ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1105(L)
(consolidated with Nos. 16-1113, 16-1125, 16-1126, 16-1131, 16-1137, 16-1138, and 16-1146)

NORTH AMERICA'S BUILDING TRADES UNIONS,

Petitioner,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, AND UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petitions for Review of a Final Rule of the United States Occupational Safety and Health Administration

JOINT BRIEF OF INDUSTRY RESPONDENT-INTERVENORS

Bradford T. Hammock
Tressi L. Cordaro
Katherine L. Soppet
JACKSON LEWIS P.C.
10701 Parkridge Boulevard, Suite 300
Reston, VA 20191
Telephone: (703) 483-8300
Counsel for Respondent-Intervenors American Foundry Society; National Association of Home Builders; and National Association of Manufacturers

Of Counsel:
Linda E. Kelly
Patrick N. Forrest
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
Telephone: (202) 637-3000
Counsel for Respondent-Intervenor National Association of Manufacturers

William L. Wehrum
Susan F. Wiltsie
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Telephone: (202) 955-1500

David Craig Landin
951 East Byrd Street
Richmond, VA 23219-4074
Telephone: (804) 788-8200
Counsel for Respondent-Intervenor National Stone, Sand & Gravel Association

March 23, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Industry Respondent-Intervenors state as follows:

A. Parties, Intervenors, and Amici

All parties, intervenors, and amici appearing in this Court are listed in the Joint Opening Brief of Industry Petitioners.

B. Rulings Under Review

References to the rulings at issue appear in the Joint Opening Brief of Industry Petitioners.

C. Related Cases

This case was not previously before this Court. Certain Petitioners filed seven Petitions for Review of the Silica Rule in six different circuit courts of appeals (*i.e.*, Nos. 16-1105, 16-1112, 16-1113, 16-1114, 16-1125, 16-1126, 16-1131). Those Petitions were transferred to this Court per the Consolidation Order of the United States Judicial Panel on Multidistrict Litigation ("MDL"). *See In re: Occupational Safety and Health Administration, U.S. Department of Labor, "Occupational Exposure to Respirable Crystalline Silica; Final Rule," March 25, 2016*, MCP No. 139, Doc. 3 (J.P.M.L. April 12, 2016). Case Nos. 16-1137, 16-1138, 16-1146, and 16-1151 were filed in this Court after the MDL's April 12th Order.

All related cases pending in this Court (Nos. 16-1105, 16-1112, 16-1113, 16-1114, 16-1125, 16-1126, 16-1131, 16-1137, 16-138, 16-1146, and 16-1151), were consolidated under the lead docket number 16-1105 by the Court's Orders dated April 28, 2016, May 6, 2016, May 11, 2016, May 17, 2016, and May 25, 2016. Voluntary dismissal of three petitions (Nos. 16-1112, 16-1114, and 16-1151) was granted by the Court's Orders dated June 7, 2016 and June 9, 2016. The undersigned counsel is not aware of any other related case currently pending in this Court or any other court.

RULE 26.1 DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Industry Respondent-Intervenors make the following statements:

No. 16-1131:

The **National Stone, Sand & Gravel Association ("NSSGA")** is a not-for-profit association organized under the laws of the District of Columbia which represents the crushed stone, sand and gravel-or-aggregates industries in legislative and regulatory arenas. NSSGA member companies produce more than 92 percent of the crushed stone and 75 percent of the sand and gravel consumed annually in the United States. NSSGA is a "trade association" within the meaning of Circuit Rule 26.1(b). NSSGA has no parent corporation and no publicly held company owns a 10 percent or greater interest in NSSGA.

No. 16-1137:

The **American Foundry Society ("AFS")** states that, founded in 1896, it is the leading U.S. based metalcasting society, assisting member companies and individuals to effectively manage their production operations, profitably market their products and services, and equitably manage their employees. The association is comprised of more than 7,500 individual members representing over 3,000 metalcasting firms, including foundries, suppliers, and customers. AFS has no parent corporation, and no publicly held company has any ownership in AFS.

The **National Association of Manufacturers ("NAM")** is the largest manufacturing association in the United States. It is a national not-for-profit trade association representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private sector research and development in the nation. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in NAM.

No. 16-1138:

National Association of Home Builders ("NAHB"): Founded in 1942, NAHB represents more than 140,000 members involved in home building, remodeling, multifamily construction, property management, specialty trade contractor, design, housing finance, building products manufacturing, and all other aspects of the residential and light commercial construction industries. NAHB is affiliated with more than 800 state and local home builders associations (HBAs) located in all 50 states and Puerto Rico. NAHB's members touch on all aspects of the residential construction industry. About one-third of NAHB's members are home builders and/or remodelers. The others are associates working in closely related specialties such as sales and marketing, housing finance, and manufacturing and supplying building materials. Currently, the residential construction sector employs over 2 million people and NAHB's builder members will construct approximately 80 percent of the new housing units projected in the next 12 months, making housing one of the largest engines of economic growth in the country. The more than 14,000 members that belong to NAHB Remodelers Council comprise about one fifth of all firms that specify remodeling as a primary or secondary business activity. The NAHB Multifamily Council is comprised of more than 1,000 builders, developers, owners, and property managers of all sizes and types of multifamily housing comprising condominiums and rental apartments. NAHB is a non-profit national

trade association incorporated in the State of Nevada with headquarters located in Washington, D.C. The NAHB has no parent company, and no publicly held company has a 10% or greater ownership interest in NAHB.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Rules:

Regulations:

---

*Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

APA	Administrative Procedure Act
JA	Joint Appendix
MRP	Medical removal protection
µg/m³	Micrograms per cubic meter of air
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act of 1970
PEL	Permissible exposure limit
PLHCP	Physician or other licensed health care professional

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addenda to the Joint Opening Brief for Industry Petitioners and the Joint Brief of Union Petitioners.

INTRODUCTION

In the Joint Opening Brief of Industry Petitioners ("Ind. Br."), Industry Respondent-Intervenors[1] and others explain that the Occupational Safety and Health Administration's ("OSHA" or the "Agency") rule entitled "Occupational Exposure to Respirable Crystalline Silica" (Docket No. OSHA-2010-0034, RIN 1218-AB70), and published in the *Federal Register* at 81 Fed. Reg. 16,285 on March 25, 2016 ("Silica Rule" or "Rule") (JA0001-JA0606), fails in four significant respects to comply with the legal standards required for OSHA rulemaking in the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), 29 U.S.C. § 655, and should be vacated by this Court. First, OSHA did not meet its burden of proving that a significant risk of material impairment of health exists at the current permissible exposure limit ("PEL") for respirable crystalline silica ("silica") and that the new 50 µg/m³ standard will substantially reduce that risk. Second, OSHA did not meet its burden of proving that the 50 µg/m^3 PEL is both technologically and economically feasible in the foundry, hydraulic fracturing, and construction industries. Third,

[1] American Foundry Society; National Association of Home Builders; National Association of Manufacturers; and National Stone, Sand & Gravel Association are referred to herein as "Industry Respondent-Intervenors."

OSHA included ancillary provisions in the rule, including medical surveillance and a virtual prohibition on dry sweeping, dry brushing, and the use of compressed air, which are not reasonably necessary and appropriate to effectuate the purposes of the standard. Fourth, OSHA failed to abide by the requirements of the OSH Act and the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, by denying stakeholders an opportunity to review and comment on key evidence used by the Agency to support the rule and by failing to make its principal contractor available for cross examination during the rulemaking.

At the same time, however, Industry Respondent-Intervenors[2] respectfully submit that there is no merit to the Union Petitioners'[3] arguments that OSHA impermissibly failed to include medical removal protection ("MRP") and related benefits in the general industry and maritime standards and failed to provide construction employees with adequate medical surveillance. Notwithstanding this,

[2] Industry Respondent-Intervenors represent employers significantly affected by the Silica Rule and who would be adversely impacted if OSHA and this Court were to adopt Union Petitioners' Petition for Review.

[3] North America's Building Trades Unions; the American Federation of Labor and Congress of Industrial Organizations; the United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America are referred to herein as "Union Petitioners."

nothing herein should be construed as Industry Respondent-Intervenors endorsing any aspect of the Silica Rule.

SUMMARY OF ARGUMENT

As Industry Petitioners state in their Joint Opening Brief, the Silica Rule includes numerous "ancillary" provisions, including exposure monitoring, respiratory protection, medical surveillance, hazard communication, recordkeeping, and housekeeping. Ind. Br. 10. These provisions are in addition to the 50 $\mu g/m^3$ PEL, which is the centerpiece of OSHA's new Rule.

Union Petitioners argue that OSHA should have also required that employers provide MRP and MRP benefits for employees in general industry and the maritime industries. Joint Brief of Union Petitioners ("Union Br.") 2-3. OSHA, however, correctly determined that MRP and MRP benefits are unwarranted in the current rulemaking. Short term medical leave is not necessary here because, in addition to the numerous other protective ancillary provisions, "workers compensation is the appropriate recourse if permanent removal is required" and because "union petitioners have not offered any evidence of medical removal protection costs or otherwise demonstrated that [MRP] would be economically feasible." Brief for Respondents ("Resp. Br.") 154-155. In addition, past health standards that have involved MRP, most have set forth clear requirements for when removal would occur, as opposed to Union Petitioners' presumed request that employees be

removed and receive pay and benefits whenever a physician or other licensed health care professional ("PLHCP") provides any recommendation for removal.

Union Petitioners also argue that OSHA's trigger for medical surveillance in the construction standard – requiring medical surveillance of employees who are required to wear a respirator for 30 or more days a year – is impermissible. The Union Petitioners do not appear to argue specifically for an alternative trigger for the Court's consideration, although they reference their suggestion in the rulemaking to trigger medical surveillance for employees exposed above the PEL as well as potentially triggering surveillance whenever a construction employee must wear a respirator at all. While it is not clear precisely what the Union Petitioners are seeking, OSHA properly rejected the Union Petitioners' suggestion to tie medical surveillance to exposure over the PEL in the Final Rule. OSHA correctly determined that such an approach made no sense due to its adoption of "Table 1" in the construction standard. Furthermore, given the significant expected use of respirators in the construction industry as a result of Table 1 and OSHA's approach to compliance, it is not at all clear that a different trigger would result in numerous construction employees receiving medical surveillance that would not receive it under the Final Rule as issued.

ARGUMENT

I. MRP AND MRP BENEFITS ARE NOT REASONABLY NECESSARY OR APPROPRIATE.

Union Petitioners argue that OSHA impermissibly failed to include MRP and MRP benefits in the general industry standard for both permanent and temporary removals from work. Union Br. 2-3. MRP and MRP benefits have been included in some, but not all, health standards to provide a certain amount of pay and benefits to employees who must be removed from their jobs, generally on a temporary basis, to avoid continued exposure to certain toxic substances. *See* Resp. Br. 154. MRP is designed "to prevent permanent health effects from developing by facilitating employee removal from exposure at a point when the effects are reversible." 81 Fed. Reg. at 16,839 (JA0555). OSHA included MRP and MRP benefits in past health standards to ensure that employees would not be discouraged from participating in medical surveillance for fear of being removed from work and losing pay and benefits as a result. *See, e.g., United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1237 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) ("*Lead I*").

During the rulemaking, OSHA did not propose that MRP and MRP benefits be included in the Rule. Several unions, including Union Petitioners, objected and argued that MRP was necessary and appropriate and, in fact, was required pursuant to several court decisions that examined OSHA's past practice of including medical removal in past health standards. Union Br. 25.

In the final rule, OSHA disagreed, easily distinguishing the reasons for MRP in those previous standards from the Final Rule at issue here. As OSHA explained in the preamble, "most [silica] health effects requiring medical removal likely resulted from exposures that occurred years earlier," and "the health effects evidence suggest that crystalline silica-related diseases are permanent." 81 Fed. Reg. at 16,839-40 (JA0555-JA0556). Thus, OSHA "did not propose MRP for respirable crystalline silica because the adverse health effects associated with respirable crystalline silica exposure (*e.g.*, silicosis) are chronic conditions that are not remedied by temporary removal from exposure." 81 Fed. Reg. at 16,839 (JA0555). Similarly, "the available evidence suggests that, given the slow progression of silica-related diseases, 'there is no urgent need for removal from . . . exposure while awaiting a specialist determination.'" Resp. Br. 156 (citing 81 Fed. Reg. at 16,840). Because temporary removal from exposure through MRP would not improve employee health or safety, OSHA concluded it is not reasonably necessary or appropriate to effectuate the purpose of the OSH Act or the standard.

Union Petitioners re-raise the same arguments that they made during the rulemaking and that OSHA rejected. They appear to suggest that in those situations where an employer receives a recommendation from a PLHCP that an employee should be removed from work or his job/task, OSHA should require the employer to remove the employee in accord with the recommendation and guarantee their wages

and benefits after the removal.[4] In particular, they contend that this Court's decision in *Int'l Union, United Auto., etc. v. Pendergrass*, 878 F.2d 389 (1989) ("*Formaldehyde*"), runs contrary to OSHA's position about permanent removal and compels a remand. *See* Union Br. 26.

In response, the Secretary explains that MRP was included in the formaldehyde standard because medical surveillance in that standard depended upon employee action, such as self-reports of symptoms, but the Silica Rule is not dependent on employee action in that respect. 81 Fed. Reg. at 16,839 (JA0555). Further, OSHA stated that it adopted MRP in other standards, including the lead standard, because it "'anticipate[d] that MRP w[ould] hasten the pace by which employers compl[ied]with the new lead standard.'" 81 Fed. Reg. at 16,840 (internal citation omitted) (JA0556). There is no evidence of any such concerns here.

While OSHA correctly distinguished previous health standards that included MRP and MRP benefit requirements from the case at hand, there are other reasons that compel the Agency not to include such requirements in the Silica Rule. In previous health standards that have included MRP and MRP benefits, many have

[4] It is unclear from Union Petitioners' Opening Brief whether (1) they are arguing that the wages and benefits remain the same as before the removal, (2) an employer can offset those wages and benefits through workers compensation payments, and (3) the wage and benefit protection ends at some future point or continue forever. These are all important considerations that previous courts have considered in analyzing the legality of including MRP and MRP benefits in past OSHA health standards. *See, e.g.*, *Lead I*, 647 F.2d at 1233-37.

established clear health outcomes that trigger removal. *See, e.g.*, 29 C.F.R. § 1910.1048(l)(8)(i), formaldehyde ("[removal provisions] apply when an employee reports significant irritation of the mucosa of the eyes or the upper airways, respiratory sensitization, dermal irritation, or dermal sensitization attributed to workplace formaldehyde exposure"); 29 C.F.R. § 1910.1025(k)(1)(i)(A), lead ("The employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 60 µg/100g of whole blood"). The Agency was able to identify those triggers and provide greater certainty to PLHCPs and employers regarding removal. In contrast, in this standard, MRP could be triggered – as we understand Union Petitioners' argument – solely on a vague recommendation from a PLHCP for an unspecified period of time. This would place a tremendous burden on employers with only indeterminate safety and health benefits to employees.

More troubling, adoption of Union Petitioners' arguments would exacerbate a standard that already runs afoul of Section 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4). As Industry Petitioners state in their Opening Brief, OSHA's decision to prevent an employer from learning about key information gleaned from the medical surveillance of an employee without that employee's consent, including whether the employee should be removed from exposure to silica, diverges from

prior OSHA precedent and OSHA's mission under the OSH Act. The Silica Rule fails to provide employers with any information from medical surveillance which would permit them to correct any hazards in the workplace. In fact, there is no nexus between the prescribed medical surveillance and the workplace. As Industry Petitioners state in their Opening Brief:

> The purpose of medical surveillance is not to mandate that employers pay for ongoing medical diagnosis and treatment with no nexus to the workplace. In fact, Section 4(b)(4) of the OSH Act prohibits OSHA from infringing on state workers compensation systems. OSHA's medical surveillance provisions have withstood previous challenges based upon Section 4(b)(4) precisely because the employer is informed of the medical conditions of the employees as it relates to worksite exposure. Without a nexus with the worksite, medical surveillance requirements are not reasonably necessary and appropriate.

Ind. Br. 113-24.

The Union Petitioners' argument would take OSHA's misguided, unlawful approach to restricting the sharing of medical information further down the Section 4(b)(4) rabbit hole. It would mandate that employers pay for wages and benefits for employees who may be suffering permanent health conditions, something that has remained and should remain the province of workers compensation. As Respondent stated, "[OSHA] reasonably found that workers' compensation is the appropriate recourse if permanent removal is required." Resp. Br. 154. MRP and MRP benefits are unlawful with respect to silica. The Union Petitioners' attempt to shift OSHA even further away from its mission should be rejected.

Industry Respondent-Intervenors are also puzzled by the Union Petitioners' request that MRP and MRP benefits be included in the general industry and maritime standards but not the construction standard, without any explanation. As Industry Respondent-Intervenors understand the Union Petitioners' arguments, this Court is compelled by its own precedent to remand the rule to further investigate providing MRP and MRP benefits to general industry and maritime workers. Presumably, in the opinion of Union Petitioners, construction employees would benefit from these requirements as much as general industry and maritime employees would benefit from them. Yet, Union Petitioners do not seek extending these requirements to construction employees. If including MRP and MRP benefits were so critical to ensuring the safety and health of employees covered by the Rule, there is no logical reason for the Union Petitioners to only seek such further protection for employees who happen to work in general industry and maritime rather than construction. Industry Respondent-Intervenors can only speculate as to why Union Petitioners are seeking these benefits for general industry and maritime employees only; however, it certainly undercuts the safety and health rationale for petitioning for same.

II. OSHA PROPERLY REJECTED UNION REQUESTS TO TIE MEDICAL SURVEILLANCE FOR THE CONSTRUCTION INDUSTRY TO EXPOSURES OVER THE PEL OR OTHER ALTERNATIVE TRIGGERS.

The Silica Rule requires construction employers to make medical surveillance available "for each employee who will be required under this section to use a

respirator for 30 or more days per year." 81 Fed. Reg. at 16,880 (JA0596). Under the Rule, medical surveillance includes several requirements such as initial monitoring (including a medical and work history, a physical examination, a chest x-ray, a pulmonary function test, and a test for latent TB), periodic monitoring, and potentially a referral to a pulmonary specialist. *Id.* at 16,880-81 (JA0596-JA0597). This is a highly burdensome regulatory scheme that numerous commenters objected to in the course of the rulemaking. *See, e.g.*, Comments of the Construction Industry Safety Coalition, Doc.ID.2319, pp.116-120 (JA3671-JA3675). The nature of construction work, with its transient worksites and workforce, present unique and difficult challenges for construction employers in administratively complying with such medical surveillance requirements.

Union Petitioners argue that OSHA erred in adopting the 30-day requirement as a trigger for medical surveillance. Union Br. 33-34. Union Petitioners believe that there will be significant numbers of employees that will be deprived of needed medical surveillance as a result of this trigger and that "OSHA was required to adopt stronger medical surveillance protections for construction workers." *Id.* at 34.

Industry Respondent-Intervenors are confused as to exactly what trigger the Union Petitioners recommend be adopted by the Agency. They mention that some construction unions argued during the rulemaking that medical surveillance should be triggered whenever an employee is exposed over the PEL. Union Br. 38. At

another point in their brief, they suggest that OSHA should have considered "the feasibility of requiring [construction] employers to offer medical surveillance to employees required to wear respirators." *See id.* at 43-44. The latter approach – requiring surveillance of *every* employee who is required to use a respirator at *any* point during a given year – is the interpretation given the Union Petitioners' brief by Respondent, *see* Resp. Br. 147, but it is not at all clear to Industry Respondent-Intervenors that the Secretary's interpretation of the Union Petitioners' brief is correct. Regardless of the precise nature of the Union Petitioners' request,[5] such surveillance is not reasonably necessary or appropriate to effectuate the purpose of the OSH Act or the standard.

As OSHA noted in the preamble to the final rule, it would not make sense – analytically or otherwise – to trigger medical surveillance off of exposure above the PEL. While Industry Respondent-Intervenors strongly dispute the extent to which employers in construction will actually use Table 1, some employers will avail themselves of that compliance option in certain circumstances, which makes it unworkable for certain employers to use any medical surveillance option triggered off of the PEL. *See* Resp. Br. 145 ("[Because of Table 1] OSHA could not

[5] In the end, the Union Petitioners seem to just ask this Court for a remand for OSHA to consider its initial determination. Union Br. 44.

implement the proposed requirement to offer medical surveillance to each employee exposed to silica above the PEL for thirty days or more per year in construction.").

The Union Petitioners' other potential alternative – requiring medical surveillance for any employee required to use a respirator even once in the course of a year – also makes no sense. Indeed, given the extensive requirements for respirators in Table 1, such a requirement taken to its logical extreme would lead to absurd results. As just one example, under Table 1, an employee performing work with a handheld powered chipping tool in an enclosed area would need to always use respiratory protection. Under this potential approach, an employee who spends 15 minutes performing work with a handheld powered chipping tool in an enclosed area just one day during the year, would need to be offered medical surveillance under the rule, assuming the employer was using Table 1. There is no scientific or health-related reason to adopt such a requirement, as even Respondent noted. *See* Resp. Br. 147 ("Workers only occasionally requiring a respirator to protect them from silica exposure would not likely receive the expected benefits from medical surveillance due to the infrequency of their exposures.")

Further, as this Court has acknowledged, construction work "requires employees to move constantly from place to place, creating widely varying . . . exposure . . . and has an unusually high number of temporary employees." *Lead I*, 647 F.2d at 1310. OSHA estimates that "approximately 93 percent of construction

companies covered by the respirable crystalline silica standard have fewer than 20 employees." 81 Fed. Reg. at 16,816 (JA0532). Requiring small business owners to provide medical surveillance for every employee who wore a respirator at any time during the year is not economically feasible or appropriate to effectuate OSHA's mission.

Moreover, Industry Respondent-Intervenors dispute one of the underlying premises of the Union Petitioners' argument – that the 30-day trigger will result in significant numbers of construction employees not receiving medical surveillance. As Industry Petitioners noted in their Opening Brief, of the 31 tasks – and locations for those tasks – analyzed in Table 1, one-third of them require some form of respiratory protection when the task is performed for just over four hours. Ind. Br. 95. According to Industry Petitioners:

> In the final Rule, OSHA converts the extent of respirator use to full time equivalent employees ("FTEs") within all affected construction industries and estimates that approximately 25,000 FTEs will be required to use respiratory protection as a result of the Rule, costing construction employers $22 million dollars annually. But when costing the number of construction employees that may need to be provided medical surveillance under the Rule because they have to wear respirators for at least 30 days per year, OSHA assumes approximately 300,000 construction employees will need to wear respirators.

Id. at 96. The extent of respirator use required by the Rule is significant by any reasonable measure. In fact, as Industry Petitioners point out, such a heavy reliance

on respirators undercuts the Agency's claim that the Rule is technologically feasible in construction.

CONCLUSION

For the foregoing reasons, and for the reasons submitted by the Secretary of Labor on behalf of OSHA, the petition filed by the North America's Building Trades Unions; the American Federation of Labor and Congress of Industrial Organizations; the United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America should be denied.

Respectfully submitted,

/s/ Bradford T. Hammock
Bradford T. Hammock
Tressi L. Cordaro
Katherine L. Soppet
JACKSON LEWIS P.C.
10701 Parkridge Boulevard, Suite 300
Reston, VA 20191
Telephone: (703) 483-8300
Counsel for Respondent-Intervenors American Foundry Society; National Association of Home Builders; and National Association of Manufacturers

/s/ William L. Wehrum
William L. Wehrum
Susan F. Wiltsie
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Telephone: (202) 955-1500

David Craig Landin
951 East Byrd Street
Richmond, VA 23219-4074
Telephone: (804) 788-8200
Counsel for Respondent-Intervenor National Stone, Sand & Gravel Association

Of Counsel
Linda E. Kelly
Patrick N. Forrest
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000
Counsel for the National Association of Manufacturers

Dated: March 23, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a).

__X__ The brief contains 3,376 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

____ The brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief 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).

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2013 in a 14 point Times New Roman font or

____ The brief has been prepared in a monospaced typeface using _____ _____in a ___ characters per inch_____ font.

March 23, 2017

/s/ Bradford T. Hammock
Bradford T. Hammock
JACKSON LEWIS P.C.
Counsel for Respondent-Intervenors American Foundry Society; National Association of Home Builders; and National Association of Manufacturers

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
North America's Building Trade v. OSHA, et al, No. 16-1105(L)

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by JACKSON LEWIS P.C., Attorneys for Intervenors-Respondents to print this document. I am an employee of Counsel Press.

On **March 23, 2017**, Counsel for Petitioner has authorized me to electronically file the foregoing **JOINT BRIEF OF INDUSTRY RESPONDENT-INTERVENORS** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

Victoria Louise Bor
Sherman, Dunn, Cohen, Leifer & Yellig, PC
900 7th Street, NW
Suite 1000
Washington, DC 20001
202-785-9300
bor@shermandunn.com
Counsel for Petitioner

Lauren S. Goodman
Kristen M. Lindberg
Heather R. Phillips
Nathaniel I. Spiller
U.S. Department of Labor
Office of the Solicitor
Room S-4004
200 Constitution Avenue, NW
Washington, DC 20210
202-693-5446
goodman.lauren@dol.gov
lindberg.kristen@dol.gov
phillips.heather@dol.gov
spiller.nathaniel@dol.gov
Counsel for Respondents

Jeremiah Andrew Collins
Bredhoff & Kaiser, PLLC
805 15th Street, NW, Suite 1000
Washington, DC 20005
202-842-2600
jcollins@bredhoff.com
Counsel for Intervenors for Respondent American Federation of Labor and Congress of Industrial Organizations; et al.

Michael Benjamin Schon
Portland Cement Association
1150 Connecticut Avenue, NW
Suite 500
Washington, DC 20036
202-719-1977
mschon@cement.org
Counsel for Intervenor for Respondents Portland Cement Association

Sheldon Gilbert
Steven Paul Lehotsky
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
202-463-5337
sheldongilbert@gmail.com
slehotsky@uschamber.com
Counsel for Intervenor for Petitioners Chamber of Commerce of the United States of America

John Michael Connolly
William Spencer Consovoy
Thomas Ryan McCarthy
Consovoy McCarthy PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
703-243-9423
mike@consovoymccarthy.com
will@consovoymccarthy.com
tom@consovoymccarthy.com
Counsel for Intervernors for Petitioners Chamber of Commerce of the United States of America, et al.

Eight paper copies will be filed with the Court within the time allowed by rule. All counsel for Amicus Curiae appearing at the time of this filing will also be serve via CM/ECF notice.

March 23, 2017

/s/ Robyn Cocho
Robyn Cocho
Counsel Press