Case No. 07-1001

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

IN RE: AMERICAN FEDERATION OF LABOR AND CONGRESSION OF INDUSTRIAL ORGANIZATIONS AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL

Petitioners.

ON A ORIGINAL PETITION FOR WRIT OF MANDAMUS

AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN TRUCKING ASSOCIATIONS' RESPONSE TO THE AFL-CIO'S AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION'S PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

This case is about economic transference, not employee safety and health. The petitioning unions are asking this Court to compel the Secretary of Labor to issue what purports to be an occupational safety and health standard mandating that employers pay for certain required personal protective equipment, rather than leave the issue where it currently is: the bargaining table. Through employee-employer negotiations, employers already pay for the majority of personal protective equipment used in the workplace. But to mandate that they pay for all of it is pure economic regulation and well beyond the Secretary's authority to enact. Whatever the Secretary's view on this issue of economic *policy*, she simply does not have the *legal* authority to force employers to pay for personal protective equipment. Therefore, the unions should be petitioning Congress on this issue, not the courts or the Secretary.

Even if the Secretary did have authority to require employers to pay for personal protective equipment, mandamus is an extraordinary remedy that is not justified here. The administrative record does not present any duty to act, much less a clear one, and even if it did, the competing issues on the Secretary's docket have a significantly greater impact on workplace safety and health than the economic regulation at issue here. Accordingly, the petition should be dismissed without granting the unions any of the unnecessary relief they request.

FACTUAL BACKGROUND

Personal protective equipment ("PPE") is worn by approximately 20 million workers nationwide. PPE acts as a barrier, protecting employees from workplace hazards that are recognized or covered by specific OSHA standards, but cannot be more effectively eliminated through other means. PPE comprises a wide variety of items—a small sample includes hats; helmets; gloves; aprons; respirators; and coveralls. *See generally* Employer Payment for Personal Protective Equipment, 64 Fed. Reg. 15,402, 15,410-13 (Mar. 31, 1999) (listing the various types of PPE).

The AFL-CIO's and United Food and Commercial Workers International Union's (collectively the "Unions") petition in this case is part of a longstanding effort by organized labor to enlist the Occupational Safety and Health Administration in its collective bargaining efforts. The Secretary of Labor (the "Secretary") promulgated the current version of the general PPE standard—29 C.F.R. § 1910.132(a)—as a national consensus standard shortly after the Occupational Safety and Health Act ("OSH Act" or "Act"), 29 U.S.C. § 651, *et seq.*, was enacted. *See Union Tank Car Co.*, 18 OSHC (BNA) 1067, 1997 WL 658425 (OSHRC 1997). Almost immediately after the standard was promulgated, organized labor sought an interpretation that would require employers to pay for all PPE, rather than simply ensure that their employees used PPE, as the plain language of the standard required.

The union efforts were rebuffed. In *The Budd Company*, 1 OSHC (BNA) 1548, 1974 WL 3996 (OSHRC 1974), the Secretary cited an employer for violating the general PPE standard because its employees were not wearing required toe protection. The employer initially contested the citation, but then moved to withdraw its notice of contest subject to the Secretary finding that it was not required to pay for that toe protection. The Secretary agreed. The United Auto Workers—the authorized representative of the employer's employees—objected to this settlement and insisted, over the objections of the Secretary, that the general PPE standard required employers to provide *and pay for* required PPE. The Occupational Safety and Health Review Commission rejected the union's position, stating that the standard "imposes no duty on the employer to provide or pay for the equipment." *Id.* at *2. The Commission continued:

> Our interpretation comports, not only with settled rules of statutory construction, but, also, with the basic objective of the Act. The purpose of the Act is to 'assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' Unlike other labor statutes with essentially economic purposes (*e.g.*, Fair Labor Standards Act), the Act is concerned solely with safety and health in the work situation. Prescription of cost allocations is not essential to the effectuation of the Act's objectives. It is irrelevant for purposes of the Act who provides and pays for the equipment.

Id. at *2. (internal citation and footnotes omitted) (emphasis added).

The Court of Appeals for the Third Circuit affirmed. "[T]he Commission's interpretation of the regulation," the court held, "does not interfere with the attainment of the congressional purpose. This Act, unlike such legislation as the Fair Labor Standards Act, is not concerned with wage and hours, but rather with reducing the incidence of job-related injuries." *The Budd Co. v. OSHRC*, 513 F.2d 201, 206 (3d Cir. 1975). "[T]he cost of the shoes," the court noted, "may be compensated by other items in the collective bargaining settlement." *Id.* at 206 n.20.

Fifteen years after *The Budd Company*, the Secretary chose to revise the PPE standards to make them "more clearly written" and "more comprehensive." 54 Fed. Reg. 33,832. The Secretary finally issued the revised rule in 1994. "Neither the NPRM nor the final rulemaking addressed any requirement that employers must provide and pay for PPE. Indeed, neither addressed cost allocation at all." *Union Tank Car Co.*, 1997 WL 658425, at *2.

Nevertheless, in 1994 the Secretary issued an interpretative memorandum stating: "OSHA has interpreted its general PPE standard, as well as specific standards, to require employers to provide *and pay for* personal protective equipment . . . ." *Id.* (emphasis added) (quoting Memorandum to Heads of Directorates from James W. Stanley, Deputy Assistant Secretary (Oct. 18, 1994)). After reiterating that interpretation in various interpretation letters and enforcement

guidelines—but without going through notice-and-comment rulemaking—the Secretary attempted to enforce this new interpretation against Union Tank Car Company. *Id.* at *3.

The Commission once again rejected this attempt to require employers to pay for PPE. "The Secretary's new interpretation," the Commission observed, "comes after twenty years of uninterrupted acquiescence in the interpretation the Commission announced in *Budd*." *Id.* Because the Secretary failed to adequately explain her change of position, the Commission refused to give it deference, rejected it, and vacated the citation. *Id.* at *4.

Rather than appeal the Commission's decision in *Union Tank*, the Secretary announced that she would initiate a rulemaking on the issue of employer payment for PPE. *See* News Release, OSHA Decides Not to Appeal Review Commission Ruling on Union Tank Personal Protective Equipment Case (Dec. 12, 1997) (attached as Exhibit D to the Unions' petition). As the News Release demonstrates, the Secretary had a clear idea of what she wanted to do before this rulemaking began. "'OSHA will revise its policy directive to make clear that we expect employers to pay for protective equipment that is not uniquely personal in nature,'" the News Release states. *Id.* (quoting Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health). The Secretary did not expect this initiative to require a significant rulemaking effort because she

"believe[d] that this issue affect[ed] only a small number of employers." *Id.* Accordingly, the Secretary hastily convened an unidentified panel of "experts" that quickly delivered the desired finding: forcing employers to pay for PPE will increase PPE usage and reduce workplace injuries. 64 Fed. Reg. at 15,421.

In fact, the Secretary's estimate of the benefits of the proposed rule relied on the guess of just one of the panel's "experts." *Id.* This mystery "expert" speculated that requiring employer payment would cut PPE non-use or misuse by more than 50%. *See id.* The basis of this statement was not revealed. *Id.* Relying on this speculation, the Secretary proposed a revised PPE standard requiring employer payment for almost all PPE on March 31, 1999. *See generally id.* at 15,402. The implications, complexities, and issues presented by the proposed rule were quickly exposed during the comment period. For example, United Parcel Service's Comments described numerous flaws in the rulemaking and the regulation, such as the complete failure to justify the proposed rule as a health and safety standard under the OSH Act. *See* Comments of United Parcel Service at 4-10 (July 23, 1999) (attached as Exhibit A). Faced with unexpected opposition, the Secretary stepped back from the initially proposed schedule and reconsidered the rule.

In 2003, unconcerned by the Secretary's other priorities—such as dealing with the increased security risks created by the September 11, 2001 terrorist

attacks, anthrax, and the creation of a comprehensive ergonomics initiative—the Unions filed a formal request with the Secretary to finish the proposed PPE rulemaking within 60 days.[1] *See* Petition to the Honorable Elaine Chao, Secretary of Labor (April 10, 2003) (attached as Exhibit F to the Unions' petition). The Secretary appropriately elected to focus on more pressing priorities. In 2004, the Secretary returned briefly to the PPE rulemaking and reopened the notice-and-comment process in order to flesh out certain troublesome issues. *See* 69 Fed Reg. 41,221 (July 8, 2004).

While the Secretary was still considering how to address the difficult and complex issues raised in both the first and second comment periods, the Unions filed a petition for writ of mandamus in this Court on January 3, 2007 seeking to cut short the Secretary's deliberation and compel the completion of the PPE rulemaking within 60 days. Pet. at 18. On February 16, this Court ordered the Secretary to respond by March 19. The Chamber of Commerce of the United

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[1] *See* Statement of John L. Henshaw, Assistant Secretary for Occupational Safety and Health U.S. Department of Labor before the Subcommittee on Labor, Health, and Human Services, and Education House Appropriations Committee (May 1, 2003), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=346 (discussing the ergonomics initiative); Statement of John L. Henshaw, Assistant Secretary for Occupational Safety and Health U.S. Department of Labor before the Subcommittee on Labor, Health, and Human Services, and Education House Appropriations Committee (Feb. 14, 2002) http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=267 (discussing OSHA's response to September 11 and anthrax).

States of America, National Association of Manufacturers, and American Trucking Associations, Inc. have moved to file this Response in support of the Secretary to prevent unlawful regulation and harmful and unnecessary interference in the Secretary's reasonable and appropriate ordering of priorities.

ARGUMENT

The Unions seek a nearly unprecedented and wholly unjustified judicial intrusion into the policy-making decisions of the Executive branch. *First*, the complicated administrative record in this matter is insufficient to establish a clear duty to regulate, eviscerating the key prerequisite to mandamus relief. *Second*, even if a clear duty did exist, the Secretary's actions are not only reasonable, but entirely appropriate in light of the scant health benefits likely to flow from the proposed PPE rule and the serious risks to employee health posed by other hazards that the Secretary is presently attempting to regulate. Even extended deliberation cannot justify re-ordering agency priorities to put less important matters first. *Third*, the Secretary does not have the authority to issue the proposed rule, which is a naked attempt at economic regulation, not an occupational safety and health standard. This Court cannot compel the Secretary via mandamus to do something that she lacks statutory authority to do. For all these reasons, the Unions' petition must be dismissed.

I. The Unions Are Not Entitled To Mandamus Relief Because The Secretary Has No Clear Duty to Act And, Even If She Did, Her Decisions Have Appropriately Balanced Her Competing Priorities.

Not all threats to employee safety and health are of the same magnitude; it is the Secretary's responsibility to identify the most significant risks and allocate her resources accordingly. New hazards, and new information about previously recognized hazards, emerge constantly, forcing the Secretary to re-order her priorities and place in-process, but less compelling standards behind newer, more important concerns. As this Court has stated: "So long as [her] action is rational in the context of the statute, and is taken in good faith, the Secretary has authority to delay development of a standard at any stage as priorities demand." *Nat'l Cong. of Hispanic Am. Citizens v. Marshall*, ("*National Congress* II"), 626 F.2d 882, 888 (D.C. Cir. 1979). Accordingly, "[t]his court should intervene to *override* [the Secretary's] priorities and timetables only in the most egregious of cases." *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987) (emphasis in original).

This case does not approach that demanding standard. As a threshold matter, mandamus relief ordering the Secretary to act is available only where the Secretary has a clear duty to act. Here, the Secretary's tentative conclusion reflected in her proposed standard—that the rule would improve workplace

safety—relied on the unsupported opinion of one unidentified "expert." This "expert" opinion stands in sharp contrast to persuasive empirical evidence that her standard will likely *increase* the risks to employee safety and health. *Compare* 64 Fed. Reg. at 15,421-22 (relying on the guess of one "expert" to estimate the number of injuries potentially avoided by forcing employers to pay for PPE) *with* Comments of United Parcel Service at 15-16 (attached as Exhibit A) (explaining that injury rates in states that require employers to pay for PPE are *higher* than the national average). While we recognize that a dispute about the merits must await a challenge to a final rule, if any, at the very least this dispute highlights the absence of a clear duty to act. Even if the Secretary did have such a duty—and she does not—her reasoned decision to take the time necessary to understand the limitations of her jurisdiction and the complexities of the proposed PPE rule while also working on several other major rulemakings is laudable; it should not be casually labeled unreasonable delay. Moreover, there is no dispute that many of the issues on the Secretary's regulatory agenda have a much more significant impact on employee safety and health than the question of who pays for PPE. For all of these reasons, the Unions' attempt to move their economic regulation to the front of OSHA's regulatory agenda should be rejected.

A. The administrative record before OSHA does not create the clear duty to act necessary for mandamus relief.

The guess of one unidentified "expert" does not create a clear duty to act sufficient to warrant mandamus relief. A writ of mandamus compelling agency action "is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). Whether the Secretary has a clear duty to regulate a specific hazard depends on the number of employees exposed and the severity of the hazard—indeed, in this case, whether a hazard exists *at all* simply because employees may be paying in whole or in part for their own PPE while working under hazard-free conditions. *See* 29 U.S.C. § 655(g) (requiring the Secretary to consider the urgency of the need for regulation in determining the priority for establishing standards); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.* ("*Benzene*"), 448 U.S. 607, 639 (1980) (holding that Secretary can regulate *only* if a "*significant* risk of a *material* health impairment" exists (emphases added)). In addition, there must be compelling evidence in the record that the failure to regulate promptly will expose workers to significant hazards because mandamus relief "presupposes . . . that the evidence before the agency sufficiently demonstrates that delay will in fact adversely affect human health to a degree which necessitates a priority response." *Oil, Chemical & Atomic Workers Union v. OSHA*, 145 F.3d 120, 123 (3d Cir. 1998).

This Court has applied these principles to justify granting mandamus only where the Secretary has failed to regulate an obvious and severe hazard—like exposure to a known carcinogen—not in cases where the benefits are speculative at best. For instance, in *In re International Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992), this Court granted mandamus relief and ordered the agency to complete its rulemaking by a set deadline in light of the "undisputed health risks of cadmium," a known carcinogen. *Id.* at 1148. In contrast, this Court refused to grant mandamus relief in *In re Mine Workers of America International Union*, 190 F.3d 545 (D.C. Cir. 1999), because there was "insufficient record evidence that a substantial health risk [from exposure to diesel gases] would result from some further delay in promulgating the regulation petitioner seeks." *Id.* at 553.

Here, the significant issues raised during the original comment period to this rulemaking justify the Secretary's cautious, deliberate approach. The NPRM asserted three reasons why employer payment would enhance employee protection. The notice-and-comment period exposed serious flaws in all three and further supports the Secretary's deliberate approach to this difficult standard.

1. First, the NPRM asserted that employers should pay for all PPE because they can best "select, order, and obtain the proper type and design of PPE" and "require standardized procedures for cleaning, stor[age], and maint[enance]."

64 Fed. Reg. at 15,409, 15,419. Comments exposed these arguments as *non sequitors*—employers can do all of these things without paying for PPE and can fail to do all of them if they do pay for PPE. *See, e.g.,* Comments of the Texas Association of Builders at 2 (attached as Exhibit B); Comments of Edison Electric Institute at 3 (attached as Exhibit C); Comments of United Parcel Service at 17-18 (attached as Exhibit A). For example, an employer can initially buy PPE and be repaid by employees. Likewise, employers can require standardized maintenance procedures for PPE purchased by employees. Simply, *who pays* has no bearing on the employer's day-to-day obligation to ensure that PPE is properly used and maintained.

2. Second, the NPRM suggested that because employers have ultimate statutory responsibility for safety and health, they must pay for PPE. This argument simply begs the question. *See, e.g.,* Comments of United Parcel Service at 19-20 (attached as Exhibit A). Employers are responsible for ensuring that employees use mandatory PPE. That responsibility is the same whether they pay for PPE or employees pay for it. Accordingly, who is ultimately responsible for violations of the Act has no bearing on who must pay for PPE.

3. Third, and finally, the NPRM posited that "requiring employees to pay for PPE may discourage their use of PPE" because "[t]here is always

reluctance to use one's own funds to pay for replacing or repairing workplace PPE." 64 Fed. Reg. at 15,409, 15,421. The simple response to this assumption lies in the employer's direct and non-transferable responsibility to enforce PPE use regardless of an employee's reluctance to pay for lost, replacement, or discounted PPE; as long as PPE is worn, safety and health are not compromised. In any event, these cost issues are precisely the stuff of collective bargaining and daily employee-employer relationships. The Secretary is wise in carefully deliberating and considering whether the current system of resolving such payment issues is broken before jumping into the fray and issuing a PPE payment requirement.

The nettlesome issues raised during the comment period not only warrant the Secretary's decision to carefully consider them, they obviate any duty to act that might have existed had the NPRM's assumptions gone unopposed. Accordingly, the drastic remedy of mandamus cannot be justified.

B. Even assuming the Secretary had a clear duty to act on the PPE rule, the Secretary's decision to take the time necessary to consider the serious arguments against her proposed PPE rule while advancing other more important rulemakings is entirely appropriate.

Even assuming the Secretary had a clear duty to amend the PPE rule—and she does not—her refusal to prematurely issue the rule without the necessary consideration does not amount to unreasonable delay. As this Court has stated on

numerous occasions, an agency's rulemaking timetables are judged by a "rule of reason." *E.g., Telecomms. Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984). No *per se* rule controls how long is too long for agency rulemaking. Rather, the facts of each case must be judged in light of the consequences of agency delay, any deadlines provided in the statutory scheme, whether the disputed rule addresses human health and welfare versus merely economic concerns, and the importance of competing issues on the agency's docket. *Id.* Here, the Secretary's deliberate prioritizing of more important rules over the proposed PPE standard is entirely appropriate and reasonable because, as even the Secretary admits, the standard is essentially economic regulation that appropriately takes a back seat to more pressing safety concerns. Further, as discussed above, the Secretary must be given the opportunity to grapple with the many complex issues associated with requiring employer payment for PPE.

1. No *per se* rule governs when agency deliberation becomes unreasonable delay; extended rulemakings are regularly accepted when the consequences of agency delay would not be significant.

An agency's timetable for rulemaking is a classic exercise of the agency's sound discretion. *See Nat'l Cong. of Hispanic Am. Citizens v. Usery* ("*National Congress* I"), 554 F.2d 1196, 1200 (D.C. Cir. 1977). The Unions do not seriously contend that the proposed PPE rule is more important than other issues on the

Secretary's docket. Nor do they contend that the Secretary has somehow acted in bad faith with respect to the rule. Rather, the main thrust of their argument is that, irrespective of the specific factual circumstances justifying a longer timetable, an eight-year gap between a notice of proposed rulemaking and the issuance of the final rule is *per se* unreasonable. This position has been expressly rejected by this Court in the past and should be rejected now.

The absence of a *per se* rule is black letter law in this Court. *E.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). Rather, each case must be examined on its particular facts. *See United Mine Workers*, 190 F.3d at 552. Although this Court has found delays less than that at issue here unreasonable, it has done so only where the consequences of agency inaction are severe, *i.e.* the agency is ignoring a significant and pervasive threat to health and safety or the agency's delays create deprivations of property without due process of law. *See, e.g., Auchter*, 702 F.2d at 1157-58 (severe health hazard); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 341 (D.C. Cir. 1980) (deprivation of due process). In contrast, this Court and other courts have regularly countenanced delays of five, seven, and even ten years for economic regulations or safety regulations that are not as urgent. *See, e.g., Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) (ten year delay not unreasonable); *National Congress* II, 626 F.2d at 890 (seven year delay not unreasonable); *In re*

Monroe Comms. Corp., 840 F.2d 942, 947 (D.C. Cir. 1988) (five year delay considered far short of egregious); *Oil, Chemical & Atomic Workers Union*, 145 F.3d at 123-24 (five year delay not unreasonable even though there was a potential risk of serious exposure to carcinogens).

Under this sensible approach, even very extended delay here should not be particularly troubling. The proposed regulation on its face deals only with who pays in whole or in part for PPE, not exposure to any workplace hazards. Irrespective of who pays for PPE, as long as employers are enforcing the use of PPE, court intervention into this tendentious issue would appear to be unjustified.

2. The OSH Act does not contain specific deadlines because the Secretary *should* shift resources to more important problems even if less important rulemakings have already begun.

The Secretary's regulatory timetables are entitled to considerable deference because the OSH Act does not contain specific deadlines. While specific statutory deadlines may supply content to the rule of reason, *TRAC*, 752 F.2d at 80, the absence of such deadlines entitles the agency to "considerable deference" over rulemaking timetables. *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). In *National Congress* I, this Court expressly rejected the contention that the OSH Act imposes mandatory deadlines on the Secretary's rulemakings. 554 F.2d at 1200. The Court held that the Secretary had the discretion to "process higher-

priority standards more quickly than initiated ones" and "may rationally order priorities and re-allocate [her] resources . . . at any rulemaking stage." *Id.* at 1199-1200. When the same litigation again reached this Court, the Court reiterated its holding: "So long as [her] action is rational in the context of the statute, and is taken in good faith, the Secretary has authority to delay development of a standard at any stage as priorities demand." *National Congress* II, 626 F.2d at 888. Further, the OSH Act itself requires the Secretary to consider the "urgency" of the need for a proposed standard when "determining the priority for establishing standards." 29 U.S.C. § 655(g). Accordingly, under this Court's precedents and the plain text of the Act, the Secretary's rulemaking timetables are unreasonable only if she has irrationally chosen to prioritize less important rulemakings over the PPE standard.

She clearly has not done so. As long as effective PPE programs are in place and enforced, payment issues must be subordinate to other safety and health initiatives where exposure to workplace hazards would be directly affected. Accordingly, to the extent the PPE rulemaking has any place on the Secretary's regulatory agenda—and in fact it is a pure economic regulation that does not belong there at all—it belongs at the bottom of the Secretary's list of rulemakings.

A brief look at the Secretary's pending regulatory agenda—but without conceding that substantial evidence will support any specific final regulation—confirms that her priorities are not only rational, but eminently sensible. Among the dozens of issues on the Secretary's docket are:

- Exposure to crystalline silica
- Exposure to beryllium
- Exposure to ionizing radiation
- Rule for emergency response and preparedness
- Revision of standards regulating power presses
- Exposure to methylene chloride
- A standard to prevent suffocation and explosions in confined spaces; and
- Revisions to the standards regulating explosives.

Semiannual Agenda of Regulations of the Department of Labor, 71 Fed. Reg. 73,359, 73,564-69 (Dec. 11, 2006). Can it possibly be said that any of these issues is *less* important than deciding who pays for what type of equipment?

This Court has made clear that mandamus relief is only appropriate when it is *clear* that the rule in question is more important than other rules on the agency's agenda. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (mandamus relief is inappropriate where competing priorities are more important, "*even [if] all the other factors considered in TRAC*

favor[] it." (emphasis added)); *United Mine Workers*, 190 F.3d at 553 (denying the writ even though the delay was "substantial" because there was "no dispute that the agency's priorities [were] appropriate"). Because that exacting standard cannot be met here, the Secretary's priorities should not be disturbed by mandamus relief.

3. The Secretary's decision to postpone issuing the rule is not unreasonable for the further reason that the payment for PPE rulemaking involves complex issues that may not have been not fully appreciated when the Secretary initially proposed the rule.

The Unions' assertions that that the PPE rulemaking is "uncomplicated" and a "straightforward" issue are simply incorrect. Pet. at 12. The varieties of PPE are virtually limitless. Just a small sample includes gloves; shoes; goggles; aprons; rubber boots; respirators; helmets; coveralls, mouthpieces; and lab coats. *See* 64 Fed. Reg. at 15,410-13 (listing the various types of PPE). Further, the Secretary estimates that almost 20 million employees in industries covered by the rule use one or more forms of PPE. *Id.* at 15,417. A rulemaking that potentially affects so many workers across so many different industries can hardly be considered "uncomplicated."

More importantly, the Secretary has given no indication that she has addressed numerous thorny issues surrounding PPE payment. Just a few of these day-to-day human resource issues include:

- Employee complaints will trigger OSHA inspections regarding the schedule for PPE replacement, with potential work disruption if replacement is not fast enough.

- What happens if an employee forgets his PPE at home? Must the employer provide replacement PPE everyday? Or must employers keep all PPE on site?

- Can an employee be disciplined for failing to bring his PPE to work? Can he be docked pay? What if existing collective bargaining agreements—necessarily negotiated *before* this rule would be issued—allow such punishment? Is the employer then powerless to discipline a recalcitrant employee?

- If the employee loses or destroys his PPE, can the employer bill him for a replacement? If not, is there no limit to the amount of PPE an employer must provide?

- Who is liable for PPE that is stolen? And who makes the final determination over whether PPE was lost, stolen, or simply given away?

Under the current regulatory regime, absent a payment requirement, these issues are resolved on a daily basis and through the collective bargaining process in a manner that does not interfere with the operation of the workplace. Establishing OSHA as the arbiter of such decisions and others deserves very careful scrutiny before the regulatory plunge is finalized.

In light of these difficult outstanding issues, the Secretary has clearly not unreasonably delayed in issuing the rule. As this Court has often noted, forcing the issuance of a rule before it is fully thought out may well *slow down* eventual enforcement of the rule by increasing the chances of litigation, judicial

invalidation, and remand to the agency for further work. *See, e.g., Sierra Club*, 828 F.2d at 798-99. That is particularly true here in light of the importance of the issues yet to be addressed. Accordingly, the Secretary's attempt to carefully consider these issues is proper rulemaking; it is not unreasonable delay.

II. The Court Must Not Compel The Secretary To Issue The Proposed Rule Because She Lacks Authority To Enact Purely Economic Regulations.

If the Court finds that the Secretary's delay is so egregious that it warrants mandamus relief, then it must also determine whether the Secretary has authority to require employers to pay for PPE. In fact, the Secretary does not have such authority. The rule is clearly an economic regulation whose direct effect is to increase wages; it is not directly or immediately related to worker safety and health. Who pays for safety and health is a policy decision for the Congress—one that it has already made under very narrow circumstances in the OSH Act. Without such a Congressional decision to expand OSHA's ambit from safety and health to economic transference, the Secretary lacks statutory authority to act. Accordingly, even if mandamus were warranted here to combat egregious delay—and it is not—the Court cannot require the Secretary to issue the proposed rule.

A. This Court can only order the Secretary to act within the scope of her authority.

Basic principles of executive and judicial power prevent this Court from ordering the Secretary to act outside the scope of her authority. Like all other federal agencies, the Secretary's "power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to [her]." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). It is axiomatic that a court has no authority to expand or contract that power. *See, e.g., Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (noting that courts cannot assist an agency in expanding its power via a consent decree).

Mandamus relief to cure unreasonable agency delay is no different. As the Supreme Court unanimously held in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), mandamus relief is only available to compel agency relief that is "legally *required*." *Id.* at 63 (emphasis in original). "[A] delay cannot be unreasonable," the Court continued, "with respect to action that is not required." *Id.* at 63 n.1. If an agency does not have authority to engage in an act, then it follows *a fortiori* that that act is not "legally required." Accordingly, this Court cannot order the Secretary to issue the proposed PPE standard unless the Secretary has authority to issue the rule.

B. The Secretary lacks authority to issue the proposed PPE rule because it is an economic regulation that is not reasonably necessary to remedy a significant risk of material impairment to employee safety and health.

The Secretary can issue regulations only for the limited purpose of improving employee safety and health. In *American Textile Manufacturers Institute, Inc. v. Donovan* ("*Cotton Dust Case*"), 452 U.S. 490 (1981), the Supreme Court held that health and safety standards issued by the Secretary under the OSH Act must be justified solely "on the basis of their relation to safety or health." *Id.* at 538. "[T]he Act in no way authorizes OSHA to repair general unfairness to employees," the Court declared. *Id.* at 540. Accordingly, the Court invalidated an OSH Act standard designed to "minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator," because the Secretary's objective in issuing the rule was "unrelated to achievement of health and safety goals." *Id.* at 539-40 (citation omitted).

Further, the Secretary is limited to regulating *significant* risks of *material* impairment of employee safety and health. In the *Benzene Case*, the Supreme Court held that the OSH Act required a threshold determination that a proposed standard "is reasonably necessary and appropriate to remedy a *significant* risk of a *material* health impairment." 448 U.S. at 639 (emphasis added). Under this standard, the burden is on the Secretary to show that it is at least more likely than

not that long-term exposure to a hazard presents a significant risk of material health impairment. *Id.* at 653. The Secretary's conclusions in this regard must be based on "reputable scientific thought," not mere speculation. *Id.* at 656.

Taken together, *Benzene* and the *Cotton Dust Case* require all rulemakings under the OSH Act to be grounded in an effort to remedy significant risks of material health impairment in the workplace and the existence of significant risks of material impairment must be supported by substantial evidence. Simply, the PPE rulemaking cannot meet this standard because the "hazard" of employees being forced to pay for their own PPE will never itself rise to the level of a significant risk of material health impairment.

In *Erie Coke Corporation*, 15 OSHC (BNA) 1561, 1992 WL 82630 (OSHRC 1992), the Occupational Safety and Health Review Commission examined a citation issued by the Secretary under a standard that required the employer to "provide" his employees with flame resistant gloves. The Secretary interpreted "provide" to mean "pay for" and cited the employer for failing to pay for the gloves its employees were admittedly using. The Commission upheld the Secretary's interpretation, but reclassified the citation to *de minimis*—a technical notice with "no direct or immediate relationship to safety or health." 29 U.S.C. § 658(a). "Common sense," the Commission noted, "dictates that Erie's employees have the incentive to wear fully protective gloves because they know

burns could otherwise result." *Erie Coke*, 1992 WL 82630, at *8. Therefore, only a *de minimis* notice—which carries no penalty and requires no abatement—could be found because "Erie's employees [had] not been shown to have suffered any direct impairment of their safety and health as a result of having to pay for the gloves." *Id.* at *12.

After the Secretary appealed, the Court of Appeals for the Third Circuit affirmed the Commission. *Reich v. OSHRC*, 998 F.2d 134, 139 (3d Cir. 1993). "[T]he safety of Erie's employees was not jeopardized by the company's failure to pay for protective gloves," the court explained. *Id.* (The employer's petition was dismissed as untimely, so the court of appeals did not address the Secretary's authority to issue the citation. *Id.* at 137.)

Erie Coke demonstrates that requiring employers to pay for PPE does not address a significant risk of a material health impairment. Currently, employers are liable if their employees are not using required PPE or if the PPE employees are using is not in sufficiently good repair. Under the proposed rule, *employers would be liable under exactly the same sets of facts*. *See* 64 Fed. Reg. at 15,402 ("The proposed rule would not require employers to provide PPE where none has been required before."). Of course, under the proposed rule, employers will also be subject to *de minimis* notices if they refuse to pay for required PPE, see *Erie*

Coke, but such notices carry no penalties *and do not have to be abated*, meaning that even after being cited the employer would not be required to pay for employees' PPE. In short, the proposed rule creates no new protections for employees, it merely transfers wealth. Whatever the merits of that policy, the Secretary does not have authority under the OSH Act to pursue such purely economic goals. Therefore, the Unions' petition should be dismissed.

United Steelworkers of America, AFL-CIO v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), confirms this result. In that case, this Court upheld provisions of the lead exposure standard that required employers to move workers with high levels of lead in their blood to safer positions and required employers to maintain a worker's salary and seniority rights during removal. *Id.* at 1238. OSHA justified the rule as necessary to maintain the integrity of its lead exposure testing program—another section of the lead exposure standard—by producing substantial evidence that, without wage and seniority protection, workers would consume harmful toxins to defeat the tests and "lie[] to physicians about their subjective symptoms." *Id.* at 1237. Critically, each of these activities would lead to a significant risk of a material health impairment—undetected exposure to toxic levels of lead—in ways that could not be eliminated by employer monitoring. Employers cannot prevent employees from lying to their doctors or from ingesting harmful substances outside the workplace. Accordingly, the Secretary was

justified in imposing an economic regulation on employers because *it was the only way to ensure the viability of the lead exposure testing program.*

Here, however, there is no danger that employee activity outside the workplace will have material health effects in the workplace. Instead, the only risk is the same risk that currently exists: employees may not use required PPE. But employers are already responsible for monitoring this risk because they bear ultimate responsibility for ensuring that employees use required PPE. In addition, the use or non-use of PPE occurs in the workplace and is readily observable by employers. Simply, there is no basis for the Secretary's reliance on a convoluted incentive rationale to justify the proposed PPE rule, especially where that rationale has no empirical support. Accordingly, the PPE rule cannot be justified as reasonably necessary to eliminate a significant risk of material health impairment to employees; thus, the Secretary lacks authority to issue the rule.

C. The Secretary's Assertion Of Authority Also Violates The Plain Text Of The OSH Act.

The plain text of the OSH Act demonstrates that Congress considered the issue of who should pay for OSHA compliance and found it irrelevant to the purposes of the Act except for one narrow circumstance. Section 6(b)(7) of the OSH Act states:

> Any standard promulgated under this subsection shall . . . [w]here appropriate . . . prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests . . . which shall be made available, by the employer or at his cost, to employees exposed to such hazards . . . .

29 U.S.C. § 655(b)(7) (emphasis added). Thus, in the very same provision in which it authorized the Secretary to require personal protective equipment, Congress authorized the Secretary to require medical examinations and *required employers to pay for them.* This limited expression of Congressional intent regarding cost issues resolves the jurisdictional issue regarding a regulation requiring payment for PPE. *First*, when Congress intended the OSH Act to direct who should pay the costs of compliance, it expressly said so. *Second*, Congress must have considered and rejected requiring employers to pay for PPE because it required employers to pay for medical examinations *in the very next sentence. See, e.g., Leatherman v. Tarrant Cty. Narcotics & Intelligence Coordination Unit*, 507 U.S. 163, 168 (1993) (under the rule *expressio unius est exclusio alterius*, the Federal Rules' express requirement of heightened pleading standards for fraud claims means that heightened pleading standards do not apply to other claims). Accordingly, the plain text of the OSH Act confirms

what case law has implied: The Secretary lacks authority to issue a purely cost-shifting rule like the proposed PPE standard.

CONCLUSION

No basis exists for granting the extraordinary remedy of mandamus. The administrative record does not establish a clear duty to act, and, even if it did, the Secretary's conduct has been eminently reasonable and competing rulemakings are more worthy of her attention. Finally, the Secretary does not even have statutory authority to issue the rule that the Unions are seeking. For all of these reasons, the Unions' petition should be dismissed.

Respectfully submitted,

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