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 PUBLIC HEALTH AND ENVIRONMENTAL A ORGANIZATIONS' OPPOSITION TO MOTION TO HOLD CASES IN ABEYANCE

Public Health and Environmental Respondent-Intervenors respectfully request this Court to deny the Environmental Protection Agency's ("EPA") extraordinary motion for indefinite abeyance of the Court's deliberations over the Clean Power Plan ("Rule"), which would have the effect of improperly suspending the Rule without review by any court, without any explanation, and without mandatory administrative process. The motion comes at the *latest* possible stage of the Court's review of the current Rule—after more than six months of deliberation following a full day *en banc* oral argument and almost a year after the conclusion of briefing—and is premised upon the *earliest* possible stage of a

review of the Rule that *may* lead to a new rulemaking of indeterminate length and outcome.

EPA's motion suffers from five fatal defects. First, the relief EPA seeks flouts the terms of the order by which the Supreme Court temporarily stayed enforcement of the Rule. The Supreme Court did not invalidate the Rule; consistent with the authority granted courts by the Administrative Procedure Act ("APA"), it issued a stay pending a decision by this Court and an opportunity for Supreme Court review. Now EPA wants the stay, but not the judicial review that formed the basis for it. Granting EPA's motion would effectively convert that temporary enforcement relief pending judicial review into a long-term suspension of the Rule likely continuing for years, without any court having issued any decision on the Rule's merits.

Second, that outcome violates fundamental requirements of the Clean Air Act and the APA, which forbid agency suspensions of rules without notice and comment rulemaking and a reasoned explanation. Through the abeyance motion, EPA seeks the Court's assistance to do what it could not do otherwise: effectively and indefinitely suspend a duly promulgated rule without proposing, taking comment on, justifying, or defending in court any legal or factual premises that might support such a result.

Third, judicial economy strongly favors this Court proceeding to issue its decision. As noted, the motion comes after the case has been fully briefed, after ten judges of this Court invested time preparing for and hearing seven hours of oral argument, and after six months of judicial deliberation. Although the Rule's enforcement has been stayed pending that review, the Rule remains on the books and presumptively valid, and Respondent-Intervenors continue to stand fully behind it.

Fourth, abeyance would severely prejudice the public health and environmental Respondent-Intervenors. On behalf of their millions of members (and together with State Respondent-Intervenors representing tens of millions of their residents), Respondent-Intervenors have, for well over a decade, sought EPA standards to limit power plants' climate-destabilizing and health-endangering carbon dioxide emissions. If abeyance is granted, the planned regulatory review and possible new rulemaking proceedings presage, at a minimum, a long delay before any reductions in these emissions are required and implemented, leaving no regulatory protections in place.

Fifth, EPA has advanced only insubstantial arguments for abeyance. Rejecting the motion and deciding the current case would in no way interfere with EPA's "opportunity to fully review the Clean Power Plan," and to conduct a new rulemaking if it so chooses. Mot. to Hold Cases in Abeyance at 1-2, 5, *West*

Virginia v. EPA, No. 15-1363 (D.C. Cir. Mar. 28, 2016), ECF 1668274 (hereinafter "Mot."). That EPA's attorneys may have to defend the current Rule while the agency considers potential alternative policies is not an extraordinary situation; rather it reflects the rule of law and the way our governmental system works.

For all these reasons, this Court should reject attempts to further delay adjudicating the validity of EPA's Rule. The agency cannot be allowed to accomplish through abeyance something the it cannot do on its own: an indefinite suspension of a duly promulgated rule without judicial review, without a notice and comment rulemaking, and without any reasoned explanation.

ARGUMENT

The Supreme Court's order staying the Clean Power Plan expressly contemplates that the *courts* will decide its validity. Mindful of that stay and the prejudice it caused, this Court has proceeded with its review expeditiously. Now EPA and Petitioners want to extend the stay and avoid judicial review, both indefinitely. But Petitioners and EPA cannot agree to deprive Respondent-Intervenors of the benefits of the law by cutting off the only avenue to lift a stay. As long as Petitioners want to continue this challenge, and Respondent-Intervenors

stand ready to defend against it, there is no reason to halt this Court's review.[1] Five considerations manifestly favor continued adjudication.

I. The Requested Abeyance Would Flout the Terms of the Supreme Court's Stay Pending Review.

EPA's motion asks the Court to hold this case undecided and in abeyance for an indeterminate period while it reviews the Clean Power Plan and then possibly initiates a new rulemaking. Mot. at 8-9. The process EPA has initiated is likely to be long and complex. The original rulemaking that led to the Clean Power Plan took over four years, and involved sixteen public hearings, more than four million comments, hundreds of meetings with stakeholders, and a record that spans tens of thousands of pages. Now, EPA's Federal Register notice states that it is initiating a new review that may be "followed by a rulemaking process that will be transparent, follow proper administrative procedures, including appropriate engagement of the public, employ sound science, and be firmly grounded in the law," and includes a long list of legal and technical issues that EPA will reevaluate with respect to both the Rule and an unspecified number of "alternative

[1] Notably, the Supreme Court recently rejected the administration's request for abeyance in an analogous context in *National Association of Manufacturers v. Department of Defense*, No. 16-299 (U.S. Apr. 3, 2017), which concerned the proper forum for challenges to the (stayed) Clean Water Rule. There, as here, the government requested an indefinite abeyance premised on the earliest stages of its review of an agency rule. And there, as here, the effect of the abeyance would have been to indefinitely suspend a duly promulgated agency rule without judicial review, and without notice and comment rulemaking.

approaches," including resetting the deadlines. Mot. Attach. 2 at 3-5. Such a process will surely take years. Indeed, the Senior Administration Official who briefed reporters on the executive order conceded that: "whether two years, three years or one year, I don't know. It's going to take some time."[2] The motion asks this Court for an abeyance lasting until 30 days after the end of that process. EPA seeks to have enforcement of the Rule stayed for this entire time. Mot. at 8-9.

The requested abeyance perverts the purpose of the Supreme Court's stay, which imposed only a temporary halt in the enforcement of the Clean Power Plan pending judicial review. The Supreme Court explicitly contemplated that the stay would last only until this Court's decision on the merits of the Rule and an opportunity for Supreme Court review. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016) (enforcement stayed "pending disposition of the applicants' petitions for review" in this Court and "disposition of" any petition for certiorari).

The original stay applicants asked for nothing more. The State challengers requested an order "temporarily divesting" the Clean Power Plan "of enforceability" pending this Court's disposition of the petitions for review and the disposition of any petition for certiorari. W. Va. Stay Application Reply at 29, No.

[2] Background Briefing on the President's Energy Independence Executive Order (Mar. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/03/27/background-briefing-presidents-energy-independence-executive-order.

15A773 (Feb. 5, 2016). Likewise, the industry applicants argued that "[a] stay [was] warranted so the courts may assess whether EPA has … authority" to issue the Rule, and that "[t]he public interest is best served by allowing the courts to address the petitions for review." Bus. Ass'n Stay Application at 3, 23, No. 15A787 (Jan. 27, 2016).

Indeed, the statutory provision that Petitioners argued gave the Supreme Court power to enter the stay, APA section 705, authorizes courts to stay a rule only "pending judicial review." 5 U.S.C. § 705; W. Va. Stay Application Reply at 29 ("[T]he States' requested relief is a straightforward APA stay."). "[S]tays plainly must be tied to the underlying pending litigation when the APA … is the authority under which the stay is granted." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012) (vacating EPA notice whose "purpose and effect" "plainly are to stay the rules pending reconsideration, not litigation").[3] Petitioners also cited 28 U.S.C. § 1651(a), which allows the Supreme Court and lower courts to issue writs "in aid of their respective jurisdictions." West Virginia Stay

[3] The legislative history of that APA provision makes clear that it was intended to "provide intermediate judicial relief … in order to make judicial review effective," and to "afford parties an adequate judicial remedy." S. Rep. No. 79-752 (1945), *reprinted in* Administrative Procedure Act: Legislative History, 79th Cong. 2d Sess., at 218 (1946).

Application at 5, No. 15A773 (Jan. 26, 2016). "[I]in aid of [courts'] jurisdictions" plainly contemplates relief during *court* review.

What EPA asks for here has nothing to do with a judicial remedy, making judicial review effective, or with judicial review of the Clean Power Plan at all. Instead, EPA seeks to halt judicial review, while at the same time benefitting from the Supreme Court's stay "pending … review." This is plainly contrary to both the letter and spirit of the APA. And the effect would be to create a perverse incentive against action: EPA could indefinitely prolong its consideration, retain the stay, and avoid addressing a pressing public threat. This Court should continue along the path charted by the Supreme Court when it entered the stay, and should not allow EPA to convert a limited stay *pending* judicial review into a long-term suspension of the Rule *without* judicial review. This factor alone warrants denial of the motion.

II. Abeyance Would Accomplish a Suspension Without Rulemaking, in Violation of the Clean Air Act and the APA.

The abeyance motion seeks to achieve a result that EPA has no authority to accomplish on its own: a suspension of the Rule without rulemaking. Both the Clean Air Act and the APA require EPA to undertake a formal rulemaking process before suspending a regulation. The Court should reject this effort to circumvent the statutes' requirements.

The case law is clear that rules cannot be suspended except through rulemaking. *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324 (D.C. Cir. Jan. 19, 1996) (Section 705 "does not permit an agency to suspend without notice and comment a promulgated rule."); *Council of the S. Mountains v. Donovan*, 653 F.2d 573, 580 n. 28 (D.C. Cir. 1981) ("[D]eferring [a] requirement" is a substantive rule subject to notice and comment.); *see Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004); *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 763 n. 23 (3d Cir. 1982). This bedrock principle of administrative law applies even where an agency plans a major change in policy. *See Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983) (vacating EPA decision to suspend processing of permits pending anticipated changes to performance standards because the suspension was a "rule" that required notice and comment).

These APA requirements are incorporated into section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), and apply with equal force to suspension of this Rule. Indeed, EPA's Federal Register notice announcing its review acknowledges that suspending the Rule would require a transparent and public rulemaking process. Mot. Attach. 2 at 3.

To suspend, revise, or rescind the Rule, section 307(d) requires EPA to first propose a rule presenting the factual data on which it is based, the agency's

methodologies, and its major legal determinations and policy considerations. 42 U.S.C. § 7607(d)(3). The agency must then allow an opportunity for public comment and a public hearing, *id.* § 7607(d)(5), and then must accompany the final rule with a reasoned explanation and a response to each significant comment and to any new data presented. *Id.* § 7607(d)(6)(A), (B). Notably, these Clean Air Act rulemaking requirements exceed those of the APA.

Observing these requirements is no less critical when an agency is changing its position. *See Encino Motorcars L.L.C. v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) ("'a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009))); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

EPA's abeyance motion, however, seeks this Court's help to accomplish a suspension of the Clean Power Plan indefinitely, to last as long as the agency may take in considering changes, without observing any of these rulemaking requirements. The Court should not countenance this maneuver.

III. Judicial Economy Strongly Favors this Court's Issuing its Decision.

Judicial economy strongly favors denying the abeyance motion. EPA's motion comes at the latest possible moment in this case, after ten judges have invested extraordinary amounts of time absorbing dozens of briefs from hundreds

of parties and amici, have heard nearly seven hours of oral argument, and have been deliberating for six months since. The amount of party and judicial resources that have been invested in this case are truly extraordinary, and comparable to very few other cases this Court has ever adjudicated.

EPA's mere intention to review the Clean Power Plan and consider a further rulemaking does not come close to rendering this case moot. The Clean Power Plan was duly promulgated and remains on the books today, even though enforcement has been temporarily stayed for the time necessary for judicial review. The Petitioners apparently still wish to challenge the Rule. Respondent-Intervenors continue to stand fully behind the legal and factual basis for the Rule, and, for reasons elaborated in the next section, will be severely harmed by further delay in abating power plants' dangerous carbon dioxide pollution.

Furthermore, whether, when, how, and to what degree EPA may repeal or revise the Rlan is at this point necessarily speculative. Indeed, the outcome of any rulemaking process necessary to revise or rescind the present rule is not—and cannot legally be—a foregone conclusion, as the Administration recognizes. *See* Mot. at 1, 5, 6, 8; Mot. Attach. 1 at 5 (§ 4) (ordering EPA to revise or rescind the Rule "if appropriate" and "consistent with applicable law"); Mot. Attach. 2 at 3; *see Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (it is unlawful for an agency official to irrevocably prejudge the outcome of a

rulemaking).[4] The Clean Power Plan was the product of years of effort by EPA, input from millions of stakeholders, and a massive scientific and technical record. Any effort to unwind or revise it would need to be at least as thorough, and such a process would surely take years. Meanwhile, this Court is at the very final stages of its review.

The Court has recognized the value to the administration of Clean Air Act programs of promptly adjudicating "primarily interpretative questions of comprehensive importance." *See Ala. Power Co. v. Costle*, 606 F.2d 1068, 1075 (D.C. Cir. 1979); *Ala. Power Co. v. Costle*, 636 F.2d 323, 344 (D.C. Cir. 1979).

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[4] Examples abound where an agency has declared an intent to revise a rule, even formally proposing a new rule, but ultimately (for a host of reasons both policy and practical) decided not to change the status quo. *See, e.g.*, *Mississippi v. EPA*, 744 F.3d 1334, 1341-42 (D.C. Cir. 2013) (two years after declaring its intent in the near term to initiate a rulemaking to revise a Clean Air Act standard for ozone pollution set by the Bush Administration, EPA decided not to change the standard after all); 70 Fed. Reg. 61,081 (Oct. 20, 2005) (proposed, but never finalized, regulatory amendments to New Source Review program); 62 Fed. Reg. 66,182 (Dec. 17, 1997) (proposing pretreatment standards for control of certain wastewater pollutants, withdrawn two years later, 64 Fed. Reg. 45,072 (Aug. 18, 1999)).

These are examples where agencies' initial interest in pursuing policy shifts foundered upon legal and factual obstacles and interaction with the public. Here, conditions in the power sector since the Clean Power Plan was finalized in 2015 make the Rule's emissions goals even easier to achieve demonstrating the attainability of deeper emissions reductions, and making a more lenient standard hard to justify. *See* MJ Bradley & Assoc., EPA's Clean Power Plan: Summary of IPM Modeling Results with ITC/PTC Extension slides 3, 13, 14 (June 2016), http://www.mjbradley.com/ reports/updated-modeling-analysis-epas-cleanpower-plan ("Overall, results indicate that CPP targets are less-costly to achieve" than originally projected.).

This consideration counsels strongly in favor of resolving key issues in this case now, as any administrative proceedings to review, and then possibly initiate a rulemaking to change the Rule will revolve around the same legal issues already briefed, argued, and considered in this case. Examples of such issues include: (1) whether issuance of mercury and air toxics standards under Clean Air Act section 112, 42 U.S.C. § 7412, precludes EPA from issuing carbon dioxide limits under Clean Air Act section 111(d); (2) whether the term "best system of emission reduction" limits standards to levels achievable only by individual power plants using on-site measures; and (3) whether any of the constitutional or federalism arguments against the Rule have merit.

These and other attacks on the validity of the Rule are ripe for resolution. If they are not decided now, the Court will face them again in the future, but only after the expenditure of significant additional administrative and judicial effort and further loss of time in curtailing power plants' dangerous pollution. *See AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) ("[J]udicial economy suggests that we address some of AT&T's other arguments to avoid relitigation of identical issues in a subsequent petition."); *Kaufman v. Mukasey*, 524 F.3d 1334, 1339 (D.C. Cir. 2008) (similar). Moreover, if EPA takes action to suspend, revise, or rescind the Clean Power Plan and the agency's action is found unlawful and vacated, the Court will find itself again needing to determine the validity of the

underlying Clean Power Plan. *See, e.g.*, *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("[B]y vacating or rescinding the rescissions proposed by [the new rule], the judgment of this court had the effect of reinstating the rules previously in force.").

Contrary to EPA's invocation of *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*"), Mot. at 7-8, abeyance would not promote judicial economy in this case. Here, EPA seeks a prolonged abeyance of litigation concerning a final rule in order to undertake a massive and uncertain new proceeding that is currently "nascent." Mot. at 8. By contrast, the *API* court granted a short abeyance of litigation concerning a tentative EPA decision in order to allow the agency to complete a new rulemaking that was both legally required and already near its mandatory completion date.[5]

Nor do the other cases EPA cites support abeyance. Mot. at 7. In *New York v. EPA*, the court granted abeyance on its own motion, before any merits briefs had been filed, and with no stay in place. Order, *New York v. EPA*, No. 02-1387 (D.C.

[5] EPA misleadingly quotes *API* for the proposition that "[i]t would hardly be sound stewardship of judicial resources to decide this case now," Mot. at 7, omitting the end of that sentence which continues "given that an already published proposed rule, if enacted, would dispense with the need for such an opinion in a matter of months." *API*, 683 F.3d at 388.

The *API* Court also concluded that the industry petitioner would not be harmed by a short abeyance. *Id.* at 389-90. Here, the harm to Respondent-Intervenors, *infra* § IV, is palpable.

Cir. Sep. 30, 2003). Likewise, in *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008), the Court granted abeyance (apparently without opposition) before any merits briefs were filed and with no stay in place. Respondent-Intervenors are aware of no case remotely similar to this one in which this Court has granted a motion for abeyance.

This Court's ruling on these issues will also promote regulatory certainty by resolving the basic legal questions raised by the challengers, while abeyance would magnify and prolong regulatory uncertainty. *See N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) ("[P]eople cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack.").

For these reasons, judicial economy overwhelmingly favors deciding the challenges to the Clean Power Plan now.

IV. Abeyance Would Severely Prejudice the Public Health and Environmental Intervenors and Their Millions of Members.

The Clean Power Plan sets the first federal limits on carbon pollution from existing power plants, the largest stationary sources of that pollution. Respondent-Intervenors have been seeking such limits for almost fifteen years. *See* Order, *New York v. EPA*, No. 06-1322, 2007 U.S. LEXIS 22688 (D.C. Cir. Sept. 24, 2007) (remanding State and environmental petitioners' challenges to EPA's failure to regulate power plant carbon dioxide standards under section 111 in light of

Massachusetts v. EPA, 549 U.S. 497 (2007)); *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (rejecting States' federal common law nuisance suit seeking to reduce power plant carbon dioxide emissions because section 111 "speaks directly" to the subject); Complaint ¶ 32, *Our Children's Earth Found. & Sierra Club v. EPA*, No. 4:03-cv-0070-CW (N.D. Cal. Feb. 21, 2003) (seeking carbon dioxide standards for fossil fuel-fired power plants under section 111).

The record supporting the Rule shows that the promulgated Clean Power Plan will cut power plants' carbon dioxide emissions by nearly a third from 2005 levels by 2030, conferring average climate protection benefits valued at $20 billion per year when the program is fully implemented. 80 Fed. Reg. 64,662, 64,665, 64,934 (Oct. 23, 2015). It will also result in public health benefits valued at an additional $14-34 billion per year by 2030, by preventing up to 3,600 premature deaths, 90,000 children's asthma attacks, and 300,000 missed school and work days each year. *See id*. at 64,934; Regulatory Impact Analysis at 4-31 tbl. 4-24, Doc. No. EPA-HQ-OAR-2013-0602-37105 (Oct. 23, 2015).

EPA suggests that Respondent-Intervenors face no immediate harm from the postponement of judicial review because even if this Court decides the case, the stay would not be lifted "any time soon" and emissions reductions are required at the earliest in 2022. Mot. at 8. This argument does not withstand even minimal

scrutiny. EPA's own Notice acknowledges that "some compliance dates have passed or will likely pass while the CPP continues to be stayed," and that "*in light of the Supreme Court stay*" EPA would re-evaluate those deadlines. Mot. Attach. 2 at 3-4 (emphasis added). And while Respondent-Intervenors advocate minimizing any delay of the Rule's deadlines, just last week, EPA informed States that it intends to apply "day-to-day tolling" to compliance deadlines—so that the longer the stay is in effect, the later requirements to abate pollution will go into effect. *See, e.g.*, Letter from E. Scott Pruitt, Admin'r of EPA, to Matt Bevin, Governor of Kentucky (Mar. 30, 2017) (attached). All of this belies an assertion that an abeyance will have no effect on carbon pollution reductions. To the contrary, abeyance instead of a decision deprives Respondent-Intervenors of the only route to lifting the stay. And "[b]ecause [carbon pollution] in the atmosphere is long lived, it can effectively lock Earth and future generations into a range of impacts, some of which could become severe." 80 Fed. Reg. at 64,682 (quoting Nat'l Research Council, *Climate Stabilization Targets: Emissions, Concentrations, and Impacts over Decades to Millenia* 3 (2011)).

An order mothballing this case would leave our millions of members with no federal protections in place from this dangerous pollution with long-term impacts. Moreover, the combination of the judicial stay and abeyance would leave scant incentive for EPA to act, leaving the Rule in prolonged legal limbo for so long as

EPA asserts that it is reviewing the Clean Power Plan or working on a rulemaking to suspend, revise, or rescind it.

This Court in *API* warned against the very situation that EPA's abeyance motion presents, noting that "an agency can[not] stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." 683 F.3d at 388. Here, granting abeyance would allow EPA to dodge review of issues upon which Respondent-Intervenors have been seeking judicial resolution for over a decade. *See* Order, *New York v. EPA*, No. 06-1322, 2007 U.S. LEXIS 22688 (D.C. Cir. Sept. 24, 2007) (remanding case to EPA).

The prolonged absence of protection is particularly problematic given the grave and urgent threat that climate change poses to human health and welfare. Ten years ago this week, the Supreme Court affirmed in *Massachusetts v. EPA* that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act, that EPA must determine on statutorily relevant grounds whether they endanger public health and welfare, and that it must issue emission standards for these pollutants if it determines that question affirmatively. This Court then remanded the *New York* case to EPA for proceedings regarding power plants consistent with *Massachusetts*. *See id*. Since then, EPA has published and updated a comprehensive endangerment finding based upon thousands of scientific

studies documenting the serious threats that carbon dioxide and other greenhouse gas emissions pose for public health and welfare. EPA issued the Clean Power Plan in 2015, eight years after this Court's remand in *New York*.

Since *Massachusetts* was decided, the key indicators of climate change and the danger to public health and welfare have only worsened. The atmospheric concentration of carbon dioxide has risen from about 384 parts per million to about 406 parts per million;[6] global average surface temperatures have climbed steadily, with 2016 being the hottest year on record;[7] and sea levels have risen steadily, now causing (to give one example) "sunny day" flooding in the streets of Miami, Norfolk and other American cities.[8]

The leading peer-reviewed scientific assessments continue to document the urgency of action. For example, the 2016 report of the congressionally-mandated U.S. Global Climate Research Program, recently reported that climate change has increased Americans' "exposure to elevated temperatures; more frequent, severe,

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[6] *See e.g.*, Nat'l Oceanic & Atmospheric Admin., *Mauna Loa CO_2 Monthly Mean Data*, ftp://aftp.cmdl.noaa.gov/ products/trends/co2/co2_mm_mlo.txt (last visited Apr. 4, 2017).

[7] *See* Press Release, Nat'l Air & Space Admin., *NASA, NOAA Data Show 2016 Warmest Year on Record Globally* (Jan. 18, 2017), http://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-year-on-record-globally.

[8] *See* Justin Gillis, *Flooding of Coast, Caused by Global Warming, Has Already Begun*, N.Y. Times, Sept. 3, 2016, https://www.nytimes.com/2016/09/04/science/flooding-of-coast-caused-by-global-warming-has-already-begun.html.

or longer-lasting extreme events; degraded air quality; diseases transmitted through food, water, and disease vectors such as ticks and mosquitoes; and stresses to … mental health and well-being," and that "[e]very American is vulnerable to the health impacts associated with climate change."[9] The gravity of these unfolding harms and growing risks makes the extraordinary delay the government now seeks especially unwarranted.

V. Against These Urgent Concerns, EPA Has Advanced Only Insubstantial and Unpersuasive Arguments for Delay.

EPA repeatedly suggests that abeyance is warranted because EPA "should be afforded the opportunity to fully review the Clean Power Plan." Mot. at 1-2, 5. But nothing about this Court's adjudication of the Rule prevents EPA from conducting that review and initiating a new rulemaking. EPA likewise asserts that abeyance is warranted "to avoid compelling the United States to represent the current Administration's position on the many substantive questions that are the

[9] U.S. Glob. Change Research Program, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* 2 (Apr. 2016), https://s3.amazonaws.com/climatehealth2016/high/ClimateHealth2016_FullReport.pdf. *See also* Royal Acad. & U.S. Nat'l Acad. of Scis. *Climate Change, Evidence & Causes* 3 (2014) https://www.nap.edu/download/18730; U.S. Glob. Change Research Program, *Climate Change Impacts in the United States: Highlights* 2 (2014), http://nca2014.globalchange.gov/system/files_force/downloads/high/NCA3_ Highlights_HighRes.pdf?download=1 (2014) ("Climate change, once considered an issue for a distant future, has moved firmly into the present.").

subject of EPA's nascent review." Mot. at 9. But the Rule must be assessed based upon the administrative record. *Sec. & Exchange Comm. v. Chenery Corp.*, 318 U.S. 80, 87 (1983). In any event, since briefing and argument in this Court are finished, nothing further is required of EPA's counsel. EPA vaguely suggests that potentially having to address the merits in any future Supreme Court proceedings "could call into the question the fairness and integrity of the ongoing administrative process." Mot. at 8. That potential is purely speculative, and in any event agencies regularly enforce, and the Department of Justice regularly defends, existing regulations that predate the current Administration and differ from what officials might have promulgated had they been in office at the relevant time.

If accepted, EPA's argument here would allow any new administration to halt enforcement of, and litigation over, regulations adopted by its predecessor merely by announcing an intention to review those regulations, evading bedrock administrative law processes for changing them. *API*, 683 F.3d at 388. That is not how our system of law and government works.

If EPA is unwilling to further defend the Clean Power Plan in this Court or the Supreme Court, many other parties to the case stand ready to do so vigorously. Intervenors enjoy "full party status," *United States ex. rel. Einstein v. City of New York*, 556 U.S. 928, 932-34 (2009), and may defend public laws when the government does not. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2684-

89 (2013); *Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 571-74 (7th Cir. 2009); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456-60, 463 (D.C. Cir. 1991); *cf. Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 571 (2007) (environmental organizations supporting EPA's regulation sought and were granted certiorari despite EPA's opposition to the petition on the grounds that it had proposed a new rule).

This Court's completing its deliberations would not call into question the "fairness and integrity" of the administrative process, nor prevent an incumbent administration from considering regulatory changes in due course. Rather, it would represent a proper exercise of the Court's jurisdiction. Indeed, the Supreme Court "recent[ly] reaffirm[ed] [] the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)) (additional citations omitted). Thus, the Court's completing its work on this case would deprive EPA of none of its rights while avoiding substantial prejudice to Respondent-Intervenors.

CONCLUSION

The Court should deny EPA's request for abeyance.

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 5151 words.

CERTIFICATE OF SERVICE

I certify that on April 5, 2017, the foregoing Opposition was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ *Sean H. Donahue*