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July 20, 2012

VIA CM/ECF

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Mr. Mark J. Langer

Clerk

United States Court of Appeals for the District of Columbia Circuit

333 Constitution Avenue, N.W.

Washington, D.C. 20001

*Re: Petitioner State of Texas's Notice of Supplemental Authority, Utility Air
Regulatory Group v. EPA, No. 11-1037*

Dear Mr. Langer:

Pursuant to Rule 28(j), we notify the Court of *National Federation of Independent Business v. Sebelius*, No. 11-393 (S. Ct. June 28, 2012) ("*NFIB*").

NFIB holds that the federal government may not threaten to revoke states' existing Medicaid funding in retaliation for their decisions not to implement a federal expansion of the Medicaid program. Because the "financial 'inducement'" to expand Medicaid coverage was "a gun to the head" of the States, the scheme violated their freedom of choice and therefore their sovereign rights. Slip op. 51-52 (Roberts, C.J). This decision affirms the principle that the federal government lacks the power to "commandeer a State's legislative or administrative apparatus for federal purposes." *Id.* at 47.

NFIB underscores the significant constitutional infirmities in EPA's SIP Call. EPA's decision to threaten states that did not forfeit their rights under the Clean Air Act to a reasonable time to revise their SIPs with a construction moratorium is no less "a gun to the head" than Congress's threat to terminate Medicaid funding. Furthermore, "the political accountability key to our federal system," *id.* at 48, is lost where EPA leverages its threatened construction moratorium to override state government actions. That injury is particularly acute in this instance, where EPA forced Wyoming to forfeit its sovereign prerogatives over air quality resources by setting a deadline for legislative action that the Wyoming legislature was constitutionally proscribed from meeting.

NFIB also demonstrates how the Court can cure these constitutional problems. There, the Supreme Court saved the Affordable Care Act by striking down the threatened Medicaid payments moratorium, disarming the federal threat. *Id.* at 55-56. The Clean

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Air Act should be interpreted to preclude EPA's threatened construction moratorium and to allow states up to three years to make prospective SIP revisions to include greenhouse gases in their PSD programs. See State Pet. Br. at 37-41; State Pet. Reply Br. at 18-21. If it is not so construed, however, then *NFIB* confirms that the SIP Call violates the Tenth Amendment and must be vacated.

Very truly yours,

/s/ Mark W. DeLaquil
Mark W. DeLaquil
Counsel for Petitioner State of Texas

cc: Counsel of Record (via CM/ECF)