ORAL ARGUMENT HEARD EN BANC 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. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15-1363 (and consolidated cases)

REPLY IN SUPPORT OF MOTION TO DECIDE THE MERITS OF CASE

The responses identify no constitutional principle, statute, rule, or judicial precedent that prevents the Court from deciding the merits. And while both EPA and Petitioners admonish the Court to avoid an "advisory opinion," EPA Resp. 14; Pet'rs Resp. 3, 4, they do not dispute that the case presents a substantial, live controversy, and that climate change harms will only worsen with inaction.

Against these certainties weighing in favor of deciding the case, EPA's and Petitioners' argument for additional abeyance is founded on uncertainty and inefficiency: uncertainty because EPA's replacement proposal lacks even an approximate date certain for finalization, and inefficiency because they seek to delay an inevitable ruling on the fundamental statutory authority question for

which EPA's proposal assumes an answer (one that greatly disserves public health and welfare). The Court should decline further abeyances and decide the merits, consistent with its "virtually unflagging" "obligation to hear and decide cases within its jurisdiction." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (citations omitted).

ARGUMENT

I. The Case Presents a Live Controversy Appropriate for a Ruling Now

A. Judicial Economy Favors a Merits Decision, Not Further Abeyance

EPA's and Petitioners' principal argument for additional abeyance is that the case might become moot if the agency finalizes the "Affordable Clean Energy" rule, 83 Fed. Reg. 44,746 (Aug. 31, 2018), on which EPA predicts final action in the "first part" of 2019, EPA Resp. 1, 5. Both posit such mootness would prompt the Supreme Court to vacate this Court's decision under *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950). EPA Resp. 9; Pet'rs Resp. 5-6.

Such uncertain possibilities do not outweigh the serious harms of not deciding the case. As Petitioners have acknowledged, "EPA could decide not to finalize its proposed rules," Pet'rs & Pet'r-Intervenors Joint Status Report in Support of Continued Abeyance at 3, ECF 1747382 (Aug. 24, 2018), much less complete the rulemaking on the vague schedule EPA now proposes. As we explained (Mot. 9-13), the broad scope and key features of the most recent

proposal indicate that the new rulemaking is especially unlikely to be expeditious: Unlike the Clean Power Plan and other prior section 111(d) rules, the proposed replacement provides no binding emission limits but only a menu of options for states to consider, drawn from a category of measures (heat-rate improvements) EPA previously found would risk *increasing* emissions, 80 Fed. Reg. at 64,727, n.370, 64,745. The proposal would exempt from regulation gas-fired plants, 83 Fed. Reg. at 44,761, which cause a major portion of electric sector emissions.[1]

And EPA's proposal would encourage power plant projects that could significantly increase carbon dioxide, as well as other harmful pollutants such as nitrogen oxides, sulfur dioxide, and particulates, by effectively eliminating New Source Review permitting and pollution control requirements. *See* 83 Fed. Reg. at 44,776-78. These sweeping revisions would apply to *all* modifications at electric generating units, not simply those undertaken to comply with the replacement rule, and are not accompanied by requisite analyses of their health and environmental consequences. The proposal also includes far-reaching changes in the general section 111(d) implementing regulations, which would fundamentally redefine EPA's implementation responsibilities. 83 Fed. Reg. at 44,769-73.

[1] *See* Energy Information Administration (EIA), 2016 Carbon Dioxide Emissions at Electric Power Plants, *https://www.eia.gov/electricity/data/emissions/emissions2016.xlsx* (showing emissions by fuel type, with aggregate natural gas combined cycle emissions of approximately 24% of total sector emissions).

While the merits of the wide-ranging and complex proposed rule are not before the Court (EPA Resp. 14), it is relevant because EPA and Petitioners trumpet it as grounds for further abeyance, and because completing a rulemaking of this scope, with necessary technical support and appropriate time for and review of public comment, is seldom simple or quick. EPA's proceedings could readily stretch well past the "first part" of next year, however defined.

Even if EPA finalizes its new proposal, it will not necessarily moot this case. According to Petitioners, "whether there is a need for a decision on aspects of the Clean Power Plan" will depend on the content of the final rule. Pet'rs Resp. 5. Nor can EPA or Petitioners predict with confidence whether and how the *Munsingwear* doctrine would apply if EPA promulgated a final rule while these cases were in the Supreme Court. "[T]he decision whether to vacate turns on the conditions and circumstances of the particular case." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (citations omitted), including "whether the party seeking relief from the judgment below caused the [nonjusticiability] by voluntary action," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).[2]

[2] The pending petitions for review challenging EPA's January 2017 denial of reconsideration requests (EPA Resp. 2, 9) have not yet been briefed or argued, are not subject to the stay (which applies pending resolution of petitions in Nos. 15-1363, *et al.*), and do not warrant postponing decision in this argued case. *See, e.g.*, State Respondent-Intervenors Opp. to Motion to Sever, ECF No. 1665786 (March 13, 2017).

Other factors demonstrate that judicial economy favors deciding the case now. The Court has already invested significant time and resources in the case. EPA and Petitioners again ignore the massive waste of judicial and party resources from not resolving the merits after briefing by numerous parties and an all-day *en banc* oral argument.

In addition, both EPA's October 2017 repeal proposal and the proposed replacement begin from the legal premise that the Clean Power Plan is beyond EPA's statutory authority, *see* 83 Fed. Reg. at 44,748 (legal analysis in October 2017 repeal proposal "incorporated into" replacement proposal). The agency now entreats the Court not to rule on the Clean Power Plan before EPA finalizes a regulation based on its position that the Plan is illegal. Refraining from deciding the very legal proposition that is the legal starting point for EPA's proposed rule is uneconomical. Thus, unlike in *Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), *see* Pet'rs Resp. 4, there is no reasonable likelihood the Court can avoid a ruling on the fundamental question of the agency's statutory authority by awaiting conclusion of the replacement (or repeal) rulemaking.

If EPA finalized such a replacement rule based on its new position regarding its statutory authority, this Court would have to determine whether EPA's rule was based "on an erroneous view of the law." *See, e.g., Prill v. Nat'l Labor Relations Bd.*, 755 F.2d 941, 956 (D.C. Cir. 1985). Were the Court to set aside a replacement

rule because EPA based it on an incorrect view of its section 111(d) authority, the Clean Power Plan could again be in effect, years after promulgation, without ever having been reviewed. This is not a case in which EPA action "would dispense with the need for . . . an opinion in a matter of months." *API v. EPA*, 683 F.3d at 388. Instead of the "finish line . . . in sight," EPA Resp. 7, the path EPA and Petitioners propose invites a years-long wild-goose chase.

B. Further Abeyance Is Inconsistent with the Clean Air Act's Mandatory Obligation and Prejudicial to the Public Interest

EPA asserts that the Clean Power Plan fulfilled the agency's statutory duty and that it is only the Supreme Court's stay, not any EPA action, that is responsible for the rule not being in effect. EPA Resp. 12-13. This position overlooks EPA's and Petitioners' affirmative efforts to forestall judicial review, which have greatly prolonged a stay that was intended to last only during expedited judicial review. Mot. 6-8.

EPA's and Petitioners' stance invites years of further delay in establishing a lawful, workable set of protections from power plant carbon dioxide emissions. Mot. 5-6. Congress required EPA to reduce such emissions to mitigate real dangers to public health and welfare. The Court should take this vital, still-unmet Clean Air Act obligation into account in determining how to handle the requests for still more abeyance, particularly because inaction on carbon pollution will exacerbate harms to human health and the environment. *See* Order, Doc. No. 1687838 (Tatel and

Millet, JJ., concurring) (continued abeyance effectively relieves EPA of its "affirmative statutory obligation" to regulate).

Attempting to downplay the effects of leaving the Clean Power Plan in an unreviewed limbo, EPA now suggests (Resp. 7) that the emission reductions under the Clean Power Plan would not differ greatly from those available under its proposed replacement. And ironically, Petitioners, who attacked the Clean Power Plan as an over-aggressive effort to revolutionize the power sector, now seek to ward off adjudication by emphasizing the same rule's modest gradualism.[3]

EPA's efforts to blur the differences between the proposal and the Clean Power Plan are unfounded. The Regulatory Impact Analysis (RIA) for the proposal (EPA-HQ-OAR-2017-21182)[4] shows the Clean Power Plan would reduce emissions from the power sector by as much as seven percent below "business as usual" levels in 2030 – many times the possible one percent reduction anticipated for the proposed replacement for that year. RIA, Table 3-41.[5] Moreover, the

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[3] *Compare* Pet'rs Resp. at 8 *with* Stay App. in S. Ct. No. 15A773 2 (Jan. 26, 2016) (multiple states, urging that rule would "force a massive reordering of the States' mix of generation facilities"); Stay App. In S. Ct. No. 15A776 at 7 (utilities, charging it would cause a "draconian restructuring of the nation's power supply") (Jan. 27, 2017); Stay App. in S. Ct. No. 15A787 at 19 (business associations, claiming rule "requires decommissioning of coal plants throughout the country").

[4] Available at: https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-21182.

[5] Other U.S. government analyses that are less optimistic about future power sector trends find the Clean Power Plan would have even greater benefits: the

proposed replacement would fail to provide any insurance against reversals in industry trends. To be sure, EPA's analysis for the proposal indicates that existing industry trends will result in far lower emissions by 2030 than EPA originally anticipated in the Clean Power Plan. RIA at 3-8; 83 Fed. Reg. at 44,754. However, as EPA admits, there is no guarantee that these trends will continue because they can depend upon shifts in fuel prices, economic growth, and other factors. *Id*. at 44,754. Indeed, the Administration is itself considering measures that could significantly disrupt current market trends toward cleaner generation, such as invoking emergency powers to subsidize aging coal plants[6] or undoing limits on toxic air pollution from coal plants.[7]

Energy Information Administration, for example, recently forecast that the Plan would reduce emissions to 12 percent below "business as usual" levels in 2030. *See* Annual Energy Outlook 2018, Reference Case Tbl. 18 (Feb. 2018), https://www.eia.gov/outlooks/aeo/excel/aeotab_18.xlsx; Annual Energy Outlook, Reference Case with CPP Tbl. 18 (Feb. 2018), https://www.eia.gov/outlooks/aeo/excel/cpp/aeotab_18.xlsx.

[6] White House, Statement from Press Secretary on Fuel-Secure Power Facilities (June 1, 2018), https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-secure-power-facilities/; Eric Wolff, *Trump Calls for Coal, Nuclear Power Plant Bailout*, Politico (June 1, 2018), https://www.politico.com/story/2018/06/01/donald-trump-rick-perry-coal-plants-617112.

[7] Amena H. Saiyid, *Trump Eyes Changes to Another Coal Plant Emissions Rule*, Bloomberg Environment (Aug. 29, 2018), https://news.bloombergenvironment.com/environment-and-energy/trump-to-reopen-another-epa-coal-rule-with-an-eye-to-changes.

In contrast to the proposed replacement, the Clean Power Plan put in place binding, quantitative emission guidelines to ensure meaningful reductions even if industry trends change.[8]

C. The Approach of Continued Delay Petitioners and EPA Advocate Could Undermine the Administration of Federal Statutes

The course that EPA and Petitioners advocate also threatens to undermine rules that advance the administration of important federal statutes like the Clean Air Act that require complex, time-consuming rulemakings based upon extensive factual records and analysis. Given the experience of this litigation to date, the schedule for judicial review of EPA's actions could stretch well into the 2020s and yet another federal administration. Should a new administration take over in January 2021 and initiate a "review" of that rule, the same arguments for avoiding a merits decision by this Court – the possibility that a future change in the rule would moot the case before the time necessary for Supreme Court review – would be available then. If such arguments can prevail even where the request for

[8] For example, EIA projects that under favorable economic growth conditions, power sector emissions would increase by roughly 40 million metric tons over "business as usual" in 2030. *Annual Energy Outlook*, High Economic Growth Side Case Tbl. 18 (Feb. 2018), https://www.eia.gov/outlooks/aeo/excel/sidecases/hmacro/aeotab_18.xlsx; EIA, Annual Energy Outlook, High Economic Growth with CPP Side Case Tbl 18 (Feb. 2018), https://www.eia.gov/outlooks/aeo/excel/sidecases/cpphm/aeotab_18.xlsx. EIA's projections show having the Clean Power Plan in place would ensure the continued downward emission trend.

abeyance comes after *en banc* oral argument, the potential for chronic delay in implementing federal statutory obligations is manifest and grave. Such delays will lead to the frustration of congressional intent to carry out statutory commands like those at issue here and to prolonged legal uncertainty, while also depriving the broader public of the benefits of agency action (such as reduction of dangerous climate pollution) and of judicial refinement and elaboration of the law.

EPA asserts that what is at issue here is not the availability of judicial review, but only its "appropriate timing," EPA Resp. 14. But at some point delayed review becomes indistinguishable from review denied, and here EPA's and Petitioners' approach would mean that an important Clean Air Act protection would fail to obtain judicial review on its merits fully three years after its promulgation, frustrating congressional intent. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 344 (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."). Furthermore, EPA has now suggested that, as part of a separate "review" of its 2015 rule regulating carbon dioxide emissions from new sources under section 111(b), the agency may reconsider its endangerment finding, which, the replacement proposal states, is part of the predicate for regulating power plant carbon dioxide emissions under

section 111(d).[9] An EPA decision to reconsider the section 111(b) endangerment finding could prompt yet further agency efforts to forestall compliance with its duties under section 111(d).

II. A Merits Decision Would Avoid Potential Prejudice to the Parties from Further Abeyance and Remand

As explained in our motion, deciding the case would not prejudice any party, in contrast to the harms associated with additional abeyance or remand. Motion 16-19. EPA contends that Movants oppose remand and agree that it would prejudice Petitioners. EPA Resp. 14-15; *see also* Pet'rs Resp. 2 n.1. This does not accurately reflect our position. Our current motion, and prior filings, show why a merits decision, rather than abeyance or remand, is by far the better course. But we have never advanced abeyance as preferable to remand, and have previously noted that remand has some benefits compared to indefinite abeyance, such as avoiding the serious unfairness associated with lengthy abeyance of a ripe case subject to a stay pending judicial review. *See* States Respondent-Intervenors' Supp. Br. 5-8, ECF No. 1675252 (May 15, 2017); Public Health and Environmental Respondent-Intervenors Supp. Br. 8-10, ECF No. 1675250 (May 15, 2017). Furthermore, although a remand might extinguish that Petitioners' ability to timely challenge the

[9] *See* 83 Fed. Reg. at 44,751-52; "EO 12866 EPA Response-Preamble Comments 2 August 16 2016" at 22, attached to EPA-HQ-OAR-2017-0355-21177 (posted Aug. 31, 2018). Consolidated petitions for review of the new source rule are being held in abeyance, *North Dakota v. EPA*, Nos. 15-1381, *et al.*

Clean Power Plan under 42 U.S.C. § 7607(b), *see* EPA Resp. 15, that result would flow from Petitioners' own voluntary choice not to press their claims.

CONCLUSION

This Court should decide the pending petitions for review.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Michael J. Myers, hereby certifies:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of Motion to Decide Merits of Case was filed on September 21, 2018 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

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