


## Selected docket entries for case 21-5016

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<b>Filed</b>	<b>Document Description</b>	<b>Page</b>	<b>Docket Text</b>
01/03/2022	 Motion Filed	2	MOTION [1928919] to govern future proceedings, to remove case from abeyance, to establish briefing schedule filed by Public Citizen Health Research Group, American Public Health Association and Council of State and Territorial Epidemiologists in 21-5018 (Service Date: 01/03/2022 by CM/ECF NDA) Length Certification: 896 words. [21-5016, 21-5018] (Kirkpatrick, Michael)

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

STATE OF NEW JERSEY, <i>et al.</i> ,	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	Nos. 21-5016, 21-5018
	)	(consol.)
MARTIN J. WALSH, <i>et al.</i> ,	)	
Defendants-Appellees;	)	
	)	
PUBLIC CITIZEN HEALTH	)	
RESEARCH GROUP, <i>et al.</i> ,	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
MARTIN J. WALSH, <i>et al.</i> ,	)	
Defendants-Appellees;	)	
	)	

**MOTION TO GOVERN FUTURE PROCEEDINGS,  
TO REMOVE CASE FROM ABEYANCE, AND  
FOR BRIEFING SCHEDULE,  
BY APPELLANTS PUBLIC CITIZEN HEALTH RESEARCH GROUP,  
AMERICAN PUBLIC HEALTH ASSOCIATION, AND COUNCIL OF  
STATE AND TERRITORIAL EPIDEMIOLOGISTS**

In accordance with the Court's order of July 12, 2021, Plaintiffs-Appellants Public Citizen Health Research Group, American Public Health Association, and Council of State and Territorial Epidemiologists (Public Health Plaintiffs) request that the Court remove this case from abeyance and issue a briefing schedule. As explained below, Defendants-Appellees have failed to honor their commitment to

issue a Notice of Proposed Rulemaking (NPRM) by December 31, 2021. The Public Health Plaintiffs and others continue to be injured by the challenged rule, which remains in force.

### **Background**

This case involves a challenge under the Administrative Procedure Act (APA) to a final rule issued by the Occupational Safety and Health Administration (OSHA), a component of the Department of Labor under the authority of the Secretary of Labor. In the two related cases consolidated in this appeal, the Public Health Plaintiffs and six states challenge the rule entitled “Tracking of Workplace Injuries and Illnesses,” 84 Fed. Reg. 380 (Jan. 25, 2019) (Rollback Rule). The Rollback Rule rescinds provisions of the rule entitled “Improve Tracking of Workplace Injuries and Illnesses,” 81 Fed. Reg. 29,624 (May 12, 2016) (Electronic Reporting Rule), that required covered employers to submit electronically certain information from OSHA Forms 300 and 301 regarding workplace injuries and illnesses. The district court, in a single decision issued with respect to both *Public Citizen Health Research Group v. Pizzella*, No. 19-166, and *State of New Jersey v. Pizzella*, No. 19-621, granted defendants’ motion to dismiss in Civil Action No. 19-166, and defendants’ motion for summary judgment in Civil Action No. 19-621, and denied plaintiffs’ motions for summary judgment in both cases. *See Public Citizen Health Research Group v. Pizzella*, 2021 WL 86861 (D.D.C. Jan. 11, 2021).

This appeal has been pending since January 2021. On February 26, 2021, OSHA filed a motion to hold this case in abeyance indefinitely to allow new agency officials to evaluate the issues. Appellants opposed an indefinite abeyance, but did not oppose a 60-day stay to allow OSHA to determine whether it would initiate rulemaking to rescind the Rollback Rule and reinstate the requirements of the Electronic Reporting Rule, which would potentially provide Appellants with the relief they seek in this case. On April 9, 2021, the Court ordered that the case be held in abeyance for 60 days. On June 8, 2021, OSHA filed an unopposed motion to continue the abeyance for an additional 30 days, stating that “the agency is considering whether to initiate rulemaking to reinstate the rescinded provisions at issue in this appeal as part of its regulatory agenda.” On June 9, 2021, the Court granted the motion.

On July 9, 2021, OSHA requested that the Court continue to hold this case in abeyance through December 31, 2021, “in light of the agency’s announcement that it intends to reinstate the provisions whose rescission is at issue in this case,” and stated that “OSHA will issue [an NPRM] no later than December 31, 2021.” Appellants did not oppose the motion based on OSHA’s express commitment to issue the NPRM by that date. The Court granted OSHA’s motion on July 12, 2021.

OSHA filed a status report on September 10, 2021, stating that it “still intends to publish [an NPRM] by December 31, 2021 as indicated by the previously-filed

motion for abeyance.” On November 9, 2021, OSHA filed a status report stating that, on October 1, 2021, it “submitted a draft [NPRM] to the Office of Information and Regulatory Affairs pursuant to Executive Order 12866. [OSHA] still intends to publish the [NPRM] by December 31, 2021 as indicated by the previously-filed motion for abeyance.”

Despite having made a firm commitment to issue the NPRM by December 31, 2021, and despite its repeated statements to this Court that it would do so, OSHA has failed to issue the NPRM.

### **Argument**

In light of OSHA’s failure to honor its commitment to Appellants and to this Court, the Court should terminate the abeyance and issue a briefing schedule. This appeal has been pending for nearly a full year, but it has been held in abeyance for most of that time based on OSHA’s repeated representations that it would issue the NPRM by December 31, 2021. Meanwhile, the Rollback Rule remains in effect nationwide and is causing harm to the Public Health Plaintiffs and others interested in protecting worker health and safety. The provisions of the Electronic Reporting Rule rescinded by the Rollback Rule were designed to provide public health organizations and others with access to data that would allow them to identify and analyze threats to worker health and safety and to develop solutions. 81 Fed. Reg.

29,629–31. The harms caused by the loss of this information have been magnified by the COVID-19 pandemic.

Further delay is unwarranted. In light of OSHA’s failure to issue the NPRM on the agreed timetable, the most expeditious way—and perhaps the only way—to remedy the ongoing harm is through this litigation. Moreover, proceeding to briefing would not preclude OSHA from issuing the NPRM at any time. If it did so, depending on the schedule proposed for completing the rulemaking, a stay of the litigation might be warranted. At this time, however, the Public Health Plaintiffs should be permitted to pursue their challenge to the existing rule.

### **Conclusion**

For the foregoing reasons, the Public Health Plaintiffs’ motion to terminate the abeyance and for a briefing schedule should be granted.

January 3, 2022

Respectfully submitted,

s/ Michael T. Kirkpatrick

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**CERTIFICATE OF COMPLIANCE**

I certify that this document complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 27(d)(1)–(2). The type face is fourteen-point Times New Roman font, and the word count is 896.

/s/ Michael T. Kirkpatrick  
Michael T. Kirkpatrick

**CERTIFICATE OF SERVICE**

I certify that on January 3, 2022, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all registered filers in this case.

s/ Michael T. Kirkpatrick  
Michael T. Kirkpatrick