

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-1317 (consolidated with Nos. 20-1318, 20-1431, & 21-1009)

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

SIERRA CLUB, et al.,

Petitioners,

v.

U.S. DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

PETITIONERS' JOINT MOTION TO LIFT
ABEYANCE

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All Petitioners—the Puyallup Tribe of Indians,¹ a coalition of States,² and a coalition of environmental groups³—jointly move to lift the abeyance in this case for the reasons set forth below. Respondents’ counsel has indicated that Respondents will likely oppose this motion.

INTRODUCTION AND RELIEF REQUESTED

In June 2020, the federal Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued a rule amending the federal Hazardous Materials Regulations to allow for the bulk transport of liquefied natural gas (“LNG”) by rail nationwide. PHMSA published that rule in July 2020. 85 Fed. Reg. 44,994 (Jul. 24, 2020) (“2020 LNG Rule”). Because of significant flaws in the 2020 LNG Rule, Petitioners sought judicial review to vacate it.

In January 2021, President Biden issued Executive Order 13990, which, among other things, emphasized his administration’s policies of improving public health, protecting the environment, and ensuring that federal decision-making is guided by “the best science.” 86 Fed. Reg. 7,037, 7,037 (Jan. 20, 2021). The

¹ A sovereign Indian tribe whose government is recognized by the United States.

² The states of Maryland, New York, California, Delaware, Illinois, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the People of the State of Michigan, and the District of Columbia.

³ Sierra Club, Center for Biological Diversity, Clean Air Council, Delaware Riverkeeper Network, Environmental Confederation of Southwest Florida, and Mountain Watershed Association.

Executive Order directed Respondents to review the 2020 LNG Rule (among other federal agency actions) for consistency with those stated policies. To allow themselves time to conduct that review, Respondents asked this Court to hold the instant case in abeyance for six months. This Court, in turn, entered an abeyance of indefinite duration, requiring Respondents to provide quarterly status updates.

More than two years later, the 2020 LNG Rule still has not been rescinded, suspended, or amended—it remains in full force and effect. Indeed, having already missed multiple self-imposed target dates for suspending the 2020 LNG Rule and for proposing a replacement regulation, Respondents advised in their March 6, 2023 status report that they would again miss their latest targets.

Two years is more than enough time for PHMSA to take meaningful action with respect to the 2020 LNG Rule. If an agency cannot “stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule,” *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 388 (D.C. Cir. 2012), then PHMSA cannot “stave off judicial review” merely by representing that it might possibly, someday, take action regarding the 2020 LNG Rule. Because derailments of trains carrying hazardous materials can endanger lives, public safety, and the environment,⁴ and because Respondents have failed to rescind or otherwise

⁴ As is well known, train derailments involving hazardous cargoes are a common occurrence throughout the country. *See, e.g.,* JP Cola, *BNSF looking at broken rail as possible cause of Raymond derailment*, Willmar Radio (Apr. 19, 2023)

meaningfully address the 2020 LNG Rule despite publicly acknowledging its significant flaws in the Federal Register, Petitioners respectfully request that this Court remove this action from abeyance and direct the parties to submit a proposed briefing schedule and format within fourteen days of the Court's order.

BACKGROUND

A. The Trump Administration legalizes widespread transport of LNG by rail.

LNG is a hazardous substance, with unique storage requirements, that federal regulations have historically barred from being shipped in rail tank cars.⁵ On April

https://www.willmarradio.com/news/bnsf-looking-at-broken-rail-as-possible-cause-of-raymond-derailment/article_70b3b7c6-dead-11ed-a4b5-4fe0c1c5c515.html (train carrying ethanol derails and causes fire in Minnesota, April 2023); Brenda Goodman, *CDC team studying health impacts of Ohio train derailment fell ill during investigation*, CNN (Mar. 31, 2023), <https://www.msn.com/en-us/news/us/cdc-team-studying-health-impacts-of-ohio-train-derailment-fell-ill-during-investigation/ar-AA19wipP> (illnesses following February 2023 train derailment in Ohio); Vonnai Phair & Isabella Breda, *What we know about the BNSF train derailment on the Swinomish Reservation*, Seattle Times (Mar. 17, 2023), <https://www.seattletimes.com/seattle-news/environment/what-we-know-about-the-bnsf-train-derailment-on-the-swinomish-reservation/> (train derailment spills 3,000 gallons of diesel onto Swinomish Reservation); *3 people are injured in a fiery West Virginia train derailment caused by a rockslide*, Associated Press (Mar. 9, 2023), <https://www.npr.org/2023/03/09/1162114971/3-people-injured-in-west-virginia-train-derailment>. See generally Federal Railroad Administration, *Train Accidents by Type*, <https://railroads.dot.gov/accident-and-incident-reporting/train-accident-reports/train-accidents-type>. Although Petitioners are not aware of any derailments involving liquified natural gas, PHMSA has acknowledged the serious risk that would accompany such a derailment. See *Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail*, 86 Fed. Reg. 61,731, 61,741 (Nov. 8, 2021).

⁵ See Thomas Declaration, Exhibit ("Ex.") A at ES-3, appendix D-7 to D-10.

10, 2019, President Trump issued Executive Order 13868, which directed the Secretary of Transportation to authorize the shipment of LNG in approved rail tank cars via a rulemaking to be finalized within 13 months.⁶ 84 Fed. Reg. 15,495, 15,496–97 (Apr. 15, 2019). In October 2019, PHMSA proposed amending the Hazardous Materials Regulations (49 C.F.R. pts. 171–180) to allow LNG to be transported by rail tank cars. 84 Fed. Reg. 56,964-01, 56,965 (Oct. 24, 2019). PHMSA issued the 2020 LNG Rule on June 19, 2020, and published it in the Federal Register on July 24, 2020. *Hazardous Materials: Liquefied Natural Gas by Rail* *Hazardous Materials: Liquefied Natural Gas by Rail*, 85 Fed. Reg. 44,994 (July 24, 2020). The 2020 LNG Rule amended the Hazardous Materials Regulations to allow the shipment of LNG in DOT-113C120W9 rail tank cars. *Id.* at 44,995. So long as those regulations authorize transporting a hazardous material by rail, industry can ship cargoes in the specified manner without providing any further notice to regulators or securing further regulatory approval.⁷

In August 2020, Petitioners timely filed petitions for review of the 2020 LNG Rule; their petitions were subsequently consolidated in this Court. Document

⁶ The Secretary of Transportation has delegated such rulemaking duties to PHMSA. *See* 49 C.F.R. § 1.97(b), (c).

⁷ *Cf.* 40 C.F.R. § 171.2(f) (“No person may transport a hazardous material in commerce unless the hazardous material is transported in accordance with applicable requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter.”).

#1868143. In January 2021, the Puyallup Tribe filed a separate petition for review in this Court timely challenging the denial of an administrative appeal that it had previously brought to PHMSA, and that petition was consolidated with the earlier petitions. Document #1884796.

B. The Biden Administration expresses interest in reviewing the 2020 LNG Rule.

In January 2021, President Biden issued Executive Order 13990, which directed agencies to consider suspending, revising, or rescinding certain agency actions based on their impact on public health and the environment. *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, Exec. Order No. 13990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). The same day, the 2020 LNG Rule was identified as an action that the Department of Transportation (“DOT”) would review in accordance with that Executive Order.⁸ PHMSA then moved the Court for a six-month abeyance. Document #1886940 at 5. In its motion, PHMSA stated that it “may seek a further abeyance, if necessary, after six months.” *Id.* PHMSA did not promise any definitive action but merely sought a reprieve to review the 2020 LNG Rule. *Id.* Petitioners did not oppose PHMSA’s request for a limited six-month abeyance.

⁸ See Thomas Declaration, Ex. B at 9.

On March 16, 2021, the Court issued an order holding the consolidated cases in abeyance, pending further order of the Court. The order did not specify an end date for the abeyance but directed Respondents to file status reports at 90-day intervals.⁹ Document #1890143.

C. Respondents admit that the 2020 LNG Rule is flawed.

Respondents' first status report, filed in June 2021, represented that PHMSA had announced plans to initiate one rulemaking to "consider suspending the [2020 LNG Rule]" and another rulemaking to "consider amending the [2020 LNG Rule]." Document #1902329 at 2. Respondents did not identify any timeline for completing either rulemaking. *See* Document #1902329. In November 2021, PHMSA published a Notice of Proposed Rulemaking to suspend the 2020 LNG Rule (the "proposed Suspension Rule") until the earlier of either (1) completion of a final rulemaking to amend the LNG Rule; or (2) June 30, 2024. *Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail*, 86 Fed. Reg. 61,731-01 (Nov. 8, 2021). Thus, the proposed suspension would be only temporary. On December 23, 2021, the three groups of Petitioners filed separate comments urging PHMSA to quickly finalize the proposed Suspension

⁹ The Court directed the parties to file "to file motions to govern further proceedings within 30 days of the completion of agency proceedings." Document #1890143.

Rule and/or quickly rescind the 2020 LNG Rule. The comment period for the proposed Suspension Rule closed the same day. *Id.* at 61,731.

In the preamble to the proposed Suspension Rule, PHMSA contended that suspension of the 2020 LNG Rule through June 30, 2024 (or any earlier amendment of the 2020 LNG Rule) would “[a]void[] any risks to public health and safety or environmental consequences (to include direct or indirect greenhouse gas (GHG) emissions) that are being evaluated in the companion rulemaking and in ongoing research efforts,” and would “reduc[e] the potential for economic burdens by ensuring that entities avoid ordering rail tank cars compliant with the current requirements when the companion rulemaking may adopt alternative requirements.” *Id.* at 61,732.¹⁰

PHMSA also admitted that a significant number of serious questions about the risks associated with transporting LNG by rail went unanswered when it promulgated the 2020 LNG Rule. For example, the LNG Task Force (consisting of staff from PHMSA and the Federal Railroad Administration) had not yet completed critical safety assessments: “several tasks—including full-scale impact testing,

¹⁰ More recently, PHMSA stated in an April 2023 letter denying an application to renew a special permit to transport LNG by rail tank car that “PHMSA understands that new information casts doubt on the continued validity of the balance between potential benefits and risks (economic, public safety, and environmental) underpinning the [2020] LNG by Rail Final Rule,” and cited to the proposed Suspension Rule to support that statement. Thomas Declaration, Ex. C at 1.

puncture and derailment simulation modeling, and LNG portable tank pool fire testing—are not expected to be completed until sometime in 2022.” *Id.* at 61,733. Moreover, PHMSA admitted that, when it issued the 2020 LNG Rule, it had been uncertain about “the potential benefits and safety and environmental risks of rail transportation of LNG” and that this uncertainty has since “in fact increased.” *Id.* at 61,735.

PHMSA further noted that a PHMSA-partner committee (the Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine), tasked with studying the safety of transportation of LNG by railcar, did not even begin its work until the very month that PHMSA issued the 2020 LNG Rule. *Id.* at 61,733–34. When the Transportation Research Board issued its Phase I report, on June 15, 2021 (the “National Academies Phase I Report”), it expressed concerns about the risks associated with transporting LNG by rail tank cars, including the “incomplete status of tasks pertaining to full-scale impact testing, portable tank pool fire testing, worst-case scenario analysis, and quantitative risk assessment,” and it emphasized “pending tasks necessary to understand the potential risks to public and worker safety arising from releases during loading, unloading, and transloading of LNG tank cars.” *Id.* at 61,734.

In the proposed Suspension Rule, PHMSA acknowledged that the National Academies Phase I Report had also identified many “information gaps in its and the

LNG Task Force’s work that PHMSA was not aware of when it issued the 2020 LNG Rule.” *Id.* at 61,735. Specifically, PHMSA cited the report’s identification of “gaps concern[ing] testing and the evaluation of public safety and environmental risks (*e.g.*, relating to full-scale impact testing, pool fire testing, worst-case analysis, and quantitative risk assessment)—including testing on which PHMSA had relied in the LNG by Rail final rule.”¹¹ *Id.*

D. PHMSA fails to timely follow through on its rulemakings.

Since these consolidated cases entered abeyance 26 months ago, Respondents have repeatedly failed to meet their own target dates for addressing the 2020 LNG Rule. In a January 2022 report on DOT rulemakings, Respondents estimated that PHMSA would issue a final decision on the proposed Suspension Rule on June 30, 2022, and a notice of proposed rulemaking to amend the 2020 LNG Rule on September 26, 2022. Document #1938736 at 4. In their June 2022 status report, Respondents advised that PHMSA would not meet those target dates. Document #1950001 at 3.

¹¹See also Thomas Declaration, Ex. D at 5-10. PHMSA stated in its proposed Suspension Rule that the National Academies Phase I Report “also emphasized the need for a robust understanding of the potential risks to public and worker safety arising from releases during loading, unloading, and transloading of LNG tank cars, and improved emergency planning and response training and resources, further underscoring the importance of PHMSA taking additional time to ensure it fully understands and considers uncertainties.” 86 Fed. Reg. at 61,735.

In the Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, Respondents estimated that PHMSA would issue a final decision on the proposed Suspension Rule in December 2022 and a notice of proposed rulemaking to amend the 2020 LNG Rule in January 2023. Document #1962485 at 4. In their September 2022 status report, however, Respondents again stated that PHMSA would not complete those actions by the estimated dates and that it planned to announce new estimates soon. Document #1962485 at 4.

In the September 22, 2022, DOT Significant Rulemakings Report, Respondents estimated that PHMSA would issue a final decision on the proposed Suspension Rule on March 13, 2023, and a notice of proposed rulemaking to amend the 2020 LNG Rule on March 20, 2023. Document #1976558 at 5. But then, in their March 2023 status report, Respondents again stated that PHMSA would not meet those target dates either. Document #1988810 at 3. Recently, Petitioners learned from Respondents' counsel that the agency was aiming to submit a final suspension rule to the White House Office of Management and Budget (OMB) in early summer 2023.¹² As of the date of the filing of this motion, Petitioners have

¹² While Petitioners believe the Court should be apprised of this potential future event, Petitioners do not view Respondents' current plans as being materially different from the previously provided, non-binding deadlines for temporarily suspending the 2020 LNG Rule that Respondents repeatedly failed to meet. If anything, Respondents' current plans are even less concrete because they do not include an expected date for issuing the final Suspension Rule. Moreover, as

not been notified of any final suspension rule having been submitted to OMB for interagency review.

Thus, although the public comment period closed nearly a year-and-a-half ago, PHMSA still has not finalized its temporary Suspension Rule. As for the hypothetical “amendment rule,” PHMSA has provided no timeline for when it might propose such a rule for notice and public comment.

ARGUMENT

A. **Petitioners’ challenges to the 2020 LNG Rule are ready for adjudication.**

When a federal court has jurisdiction, its “‘obligation’ to hear and decide a case is ‘virtually unflagging.’” *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). This obligation is fundamental to our constitutional system, and the federal courts should decide cases that are properly presented to them absent the most compelling circumstances. *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 71 (2009) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given... Questions may occur which we would gladly avoid; but we cannot avoid them.”) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

discussed in this motion, the prospect of temporarily suspending the rule does not justify holding this case in abeyance any longer.

More than two years have passed since the Court placed these consolidated cases into abeyance, yet the 2020 LNG Rule remains in full force and effect. As Respondents' status reports show, Respondents have repeatedly set target dates for proposing and finalizing two separate rules related to the 2020 LNG Rule. The first, a proposed rule that would temporarily suspend the 2020 LNG Rule, was published in November 2021, with the public comment period closing December 23, 2021. More than sixteen months later, PHMSA has yet to finalize that proposal. Respondents have thrice offered an estimated date for finalizing the proposed Suspension Rule but have failed to meet that date each time.

The status of PHMSA's promised "amendment rule" is even murkier. And, significantly, PHMSA has provided no basis to conclude that this rule, which remains hypothetical, will actually address the significant safety and environmental issues that caused Petitioners to challenge the 2020 LNG Rule.

As this Court has previously warned, an agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." *Am. Petroleum Inst.*, 683 F.3d at 388; *see also Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 480 F. Supp. 3d 256, 280 (D.D.C. 2020) (citing *Am. Petroleum Inst.* in rejecting argument that case was prudentially unripe). Such is the case here. More than two years after this case entered abeyance, PHMSA

has merely proposed to temporarily suspend the 2020 LNG Rule. PHMSA has not even proposed a rule to repeal or meaningfully amend the challenged 2020 LNG Rule, and Respondents' March 2023 status report to this Court lacked any estimate of when they might do so.

So long as the 2020 LNG Rule remains in effect, industry can lawfully ship LNG—with no requirement to provide notice to regulators, much less seek additional regulatory approval—in rail tank cars that have never been demonstrated to be safe for transporting this highly hazardous cargo. Further, both the rail and petrochemical sectors have continued to demonstrate their intent to rely on the 2020 LNG Rule during the two years that this case has been held in abeyance. In December 2021, for example, CSX Transportation (CSX) informed PHMSA that, “in reliance on the LNG Final Rule, CSX is working on several projects to transport LNG by rail in or before 2024.”¹³ And in August 2021, PHMSA received a request for a special permit to ship cryogenic ethane by rail using the same class of tank cars

¹³ Thomas Declaration, Ex. E at 1 (emphasis added). In a subsequent “listening session,” CSX provided Respondents with information on CSX’s view of how the market was responding to the proposed Suspension Rule. It is not clear from the publicly available minutes of that meeting, however, that CSX was also referring to the same projects it referenced in its December 2021 comments to PHMSA on the proposed Suspension Rule.

See <https://www.regulations.gov/document/PHMSA-2021-0058-7064>.

authorized for transporting LNG by the 2020 LNG Rule, based largely on a comparison of the safety risks posed by the two commodities.¹⁴

And while the status of the 2020 LNG Rule remains unchanged from when this case entered abeyance, the dangers of transporting LNG by rail have become increasingly clear over that time. The National Academies Phase I Report, issued in June 2021, revealed a disturbing number of research gaps in the data available to PHMSA when it finalized the 2020 LNG Rule, including a lack of puncture testing of the DOT-113C120W9 tank car.¹⁵ A subsequent National Academies report released in September 2022 (the “National Academies Phase II Report”) confirmed that research gaps concerning the safety of transporting LNG in DOT-113C120W9 tank cars continue. The National Academies Phase II Report further recommended that (1) PHMSA and the Federal Railroad Administration further review and test the DOT-113C120W9 tank car, noting that the limited testing that had been conducted was inadequate to answer many remaining safety questions; and (2) no such tank cars be put into service until PHMSA and the Federal Railroad Administration complete a safety assurance plan meeting the requirements specified in the report.¹⁶ Further, the insufficiency of existing safety measures to prevent accidents involving hazardous cargos transported by rail has been underscored by a series of high-profile

¹⁴ See Thomas Declaration, Ex. F at 3.

¹⁵ See Thomas Declaration, Ex. D at 5-6, 23-26.

¹⁶ Thomas Declaration, Ex. G at 2-3, 47-51.

derailments, including the recent catastrophe in East Palestine, Ohio.¹⁷ Accordingly, the 2020 LNG Rule continues to place Petitioners' members and residents, as well as communities, train crews, first responders, and the environment, at risk.

Before it entered abeyance, this case was moving towards a resolution on the merits. Respondents produced an index of the administrative record, the Court ordered the parties to submit proposed briefing formats, and the Court ordered Petitioner Puyallup Tribe to brief its request to supplement the record in its merits briefing. Document #1881148, #1882548. Yet the case has languished for more than two years with little visible movement toward resolution of the many problems that Respondents admit are presented by the 2020 LNG Rule. This Court should heed its “virtually unflagging” obligation to hear the consolidated cases by lifting the abeyance and directing the parties to submit a joint briefing proposal so that Petitioners' challenges to the 2020 LNG Rule can be resolved on the merits. *See Sprint Commc'ns, Inc*, 571 U.S. at 77.

B. There are no prudential reasons to extend the abeyance any further.

When Respondents asked this Court to hold the 2020 LNG Rule challenges in abeyance, they relied on *American Petroleum Institute* (Document #1886040 at 5), in which this Court held a rulemaking challenge in abeyance after deeming it “unripe

¹⁷ Indeed, PHMSA's latest status report acknowledged the East Palestine incident's relevance here. *See* Document #1988810 at 3. *See also supra* note [4] (listing stories of recent derailments).

as a prudential matter.” *Am. Petroleum Inst.*, 683 F.3d at 384. “The prudential ripeness doctrine ‘exists to prevent the courts from wasting [their] resources by prematurely entangling [themselves] in abstract disagreements.’” *Cigar Ass’n of Am.*, 480 F. Supp. 3d at 280, *aff’d sub nom. Cigar Ass’n of Am. v. United States Food & Drug Admin.*, 5 F.4th 68 (D.C. Cir. 2021) (quoting *Nat’l Treasury Emps. Union v. United States*, 1010 F.3d 1423, 1431 (D.C. Cir. 1996)). Here, by contrast, Petitioners do not seek to entangle the Court in a premature adjudication over abstract disagreements, but rather to remove this case from abeyance to enable the timely disposition of Petitioners’ claims. Indeed, as this Court also recognized in *American Petroleum Institute*, an agency cannot “stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way.” *Am. Petroleum Inst.*, 683 F.3d at 388.

This Court tends to look to two factors to determine whether a case should be held in abeyance for prudential reasons: (1) whether the agency faces a binding deadline and (2) whether a proposed action will directly address the issues presented by the pending petition for review. *See e.g., Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552–53 (D.C. Cir. 2012) (placing case in abeyance in December 2012, based on government’s “binding representations” that it would propose a new rule in the first quarter of 2013, and issue a final rule before August 2013); *Teledesic LLC v. FCC*, 275 F.3d 75, 82-83 (D.C. Cir. 2001) (denying abeyance during the FCC’s

consideration of a parallel petition for reconsideration and resolving “remaining challenges” that were not ultimately addressed by the agency’s order on reconsideration); *see also Labor Council for Latin Am. Advancement v. EPA*, 12 F.4th 234, 253 (2d Cir. 2021) (finding case prudentially unripe where agency proposed a rulemaking that would address the petitioners’ concerns on the same day it promulgated the challenged final rule and noting that “if the delay occasioned by our reliance on prudential ripeness were open-ended,” the petitioners “would have a stronger argument against application of that doctrine”). Neither factor favors Respondents here.

American Petroleum Institute provides an instructive contrast. There, the petitioner challenged an EPA regulation regarding the definition of solid waste. 683 F.3d at 387–88. That same provision was also challenged, though on different grounds, by the Sierra Club. *Id.* at 386. The Sierra Club settled its challenge with EPA in an agreement requiring EPA to publish a proposed rule addressing the challenged provision within nine months and to finalize that proposal within eighteen months. *Id.* After the parties in *American Petroleum Institute* completed briefing, EPA proposed a rule consistent with the terms of the settlement that would have significantly amended the challenged rule if finalized. *Id.* at 384. As a result, this Court deemed the challenge prudentially unripe and placed the case in abeyance, subject to regular reports on the status of the proposed rulemaking. *Id.* The Court

reasoned that EPA’s proposed changes, which the agency had made a legally binding commitment to finalize by a specified date, would obviate the need to reach the merits of the American Petroleum Institute’s challenge. *See id.* at 387–88.

The circumstances here are nothing like those in *American Petroleum Institute*. PHMSA faces no binding deadline to finalize its temporary suspension of the 2020 LNG Rule, much less any deadline to repeal or meaningfully amend the 2020 LNG Rule. Instead, it has merely announced non-binding target dates for temporarily suspending the LNG Rule and proposing an “amendment rule”—dates that it has repeatedly failed to meet.¹⁸ Respondents’ March 2023 status report to this Court fails even to identify target dates to advance these rulemakings.

Additionally, PHMSA has provided no details of what its hypothetical “amendment rule” might accomplish. Thus, unlike in *American Petroleum Institute*, where the Court knew that EPA’s proposed rule would obviate the petitioner’s challenge, this Court has no way to assess what effect, if any, PHMSA’s promised “amendment rule”—assuming PHMSA ever proposes and finalizes one—could

¹⁸ PHMSA has shown that despite competing rulemaking priorities, the agency is capable of swiftly completing rulemaking that alters the regulation of LNG transport by rail. It took PHMSA 14 months to develop, propose, and finalize the 2020 LNG Rule after President Trump directed PHMSA to do so in April 2019 by Executive Order 13868. But nearly 28 months have passed since President Biden’s Executive Order 13990 directed PHMSA to reconsider the 2020 LNG Rule, and it has been over 16 months since the close of the public comment period on PHMSA’s proposed Suspension Rule.

have on Petitioners' challenge. What is known is that the 2020 LNG Rule, which Petitioners timely challenged, remains in effect.

As this Court made clear in *American Petroleum Institute*, an agency cannot render a challenge prudentially unripe by suggesting that, at some unidentified time in the future, it might amend the challenged regulation. *Am. Petroleum Inst.*, 683 F.3d at 388 (recognizing that an agency cannot “stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way”); *see also Kyle-Label v. Selective Serv. Sys.*, 364 F. Supp. 3d 394, 404 (D.N.J. 2019) (citizens' rights “cannot be held hostage to a possibility that a commission is investigating a particular policy, which may or may not give rise to legislation, which may or may not be enacted into law”). Indeed, at least one court has rejected an agency's claim that Executive Order 13990—the very Executive Order that directed Respondents to reconsider the 2020 LNG Rule—could justify holding a case in abeyance. *See Pasqua Yaqui Tribe v. EPA*, CV-20-00266-TUC-RM, 2021 WL 4844323, at *2 (D. Ariz. Apr. 12, 2021) (declining to hold a case in abeyance where the two agencies involved requested time only to consider modifying a challenged rule). The Court should reach a similar conclusion and remove this case from abeyance.

The hardship associated with any further delay in adjudicating Petitioners' challenges to the 2020 LNG Rule only confirms the importance of lifting the

abeyance here. As explained above, PHMSA has admitted that the safety analysis underlying the LNG Rule suffered from “information gaps,” “uncertainties,” and “incomplete” testing and analyses. 86 Fed. Reg. at 61,734–35.

But as long as the 2020 LNG Rule remains in effect, industry can ship LNG in the tank cars specified by that rule without providing any additional regulatory notice, much less obtaining any approval. As such, the dangers that the 2020 LNG Rule poses to the public, train crews, first responders, and the environment are significant and real.

In sum, there are no prudential reasons to defer Petitioners’ challenges any longer. The 2020 LNG Rule remains in effect, and PHMSA has given no reason to believe that it has any concrete plans to voluntarily annul it. Any relief that would come from PHMSA finalizing its Suspension Rule would be temporary. Thus, there is nothing overriding this Court’s “virtually unflagging” obligation to hear Petitioners’ challenge. *Sprint Commc’ns*, 571 U.S. at 77.

CONCLUSION

For all these reasons, Petitioners respectfully ask the Court to lift the abeyance and direct the Parties to submit a proposed briefing schedule and format within fourteen days of the Court’s order.

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Dated this 17th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 4,837 words.
2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the District of Columbia Circuit by using the appellate CM/ECF system on this 17th day of May, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

DATED this 17th day of May, 2023.

/s/ Nicholas G. Thomas

Nicholas G. Thomas