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November 23, 2015

The Honorable John F. Kerry  
Secretary of State  
United States Department of State  
2201 C Street N.W.  
Washington, DC 20520

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 CO<sub>2</sub> reduction program—the so-called “Clean Power Plan”<sup>1</sup>—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 CO<sub>2</sub> 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 CO<sub>2</sub> Emissions Is Premised On An Unlawful Regulation That Is Unlikely To Survive Judicial Review**

The President's representations regarding his Administration's CO<sub>2</sub> 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

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<sup>1</sup> 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.<sup>2</sup>

The legal arguments against the Power Plan are strong and numerous. We summarize only three here<sup>3</sup>:

*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 CO<sub>2</sub> 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."<sup>4</sup> 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."<sup>5</sup> 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]"<sup>6</sup>—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,<sup>7</sup> 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.<sup>8</sup> As a result, the States will have no choice under the Power Plan but to take certain actions, which violates the

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

<sup>3</sup> 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>.

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

<sup>5</sup> *Id.* (quotations omitted).

<sup>6</sup> 42 U.S.C. § 7411(d)(1)(A).

<sup>7</sup> See 77 Fed. Reg. 9,304 (Feb. 16, 2012).

<sup>8</sup> *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.<sup>9</sup>

**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.<sup>10</sup> 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.”<sup>11</sup>

The ratification process is of special importance to the States, as a lawful treaty takes precedence over all State laws and constitutions.<sup>12</sup> 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.<sup>13</sup>

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.”<sup>14</sup> 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.<sup>15</sup> None of these preconditions are present here. Neither a preexisting treaty nor the Constitution authorizes the President to make an executive agreement mandating domestic CO<sub>2</sub> emission reductions. Nor does the President have authorization under an act of Congress such as the Clean Air Act, as discussed above.

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

<sup>10</sup> U.S. Const. art. II, § 2, cl. 2.

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

<sup>12</sup> U.S. Const. art. VI, cl. 2.

<sup>13</sup> U.S. Const. art. I, § 10, cl. 1.

<sup>14</sup> 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>.

<sup>15</sup> 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."<sup>16</sup> 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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Ken Paxton  
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State of Texas

cc:

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The Honorable Mitch McConnell  
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<sup>16</sup> *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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