ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW JERSEY, *et al.*, Plaintiffs-Appellants, v. JULIE A. SU, *et al.*, Defendants-Appellees; PUBLIC CITIZEN HEALTH RESEARCH GROUP, *et al.*, Plaintiffs-Appellants, v. JULIE A. SU, *et al.*, Defendants-Appellees.	**No. 21-5016, 21-5018 (consol.)**

APPELLANTS' UNOPPOSED MOTION FOR VOLUNTARY DISMISSAL AND VACATUR

These cases challenged regulations issued by the Occupational Safety and Health Administration ("OSHA") that are no longer in effect. Therefore, the State of New Jersey, the State of Illinois, the State of Maryland, the Commonwealth of Massachusetts, the State of Minnesota, and the State of New York (collectively, the

"States"), and Public Citizen Health Research Group, American Public Health Association, and Council of State and Territorial Epidemiologists (collectively, "Public Health Plaintiffs"), Appellants in the above-captioned matter, jointly request that the Court dismiss the appeals as moot, vacate the district court's order and opinion, and remand the cases to the district court with instructions to dismiss them as moot, consistent with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Appellants have conferred with Appellees' counsel, and Appellees consent to this request.

BACKGROUND

Under the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), OSHA is tasked with ensuring "safe and healthful working conditions" for workers in the United States. 29 U.S.C. §§ 651-678. Since 1971, OSHA has used that authority to require employers to track workplace injuries and illnesses. OSHA has gradually increased the type of information the agency gathers over time, with the aim of improving workplace health and safety.

OSHA regulations require employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses at their establishments. 29 CFR part 1904.0-1904.46. Covered employers must log each recordable employee injury and illness on OSHA Forms 300, 301, and 300A. Form 300, "Log of Work-Related Injuries and Illnesses," collects information about each

injury or illness, including the date, location, description of the injury/illness, outcome, and the employee's name and job title. Form 301, "Injury and Illness Incident Report," collects detailed information about the injury or illness, as well as the names and addresses of the employee and the healthcare professional that treated the employee. Form 300A, "Summary of Work-Related Injuries and Illnesses," is an end-of-year summary report, which summarizes the total number, types, and outcomes of injuries and illnesses at the establishment. Employers must post Form 300A in a visible location in the workplace.

In 2016, OSHA promulgated a final rule entitled, "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016) ("2016 Rule"). At the time of the 2016 Rule, "very limited information" was publicly available about specific injuries and illnesses occurring in the workplace. *Id.* at 29,629. The 2016 Rule expanded public access to workplace injury data by requiring covered employers to submit detailed injury and illness information electronically from Forms 300 and 301. The 2016 Rule thus improved worker health and safety, and received significant support from workers, labor unions, professional associations, and researchers. *Id.* at 29,633. At that time, OSHA considered privacy concerns raised by commenters and confirmed that the agency would use software that would search for and de-identify personally identifiable information ("PII") before submitted data could be posted on OSHA's publicly accessible Web site, reiterated that small

establishments were only required to submit data from Form 300A, and indicated that it planned to introduce a data collection system that would isolate data behind a separate firewall until sensitive fields had been scrubbed. *Id.* at 29,662.

OSHA was scheduled to begin collecting the information from Form 300A on December 15, 2017, and the more detailed information from Forms 300 and 301 on July 1, 2018. In 2017, however, OSHA abruptly delayed the implementation of the 2016 Rule, twice. *See* "Improve Tracking of Workplace Injuries and Illnesses: Delay of Compliance Date," 82 Fed. Reg. 29,261 (June 28, 2017), 82 Fed. Reg. 55,761 (Nov. 24, 2017). Two years later, OSHA reversed its position regarding the collection of detailed workplace injury and illness information. *See* "Tracking of Workplace Injuries and Illnesses," 84 Fed. Reg 380 (Jan. 25, 2019) ("Rollback Rule").

The Rollback Rule rescinded the 2016 Rule's requirement for electronic submission of information from Forms 300 and 301, but left in place the requirement to submit information from Form 300A. OSHA cited concerns over worker privacy and the resources necessary to avoid accidental disclosure of workers' PII as the basis for the Rollback Rule. *Id.* at 384, 392. Although none of the forms request PII, OSHA expressed concern that such information may be inadvertently included alongside the requested information. *Id.* at 384. OSHA also determined that automated PII-stripping software could not adequately protect worker privacy and concluded that its collection of information from Forms 300

and 301 would require a manual review process to eliminate PII. *Id.* at 392. Furthermore, OSHA claimed that third-party entities would not benefit from the collected data because it would not be published by OSHA. *Id.* at 391.

In 2019, the States and the Public Health Plaintiffs initiated two related cases, consolidated in this appeal, challenging the Rollback Rule under the Administrative Procedure Act ("APA"). The district court, in a single decision issued with respect to both *Public Citizen Health Group v. Pizzella*, No. 19-166, and *State of New Jersey v. Pizzella*, No. 19-621, granted the federal government defendants' motion to dismiss in Civil Action No. 19-166 and 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*, 513 F. Supp. 3d 10 (D.D.C. Jan. 11, 2021). In reaching its decision, the district court found that the Public Health Plaintiffs lacked Article III standing to challenge the Rollback Rule, while rejecting the States' substantive arguments on the merits. *Id.* at 19-30. The States and the Public Health Plaintiffs appealed.

After Appellants filed their opening briefs in this appeal, OSHA promulgated a final rule entitled, "Improve Tracking of Workplace Injuries and Illnesses," 88 Fed. Reg. 47,254 (July 21, 2023) ("2023 Final Rule"), which effectively reverses the Rollback Rule. Specifically, the 2023 Final Rule requires establishments with 100 or more employees in certain designated industries to electronically submit information

from their OSHA Forms 300 and 301 to OSHA once a year. *Id.* It continues to maintain the 2016 Rule's requirement that establishments in certain industries with 20 to 249 employees electronically submit information from their Form 300A to OSHA on an annual basis. *Id.*

ARGUMENT

THE 2023 FINAL RULE HAS RENDERED THIS APPEAL MOOT, AND VACATUR IS APPROPRIATE.

The 2023 Final Rule entirely eliminates the challenged aspects of the Rollback Rule, making this case moot. *See Akiachak Native Cmty. v. United States DOI*, 827 F.3d 100, 113 (D.C. Cir. 2016) ("when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot"). When a civil case becomes moot, "[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39; *see, e.g.*, *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (instructing Second Circuit to vacate district court's decision and remand with instructions to dismiss when case was rendered moot by intervening agency action). Because this case became moot after the district court's decision below, the Court should vacate the district court's order and accompanying memorandum opinion, and direct that the case be dismissed as moot.

Vacatur "clears the path for future re-litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."

Munsingwear, 340 U.S. at 40. Courts look "to notions of fairness when deciding whether to use the remedy." *Sands v. NLRB*, 825 F.3d 778, 785 (D.C. Cir. 2016); *see also Akiachak Native Cmty.*, 827 F.3d at 115 (explaining that moot cases should be disposed of "'in the manner most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot'" (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994))). "[I]f the party who lost below did not cause the case to become moot, that is, if happenstance or the actions of the prevailing party ended the controversy, vacatur remains the standard form of relief." *N. Cal. Power Agency v. Nuclear Reg. Comm'n*, 393 F.3d 223, 225 (D.C. Cir. 2004); *see, e.g.*, *American Bar Ass'n v. FTC*, 636 F.3d 641, 648-49 (D.C. Cir. 2011) (vacating judgment below when mootness resulted on appeal due to the enactment of intervening legislation).

Here, vacatur is appropriate for several reasons. First, because vacatur is equitable in nature, the Court should take account of the public interest. *See Bancorp*, 513 U.S. at 26 ("when federal courts contemplate equitable relief, our holding must also take account of the public interest"); *Sands*, 825 F.3d at 785 ("[w]hen deciding whether to vacate, [courts] also take the public interest into account"). Vacatur would serve the public interest by furthering the traditional purpose of the doctrine: *i.e.*, clearing the path for future litigation (or re-litigation) of similar issues that arise from OSHA's rulemaking. The district court's unreviewable decision should not serve as

operational guidance to OSHA's exercise of rulemaking authority.

Second, the roles of the parties in mooting the case weigh in favor of vacatur. Mootness resulting from Appellees' promulgation of the 2023 Final Rule prevents further review of the adverse ruling below - a circumstance beyond Appellants' control. *See Bancorp*, 513 U.S. at 25 ("a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment"). It is therefore fair to relieve Appellants from the district court opinion's effects since appellate review is no longer available.

Finally, Appellees consent to this request for vacatur. Because vacatur is an equitable remedy, this Court should consider the parties' mutual agreement to such relief as a factor in support of vacating the district court's decision below. *See, e.g.*, *Sands*, 825 F.3d at 786 (considering opposing party's lack of resistance to a request for vacatur as a "significant" factor counseling in favor of such relief).

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's Order, ECF No. 27, and Memorandum Opinion, ECF No. 28, and remand with instructions to dismiss the case as moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2023, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Andrew H. Yang
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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2043 words. It also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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