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House Bill 596/ Senate Bill 783 – Favorable
March 9, 2022

Dear Chairman Smith, Vice-Chair Waldstreicher, Honorable Members of the Judiciary Proceedings Committee,

On February 28, 2022, the United States Supreme Court heard oral arguments in *West Virginia v. EPA*. The outcome of that case will determine the course of federal climate policy in the United States. Specifically, it will determine the scope of US EPA's authority to limit greenhouse gas emissions from the electricity sector, and to encourage replacing existing fossil fuel electricity generation with renewable sources, under the Clean Air Act.[2] Given the Court's growing antagonism to the administrative state, the Court's reasoning in *National Federation of Independent Business v. Department of Labor*,[3] and that the Court took the case, even though it contains standing and mootness defects,[4] most environmental law scholars anticipate that the majority will decide the case on the merits, and that it will severely curtail the EPA's authority to regulate greenhouse gasses.

Why does this federal case matter to Maryland and the choice before the Judicial Proceedings Committee?

1. **Constitutional rights to a healthy environment can help states to fill in the gap left by the federal government.**
   Over the past decade, in the absence of meaningful climate action at the federal level, states and municipalities have worked to fill in the gap. *West Virginia* likely will widen that gap by disabling the US EPA's ability to systematically regulate greenhouse gas emissions. Greenhouse

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[2] The statutory language in question is Section 111 of the Clean Air Act (42 U.S.C. Section 7411), which grants the EPA authority to regulate emissions from power plants. The Obama Administration relied on this section for the Clean Power Plan, which would have regulated emissions on a system-wide basis, so that decreasing emissions in one plant would not cause an increase at another plant (e.g., "generation shifting"). When the Trump Administration took over, the EPA adopted a narrower read of Section 111, only allowing individual plant-by-plant regulation.
[3] Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, SOCARXIV PAPERS vol. 5.2 (2022), https://doi.org/10.31235/osf.io/2cqt8. (arguing that the elevation of the "major questions doctrine" in *National Federation of Independent Business v. Department of Labor* to an analytical tool—requiring that statutes must speak *directly* to the matter being regulated for agency action to be valid—is a "new veto" power among the branches that "threatens to cripple the administrative state"). Brief of Amicus Curiae Richard L. Revesz in Support of Federal, Non-Governmental Organization and Trade Association, Power Company, and State and Municipal Respondents, Nos. 20-1530, 20-1778 and 20-1780, *West Virginia v. EPA*, https://www.supremecourt.gov/DocketPDF/20/20-1530/211297/20220125143949146_Amicus%20Brief.pdf.
[4] The EPA is not enforcing the Clean Power Plan, and is not currently enforcing Section 111 of the Clean Air Act against the petitioners, raising the question of whether this is a judiciable case or controversy. *See* Jonathon Adler, *Does the Supreme Court Have Jurisdiction to Hear West Virginia v. EPA?*, THE VOLOKH CONSPIRACY, (Feb. 3, 2022), https://reason.com/volokh/2022/02/03/does-the-supreme-court-have-jurisdiction-to-hear-west-virginia-v-epa/ (Giving an overview of the justiciability questions in *West Virginia*).

gas emissions from electricity generation accounts for approximately one quarter of total greenhouse gas emissions in the United States.[5] Because these emissions come from stationary sources, and renewable energy generation are known zero-emissions alternatives, regulating emissions from electric generation is among the easiest ways to quickly reduce greenhouse gas emissions in the United States. Absent federal action, states empowered by constitutional principles and substantive rights, like those in SB 783, can take positive steps through state law to reduce greenhouse gas emissions.

2. **Cooperative federalism gives states a role in determining federal regulation in their territory; constitutional rights to a healthy environment can encourage states to be proactive in their negotiations and planning alongside the federal government.**
The major federal environmental laws function by cooperative federalism—states work together with federal agencies to develop specific plans to limit pollution, within the confines of federal statutory frameworks. The Clean Air Act works this way. So too does the Clean Water Act. If Maryland were to adopt an environmental rights amendment, it could provide an avenue for encouraging the state in its negotiations and discussions with federal agencies to act in the interest of future Marylanders. For example, the Clean Air Act sets a "floor" for certain kinds of air pollution. But, in developing plans to meet that floor, states have authority to further reduce emissions.[6] By clearly stating the role of the state in protecting the human environmental rights of Marylanders, SB 783 arms the state in its approach to cooperative federalism.

3. **A constitutional right to a healthy environment facilitates inter-systems and inter-sectoral planning needed to prevent and adapt to climate impacts.**
The nature of climate change requires broad cross-sector planning.[7] Energy relies on water systems and vice-versa.[8] Existing environmental statutes tend to address single sectors, or are geographically limited. A broad right to a healthy environment, like that of SB 783, can affirmatively encourage state agencies to increase cross-sector communication, monitoring, and planning.

Finally, it is worth noting that what constitutional rights "mean" is decided through generations of the state and citizens engaging with that right. Pennsylvania's Environmental Rights Amendment, passed in 1971, spent most of its life subverted by a judicial balancing test, and did not begin to regain its textualist plain meaning until 2013. Looking back deeper in history, it took over eighty years for the Fourteenth Amendment of the United States Constitution to take on its current meaning. In both instances, despite the potential, and actual, dormancy of the amendments, the legal rights were there to act on as their meanings evolved.

In light of the history of principled constitutional amendments, and the pressing need for states to build a legal architecture to deal with climate change, I urge you to support SB 783.

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[5] US EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited March 7, 2022).
[6] *See* 42 U.S.C. §7416. *See* William W. Buzzbee, *Clean Air Act Dynamism and Disappointments: Lessons for Climate Legislation to Prompt Innovation and Discourage Inertia*, 32 WASH. U. J.L. & POL'Y 33 (2010) (For further reading on "floor preemption" of the CAA).
[7] Linda Shi, Susanne Moser, *Transformative climate adaptation in the United States: Trends and prospects*, 372 SCIENCE 6549 (2021). Available at https://www.science.org/doi/abs/10.1126/science.abc8054.
[8] Sonya Ziaja, *Rules and Values in Virtual Optimization of California Hydropower*, **57** NATURAL RESOURCES J. 329 (2017).