States may be better equipped to determine how to shape economic policy to deal with the effects of EPA regulations. States can use the information to better understand the scope of the anticipated impact and plan for economic relief measures, or job-retraining programs. More data will undoubtedly be helpful. As Congress explained during the 1971 Economic Dislocation Hearing, which led to Section 321's enactment: "[A]ll of us need more *information* on why plants are shut down" and "the public needs *better access to this information*." *Economic Dislocation Hearing*, 92d Cong. 1, 281 (1971) (App. 519) (emphases added). But the benefit is not merely the addition of more data. There is value to obtaining the data and analysis from *the same entity that is responsible for the activity that is causing the job losses and economic dislocation*. Recognizing that the agency has an incentive to under-estimate any negative jobs impact from its own policies, EPA's own analysis provides a minimum baseline to understanding the economic effects of any CAA regulation.

II. SECTION 321 JOB-LOSS INFORMATION CAN BE USEFUL IN STATE BUDGETING.

Beyond providing information relevant to general economic policymaking, CAA Section 321 can be specifically helpful in state budgeting. Nearly every State is required by law to maintain a balanced budget. *See* Nat'l Conf. of State Legislatures, State Balanced Budget Provisions, http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements-provisions-and.aspx; *see also* W. Va. Const. art. VI, § 51; *Fletcher v. Com.*, 163 S.W.3d 852, 856 (Ky. 2005). That process requires accurate and timely information—in particular, accurate tax-revenue forecasts and an accurate assessment of the States' respective workforces. To that end, States have established a variety of mandates and procedures to ensure that legislators and policymakers are receiving such information. *See, e.g.*, W. Va. Code § 11B-2-11; Ohio Rev. Code Ann. § 126.02. For example, in Kentucky, the Office of the State Budget Director must provide each branch of government a "budget planning report" every other year that includes, among other things, "projections of economic conditions and outlook" and "[p]rojections of personal income, employment, and economic indicators *that reflect economic conditions*." Ky. Rev. Stat. Ann. § 48.120 (emphasis added). Section 321 assessments are precisely the kind of information needed for these purposes.

Moreover, consistent Section 321 assessments by EPA could be particularly helpful in mitigating the budgeting challenges that arise from unexpected revenue shortfalls. In recent times, accurate state budgeting has become even more difficult for certain States, which are facing a challenging fiscal landscape due in part to activities by EPA. As thoroughly recounted by Plaintiffs, *see, e.g.*, Appellants Br. 51-52, the regulatory climate created by EPA's CAA activity has generated significant economic difficulty, particularly in those States that rely on the energy industry. In these States, sudden declines in the energy industry have led to unexpected revenue shortfalls, which in turn have left policymakers facing difficult, unanticipated decisions about how best to prioritize competing, important public interests.

CAA-driven job-loss data could provide States advance notice of looming spikes in unemployment, particularly in those areas of the State with industry affected by Clean Air Act regulations. As fewer workers are employed, the State and local governments will collect less tax revenue because income and sales tax collections, among others, are likely to be negatively affected by significant economic dislocation and job losses caused by CAA regulation. With Section 321 job-loss information, States may be able to create more accurate revenue projections and make appropriate budgetary adjustments in advance of any crisis.

Consider West Virginia's recent experience. A few months into fiscal year 2015, West Virginia Governor Earl Ray Tomblin imposed an immediate 4 percent funding cut for most state agencies, including the Department of Health and Human Resources, the Department of Commerce, and Department of Transportation. This cut was necessary because of an "*unforeseen* drop in West Virginia's coal and natural gas tax collections." Matt Maccaro, *Tomblin announces 4% budget but for most agencies*, MetroNews (Oct. 5, 2015) (emphasis added).[4] As the Governor noted in late 2015, "the state's finances have not been this bad since the 1980s." Hoppy Kercheval, *Coal slowdown hits state budget hard*, MetroNews

[4] This article may be found here: http://wvmetronews.com/2015/10/05/tomblin-announces-4-percent-budget-cut-for-most-government-agencies/.

(Oct. 7, 2015).[5] The problem only grew worse as 2015 drew to a close. *See* Jeff Jenkins, *State budget problems continue to grow*, MetroNews (Dec. 4, 2015) ("State Revenue Secretary Bob Kiss said . . . the state's budget problems are going to continue to grow following another month of missing the mark on revenue collections.").[6]

By January 2016, and the start of the annual legislative session, the state revenue shortfall became an immediate fiscal challenge because the then-operating budget was running a $252 million deficit. *See* Jeff Jenkins, *State budget hole grows deeper; revenue shortfall to top $350 million*, MetroNews (Jan. 6, 2016).[7] Following months of negotiations between the Governor and Legislature, including during extended regular and extraordinary budget sessions, the fiscal hole was finally patched for fiscal year 2015 and a balanced budget was enacted for fiscal year 2016, which began on July 1.

Though there are undoubtedly many reasons for West Virginia's budget crisis, Section 321 job-loss evaluations may have helped to mitigate these harms. For one, EPA's information may have allowed state officials to craft more accurate

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[5] This article may be found here: http://wvmetronews.com/2015/10/07/coal-slowdown-hits-state-budget-hard/.

[6] This article may be found here: http://wvmetronews.com/2015/12/04/state-budget-problems-continue-to-grow/.

[7] This article may be found here: http://wvmetronews.com/2016/01/06/state-budget-hole-grows-deeper-revenue-shortfall-to-top-350-million/.

tax revenue projections in advance of developing the following year's budget. Likewise, advanced warning of the projected economic dislocation and job losses may have allowed state leaders more time to consider the policy and fiscal changes in an atmosphere of political and economic stability—not crisis.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,128 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on April 7, 2017, the foregoing document was served on the counsel of record for all parties through the CM/ECF system. One paper copy of this brief will be sent to the Clerk of Court via Federal Express.

/s/ Elbert Lin
Elbert Lin

April 7, 2017
Date