

[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 December 1, 2022, 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 delayed the resolution of

this case by making a series of commitments regarding the timing of a rulemaking that would potentially provide Appellants with the relief they seek, only to renege on those commitments. All the while, 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 [the 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,

ordered OSHA to file status reports at 60-day intervals, and directed the parties to file motions to govern future proceedings by January 3, 2022. In its status reports filed on September 10 and November 9, 2021, OSHA stated that “intends to publish [the NPRM] by December 31, 2021 as indicated by the previously-filed motion for abeyance.”

Despite having thrice told this Court that it would issue the NPRM by December 31, 2021, OSHA failed to do so. On January 3, 2022, the Public Health Plaintiffs therefore filed a motion to remove the abeyance and for a briefing schedule, which the Court granted on March 31, 2022.

On April 2, 2022, OSHA filed another motion to hold this case in abeyance, noting that it had issued the NPRM on March 30, 2022. Appellants consented to an abeyance until the conclusion of the 60-day comment period. The Court granted the motion and directed the parties to file motions to govern future proceedings by June 1, 2022. On May 27, 2022, OSHA filed an unopposed motion to continue the abeyance for an additional 45 days because it had extended the comment period through June 30, 2022. The Court granted the motion.

OSHA filed motions to continue the abeyance for an additional 45 days on July 15, August 29, October 13, and November 28, 2022. In the motions filed on October 13 and November 28, OSHA stated that “[t]he agency aims to conclude the rulemaking process by March 31, 2023.” In reliance on that representation,

Appellants did not oppose the motions. On January 4, 2023, the U.S. Office of Information and Regulatory Affairs released its Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, stating that OSHA expected to complete the rulemaking by the end of March 2023. See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1218-AD40>. However, on January 10, 2023, OSHA's counsel informed Appellants' counsel that OSHA will not honor its commitment to complete the rulemaking by March 31, 2023. Counsel stated that OSHA now says that it hopes to do so by the end of June 2023.

### **Argument**

In light of OSHA's repeated failures to honor its representations to this Court and to Appellants, the Court should terminate the abeyance and issue a briefing schedule. This appeal has been pending for nearly two years, but it has been held in abeyance for most of that time based on OSHA's representations. For most of 2021, the case was held in abeyance because of OSHA's repeated representations that it would issue the NPRM by December 31, 2021, which OSHA failed to do. For most of 2022, the case was held in abeyance because of OSHA's repeated representations that it would complete the rulemaking by March 31, 2023, which it now states that it will not do.

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.

Further delay is unwarranted. Because of OSHA’s pattern of renegeing on its agreements, 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 a final rule that provides Appellants with the relief they seek. 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 11, 2023

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 1,157.

/s/ Michael T. Kirkpatrick  
Michael T. Kirkpatrick

**CERTIFICATE OF SERVICE**

I certify that on January 11, 2023, 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