IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, *et al*,	)	
	)	
Plaintiffs-Appellees,	)	**Consolidated Case Nos.**
	)	**20-3806; 20-3815**
vs.	)	
	)	
EUGENE SCALIA, *et al*,	)	
	)	
Defendants-Appellants,	)	
	)	
INTERNATIONAL FRANCHISE ASSOCIATION, *et al*,	)	
	)	
Intervenors-Appellants.	)	

INTERVENORS-APPELLANTS' OPPOSITION TO MOTION TO HOLD APPEAL IN ABEYANCE

Intervenors-Appellants International Franchise Association, the Chamber of Commerce of the United States of America, the HR Policy Association, the National Retail Federation, the Associated Builders and Contractors, and the American Hotel and Lodging Association (the "Associations") oppose the motion of the U.S. Department of Labor (the "Department") to hold the present consolidated appeal in abeyance for six months. As the sole ground for its motion, the Department states that it has published a notice proposing to rescind the Joint Employer Rule at issue in this case and will be engaged for some unspecified period of time in reviewing

comments and analyzing whether to adopt the proposed rulemaking, and finalizing any such determination. (Motion at 2-3). The Department provides no legal support for its motion.

As further explained below, the Associations oppose the motion because it is apparent from the Department's proposed rulemaking that the driving force behind the proposal to rescind the Joint Employer Rule (the "Rule") is that the district court below declared the Rule to be invalid. But as previously argued in the briefs of the Associations *and the Department*, the district court's decision was wrongly issued and should be reversed in this appeal. This Court should therefore complete its review of the district court's opinion in an expeditious fashion, and not hold the appeal in abeyance, so that the erroneous district court decision does not improperly taint the Department's rulemaking proceeding.

BACKGROUND

On April 9, 2019, the Department issued a Notice of Proposed Rulemaking to clarify the Department's Joint Employer standard under the Fair Labor Standards Act, for the purpose of clarifying and unifying myriad inconsistent rulings of courts around the country on this important issue. [1] After receiving over 57,000 comments during the comment period, the Department issued the Rule on January 16, 2020,

[1] *See* Joint Employer Status under the Fair Labor Standards Act, Docket No. WHD-2019-0003, *Unified Agenda & Docket Details*, https://beta.regulations.gov/docket/WHD-2019-0003/unified-agenda;

with an effective date of March 16, 2020. SPA 191. On February 26, 2020, the State Plaintiffs filed suit to vacate the Rule and enjoin its implementation. JA 30. After finding (erroneously) that the State Plaintiffs had standing to sue, the district court ultimately determined on cross-motions for summary judgment that one provision of the Rule was severable and should remain in effect, but that the bulk of the Rule should be vacated. JA 25-26; SPA 87. The consolidated appeals followed. JA 26-27.

On January 15, 2021, the Associations and the Department submitted their opening briefs to this Court. *See* ECF Nos. 58, 59. The State Plaintiffs' brief is due to be filed on April 16, 2021. *See* ECF No. 70.

On March 12, 2021, the Department published a Notice of Proposed Rulemaking proposing to rescind the Rule. 86 Fed. Reg. 14,038 (Mar. 12, 2021). Throughout the NPRM, the Department relies heavily on the district court's decision, citing it more than 40 times, quoting it extensively and in each instance claiming support for rescission from the district court's findings. *Id*.

On March 31, 2021, the Department filed the pending motion seeking to hold this appeal in abeyance for six months, until October 18, 2021, to allow the Department time to review and analyze the comments and make a final determination regarding rescission of the Rule. ECF No. 90. The Department cited no legal precedent in support of its motion and relied entirely on the NPRM, which in turn relies mostly on the district court decision which is now on appeal.

ARGUMENT

I. The NPRM Only Underscores the Need for Expeditious Consideration of this Appeal; The Department's Motion Should Therefore Be Denied.

As noted above, the Department's NPRM relies heavily for its proposed rescission of the Joint Employer Rule on the district court's erroneous determination that the Rule is invalid. Such a direct connection between the district court decision being appealed and the proposed rescission of the Rule – far from justifying a motion for abeyance - creates a strong ground for proceeding expeditiously to *complete* the appeal. Only by this Court's action deciding the appeal, can the Department and the regulated community know whether the NPRM is justified. It thus remains as important as ever for this Court to review the opinion below in an expeditious fashion, so that the erroneous district court decision does not taint the Department's rulemaking proceeding.

As explained more fully in the briefs already filed by the Associations and the Department, contrary to the district court's decision, no legal basis existed for the district court even to reach the merits of the Rule, because the State Plaintiffs lacked standing to sue under this Court's recent holdings. But on the merits as well, the Rule should be upheld, per the Department's own brief. And the Rule remains vital to the post-pandemic recovery of the affected industries and to job growth in general. As the Administrative Record makes clear, the Rule is essential to reduce and prevent burdensome litigation that has discouraged job growth among the

Associations' members.

Numerous courts have held that agencies cannot cut off judicial review of a challenged rule simply by initiating a new proposed rulemaking. *See Nat'l Ass'n of Mfrs. v. U.S. Dep't of Defense*, 2017 U.S. LEXIS 2322 (2017) (Supreme Court denial of agency's motion to hold briefing schedule in abeyance); *see also Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) (rejecting agency claim that pending rulemaking justified deferring appeal); *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426 (D.C. Cir. 2018) (declining to exercise discretion to hold case in abeyance).

The Supreme Court's denial of a motion for abeyance filed by the Trump Administration in *NAM v. US DOD* is particularly instructive, because the procedural posture of that case was quite similar to the present appeal. The final Clean Water Rule of the Obama Administration was pending in the Court on appeal from a ruling below staying the rule, when the Department of Defense announced a proposed rulemaking to rescind the rule, seeking abeyance until that rescission rulemaking was completed. The Court denied the motion and proceeded to decide the appeal. 138 S. Ct. 617.[2]

[2] The procedural posture of the motion is set forth in detail in the Opposition of Respondent Conservation Groups in Supreme Court Docket No. 16-299.

In the present appeal, determining the validity of the district court's decision preventing the final rule from going into effect will greatly affect the rights and obligations of the Associations' many thousands of member businesses. Holding the case in abeyance would harm the Associations by failing to provide them "more meaningful, detailed, and uniform guidance of who is a joint employer under the Act," as called for by the Rule. SPA 196-97. And if the district court's ruling is allowed to stand, the Associations' members are threatened with imminent harm by the continued proliferation of inconsistent and overbroad court rulings interpreting the Department's long outdated prior joint employment standard. JA 272-330.

In the present consolidated appeals, both the Department and the Associations have fully briefed their arguments for reversal of the district court's decision, and the State Plaintiffs' brief is due to be filed on April 16. With the replies due in May, the briefing process will be completed long before six months have passed. And, of course, the rulemaking may actually take much longer than six months, as rulemakings often do. [3] A timely decision by this Court is certainly possible in

[3] The rulemaking process for the current Rule took nearly one year to complete, during which time the Department received over 57,000 comments and extended the comment period. Any effort by the Department to revise or revoke the final rule should involve a similarly thorough review. *See N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012) (considering the length of the comment period and number of comments received during the prior rule's notice and comment period in determining whether the agency provided a sufficient notice and comment period when it replaced the final rule).

advance of the completion of the proposed rulemaking.

As the Department itself concedes (Motion at 3), it has not prejudged the outcome of the NPRM. Indeed, it would be improper for the Department to do so in advance of reviewing and analyzing the public comments. *See Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (noting that the purpose of rulemaking "would be frustrated if a Commission member had reached an irrevocable decision on...a rule...prior to the Commission's final action"); *see also Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 821 F.3d 19, 29 (D.C. Cir. 2016) (same). The Department's motion further states that additional time will be necessary for the Department to finalize the rule. It is not at all clear how long the Department will need to review and analyze comments on the NPRM, draft a final rule and preamble addressing all significant comments, and complete the Office of Management and Budget review process. The intervening time could therefore be productively used by this Court in considering whether the district court decision underpinning the Department's proposed rescission was or was not correctly decided.

Considering, therefore, the serious flaws in the district court decision on which the NPRM heavily relies, as described in the Department's own brief to this Court, and the uncertain amount of time needed by the Department to reconsider the Rule in its just started notice and comment rulemaking, it remains necessary and appropriate to proceed with the present appeal.

CONCLUSION

This Court should deny the Department's Motion to Hold in Abeyance this appeal. The Court should proceed to expeditiously decide the appeal and should set aside the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the above-named counsel hereby certifies that this memorandum complies with the type-volume limitation of the Federal Rules of Appellate Procedure. As measured by the word processing system used to prepare it, this memorandum contains 1,744 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2021, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/Maurice Baskin