ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2017

No. 15-1381 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH DAKOTA, *et al.*,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATE AND NON-STATE PETITIONERS' AND PETITIONER-INTERVENORS' RESPONSE IN SUPPORT OF EPA'S MOTION TO HOLD CASES IN ABEYANCE

State and Non-State Petitioners and Petitioner-Intervenors (collectively "Petitioners") submit this response in support of Respondent EPA's March 28, 2017 motion to hold these consolidated cases in abeyance pending administrative reconsideration. (ECF No. 1668276.) Because oral argument is currently scheduled to take place in less than three weeks, Petitioners respectfully request prompt action on EPA's motion.

As its motion explained, the EPA has formally commenced review of the Section 111(b) rule ("Rule") at issue in these consolidated cases pursuant to an Executive Order entitled "Promoting Energy Independence and Economic Growth," issued March 28, 2017. Motion at 1. *See also* EPA Federal Register Notice, "Notice of

Review of the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units," at 3 (Mar. 28, 2017) (Attachment 2 to EPA's motion) ("The Executive Order specifically directs EPA to review and, if appropriate, initiate reconsideration proceedings to suspend, revise or rescind the New Source Rule. Pursuant to the Executive Order, EPA is initiating its review of the New Source Rule and providing advanced notice of forthcoming rulemaking proceedings consistent with the President's policies.").

Both the interests of justice and judicial economy counsel in favor of holding the cases in abeyance as EPA requests. Such abeyance would conserve judicial and party resources by eliminating the need for the parties and the Court to continue to prepare for argument, the need for argument itself, and the need for the Court thereafter to consider the lawfulness of the Rule during the pendency of EPA's review. The Section 111(b) Rule has not been stayed, and thus will remain in effect during the period of the abeyance. Thus, any hardship granting the abeyance would cause would be to the Petitioners who nevertheless support the abeyance.

The Court's authority "to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1888-89 (2016) (noting court's "inherent power … to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases") (citations omitted).

EPA's request is routine. The government frequently requests and is accorded abeyances in pending litigation to afford it the opportunity to address policy changes due to changes in presidential administrations. *See, e.g., California et al. v. EPA*, No. 08-1178, ECF No. 1167136 (D.C. Cir., Feb. 25, 2009) (putting case in abeyance indefinitely after opening briefs had been filed to permit new administration to reconsider determinations promulgated by EPA under former administration); *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (noting this Court's grant of motion to hold case in abeyance after change in administrations); Clerk's Order, *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Mar. 19, 2009) (granting abeyance after election to permit agency to review and reconsider former administration's rule); Order, *Am. Petroleum Inst. v. EPA*, No. 08-1277, ECF No. 1173675 (D.C. Cir. Apr. 1, 2009) (holding case in abeyance to allow EPA to reconsider prior administration's rule); Order, *Sierra Club v. EPA*, No. 09-1018, ECF No. 1165868 (D.C. Cir. Feb. 19, 2009) (similar); Order, *Natural Resources Defense Council v. EPA*, No. 08-1250 (D.C. Cir. Dec. 3, 2008) (similar); *see generally* Richard J. Lazarus, *The Transition and Two Court Cases*, 26 The Environmental Forum 12, at 14 (Feb. 2009).

Even more recently, this Court held the Affordable Care Act challenge in abeyance even before inauguration to acknowledge the incoming administration's signaling of a change in policy that could affect the legal terrain on which the appeal had been argued. *House of Representatives v. Burwell*, No. 16-5202, Order at 1, ECF No. 1649251 (Dec. 5, 2016). The Court should do the same in this case.

Holding these cases in abeyance would conserve judicial and party resources and avoid the possibility of the Court issuing an opinion that could be rendered both moot and advisory by EPA's action to revise or rescind the Rule. *See Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1010-11 (D.C. Cir. 2001) ("The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed" because "[a] new system is now in place" and "[a]ny opinion regarding the former rules would be merely advisory."). It is a fundamental Article III principle that "an actual controversy must be extant at all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997). It "is not enough that a dispute was very much alive when suit was filed"; the "parties must continue to have a personal stake in the outcome of the lawsuit" to prevent the case from becoming moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990) (internal quotation marks omitted).

This Court has described as a "perfectly uncontroversial and well-settled principle of law" the proposition that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot." *Akiachak Native Community v. Dep't of Interior*, 827 F.3d 100, 113-14 (D.C. Cir. 2016) (citing cases); *see also id.* at 106 (noting that an order following withdrawal "would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits"); *Initiative & Referendum Inst. v. Postal Service*, 685 F.3d 1066, 1074 (D.C. Cir. 2012) (mooting challenge because regulation was amended); *Larsen v. U.S. Navy*, 525 F.3d 1, 4-5 (D.C. Cir. 2008) (similar); *Coalition of Airline Pilots Ass'ns v. FAA*,

370 F.3d 1184, 1190 (D.C. Cir. 2004) (mooting challenge after agency abandoned the regulation and resolved petitioners' objections); *Nat'l Mining Ass'n*, 251 F.3d at 1010-11 (*supra*); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1295-96 (D.C. Cir. 2000) (holding challenge to regulation moot after agency clarified it); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (similar, as to amended statute); *Freeport–McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992) (finding a case "plainly moot" where the challenged agency order had been "superseded by a subsequent order," and noting that such an occurrence was so routine that "[o]rdinarily, we would handle such a matter in an unpublished order"). A superseding rulemaking is sufficient to render review of the old regulation moot. *Gulf Oil Corp. v. Simon*, 502 F.2d 1154, 1156 (Temp. Emer. Ct. App. 1974) (cited in *Akiachak Native Community*, 827 F.3d at 114); *Freeport-McMoRan Oil & Gas Co.*, 962 F.2d at 46.

Moreover, any judgment rendered in a case that later becomes moot is ordinarily vacated pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Supreme Court has stated that its "established" "practice in this situation is to vacate the judgment below." *Camreta v. Greene*, 563 U.S. 692, 712 (2011). "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance," the Court emphasized, "ought not in fairness be forced to acquiesce in" that ruling. *Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). *Munsingwear* was extended to the administrative context in *A.L. Mechling Barge Lines v. United States*, 368 U.S. 324, 329 (1961).

Thus, for example, any decision by this Court granting or denying the petitions for review should be vacated pursuant to *Munsingwear* if the case were subsequently mooted by EPA action. Such a *vacatur* would be necessary in order "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41 (cited in *Am. Family Life Assur. Co. v. FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997)). This Court has cited with approval the statement in Wright & Miller's *Federal Practice and Procedure* that "it is 'appropriate for a court of appeals to vacate its own judgment if it is made aware of events that moot the case during the time available to seek certiorari.'" *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (citing Wright, *et al.*, *Federal Practice and Procedure* § 3533.10 at 435).

Notably, the mootness giving rise to *vacatur* in *Munsingwear* itself was caused by the annulment of regulations by executive order. *Bancorp*, 513 U.S. at 25 n.3 (citing *Fleming v. Munsingwear, Inc.*, 162 F.2d 125, 127 (8th Cir. 1947)); *see also A.L. Mechling Barge Lines*, 368 U.S. at 329 ("We think the principle enunciated in *Munsingwear* at least equally applicable to unreviewed administrative orders …."); *cf. Relf v. Weinberger*, 565 F.2d 722, 727 (D.C. Cir. 1977) (vacating orders where agency announced its "inten[tion] to issue a new notice of rule making … at the conclusion of which it will promulgate [new] comprehensive regulations").

Finally, holding these cases in abeyance (in the absence of a stay) would not interfere with any possible environmental benefits the Rule is asserted to create. Even when EPA promulgated the Rule in 2015, the agency admitted that any environmental

impact of the Rule would be "negligible." *See* 80 Fed. Reg. 64,510, 64,640 (Oct. 23, 2015) ("EPA projects that this final rule will result in negligible CO_2 emission changes [and] quantified benefits.").

In sum, judicial economy and the interests of justice counsel in favor of holding these cases in abeyance pending further order of this Court. Abeyance also would avoid this Court issuing an opinion that would be rendered moot and advisory once the agency completes its announced rulemaking action to alter or repeal the Section 111(b) Rule.

CONCLUSION

The Court should grant EPA's motion to hold these consolidated cases in abeyance.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(e)(1) and 32(e)(2)(C), I hereby certify that the foregoing Response in Support of EPA's Motion to Hold Cases in Abeyance contains 1,601 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: March 30, 2017

/s/ Tristan L. Duncan
Tristan L. Duncan

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of March 2017, a copy of the foregoing Response in Support of EPA's Motion to Hold Cases in Abeyance was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Tristan L. Duncan
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