ORAL ARGUMENT HEARD ON SEPTEMBER 27, 2016

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

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

**RESPONDENT-INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' RESPONSE TO RESPONDENT'S OCTOBER 10, 2017 STATUS REPORT**

This Court should deny respondent Environmental Protection Agency's latest request for indefinite abeyance, presented in its October 10, 2017 Status Report (ECF No. 1698068). Because EPA has not established the necessary grounds for the requested abeyance and because the case involves a time-sensitive statutory obligation to protect the public health and welfare from grave threats, the Court should decide this fully briefed and argued case on the merits. Indeed, Administrator Scott Pruitt's new proposal for total repeal of the Clean Power Plan — leaving Clean Air Act duties unfulfilled and the public unprotected — only underscores why abeyance is inappropriate, especially given that the rationale for

the proposed repeal tracks the statutory authority argument presented in petitioners' briefs and oral argument. If the Court nevertheless decides to place the case in further abeyance, it should do so for no longer than 120 days and it should require EPA to continue submitting status reports every 30 days.

## BACKGROUND

These consolidated challenges to the Clean Power Plan were argued en banc more than a year ago, on September 27, 2016. Nearly six months ago, EPA requested that the litigation be held in abeyance indefinitely. Mot. to Hold Cases in Abeyance, ECF No. 1668274 (Mar. 28, 2017). The Court instead placed the case in abeyance only for 60-day periods. Order, ECF No. 1673071 (Apr. 28, 2017); Order, ECF No. 1687838 (Aug. 8, 2017). The latter abeyance period expired on October 10.

EPA now renews its request for indefinite abeyance "pending the conclusion of rulemaking." Status Report, at 4. Its Status Report notes that, on October 10, Administrator Scott Pruitt signed a proposed rule that would completely repeal the Clean Power Plan. The proposal (now published in the Federal Register) rests on the proposition that the Clean Power Plan "is not within Congress's grant of authority to the Agency under the governing statute," because the best system of emissions reduction identified in the rule "exceeds the bounds of the statute." 82 Fed. Reg. 48,035, 48,037-38 (Oct. 16, 2017).

In other words, the Administrator now seeks to fend off the Court's decision of the pending case on the ground that he has proposed to repeal the Clean Power Plan as beyond the agency's *statutory authority*. This, of course, is a central issue that was fully briefed and argued in the pending litigation. See Petitioners' Opening Br. on Core Legal Issues, at 41-56, ECF No. 1610010 (Apr. 22, 2016).

EPA's Notice states that the Administrator has not decided whether he will replace the Clean Power Plan with *any* regulation of carbon dioxide emissions from power plants:

> [T]he EPA continues to consider whether it should issue another CAA section 111(d) rule addressing GHG emissions from existing EGUs and, if so, what would be the appropriate form and scope of that rule.

82 Fed. Reg. at 48,038 (citations omitted). *See also id.* at 48,036 ("The EPA has not determined the scope of any potential rule under CAA section 111(d) to regulate greenhouse gas (GHG) emissions from existing EGUs, and, if it will issue such a rule, when it will do so and what form that rule will take."). EPA states that it intends to issue "an Advance Notice of Proposed Rulemaking (ANPRM) in the near future" on those issues. *Id.* Administrator Pruitt has provided no estimate of when he expects to complete either the repeal rulemaking or any possible future rulemaking addressing whether and how to replace the Clean Power Plan.

Existing power plants are the largest stationary sources of carbon dioxide pollution, and are responsible for approximately 30 percent of the nation's total

greenhouse gas emissions (a total of over 1.9 billion metric tons in 2015). EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2015*, at ES-5, ES-6 (2017). Although current Respondent-Intervenors twice filed suit to compel EPA to reduce power plant carbon emissions more than a decade ago, *e.g.*, Pet. for Review, *New York v. EPA*, D.C. Cir. No. 06-1322 (Sept. 13, 2006), Administrator Pruitt's request for abeyance, coupled with his proposed repeal and failure to commit to any replacement rule, would leave EPA's statutory duty to curb this grave and urgent threat completely unfulfilled and in intolerable limbo.

## ARGUMENT

This Court should reject further abeyance and decide the case.[1] The Administrator's *proposed* repeal does not alter the final, promulgated status of the Clean Power Plan, nor divest the Court of the authority and duty to decide this fully briefed and argued case. The prudential ripeness doctrine that EPA has obliquely invoked as the basis for abeyance, Mot. to Hold Cases in Abeyance, ECF No. 1668274 at 7, is a doctrine of discretion that turns on the specific circumstances, including the public interest. Here, compelling considerations counsel strongly against further abeyance.

[1] *See* Corrected Resp't-Intervenor Public Health and Env. Orgs.' Opp. to Mot. to Hold Cases in Abeyance, ECF No. 1669770 (April 5, 2017); Supp. Br. of Pub. Health and Envtl. Org. Resp't-Intervenors, ECF No. 1675202 (May 15, 2017).

This case concerns urgent, existential threats to public health and welfare. The impacts of climate change are increasingly evident and dire. Americans are already suffering from an increase in extreme weather and its disastrous consequences, as evidenced by the loss of life and property caused by the four powerful hurricanes and numerous massive wildfires that have hit this country in only the past two months. It has been more than ten years since the Supreme Court confirmed EPA's authority and responsibility to curb dangerous greenhouse gas pollution in *Massachusetts v. EPA*, 549 U.S. 497 (2007). As a result of that decision, this Court remanded to EPA petitions from many of the state and environmental intervenors here challenging the agency's failure to fulfill its duty to regulate power plant carbon dioxide emissions when it issued standards under Section 111 of the Clean Air Act. Order, *New York v. EPA*, No. 06-1322 (Sept. 24, 2007) (Ex. 2 to NGO Resp't-Intervenors' Supp. Br., ECF No. 1675202 (May 15, 2017). As these legal developments have unfolded, climate change has become even more exigent. The concentration of carbon dioxide in the atmosphere was approximately 325 parts per million (ppm) in 1970, when Congress enacted the Clean Air Act authority to address climate change; was about 383 ppm in 2007,[2] when the Supreme Court decided *Massachusetts v. EPA*; and is well over 400 ppm

[2] *See* Nat'l Atmos. and Space Admin., "Global Mean $CO_2$ Mixing Ratios — Observations", https://data.giss.nasa.gov/modelforce/ghgases/Fig1A.ext.txt (last visited Oct. 16, 2017); *see also* Ex. 1 to NGO Resp't-Intervenors' Supp. Br.

now when Administrator Pruitt has proposed to repeal the Clean Power Plan.[3] 2016 was the hottest year on record, and "[o]f the 17 hottest years ever recorded, 16 have now occurred since 2000."[4]

It has been nearly eight years since EPA determined ''that [greenhouse gases] endanger public health, now and in the future,'' 74 Fed. Reg. 66,496 (Dec. 15, 2009) – a finding referenced even in the current repeal proposal. *See* 82 Fed. Reg. at 48,037 (citing 80 Fed. Reg. 64,510, 64,518 (Oct. 23, 2015), and EPA's 2009 Endangerment Finding). The Clean Air Act imposes an affirmative duty, employing the mandatory term "shall," 42 U.S.C. § 7411(d)(1), to protect the public from health- and welfare-endangering pollution of this kind. *See Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 126-27 (D.C. Cir. 2012) (noting that Congress's use of term "shall" in section 202 of the Act "vested a non-discretionary duty to regulate," and that, once EPA has made an endangerment finding, it lacks "discretion to defer" regulation), *rev'd in part on other grounds*, 134 S. Ct. 2427 (2014); Order, ECF No. 1687838 (Aug. 8, 2017) (concurring statement of Judges Tatel and Millett) (observing that EPA's endangerment finding

[3] National Oceanic and Atmospheric Administration, "Recent Global $CO^2$," https://www.esrl.noaa.gov/gmd/ccgg/trends/global.html (last visited Oct. 16, 2017).

[4] Jugal K. Patel, How 2016 Became the Earth's Hottest Year on Record, N.Y. TIMES (Jan. 17, 2017) *available at*: https://www.nytimes.com/interactive/2017/01/18/science/earth/2016-hottest-year-on-record.html (last visited Oct. 16, 2017).

"triggered an affirmative statutory obligation to regulate greenhouse gases") (citing *Massachusetts v. EPA*, 549 U.S. at 533). These unaddressed threats and unmet statutory duties, and the more than decade-long delays that have already occurred, counsel strongly against this Court exercising its discretion in a way that would cause further delay.

If the repeal proposal is ultimately promulgated, it will leave the EPA's statutory duty completely unfulfilled. Furthermore, EPA proposes no timetable for final action on the repeal proposal,[5] let alone a schedule to issue and complete consideration of an *advance* notice of whether to propose a replacement rule.

While delays flowing from abeyance might in some other circumstances be relatively benign, that is emphatically not so in a case concerning such urgent threats to public health and environment, and where implementation of the current rule has been stayed precisely for the purpose of obtaining this Court's decision on its merits. The fact that EPA, after having urged the Court not to complete its review for many months, now proposes to repeal the Clean Power Plan on

[5] That EPA issued the proposed rule with only a partially completed cost-benefit analysis is still further evidence that the rulemaking process will take a long time to complete. *See* 82 Fed. Reg. at 48,043 n.22 (EPA to conduct further analysis of the costs and benefits presented in the repeal proposal and will "provide an opportunity for the public to comment on the re-analysis"); *id*. at 48,047 (that re-analysis to be completed "within 6 months"). The Administrator apparently intends a further round of public comment after the re-analysis is issued. *Id*. ("EPA plans to perform updated modeling and analysis of avoided compliance costs, forgone benefits, and other impacts, which will be made available for public comment before any action that relates to the CPP is finalized.").

statutory-authority grounds that are a central focus of this Court's review, shows that EPA is trying to avoid the timely clarification and implementation of its statutory duties.

Finally, even if the Court does not decide the case now, it must not countenance the continued deferral of EPA's statutory duty to curb this dangerous pollution. The Court should, at a minimum, decline EPA's renewed request for indefinite abeyance and limit abeyance to a period of no more than 120 days. The Court should continue to require regular status reports every 30 days.

## CONCLUSION

The Court should deny EPA's request for further abeyance and decide the case. If the Court grants further abeyance, it should do so only for a limited period, not exceeding 120 days, and with regular reporting requirements at least every 30 days.

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 1747 words.

## CERTIFICATE OF SERVICE

I certify that on October 17, 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