

[NOT SCHEDULED FOR ORAL ARGUMENT]

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

STATE OF NEW JERSEY, *et al.*,  
Plaintiff-Appellants,

v.

MARTIN J. WALSH, *et al.*,  
Defendants-Appellees;

PUBLIC CITIZEN HEALTH RESEARCH, *et  
al.*,  
Plaintiff-Appellants,

v.

MARTIN J. WALSH, *et al.*,  
Defendants-Appellees.

Nos. 21-5016, 21-5018  
(consol.)

**MOTION TO HOLD APPEAL IN ABEYANCE PENDING  
RULEMAKING AND RESPONSE TO PLAINTIFFS' MOTION TO  
SET A BRIEFING SCHEDULE**

In accordance with the court's order of July 12, 2021, the government respectfully requests that this Court continue the abeyance in this matter until February 14, 2022 as the process for review by the Office of Information and Regulatory Affairs has been extended and is scheduled to conclude at the end of January. Counsel for Plaintiff-Appellants Public Citizen Health Research

Group, American Public Health Association, and Council of State and Territorial Epidemiologists have indicated they oppose this motion and have moved for this Court to set a briefing schedule. Counsel for plaintiff States have authorized us to state that they consent to continued abeyance until February 14, 2022.

1. The Occupational Safety and Health Administration (OSHA), a component of the Department of Labor, requires qualifying employers to record work-related injuries and illnesses on three standardized forms. *See* Dkt. No. 28 at 1. In May 2016, OSHA issued a new rule requiring employers to submit the data from these forms electronically each year. *Id.* Prior to this new rule, employers kept this data on-site to be collected during an on-site inspection or as part of a broader industry survey. *Id.* at 2. Before the first filing deadline, OSHA announced that it was partially rescinding the rule and would only require submission of one of the three forms. *Id.* Two sets of plaintiffs—one, a group of public health organizations and the other a group of States—challenged the lawfulness of the rescission. *Id.*

2. On January 11, 2021, the district court issued its opinion upholding the agency’s action. Plaintiff-Appellants filed a notice of appeal.

3. On February 26, 2021, the government sought to place the appeal in abeyance while new agency officials re-evaluated the issues underlying the

case. On April 9, 2021, this Court granted the request for abeyance for 60 days and ordered the parties to file additional motions by June 8, 2021. On June 9, 2021, this Court granted the government's request to continue abeyance for an additional 30 days. On July 12, 2021, this Court granted the government's request to continue abeyance through January 3, 2022 in light of the agency's announcement that OSHA intended to issue a proposal to restore the provisions whose rescission were challenged in this suit by December 31, 2021.

4. In its November 9, 2021 status report, the government reported that OSHA had submitted a draft Notice of Proposed Rulemaking (NPRM) to the Office of Information and Regulatory Affairs (OIRA) pursuant to Executive Order 12866 and that the Department of Labor still intended to publish the Notice of Proposed Rulemaking by December 31, 2021. Unfortunately, the agency was unable to achieve that goal. The period of review for OIRA has been extended and is scheduled to conclude at the end of January. The agency now informs us that it anticipates it will publish the NPRM no later than February 14, 2022.

5. Plaintiffs' suggestion that this Court should order briefing because the agency failed to honor a firm commitment to engage in rulemaking by December 31, 2021 bears no scrutiny. There is no basis for this Court to issue

a briefing schedule that will soon be obviated by the agency's stated intent to restore the rescinded provisions through the rulemaking process, and that remains true even if there were a brief unforeseen additional delay in the administrative processes.

6. The government respectfully requests this Court continue to hold this case in abeyance through February 14, 2022 pending this rulemaking process. Counsel for Plaintiff-Appellants Public Citizen Health Research Group, American Public Health Association, and Council of State and Territorial Epidemiologists have indicated they oppose this motion. Counsel for plaintiff States have authorized us to state that they consent to continued abeyance until February 14, 2022.

Respectfully submitted,

MARK B. STERN

*/s/ Laura E. Myron*

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**CERTIFICATE OF COMPLIANCE**

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(1)-(2) because it contains 691 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Laura E. Myron  
LAURA E. MYRON  
*Counsel for the*  
*Defendants-Appellees*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 3, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Laura E. Myron  
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