No. 22-1002

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

NATIONAL NURSES UNITED, NEW YORK STATE NURSES ASSOCIATION, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS, AMERICAN FEDERATION OF TEACHERS, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; UNITED STATES DEPARTMENT OF LABOR; MARTIN J. WALSH, in his official capacity as Secretary of the United States Department of Labor, and DOUGLAS L. PARKER, in his official capacity as Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

On Petition for a Writ of Mandamus

DEPARTMENT OF LABOR'S OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS

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January 21, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) PARTIES AND AMICI

All parties, intervenors, and amici appearing in this court are listed in the unions' petition.

(B) RULING UNDER REVIEW

There are no rulings under review. The petitioners seek mandamus to compel the agency to issue a permanent health standard.

(C) RELATED CASES

In 2020, Petitioner AFL-CIO filed, and the court denied, a petition for a writ of mandamus seeking to compel OSHA to issue an emergency temporary standard for COVID-19. *In re: Am. Fed. of Labor and Cong. of Indus. Orgs.,* 2020 WL 3125324 (D.C. Cir. No. 20-1158).

In 2021, Petitioner AFL-CIO and another union filed a petition for review of the emergency temporary standard at issue here, challenging OSHA's decision to limit the standard to the healthcare sector. *United Food and Com. Workers Int'l Union, AFL-CIO, and Am. Fed. of Labor and Cong. of Indus. Orgs. v. OSHA* (D.C. Cir. No. 21-1143). Briefing in that case is currently held in abeyance.

We are unaware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ *Anne E. Bonfiglio*
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INTRODUCTION

Petitioners National Nurses United, et al. (referred to collectively in this brief as the "Unions") ask this Court for a drastic remedy: a writ of mandamus compelling the Occupational Safety and Health Administration (OSHA) to issue a final Healthcare Standard within thirty days. Since publishing an emergency temporary standard to protect healthcare workers from COVID-19 on June 21, 2021 (the "Healthcare ETS"), OSHA has promulgated a second emergency temporary standard establishing vaccine and testing requirements to protect more workers from workplace transmission of COVID-19, which required a significant allocation of OSHA resources. As a result, OSHA could not finalize a Healthcare Standard (stemming from the Healthcare ETS) within the six months contemplated by section 6(c)(3) of the Occupational Safety and Health Act. *See* 29 U.S.C. § 655(c)(3). OSHA has since determined, however, that it will marshal its resources and endeavor to complete a Healthcare Standard promptly.

The Secretary, informed by OSHA's expertise, is entitled to allocate scarce agency resources as he determines what is most appropriate to meet the Agency's mission. Because the Unions have not demonstrated that the Secretary has abused his discretion here, the Court should deny their request for a writ of mandamus.

STATEMENT OF THE CASE

I. Legal Framework

The Occupational Safety and Health Act of 1970 (OSH Act or Act) seeks "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The Act vests the Secretary of Labor, acting through OSHA, with "broad authority" to establish "standards" for health and safety in the workplace. *Indus. Un. Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 611 (1980) (plurality op.); *see* 29 U.S.C. §§ 654(a)(2), (b), 655.

Under section 6(b) of the Act, OSHA can establish through notice-and-comment rulemaking permanent health and safety standards that are "reasonably necessary or appropriate" to address a "significant risk" of harm in the workplace. *Am. Petrol. Inst.*, 448 U.S. at 642-43 (plurality op.); see 29 U.S.C. §§ 652(8), 655(b). Separately, under section 6(c), if OSHA "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and (B) that a standard "is necessary to protect employees from such danger," the Agency must issue an ETS that takes "immediate effect" and serves as a "proposed rule" for notice-and-comment rulemaking. 29 U.S.C. § 655(c). Such emergency temporary standards are "effective until superseded" by a permanent standard. *Id*. § 655(c)(2)-(3). The

Act contemplates that OSHA "shall promulgate" this permanent standard within six months. *Id*. § 655(c)(2)-(3).

The Act also grants the Secretary discretion to "determin[e] the priority for establishing standards under [section 6], . . . giv[ing] due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments." *Id*. § 655(g); *see Nat'l Cong. of Hisp. Am. Citizens v. Usery (El Congreso I)*, 554 F.2d 1196, 1199–200 (D.C. Cir. 1977).

II. Background

On January 21, 2021, President Biden issued an executive order that, among other things, directed OSHA to consider whether any emergency temporary standards were necessary to address the ongoing COVID-19 pandemic. *See* Exec. Order No. 13999, 86 Fed. Reg. 7211 (Jan. 21, 2021). OSHA immediately shifted significant resources from its existing COVID-19 response activities toward consideration of an ETS. Frederick Decl. ¶ 3. On June 21, 2021, OSHA published the Healthcare ETS to protect workers in the healthcare sector from COVID-19. 86 Fed. Reg. 32376 (June 21, 2021). The Healthcare ETS required covered healthcare employers to develop and implement a COVID-19 plan to identify and control COVID-19 hazards in the workplace. *Id*. at 32376. It also established specific requirements for: patient screening and management; standard and transmission-

based precautions; personal protective equipment (PPE), including facemasks or respirators; controls for aerosol-generating procedures; physical distancing of at least six feet, when feasible; physical barriers; cleaning and disinfection; ventilation; health screening and medical management; training; anti-retaliation; recordkeeping; and reporting. *Id*. The Healthcare ETS became effective immediately, with compliance obligations beginning for some requirements on July 6, 2021, and others on July 21, 2021. *Id*.

On November 5, 2021, OSHA published a second ETS ("Vaccination and Testing ETS") establishing vaccine and testing requirements to protect workers from workplace transmission of COVID-19. 86 Fed. Reg. 61402 (Nov. 5, 2021). The Vaccination and Testing ETS covered most large employers (100 or more employees), but excluded settings where employees provide healthcare services or healthcare support services "when subject to the requirements of [the Healthcare ETS]." *Id*. at 61515; 29 C.F.R. § 1910.501(b)(2)(ii). OSHA estimated that the Vaccination and Testing ETS would provide protection for 84.2 million workers and would prevent over 6,500 deaths and over 250,000 hospitalizations. Frederick Decl. ¶ 7; 86 Fed. Reg. at 61408, 61467.

December 21, 2021, marked six months following publication of the Healthcare ETS. On December 27, 2021, OSHA announced on its website that it would be unable to finalize a Healthcare Standard "in a timeframe approaching the

one contemplated by the OSH Act[.]" *See* OSHA, Statement on the Status of the OSHA COVID-19 Healthcare ETS (Dec. 27, 2021), available at https://www.osha.gov/coronavirus/ets. Accordingly, OSHA stated that it was withdrawing the non-recordkeeping portions[1] of the healthcare ETS, while the Agency "continue[s] to work expeditiously to issue a final standard that will protect healthcare workers from COVID-19 hazards, and will do so as it also considers its broader infectious disease rulemaking." *Id*. OSHA indicated it would "vigorously enforce the general duty clause and its general standards, including the Personal Protective Equipment (PPE) and Respiratory Protection Standards, to help protect healthcare employees from the hazard of COVID-19" while it worked to develop a final rule. *Id*. OSHA also noted that the Agency planned to publish a Federal Register notice to implement the website announcement. *Id*.[2]

On January 13, 2022, the United States Supreme Court issued a stay of the Vaccination and Testing ETS pending the disposition of numerous petitions for review in the Sixth Circuit Court of Appeals. In issuing a stay, the Supreme Court

[1] The recordkeeping provisions of the Healthcare ETS were adopted under section 8 of the OSH Act, and OSHA made a good cause finding to forgo notice and comment in light of the grave danger presented by the pandemic. See 86 FR 32559.

[2] In light of the Unions' subsequent commencement of this mandamus action and the Supreme Court's recent decision staying the Vaccination and Testing ETS, OSHA decided it would not publish a Federal Register notice pending the outcome of this litigation. Parker Decl. ¶ 6.

found that the petitioners in the case were likely to prevail on the merits. *Nat'l Fed. Of Indep. Bus. ("NFIB"), et al. v. Dep't of Labor, OSHA, et al.*, 595 U.S. ___, ___ (2022) (slip op., at 7-8).

In light of the Supreme Court's decision staying the Vaccination and Testing ETS, OSHA has determined that it will re-prioritize its resources to focus on finalizing a permanent Healthcare Standard. Parker Decl. ¶ 7. The Agency currently anticipates that it will be able to complete this rulemaking within six to nine months. *Id.* ¶ 11.

STANDARD OF REVIEW

Mandamus "is a drastic remedy . . . invoked only in extraordinary circumstances." *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (internal quotations omitted); *see also Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 944 F.3d 945, 949 (D.C. Cir. 2019) ("Mandamus is one of the most potent weapons in the judicial arsenal, a drastic and extraordinary remedy reserved for really extraordinary causes." (quoted source omitted)). The issuance of the writ is "reserved only for the most transparent violations of a clear duty to act." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoted source omitted); *see also In re Pub. Emps. for Env't Resp.*, 957 F.3d 267, 273 (D.C. Cir. 2020) (mandamus relief only available for violation of a "nondiscretionary duty"). Only if the Court finds that the agency's duty to act is indisputable does the Court turn to

whether the agency's delay has been unreasonable, applying the six-factor "*TRAC*" balancing test. *See Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("TRAC"). The court "may grant relief only when it finds compelling equitable grounds." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016).

ARGUMENT

OSHA has discretion to prioritize and use its resources in the manner that best implements competing priorities and the reality of scarce Agency resources. Here, after promulgating the Healthcare ETS, OSHA reassessed the Agency's priorities and focused its efforts on drafting and promulgating the Vaccination and Testing ETS. Following the Supreme Court's decision staying the Vaccination and Testing ETS, OSHA now intends to return its focus to finalizing a permanent Healthcare Standard. These actions reflect an appropriate and permissible exercise of OSHA's discretion in allocating scarce agency resources and ordering agency priorities during this unprecedented crisis. The Unions have therefore failed to make the showing required for the extraordinary relief of mandamus and the Court should deny their petition, which seeks to compel the Secretary to issue within thirty days a "Permanent Standard for Healthcare Occupational Exposure to COVID-19" and, in the meantime, to "retain and enforce" the entirety of the Healthcare ETS. Pet. at 2-3.

I. The Unions Are Not Entitled to a Writ of Mandamus Because the Secretary Possesses Discretion to Delay a Final Healthcare Standard While Addressing Other Priorities and He Reasonably Exercised that Discretion.

To establish their entitlement to a writ of mandamus, the Unions must first establish a "transparent violation[] of a clear duty to act." *In re Core Comms., Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). As explained below, the Unions have failed to meet this burden.

Congress gave the Secretary broad discretion to implement the OSH Act, particularly when determining the appropriate means to address the myriad of workplace hazards. *See Bldg. & Const. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988) (noting the "almost unlimited discretion" the OSH Act affords the Secretary "to devise means to achieve the congressionally mandated goal"). The Secretary likewise possesses broad discretion to order agency priorities. *See* 29 U.S.C. § 655(g) (giving the Secretary authority to "determin[e] the priority for establishing standards"); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."). In *El Congreso I*, 554 F.2d at 1199–200, this Court held that "Congress left … open-ended discretion in the Secretary at many key points in the Act" and implicitly acknowledged "that traditional agency discretion to alter priorities and defer action due to legitimate statutory considerations was preserved." *Id*. Accordingly, the

Secretary "may rationally order priorities and re-allocate his resources . . . at any rulemaking stage, so long as his discretion is honestly and fairly exercised." *Id*. at 200.

It is true that section 6(c) of the Act requires the Secretary to issue an ETS if he determines that it is necessary to address a grave danger to workers. 29 U.S.C. § 655(c). The Secretary has done that here. It is also true that an ETS serves as the proposal for a final standard. *Id*. But contrary to the Unions' assertions, the timeframe for finalizing such a standard is subject to the Secretary's discretion under section 6(g) to "determin[e] the priority for establishing standards[.]" *See id*. § 655(g).

Although section 6(c)(3) contemplates OSHA replacing an ETS with a permanent standard within six months, that provision, like similar rulemaking deadlines in the Act, must be read in conjunction with section 6(g)'s grant of discretion to the Secretary. *See El Congreso I*, 554 F.2d at 1198-1200 (holding timetables in section 6(b) do not circumscribe broad grant of discretion conferred through section 6(g)). When adding section 6(g) to the Act, Senator Javits explained that its purpose was to allow the Secretary the flexibility "to yield to more urgent demands before he tries to meet others." 115 Cong. Rec. 37, 623 (1970).

This Court has consistently held that the statutory deadlines for promulgating permanent safety or health standards under section 6(b) are not mandatory, despite their 'shall issue' language, because of the broad grant of discretion that Congress conferred to the Secretary through section 6(g). *See El Congreso I*, 554 F.2d at 1198-1200; *Nat'l Cong. of Hisp. Am. Citizens v. Marshall (El Congreso II)*, 626 F.2d 882, 888 (D.C. Cir. 1979) ("[I]t [is] clear that the timetables set forth in 655(b) are not etched in stone."); *see also Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Chao*, 361 F.3d 249, 254 (3d Cir. 2004) (finding the D.C. Circuit has "convincingly confirmed that in § 655, the statutory deadlines do not circumscribe the discretion of the Administration" (internal quotations removed)); *cf. Action on Smoking & Health v. Dep't of Labor*, 100 F.3d 991, 994 (D.C. Cir. 1996) (holding that regulatory deadlines concerning the regulation of occupational carcinogens were non-mandatory under § 655(g)'s broad delegation of discretion).

Like the deadlines set throughout the section 6(b) rulemaking process, the six-month procedural deadline in section 6(c)(3) is "not etched in stone." *See El Congreso II*, 626 F.2d at 888. Section 6(g)'s broad grant of discretion explicitly applies to any standard established under section 6. *See* 29 U.S.C. § 655(g) ("In determining the priority for establishing standards *under this section*…") (emphasis added); *El Congreso II*, 626 F.2d at 888 ("the Secretary has the

authority to *delay development of a standard at any stage* as priorities demand"); *Int'l Union*, 361 F.3d at 254 ("[I]n § 655, the statutory deadlines do not circumscribe the discretion of the administration[.]"). This is true, *a fortiori*, in the time of a national emergency where the Secretary must be free to allocate his resources to protect all workers as the threat posed by the COVID-19 pandemic continues to evolve. Thus, the Agency retains discretion to delay the promulgation of a final standard regardless of whether it initiated the rulemaking under section 6(b) or 6(c).

Here, faced with a continuing and evolving pandemic and the need to address the hazard of COVID-19 on multiple fronts, the Secretary determined that OSHA's resources should be directed toward other areas of urgent need, including the development of the Vaccination and Testing ETS and the Agency's other pandemic related activities, rather than toward finalizing the Healthcare ETS on an expedited timetable. However, in light of the Supreme Court's stay of the Vaccination and Testing ETS, OSHA now can devote its resources to finalizing the Healthcare ETS. Parker Decl. ¶ 11.

Because these decisions are reasonable exercises of the discretion granted the Secretary by section 6(g) of the OSH Act, and because the Secretary plans to move expeditiously toward finalizing protections for healthcare workers while utilizing all available protections in the meantime, mandamus is inappropriate.

II. Even If the Secretary Had a Nondiscretionary Duty to Finalize the Healthcare ETS Within Six Months, Mandamus is Not Warranted Under the *TRAC* Factors.

Even if the Court were to decide that the Secretary had violated a clear duty, "[e]quitable relief, particularly mandamus, does not necessarily follow a finding of a violation[.]" *In re Barr Lab'ys, Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). Rather, the Court must determine whether OSHA's delay in finalizing a Healthcare Standard is "so egregious as to warrant mandamus." *TRAC*, 750 F.2d at 79. Applying the *TRAC* factors, the Unions' petition fails because the Secretary's decisions with respect to the Healthcare ETS (and a related permanent Healthcare Standard) have been reasonable.

When evaluating the reasonableness of an agency's delay, the Court considers the following:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80 (citations and internal quotation marks omitted). The first factor, the "rule of reason," is the most important. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008).

The first two *TRAC* factors take into account the time that the agency has been given to address an issue (second factor) and the time that the agency has taken to address that issue (first factor). As *TRAC* noted, the second factor "may supply content" to the first because it indicates the speed with which Congress expected the agency to Act. 750 F.2d at 80. However, this is not strictly the case for OSHA rulemakings. As explained above, in enacting the OSH Act, Congress both provided timetables for promulgating final standards and provided the Secretary with the flexibility to exceed those deadlines where necessary. In this case, OSHA reasonably exercised its discretion under the OSH Act to delay a final Healthcare Standard because it needed to redirect its limited resources to address the grave danger the pandemic posed to workers outside the healthcare sector.

With respect to Agency priorities and allocation of resources, OSHA appropriately determined that attempting to complete a final Healthcare Standard within six months of the promulgation of the Healthcare ETS would have prevented OSHA from engaging in other efforts it determined were necessary to protect workers in the ongoing and evolving national pandemic. The emergence of the delta variant in summer 2021 caused the number of COVID-19 cases to

increase significantly during the Healthcare ETS's comment period. Frederick Decl. ¶ 5. This sharp increase in cases and hospitalizations led OSHA to determine that the promulgation of the Vaccination and Testing ETS was necessary to protect a larger contingent of the American workforce from the grave danger that COVID-19 presented. *Id*. The Agency redirected its limited resources from developing a permanent Healthcare Standard to support this broader effort, which necessitated that OSHA quickly develop and promulgate the Vaccination and Testing ETS, and vigorously defend that ETS in litigation. *Id*. ¶ 6.

OSHA's allocation of resources toward protections for workers not covered by the existing Healthcare ETS was consistent with both the OSH Act's broad purpose to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(B), and the Act's specific mandate that the Secretary prioritize urgently needed standards, *id*. § 655(g); *El Congreso I*, 554 F.2d n. 36 ("Giving priority to the most severe hazards, for example, comports with the Act's provisions for expedited rulemaking to deal with grave dangers." (citing 29 U.S.C. § 655(c)). However, these actions necessarily required the Agency to delay the promulgation of a final Healthcare Standard to "yield to more urgent demands." 116 Cong. Rec. at 623.

The need for OSHA to make tough choices regarding the allocation of its limited resources is clear when one considers the cumbersome and time-consuming

process required to finalize an OSHA standard. In addition to the basic requirements under the OSH Act and Administrative Procedures Act (APA) to gather evidence, seek public comment, and incorporate these into a final standard, the prolonged period for promulgating a final OSHA standard is due to a combination of federal laws and executive orders that have added numerous additional steps to the OSHA rulemaking process. Since promulgating the OSH Act, Congress itself has imposed several additional rulemaking requirements on the Agency. *See*, *e.g.*, Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-20 (1980) (requiring that agencies seek public comment on proposed information collections and submit proposed collections for OMB review and approval); Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (1980) (requiring the Agency to seek public comment on regulatory flexibility analysis for small entities and publish final regulatory flexibility analysis addressing comments received); Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1532 (requiring written qualitative and quantitative assessment of regulatory mandates that may result in state, local, and tribal government expenditures of over $100,000,000); Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 957-74 (codified in scattered sections of 5 U.S.C. and 15 U.S.C.) (requiring creation of small business representative panels for rules with significant impact on substantial number of small entities, and publication of panel member's

recommendations). Presidents have also imposed requirements on all agencies. Exec. Order No. 12866, 58 Fed. Reg. 51, 735 (Oct. 4, 1993) (requiring receipt and review by White House Office of Information and Regulatory Affairs of regulatory text and cost benefit analysis for certain actions); Exec. Order 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (requiring agency consultation with Tribal officials when developing federal policies with Tribal implications).

The additional requirements stemming from these laws have significantly increased the Agency's burden beyond what Congress contemplated when promulgating section 6 of the OSH Act. In the context of emergency temporary standards, these requirements render section 6(c)(3)'s six-month provision impractical under the best conditions, and even more so during an ongoing pandemic requiring Agency action on multiple fronts. *See* Scott D. Szymendera, Cong. Rsch. Serv., R46288, OSHA: COVID-19 Emergency Temporary Standards on Health Care Employment and Vaccinations for Large Employers 6 (2021) (observing that "six months is well outside of historical and currently expected time frames for developing and promulgating a standard under the notice and comment provisions of the APA and OSH Act, as well as under other relevant federal laws and executive orders").[3] These requirements, coupled with the

[3] In the context of the Mine Act, this Court has previously held that increased statutory requirements and executive orders do not excuse failure to meet a

complexity of the Healthcare ETS, the need to hold a public hearing, and the need to ensure the Agency is considering the most up-to-date science on COVID-19, *see* Parker Decl. ¶¶ 8-10, mean that the Unions are entirely incorrect in their assertion that OSHA can finalize a Healthcare Standard in the next thirty days, *see* Pet. 25-26.

Indeed, OSHA's normal rulemaking process takes considerably longer. In 2012, the U.S. Government Accountability Office reviewed fifty-eight safety and health standards OSHA issued between 1981 and 2010 and found the average time from notice of proposed rulemaking (NPRM) to final rule was thirty-nine months. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-330, WORKPLACE SAFETY & HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING 8 (2012). The same year, OSHA published a flowchart of the standard-setting process. The Agency itself estimated that the timeframe from NPRM to final rule was anywhere between twenty-six and sixty-three months. Frederick Decl. ¶ 9; OSHA, Directorate of Standards and Guidance, *The OSHA Rulemaking Process*, October

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mandatory statutory deadline. *See In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999). However, the Court expressly distinguished the OSH Act and the Court's prior decision in *El Congreso I*, noting that the Mine Act does not contain a discretion-granting provision comparable to OSH Act section 6(g). *Id*. at 550. Regardless, OSHA cites these challenges merely to provide the Court context for the Agency's rulemaking decisions and projected timeline.

15, 2012, available at

https://www.osha.gov/sites/default/files/OSHA_FlowChart.pdf.

Analysis of the third and fifth *TRAC* factors does not alter the balance in favor of mandamus. There is no doubt the Healthcare ETS affects human health and welfare.[4] However, and as explained above, one of the reasons OSHA has not finalized a permanent Healthcare Standard is that OSHA shifted significant resources toward publishing the Vaccination and Testing ETS, which also affected worker safety and health. Because OSHA's resources are finite, an inability to shift resources would have significantly limited OSHA's ability to publish the Vaccination and Testing ETS. Indeed, this Court has been hesitant to find an agency's delay unreasonable and order expedited action when an agency's delay was the result of work on other equally important matters that also affect human health and welfare. *See*, *e.g.*, *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1998) (In analyzing the third *TRAC* factor, the Court noted that the impact of the delay "on the public health [was] effectively irrelevant in light of [its] analysis of *TRAC*'s fourth factor, the effect of relief on competing agency priorities."). The

[4] The Unions did not identify any interests prejudiced by delay other than the impact on human health and welfare, which the fifth *TRAC* factor encompasses. Additionally, in cases involving actions that affect human health and welfare, this Court has often noted that the Third and Fifth factors overlap. *See*, *e.g.*, *In re Barr Labs., Inc.*, 930 F.2d at 75; *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 552 n.6 (D.C. Cir.1999).

Secretary's need for flexibility in responding to new developments in this national pandemic counsel even more strongly against a finding of unreasonable delay in this case.

Moreover, although OSHA has not changed its position that a specific standard is the best way to protect healthcare and healthcare support workers from COVID-19, the effect of OSHA's delay is mitigated by the Agency's plan to utilize existing standards, including the PPE standard and Respiratory Protection standards, and the general duty clause to provide protection while the rulemaking is ongoing. *See* OSHA, Statement on the Status of the OSHA COVID-19 Healthcare ETS (Dec. 27, 2021), *available at* https://www.osha.gov/coronavirus/ets. OSHA has stated that it will accept compliance with the terms of the Healthcare ETS as satisfying employer's obligations under the general duty clause and emphasized that "[c]ontinued adherence to the terms of the healthcare ETS is the simplest way for employers in healthcare settings to protect their employees' health and ensure compliance with their OSH Act obligations." *Id*.

The fourth *TRAC* factor differs from the others in that the focus is on the potential effect of the court expediting action rather than the reasonableness of the agency's actions. First, as explained above, OSHA simply cannot finalize a Healthcare Standard within the timeframe the Unions suggest. Moreover, imposing

a mandatory timeline on the Secretary during an ever-evolving national crisis would prevent the Agency from properly responding to new pandemic developments. OSHA plays an essential role in the overall federal response to COVID-19, providing critical guidance and protections to American workers. Over the past two years, OSHA has expeditiously adapted its pandemic response to ensure that it accords with the latest scientific developments and addresses the increased risks of virus variants. Constraining OSHA's resources to finalizing a Healthcare Standard would impede the Agency's ability to quickly pivot as the pandemic continues to change course, leaving workers vulnerable in the face of new viruses or variants. Thus, OSHA's continuing engagement in the federal pandemic response is a competing priority that also weighs against mandamus in this action.[5]

This case is unlike those in which this Court has imposed a timetable for OSHA to act. In those cases, the delays were both greater and unjustified by agency work on equally important priorities. For example, in *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983), this Court declined to order OSHA to issue an ETS for ethylene oxide (EtO), but ordered the agency to issue an NPRM within thirty days and to finalize a permanent standard "as promptly as

[5] As to the sixth *TRAC* factor, OSHA simply notes that the Unions have not alleged any impropriety in the Secretary's actions.

possible," but "well in advance" of the agency's three-year estimate. *Id*. at 1159-60.[6] In doing so, the Court emphasized that eighteen months had already passed since OSHA's decision to begin rulemaking. *Id*. at 1154. The Court said that it "would hesitate to require the Assistant Secretary to expedite the EtO rulemaking if such a command would seriously disrupt other rulemakings of higher or competing priority," but found that none of the competing priorities the Secretary identified "approach in urgency the need for prompt issuance of a new EtO exposure standard[.]" *Id*. at 1158. Finally, the Court emphasized that while delaying rulemaking on an EtO standard OSHA had "embarked upon the least responsive course short of inaction," in the face of an admitted grave danger to workers. *Id*. at 1153; *see also In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (ordering OSHA to issue a final rule for cadmium exposure within 5 months, after a 2-year delay from the NPRM, and a total of 6 years from the time OSHA received a petition requesting an ETS on cadmium exposure); *cf. In re Int'l Union, United Mine Workers of Am.*, 231 F.3d 51, 54 (D.C. Cir. 2000) (denying petition to compel the Mine Safety and Health Administration to

[6] In similar cases, other courts have provided much longer timeframes for OSHA to engage in the rulemaking process. *See, e.g.*, *Pub. Citizen's Rsch. Grp. v. Chao*, No. 02-1611, 2003 WL 22158985 (3d Cir. 2003) (ordering OSHA to issue a proposed rule for hexavalent chromium within 18 months and a final rule within the following 15 months).

promulgate an ETS or to engage in rulemaking for exposure to coal mine dust where notices of two related proposed rulemakings had issued).[7]

In sum, taken together, the TRAC factors demonstrate that the Unions have failed to show OSHA's delay has been unreasonable. Rather, the Secretary has reasonably and responsibly exercised his judgment to determine the best and most effective means to carry out his duties under the Act.

III. The Secretary's Decision to Rely on Other Enforcement Tools Pending the Development of a Permanent Healthcare Standard Was Reasonable.

The Secretary's decision to rely on other tools to protect healthcare workers after the six-month period set forth in section 6(c)(3) while OSHA works towards finalizing a permanent Healthcare Standard was reasonable. Section 6(c)(2) states an ETS "shall be effective until superseded" by a permanent standard. 29 U.S.C. §

[7] Rather than granting requests for agencies to take immediate action, the Court more often relies on agencies to provide their own deadlines and orders them to provide the Court updates. *See TRAC,* 750 F.2d 70, 81 (ordering the FCC to inform the court of the dates the agency anticipates resolution of the disputes at issue, and to advise the court of its progress every 60 days thereafter); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Donovan*, 756 F.2d 162, 165 (D.C. Cir. 1985) (declining request to compel OSHA to adhere to its timetable without extension, but ordering OSHA to inform the court of any action that might cause delay); *but see In re Core Commc'ns, Inc.*, 531 F.3d 849, 861 (D.C. Cir. 2008) (directing the FCC to provide a rationale for its interim intercarrier compensation rules within six months without extension or the rules would be vacated, six years after the court remanded and requested a rationale without imposing a deadline). Although the Secretary believes such an approach is unnecessary here, it would be more appropriate than granting the Unions' request for a writ of mandamus.

655(c)(2). However, no court has considered whether an ETS remains in effect and enforceable when the Secretary is unable to finalize a permanent standard in a timeframe approaching the one contemplated by the OSH Act due to competing priorities, as OSHA had previously determined is the case here. OSHA now expects to finalize a Healthcare Standard much sooner than anticipated given the Agency's re-prioritizing of resources subsequent to the Supreme Court's decision in *NFIB*. Should the Court determine that the ETS remains in effect until superseded by a final standard, the Court should recognize that a final standard is estimated to take six to nine months, not the thirty days requested by the Unions.[8]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Mandamus should be denied.

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health

[8] Even if the Healthcare ETS remained in effect, OSHA still could have exercised its broad prosecutorial discretion in deciding how to enforce it. *See Nat'l Roofing Contractors Ass'n v. U.S. Dep't of Lab.*, 639 F.3d 339, 343 (7th Cir. 2011).

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CERTIFICATE OF COMPLIANCE

This answer complies with the length limitations of Fed. R. App. P. 21(d) and the Court's January 6, 2022 Order because it contains 6,244 words, excluding the documents required by Fed. R. App. P. 21(a)(2)(C).

This answer 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 proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

/s/ Anne E. Bonfiglio
Attorney for the Secretary of Labor

Jan. 21, 2022

CERTIFICATE OF SERVICE

I certify that on this 21st day of January, 2022, I caused the Department of Labor's Opposition to the Petition for a Writ of Mandamus to be electronically filed via the Court's CM/ECF system, providing service on all counsel of record.

/s/ Anne E. Bonfiglio
Attorney for the Secretary of Labor

Jan. 21, 2021

No. 22-1002

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

NATIONAL NURSES UNITED, NEW YORK STATE NURSES ASSOCIATION, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS, AMERICAN FEDERATION OF TEACHERS, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; UNITED STATES DEPARTMENT OF LABOR; MARTIN J. WALSH, in his official capacity as Secretary of the United States Department of Labor, and DOUGLAS L. PARKER, in his official capacity as Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

On Petition for a Writ of Mandamus

DECLARATION OF DOUGLAS L. PARKER

I, Douglas L. Parker, am the Assistant Secretary of Labor for Occupational Safety and Health. I possess personal knowledge of the matters set forth in this declaration and am competent to testify to the same.

1. I have served as Assistant Secretary of Labor for Occupational Safety and Health since November 3, 2021. As Assistant Secretary, I oversee all of OSHA's activities, including its regulatory response to the COVID-19 pandemic.

2. On November 5, 2021, OSHA published its Vaccination and Testing Emergency Temporary Standard (ETS) establishing vaccine and testing requirements to protect workers in all industries from workplace transmission of COVID-19. The Vaccination and Testing ETS covered most large employers (100 or more employees), but excluded settings where employees provide healthcare services or healthcare support services to the extent they are covered by the June 21, 2021 Healthcare ETS. While OSHA's Healthcare ETS was estimated to affect 18.1 million workers, 86 Fed. Reg. 32376, 32487 (June 21, 2021), the Vaccination and Testing ETS sought to protect 84.2 million, 86 Fed. Reg. 61402, 61467 (Nov. 5, 2021).

3. Given the broad impact of the Vaccination and Testing ETS, OSHA determined it should prioritize a final vaccination and testing standard. However, doing so would demand significant agency resources. In particular, it would require the attention of almost all of OSHA's limited rulemaking staff who could

be of assistance in the rulemaking, including all of the subject matter experts responsible for the Healthcare ETS. Therefore, development of the Vaccination and Testing ETS and OSHA's decision to focus its efforts on finalizing a vaccination and testing permanent standard meant that OSHA was unable to develop a final healthcare standard within six months.

4. The six-month date following publication of the Healthcare ETS was December 21, 2021. Having determined to prioritize a final vaccination and testing standard, OSHA realized that it would not be able to finalize the Healthcare ETS "in a timeframe approaching the one contemplated by the OSH Act[.]" *See* OSHA, Statement on the Status of the OSHA COVID-19 Healthcare ETS (Dec. 27, 2021), *available at* https://www.osha.gov/coronavirus/ets. In light of the lengthy rulemaking timeframe OSHA estimated, the Agency initially determined that it should withdraw the non-recordkeeping portions of the healthcare ETS—those promulgated pursuant to OSH Act section 6(c)'s emergency powers—while the Agency continued to work toward a final healthcare standard. *See id*.

5. In addition, OSHA noted that the Vaccination and Testing ETS, and the CMS Vaccination requirements, would provide protection to Healthcare workers in the interim, as would OSHA's the General Duty Clause and other applicable standards, including the Personal Protective Equipment and Respiratory Protection Standards. While, as OSHA noted in the preamble, these requirements

are not as protective as the Healthcare ETS, they still provided some protection while OSHA attempted to ensure protection for a much wider worker population.

6. On January 5, 2022, Petitioners commenced this action. On January 13, 2022, the United States Supreme Court issued a stay of the Vaccination and Testing ETS. In light of these developments, OSHA determined to hold off publishing a Federal Register notice withdrawing the Healthcare ETS pending the outcome of this litigation.

7. The Supreme Court's decision staying the Vaccination and Testing ETS has altered OSHA's rulemaking priorities and the Agency now plans to focus its resources on finalizing a COVID-19 standard for healthcare. Even so, OSHA cannot complete a final rule in thirty days like the Petitioners request.

8. Finalizing a permanent COVID-19 standard for healthcare will involve complex scientific and economic analysis and resolution of numerous policy questions. In addition, OSHA has received 481 comments in the rulemaking docket, for which the Agency will have to complete review. *See* Healthcare ETS docket, *available at* https://www.regulations.gov/docket/OSHA-2020-0004/comments. Any final rule will have to respond to all significant comments.

9. In addition, although the Petitioners state otherwise in their petition, OSHA did receive a request for a public hearing on the Healthcare ETS. *See* https://www.regulations.gov/comment/OSHA-2020-0004-1034 (Attachment 1).

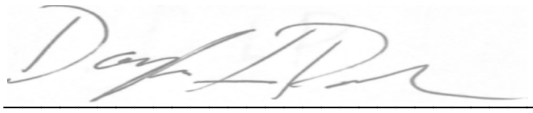
29 U.S.C. § 655(b)(3) requires OSHA to hold a public hearing when one is requested. A hearing will take time to organize and will require notice to the public. OSHA also expects to receive significant interest in the public hearing, which may result in a hearing that takes multiple weeks to complete. Once complete, OSHA will have to review all of the testimony and exhibits submitted at the hearing and incorporate them into any final rule.

10. Further, the analysis undergirding the Healthcare ETS was completed in June of 2021, and predates both the Delta and Omicron surges. The science and CDC recommendations on COVID-19 infection control have evolved since that time, and OSHA will need to consider whether to update the standard on a number of issues including vaccination and boosters, medical removal for close contact at work, and return to work guidance. OSHA may need to reopen the record to obtain new comments on those issues before the hearing and time would be needed to evaluate those comments and incorporate them into any final rule.

11. Although OSHA will be unable to complete rulemaking as quickly as the Petitioners suggest, OSHA is planning to work expeditiously toward a final standard. In light of OSHA's reordering of its priorities, the Agency now estimates that it will be able to draft a rule finalizing the Healthcare ETS in six to nine months.

12. OSHA's experience during the COVID-19 pandemic, however, is that events are unpredictable. Changes in the science or course of the pandemic in the coming months may require the Agency to reevaluate policy decisions, which could significantly change this timeline.

I declare pursuant to 28 U.S.C. § 1746 under penalty of perjury that the foregoing is true and correct. Executed on this 21st day of January, 2022, at Washington, D.C.



Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor

No. 22-1002

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

NATIONAL NURSES UNITED, NEW YORK STATE NURSES ASSOCIATION, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS, AMERICAN FEDERATION OF TEACHERS, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

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OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; UNITED STATES DEPARTMENT OF LABOR; MARTIN J. WALSH, in his official capacity as Secretary of the United States Department of Labor, and DOUGLAS L. PARKER, in his official capacity as Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

On Petition for a Writ of Mandamus

DECLARATION OF JAMES FREDERICK

I, James Frederick, am the Deputy Assistant Secretary of Labor for Occupational Safety and Health. I possess personal knowledge of the matters set forth in this declaration and am competent to testify to the same.

1. I have served as Deputy Assistant Secretary for OSHA since January 2021, and in that capacity oversee the Directorate of Standards and Guidance. DSG is responsible for developing all of OSHA's health and safety standards, except those that affect only the construction industry. In addition, from January 20, 2021 to November 3, 2021, I served as Principal Deputy and in that capacity oversaw the entire agency until Douglas Parker started as Assistant Secretary.

2. In these roles, I have overseen OSHA's regulatory response to the COVID-19 pandemic, including development of the June 21, 2021 Healthcare Emergency Temporary Standard (ETS), the November 5, 2021 Vaccination and Testing ETS, and numerous roll-out and guidance documents. I also oversee OSHA's rulemaking activities related to a potential Infectious Diseases standard.

3. In January of 2021, President Biden issued Executive Order 13999, directing OSHA to consider whether any emergency temporary standards were necessary to address the ongoing COVID-19 pandemic. OSHA immediately shifted significant resources from its existing COVID-19 response activities toward consideration of an ETS.

4. On June 21, 2021, OSHA published an ETS ("Healthcare ETS") to protect healthcare and healthcare support workers from occupational exposure to COVID-19. The interim final rule establishing the standard comprises 253 pages in the Federal Register. In it, OSHA explained that it had determined that exposure to COVID-19 poses a grave danger to those healthcare and healthcare support workers who work in settings where patients with suspected or confirmed COVID-19 receive treatment. OSHA also determined that measures adopted in the ETS were necessary to address this grave danger.

5. Shortly after publication of the Healthcare ETS, the Delta variant emerged as the dominant variant of the SARS-CoV-2 virus in the United States. The Delta variant, with its increased infectiousness and transmissibility, as well as more severe health effects, resulted in increased risk of exposure and disease across the American workforce. The emergence of this new variant and the sharp rise of COVID-19 cases across the country led OSHA to determine that another, broader standard was necessary to protect workers beyond those healthcare settings covered by the Healthcare ETS.

6. The Agency redirected all of its available rulemaking resources away from developing a permanent Healthcare standard to support this broader effort, which necessitated that OSHA quickly develop and promulgate the Vaccination and Testing ETS, and vigorously defend the standard in litigation.

7. On November 5, 2021, OSHA published its "Vaccination and Testing ETS" establishing vaccine and testing requirements to protect workers in all industries from workplace transmission of COVID-19. OSHA estimated that the Vaccination and Testing ETS would provide protection for 84.2 million workers and would prevent over 6,500 deaths and over 250,000 hospitalizations.

8. The process of promulgating an OSHA standard involves a large number of complex health and feasibility issues, as well as numerous procedural and legal requirements, demanding significant agency resources. The agency has limited staff and contractor resources and must prioritize which industries and which hazards to focus its regulatory efforts. Additionally, the agency must consider the skill set of its employees (i.e., health scientists vs. safety engineers) in establishing the entire regulatory program.

9. In 2012, DSG published a flowchart of OSHA's rulemaking process with the Agency's estimates of the timeframes required for each rulemaking stage. *See* OSHA, Directorate of Standards and Guidance, *The OSHA Rulemaking Process*, October 15, 2012, available at https://www.osha.gov/sites/default/files/OSHA_FlowChart.pdf. Based on OSHA's estimates at the time, the minimum timeframe between publication of a proposed rule and promulgation of a final standard (Stages 4 through 6 in the flowchart) is 26 months, with the process taking as long as 63 months. These estimates remain true today.

10. The difficulty of completing rulemaking in a short timeframe has only been exacerbated in the context of the COVID-19 pandemic. The effect of the COVID-19 crisis on the American workforce, unprecedented in OSHA's history, has led to unprecedented demands on the Agency's resources. OSHA simply cannot meet all of the demands on its resources occasioned by the pandemic on a swift timeline.

11. Nonetheless, with the Agency's reprioritization of the Healthcare ETS following the Supreme Court's stay of the Vaccination and Testing ETS, OSHA plans to work expeditiously towards a final Healthcare Standard. Working aggressively, OSHA estimates that it can draft a rule finalizing the Healthcare ETS in six to nine months.

I declare pursuant to 28 U.S.C. § 1746 under penalty of perjury that the foregoing is true and correct. Executed on this 21st day of January, 2022, at Washington, D.C.

James Frederick
Deputy Assistant Secretary of Labor for
Occupational Safety and Health
U.S. Department of Labor