ORAL ARGUMENT PREVIOUSLY SCHEDULED FOR APRIL 17, 2017
DEFERRED PENDING DISPOSITION OF ABEYANCE MOTION

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

STATE OF NORTH DAKOTA, et al., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15–1381 (and consolidated cases)

RESPONDENT–INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' OPPOSITION TO MOTION TO HOLD CASES IN ABEYANCE

Public Health and Environmental Intervenors oppose the Environmental Protection Agency's motion to hold in abeyance the consolidated challenges to EPA's Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units ("Rule"), 80 Fed. Reg. 64,510 (Oct. 23, 2015). Filed well after the close of briefing and only weeks before a scheduled oral argument, EPA's motion is premised solely upon the initiation of a lengthy review, now only in its "nascent" stage, Mot. to Hold Cases in Abeyance, at 9, *North Dakota v. EPA*, No. 15-1381, (D.C. Cir Mar. 28, 2017) ECF 1668276 [hereinafter "EPA Mot."], to consider

possible changes to the Rule. EPA's motion does not provide the requisite "extraordinary" grounds to further postpone oral argument or any good reason for the Court to decline to exercise its "virtually unflagging obligation," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), to decide a case over which it has jurisdiction. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014).

To be sure, EPA's motion here is presented in a different context than its abeyance motion in the Clean Power Plan case. See Mot. to Hold Cases in Abeyance, *West Virginia v. EPA*, No. 15–1363 (filed March 28, 2017), ECF 1668274. The Rule for new, modified, and reconstructed sources is currently in effect and not stayed, and oral argument and months of judicial deliberation have not occurred. But, as in the Clean Power Plan case, the mere initiation of an administrative "review" process here is no valid ground for indefinitely delaying judicial review of a final rule, and here too respondent-intervenors would be harmed by EPA's belated attempt to evade that review.

The Court has before it a live controversy over a critical environmental and public health safeguard adopted after years of administrative processes as prescribed by the Clean Air Act. Petitioners intend to keep their challenges to it alive, and respondent–intervenors stand ready to defend it. EPA's arguments for abeyance come belatedly, are notably thin, and would set a problematic precedent.

The Court should not countenance here something it has previously warned against – allowing an agency to dodge an imminent judicial ruling on a challenged rule simply by announcing an intention to review it.

BACKGROUND

This rulemaking follows almost 15 years of efforts –to compel EPA to meet its obligation under Clean Air Act section 111, 42 U.S.C. § 7411, to abate emissions of carbon dioxide, the principal climate–changing greenhouse gas, from the largest stationary sources. Beginning in 2002, States and environmental organizations (many of them respondent–intervenors here) filed a series of notice letters, lawsuits, and rulemaking comments seeking EPA regulation of carbon dioxide pollution from power plants under section 111.[1] When EPA issued power plant emissions standards in 2006 that failed to limit carbon dioxide, States and

[1] *See* Complaint, ¶ 32, *Our Children's Earth Found. and Sierra Club v. EPA*, No. 03-cv-00770-CW (N.D. Cal. Feb. 21, 2003) (after inaction following August 27, 2002 notice letter, see *id*., ¶ 4, seeking carbon dioxide standards from fossil-fuel fired power plants), *proposed consent decree published for comment*, 68 Fed. Reg. 65,699 (Nov. 21, 2003), entry of Order Approving Consent Decree, Doc. No. 47 (Feb. 9, 2004). *See also* States of New York, *et al*., Notice of Intent to Sue Under Clean Air Act § 304(b)(2) (Feb. 20, 2003), *available at* https://ag.ny.gov/sites/default/files/press–releases/archived/whitman_letter.pdf; Comments of Environmental Defense, Sierra Club, Clean Air Task Force, Natural Resources Defense Council, *et al*., 9-16, EPA Doc. No. OAR-2005-0031 (Apr. 29, 2005) (urging that revised New Source Performance Standards for power plants must limit carbon dioxide emissions).

environmental organizations filed suit, arguing that EPA was required to issue standards for those emissions. Pet. for Review, *New York v. EPA*, No. 06–1322 (D.C. Cir. Sept. 13, 2006). After the Supreme Court (10 years ago this week) confirmed in *Massachusetts v. EPA*, 459 U.S. 497 (2007), that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act, this Court remanded the *New York* case for proceedings regarding power plants consistent with *Massachusetts*. Order, No. 06–1322 (D.C. Cir. Sept. 24, 2007), ECF 1068052.

After a lengthy administrative process,[2] EPA promulgated the Rule in October 2015. 80 Fed. Reg. 64,510 (Oct. 23, 2015). The Rule sets out emissions standards for new, modified, and reconstructed power plants. It rests on an extensive administrative record reflecting broad participation of scientific experts; power companies and related industries; tribes, states and local governments; environmental groups; and interested members of the general public. 80 Fed. Reg. at 64,528-29.

[2] *See* 77 Fed. Reg. 22,392 (Apr. 13, 2012) (proposed rule for new fossil fuel-fired power plants); 79 Fed. Reg. 1430 (Jan. 8, 2014) (withdrawal of proposal); 79 Fed. Reg. 1430 (Jan 8, 2014) (further proposal for new sources); 79 Fed. Reg. 34,960 (June 18, 2014) (proposal for modified and reconstructed steam units).

Many entities petitioned for review, and many others intervened in support of the Rule. After petitioners twice delayed the briefing schedule,[3] a lengthy briefing process ensued involving dozens of parties and amici and more than 500 pages of briefing. The Court set oral argument for April 17, 2017.

On March 28, 2017 – just three weeks before that scheduled argument – EPA filed a motion to hold the case in abeyance, attaching to its motion an Executive Order entitled Promoting Energy Independence and Economic Growth, and a pre–publication version of an EPA "Notice of Review" (EPA Mot., Attach. 2) (since published at 82 Fed. Reg. 16,330 (Apr. 4, 2017)). EPA states that it plans to review the Rule and other regulations in light of factors enumerated in the Executive Order, such as whether the rule will "burden the development or use of domestically produced energy resources," EPA Mot., Attach. 1, § 1. *See also* Attach. 2, at 4-5. The Notice states that EPA will undertake a rulemaking process if it determines that "suspension, revision or rescission of the New Source Rule may be appropriate," and that any ensuing rulemaking will be "transparent, follow

[3] Petitioners first sought to extend the time for filing proposed briefing schedules until after a briefing schedule had been established in *West Virginia v. EPA*, *see* Mot. to Extend Time, No. 15-1381 (Jan. 6, 2016), ECF 1592154, and filed a motion to suspend the briefing schedule in May 2016 that postponed briefing by several months, *see* Mot. to Extend Briefing Schedule, No. 15-1381 (May 24, 2016), ECF 1614749.

proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." *Id*. Attach. 2 at 3.

EPA's motion asks that this case be put in abeyance for an indeterminate period, until 30 days after the conclusion of the agency's review and "any resulting forthcoming rulemaking." EPA Mot. 8-9.

ARGUMENT

The validity of this important Rule, which was years in the making, presents a live controversy that is now poised for decision by this Court. EPA and petitioners fail to identify any extraordinary grounds for continued delay of oral argument, or even any valid reason for this Court not to proceed with this fully briefed case. EPA's motion for abeyance should be rejected.

I. Abeyance at this Late Stage of the Litigation Premised on a "Nascent" Administrative Review is Unwarranted.

A. EPA's Motion is Late and Comes after Major Investments of Litigation Efforts by Parties and the Court

EPA's abeyance motion comes after the completion of extensive briefing by the many parties and amici and was filed after the argument date and panel were announced and only three weeks before the scheduled oral argument. Although this Court has now removed the case from oral argument calendar pending disposition of EPA's motion, *Order*, No. 15-1381(Mar. 30, 2017), ECF 1668612, the fact that the request came so late in the process militates against granting the

requested relief. D.C. Cir. Rule 34(g) ("When a case has been set for oral argument, it may not be continued by stipulation of the parties, but only by order of the court upon motion evidencing extraordinary cause for a continuance."). The parties, amici, and the Court have spent substantial resources on this case, and EPA's motion does not come close to demonstrating "extraordinary cause" to put off argument and indefinitely delay the litigation at this late point.

B. A New Agency Review and Possible Future Initiation of a New Rulemaking do not Constitute Valid Grounds for Abeyance.

The fact that EPA is at the very beginning of a "review" to consider whether, potentially, to propose a new rule at some unspecified future time provides no compelling reason to mothball a case with over a decade of administrative history that is, finally, fully briefed and ready for argument.

The cases cited by EPA involved circumstances markedly different from those here. In *New York v. EPA*, the court granted abeyance on its own motion, and before any merits briefs had been filed, in light of an ongoing reconsideration proceeding. *Order*, D.C. Cir. No. 02–1387, 2003 U.S. App. LEXIS 20077 (Sep. 30, 2003). And in *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008) (No.

02-1135), the Court granted abeyance (apparently without opposition) pending reconsideration proceedings, also before any merits briefs were filed.[4]

At this point, there is no assurance whatsoever that EPA will ever complete its review of the Rule, propose any changes for notice and comment, or finalize any such changes, or how long this process will take. The Executive Order itself cannot, and does not purport to, change the status of the Rule. It can be changed only as it was made —by following the Clean Air Act's detailed rulemaking procedures, 42 U.S.C. § 7607(d). Whether, when, how, and to what degree EPA may repeal or revise the Rule is at this point "speculation" (as EPA's motion puts it, EPA Mot. at 9). *See id.*, Attach. 1 at 5 (§ 4) (ordering EPA to revise or rescind the Rule "if appropriate" and "consistent with applicable law"); *id*., Attach. 2 at 3; *see Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979)

[4] Nor do any of the other cases cited by Petitioners support the relief requested here. See Petr. Resp. 3 (citing *California, et al. v. EPA*, No. 08-1178 (D.C. Cir., Feb. 25, 2009) (ECF No. 1167136); *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013); Order, *Am. Petroleum Inst. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (ECF No. 1173675); Order, *Sierra Club v. EPA*, No. 09–1018 (D.C. Cir. Feb. 19, 2009) (ECF No. 1165868); *House of Representatives v. Burwell*, No. 16–5202, Order at 1 (Dec. 5, 2016) (ECF No. 1649251); Order, *Natural Resources Defense Council v. EPA*, No. 081250 (D.C. Cir. Dec. 3, 2008), ECF 1152283). None had been fully briefed – let alone scheduled for oral argument – at the time of the abeyance order. (No briefs at all had been filed in *Mississippi*; *American Petroleum Institute*, *Sierra Club*, and *NRDC*). None involved grounds for abeyance as preliminary and tentative as here– an internal consideration of whether to initiate a new rulemaking that would likely take years to complete, that has no prescribed or set timeline, and has not even begun. And none of the cited cases provide a published decision or any written analysis of the abeyance question.

(unlawful for an agency official to prejudge irrevocably the outcome of a rulemaking).

Examples abound where an agency has declared an intent to revise a rule or formally published a proposed rule, but ultimately decided – whether due to public opposition, resource constraints, legal or factual record obstacles, changed circumstances, or other reasons – not to finalize a new rule. For example, when President Obama took office in 2009, EPA declared its "inten[t] in the near term to initiate a rulemaking" to revise a Clean Air Act standard for ozone pollution set by the Bush Administration." Mot. to Hold Cases in Abeyance, at 3, *Mississippi v. EPA*, No. 08–1200 (Oct. 16, 2009), ECF No. 1211554. Approximately two years later, however, EPA withdrew its reconsideration proceedings, leaving the Bush–era standards in effect. *See Mississippi v. EPA*, 744 F.3d 1334, 1341–42 (D.C. Cir. 2013).[5]

[5] *See also, e.g.*, 70 Fed. Reg. 61,081 (Oct. 20, 2005) (proposed, but never finalized regulatory amendments to definition of "emissions increase" in Clean Air Act new source review regulations); 62 Fed. Reg. 66,182 (Dec. 17, 1997) (proposing pretreatment standards for control of certain wastewater pollutants, withdrawn two years later, 64 Fed. Reg. 45,072 (Aug. 18, 1999)); 55 Fed. Reg. 30,798 (July 27, 1990) (proposing regulations on RCRA corrective action, "most provisions" of which were withdrawn nine years later, 64 Fed. Reg. 54,604 (Oct. 7, 1999)); 52 Fed. Reg. 31,162 (Aug. 19, 1987) (proposing on–board refueling vapor recovery systems, only to decide, five years later, not to impose them, 57 Fed. Reg. 13,220 (Apr. 15, 1992), *vacated by NRDC v. EPA*, 983 F.2d 259 (D.C. Cir. 1993)).

In asking the Court to halt its deliberations, EPA relies primarily upon *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*"). *API* is relevant here only insofar as it cautions *against* what EPA now seeks. There, the decision for which the challengers sought review—EPA's decision to omit their waste from an exemption—was itself tentative, *id.* at 387-88; by contrast, no one alleges that the Rule here is not final. Under a schedule imposed by a settlement agreement, EPA had "already published [a] proposed rule" and was required to finalize the rule "in a matter of months." *API*, 683 F.3d at 388-89.[6] Here, EPA describes its own efforts as "nascent," EPA Mot. at 9, and has merely professed its intent to review the Rule and, "if appropriate," propose revisions at some indefinite time in the future.

Indeed, the *API* court warned against the very situation present here. As the court emphasized, its decision should not be read "to say an agency can stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." 683 F.3d at 388; *see also Am.*

[6] EPA misleadingly quotes *API* for the proposition that "'[i]t would hardly be sound stewardship of judicial resources to decide this case now," EPA Mot. at 8, omitting the end of that sentence which continues "given that an already published proposed rule, if enacted, would dispense with the need for such an opinion in a matter of months." 683 F.3d at 388.

Petroleum Inst. v. EPA, 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely.").

Here the risk of "perpetually dodg[ing] review" is all too real. The Rule itself was the long-awaited final product of a laborious effort to compel EPA to comply with its obligations under Clean Air Act section 111 and set carbon standards for power plants. Environmental groups filed a lawsuit seeking those standards in 2003, and EPA entered a consent decree agreeing to review its section 111 standards for power plants. *See supra*, n.1. Then, in 2006, some of the respondent–intervenors filed a case because EPA had failed to include carbon dioxide standards in the final rule, and this Court remanded that case in light of *Massachusetts v. EPA*. Order, *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007), ECF 1068052. Now, when a challenge to a Rule finally regulating those emissions is fully briefed and on the cusp of argument, EPA seeks to snatch it back and "stave off judicial review." Granting the motion here would go well beyond what *API* approved, and would present the very abuse the *API* court condemned. It would do so, moreover, in the face of the Supreme Court's post-*API* expressions of doubt over the "continuing vitality of the prudential ripeness doctrine," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). *See id.* (noting Court's "recent reaffirmation of the principle that 'a federal court's obligation to hear and

decide' cases within its jurisdiction 'is virtually unflagging'") (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citations omitted)).[7]

C. EPA's Argument that Defending the Rule on the Books Might Interfere with a Possible New Rulemaking is Untenable, and, in Any Event, No Basis for Abeyance.

EPA suggests (EPA Mot. at 7-8) that continued litigation of this case might improperly constrain the agency's review and its potential new rulemaking process. Specifically, EPA argues that if oral argument were held in the midst of the agency's review, "counsel would likely be unable to represent the current Administration's position on the many substantive questions that are the subject of the nascent review," and that, if counsel "speculate[d] as to the likely outcome of the current Administration's review," it would "call into question the fairness and integrity of the ongoing administrative process." *Id*. 8-9.

These concerns lack merit. The Court's continued adjudication of these petitions does not impair EPA's ability to review the Rule or initiate a new

[7] Nor would EPA's proposed abeyance–for–administrative review approach have any clear efficiency benefits. In cases where the agency opens a new rulemaking but does not end up completely rescinding the prior rule – or when the rescinding rule is itself later invalidated – judicial review of the original rule may well have to proceed anyway, perhaps years after the fact. And agency error is more likely where the second rulemaking occurs without the benefit of a court decision addressing the issues in the prior rulemaking.

rulemaking to consider possible changes. See EPA Mot. 7 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

That EPA may have to enforce and defend a Rule that may not fully accord with the current Administration's views is not an extraordinary event; it is how the rule of law works. A new Administration's disagreement with regulations on the books may be a reason to initiate rulemaking to make changes, but it is not a basis for declining to defend and enforce current rules.

Even if EPA were to take the extraordinary step of refusing to defend the Rule, respondent–intervenors stand ready to do so. Intervenors enjoy "full party status," *U.S. ex rel. Eisenstein v. City of N.Y., N.Y.*, 556 U.S. 928, 932–34 (2009), and may defend public laws when the government does not, *e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2684-89 (2013); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 477, 482-87 (9th Cir. 2010) (upholding private conservation intervenors' right to defend Bureau of Land Management regulations that agency no longer defended); *Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 571-74 (7th Cir. 2009) (upholding private company permitted to intervene and defend Wisconsin statute regulating gasoline sales after state government declined to defend); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (environmental intervenors could defend Forest Service's Roadless Rule despite

absence of appeal by agency); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456-60, 463 (D.C. Cir. 1991) (mining association allowed to defend Interior Department regulations against environmental group's challenge after Interior did not appeal; district court judgment for environmental plaintiffs reversed). And the administrative record that is the sole basis for review, *Camp v. Pitts*, 411 U.S. 138, 142 (1973), is complete and before the Court.

D. EPA's Requested Relief Would Undermine Federal Administrative Law.

Halting judicial review of final regulations at an advanced stage of the litigation simply because the new administration may initiate new rulemaking would disrupt and impede the orderly administration of the law. Doing so leaves existing rules in a protracted limbo state, sometimes for years. *See N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) ("people cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack").[8] It deprives both the public and agencies of the

[8] This Court has emphasized that statutory regimes with fixed periods for pre-enforcement judicial review reflect congressional judgments on the importance of expeditious resolution of regulatory challenges. *Ala. Power Co. v. Costle*, 606 F.2d 1068, 1075 (D.C. Cir. 1979) ("The judicial review provisions as well as other features of the Clean Air Act Amendments set a tone for expedition of the administrative process that effectuates the congressional purpose to protect and enhance an invaluable national resource, our clean air."); *see also Eagle-Picher Industries v. EPA*, 759 F.2d 905, 916 (D.C. Cir. 1985) (Superfund's broad pre-

benefit of judicial explication of "what the law is." *See AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) (addressing arguments to "avoid re–litigation of identical issues in a subsequent petition"); *cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (discussing the public interest in judicial decisions).[9] It would invite the same strategic games by agencies that the *API* court denounced, i.e., efforts to stave off possibly inconvenient judicial rulings by announcing policy "reviews" and, on that basis, seeking indefinite postponement of judicial scrutiny. *See* 683 F.3d at 388.

II. This Case Is Far from Moot.

Petitioners (Petr. Resp. 4-6) urge that the current challenge would be moot if EPA chooses to initiate a new rulemaking and then finalizes a new regulation that rescinds or replaces the Rule. They further argue that, under *United States v.*

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enforcement review regime represents congressional judgement on need to avoid "needless delays in the implementation of an important national program").

[9] In addition to issues unique to the long–running dispute over EPA's obligation to regulate power plants' carbon dioxide emissions, this case presents legal issues of general importance to the administration of the Clean Air Act Section 111's pivotal New Source Performance Standards program. These include petitioners' arguments that technologies must be "commercially available" in order to support the "best system of emissions reduction," and that EPA must make a new endangerment finding when it regulates an additional pollutant from an existing source category, State Ptrs' Final Opening Br. 1, 34, 24-25, 34-36, No. 15-1381 (D.C. Cir. Feb. 3, 2017), ECF No. 1659341. All of these issues are fully briefed and ripe for decision (indeed, petitioners agreed to submit the latter issue for decision on the briefs, Joint Briefing Proposal at 1 (March 20, 2017), ECF No. 1666889).

Munsingwear, 340 U.S. 36 (1950), parties unhappy with the Court's decision of this case would have a basis for seeking to vacate that decision should the rulemaking change come in the interval between this Court's decision and final action by the Supreme Court on certiorari.

Merely to recite this argument is to note the multiple layers of speculation upon which it depends – and how far it departs from the established test for mootness. *See Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (case is moot where "events have so transpired that the decision will neither presently affect the parties' rights nor have a more–than–speculative chance of affecting them in the future").

Petitioners' argument rests upon a curious and unfounded confidence about the ultimate result of the EPA's nascent review. But consistent with presumptions of regularity, no one can now know the result of EPA's review and any rulemaking proceedings. *E.g.*, EPA Mot., Attach. 2 at 3. Petitioners' speculations as to the timing and content of future agency action do not provide grounds for abeyance.[10]

[10] *Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977) (cited in Pet'rs' Resp. 6), involved sharply different circumstances. There, this Court held that a challenge to regulations that the district court had ruled unlawful was moot where those regulations had never gone into effect, the agency had promulgated interim regulations in response to the district court's ruling, and the agency had stated its intention to issue new permanent regulations supplanting those the district court had held unlawful. *Id.* at 724–26. By contrast, petitioners' discursus on *Munsingwear* depends on free–floating speculations about what this Court,

This Court should reject petitioners' effort to maintain their challenges indefinitely while avoiding judicial decision of their claims. Having long asserted that the Rule is unlawful, petitioners now seek to delay indefinitely putting their claims to a judicial test – but without dismissing their challenges.

III. Respondent–Intervenors Would Be Prejudiced by an Abeyance.

No showing of prejudice" is required to justify the adjudication of live controversies or to trigger federal courts' obligation to decide cases properly before them. Nevertheless, EPA is wrong when it claims that respondent–intervenors would suffer "no harm" (EPA Mot. at 9) from the requested abeyance.[11] In fact, abeyance would allow EPA to evade judicial review on legal issues many respondent–intervenors have been seeking judicial resolution of for over a decade, *supra*, pp. 3-4 & n.1, and which petitioners continue to dispute, and would leave a long–sought rule in legal limbo indefinitely.

Petitioners' assertion that the Rule does nothing (Petr's Resp. 6–7) conflicts with their own repeated assertions that the Rule prevents new coal plants from being constructed. See Non–State Petitioners' Br. at 15 (asserting that the Rule "effectively precludes the construction of new steam generating units and shortens

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EPA, and the Supreme Court may do in the future, and provides no basis for avoiding the case that is before the Court.

[11] As this Court's rule disfavoring delays of cases scheduled for argument recognizes, Cir. Rule 34(g), pausing cases at this late stage inconveniences the parties and Court, as is certainly the case here.

the lives of existing units") (ECF No. 1659209). The Rule is highly valuable to and protective of respondent–intervenors and their members because it ensures, that for new coal plants that would emit carbon in massive volumes for decades, standards will be in place to limit that pollution, see 80 Fed. Reg. at 64,574, 64,642; Resp't EPA's Br. 79 (noting that additional carbon emissions from even a single uncontrolled new coal plant are extremely voluminous) (ECF No. 1659737). And petitioners, in their briefs attacking the Rule, describe it as the "statutory predicate" and "but-for cause" of the Clean Power Plan, which provides enormous health and environmental benefits. State Pet'rs' Final Opening Br. 2, 11–12, ECF. No. 1659341; see also N.D. Br. 7, ECF No. 1659075. In short, petitioners' efforts now to dismiss the Rule's importance are in error and provide no ground for deferring review.

CONCLUSION

The Court should deny EPA's motion for abeyance and reschedule the argument for the earliest practicable time.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 4440 words.

CERTIFICATE OF SERVICE

I certify that on April 5, 2017, the foregoing Response was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue