

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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PUBLIC CITIZEN HEALTH RESEARCH		)	
GROUP, <i>et al.</i> ,		)	
		)	
	Plaintiffs,	)	Civil Action No. 18-1729 (TJK)
		)	
	v.	)	
		)	
PATRICK PIZZELLA, <i>et al.</i> ,		)	
		)	
	Defendants.	)	
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**PLAINTIFFS’ RESPONSE TO DEFENDANTS’  
SUPPLEMENTAL BRIEF ON MOOTNESS**

Defendants assert that the 2019 Rollback Rule “permanently rescinded” the July 2018 reporting deadline, “thereby superseding” the 2018 Suspension Rule challenged in this case. Defs. Supp. Br. 1, ECF No. 36. Defendants’ argument fails because the 2019 Rollback Rule took effect on February 25, 2019, is not retroactive, and did not address the July 2018 deadline. The Suspension Rule remains in effect and is depriving plaintiffs of access to the data that the 2016 Electronic Reporting Rule required employers to submit before the Rollback Rule was even proposed. Thus, there remains a live controversy between the parties as to the validity of the Suspension Rule, and, regardless of the outcome of the cases challenging the Rollback Rule, the Court can still order effective relief in this case: The Court can “declare the earlier suspension of the Rule unlawful, require OSHA to recognize the July 2018 submission deadline, and give Plaintiffs the relief they seek—data that employers should have been required to submit to OSHA by July 2018.” *Pub. Citizen Health Research Grp. v. Acosta (PC HRG)*, 363 F. Supp. 3d 1, 21 (D.D.C. 2018).

**I. The 2019 Rollback Rule did not rescind the July 2018 reporting deadline or supersede the Suspension Rule because the Rollback Rule is not retroactive.**

OSHA claims that the 2019 Rollback Rule “permanently rescind[ed] the collection requirements covered by the 2018 [Suspension Rule] ... because the 2019 Rule superseded the 2018 [Suspension Rule] by eliminating the provisions of the 2016 Rule that Plaintiffs ask this Court to enforce.” Defs. Supp. Br. 5. OSHA’s assertion would be correct only if the Rollback Rule were retroactive. It is not. An agency may not promulgate a retroactive rule absent express congressional authorization, and no such authorization has been provided. *See* Pls. Supp. Mem. 2–3, ECF No. 35.

In a footnote, OSHA acknowledges “the general principle that ‘legislative rules be given future effect only.’” Defs. Supp. Br. 8 n.4 (quoting *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987)). While taking the position that the Rollback Rule rescinded the 2018 reporting requirements, OSHA at the same time argues that the Rollback Rule is not actually retroactive, because a rule is not retroactive just because it upsets expectations based on the prior rule. *Id.* (citing *DirectTV, Inc. v. FCC*, 110 F.3d 816, 825–26 (D.C. Cir. 1997)). Here, however, construing the Rollback Rule to rescind the 2018 collection requirements would go beyond “upset[ting] expectations”; it would relieve covered employers of a legal obligation imposed by the 2016 Electronic Reporting Rule and unlawfully suspended by the 2018 Suspension Rule. Thus, OSHA faces a conundrum: It cannot show mootness unless it construes the Rollback Rule to lift the 2018 reporting requirement, but it cannot construe the Rollback Rule to lift the 2018 reporting requirement unless the rule is impermissibly retroactive.

Moreover, OSHA’s argument that the Rollback Rule “eliminates the requirements plaintiffs would have this Court enforce,” Defs. Supp. Br. 7, contradicts OSHA’s position during the rulemaking and in earlier papers in this case. In both the NPRM and in the preamble to the

Rollback Rule, OSHA stated that it would not enforce the 2018 reporting requirement at issue here without first giving notice. 83 Fed. Reg. 36494, 36496 (Jul. 30, 2018); 84 Fed. Reg. 380, 382 (Jan. 25, 2019). OSHA's statements would make no sense if the Rollback Rule eliminated that requirement. And in its summary judgment papers in this Court, OSHA did not suggest mootness, but argued that, if the Rollback Rule were upheld, the question whether it should have to enforce the 2018 reporting requirement would "turn on the equities." Defs. Mot. 11, ECF No. 26. Therefore, as this Court has observed, the Rollback Rule's rescission of future reporting requirements does not prevent the Court from granting effective relief for the unlawful suspension of the 2018 deadline because "permanently rescinding the Rule *after* that compliance deadline passed and the obligations of covered employers were allegedly unlawfully postponed" would "not affect any alleged harm caused to Plaintiffs by [OSHA]'s original suspension of the July 2018 deadline—loss of access to data employers were required to submit by that date." *PC HRG*, 363 F. Supp. 3d at 21.

**II. OSHA has not repromulgated the Suspension Rule using notice-and-comment procedures.**

OSHA observes that "a challenge to an agency's failure to promulgate a regulation using notice and comment procedures" can sometimes be "mooted by subsequent repromulgation using those procedures," Defs. Supp. Br. 6, because "a court 'can hardly order [an agency] ... to do something that it has already done,'" *id.* (quoting *NRDC v. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814 (D.C. Cir. 1982)). That statement is correct but does not describe the situation here. Compliance with the procedural requirements of the APA with respect to issuing the Rollback Rule cannot cure the procedural deficiencies of the Suspension Rule because the two rules cover different things. The Suspension Rule eliminated the July 2018 reporting deadline. The Rollback Rule eliminated reporting requirements after February 2019. Indeed, in issuing the Rollback Rule,

OSHA did not seek comment regarding the July 2018 reporting deadline and the preamble to the Rollback Rule does not address the issue. Thus, the use of notice-and-comment procedures to issue the Rollback Rule is irrelevant to plaintiffs' claim that OSHA violated the APA by issuing the Suspension Rule without observance of notice-and-comment procedures and without a reasoned explanation.

The cases cited by OSHA on page 9 of its supplemental brief are inapposite for the same reason. In each of those cases, plaintiffs challenged rules that had been rescinded or superseded and no longer had any force. Here, in contrast, the Suspension Rule remains in force because it has not been rescinded or superseded by the Rollback Rule.

### CONCLUSION

The 2019 Rollback Rule does not moot plaintiffs' procedural and substantive challenges to the 2018 Suspension Rule. The Court should grant summary judgment for plaintiffs and order defendants promptly to notify covered employers that they must electronically submit the OSHA Form 300 and 301 data that the Electronic Reporting Rule required employers to submit by July 2018.

Dated: September 18, 2019

Respectfully submitted,

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