

IN THE
United States Court of Appeals for the Eighth Circuit

STATE OF IOWA, ET AL.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

DISTRICT OF COLUMBIA, ET AL.,

Intervenor-Respondents.

On Petitions for Review of an Order and Rule
of the Securities and Exchange Commission

**CONSOLIDATED OPPOSITION TO INTERVENOR-
RESPONDENTS'
MOTION TO HOLD CASE IN ABEYANCE**

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INTRODUCTION

On March 6, 2024, the Securities and Exchange Commission adopted the most aggressive environmental regulation that it had ever attempted. That rule would increase the cost of being a public company in the United States by billions of dollars. Worse yet, this momentous, major rule is primarily an environmental regulation—not a securities regulation.

Because Petitioners allege that the Rule is ruinously expensive and illegal, they sued and sought a stay. One of this Court’s sister circuits even granted a stay of the rule before the lottery transferred the challenge to this Court. And facing a strong likelihood of the Rule being stayed, SEC agreed to voluntarily stay the rule during the pendency of this litigation.

Now the challenge to the Rule is fully briefed. SEC notified the Court “that it wishes to withdraw its defense of the Rules.” Yet SEC does not ask for the case to be held in continued abeyance—perhaps because SEC too benefits from a merits decision that helps define the scope of its authority. SEC has also has not shown any intent to withdraw the illegal rule, and SEC’s voluntary stay of the rule was contingent on completion

of this judicial review. So there is still significant risk until the rule is set aside for good.

Petitioners respectfully oppose Intervenor-Respondents' unilateral request to hold this fully briefed case in abeyance. Briefing is completed and the Court has enough to come to a decision. The challenge to this Rule has proceeded for more than a year. Intervenor-Respondents pledged in their intervention motion that their intervention would not "cause undue delay or prejudice." Mot. Int. Party Mass. *et al.*, at *21 (Apr. 3, 2024). Yet their motion to stay promises exactly that.

Petitioners see two best options for this Court:

1. Hold argument on the fully briefed case, allowing the parties to split time as needed to fully discuss the challenge to the Rule; or,
2. Submit the case without argument and issue a decision or order holding the rule unlawful on the merits and vacating it.

Until this Court issues a decision, the Rule hangs like the Sword of Damocles over public companies around the country. Neither Respondents, nor Intervenor-Respondents, should dictate the pace at which a challenge to a Rule should proceed. Even with the stay currently in place the Rule continues to impose potential liability up until the point that it is vacated. Indeed, it is no surprise that Intervenor-Respondents

defending a Rule want the challenge to be indefinitely held in abeyance. That legal limbo serves no other party. There is no basis for such an extreme remedy.

Intervenor-Respondents make much of SEC now declining to defend the illegal Rule before this Court. But Intervenor-Respondents can muster a defense—and have in their briefing. There is a certain irony to Intervenor-Respondents intervening in this case to defend the Rule for fear that SEC would decline to defend it and now asking this Court to hold the case in abeyance. Defending the Rule is why they intervened—not to ask for an indefinite abeyance that forever keeps a decision at bay. And Intervenor-Respondents acknowledge that every other Party in this case seeks this Court’s resolution on the merits. *See* Mot. to Hold Case in Abeyance, at *6 n.4 (Apr. 4, 2025) (“Intervenors’ Abeyance Motion”). Even worse, drastic problems attach to regulated parties when burdensome regulations are held indefinitely in abeyance.

Petitioners respectfully request that this Court set these consolidated cases for argument and submission or, alternatively, submit the case for decision in an appropriate and timely manner.

ARGUMENT

The Court should deny Intervenor-Respondents’ request to hold this case in indefinite abeyance. The Supreme Court recently denied many requests for abeyance in cases that were similarly far down the tracks. It did so even when those requests came from the agency itself, and even when the agency said it wished to reassess the basis for and soundness of the underlying challenged actions—neither of which is true here. *See, e.g., EPA v. Calumet Shreveport RFG*, No. 23-1229, 2025 WL 412995 (Feb. 6, 2025); *Diamond Alt. Energy, LLC v. EPA*, No. 24-7, 2025 WL 412999 (Feb. 6, 2025); *Oklahoma v. EPA*, No. 23-1067, 2025 WL 412998 (Feb. 6, 2025); *Pacificorp v. EPA*, No. 23-1068, 2025 WL 412994 (Feb. 6, 2025). This Court should do the same and deny Intervenor-Respondents’ requested indefinite abeyance.

A. The requested stay promises serious harm to regulated companies, the States, and others with no discernible benefit in return.

“The proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708 (1997). To carry their burden, Intervenor-Respondents “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility

that the stay for which [they] pray[] will work damage to someone else.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255, 255 (1936). Intervenor-Respondents cannot show any hardship to themselves in continuing with this case, and there is far more than a fair possibility of hardship to others.

Intervenor-Respondents at most raise vague notions of conserving resources. But “the interests of judicial economy alone are insufficient to justify such an indefinite stay.” *Ortega Trujillo v. Conover & Co. Commc’ns*, 221 F.3d 1262, 1265 (11th Cir. 2000). Even more so here. Briefing has been completed since September 2024, and (as discussed below) this Court need not hold oral argument before issuing an opinion or order vacating the climate rule. Weighed against any slight consideration of preserved effort is a multi-billion-dollar, unprecedented climate rule that remains on the books and imposes burdensome requirements on registered companies over the next several years. To be sure, the rule is temporarily stayed, but only by order of SEC rather than by court order. SEC itself will benefit from knowing the scope of its authority going forward. Petitioners and regulated industries need

certainty in the form of a *Court decision* holding the rule unlawful and vacating it.

SEC has not said that it intends to engage in a new rulemaking—nor would such anticipated rulemaking justify abeyance here. *Contra* Stay Mot. 5 (misreading a statement from the Acting SEC Chair to say that the Commission “has indicated that it is likely to amend or rescind [the challenged regulations] if upheld”). Even if SEC eventually began rulemaking, there is a serious risk that it would take years. Paul Rosenzweig, *Making Good Cybersecurity Law and Policy: How Can We Get Tasty Sausage?*, 8 I/S: J.L. & Pol’y for Info. Soc’y 393, 400 (2012) (noting that the average notice-and-comment rulemaking “takes eighteen to twenty-four months”). That delay would leave uncertainty and present a real possibility that the climate rule would not be fully off the books. And there is no guarantee that a new rule would cure the problems in the final Rule challenged here.

If the Court holds this case in abeyance, it would extend a dispute that has been lingering for years. Despite being a priority of the last Administration’s SEC leadership, the climate rule was not finalized until more than three years into the presidential term, and legal challenges

prevented it from meaningfully going into effect before that Administration ended. Many cases challenging regulations from even before January 2020 are still being litigated. They are still pending due to lengthy abeyances and stays, often because the Biden Administration miscalculated its ability to finalize a new lawful regulation before the end of its term in 2025. *See, e.g., Pangea Legal Servs. v. DHS*, No. 20-17490 (9th Cir.) (appeal from No. 3:20-cv-7721 (N.D. Cal.)); *Pangea Legal Servs. v. DHS*, No. 3:20-cv-9253 (N.D. Cal.); *U.T. v. Barr*, No. 1:20-cv-116 (D.D.C.). Indefinitely staying this case promises a similar state of purgatory for the Rule. That outcome—which is far from speculative here—would harm Petitioners, who have faced the specter of the unlawful climate rule for more than three years. *See* Liberty Energy’s Emergency Mot. for Stay, at *27–28 (attached as Ex. 1 to letter filed Mar. 26, 2024) (citing declarations stating that many covered entities would need a nearly-year-long head start to create the requisite “internal control systems and disclosure control procedures to capture and distill information related to physical and transition risks, severe weather events, severe natural conditions, and greenhouse gas emissions”).

Accordingly, the Court should proceed to a decision and vacate the climate rule as unlawful. The Court could first hold oral argument and then issue an opinion. Or the Court could proceed without oral argument and issue a summary opinion or order holding the rule unlawful on the merits and vacating it, which would satisfy Intervenor’s apparent desire to avoid oral argument. *See In re Clean Water Act Rulemaking*, 60 F.4th 583, 594 (9th Cir. 2023) (court must hold regulation unlawful before vacating it); *see also* Fed. R. App. P. 42(b)(3) (an order is required to vacate agency action).

SEC’s decision to withdraw its defense of the climate rule confirms it is unlawful on the grounds Petitioners have raised and fully briefed. After years of agency proceedings and litigation, this Court should take the final step and provide much-needed certainty to the nation’s economy and publicly listed companies.

B. Intervenor-Respondents’ authorities are inapposite.

Intervenor-Respondents raise several distinguishable cases in their attempt to justify an indefinite abeyance here. First, they contend that this will give SEC time to “reconsider its action.” Mot. to Hold Case in Abeyance, at *4 (Apr. 4, 2025) (“Intervenors’ Abeyance Motion”) (citing

Ethyl Corp. v. Browner, 989 F.2d 522, 524 n.3 (D.C. Cir. 1993)). But SEC has not said here that it intends to reconsider its action. It has merely noted that it does not intend to argue in defense of the Rule. Given that Intervenor-Respondents remain in the case and are vigorously defending the Rule, the case remains in a clear adverse posture.

Intervenor-Respondents' reliance on *Ethyl Corp. v. Browner* shows why this Court should decline abeyance. There, the petitioner showed the respondent agency U.S. Environmental Protection Agency data that undermined a rule it had issued. 989 F.2d at 523. EPA asked the Court to remand so that it could reconsider its faulty rule. *Id.* at 524. The petitioner opposed the remand motion because it believed it was entitled to an automatic waiver of the rule. *Id.* After argument on whether remand was required, the Court remanded to EPA to reconsider the challenged rule. *Id.* Unlike here, that request came from the respondent agency itself. And unlike here, there was a hard 180-day timeline for a remedy following a remand. *Id.*

Also, the challenged rule in *Ethyl Corp.* was 23 pages long and affected a waiver for one company. *Id.* at 523 (citing *Fuels and Fuel Additives; Waiver Application*, 57 Fed. Reg. 2535 (Jan. 22, 1992)). Left

without any on-point cases, Intervenor-Respondents are left to twist inapposite cases to try to justify their novel ask. But a single-company waiver litigated under the strict framework of the Clean Air Act when the agency itself requested remand is quite different from the situation here. The Rule affects every public company (and, because of its downstream effects, likely many others). It imposes billions of dollars in costs. And SEC itself has not said that it seeks to amend the hundreds of pages of new rule. *Cf.* Intervenor’s Abeyance Motion, at *5 (citing *West Virginia v. EPA*, No. 24-1120, Doc. 210184 (D.C. Cir. Feb. 19, 2025) (granting *EPA*’s post-argument abeyance motion)).

Intervenor-Respondents tread new ground in explaining that a single member of a multi-member commission’s disagreement with a rule (that he voted against) justifies indefinite abeyance. *Id.* Indeed, they contend that it is “not a worthwhile use of this Court’s and the parties’ time and resources to adjudicate these cases when the agency that promulgated the regulations has indicated that it is likely to amend or rescind them if upheld.” *Id.* But Petitioners disagree. Each Petitioner agrees that resolving this case *is* a worthwhile use of resources. And SEC does not disagree. *Cf. id.* Intervenor-Respondents even acknowledge that

like every other party seeks this Court’s final resolution on the merits. *Id.* at *6 n.4. *Cf. Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying the Federal Communication Commissions “novel, last second motion to remand” premised on “a post-argument ‘policy statement,’” that did “not bind the Commission to a result in any particular case”).

And courts have issued merits opinions before despite the federal government’s withdrawing its position. *See, e.g., Massachusetts v. U.S. Dept. of Health and Hum. Servs.*, 682 F.3d 1, 7 (1st Cir. 2012) (“A delay in proceedings followed the Justice Department’s about face while defense of the statute passed to a group of Republican leaders of the House of Representatives—the Bipartisan Legal Advisory Group (‘the Legal Group’)—who retained counsel and intervened in the appeal to support section 3.”). The Rule, while stayed, is still in effect. And even though SEC is declining to defend the Rule going forward, Intervenor-Respondents here can keep adversity alive—including at argument.

Intervenor-Respondents defending the Rule claim that “abeyance would not prejudice any party.” Intervenor’s Abeyance Motion at *6. Petitioners disagree—abeyance will cause significant prejudice to

Petitioners. Intervenor-Respondents fail to recognize the huge costs that accompany compliance. And they fail to recognize that those costs cannot just be flipped like a switch. *See, e.g., Romy Hammes, Inc. v. Comm’r*, 68 T.C. 900, 911 (1977) (noting how “recurring and protracted litigation” on an issue produced “uncertainty [that] impairs mobility of capital, increases compliance costs, and imposes inequities”). The Rule is voluntarily stayed during the pendency of the litigation, but the penalties in the rule became effective—but for the temporary voluntary stay—on May 28, 2024. Petitioners raise serious challenges that they believe should win the day—if they do not, the cost of compliance imposed on these companies will be enormous and almost immediate. The uncertainty and scope of the costs is huge enough to impose significant potential compliance prejudice on Petitioners as they wait for final resolution.

CONCLUSION

All Petitioners agree—and SEC does not disagree—that this case should not be held in abeyance. Intervenor-Respondents intervened in this case to defend their interests and the Rule. This Court should not hold the case in indefinite abeyance and should instead allow Intervenor-

Respondents to fulfill the promise of their intervention and proceed to final decision.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Local R. 25A, I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,390 words, excluding those parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because the brief has been prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft Office 365.

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on April 14, 2024. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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