ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

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

MURRAY ENERGY CORPORATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and E. SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, Respondents.	Case No. 16-1127 (and consolidated cases)

PETITIONERS' RESPONSE IN SUPPORT OF
EPA'S MOTION TO CONTINUE ORAL ARGUMENT

Petitioners in these consolidated cases submit this response in support of Respondent U.S. Environmental Protection Agency's ("EPA" or "Agency") April 18, 2017 motion to continue the oral argument currently scheduled for May 18, 2017. EPA Mot., ECF No. 1671687. Because oral argument is scheduled to take place in less than four weeks, Petitioners respectfully request that this Court take prompt action on EPA's motion.

As explained in the Agency's motion, "EPA officials appointed by the new Administration are closely reviewing the Supplemental Finding"—the agency action challenged here—"to determine whether the Agency should reconsider the rule or some part of it." EPA Mot. 5; *see also id.* 6 (Agency "will be closely scrutinizing the

Supplemental Finding to determine whether it should be maintained, modified, or otherwise reconsidered"). That review is taking place in accordance with an Executive Order issued by the President directing EPA to identify any rule that is not "mandated by law, necessary for the public interest, and consistent with" stated policy and that "potentially burden[s] the development or use of domestically produced energy resources." Exec. Order No. 13783 § 2, 82 Fed. Reg. 16,093 (Mar. 28, 2017). The Executive Order further directs EPA to recommend actions consistent with law that "could alleviate or eliminate" any such burdens. *Id.*

Both the interests of justice and judicial economy weigh in favor of granting EPA's requested relief. Continuing oral argument in this case would conserve the parties' and the Court's resources by avoiding the need to prepare for oral argument, the need to hear and present arguments in the case, and the need for the Court to consider the lawfulness of the Supplemental Finding and prepare an opinion while EPA's review is pending. Continuing oral argument would not cause any harm to respondent-intervenors, since the underlying Mercury and Air Toxics Standards ("MATS") Rule has not been stayed.

EPA's request is unremarkable: it is within the Court's authority and fully consistent with its past practice. And the Court's power "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. N. 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). This Court recently granted a similar motion by EPA to continue oral argument in challenges to the Agency's National Ambient Air Quality Standards for ozone while the new administration reviews its position on that rule. Order, *Murray Energy Corp. v. EPA*, No. 15-1385, ECF No. 1670626 (D.C. Cir. Apr. 11, 2017) (removing case from oral argument calendar eight days before scheduled argument date); *see also* Order, *North Dakota v. EPA*, No. 15-1381, ECF No. 1668612 (D.C. Cir. Mar. 30, 2017) (removing case from oral argument calendar *sua sponte* in light of EPA review of underlying rule and motion to hold cases in abeyance).

Indeed, the government frequently requests—and this Court frequently grants—abeyance in pending litigation to afford it the opportunity to address policy changes arising from changes in presidential administrations. *See, e.g.*, *California v. EPA*, No. 08-1178, ECF No. 1167136 (D.C. Cir. Feb. 25, 2009) (placing case in abeyance indefinitely after opening briefs had been filed to permit new administration to reconsider determinations promulgated by EPA under former administration); 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, *Nat. Res. Def. 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 Envtl. Forum 12, at 14 (Feb. 2009). Similarly, this Court held challenges to the Affordable Care Act 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 briefed. Order, *U.S. House of Representatives v. Burwell*, No. 16-5202, ECF No. 1649251 (D.C. Cir. Dec. 5, 2016).

Continuing oral argument in this case would conserve the Court's and the parties' resources while avoiding the possibility of the Court issuing an opinion that could be rendered both moot and advisory by any action EPA takes to revise or rescind the Supplemental Finding.[1] *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 principle of Article III standing that "an actual controversy must be extant at all stages of review." *Arizonans for Official English v.*

[1] Petitioners note that Executive Order 13783 establishes it is "the policy of the United States that necessary and appropriate environmental regulations . . . [be] of greater benefit than cost." Exec. Order No. 13783 § 1(e), 82 Fed. Reg. at 16,093. Because this explicit policy conflicts with EPA's prior position in the Supplemental Finding and this litigation, *see* EPA Br. 29, ECF No. 1667291, it is far from speculative that EPA's review will result in some changes to the Supplemental Finding.

Arizona, 520 U.S. 43, 67 (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. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990) (internal quotation marks omitted).

EPA's review of the Supplemental Finding could resolve some or all of the issues raised by Petitioners here. Respondent-Intervenors argue that EPA's review could not render Petitioners' challenges moot because that review is "futile" in light of *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). According to Respondent-Intervenors, *New Jersey* requires the Agency to regulate power plants under Clean Air Act section 112 regardless of the Supreme Court's direction in *Michigan v. EPA* that EPA review its "appropriate and necessary" determination under a new legal standard. Non-Govtl. Org. Resp.-Int. Opposition 12-16, ECF No. 1672173; State & Local Govt. Resp.-Int. Opposition 8-9, ECF No. 1672191. That argument is a red herring. It incorrectly assumes Petitioners' claims could only be mooted if EPA finds regulating power plants under section 112 is *not* "appropriate and necessary" and revokes the MATS Rule. To the contrary, *any* action that replaces the Supplemental Finding with a new determination would moot Petitioners' challenges, regardless of whether such action is taken on EPA's own initiative or pursuant to a voluntary remand granted by this Court. In any event, even if *New Jersey* did constrain EPA's

authority as Respondent-Intervenors claim,[2] that constraint would be lifted if, after its review, the Agency seeks (and this Court issues) an order granting voluntary remand of the Supplemental Finding.

In short, Petitioners are challenging a specific agency action—the Supplemental Finding—and if that action is replaced, revoked, or remanded, the case is moot, regardless of what replaces it. In this Court it is a "perfectly uncontroversial and well-settled principle of law" that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot." *Akiachak Native Cmty. v. U.S. 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. U.S. Postal Ser.*, 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); *Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d

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[2] Respondent-Intervenors are wrong about the import of *New Jersey*. As that case explains, "[s]ection 112(n)(1) governs how the Administrator decides whether to list EGUs." *New Jersey v. EPA*, 517 F.3d at 582. In *New Jersey*, however, "the Administrator's decision to add … a source category or subcategory to the list under section 112(c) [could not be reviewed by the court] until 'the Administrator issues emission standards for such pollutant or category.'" *Id.* at 579 (quoting CAA § 112(e)(4)). Accordingly, the only avenue available to EPA *at that time* to delist was under § 112(c)(9). Here, the decision to list is precisely what the Supreme Court reviewed in *Michigan*. The Court held that decision unlawful, and this Court remanded for EPA to reexamine it. Thus, if EPA determines that the "appropriate and necessary" decision was incorrect under *Michigan*, then power plants were not properly included on the source category list in the first place, as *New Jersey* recognizes.

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; *Arizona Public Serv. 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 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 Cmty.*, 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. *U.S. Bancorp Mortg. 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 mootnesss, 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).

Finally, continuing oral argument in this case would not prejudice Respondent-Intervenors. Neither the Supplemental Finding nor the MATS Rule which it was adopted to support has been stayed, and the MATS Rule's emission limitations are currently in effect for coal- and oil-fired power plants. *See White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100, ECF No. 1588459 (D.C. Cir. Dec. 15, 2015) (remanding MATS Rule without vacatur). Therefore, continuing oral argument would only disadvantage the Petitioners (who would have to wait longer for judicial resolution of any remaining issues), who nonetheless support EPA's motion. EPA's offer to report to the Court periodically on the status of its review, *see* EPA Mot. 8—and the parties' ability to request that the continuance be lifted if and as circumstances change based

on those status reports—provide a safeguard against the possibility that the Agency could unreasonably compound that disadvantage by carrying on its review indefinitely.

In sum, judicial economy and the interests of justice support continuing oral argument in this case pending EPA's review of the Supplemental Finding. The Court should therefore grant EPA's motion.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant EPA's motion to continue oral argument in this case.

April 24, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(1)(D) of the Federal Rules of Appellate Procedure and Circuit Rules 27(a)(1) and 27(a)(1)(2), I certify that the foregoing Industry Petitioners' Response in Support of EPA's Motion to Continue Oral Argument contains 2,155 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 of 5,200 words set by Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure.

/s/ Makram B. Jaber
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Dated: April 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served electronically through the Court's CM/ECF system on all ECF registered counsel.

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April 24, 2017