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)

SUPPLEMENTAL BRIEF OF RESPONDENT-INTERVENORS ADVANCED ENERGY ECONOMY, AMERICAN WIND ENERGY ASSOCIATION, AND SOLAR ENERGY INDUSTRIES ASSOCIATION

Respondent-Intervenors Advanced Energy Economy, American Wind Energy Association, and Solar Energy Industries Association hereby respond to this Court's request for supplemental briefing on the possibility of remanding this case to the agency. April 28, 2017, Order at 2.

As an initial matter, we believe the best course of action would be for this Court to simply render a decision on the merits rather than remand or hold the case in abeyance. To remand or hold the case in continued abeyance at the final stage of the judicial-review process would squander the tremendous expenditure of resources by each participant and this Court on the case. After more than a

thousand pages of briefing from more than two hundred entities, and seven hours of oral argument, the pending questions of EPA's authority to promulgate the Clean Power Plan ("the Rule") under the Clean Air Act are ripe for resolution.

Forgoing a decision on the merits would also cause enduring harm to the environment and, in turn, the technologies that are poised to mitigate those hazards. This Court's decision impacts the actions and expenditures of all members of the advanced and renewable energy sector—a $200 billion market. In short, such an urgent matter—squarely before the Court and involving threshold questions regarding the scope of the Clean Air Act—should be decided now.

If this court declines to decide the case on the merits, however, disposition through remand to the agency, rather than continued abeyance, is the legally sound and equitable course. Due to the procedural posture of this litigation, a remand would ultimately lift the Supreme Court's stay of the Clean Power Plan. That is because the Supreme Court ordered that the Rule "is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought." Order, *West Virginia v. EPA*, S. Ct. No. 15A773 (Feb. 9, 2016). A remand by this Court would be a "disposition" of the petitions

for review—and would therefore terminate the stay (after the Supreme Court's disposition of any petition to review this Court's remand order).[1]

Once the stay is lifted, the Clean Power Plan would remain in effect—and the EPA would therefore have to comply with the Clean Air Act's rulemaking process if it eventually decides to amend or rescind the Rule. *See* 42 U.S.C. 7607(d) (rulemaking requirements); Abeyance Opp. of Public Health and Environmental Organizations at 9-10 (citing cases affirming that altering or suspending regulations requires notice-and-comment rulemaking). A remand would therefore ensure that the agency actually tackles the issue it has identified—whether to alter or rescind the Clean Power Plan, consistent with its statutory authority to regulate carbon emissions—and that the agency does so in accordance with administrative-law principles. And it will also ensure that, unless and until the agency decides to do so, the Rule will remain in effect.

Granting a continued abeyance, by contrast, would allow EPA to suspend indefinitely a legally promulgated rule without providing a record-based rationale for doing so or an opportunity for judicial review. Indeed, in its Motion for

[1] Remand of these consolidated cases terminates this Court's jurisdiction over them—and constitutes a "disposition" of the petitions for review. D.C. Cir. Rule 41(b) ("If the case is remanded, this court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand."); *see also* D.C. Circuit Handbook 35; *NLRB v. Wilder Mfg. Co.*, 454 F. 2d 995, 998 (D. C. Cir. 1971); *NLRB. v. Local Union 25, Int'l Bhd. of Elec. Workers*, No. 77-2044, 1978 WL 4101, at *1 (D.C. Cir. May 22, 1978).

Abeyance, EPA rested its request on the assertion that it *might*, at some future time, initiate a new rulemaking or work other changes to the Rule. That speculative pronouncement cannot support suspension or rescission of the Clean Power Plan. *See* 5 U.S.C. § 553(b), (c); *id.* § 551(5); *see also* 42 U.S.C. § 7607(d)). Instead, if the agency wishes to attempt to replace or rescind the Rule, it must do so through reasoned decision-making. EPA cannot elude that bedrock principle of administrative law and effectively nullify the Rule through continued—and possibly indefinite—abeyance.

For the reasons stated above, if this Court decides not to decide the case on the merits it should remand to the agency (without vacatur), rather than hold the case in abeyance.

Respectfully submitted.

Dated: May 15, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that certify that the Supplemental Brief of Respondent-Intervenors Advanced Energy Economy, American Wind Energy Association, and Solar Energy Industries Association complies with the requirements of Fed. R. App. P. Rule 27(d)(2) and this Court's April 28, 2017, Order because it contains 759 words as counted by the word-processing system used to prepare it.

Dated: May 15, 2017

/s/ Lawrence S. Robbins
Lawrence S. Robbins

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 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
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