No. 24-1522 and all consolidated cases: Nos. 24-1624, 24-1626, 24-1627, 24-1628, 24-1631, and 24-1634

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF IOWA, *et al.*,
PETITIONERS,

V.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT,
DISTRICT OF COLUMBIA, *et al.*,
INTERVENORS.

ON PETITION FOR REVIEW OF AN ORDER AND RULE OF THE SECURITIES AND EXCHANGE COMMISSION

INTERVENOR STATES' REPLY IN SUPPORT OF ABEYANCE

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As Intervenor States explained in their motion, this Court should hold these consolidated petitions for review in abeyance until SEC clarifies whether it plans to amend or rescind the challenged Rules through notice-and-comment rulemaking, which could make hearing oral argument and issuing a decision on the merits unnecessary. Petitioners offer no sound reason to deny this relief. They do not and cannot dispute that an abeyance could preserve this Court and the parties' resources. And they do not and cannot deny that an abeyance would maintain the status quo given SEC's stay, which absolves them of any immediate compliance obligations or liability, and which would remain in effect during an abeyance. Instead, petitioners simply contend that abeyance would not "serve[]" *their* interests. States Opp. 3-4; *see* Chamber Opp. 2-3.[1] But that is not a reason to expend this Court's time and resources unnecessarily. For the reasons explained below, the Court should hold these cases in abeyance until SEC decides and discloses how it intends to proceed, including whether it will seek to amend or rescind the Rules if this Court upholds them.

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[1] The "States Opp." refers to the opposition filed by State Petitioners (Nos. 24-1522, 24-1627, 24-1631, 24-1634); Liberty Energy and Nomad Proppant Services (No. 24-1624); Texas Alliance of Energy Producers and Domestic Energy Producers Alliance (No. 24-1626); and National Legal & Policy Center and Oil & Gas Workers Association (No. 24-1685). *See* Doc. 5505965 (8th Cir. Apr. 14, 2025). The "Chamber Opp." refers to the opposition filed by Chamber of Commerce and National Center for Public Policy Research (Nos. 24-1628, 24-2173). *See* Doc. 5506169 (8th Cir. Apr. 14, 2025).

First, petitioners miss the point of abeyance, which is not about the parties' litigation preferences, but rather to preserve judicial resources. Abeyance will ensure that this Court does not expend significant resources deciding the merits of regulations that SEC could promptly seek to nullify. The Court should devote the time and energy necessary to hear oral argument and write an opinion addressing the many issues these petitions raise *only* if doing so is necessary. Petitioners may view this as merely a "slight consideration," States Opp. 6, but this Court has always treated judicial resources as a significant concern. *See, e.g.*, *Liles v. Del Campo*, 350 F.3d 742, 746–47 (8th Cir. 2003) (affirming decision enjoining related litigation "to save scarce judicial resources"); *Contracting Nw., Inc. v. City of Fredericksburg*, 713 F.2d 382, 387 (8th Cir. 1983) (recognizing courts' "inherent power" to hold cases to "conserve judicial resources").

So there is no "irony" in Intervenor States intervening to defend the Rules yet seeking abeyance now that SEC has withdrawn its defense. States Opp. 4; *see* Chamber Opp. 3. Intervenor States are prepared to defend the Rules with or without SEC, including at argument, to protect their unique interests—provided that doing so is not a useless exercise. To be sure, "SEC has *not* said it will commence a new rulemaking to revisit the" Rules. Chamber Opp. 4; *see* States Opp. 7. But that is precisely the concern that warrants proceeding with caution and obtaining more information from the agency. SEC has not said *anything* other than its unusual letter

withdrawing its defense. Before wading into the merits, this Court should first ensure that, if it takes the time to decide these petitions and ultimately upholds the Rules, SEC will not simply turn around and seek to rescind them.

Second, petitioners mischaracterize abeyance as an "extreme remedy." State Opp. 4. But holding "cases in abeyance" is the "traditional route" when a "new administration" stops "defending the prior administration's rule," so that the agency cannot effectively "eliminate the rule while avoiding" the APA's "formal notice-and-comment procedures." *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742, 743, 751, 752 (9th Cir. 2021) (VanDyke, J., dissenting). And the fact that "the *agency itself*" usually seeks an abeyance in such circumstances, Chamber Opp. 3-4, simply underscores the anomaly of SEC's tactic here—declining to defend the regulations while nudging these cases to "go forward by suggesting . . . which issues the Court should resolve," Chamber Opp. 4. Moreover, far from being "endless," Chamber Opp. 5, or "indefinite," States Opp. 4, the duration of an abeyance would be entirely up to SEC and could end once SEC determines and discloses "what action it intends to take regarding the Rules," Mot. 7.

Nor do petitioners cite any authority suggesting that courts "ordinarily" decide "rule challenge[s]" in circumstances like this. Chamber Opp. 2-3; *see* State Opp. 5, 12. Just the opposite. The ordinary course in circumstances where an agency

indicates that it will rethink (and potentially rescind) a regulation is overwhelmingly an abeyance.[2] Indeed, the Chamber of Commerce itself recently declined to oppose an abeyance in a case where the agency indicated that it simply wished to *review* the underlying regulation. *See* Mot. to Hold Cases in Abeyance, *Chamber of Commerce of the USA. v. EPA*, No. 24-1193 (D.C. Cir. Feb. 11, 2025), Doc. No. 210070 (indicating that petitioners do not oppose abeyance); *see also* Order, *Chamber of*

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[2] *See, e.g.*, Order, *Sorptive Mins. Inst. v. Mine Safety & Health Admin.*, No. 24-1889 (8th Cir. Apr. 11, 2025), Doc. No. 5505588 (ordering four-month abeyance after agency paused enforcement of rule protecting mine workers from silica dust); Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. Feb. 24, 2025), Doc. No. 5488538 (ordering open-ended abeyance so EPA could review action disapproving state implementation plan); Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Apr. 14, 2025), Doc. No. 2111018 (ordering abeyance so EPA could review and potentially revise a cross-state pollution rule); Order, *Am. Fuel & Petrochem. Mfrs v. EPA*, No. 25-1083 (D.C. Cir. Apr. 11, 2024) (ordering abeyance so EPA could review waiver for California's mobile-source program), Doc. No. 2110713; Order, *Students for Fair Admissions v. U.S. Naval Academy*, No. 24-2214 (4th Cir. Apr. 1, 2025), ECF No. 26 (granting abeyance in light of change in Naval Academy's admissions policy); Order at 2, *Coin Center v. Sec'y, U.S. Dep't of the Treasury*, No. 23-13698 (11th Cir. Mar. 4, 2025), ECF No. 55 (granting abeyance to allow new leadership to review underlying designation); Order, *Kentucky v. EPA*, No. 24-1050 (D.C. Cir. Feb. 25, 2025), Doc. No. 2102525 (ordering abeyance so EPA could review national air-quality standards); Order, *Am. Water Works Ass'n v. EPA*, No. 24-1376 (D.C. Cir. Feb. 19, 2025), Doc. No. 2101495 (granting abeyance so EPA could review lead-pipe rule); Order, *Associated Gen. Contractors of Am. v. U.S. Dep't of Labor*, No. 24-10790 (5th Cir. Feb. 17, 2025), ECF No. 47-2 (granting abeyance so incoming leadership could review litigation); Order, *In re Nat'l Highway Traffic Safety Admin.*, No. 24-7001 (6th Cir. Feb. 14, 2025), ECF No. 143-1 (ordering abeyance so NHTSA could review fuel-efficiency standards); Order, *Newburgh Clean Water Project v. EPA*, No. 21-1019 (D.C. Cir. Feb. 1, 2023), Doc. No. 1984197 (granting abeyance so EPA could "engage[] in new rulemaking" of lead-pipe rule).

Commerce, No. 24-1193 (D.C. Cir. Feb. 24, 2025), Doc. No. 2102403 (granting abeyance). Many of the State Petitioners have similarly declined to oppose agencies' numerous requests for abeyances in just the past three months. See *supra* note 2.

The small subset of cases petitioners cite are far different. One involved challenges to a federal *statute*, not a regulation that could be rescinded by the litigating agency. *Massachusetts v. DHHS*, 682 F.3d 1 (1st Cir. 2012) (addressing DOMA). Another involved an FCC order that, unlike the stayed Rules here, was "still in force" and that FCC still "defend[ed] portions of." *Glob. Tel*Link v. FCC*, 866 F.3d 397, 407 (D.C. Cir. 2017). Another involved an agency that at least "continued to argue that the court lacked jurisdiction," and did so successfully in persuading the court that it had "no license to consider the merits of the challenge." *Wild Va. v. Council for Env't Quality*, 56 F.4th 281, 287, 291 (4th Cir. 2022). And the Supreme Court cases petitioners cite involved threshold questions of venue[3] or jurisdiction[4] independent of the merits of the agency actions, which is no doubt why

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[3] Three of the cases address whether the D.C. Circuit is the exclusive venue for challenging certain EPA actions under the Clean Air Act. *See EPA v. Calumet Shreveport Refin., L.L.C.*, No. 23-1229 (U.S. argued March. 25, 2025); *Oklahoma v. EPA*, No. 23-1067 (U.S. argued Mar. 25, 2025); *Pacificorp v. EPA*, No. 23-1068 (U.S. argued Mar. 25, 2025).

[4] *Diamond Alternative Energy, LLC v. EPA*, No. 24-7 (U.S. *petition for cert. filed* Jul. 2, 2024), addresses whether fuel producers satisfied Article III's

they were not held in abeyance. After all, the Supreme Court *granted* a contemporaneous request for abeyance in another case that, like this one, involved an assessment of the merits. *See Dep't of Educ. v. Career Colls. & Schs. of Texas*, No. 24-413, 2025 WL 412996, at *1 (U.S. Feb. 6, 2025) (ordering "abeyance" so the Department of Education could reassess student-loan regulations). In sum, none of petitioners' cited cases suggests that it would be "appropriate" or "ordinary" (Chamber Opp. 2) to adjudicate the legality of regulations that remain stayed by an agency that no longer defends them.

Third, petitioners cannot show prejudice. Petitioners offer only vague assertions about unspecified "costs," "uncertainty," and "potential liability" on the theory that SEC's "Rule, while *stayed*, is still in *effect*." States Opp. 3, 7, 12-13 (emphasis added); *see* Chamber Opp. 2 (Rules "remain[] a federal regulation" despite "stay"). But SEC's stay is both clear and legally enforceable: it "avoids potential regulatory uncertainty" by postponing the Rules' "effective dates." The Enhancement and Standardization of Climate-Related Disclosures for Investors; Delay of Effective Date, 89 Fed. Reg. 25804, 25805 (April 12, 2024). Petitioners themselves agree that the Rules have not "meaningfully go[ne] into effect," and that "the penalties in the rule" are not currently "effective" because of SEC's "stay,"

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redressability element when challenging EPA's grant of a waiver to California to set its own vehicle-emissions standards.

which remains in effect "during the pendency of this litigation." States Opp. 2, 8, 13.

To the extent petitioners argue that an abeyance would prejudice them because SEC might lift the stay and suddenly begin to enforce the Rules during an abeyance, that risk of prejudice is negligible given that a controlling majority of the Commissioners have prohibited SEC's counsel from continuing to even defend the Rules in litigation. Indeed, one petitioner has publicly eulogized the Rules as "doomed" given the new "majority on the SEC." National Legal and Policy Center, *SEC Puts Final Nail in Climate Rule Coffin* (Apr. 2, 2025), https://perma.cc/3DK8-7AV5 (describing SEC's withdrawal as "handing [petitioners] a victory" in this case). Holding these petitions in abeyance and maintaining the status quo, therefore, would not remotely expose petitioners to "drastic problems" or "significant risk," much less place them beneath the "Sword of Damocles," States Op. 3-4.[5] Besides, denying abeyance is not guaranteed to prevent the risks petitioners fear, as they will face compliance obligations and liability should this Court uphold the Rules.

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[5] Curiously, petitioners try to bolster their claims of prejudice by pointing to Liberty Energy's 2024 stay motion, *see* States Opp. 8, which argued that they would be harmed if the Rules were *not* stayed during this litigation, *see* Stay Mot. at 1-3, 27-28, *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 8, 2024), ECF No. 5-1. But those purported harms were ameliorated by SEC's stay, which would remain in place during an abeyance. Petitioners accordingly cannot rely on such assertions now to oppose the same status quo they sought—and received from the agency—at the outset of litigation.

Finally, petitioners' alternatives to abeyance make little sense. Some petitioners say the Court should decide the cases without oral argument. States Opp. 3. But as this Court has noted, "[i]t cannot be stressed enough that oral argument at the appellate level is both meaningful and extremely helpful to the court." *Lockett v. Int'l Paper Co.*, 871 F.2d 82, 83 n.2 (8th Cir. 1989). And that is particularly so when, as here, a case "presents complex legal issues" and involves a host of challenges from multiple petitioners. *N. Hills Bank v. Bd. of Governors of Fed. Rsrv. Sys.*, 506 F.2d 623, 626 (8th Cir. 1974) (Lay, J., concurring). If this case proceeds, the Court should hold oral argument before it decides the weighty issues raised in these petitions, and Intervenor States are prepared to argue in defense of the Rules. Intervenor States simply ask that, before hearing what is likely to be a lengthy argument and issuing a decision, the Court ensure that doing so is a necessary and prudent expenditure of its resources.

Even more flawed is some petitioners' proposal (Chamber Opp. 5-6) to "equitably vacate" the Rules *without* addressing the merits at all—an approach they purport to derive from cases where civil judgments become moot on appeal, *see United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Even their co-petitioners do not subscribe to that theory. *See* State Opp. 9. For good reason. The narrow *Munsingwear* principle may apply "to unreviewed administrative orders" if "intervening mootness" occurs. *A.L. Mechling Barge Lines, Inc. v. United States*,

368 U.S. 324, 329-30 (1961). But here, while this case could become moot if SEC rescinds the Rules through notice-and-comment rulemaking, it is not moot now, and no petitioner suggests otherwise.

Absent a finding of mootness, courts cannot "equitably vacate" a rule that was promulgated through the proper channels merely because an agency withdraws its defense in litigation and declines to disclose its future action. Regulations issued after notice and comment are presumptively valid. *See Ark. Poultry Fed'n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988). And petitioners' novel approach of vacatur-without-mootness for regulations that remain presumptively valid is not only patently inequitable—it erodes rule-of-law values and undermines the critical participatory, transparency, and process-based protections that Congress enacted in the Administrative Procedure Act (APA). Indeed, in allowing courts to "set aside" agency actions "found to be" unlawful, 5 U.S.C. § 706(2), the APA necessarily bars courts from vacating rules "without a holding of unlawfulness," *In re Clean Water Act Rulemaking*, 60 F.4th 583, 594-95 (9th Cir. 2023). In short, because SEC's presumptively lawful Rules have not been rescinded through the proper legal channels, these cases are not moot and vacatur is not equitably or legally justified.

* * *

For all of these reasons, this Court should grant the Intervenor States' motion to hold these consolidated cases in abeyance and direct SEC to file status reports every 90 days until it decides on a course of action for the Rules.

Respectfully submitted,

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I certify that on April 21, 2025, this reply was served on all parties via this Court's CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A) because the brief contains 2,432 words, excluding exempted parts. This reply complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

I also certify that this reply has been scanned for viruses and is virus free.

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