ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*,	§	
	§	
Petitioners,	§	
	§	
v.	§	No. 19-1140
	§	and consolidated cases
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	§	
	§	
Respondents.	§	

MEMORANDUM IN OPPOSITION
TO MOTIONS FOR ABEYANCE

Petitioners in *Robinson Enterprises, Inc., et al. v. United States Environmental Protection Agency, et al.* (Case No. 19-1175) (the "*Robinson* Petitioners"),[1] oppose the motions to hold this matter in abeyance filed by Environmental and Public Health Petitioners (Doc. No. 1807492) and by State and Municipal Petitioners (Doc. No. 1808098) (collectively, the "Motions" filed by the "Movants").

There is no valid reason to hold the challenges of the *Robinson* Petitioners dealing with the Affordable Clean Energy rule (the "ACE Rule") in abeyance.

[1] The *Robinson* Petitioners consist of Robinson Enterprises, Inc.; Nuckles Oil Company, Inc., dba Merit Oil Company; Construction Industry Air Quality Coalition; Liberty Packing Company LLC; Dalton Trucking, Inc.; Norman R. "Skip" Brown; Joanne Brown; the Competitive Enterprise Institute; and the Texas Public Policy Foundation.

Movants argue that this matter must be held in abeyance until two categories of actions are taken by the Environmental Protection Agency ("EPA"): a related rulemaking regarding proposed New Source Review ("NSR") reforms, and various petitions for reconsideration setting forth certain arguments that Movants claim EPA relied on but that they did not have an opportunity to address during the rulemaking process. Neither category provides the Court with a basis to delay the challenge of the *Robinson* Petitioners.

As an initial matter, it is strange that Movants seek to hold this Court's resolution of their own petitions in abeyance, given the fact they filed those petitions so early seeking immediate review: by Environmental and Public Health Petitioners on July 8, 2019 (two months before the deadline to submit petitions), and by the State and Municipal Petitioners on August 13, 2019 (over three weeks before the deadline). They could have with equal effect and less burden to this Court and the other parties awaited EPA's decisions on their administrative petitions before deciding whether to challenge those decisions. The "hurry up and wait" approach taken by the Movants gains them little other than delay, which they apparently desire. Although the *Robinson* Petitioners opposed EPA's pending motion to unduly expedite this litigation, which requires the opportunity to fully air complex legal issues, there is no reason why this case should not proceed in due course under the Court's standard operating procedures.

Importantly, the challenge by the *Robinson* Petitioners goes to the very legal foundation for EPA adopting the ACE Rule. The future actions by EPA that Movants point to would not have any bearing on the issues that the *Robinson* Petitioners raise challenging EPA's authority to regulate carbon dioxide emissions through the process EPA has chosen. At most, judicial resolution of the issues raised by the Movants in their motions for reconsideration pending before EPA should be severed, and those isolated challenges be held in abeyance, having no effect on fundamentally ripe challenges like those of the *Robinson* Petitioners that involve solely legal questions.

ARGUMENT

The *Robinson* Petitioners' challenges to the ACE Rule are based upon grounds that reach the fundamental question of whether EPA had the authority to regulate carbon dioxide emissions under Section 111 of the Clean Air Act ("CAA" or the "Act"). First, if EPA wishes to regulate carbon dioxide emissions from stationary sources, EPA must proceed under Sections 108-110 of the Act, which is the regulatory path Congress prescribed for air pollutants in the "ambient air" emitted from "numerous or diverse" sources. Carbon dioxide is a ubiquitous substance in the "ambient air" and is emitted from "numerous or diverse" sources. 42 U.S.C. § 7408(a)(1). It is virtually everywhere and in everything. Accordingly, any regulation of carbon dioxide emissions from stationary sources is required to

proceed under Sections 108-110 of the Act rather than under Section 111. EPA's failure to take the mandated regulatory path under Sections 108-110 is fatal to the ACE Rule. That specific challenge is fully ripe for a decision by this Court.

Furthermore, the CAA does not permit EPA to regulate emissions from stationary sources under Section 111 when emissions from such sources are also regulated under Section 112. Because electric generating units had already been regulated under Section 112, it was impermissible for EPA to promulgate the ACE Rule regulating such units under Section 111.

Moreover, under the ACE Rule EPA impermissibly regulated carbon dioxide emissions from existing EGUs under Section 111(d) without first having made the requisite pollutant-specific endangerment finding under Section 111(b) of the Act, thereby failing to follow a mandated statutory procedure.

These challenges go to the heart of the final agency action set forth in the ACE Rule and are ripe for resolution by this Court. The Movants present no valid reason for holding them in abeyance.

Holding a case in abeyance is an "exercise [of] discretion" that this Court may "decline" to take. *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426 (D.C. Cir. 2018). The usual path followed by this Court has been to rule on the merits of the original petition while resolving later any challenges to EPA's eventual denial of reconsideration petitions. See, e.g., *EME Homer City Gen. v. EPA*, 795 F.3d 118,

137 (D.C. Cir. 2015) (deciding merits of rule notwithstanding pending administrative reconsideration petitions); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 549 (D.C. Cir. 2015) (same); *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 743-744 (D.C. Cir. 2014) (same). Indeed, as this Court explained in *Util. Air Regulatory Grp.*, 744 F.3d 741, in Clean Air Act section 307(b)(1), Congress explicitly legislated that a pending petition for agency reconsideration does not deprive a rule of finality. *See* 42 U.S.C. § 7607(b)(1) (the filing of an administrative reconsideration petition "shall not affect the finality of such rule or action for purposes of judicial review).

The remedy for Movants is not to broadly seek abeyance of all of the challenges consolidated in this action but to ask the Court to sever from this litigation the specific issues it raises, seeking the establishment of a new docket for the severed issues, and asking the Court to hold the case in that new docket in abeyance pending the completion of EPA's other proceedings. See, e.g., *Sierra Club v. EPA*, 884 F.3d 1185, 1191 (D.C. Cir. 2018) (severing challenges to two aspects of a final rule and holding them in abeyance pending EPA's reconsideration). Movants should not be permitted to hold hostage proceedings that challenge EPA's legal authority to promulgate the ACE Rule under Section 111 of the Clean Air Act. See *Am. Petroleum Inst.*, 683 F.3d at 387 (fitness of an issue for judicial resolution "depends on whether it is purely legal, whether consideration of the issue would benefit from

a more concrete setting, and whether the agency's action is sufficiently final."). Indeed, challenges to EPA's very authority to issue regulations of this type is logically prior to any subsidiary factual issues raised by Movants, making resolution of the issues raised by the *Robinson* Petitioners necessary before EPA acts further in this area. See *Util. Solid Waste Activities Grp.*, 901 F.3d at 437 (declining EPA's request for a remand to reconsider its interpretation of a statute because the claim "involve[d] a question—the scope of the EPA's statutory authority—that is intertwined with any exercise of agency discretion going forward").

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(2)(A), I hereby certify that the foregoing complies with the type-volume limitation because it contains 1,190 words, according to the count of Microsoft Word.

/s/ Ryan D. Walters
RYAN D. WALTERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed September 30, 2019 with the Clerk of Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/ Ryan D. Walters
RYAN D. WALTERS