State of West Virginia
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The Honorable Bill Ferguson
Senate President
State House, H-107
100 State Circle
Annapolis, MD 21401

The Honorable Adrienne A. Jones
House Speaker
State House, H-107
100 State Circle
Annapolis, MD 21401

Dear Senate President Ferguson and House Speaker Jones:

As the Attorney General of West Virginia, I am writing to you about the Coal Transportation Fee and Fossil Fuel Mitigation Fund (Coal Dust Cleanup and Asthma Remediation Act) (H.B. 1088 and S.B. 882), a bill recently introduced in the Maryland General Assembly that would impose a $13-per-ton fee on all coal transported in the State.

The Bill embraces a flawed approach by targeting out-of-state coal producers. It will harm Maryland and West Virginia alike, raise serious constitutional questions, and run afoul of preemption doctrines. We urge you to table the Bill.

Coal's Benefits

For decades, West Virginia and Maryland have mutually benefited from coal.

West Virginia is the "nation's second-largest coal producer." EIA, *West Virginia State Energy Profile* (last updated Feb. 20, 2025), https://tinyurl.com/2dtvbbkc. That production has helped to power America. In fact, both domestically and abroad, coal has played a central role in industrialization and energy production since the Industrial Revolution. *See Amoco Prod. Co. v. S. Ute Indian Tribe,* 526 U.S. 865, 866 (1999).

Likewise, though Maryland doesn't produce much coal of its own, the State's proximity to coal-rich States like West Virginia and Pennsylvania allows it to be one of the country's largest exporters of coal. The Port of Baltimore is the "second-largest coal exporting port" in the United States. EIA, *Maryland State Energy Profile* (last updated Jan. 16, 2025), https://tinyurl.com/4eanx563. In 2023, over a quarter of our nation's coal exports (28 million short tons) passed

through that port. EIA, *U.S. coal exports from the Port of Baltimore rebounded two months after bridge collapse* (Oct. 16, 2024), https://tinyurl.com/29j2y3xk; *see also* EIA, ANNUAL COAL DISTRIBUTION REPORT 88 (2023), https://tinyurl.com/r7a7p7jk (noting the country's coal exports are about 100 million short tons (or 200 billion pounds)).

The Bill threatens this symbiotic relationship. Under its terms, Maryland would impose a $13 fee per short ton of coal on "the first carrier to transport coal in the State." S.B. 882 at 3-4 (Md. 2025). And even though the Bill is called the "Coal Dust Cleanup and Asthma Remediation Act," nearly all the money would go to fill Maryland's "Fossil Fuel Mitigation Fund" to "support activities … that reduce greenhouse gas emissions in the State." *Id.* at 5; c*f. id.* (earmarking just "up to 2% for … programs related to asthma treatment for communities impacted by coal dust").

This Bill's Damaging Effects

This Bill inappropriately targets and extracts large sums of money from energy suppliers to bankroll Maryland's budget. It does so by nearly doubling the cost of sending coal to or through Maryland. On average, transporting coal costs about $18.77 per short ton. *See* EIA, *The cost of transporting coal to the U.S. electric power sector fell slightly in 2023* (Feb. 12, 2025), https://tinyurl.com/yc6ba7bw. Without the fee, transporting the country's coal exports in 2023 likely cost close to $526 million ($18.77 per short ton multiplied by 28 million short tons). But with the proposed fee, that cost could rise to $890 million—an addition of $364 million (28 million short tons multiplied by $13 per short ton).

Though West Virginia supports Maryland's efforts to solve its internal problems, a State cannot fill its coffers at the expense of hard-working Americans miles away in other States who work to keep our lights on and houses warm. This scheme isn't unique, either: two States have already tried something similar, and both are facing lawsuits. *See* Jack Raffetto, et al., *States Challenge New York's Climate Superfund Act*, SIDLEY (Feb. 12, 2025), https://tinyurl.com/2d8cx89v.

And although it would have painful effects on millions of Americans, the Bill will especially hurt West Virginians:

- Two-fifths of the coal produced in West Virginia goes to foreign markets. *West Virginia State Energy Profile*, *supra*.

- To get to those markets, the coal travels by railroad to Maryland. About half of Maryland's total coal exports come from West Virginia (around 14 million short tons). *See* Curtis Tate, *How Baltimore Port Closure Affects Coal Producers in W.Va.*, WVPUBLIC.ORG (April 1, 2024), https://tinyurl.com/3wpbes28; *see also* ANNUAL COAL DISTRIBUTION REPORT, *supra*, at 88 (totaling West Virginia's exports).

- Based on these numbers, Maryland's fee would increase the cost of coal coming from West Virginia by at least $182 million *annually* (14 million short tons multiplied by $13 per short ton).

These costs will be passed to consumers as "transportation costs," which will "affect[] the final delivered price of coal." EIA, *Coal Explained* (last updated April 17, 2024), https://tinyurl.com/bdeesp2h; *see also Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (observing that a state flat tax on natural gas pipeline companies "is clearly intended to be passed on to the ultimate consumer").

Even in Maryland, the Bill's threatened harm is well known. Indeed, one of the Bill's sponsors, Delegate Dana Stein, acknowledged its substantial costs but insisted Marylanders wouldn't feel them. *See* MD. LEAGUE OF CONSERVATION VOTERS, *New Study Confirms Coal Dust Clean Up and Asthma Mitigation Fund Financially Feasible, Will Provide Critical Health Benefits to Marylanders* (Feb. 27, 2025), https://tinyurl.com/2h3hyvj7 (statement of Delegate Stein noting that it would be more expensive for coal to be diverted to the Port of Virginia, which "means that the coal fee would generate significant funds for climate mitigation while having little, if any, impact on the Port of Baltimore"). According to Delegate Stein and his supporters, these new costs do not matter because they will be borne by "the Northern Appalachian mines in West Virginia, which account for the vast majority of coal exported through the Port of Baltimore." *Id.* (cleaned up). And because it costs less to pay Maryland's proposed fee than to divert coal exports elsewhere, Delegate Stein assumes that West Virginia will still send its coal to Maryland. *Id.*

But Maryland relies on the regional electric grid, which still relies on coal. So "electricity prices in the State may increase as a result." Kathleen P. Kennedy, First Reader, H.B. 1088, at 7 (Feb. 27, 2025), https://tinyurl.com/yck48275. And the fee places the Port of Baltimore "at a competitive disadvantage with neighboring ports," which "could result in an overall loss of jobs and investment[s]." *Id.* at 6. So the Bill's costs are very much Maryland's problem.

Constitutional Concerns

The Bill's disregard of other States in turn disregards our Constitution and its prohibition on state-by-state regulations on matters of interstate importance.

The Constitution's Commerce Clause gives Congress—not Maryland or any other State—the power "[t]o regulate commerce … among the several States." U.S. CONST. art. I, § 8, cl. 3. And the Commerce Clause "contain[s] a further, negative command" that effectively forbids "certain state tax[es] even when Congress failed to legislate on the subject." *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 549 (2015). In other words, "in matters … of interstate commerce there are no state lines"—they are "essentially irrelevant." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618-19 (1981). Under this analysis, no state-imposed burden can escape scrutiny, even facially neutral ones. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Put simply, a State cannot "unfair[ly] burden" interstate commerce. *Cent. Greyhound Lines of N.Y. v. Mealey*, 334 U.S. 653, 662 (1948). When those burdens occur, the Commerce Clause "self-execut[es]" and "presumptively prevails." *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986).

Yet the Bill uses Maryland's unique position as a major coal export hub to extract significant funds from coal-producing States. If every State were to pass similar bills leveraging their respective advantages, it will result in "economic Balkanization." *Hughes v. Oklahoma*, 441 U.S.

322, 325 (1979); *see also id.* at 326 n.2 (noting that the Commerce Clause supports the "solidarity and prosperity of this Nation"). States must instead "sink or swim together"; unity, "not division," maintains our nation's long-term "prosperity and salvation." *H.P. Hood & Sons, Inc v. Du Mond*, 336 U.S. 525, 532 (1949).

The Commerce Clause is also offended when a State places a burden on interstate commerce that is excessively out-of-balance with any "putative local benefits." *Pike*, 397 U.S. at 142. Interstate commerce relies heavily on "trucks, trains, and the like." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 379 n.2 (2023). While the Bill may bring some public benefit to Maryland, a carrier transporting coal through the State will pay nearly double its average transportation costs—a significant burden hindering the interstate flow of coal. Higher costs will upend national and international energy markets, engender state hostility, and raise energy costs throughout the nation while Maryland extracts money for its fund. The Bill's burden on interstate commerce then is "clearly excessive in relation to [Maryland's] putative local benefits." *Pike*, 397 U.S. at 142.

Further compounding the Bill's problems, the Commerce Clause prohibits States from interfering with the interstate commerce of natural resources. As a geographically diverse nation, "there are several states" where "the earth yields products of great value which are carried into other states and there used." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). The Supreme Court recognized that if a state law "prevents, obstructs, or burdens … [natural-resource] transmission," it is a "prohibited interference." *Id.* at 597. Likely because "each state is made the greater by a division of its resources, natural and created, with every other state, and those of every state with it." *West v. Kan. Nat. Gas Co.*, 221 U.S. 229, 255 (1911). But if Maryland "burden[s] [this] transmission" of natural resources, "other[] [States] may" as well. *Pennsylvania*, 262 U.S. at 596. So the Commerce Clause prohibits the Bill's burden on coal transportation.

And most importantly, the Commerce Clause forbids a State from discriminating against interstate commerce. State fees become "plainly discriminatory" if they are not "internally consistent." *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282-83, 286 (1987) (applying the internally consistent test to a "State's vehicle registration fee"); *see also Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). This test asks if the fee is internally consistent, meaning if every State enacted the same fee, it would not "place interstate commerce at disadvantage … compared with commerce intrastate." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

If the fee does disadvantage out-of-state commerce (as opposed to purely in-state commerce), then the fee is not internally consistent and is discriminatory—meaning it cannot stand under the Commerce Clause. *See Am. Trucking Ass'ns*, 483 U.S. at 284 (observing that "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred"); *see also Nippert v. City of Richmond*, 327 U.S. 416, 418, 430 (1946) (invalidating a flat tax on all those "engaged in business as solicitors" because it is "obvious that the cumulative burden will be felt more strongly by the out-of-state" solicitor "than one who confines his movement within the state").

The Bill's proposed fee is discriminatory because it is not internally consistent. If every State were to impose the same $13-per-short-ton fee on any carrier transporting coal through their borders, it would cause interstate carriers to pay the fee multiple times and suffer significant financial costs, while purely in-state carriers would only pay the fee once. The Commerce Clause doesn't allow this.

Preemption Concerns

Commerce Clause aside, federal laws will preempt most of the Bill. Under the Constitution, state laws cannot conflict or interfere with a federal regulatory field. *Hillsborough County v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 712-13 (1985). So when Congress crafts a federal regulation and then "clear[ly]" marks where state laws are preempted, there is "no room for the States to supplement" that federal law. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978).

Relevant here, the Bill exacts fees from all carriers of coal, which includes railroads. Indeed, railroad companies will pay almost all the fees because nearly all coal goes to Maryland by rail. *See* EIA, *What are the energy impacts from the Port of Baltimore Closure?* (March 28, 2024), https://tinyurl.com/yskwjzx2 (observing that the Baltimore harbor's two coal export terminals are serviced by railroad); *see also* ANNUAL COAL DISTRIBUTION REPORT, *supra*, at 57 (2023). Federal law does not allow this.

Congress enacted the Interstate Commerce Commission Termination Act to keep railroads "deregulat[ed]." *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018); *see also* 49 U.S.C. § 10101 (listing the United States policy goals for railroads, including "allowing rail carriers to earn adequate revenues"). "As part of this deregulation program," the ICCTA has one of the "broad[est] statement[s] of Congress's intent to preempt state regulatory authority." *BNSF Ry.*, 904 F.3d at 760. This "broad" "jurisdiction" clause grants the ICCTA "exclusive jurisdiction over a wide range of state and local regulation of rail activity." *Id.* (cleaned up). The exclusive jurisdiction includes "transportation by rail carriers … with respect to rates," 49 U.S.C. § 10501(b)(1), "services" and "equipment of any kind related to the movement of … property" like "storage," *id.* § 10102(9).

While the ICCTA does not preempt every state law "touching" railroads, *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 18 (D.C. Cir. 2017), it does preempt "state laws" with the "effect of managing or governing rail transportation," *PCS Phosphate Co., v. Norfolk S. Corp*, 559 F.3d 212, 218 (4th Cir. 2009) (cleaned up); *BNSF Ry.*, 904 F.3d at 760; *see also BNSF Ry. Co. v. Town of Cicero*, 592 F. Supp. 3d 716, 729 (N.D. Ill. 2022) ("A town or state can impose health and safety measures of general applicability, but they cannot use them as pretext for interfering with or curtailing rail service." (cleaned up)). In other words, a state law may not "unreasonably burden[]" or "discriminate" against rail carriers. *Norfolk S. Ry Co. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010).

A state law unreasonably burdens rail carriers if it "unreasonably interfere[s] with rail transportation." *PCS Phosphate Co.*, 559 F.3d at 221 (cleaned up); *see also Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008) (noting that "regarding the unreasonable-burden prong, the substance of the regulation must not be so draconian that it

prevents the railroad from carrying out its business in a sensible fashion" (cleaned up)). The ICCTA also preempts state laws that discriminate against railroads: when a state law "address[es] state concerns generally" by "targeting the railroad industry." *Adrian & Blissfield R. Co.*, 550 F.3d at 541; *see also N.Y Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007) (observing that the discrimination prong asks if the "state is regulating principally to discriminate against a specific industry").

The Bill unreasonably burdens and discriminates against railroad carriers. Requiring a railroad carrier to pay hundreds of millions of dollars in fees for transporting coal to Baltimore Harbor is an unreasonable interference. That's especially so if the fees cause rail carriers to divert to other export hubs more out-of-the-way than Maryland's.

The Bill is also discriminatory because it targets railroad carriers. Again, look at the numbers. The Bill would subject railroad carriers to about $373 million in fees. Truck carriers, on the other hand, would pay about $9.7 million. ANNUAL COAL DISTRIBUTION REPORT, *supra*, at 57 (noting that trucks carry 751 thousand short tons of coal to Maryland). In other words, railroad carriers would pay about 97% of the total fees and pay virtually 100% of the fees for coal exports. So even though this may be a neutrally applied fee scheme, this type of disparate impact is discriminatory *See Nat'l Pork Producers*, 598 U.S. at 378 (observing that a "law's practical effects may also disclose the presence of a discriminatory purpose").

Either way, federal law preempts most, if not all, of the Bill's fee scheme.

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Unless the House or Senate substantially revises the Bill, we do not see how it could withstand judicial scrutiny. West Virginia is already leading the fight against a similar bill. *See* Complaint, *West Virginia v. James*, No. 1:25-cv-00168 (N.D.N.Y. Feb. 6, 2025), ECF No. 1. We hope we will not be compelled to do the same as to Maryland. We would rather devote our time to working together to resolve the problems facing our region, including environmental concerns.

We would welcome the chance to talk more about possible alternatives that might address Maryland's environmental concerns without creating constitutional conflicts or disrupting our region's economic interdependence. In the meantime, the General Assembly should table the Bill.

Sincerely,

John B. McCuskey
Attorney General