

[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.)	

**RESPONSE IN OPPOSITION TO APPELLEES' MOTION FOR
CONTINUED ABEYANCE
BY APPELLANTS PUBLIC CITIZEN HEALTH RESEARCH GROUP,
AMERICAN PUBLIC HEALTH ASSOCIATION, AND COUNCIL OF
STATE AND TERRITORIAL EPIDEMIOLOGISTS**

Appellees have filed a motion seeking continued abeyance. As explained below, and for the reasons set forth in the motion of Appellants Public Citizen Health Research Group, American Public Health Association, and Council of State and Territorial Epidemiologists (Public Health Plaintiffs) to remove this case from abeyance and issue a briefing schedule (filed January 11, 2023), the Court should

deny Appellees' motion, grant the Public Health Plaintiffs' motion, and establish a briefing schedule, because the Public Health Plaintiffs and others continue to be injured by the challenged rule.

Argument

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 a notice of proposed rulemaking 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 OSHA now states that it will not do. Although OSHA "aims to conclude the rulemaking" by June 30, 2023, Appellees' Motion at 1, it makes no commitment to doing so. At this point, OSHA's "aim" is not sufficient to justify further delay.

The provisions of the Electronic Reporting Rule rescinded by the Rollback Rule were designed to provide public health organizations and others with access to data that would allow them to identify and analyze threats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. Yet 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.

In light of OSHA's repeated failures to meet its representations to this Court and to Appellants, the Court should terminate the abeyance and issue a briefing schedule. A continued abeyance would effectively deprive the Public Health Plaintiffs of their right to pursue their challenge to an existing rule, which OSHA may or may not revise by June 30, or some later date, or at all.

Conclusion

For the foregoing reasons, Appellees' motion to continue the abeyance should be denied, and Appellants Public Health Plaintiffs' motion to terminate the abeyance and for a briefing schedule should be granted.

January 12, 2023

Respectfully submitted,

s/ Allison M. Zieve

Michael T. Kirkpatrick

PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street NW

Washington, DC 20009

(202) 588-1000

Counsel for Public Citizen Health Research Group, American Public Health Association, and Council of State and Territorial Epidemiologists

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 386.

s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I certify that on January 12, 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/ Allison M. Zieve
Allison M. Zieve