ORAL ARGUMENT HEARD ON SEPTEMBER 27, 2016

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

STATE OF WEST VIRGINIA, et al., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15-1363 (and consolidated cases)

RESPONDENT-INTERVENOR ADVANCED ENERGY ECONOMY'S OPPOSITION TO MOTION TO HOLD CASES IN ABEYANCE

Respondent-Intervenor Advanced Energy Economy (AEE) opposes the motion by the U.S. Environmental Protection Agency and Administrator Scott Pruitt (together, EPA or "the Agency") to hold this litigation in abeyance. The basis of the Agency's request is a vague representation that it *may*—"if appropriate"—initiate a new rulemaking at some unknowable date in the future. Motion at 1. Because the U.S. Supreme Court's stay of the Rule would remain in effect during an abeyance, the Agency's requested relief would be tantamount to *vacatur* by indefinite delay.

This, the Agency cannot do. EPA may attempt to rescind or replace the Clean Power Plan through formal notice and comment rulemaking. Or, in the

extraordinary circumstance that it reaches an entirely different determination upon reexamination, it may abandon its defense of the Rule. But EPA may not misappropriate principles of judicial review to circumvent the administrative procedure for repealing or revising a duly promulgated rule. This Court has warned against as much in the very cases EPA cites for its request, as the other Respondent-Intervenors explain in their opposition briefs. *See* Opp. of Public Health and Environmental Organizations at 14-15, Doc. 1669770 (April 5, 2017); Opp. of States and Municipalities at 9-11, Doc. 1669699 (April 5, 2017).

Here, EPA attempts to be the very "savvy agency" "perpetually dodg[ing] review" that this Court foretold in *American Petroleum Institute v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012). Indeed, just this week the Supreme Court denied a similar invitation by the Agency for indefinite delay in the litigation challenging the scope of jurisdiction under the Clean Water Act. *See* Order, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299, 2017 WL 1199467 (Apr. 3, 2017). This Court should similarly reject the Agency's attempt to circumvent the judicial-review process in this case.

Because the Clean Power Plan is a duly promulgated regulation, it remains the law of the land, even while stayed by the Supreme Court pending judicial review. Granting EPA's eleventh-hour request and leaving the Rule's status in limbo would permit any agency to suspend any legally promulgated rule by merely

claiming that it *might*, at some future time, initiate a new rulemaking and make some unknown changes to the Rule. Instead, while EPA's potential repeal or revision of the Plan is purely speculative, what *is* clear is that an Executive Order and the Agency's simple incantation of commencing an administrative-review process cannot suspend or rescind the Plan. *See* 5 U.S.C. § 553(b), (c); *id.* § 551(5); *see also* 42 U.S.C. § 7607(d)).

Further, granting the Agency's motion would upend principles of judicial economy. EPA's assertion to the contrary—that its proposed relief would somehow *promote* judicial economy—simply blinks reality. EPA promulgated the Clean Power Plan more than seventeen months ago after one of the most comprehensive and protracted rulemaking processes in agency history—a rulemaking that involved four million public comments. The instant litigation resulted in more than a thousand pages of briefing from more than two hundred entities. This Court heard nearly seven hours of oral argument in September 2016. To hold the case in abeyance at the final stage of the judicial-review process would waste the tremendous expenditure of resources by each participant and this Court. Moreover, abeyance would squander the opportunity for the Court to resolve critical questions regarding EPA's authority under the Clean Air Act that are not only ripe for resolution, but will also shape any future rulemakings in this arena.

Finally, contrary to the Agency's assertion (Motion at 8), additional and indefinite delay would force concrete harm on AEE and its members. AEE's members include providers of a broad range of advanced energy products and services, including those related to natural gas, wind, solar, and nuclear power generation; energy efficiency technologies; smart grid technologies; and advanced transportation systems. Holding this litigation in abeyance would prolong uncertainty for these businesses in particular and for the power sector more generally. Delaying, if not abandoning, a decision at this point would chill the continued growth of the $200 billion advanced energy market.

EPA's proposition is untenable under the Administrative Procedure Act, the Clean Air Act, this Court's precedent, and basic notions of judicial economy. For these reasons, the Court should deny this unprecedented request to hold the case in abeyance and proceed with a decision providing long-awaited certainty to the regulated community and the providers of advanced energy products and services.

Respectfully submitted.

Dated: April 6, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that certify that Respondent-Intervenor Advanced Energy Economy's Opposition To Motion To Hold Cases In Abeyance complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains 732 words as counted by the word-processing system used to prepare it.

Dated: April 06, 2017

/s/ Lawrence S. Robbins
Lawrence S. Robbins

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will serve electronic copies of such filing on all registered CM/ECF users.

/s/ Lawrence S. Robbins
Lawrence S. Robbins