ORAL ARGUMENT NOT YET SCHEDULED

Case No. 16-1105

(consolidated with Nos. 16-1113, 16-1125, 16-1126, 16-1131, 16-1137, 16-1138, 16-1146)

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

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NORTH AMERICA'S BUILDING TRADES UNIONS, ET AL.,
*Petitioners,*

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, ET AL.,
*Respondents.*

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On Petitions for Review of a Final Rule of the Occupational Safety & Health Administration, U.S. Department of Labor

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# CORRECTED REPLY BRIEF OF PETITIONERS-INTERVENORS NORTH AMERICA'S BUILDING TRADES UNIONS, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

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## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES



## STATUTES RULES AND REGULATIONS



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

# GLOSSARY

| | |
|---|---|
| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| AISI | American Iron & Steel Institute |
| BCTD | Building & Construction Trades Department |
| OSHA | Occupational Safety & Health Administration |
| PAPR | powered air-purifying respirator |
| PEL | permissible exposure limit |
| UAW | International Union, United Automobile, Aerospace & Agricultural Implement Workers of America |
| USW | United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union |

The Union Petitioners-Intervenors[1] respectfully submit this reply brief in response to the Brief for Respondents ("OSHA Br.") and the Joint Brief of Industry Respondents-Intervenors ("Ind. Int. Br.").

## STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the addendum to the Joint Brief of Union Petitioners.

## SUMMARY OF ARGUMENT

OSHA's reasons for failing to require medical removal protection in the general industry standard cannot be squared with the agency's statutory mandate. Where medical surveillance shows a worker to be at heightened risk and a medical professional determines that the worker should be protected by removal from exposure, the OSH Act requires such protection. That removal may only be recommended in a limited number of cases is no reason to refuse to require it when it *is* recommended; and no question of economic feasibility could arise from requiring reasonable wage protection in such limited instances.

[1] The Union Petitioner-Intervenors ("Unions") are North America's Building Trades Unions; the American Federation of Labor and Congress of Industrial Organizations; the United Steel, Paper and Forestry, Rubber, Manufacturing, Allied–Industrial and Service Workers International Union, AFL-CIO-CLC; and the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America.

Nor does OSHA's mandate allow the agency to declare that workers' compensation is "the appropriate recourse if *permanent* removal from exposure is required." OSHA Br. 156-57 (emphasis added). Workers' compensation will not protect the health of a worker for whom further exposure to silica carries great risk but whom the employer declines to transfer to another available position. Requiring health-protective transfers in such circumstances, with reasonable wage protection so employees will not be deterred from informing the employer of the medical need for removal, is the job of OSHA standards, not of workers' compensation.

OSHA also erred in providing that a construction worker exposed to silica and required to wear a respirator – a proxy for exposures above the PEL – need not be offered medical surveillance unless an employer determines that the worker will be required to use respirators for 30 or more days a year while working *for that employer*. OSHA fails to recognize that because exposures permitted in the construction industry have been at least 2.5 times as high as those permitted in general industry, medical surveillance is particularly important to protect the health of construction workers. For a construction worker who works for a series of different employers for brief periods of time, as is common in the industry, and who is exposed to silica in a manner that requires use of a respirator, exposures may be at least as high as if the employee had worked for a single employer, even

though the employee's respirator use with any single employer may not exceed 30 days. Medical surveillance would provide significant health benefits to such employees, and OSHA's refusal to require such protection is contrary to its statutory mandate.

## ARGUMENT

### I. OSHA HAS NOT JUSTIFIED ITS FAILURE TO REQUIRE EMPLOYERS TO REMOVE AT-RISK EMPLOYEES FROM EXPOSURE TO SILICA WHERE MEDICALLY INDICATED AND TO PROVIDE A MEASURE OF WAGE PROTECTION SO THAT EMPLOYEES WILL NOT BE DETERRED FROM SEEKING SUCH REMOVAL.

In attempting to justify its decision to omit medical removal provisions from the general industry standard, OSHA fails to confront, much less to explain, a glaring anomaly in the provisions of the standard.

The preamble makes clear, and OSHA does not dispute, that a central purpose of the medical surveillance provisions of the standard is to inform an employee and, if authorized by the employee, to inform the employer, of any steps a medical professional recommends be taken to limit the employee's exposure to silica, including removal to a job assignment with less exposure. And yet, *the standard does not require an employer to do anything* in response to such a recommendation. *See* Joint Brief of Union Petitioners ("U. Pet. Br.") 21-22.

OSHA clearly believes that an employer *should* "follow [the medical professional's] recommendations." 81 Fed. Reg. 16833/1. But no provision of the standard requires that the employer do so. No matter how urgent may be the need to remove an employee from exposure, the standard does not require the employer to take that action, even if the employee could readily be reassigned to a job with lower exposure.

Thus, with respect to the workers who have been most severely affected by exposure to silica, the standard fails to require the most obvious, simple and effective step that could be taken to protect their health from further deterioration.

OSHA's brief declares that the "primar[y]"reasons for this omission are first, that the number of employees who need to be temporarily removed from exposure is relatively small, *see* OSHA Br. 154, and second, "that workers' compensation is the appropriate recourse if *permanent* removal is required," *id.* (emphasis added). Those proffered reasons, and the additional arguments advanced in OSHA's brief with regard to the medical removal issue, lack substance.

### A. That Temporary Removal from Exposure May Only be Recommended for a Limited Number of Employees Is No Reason for Failing to Require Removal When It Has Been Recommended By a Medical Professional.

1. OSHA's brief declares that the evidence "suggests," OSHA Br. 156, that where a medical professional has referred an employee to a specialist for

further evaluation of signs or symptoms of silica-related disease, "there is no urgent need for removal from … exposure while awaiting a specialist determination." *Id.* (quoting 81 Fed. Reg. 16840/2). In point of fact, however, the preamble says only that there is no need for removal "in *most* [such] cases." 81 Fed. Reg. 16840/2 (emphasis added). The preamble acknowledges that in *some* cases, such as where there is a possibility of acute silicosis, there *will* be a need for removal pending a specialist's determination. *Id.* Neither the preamble nor OSHA's brief provides any justification for the agency's decision not to require temporary removal in such cases when a medical professional has found it to be necessary.

OSHA quotes this Court's statement that "a party challenging an OSHA standard must bear the burden of demonstrating that the [additional provision] it advocates will be feasible to implement and will provide more than a *de minimis* benefit for worker health." OSHA Br. 155, quoting *Bldg. & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988) ("*BCTD*"). OSHA does not contend that a medical removal provision would run afoul of the *second* prong of that requirement, *see* OSHA Br. 155, and it plainly would not. A provision requiring temporary removal when a medical professional has determined this to be necessary will, by its nature, provide a benefit for worker health in virtually every instance in which the provision applies. It is appropriate for OSHA to

"mandate[ ] special treatment of workers with higher risk propensities," *BCTD*, 838 F.2d at 1272, and there could not be a clearer example of such a situation than where a medical professional has determined, based on the results of medical surveillance, that a particular worker is at such heightened risk that the worker should be removed from the exposure he or she is confronting on the job.[2]

As for the *first* prong of the test OSHA quotes from *BCTD*, the agency asserts that "union petitioners have not offered any evidence of medical removal protection costs or otherwise demonstrated that it would be economically feasible." OSHA Br. 155. But, as OSHA properly states in its brief, "[a]n OSHA standard is economically feasible for an industry 'if the costs it imposes' do not 'threaten massive dislocation to, or imperil the existence of,' that industry." OSHA Br. 108-09, quoting *American Iron & Steel Institute v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991) (*"AISI"*) (in turn quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d

[2] OSHA also appears to accept, as it must, that some workers cannot wear even a powered air-purifying respirator ("PAPR"), and are at heightened risk for that reason. *Compare* OSHA Br. 160 with U. Pet. Br. 31-32. OSHA faults the Unions for not quantifying the number of employees who are in this category and who therefore would need to be removed from exposures that exceed the PEL, OSHA Br. 160-61, but that contention is beside the point. OSHA has recognized in other standards that if an employee cannot wear a respirator, the employee should be transferred without loss of pay to a position where respirators are not required. *See* U. Pet. Br. 31. If, as a result of the increased availability of PAPRs, there will be fewer employees in that category than may have been the case in the past, that is no reason not to continue to require medical removal protection for those workers who cannot wear any respirator and who therefore have a "higher risk propensit[y]." *BCTD*, 838 F.2d at 1272.

1189, 1265 (D.C. Cir. 1980) ("*Steelworkers*")). Under that test, no issue of economic feasibility could possibly arise from requiring employers to temporarily remove from exposure the small number of workers for whom such removal is medically recommended, and to provide some reasonable protection of wages and benefits during such removals. Besides, as employers implement the PEL, fewer and fewer workers will be exposed to silica at levels that require respirator use or threaten their health, so the number of workers needing removal is likely to decline over time. *Steelworkers*, 647 F.2d at 1235 (recognizing that the number of workers affected by medical removal protection declines over time).

2. Another situation in which unions and public health experts recommended that medical removal protection should be provided by the silica standard is where a worker is experiencing exacerbated symptoms of a non-malignant respiratory disease, such as chronic obstructive pulmonary disease. *See* U. Pet. Br. 29-30. OSHA's brief argues that temporary removals should not be required in such circumstances because removal "would offer little more than a repeated, short-term reprieve from symptoms of a permanent health condition that would recur upon re-exposure." OSHA Br. 156.

To the extent that OSHA may be suggesting that *permanent* removal may be the only effective way to protect workers whose silica-related respiratory disease presents recurring periods of exacerbation, *see id.*, that may well be true for some

workers. For other workers with respiratory disease, however, a medical professional may determine that an individual may continue to work on a job with exposure to silica, with temporary removal being necessary if the individual's symptoms become exacerbated. To assert that it would not be appropriate to provide a "short-term reprieve" to such workers from symptoms that could "recur upon re-exposure" cannot be squared with previous standards that have provided for recurring temporary removals. *See* U. Pet. Br. 29-30 & n. 15 (citing standards).

Furthermore, such an assertion ignores the agency's mandate to promulgate a standard that will "most adequately assure[ ] . . . that no employee will suffer material impairment of health or functional capacity." 29 U.S.C. § 655(b)(5). OSHA has recognized that severe irritation constitutes "material impairment" even if "th[e] effects may be transitory." *AFL-CIO v. OSHA*, 965 F.2d 962, 975 (11th Cir. 1992) (agreeing that sensory irritation constitutes material impairment).

In sum, when a medical professional recommends that a worker be temporarily removed from exposure to silica while a specialist conducts further tests, *supra* at 4-5, or because the symptoms of a worker's respiratory disease have become exacerbated, *supra* at 7, or because a worker who is exposed above the PEL cannot wear a respirator, *supra* note 2, the employer should be required to remove the worker temporarily from exposure, with reasonable protection of wages and benefits such as OSHA has mandated in several other standards.

OSHA's stated reasons for declining to require such protection cannot be squared with its past actions or its statutory mandate.

### B. OSHA's Refusal to Provide Protection to Workers Who Should Be Permanently Removed From Exposure is Unreasoned and Contrary to The Agency's Statutory Mandate.

1. In rejecting any form of permanent removal protection on the ground that such protection has no purpose "where the effects [of disease] are already permanent," OSHA Br. 157, OSHA makes clear its apparent belief that the agency has no duty to protect worker health where the "objective" of "prevent[ing] permanent health effects from developing … cannot be met." OSHA Br. 157. That cramped view of OSHA's responsibility should not be countenanced. Under the OSH Act, the agency's objective cannot be confined to preventing permanent impairment, but must also aim to prevent a worker who already is suffering from a work-induced permanent health impairment from being afflicted by additional or worsened symptoms. *See* U. Pet. Br. 27-28.

2. OSHA's declaration that it "considers workers' compensation the appropriate recourse if permanent removal from exposure is required," OSHA Br. 156-57, only confirms that the agency has chosen to ignore its statutory mandate in this context. In some standards, OSHA *has* included provisions to protect workers who have been determined by a medical professional to be in need of permanent

removal from exposure. Although OSHA has not required employers to provide pay to employees who have become permanently unable to work, standards have required that such an employee be given an opportunity to transfer to another position without a reduction in wage rate. *See* U. Pet. Br. 23 n. 11 (citing standards).

Such a transfer opportunity, which enables an employee to keep working notwithstanding the disease that has been caused by exposure on the job, bears no resemblance to workers' compensation. OSHA's statutory mandate does not permit the agency to ignore the need to protect the health of such workers by enabling them to be removed from exposure and transferred to safer assignments without being deterred by fear of wage loss. To that end, far from constituting "the appropriate recourse," OSHA Br. 156, workers' compensation is no recourse at all.

OSHA's position against permanent removal provisions may have hardened since this Court decided *UAW v. Pendergrass*, but that does not change the fact, noted by the Court in that case, that OSHA's prior actions cannot be reconciled with the position OSHA asserted in that case and has asserted again here. *See UAW v. Pendergrass*, 878 F.2d 389, 400 (D.C. Cir. 1989). Nor, despite OSHA's protestations to the contrary, *see* OSHA Br. 102, has OSHA supplied the "logic" this Court found to be absent in *Pendergrass*, 878 F.2d at 401, or provided any justification for the agency's position, found wanting in *Pendergrass*, *id.* at 400,

that workers' compensation must be the only recourse for workers who should be permanently removed from the exposure.

3. OSHA suggests that medical removal protection has been provided in previous standards only because employees might otherwise have been unwilling to participate in medical surveillance, and the agency argues that "the incentive for employee cooperation that wage protection crucially provides in other situations was adequately addressed by the enhanced privacy protection in the medical surveillance provision [of the silica standard]." OSHA Br. 158. OSHA is wrong. Under the silica standard, employees still face a significant deterrent to voluntarily stepping forward to protect their health.

If workers fear that they may be terminated or transferred to a lower-paying job, they may "underreport symptoms," *Pendergrass*, 878 F.2d at 400, "suffer[ing] continuing exposure to impermissibly high dust levels" rather than "risk disadvantageous transfers." *AFL-CIO v. Marshall*, 617 F.2d 636, 674-75 (D.C. Cir. 1979), *aff'd in part and remanded in part sub nom. Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981). *See* U. Pet. Br. 22 and n.9. That is as true in the case of silica as in the prior standards that have provided medical removal protection. When a worker is told by a medical professional that he or she should be removed from exposure to silica, if medical removal protection is not available the worker will be reluctant to authorize the medical professional to relay the

medical recommendation to the employer, "for fear of economic loss." *Pendergrass*, 878 F.2d at 400. As a result, many workers will be left "to suffer continuing exposure to impermissibly high dust levels." *Marshall*, 617 F.2d at 674-75. This, and not simply the employees' willingness to participate in medical surveillance, is what is at stake where medical removal protection is not provided.

### C. Industry Arguments For Rejecting Medical Removal Protection Cannot Substitute for the Reasons OSHA Gave, and Are Without Merit In Any Event.

In their brief as intervenors, the industry petitioners argue that, in addition to the reasons given by OSHA for not requiring medical removal protection in the standard, "there are other reasons that compel the Agency not to include such requirements in the Silica rule." Ind. Int. Br. 7. In particular, industry states that "[i]n previous standards that have included MRP and MRP benefits, many have established clear health outcomes that trigger removal," Ind. Int. Br. 7-8; and industry suggests that such clear "triggers" could not be established for removal from exposure to silica.

OSHA's regulatory decision cannot be sustained on the basis of "other reasons," *id.*, on which the agency did not rely. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539-40 (1981). But in any event, industry's observation regarding medical removal provisions in other standards misses the mark.

As OSHA acknowledges, the agency's general approach has simply been to require removal "when removal is recommended by a health care provider." OSHA Br. 154. Standards that provide for medical removal protection typically include language that requires removal when there has been a medical determination that removal is warranted for any reason. *See* 29 C.F.R. § 1910.1025(k)(1)(ii) lead;[3] *id.* § 1910.1027(l)(11)(i)(A) (cadmium); *id.* § 1910.1028(i)(8)(ii) (benzene); *id.* § 1910.1052(j)(11)(i)(A) (methylene chloride). OSHA did not suggest – and neither does industry – that medical professionals cannot be trusted to determine when removal from exposure to silica is medically indicated.[4]

[3] Industry quotes one section of the lead standard, § 1910.1025(k)(1)(i)(A), which requires temporary removal when an employer's blood lead level exceeds a specified limit. Industry fails to mention § 1910.1025(k)(1)(ii)(A), which provides in addition that an employee must be temporarily removed whenever there has been "a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead."

[4] Industry suggests that a removal recommendation should not be "for an unspecified period of time." Ind. Int. Br. 8. Previous standards generally have not required that the period of removal be specified, but they often have limited the period of wage protection. *See* U. Pet. Br. 23 (citing standards). A similar approach could have been taken in the silica standard had OSHA not chosen to leave medical removal protection out of the standard altogether.

## II. OSHA ERRED IN REFUSING TO REQUIRE EMPLOYERS TO OFFER MEDICAL SURVEILLANCE TO ALL CONSTRUCTION EMPLOYEES WHO ARE REQUIRED TO USE RESPIRATORS

During the rulemaking proceedings, the construction unions urged OSHA to require employers to offer medical surveillance to any employee exposed to silica above the PEL. Ex. 4223 at 124-127; Ex. 4219 at 29-30. OSHA decided, in promulgating the final construction standard, to base the medical surveillance trigger, in part, on respirator use – a proxy for exposures above the PEL – a decision with which the Unions agree. U. Pet. Br. 36. However, rather than extending this protection to all employees subject to that level of exposure, OSHA decided to offer medical surveillance only to those employees who "will be required," while employed by a particular employer, to use respirators for 30 or more days a year. As the Unions explained in their opening brief, linking medical surveillance to 30 days of exposure with a single employer will deny protection to construction employees who face significant risks from exposure to silica. *Id.* at 36-38.

OSHA justifies the 30-day trigger as focused on capturing those employees most likely to suffer silica-related health effects because they have repeated exposures. OSHA Br. 146. This explanation ignores two crucial points. First, for decades, permissible silica exposures in the construction industry have been at least 2.5 times as high as those permitted in general industry. That means there

undoubtedly are current construction workers who have already experienced exposures to silica at levels far higher than the 100 μg/$m^3$ level which OSHA has found to pose a significant risk. Medical surveillance therefore serves a particularly compelling need for construction workers.

Second, OSHA's explanation ignores the fact that it is common in the construction industry for employees who, by virtue of their trades, are repeatedly engaged in silica-generating tasks, to work for a series of different employers for brief periods of time. As one industry representative testified, short-term employees may work "for four or five or six different contractors, every job, every two or three weeks, and could be on five different companies in any given season." Tr. 2920. No one of these assignments may require them to wear respirators for 30 days. Yet, their cumulative exposures – the reason for requiring medical surveillance – may pose at least as high a risk to them as to those employees who work for the same employer long enough to trigger the surveillance requirement. A trigger based solely on duration with each separate employer thus fails to satisfy OSHA's expressed goal of "capturing cumulative effects caused by repeated exposures." 81 Fed. Reg. 16814/3.

OSHA's rejection of the Union's concern that this 30-day trigger will encourage employers to manipulate employees' tenure, either by laying them off as they reach 30 days of respirator use or by rotating them to different tasks, is based

on assumptions that cannot withstand analysis. According to the agency, employers are more likely to absorb the "modest" costs of medical exams than to shoulder the costs of continually training new workers. OSHA Br. 146 n.96. While the Unions agree that the per-exam cost is modest,[5] industry's opposition to this requirement provides ample evidence that construction employers disagree. Industry representatives urged OSHA not to require employers to offer exams to employees until they were exposed for at least 120 days, to avoid the costs. 81 Fed. Reg. 16816/3; Tr. 1452-53. On the other hand, given the patterns of construction industry employment, an employee who is "new" to a particular contractor is not necessarily "new" to the trade, and any construction worker who has been in the trade for any period of time – and any employee who has completed an apprenticeship – will be hired with basic skills that they carry from employer to employer. OSHA's own calculations of the costs of compliance with the silica standard belie the agency's assumption that training costs will outstrip even the modest costs of providing medical surveillance.[6]

[5] OSHA estimates the per-employee cost for initial medical exams will range from $433 - $471, depending on the size of the employer. 81 Fed. Reg. 16515/1; Ex. 4247 at V-362, V-366, Table V-63.

[6] OSHA has estimated the costs of providing new employees with the training required by the standard will range from $38.14 - $55.76 per employee, depending on the size of the employer, Ex. 4247 at V-382, Table V-69, a cost the agency acknowledges is an overestimate, since it assumes each new employee will have no

OSHA's basic argument is that, contrary to the Union's assertions and record evidence, the Unions have failed to show that it will be a "common occurrence" for affected construction workers to fall through the cracks and be denied medical surveillance. OSHA Br. 147. In making that argument, OSHA is misconstruing its obligation and the Union's burden. Where OSHA finds that exposures at the PEL continue to pose a significant risk of harm, the agency's "duty [is] to keep adding measures so long as they afford benefit and are feasible, up to the point where [OSHA] no longer finds significant risk." *BCTD*, 838 F.2d at 1269.[7] Here, construction workers are likely to have experienced high past silica exposures, to have high cumulative silica exposures, and hence, to face high health risks from those exposures. OSHA ignored these heightened risks in crafting the construction industry medical surveillance trigger.

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baseline silica training, *id.* at V-379. Thus, although employers will incur some expenses in complying with the training requirements under this and other OSHA standards, those costs are likely to be low, since employees who move from job-to-job are likely to have already have received some of the required training.

[7] Contrary to the Industry Petitioners-Intervenors' assertion that it would be economically infeasible to peg the medical surveillance requirement to respirator use (Ind. Inter. Br. 14), in performing the analysis on which it determined the standard was economically feasible, OSHA assumed that every employee required to wear a respirator would receive medical surveillance. *See* U. Pet. Br. 40 n.18; *see also* Ex. 4247 at V-363, Table V-63 ("Medical Surveillance and TB Testing – Construction Industry Assumptions and Unit Costs; Coverage: *All employees using respirators*") (emphasis added).

OSHA seems, however, to be suggesting that because the Unions cannot quantify how many employees may lose medical surveillance because they are exposed to silica on jobs controlled by several different employers, the Unions have failed to prove that adding them to the cohort of employees entitled to the exams will "provide more than a *de minimis* benefit for worker health." OSHA Br. 147-48, quoting *BCTD*, 838 F.2d at 1271. The record, however, supports the conclusion that substantial numbers of employees will be denied medical surveillance despite having experienced, and continuing to experience, dangerous cumulative exposures to silica through their work. OSHA's own findings about the value of medical surveillance – in identifying silica-related adverse health effects so employees can take appropriate intervention measures, determining whether employees can continue to be exposed without increasing their risks, and determining employees' fitness to use respirators, 81 Fed. Reg. 16812/2 – have particular resonance in the construction industry, and show that extending medical surveillance to these employees will "provide more than a *de minimis* benefit to worker health."

## CONCLUSION

For the reasons stated in the Joint Brief of Union Petitioners-Intervenors and in this Reply Brief, this Court should remand the silica standard for reconsideration of (i) OSHA's decision not to include medical removal protection in the general

industry standard, and (ii) the medical surveillance trigger OSHA adopted in the construction standard. In all other respects, the Court should uphold the standard.

Respectfully submitted,

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Date: March 10, 2017

## CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,340 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Jeremiah A. Collins
Jeremiah A. Collins

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of March 2017, I caused a true and correct copy of the foregoing Corrected Joint Brief of Union Petitioners to be filed electronically with the Clerk of the Court using the Case Management and Electronic Case Files ("CM/ECF") system for the D.C. Circuit. Participants in the case will be served by the CM/ECF system or by U.S. mail.

/s/ Jeremiah A. Collins
Jeremiah A. Collins