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The States are the primary stewards of our nation's clean air and clean water. Although smog and polluted water in the States surely present themselves as significant issues to experts in Washington, D.C., we state officials live where we work. We breathe the same air and drink the same water as our neighbors, and we uniquely understand our States' geographies, industries, and relationships, which is vital to crafting environmental regulations that actually achieve their intended goals. But an ever-growing share of that authority is slowly making its way from the States to one federal body: the EPA.

At the federal level, though, it appears the EPA may not quite grasp its duty to the States and the public. As we all know, no voter elected a single bureaucrat in the powerful EPA. And yet given the EPA's enormous lawmaking power, our nation's environmental policymaking is left vulnerable to this one unelected body's every word. The States and the public aren't supposed to be helpless. Under the Administrative Procedure Act and the many features of cooperative federalism outlined in federal environmental laws, States and the public are supposed to be able to rely on robust procedures that require public participation before agency schemes become laws.

The EPA has trivialized the constraints on its authority by minimizing the anti-democratic harms from sue-and-settle litigation. In a sue-and-settle arrangement (under 42 U.S.C. §7604, for example) a pro-regulation interest group files a lawsuit, asking the EPA to move forward on one of its pet projects. The EPA sits down privately with the interest group, which likely includes friends and former colleagues, and comes to a deal: it'll move forward on that project, on certain terms and timelines. The interest group agrees to the settlement, pleased with what it's been promised. The States (which may have been undertaking action on that exact issue) and the public are left in the dark and cut out from the process. Though interested parties usually learn of the settlement later, they are asked to submit comments to an inbox, while only the interest group and the EPA have actually discussed (and agreed to) the EPA's proposal.

The harm this opaque process imposes to our democracy is tremendous. The public, which relies on the EPA to make decisions governing resource allocation and agency priorities based on its expertise, instead must watch special-interest groups sue a friendly agency, engage in closed-door discussions, and secure promises mandated by judicial decree. The settlement can hardly be trusted to be the result of agency expertise.

This process isn't rare. From June 2008 through June 2013, the EPA issued nine rules—nearly a third of its rulemakings—in response to settlements that the EPA manufactured

alongside private parties. To be sure, EPA officials *said* the instigating lawsuits barely affected the agency's work, hoping the public would take their word for it. And yet, the public continued to lack any meaningful way to engage in pre-suit coordination or during-suit negotiations. So promises of propriety and regularity, from officials leaving closed-door negotiations, rang hollow.

Fortunately, in October 2017, the EPA explicitly acknowledged that secretive meetings are no way to operate an agency, especially given that the law requires the EPA to meaningfully engage with the States and the public. "Sue and settle ... undermines the fundamental principles of government," the 2017 memo said. The 2017 memorandum came with a set of explicit directives to ensure that its categorical directive—"EPA will not resolve litigation through backroom deals with any type of special interest group"—would be enforced. For example, the directives prohibited the agency from awarding attorney's fees from any settlement, reducing the incentive for special interest groups to bring suits for financial benefit.

Your March 18, 2022 memorandum revokes the 2017 memorandum and its corresponding directives. You argue settlements should be celebrated because they "preserve[] agency resources." But federalism is quite resource intensive, and litigation can never be used to side-step our constitutional order. You conclude the memorandum by requiring a few notices-of-suit be posted online. But the problem never was that the States and public were *unaware* that they were being excluded. The problem is that the States and public *were being* excluded in the first place. Everyone knows that the Met Gala takes place; the public notice is plentiful. Notice is a far leap from participation.

Your memorandum will predictably invite a wave of special interest lawsuits. We write to remind the EPA of its duty to our democratic process and our federalist system. By elevating one plaintiff's brief over the EPA's own judgment, and by excluding States and the public from the process, the EPA does grave disservice to those it purports to serve. Your \$9.56 billion agency may be unelected, but the power you wield still must be in service to our nation, even those of us not invited to the negotiating table.

Yours,



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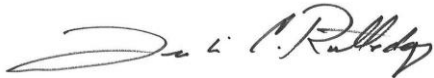
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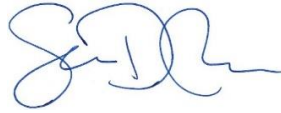
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