United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363 **September Term, 2017**

EPA-80FR64662
EPA-82FR4864

Filed On: June 26, 2018

State of West Virginia, et al.,

Petitioners

v.

Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency,

Respondents

American Wind Energy Association, et al.,

Intervenors

Consolidated with 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-1488

BEFORE: Garland*, Chief Judge; Henderson, Rogers, Tatel,** Griffith, Kavanaugh, Srinivasan, Millett, Pillard, Wilkins,** and Katsas*, Circuit Judges

O R D E R

It is **ORDERED**, on the court's own motion, that these consolidated cases remain in abeyance for 60 days from the date of this order. EPA is directed to continue to file status reports at 30-day intervals beginning 30 days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Chief Judge Garland and Circuit Judge Katsas did not participate in this matter.

** A statement by Circuit Judge Tatel, joined by Circuit Judge Millett, concurring in the order granting further abeyance, is attached.

** A statement by Circuit Judge Wilkins, joined by Circuit Judge Millett, is attached.

TATEL, *Circuit Judge*, joined by MILLETT, *Circuit Judge*, concurring in the order granting further abeyance:

Like Judge Wilkins, I have reluctantly voted to continue holding this case in abeyance for now. Although I might well join my colleagues in disapproving any future abeyance requests, I write separately only to reiterate what I said nearly a year ago: that the untenable status quo derives in large part from petitioners' and EPA's treatment of the Supreme Court's order staying implementation of the Clean Power Plan pending judicial resolution of petitioners' legal challenges as indefinite license for EPA to delay compliance with its obligation under the Clean Air Act to regulate greenhouse gases. *See* Per Curiam Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Aug. 8, 2017) (Tatel and Millett, JJ., concurring in the order granting further abeyance).

In early 2016, petitioners represented to the Supreme Court that a stay was necessary to protect them from irreparable injury while the federal courts resolved their legal challenges to the Clean Power Plan. *See* Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 38–45, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016). Since then, however, EPA has proposed to repeal the Plan, *see* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,035 (proposed Oct. 16, 2017), and both petitioners and EPA itself have urged this court—successfully, so far—to refrain from conducting the very legal analysis the Supreme Court stay was designed to accommodate, *see* Petitioners' and Petitioner-Intervenors' Response in Support of EPA's Motion to Hold Cases in Abeyance at 8, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 6, 2017) (explaining that because "the case could ultimately be mooted by EPA's forthcoming action," any present effort to resolve the Rule's legality "would be wasted").

The Supreme Court has reminded parties that they "have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of [a] litigation." *Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)); *cf. Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983) ("As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation."). Perhaps, if advised of circumstances as they stand today, the Supreme Court would extend the stay to give EPA additional time to consider its options for replacing the Clean Power Plan with greenhouse-gas regulations that better align with the agency's current views. Or perhaps, given EPA's own judicially upheld determination that greenhouse gases pose an ongoing threat to public health and welfare, *see Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part and rev'd in part on other grounds sub nom. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and the Court's decade-old recognition in *Massachusetts v. EPA* that "[u]nder the clear terms of the Clean Air Act," EPA must take regulatory action in the face of such a determination, 549 U.S. 497, 533 (2007), the Court would determine that the need for expeditious agency action does not permit the luxury of continued delay. Either way, and especially given that EPA has yet to present any concrete alternative for complying with *Massachusetts v. EPA*, the Supreme Court is entitled to decide for itself whether the temporary stay it granted pending *judicial* assessment of the Clean Power Plan ought to continue now that it is being used to maintain the status quo pending *agency* action.

WILKINS, *Circuit Judge*, joined by MILLETT, *Circuit Judge*:

Over a year has passed since we first held in abeyance our decision in this case – and nearly two years since oral argument. I will join in one further abeyance, but I am writing to apprise the parties that it is the last one that I am inclined to grant.

The Court's ability to hold a case in abeyance – or to stay a rule – derives from the Court's inherent equitable power to "preserv[e] rights" and "to save the public interest from injury or destruction while an appeal is being heard." *See Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 15 (1942). The Administrative Procedure Act codifies this in the rulemaking context by enabling courts, where "necessary to prevent irreparable injury," "to postpone the effective date of an agency action or to preserve status or rights *pending conclusion of the review proceedings*." 5 U.S.C. § 705 (emphasis added). Thus, the Court's equitable power to maintain the status quo is inextricably tied to the Court's authority to resolve disputes. *Nken v. Holder*, 556 U.S. 418, 421 (2009) (power to stay an action or ruling "allow[s] an appellate court the time necessary to review it"); *see also* 28 U.S.C. § 1651(a) (All Writs Act empowers courts to "issue all writs necessary or appropriate *in aid of their respective jurisdictions*" (emphasis added)). Courts cannot simply issue stays without an active case pending. *See In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985) (Absent a petition, "there was no ongoing proceeding in this court in which a motion for stay could have been filed and thus the court did not have jurisdiction to grant the motion for stay.").

While this matter technically remains pending before us, in reality, the dispute appears to have dissipated. From the beginning of the abeyance proceedings, Petitioners and Petitioner-Intervenors have supported the request by the Environmental Protection Agency (EPA) that the Court detain its decision, on the basis that the Clean Power Plan may be short-lived after agency review. *See* Doc. #1669984, Pet'rs' and Pet'r-Intervenors' Resp. in Supp. of EPA's Mot. to Hold Cases in Abeyance. In other words, the parties who brought this controversy have joined their erstwhile adversary in seeking indefinite delay of the very result that their Petitions request – that is, this Court's review of the Clean Power Plan – and Petitioners appear to have no current interest in prosecuting this action to disposition. Meanwhile, EPA has offered no indication of when it expects its review of the CPP to be complete, and instead simply asserts that "these cases should remain in abeyance pending the conclusion of [its] rulemaking [process]." Doc. #1733943, EPA Status Report (June 1, 2018). In this posture, our abeyance does not serve to maintain the status quo while *the Court decides* the disposition of the Petitions: instead, the result is the maintenance of the status quo while *EPA decides* the disposition of the rule that the Petitions challenge. The upshot is that the Petitioners and EPA have hijacked the Court's equitable power for their own purposes. If EPA or the Petitioners wish to delay further the operation of the Clean Power Plan while the agency engages in rulemaking, then they should avail themselves of whatever authority Congress gave them to do so, rather than availing themselves of the Court's authority under the guise of preserving jurisdiction over moribund petitions.

Unless Petitioners articulate a good reason to conclude otherwise, it would appear that the equities will no longer favor granting further abeyance in 60 days. At that time, I will urge the Court to dismiss the Petitions without prejudice and remand the case to EPA.