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The Honorable Doug Parker
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
Washington, DC 20210

Submitted electronically: www.regulations.gov

Re: Proposed Rule, Occupational Safety and Health Administration; Worker Walkaround Representative Designation Process; Docket No. OSHA–2023-0008; RIN 1218-AD45; (88 Fed. Reg. 59,825, August 30, 2023)

Dear Assistant Secretary Parker:

The U.S. Chamber of Commerce (the Chamber) submits these comments on OSHA's proposed rule, "Worker Walkaround Representative Designation Process" (hereinafter the "Walkaround rule" or "the proposed rule"). Through its proposed rule, OSHA seeks to amend 29 C.F.R. § 1903.8, *Representatives of employers and employees*, to empower OSHA Compliance Safety and Health Officers (OSHA inspectors) to designate union organizers, community activists, or any other third-party representatives to accompany OSHA on an inspection of a workplace simply on the basis of an employee request. The Chamber is opposed to the proposed rule that is a significant change in the well-established interpretation of this OSHA regulation and a major encroachment into the rights of a vast number of private employers, many of which are small businesses, as OSHA seeks to politicize and weaponize the agency's inspections.

OVERVIEW

The proposed rule would require private-sector employers to grant access to their private property to nonemployees and any other third parties simply on the basis of the person being requested as a representative. OSHA contends that its inspectors will restrict and regulate this otherwise clear violation of property rights through its power to decide whether the requested representative "is reasonably necessary to the conduct of an effective and thorough inspection of the workplace." However, the proposed rule leaves little doubt that union organizing is its primary purpose, which will make it difficult for any inspector to conclude that a union request in a non-union workplace is anything other than reasonably necessary.

To be clear, in seeking to fulfill President Biden's explicit promise to be the most pro-union administration,[1] the proposed Walkaround rule is nothing more than rulemaking to promote union organizing cloaked in an agenda of promoting worker health and safety. Since all OSHA standards must be "reasonably necessary or appropriate to provide safe and healthful employment," *see* Section 3(8) of the OSH Act, 29 U.S.C. § 652(8), the proposed rule attempts to mask its true purpose by falsely claiming that it: (1) only "clarifies" the existing rule in Section 1903.8; and (2) does not impose any new burden or costs upon employers. Neither is true. The proposed rule does vastly more than clarify the existing rule, and it imposes significant new burdens and costs on employers without meeting OSHA's analysis and disclosure obligations under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). *See* 5 U.S.C. §§ 601-12. The desire to assist labor organizing by hastily pushing through this proposed regulation without candor and the required procedures of rulemaking is glaringly obvious for all to see.

Under section 8(e) of the OSH Act, a representative must be an "authorized employee representative." The current regulation, 29 C.F.R. § 1902.8(c), states that "[t]he representative(s) authorized by employees shall be an employee(s) of the employer." The regulation implementing section 8(e) of the OSH Act provides a narrow exception in which a non-employee third party might be allowed to serve as a representative for "good cause . . . shown," such as an industrial hygienist or safety engineer. This strikes a balance to allow for only qualified expertise regarding workplace safety while addressing employers' property rights and their rights to protect proprietary and confidential information.

What OSHA is proposing, however, is not new. As OSHA admits, the Walkaround rule is in some respects a reprise of its short-lived letter of interpretation, based on a request from the United Steelworkers, issued during the Obama administration (referred to as the Sallman letter or Fairfax Memo). Also, in a blatant effort to help unions organize, the Fairfax Memo attempted to rewrite four decades of OSHA's interpretation that only *union* representatives who were recognized by the National Labor Relations Board (NLRB) as the majority representative of the employer's employees could be considered an "authorized employee representative" under Section 8(e) of the OSH Act and its implementing regulation, 29 C.F.R. § 1903.8.[2] The Fairfax Memo was very explicit. Its purpose was to ensure that uncertified union representatives could serve as authorized employee representatives. OSHA now seeks to use rulemaking to convert OSHA's short-lived prior guidance into a regulation but in so doing hide

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1 See, e.g., FACT SHEET: Ahead of Labor Day, Biden-Harris Administration Announces New Actions to Empower Workers—Building on the President's Historic Support for Workers and Unions (Sept. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/01/fact-sheet-ahead-of-labor-day-biden-harris-administration-announces-new-actions-to-empower-workers-building-on-the-presidents-historic-support-for-workers-and-unions/#:~:text=Conducting%20analysis%20on%20how%20unions,savings)%2C%20and%20broadening%20homeownership.

2 The memo was rescinded by the Trump administration, and OSHA returned to interpreting its regulation, section 1903.8, as providing only a narrow exception in which a non-employee third party might be allowed to serve as a representative for good cause—i.e., such as an industrial hygienist or a safety engineer.

the proposed rule's organizing purpose. It does so with this proposed rule that is facially broader and appears to apply to more than just union organizing. Rather than truthfully using the words "union" or "organizers," the proposed rule instead allows for "a multitude of third parties who might serve as representatives authorized by employees for purposes of the OSHA walkaround inspection."[3]

Moreover, while the undeniable purpose of the proposed rule is to promote union organizing and provide unions access to unrepresented employees at their worksite, OSHA's efforts to conceal this objective by offering access to any third party will create havoc. Allowing anyone to be a representative—regardless of whether they are even tangentially related to employees or the inspection—will turn OSHA inspections into an opportunity for individuals or groups with grievances or an agenda against the employer to advance their interests by gaining full access to the employer's property. This might include environmental disputes, media campaigns against the company, or exploiting confidential or proprietary information. The proposed broadening of the exception places no limits on who and how many non-employees may serve as an "authorized employee representative," which changes—not clarifies—the rule.

OSHA's proposed broad changes to this narrow exception will swallow the rule and become the new rule itself. For example:

- There are no restrictions on the number of representatives—whether union organizations, community activists, or other third parties—that may accompany the OSHA inspector. Where there are competing unions seeking to organize employees, OSHA will be placed in the middle of labor disputes between unions, employees, and their employer, which specifically contradicts OSHA's Field Operations Manual (FOM). *See* FOM at 3-9, 3-10.

- OSHA's proposed rule undermines federal labor relations policy by disregarding the need for lawful recognition of a union as selected by the majority of the employees in a unit appropriate for such purposes through procedures set forth in the National Labor Relations Act (NLRA). There is no guidance on how the OSHA inspector should grant or manage the requests, and the rule disregards workplace democracy.

- There are no restrictions placed on the conduct of a non-employee third party, including union organizers, who may appear to employees during the inspection to be government officials. Can they interact with employees or engage in union organizing activity, including soliciting employees or distributing material such as union authorization cards? Can they use their phones to take pictures? Can they

[3] This true intent is clear simply from the fact that the proposed rule says nothing about providing employers an opportunity to propose multiple third parties to accompany an OSHA inspector on the inspection of the workplace to contribute to a more effective and thorough investigation.

wear apparel promoting the union, or urging support for an organizing drive? What happens if the conduct disrupts operations or production?

- Unlike the regulation for determining or assessing the credentials of an OSHA inspector and his or her conduct during an inspection, there is no provision for verifying the qualifications of the non-employee third-party representative to assess whether he or she is "necessary to the conduct of an effective and thorough inspection of the workplace." For example, 29 C.F.R. § 1903.7(a) states, "At the beginning of an inspection, Compliance Safety and Health Officers shall present their credentials to the owner, operator, or agent in charge at the establishment"; yet no similar provision is made regarding third-party representatives.

- There is no provision for the responsibility for the actions and safety of these individuals while they are on an employer's premises. Is OSHA willing to be liable for their actions if they act inappropriately, share trade secrets or confidential information, get hurt, deviate from the mission of the inspection, defame the employer, or harm persons or property? How will OSHA rein in this problematic behavior?

- There is no provision for safety training or the personal protective equipment (PPE) to be utilized by the non-employee third party. Will the third party, OSHA, or the employer be required to provide and pay for PPE?

In sum, as further detailed below, the proposed rule is not permitted as Congress did not confer authority upon OSHA to determine who is an employee's authorized representative because such a question is within the exclusive jurisdiction of the NLRB with respect to non-union workplaces. Nor is the proposed rule permitted under the meaning of the language of section 8(e) of the OSH Act, and the rule is arbitrary and capricious as the agency lacks a rational basis for adopting it—evidenced by the reliance on improper factors, its failure to consider pertinent aspects of inspections, and by reaching a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise. The burden on employers to navigate the many unanswered practical and legal implications of the proposed rule will far outweigh any alleged benefit to worker health and safety and result in unmanageable inspections that will not promote worker safety; rather, it will result in less thorough and less effective inspections. As such, the Chamber urges OSHA to withdraw the proposed rule.

The following discussion highlights additional legal and practical failures of the proposed rule.

Analysis

I. In Proposing the Walkaround Rule, OSHA Failed to Comply with Obligations Under SBREFA Requiring the Agency to Assess and Estimate the Burdens and Costs to Small Employers.

To comply with the SBREFA amendments to the RFA, federal agencies must consider the impact of small entities when drafting their rules. *See* 5 U.S.C. §§ 601-12. The RFA requires an issuing agency to consider regulatory impacts and alternatives, with the goal of minimizing significant economic impacts on small entities. An agency that publishes a notice of proposed rulemaking in the Federal Register must prepare an initial regulatory flexibility analysis (IRFA) describing the effect of the proposed rule on small businesses and discussing alternatives that might minimize adverse economic consequences, *see* 5 U.S.C. §§ 603-04,[4] unless the agency certifies that the proposed rule will not have a "significant economic impact on a substantial number of small entities" and provides a factual basis for that certification, *id.* § 605.

IRFAs are also required to contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the proposed rule on small entities." The IRFA, or a summary of the IRFA, must be published in the Federal Register when the proposed rule is published. This allows the public an opportunity for input on the IRFA while the agency is already taking comment on the proposed rule as required by the Administrative Procedure Act (APA), 5 U.S.C. §§ 101-1014. In addition, Section 609 of the RFA requires OSHA to hold small-business advocacy review panels, which are a supplemental means of obtaining input on the proposed rule and IRFA. 5 U.S.C. § 609.

OSHA failed to do any of this. OSHA seeks to excuse its non-compliance by erroneously certifying that the rule does not have a significant impact on a substantial number of small entities. Yet, OSHA is required to provide "a factual basis" for making its certification that a given regulation does not trigger SBREFA analysis. In this case, OSHA blithely states that there are no economic costs, but this is not in compliance with SBREFA's provisions.

In reality, OSHA's proposed Walkaround rule will impose substantial compliance costs on the Chamber's members and other small entities, including but not limited to costs associated with this regulation—such as time required to communicate with employees regarding the non-government official role of any non-employee third party such as a union organizer; consulting with outside counsel; procuring and provision of PPE; potential liability for any harm to persons or property or the harm from any sharing of trade secrets or confidential information; and defamation of the employer. Undoubtably, many employers will require the help of legal counsel to navigate the confusion caused by the proposed rule

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[4] Section 603 requires agencies to include in each IRFA:

> (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule . . .; [and] (5) an identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule.

5 U.S.C § 603.

despite OSHA's claims that "there are no new costs borne by employers associated with the proposal." 88 Fed. Reg. 59825, 59831 (Aug. 30, 2023).

II. The Proposed Walkaround Rule Conflicts with the NLRA Regarding the Selection and Handling of Statutorily Recognized Union Representatives.

Congress did not confer authority upon OSHA to determine who is an employee's authorized union representative because such a question is within the exclusive jurisdiction of the NLRB in non-union workplaces. OSHA's proposed rule would permit any employee to select a union representative without legal authority or any consideration of fellow employees' choice (let alone a majority vote among employees regarding the selection). The plain language of the proposed rule tasks the OSHA inspector with determining and recognizing an "authorized representative" contrary to employees' rights under the NLRA to select a representative based on majority support from the appropriate unit of employees. 29 U.S.C. § 157. This will conflict and interfere with the NLRB's statutory role to determine such questions concerning union representation. Indeed, contrary to the random and unstructured process proposed by OSHA, the NLRB has developed a very rigorous process—safeguarded by what the NLRB demands be "laboratory conditions"—under which employees select a union to represent them.[5]

The OSH Act clearly is intended to defer to the NLRB's representation authority when it comes to designating an "authorized representative" for workplace inspections. Where a union has been lawfully recognized after selection by a majority of employees pursuant to the NLRB process, OSHA treats—and has historically treated—the union as the authorized representative for inspection purposes. On the other hand, upon the commencement of an OSHA inspection where there is no union lawfully in place, there is no "authorized representative" to walk around with the OSHA inspector during an inspection. In such situations, OSHA is not instructed to usurp the NLRB's authority and randomly choose a representative, but rather it is directed to "consult with a reasonable number of employees concerning matters of health and safety in the workplace."[6]

That only lawfully recognized unions are intended to be the authorized representative for OSHA inspection purposes is supported by the fact that federal labor law treats these

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[5] An OSHA-NLRB Memorandum of Understanding (MOU), dated January 12, 2017, recognizes the distinct authority of each agency and states that the interests of OSHA focus around assuring safe and healthful working conditions while the NLRB exists to "encourage[e] the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment."

[6] In the preamble to the proposed rule, OSHA cites congressional debate on removing the section 8(e) language "a representative authorized by his employees" due to concerns that it "could . . . lead to 'collective bargaining' sessions and could interfere both with the inspection and employer's operations." 88 Fed. Reg. at 59828-29 (citing Proposed Amendment No. 1056, reprinted in Legislative History of the Occupational Safety and Health Act of 1970 at 370-72 (Comm. Print 1971) (Legislative History)). Congress's rejection of this amendment did not demonstrate that multiple or non-employee third parties in a non-union workplace could serve as authorized representatives, as OSHA claims, but

union officials differently. Specifically, the NLRB grants nonemployee union officials access to employer property to carry out representational duties. Under longstanding precedent, the Board requires that employers allow nonemployee union representatives access to employer's property where necessary for the "responsible representation of employees." *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985), *enforced*, 778 F.2d 49 (1st Cir. 1985). In addition, where a union has been lawfully recognized for nonemployee union representative access, there is a process—often in the context of safety and health matters—for the employer and union to address concerns about confidentiality, operational disruptions, and other legitimate concerns. *See ASARCO, Inc.*, 276 NLRB 1367 (1985), *enforced in relevant part* 805 F.2d 194, 198 (6th Cir. 1986). Such matters fall within the NLRA's requirement that employers and unions bargain in good faith over reasonable measures to permit property access while protecting employers' legitimate business interests. *See, e.g., Caterpillar, Inc.*, 361 NLRB 846 (2014), *reaff'g* 359 NLRB 790 (2013) (employer violated NLRA by refusing to grant nonemployee union representative access to its facility to conduct inspections after fatal accident; employer also failed to demonstrate sufficient confidentiality interest requiring union confidentiality agreement), *enforced*, 803 F.3d 360 (7th Cir. 2015).

The proposed rule similarly conflicts with other important NLRA protections. For instance, Section 8(a)(2) of the NLRA prohibits an employer from contributing "support" to a labor organization. In this regard, an employer providing a union organizer with access to its property may be providing unlawful support and assistance to that union, which is a violation of the NLRA. Because the "natural tendency of [employer] support would be to inhibit employees in their choice of a bargaining representative," the Board and the courts will consider the totality of the facts in deciding whether there is a violation. *See, e.g., Coamo Knitting Mills*, 150 NLRB 579 (1964).

Regardless of whether permitting an organizer from a particular union on company premises would violate the NLRA under certain circumstances, the requirement to do so under the proposed Walkaround rule undoubtedly could be viewed by employees as support or favoritism by the employer. The perception of special treatment undermines employees' free choice in their ultimate selection of a bargaining representative—this is especially true

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rather that Congress recognized that the authorized representative would be a certified bargaining representative and there was criticism—albeit rejected—that their inclusion in the inspection may be disruptive. All discussion in the legislative history makes reference to an authorized representative in the collective bargaining context. *See, e.g.,* House of Representatives debate on H.R. 16785, 92d Cong. 1st Sess., reprinted in Legislative at 1190 (in resolving the debate, "[t]he House receded with the understanding that the provision [in section 8(e)] in itself does not confer authority on the Secretary to prescribe regulations with respect to representation questions in a collective bargaining context."). The proposed rule would also bypass the NLRA's procedures for establishing union representation, which requires a union to demonstrate that a majority of the employees support representation before an employer can recognize the union (or another organization) as the employees' representative. OSHA's proposed rule thus conflicts with the NLRA, is contrary to the principles of workplace democracy, and may be contrary to the wishes of a majority of the workers at the facility.

where two rival unions may be seeking to represent the workforce, and under the proposed rule, one union's organizer was granted access and the other's was not.

III. OSHA's Proposed Rule Violates Employer Property Rights and the Fifth and Fourteenth Amendments.

OSHA's preamble to the proposed rule, citing the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), also mistakenly claims that the amendments to the proposed rule address the Fourth Amendment rather than constituting a "physical taking" under the Takings Clause of the Fifth and Fourteenth Amendments. OSHA's painstaking efforts to shoehorn the issue into the Fourth Amendment fail to acknowledge the rights of property owners when an OSHA inspection goes beyond government officials to invite non-employee third parties onto employers' property—those individuals do not step into the shoes of government officials (and, if OSHA claims they do, there are even more significant issues with the proposed rule).

While "a property owner traditionally had no right to exclude *an official* engaged in a reasonable search [as] government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners," *id.* at 2079 (emphasis added) (citations omitted), OSHA's proposed rule goes beyond the right of an OSHA inspector to engage in a reasonable search *as a governmental official* on an employer's property. The proposed rule seeks to create a new—albeit unconstitutional—right preventing an employer from excluding non-employee *non-government officials* from its private property.

For such a right, OSHA cites *Cedar Point Nursery*. However, this case does not give OSHA the authority it is claiming. The Supreme Court in *Cedar Point* affirmed that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." 141 S. Ct. at 2072 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982)). The Court in *Cedar Point* noted that "[u]nder the Constitution, property rights 'cannot be so easily manipulated.'" 141 S. Ct. at 2076 (citing *Horne v. Dep't of Agric.*, 576 U.S. 351, 365 (2015)). In *Cedar Point*, a union-organizing case, the Supreme Court held that a California regulation granting labor organizations a "right to take access" to an agricultural employer's property to solicit support for unionization was a *per se* physical taking under the Fifth and Fourteenth Amendments. The Supreme Court further expounded that "[t]he fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction."[7] *Id.* at 2075. In other words, the unlawful California regulation did not become lawful simply because the state legislature sought to create a limited exception for violating an employer's private property rights.

For more than 65 years, the Supreme Court has recognized that the "National Government" via the Constitution "preserves property rights," including "the right to exclude from property." *Nat'l Lab. Rels. Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Specifically, in considering property access for nonemployees under the NLRA, the Supreme

[7] The Supreme Court saw through the unlawful exception: "[W]ithout the access regulation, the growers would have had the right under California law to exclude union organizers from their property," and "no one disputes that the access regulation took that right from them." *Id.* at 2076.

Court has drawn a distinction "of substance" between employees and non-employees. *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992) (quoting *Nat'l Lab. Rels. Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)). While employers are required to balance conflicting interests when dealing with employees, the Supreme Court has directed that "[i]n cases involving *nonemployee* activity . . . the [NLRB] [i]s not permitted to engage in that same balancing." *Lechmere* at 537 (quoting *Babcock*, 351 U.S. at 109-110). When it comes to non-employees, an employer is not required to yield its private property rights except in very limited circumstances. In *Lechmere*, the Court concluded that an employer could restrict nonemployee union access to an employee parking lot on the employer's property. 502 U.S. at 541.

OSHA's proposed rule completely ignores the Supreme Court's well-established distinction between employees and non-employees. Removing an employer's ability to exclude non-employees and otherwise decide who is allowed entry on its premises, as OSHA's proposed rule would do, clearly violates the Fifth and Fourteenth Amendments.

IV. The Proposed Walkaround Rule Will Not Be Afforded Deference.

A. The Proposed Rule Fails to Give Meaning to the Terms "a Representative Authorized by His Employees."

Congress is expected "to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 143 S. Ct. 661, 665 (2022). Congress did not empower OSHA to alter the legal landscape to permit its inspectors to make determinations as to which non-employees have legal authority to represent employees.

Any proposed revision to 29 C.F.R. § 1903.8 must be promulgated under the authority given to OSHA when Congress enacted the OSH Act—specifically Section 8(e), which provides that "a representative of the employer and *a representative authorized by his employees* shall be given an opportunity to accompany the Secretary . . . for the purpose of aiding such inspection." 29 U.S.C. § 657(e) (emphasis added).

OSHA's current reasonable interpretation of this statutory provision, codified in 29 C.F.R. § 1903.8(c), says that any employee representative "shall be" an employee of the employer, with limited exceptions. OSHA's new interpretation in the proposed rule of what it means for an employee to be "authorized by his employees" is inconsistent with the meaning of "authorized." Therefore, the proposed rule would not succeed against a challenge under *Chevron.*[8]

In considering the intent of Congress in including the language "*a representative authorized by his employees*," OSHA should look to courts' consideration of similar statutory

[8] Deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is not warranted where a regulation is "procedurally defective," as discussed *supra*—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) (citations omitted).

language. For example, in 2005 the Court of Appeals for the Tenth Circuit interpreted the phrase "authorized representative of employees" under the Comprehensive Environmental Response, Compensation and Liability Act, the Solid Waste Disposal Act, and the Federal Water Pollution Control Act, and the court determined that there must be some "legal authority, rather than merely a request by employees to represent them." *Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155, 1178-79 (10th Cir. 2005).

Anderson involved a political appointee who was named to the board of directors of the Denver Metro Wastewater Reclamation District at the recommendation of a local union. The director, Anderson, sought to sue the District under the whistleblower provisions of various environmental statutes as an "authorized representative of employees." The Administrative Review Board (ARB), which was granted authority by the Secretary of Labor and assigned responsibility to issue agency decisions after review or on appeal of matters arising under a wide range of employee protection laws, ruled that Anderson was not an "authorized representative" because that term entails "some sort of tangible act of selection" and, furthermore, requires "*legal authority*, rather than merely a simple request by employees to represent them." *Id.* (emphasis added). Applying *Chevron* in reviewing the ARB's decision, the Tenth Circuit agreed that the intent of Congress was clear when it used the language "authorized representative of employees," and it must give effect to that intent.

In noting that the plain meaning of "authorized" required some sort of legal delegation to act in one's shoes, the Tenth Circuit noted the following definitions of "authorized":

> "1: [gave] authority to: empowered[;] 2: [gave] legal or official approval to . . .[;] 3: [established] by or as if by authority: sanctioned." WEBSTER'S COLLEGE DICTIONARY 59 (2003). Black's Law Dictionary defines it as: "1. [gave] legal authority; . . . empowered . . . 2. [] formally approved; . . . sanctioned . . . . " BLACK'S LAW DICTIONARY 129 (7th ed. 1999).

Id. at 1180. The court noted the plain meaning of "representative" as:

> "[S]tanding or acting for another especially through delegated authority . . . ." WEBSTER'S COLLEGE DICTIONARY 762 (2003). Black's Law Dictionary defines it as "one who stands for or acts on behalf of another . . . ." BLACK'S LAW DICTIONARY 1304 (7th ed. 1999).

Id. Considering these definitions, the court found that "based solely on the statutory language used, the term 'authorized representative' requires some sort of tangible delegation to act in one's shoes." *Id.*

Similarly, the Sixth Circuit in *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1190-91 (6th Cir. 1982), interpreted the term "authorized representative" in the context of the Clean Air Act, and concluded that an "authorized representative" of the Environmental Protection Agency (EPA) means "officers or employees of the EPA, and cannot include employees of private contractors." *Id.* The Sixth Circuit noted in *Stauffer* that, under the terms of the statute, an "authorized representative" of an employee cannot be a third party but must be a fellow employee of the EPA.

Based on the meaning of the phrase "authorized representative" as set forth in Section 8(e) in the OSH Act, the agency is not permitted to set forth a contrary definition of it in a new regulation.[9] *See, e.g.*, *Dig. Realty Tr., Inc. v. Somers*, 583 U.S. ___, 138 S. Ct. 767, 781-82 (2018) ("[b]ecause Congress has directly spoken to the precise question at issue, we do not accord deference to the contrary view advanced by the SEC . . . . The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term." (citations omitted)). Even assuming *arguendo* that the statute is ambiguous, the proposed rule would still fail the *Chevron* test because it is an arbitrary and capricious interpretation of the OSH Act. To be authorized by employees requires legal authority, not merely a simple request by employees to represent them.

B. OSHA Cannot Interpret Section 8(e) in Such a Way That Would Bring It into Conflict with Section 15 of the OSH Act.

OSHA's proposed rule is also inconsistent with Section 15 of the OSH Act, which provides that:

> All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this chapter which contains or which might reveal a trade secret referred to in section 1905 of title 18 shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceeding under this chapter. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

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[9] OSHA cites *National Federation of Independent Business v. Dougherty*, 2017 WL 1194666 (N.D. Tex. 2017), in support of the agency's actions in proposing the new rule. *Id.* at *12 ("[T]he Act merely provides that the employee's representative must be authorized by the employee, not that the representative must also be an employee of the employer."). In 2016, the National Federation of Independent Business (NFIB) challenged the Fairfax Memo, arguing, in part, that the memo exceeded OSHA's authority under 29 U.S.C. § 657(e). The United States District Court for the Northern District of Texas rejected NFIB's argument, finding that "the Act merely provides that the employee's representative must be authorized by the employee, not that the representative must also be an employee of the employer." *Dougherty*, 2017 WL 1194666, at *12. However, the district court's consideration of the arguments was limited (one page of a 29-page order, granting in part and denying in part a motion to dismiss), and the record was not fully developed on this issue because the focus of the parties' briefing in that case was around the NFIB's claim that the Fairfax Memo violated the APA in publishing the interpretation through a memorandum.

OSHA also cited *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 338 (7th Cir. 1995) ("[T]he plain language of § 8(e) permits private parties to accompany OSHA inspectors."). But in *Caterpillar*, the essential issue was whether striking *employees* could join an inspection—not merely any private party who had not been granted legal authority to represent employees. Thus, while OSHA's parenthetical appears to be helpful at first blush, it cannot fairly be said to support its overly broad interpretation of who may serve as an authorized employee representative.

29 U.S.C. § 664. This procedure contemplates the "Confidential – Trade Secret" designation upon sharing information with OSHA, but it does not provide any procedure whereby non-employee third parties ever lay eyes on the confidential information or trade secrets—likely because that was never Congress's intent. Permitting non-employees (some of whom may work directly for competitors) to accompany the OSHA inspector on an inspection would violate 29 U.S.C. § 664 by potentially disclosing trade secrets to third parties before an order can be entered to protect the confidentiality of trade secrets. Not only has OSHA failed to consider pertinent aspects of the problem,[10] the canons of statutory interpretation mandate that OSHA cannot interpret Section 8(e) of the OSH Act in such a way that would bring it into conflict with Section 15, particularly where OSHA's prior interpretation avoided the conflict. *See Epic Sys. Corp. v. Lewis*, 548 U.S. ___, 138 S. Ct. 1612, 1630 (2018).[11]

C. OSHA Has Failed to Provide a Reasoned Explanation for the New Walkaround Rule and to Consider Relevant Aspects of the Issue, Leaving Many Gaps.

An arbitrary and capricious regulation of the sort proposed by OSHA through the Walkaround rule is itself unlawful and receives no *Chevron* deference.[12] *Encino Motorcars*, 579 U.S. at 222 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001)). An agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it—for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered

[10] OSHA limited its consideration of this issue by acknowledging—sort of—that the issue may create costs for employers: "OSHA considered that employers may have policies and rules for third parties, such as . . . procedures in place to protect confidential business information from third parties who may be on site. However, such policies are not required by this regulation, and therefore any associated costs are therefore not attributable to this proposed rule." 88 Fed. Reg. at 59831.

[11] OSHA attempts to suggest that employers still have the right to protect trade secrets by "request[ing] that areas of the facility containing trade secrets be off-limits to the representatives authorized by employee(s) who do not work in that particular of the facility." 88 Fed. Reg. 59830-31, citing 29 C.F.R. 1903.9(d). However, this is based on the current regulations where an employee's representative "shall be an employee of the employer", section 1903.8(c), whereas under the proposed regulation, the employee's representative will not be an employee of the employer, thereby nullifying the protection afforded to employers by section 1903.9(d).

[12] While agencies are permitted to change their existing policies as long as they are consistent with the authorizing statute and provide a reasoned explanation for the change, *see Encino Motorcars*, 579 U.S. at 221 (and cases cited therein), the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* (citing and quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). In explaining its changed position, an agency must also be cognizant that long-standing policies may have "engendered serious reliance interests that must be taken into account." *Id.* at 221-22 (citing *Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735, 742 (1996)). A reasoned explanation is needed for disregarding facts and circumstances that underlay the prior policy. *Id.* at 222 (citing *Fox Television Stations*, 556 U.S. at 515-16). An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id.* (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also* APA, 5 U.S.C. § 706(2)(A) ("reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). *See also Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (in order for an agency interpretation of statute to be granted deference, it must be consistent with the congressional purpose); *Christopher v. Smith Kline Beecham Corp.*, 567 U.S. 142, 155 (2012) (deference to an agency's interpretation of its own ambiguous regulation is unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question). *See also Perez v. Loren Cook Co.*, 803 F.3d 935, 939 (8th Cir. 2015) (agency's interpretation not entitled to deference "when the interpretation is plainly erroneous or inconsistent . . . [or] when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question . . . . This may be evidenced by an agency's current position conflicting with prior interpretations, by an agency's use of the position as nothing more than a litigating position, or using the interpretation as a post hoc rationalization for prior action." (citations omitted)). Applying those principles, OSHA's proposed Walkaround rule is arbitrary and capricious as it has not proposed a permissible construction of Section 8(e) of the OSH Act, and it was proposed without the reasoned explanation that is required. Rather, it failed to consider relevant aspects of the issue—leaving many gaps for employers, employees, and OSHA inspectors to navigate; contradicted its own interpretations; and failed to articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43.

OSHA's intention to broaden the types of individuals who may join inspections is made explicit in the preamble to the proposed rule. Specifically, OSHA "proposes to delete the examples of industrial hygienists and safety engineers currently in [29 C.F.R. § 1903.8(c)] so that the focus is properly on the knowledge, skills, or experience of the individual rather than their professional discipline." Here, OSHA suggests leaving open-ended which individuals can be considered "authorized representatives." Although OSHA outlined several examples in the proposed rule (e.g., union leaders[13] or safety councils), the intentional omission leaves the practical application of the proposed rule arbitrary and capricious, with employers unable to prepare for which individuals may enter their facilities during inspections and what such individuals may do while on their property. The proposed rule fails to address myriad questions about how the rule would function in practice, such that it is unworkable.

[13] In fact, non-employer union representatives were the first example outlined by OSHA in the proposed rule, underscoring the pro-union undertone motivating the proposed rule. *See* proposed rule Section III ("One scenario where OSHA has encountered third-party employee representatives is in union workplaces where employees have designated a union representative, such as an elected local union leader, business agent, or safety and health specialist, to be their representative for the walkaround inspection. These representatives are often employees of the union rather than the employer being inspected. Third-party representation may also arise in workplaces without collective bargaining agreements where employees have designated a representative from a worker advocacy group, community organization, or labor union to serve as their representative in an OSHA inspection.").

In addition to the proposed rule's failure to address the issues identified earlier (*see supra* pages 3-4), there are other unaddressed questions that leave employers in the dark. For example, it is unclear whether a representative's "expertise" may expand the scope of an inspection based on what he or she sees in "plain view." Employers have a right to require that OSHA inspectors seek an inspection warrant before entering their establishment and may refuse entry in circumstances where a warrant has not been obtained. An exception to the warrant requirement is where a hazard can be observed in "plain view." *See* FOM at 3-5. Here it is unclear whether non-employee representatives' observations could satisfy the "plain view" exception. This would be problematic because if OSHA inspectors' findings are supplemented by third parties' findings, it cannot be fairly said that the findings were in "plain view" of the investigator. Further, it is unclear *how* an OSHA inspector would select the authorized representative(s).

As mentioned above, how would OSHA decide who is able to join an inspection if employees disagree about who should serve as their "authorized representative" with respect to a union representative? OSHA has failed to outline the procedure, leaving one to wonder whether the decision would be clear and objective. There is no apparent limit to the number of "authorized representatives" permitted to join OSHA inspections. Nothing in the proposed rule says that multiple employees could not request their own representatives. As such, employers are left to wonder if they are to be expected to accommodate as many additional people on their premises as OSHA deems appropriate, leaving security and safety out of business owners' control. Further, OSHA did not discuss whether "authorized representatives" would be required to stay close to the OSHA inspector during the inspection. Employers are uninformed about their obligations to monitor the representatives, such as in situations where a representative wanders away from the inspection. This scenario similarly effects employers' ability to ensure a safe and secure workplace.

In addition to the proposed rule leaving employers guessing about a variety of legal concerns that the proposed rule would raise, other questions remain: Will the representatives be allowed to take their own notes and photographs? If so, will those be incorporated in OSHA's investigatory file, which eventually would be produced to the employer through discovery if a citation is issued and contested? Would notes of employee statements taken by a representative be covered by informant's privilege—as would be the case with employee statements made to OSHA officials?

The gaps in the proposed rule highlight that OSHA's intent is not about promoting employee participation and safety but rather to push forth the Biden administration's pro-union agenda, even at the cost of implementing arbitrary, haphazard authority. Whatever the motivation, considering the expansive departure from the existing rule, OSHA needed a more reasoned explanation for its decision to depart from it. Here, OSHA has not even displayed an awareness that it is changing position, let alone shown that there are good reasons for the new policy; instead, it claims that the proposed rule only clarifies the existing regulation. Thus, for these additional reasons, the proposed rule will not be entitled to deference. *See Encino Motorcars*, 579 U.S. at 221-22; *Fox Television Stations*, 556 U.S. at 515-16; *Brand X*, 545 U.S. at 981-82.

D. The Proposed Rule Contradicts OSHA's Prior Interpretations and OSHRC Rules.

OSHA's current interpretation, 29 C.F.R. § 1903.8(c), plainly states that an employee representative "shall be an employee(s) of the employer." That regulation, with the limited exception for specialists "such as industrial hygienists and safety engineers," was promulgated in 1971, and has remained effective—short of the Fairfax Memo—for over 50 years, rendering the vast expansion of permissible authorized representatives an unreasonable departure from prior policy. *See, e.g.*, *Northpoint Tech., Ltd. v. F.C.C.*, 412 F.3d 145, 156 (D.C. Cir. 2005) ("A statutory interpretation . . . that results from an unexplained departure from prior [FCC] Commission policy and practice is not a reasonable one."). While the current rule grants a limited exception, the amendment to the rule swallows the exception such that no exception remains. For 40 years, prior to the Fairfax Memo, section 1903.8(c) was not interpreted to include non-employee union organizers. The present vast expansion of the rule is evident when considering language of Section 8(e) of the OSH Act that states, "Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace." Thus, Congress contemplated the situation where there was not a legal "authorized employee representative," such as where there is no collective bargaining representative, and it determined that effective health and safety inspections of such workplaces could be conducted by consulting directly with a reasonable number of employees concerning health and safety matters.

Additionally, OSHA's FOM makes clear that it is OSHA's policy not to become involved in labor disputes. *See* FOM at 3-9 ("Under no circumstances are OSHA inspectors to become involved in a worksite dispute involving labor management issues or interpretation of collective bargaining agreements."); *id.* at 3-10 ("During the inspection, OSHA inspectors will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute."). Reviewing courts will consider the FOM to "determine whether the Secretary has consistently applied the interpretation . . . a factor bearing on the reasonableness of the Secretary's position." *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 158 (1991). OSHA's FOM even contemplates the need for the inspector to conduct a walkaround inspection with an interpreter so that the "[inspector may] converse with employees" and instructs the inspector to contact the government agency, General Services Administration, to obtain an interpreter. FOM at VII ("Walkaround Inspection"), I.5.a.

The failings of OSHA's proposed new interpretation of Section 8(e) is also evident when taking into account how the agency gave no consideration whatsoever to, and in fact contradicts, the Rules of Procedure of the Occupational Safety and Health Review Commission (OSHRC or "the Commission"). With the proposed Walkaround rule, even before the issuance of a citation and any litigation following the contesting of an inspection, *at the beginning of an inspection* of a workplace, OSHA seeks to engage in discovery through the use of the designation of "experts" deemed qualified by OSHA inspectors alone. However, recognizing the need for discovery *once litigation commences*, Review Commission Rule 53 provides for the use of worksite visits for purposes of expert discovery after the issuance of a citation. Rule 53 provides, in pertinent part:

> (a) Scope. At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve on any other party a request to:
>
> . . . .
>
> (2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property.

29 C.F.R. § 2200.53(a). The rule also specifies the procedure to be used for requesting entry, and the procedure to follow if entry is refused:

> (b) Procedure. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. It shall specify a reasonable time, place, and manner of making the inspection and performing related acts. The party upon whom the request is served shall serve a written response within 30 days after service of the request, unless the requesting party allows a longer time. The Commission or the Judge may allow a shorter time or a longer time, should the requesting party deny an extension. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in whole or in part, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, that part shall be specified. To obtain a ruling on an objection by the responding party, the requesting party shall file a motion conforming to § 2200.40 with the Judge and shall annex its request to the motion, together with the response and objections, if any.

29 C.F.R. § 2200.53(b).

Such disputes regarding the right to engage in discovery, including allowing experts to enter an employer's property, are appropriate for Commission Administrative Law Judges, the Commission, and courts to decide[14]—not OSHA inspectors who are not equipped to hear employers' objections or to make legal conclusions regarding (and orders enforcing) them.

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[14] In deciding such disputes, the Commission and courts are guided by Federal Rule of Civil Procedure 26(b), which indicates that the request to enter upon land must be:

> [R]elevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). Commission Rule 52(b) is virtually identical to Rule 26(b) of the Federal Rules of Civil Procedure.

But through this proposed rule, OSHA seeks to get an early bite at the apple, without a Commission Order, and be the sole adjudicator as to the reasonableness of requests of non-employee third parties to enter an employer's property. While the effect of the proposed rule is clear, OSHA's analysis on this issue is nonexistent. *See Motor Vehicle Mfrs.*, 463 U.S. at 48, 57 (in finding that an agency failed to supply requisite "reasoned analysis," the Court noted that it is "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.") (citations omitted). Rather, OSHA's proposed rule is clearly inconsistent, and this provides reason to suspect that the agency's interpretation does not reflect its fair and considered judgment; its objective, instead, is for OSHA to use this rule to deliver on its support of unions' organizing efforts.

Conclusion

OSHA's proposed Walkaround rule clearly exceeds OSHA's statutory authority and is arbitrary and capricious, as the agency lacks a rational basis for adopting it. The proposed rule would impose significantly more costs than OSHA has estimated, for no measurable benefits. More importantly, OSHA's intention to promote employee participation in OSHA inspections and promote worker safety has been overshadowed by the agency's true intent to promote the Biden administration's pro-union agenda. Thus, the Chamber opposes the proposed rule and urges OSHA to withdraw it.

Sincerely,

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