No. 20-73203

**IN THE**
**United States Court of Appeals**
**for the Ninth Circuit**

---

IN RE AMERICAN FEDERATION OF TEACHERS; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; WASHINGTON STATE NURSES ASSOCIATION; UNITED NURSES ASSOCIATION OF CALIFORNIA.

*Petitioners*,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; UNITED STATES DEPARTMENT OF LABOR; EUGENE SCALIA, in his official capacity as Secretary of the United States Department of Labor,

*Respondents*.

---

# PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION FOR WRIT OF MANDAMUS

---

Michael C. Martinez
Jeffrey B. Dubner
Sean A. Lev
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
Telephone: (202) 448-9090
Facsimile: (202) 701-1775

*Counsel for Petitioners*

## TABLE OF CONTENTS

Table of Authorities ..... iii

Introduction ..... 1

Argument ..... 2

I. Petitioners Have Standing to Bring this Action ..... 2

II. Res Judicata Does Not Bar Petitioners' Claim ..... 6

III. OSHA's Delay of the Infectious Diseases Standard is Unreasonable ..... 11

A. OSHA has a duty to issue the Infectious Diseases Standard. ..... 11

B. OSHA's delay in issuing the Infectious Diseases Standard is unreasonable. ..... 14

Conclusion ..... 18

Certificate of Compliance ..... 19

Certificate of Service ..... 20

# TABLE OF AUTHORITIES

**Page(s)**

## Cases

*In re A Cmty. Voice*,
878 F.3d 779 (9th Cir. 2017) .....13

*In re AFL-CIO*,
No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020) .....7, 10, 11

*Cent. Delta Water Agency v. United States*,
306 F.3d 938 (9th Cir. 2002) .....6

*Garity v. APWU Nat'l Labor Org.*,
828 F.3d 848 (9th Cir. 2016) .....6

*Howard v. City of Coos Bay*,
871 F.3d 1032 (9th Cir. 2017) .....6

*Hyatt v. U.S. Patent and Trademark Off. ("USPTO")*,
904 F.3d 1361 (Fed. Cir. 2018) .....8, 9, 10

*Massachusetts v. EPA*,
549 U.S. 497 (2007).....2, 3, 4, 5

*In re Nat. Res. Def. Council, Inc.*,
956 F.3d 1134 (9th Cir. 2020) .....16

*ProShipLine Inc. v. Aspen Infrastructures Ltd.*,
609 F.3d 960 (9th Cir. 2010) .....6, 8

*Pub. Citizen Health Research Grp. v. Auchter*,
702 F.2d 1150 (D.C. Cir. 1983).....8, 12, 16, 18

*Pub. Citizen Health Research Grp. v. Chao*,
314 F.3d 143 (3d Cir. 2002) .....9, 13, 14

*Pub. Citizen Health Resource Grp. v. Comm'r, FDA*,
740 F.2d 21 (D.C. Cir. 1984).....17

*Public Citizen, Inc. v. Trump*,
297 F. Supp. 3d 6 (D.D.C. 2018).....3

*Public Citizen, Inc. v. Trump*,
No. 17-253-RDM (D.D.C. Apr. 20, 2018) .....4

*Telecommunications Research and Action Center ("TRAC") v. Federal Communications Commission*,
750 F.2d 70 (D.C. Cir. 1984).....14, 16, 17

**Statutes**

Administrative Procedure Act, 5 U.S.C. § 706(1).....2, 3, 4

OSH Act, 29 U.S.C. § 655 .....9, 17

**Other Authorities**

*Cases and Deaths Among Healthcare Personnel*, CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#health-care-personnel (last updated Jan. 27, 2021).....1

DOL/OSHA Spring 2016 Agenda, RIN 1218-AC46, Office of Information and Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=1218-AC46 .....13

E.O. on Protecting Worker Health and Safety, Jan. 21, 2021, at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/ .....8

National Nurses United, Petition Letter to OSHA (Mar. 4, 2020), https://act.nationalnursesunited.org/page/-/files/graphics/NNUPetitionOSHA03042020.pdf .....7

## INTRODUCTION

Respondents cannot, and do not, deny that healthcare workers are at high risk from non-bloodborne infections, including tuberculosis, influenza, SARS, and COVID-19. They contend only that OSHA still has not reached a final decision as to whether to set a standard after more than a decade considering the issue and that, even at this glacial pace, the Court should defer to OSHA's setting of its own priorities. While OSHA has some discretion to determine if a risk warrants the imposition of a specific standard and what risks to prioritize, its discretion is not absolute. This is why the D.C. Circuit granted mandamus under analogous circumstances in *Public Citizen Health Research Group v. Auchter.* While Respondents emphasize the patchwork of (ineffective) actions the Trump Administration took to address these issues, the fact is that a single airborne disease, COVID-19, has infected an additional 192,000 healthcare workers and killed 540 more of them just since this Petition was filed.[1] At this point, the agency's failure to move toward a permanent standard has strayed far outside the bounds of reasonable agency behavior, and mandamus is warranted.

Respondents' attempt to avoid the merits by disputing Petitioners' standing is contrary to settled law. Litigants do not need to know the exact content of

[1] *Cases and Deaths Among Healthcare Personnel*, CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#health-care-personnel (last updated Jan. 27, 2021).

agency action that has been unreasonably delayed to have standing under section 706(1) of the Administrative Procedure Act; rather, they only need to show some possibility that ending the unreasonable delay will benefit them.

Nor is this unreasonable delay action barred by res judicata, as Respondents contend, because it does not share an identity of claims with the petition for review in the D.C. Circuit. That petition challenged only OSHA's denial of a March 2020 request for an emergency *temporary* standard to specifically address COVID-19. It did not seek relief from OSHA's decade-long failure to act on a different petition for a *permanent* standard covering all non-bloodborne infectious diseases.

## ARGUMENT

### I. PETITIONERS HAVE STANDING TO BRING THIS ACTION

Respondents' arguments against both organizational and associational standing rely on the same proposition: that, because Petitioners cannot state precisely "what OSHA might ultimately propose" in the unreasonably delayed standard, Resp'ts' Br. at 19, their claimed injury is neither traceable to Respondents' actions nor redressable by a grant of mandamus. This argument fundamentally misunderstands the standing requirement applicable to unreasonable delay claims under section 706(1) of the APA.

A claim under section 706(1) seeks to vindicate "'a procedural right' ... , the right to challenge agency action unlawfully withheld." *Massachusetts v. EPA*, 549

U.S. 497, 517 (2007) (quotation omitted). In such cases, a litigant "has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518 (emphasis added). Indeed, a litigant who "alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." *Id.* (quoting *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)).

Respondents' arguments are squarely contrary to this precedent. Of course, any standard must be responsive to "contrary comments or evidence that might be received during the requisite notice-and-comment period[,]" Resp'ts' Br. at 18, but one never knows what an agency will do when required to take long-delayed action, so this is true in *every* claim under section 706(1). Respondents' argument would essentially read section 706(1) out of the APA for agency rulemaking. If accepted, it would perversely provide *more* protection to agencies in cases where they had done *less* to comply with a statutory requirement.

No cases support this inversion of the law. Tellingly, Respondents' main citation is to a district court case that did not deal with delayed action under section 706(1) at all, but rather considered a claim that an already-issued Executive Order violated the Constitution, was *ultra vires*, and was arbitrary and capricious. *See Public Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6 (D.D.C. 2018); *see also* Second

Am. Compl. ¶¶ 156-96, *Public Citizen, Inc. v. Trump*, No. 17-253-RDM (D.D.C. Apr. 20, 2018).

Respondents' argument against organizational standing is based wholly on this mistake of law. They do not dispute Petitioners' showing that OSHA's refusal to issue an Infectious Diseases Standard has caused them to divert resources and frustrated their missions. Rather, they assert only that "given the lack of clarity about whether a final federal standard would ultimately issue and, if so, what it might require, Petitioners are unable to demonstrate how requiring OSHA to resume its nascent rulemaking process would redress their concerns." Resp'ts' Br. at 19. But the Supreme Court has explicitly stated that a litigant bringing a section 706(1) claim "can assert that right without meeting all the normal standards for redressability." *Massachusetts*, 549 U.S. at 517 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). Petitioners have shown, without dispute, that they will concretely benefit if OSHA issues a standard along the lines of the one it outlined in the SER Background Document; that is more than enough.

Because Respondents' single argument against organizational standing is fatally flawed, the Court need not consider whether Petitioners have associational standing as well. However, Respondents' arguments are equally flawed as to Petitioners' members. Respondents imply that the Infectious Diseases Standard would be wholly duplicative of OSHA's existing respiratory protection and PPE

standards, Resp'ts' Br. at 15, but the necessary protective measures go well beyond these issues to include things like social distancing and exposure notification standards, as outlined further in the regulatory framework. *See, e.g.*, Pet'rs' Br. at 5 (citing Decls. at Tabs F-G, I-N), 11 (citing Q+A on OSHA's Infectious Diseases Regulatory Framework at Tab E).

Respondents also note that four of the declarants are in California and Washington, which have issued their own COVID-19 standards. Resp'ts' Br. at 15-17. This is completely inapplicable to declarant Beth Cohen, who lives in a state that lacks such a state plan for private sector workers such as herself. But even as to the other four members, Respondents' argument that they must show exactly how a federal standard would differ from a state standard cannot be squared with the settled law that litigants need not prove "the substantive result" of the unlawfully withheld action. *Massachusetts*, 549 U.S. at 518 (quoting *Sugar Cane Growers*, 289 F.3d at 94). Moreover, as Petitioners have explained at length, the risk to their members goes beyond COVID-19 to the full range of non-bloodborne infectious diseases. *See* Pet'rs' Br. at 5 (citing Decls. at Tabs F-J).

## II. RES JUDICATA DOES NOT BAR PETITIONERS' CLAIM

Res judicata, or claim preclusion,[2] is no bar to this unreasonable delay action, as this action differs significantly from the petition for review in the D.C. Circuit that OSHA argues is preclusive. The bar only applies when there is: (1) "an identity of claims" between two actions; (2) "a final judgment on the merits" in the earlier action; and (3) identity or "privity between parties." *See City of Coos Bay*, 871 F.3d at 1039 (internal quotations and citation omitted). The party asserting claim preclusion "must carry the burden of establishing all necessary elements." *Garity v. APWU Nat'l Labor Org*., 828 F.3d 848, 855 (9th Cir. 2016) (quotation omitted). OSHA cannot meet its burden.

*First*, there is no identity of claims between the two actions, meaning the two do not "arise out of *the same transactional nucleus* of facts." *ProShipLine Inc. v. Aspen Infrastructures Ltd*., 609 F.3d 960, 968 (9th Cir. 2010) (quotation omitted). When comparing the "nucleus of facts," "[a court] must narrowly construe the scope of that earlier action." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002).

[2] Respondents do not and could not assert "issue preclusion," or collateral estoppel, which would require a showing that the "issue at stake was identical in both proceedings" or that the identical issue was "actually litigated and resolved." *See Howard v. City of Coos Bay*, 871 F.3d 1032, 1040-41 (9th Cir. 2017).

As more fully explained in Petitioners' opening brief, the instant matter is (1) an unreasonable delay action, (2) stemming from Petitioners' 2009 petitions for rulemaking, (3) requesting that OSHA issue a permanent standard under section 655(b) of the OSH Act, (4) to address non-bloodborne infectious diseases, (5) affecting workers in healthcare settings. *See* Pet'rs' Br. at 1-2. OSHA has never denied the 2009 administrative petitions. In fact, those petitions were the basis for the rulemaking process on the Infectious Diseases Standard that the Trump Administration shelved in 2017. The reasonableness of that delay is at issue here.

By comparison, the D.C. Circuit matter was (1) a petition for review, not an unreasonable delay action,[3] (2) concerning OSHA's denial of a March 2020 petition for rulemaking by the AFL-CIO, following the emergence of COVID-19, (3) requesting that OSHA issue an emergency temporary standard ("ETS") under section 655(c) of the OSH Act, (4) to address the risks posed specifically by COVID-19, (5) to all workers, not just those in healthcare settings.[4] In short, not

[3] Although the AFL-CIO initially styled its case as an emergency petition for a writ of mandamus seeking an order that OSHA resolve its petition for rulemaking and issue an ETS, OSHA formally denied the petition for rulemaking while the matter was pending and the D.C. Circuit then converted the mandamus request into a petition for review of OSHA's denial. *See In re AFL-CIO*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020).

[4] National Nurses United, a union affiliated with the AFL-CIO, also filed a petition with OSHA seeking an ETS to protect nurses. *See* National Nurses United, Petition Letter to OSHA (Mar. 4, 2020), https://act.nationalnursesunited.org/page/-/files/graphics/NNUPetitionOSHA03042020.pdf.

only did the two claims stem from different petitions, but they are also different types of actions, seek different relief, and have different scopes.[5] These two cases thus do not arise from the "same" nucleus of facts. *ProShipLine*, 609 F.3d at 968.

Nor could the two claims have been "conveniently" brought together because the two actions had different "motivation[s]." *Hyatt v. U.S. Patent and Trademark Off. ("USPTO")*, 904 F.3d 1361, 1371 (Fed. Cir. 2018). Aside from the myriad factual differences between the two actions, the purpose of the ETS case was to address the immediate workplace risks from the raging pandemic through a temporary standard that could be deployed expeditiously. To tack on an unreasonable delay claim based on a different petition and for a different standard would have been inconsistent with the emergency nature of the D.C. Circuit action requesting emergency relief.

The threshold burdens in the two cases also differ significantly. Obtaining an ETS under section 655(c) requires a more exacting showing than obtaining a permanent standard under section 655(b). *See, e.g., Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983) (describing an ETS as "the

[5] On January 21, 2021, President Biden directed OSHA to consider whether an ETS addressing the occupational risks of COVID-19 is necessary, and, if so, to implement such an ETS by March 15, 2021. *See* E.O. on Protecting Worker Health and Safety, Jan. 21, 2021, at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/. As of the date of this filing, OSHA's determination had not been publicly announced.

most drastic measure in the Agency's standard-setting arsenal"). It requires a showing of "grave danger" to occupational safety and health and that an ETS is "necessary" to protect from that danger. *See* 29 U.S.C. § 655(c). This is because an ETS allows OSHA to bypass normal notice and comment procedures, allowing an ETS to take effect immediately and remain in effect until the issuance of a permanent standard within six months. *Id.* For a permanent standard, only a "significant risk" to occupational safety and health is required. *See Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143 at 152-53 (3d Cir. 2002).

*Hyatt v. USPTO* is instructive. Using the same res judicata factors used by the Ninth Circuit, the Federal Circuit considered whether a petitioner's unreasonable delay action and petition for review shared a nucleus of operative facts for the purposes of claim preclusion. *Hyatt,* 904 F.3d at 1370-71. In his unreasonable delay suit, the petitioner challenged the PTO's reopening of prosecution of his pending patent applications, alleging that the PTO had "unreasonably delayed final agency action" on these applications. *Id.* at 1370. The claim failed. He then petitioned the PTO for a rule repealing the regulation allowing for the alleged delay affecting his applications. *Id.* at 1371. The PTO denied the petition for rulemaking, and Petitioner brought a petition for review, challenging the denial. The Federal Circuit found that, even though Petitioner could have challenged the regulation in the earlier suit, the petition for review did

not share an identity with the unreasonable delay action because they arose "from a different set of facts unrelated in time, origin, or motivation to his prior unreasonable delay claims." *Id.* This action and the petition for review in the D.C. Circuit stem from facts similarly unrelated in time, origin, and motivation such that they do not share an identity of claims.

*Second*, the D.C. Circuit did not issue a judgment on the merits that applies here; it reviewed only whether OSHA's rationale for denying the March 2020 petitions was reasonable considering the heightened burden for obtaining an ETS. *In re AFL-CIO*, 2020 WL 3125324, at *1. It resolved none of the issues before this Court, namely, (1) whether OSHA has a duty to issue an Infectious Diseases Standard, (2) whether OSHA unreasonably delayed the Standard that has been pending for over 10 years, and (3) whether OSHA must issue an NPRM on the Standard within 90 days and prioritize the rulemaking.

Respondents' attempts to tie the D.C. Circuit action to this case fail. They are incorrect to suggest that the petition for review was an unreasonable delay action. Resp'ts' Br. at 20-21. While the AFL-CIO pointed to OSHA's extensive delay in issuing an Infectious Diseases Standard to support their position that the more expedited standard was necessary to address the immediate dangers from COVID-19, it did not bring an unreasonable delay claim. OSHA acknowledged as much in its response brief before the D.C. Circuit. *See* ETS Resp'ts' Br. at 15, *In re*

*AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020) ("[T]his is not an unreasonable-delay case.").

Nor did the AFL-CIO seek the implementation of the Infectious Diseases Standard in the petition for review. Resp'ts' Br. at 20-21. The AFL-CIO pointed to the pending regulatory framework and studies conducted thus far to show that an ETS could be completed expeditiously, but they also argued that "OSHA could also borrow" from other sources, such as from California's existing Aerosol Transmission Disease standard, "as necessary to help meet [a] court-imposed deadline." Resp'ts' Br. Tab E (ETS Pet'rs' Br.) at 30. Because the D.C. Circuit did not consider the merits at issue here, the judgment is no bar to this action.

## III. OSHA'S DELAY OF THE INFECTIOUS DISEASES STANDARD IS UNREASONABLE

### A. OSHA has a duty to issue the Infectious Diseases Standard.

OSHA must issue a standard to protect healthcare workers from the significant risks posed by non-bloodborne infectious diseases. Respondents do not argue that the risk from these diseases to these frontline workers is insignificant, nor could they. Instead, they argue that *only* OSHA can make that risk determination and that it still has not made that call – despite the documented risk before the pandemic from diseases like tuberculosis, SARS, and influenza; the decade-long administrative process; OSHA's acknowledgment of both the "well-recognized risk" and the inadequacy of existing requirements; and the mounting

toll from COVID-19. *See* Pet'rs' Br. at 11-12, 15-23. They also argue that, because OSHA has not made that determination, the rulemaking has not progressed to the point where the Court can mandate an NPRM. Both arguments fail.

While OSHA has some discretion to determine whether a risk warrants a standard, that discretion is not absolute. As detailed in Petitioners' opening brief, *Auchter* makes clear that a court can review and determine, based on the available record, whether a risk is significant. 702 F.2d at 1157 ("*In* [*the*] *face of this evidence*, [OSHA's] unaccounted-for delay in issuing a Notice of Proposed Rulemaking and [its] refusal to assign to the [Ethylene Oxide] rulemaking any priority status constitute agency action "unreasonably delayed.") (emphasis added).

Respondents attempt to distinguish *Auchter* and other relevant precedent by contending that OSHA, there unlike here, had expressed an "intent[ion]" to issue a standard and that the rulemaking here only demonstrates OSHA's "initial thinking" on the matter. Resp'ts' Br. at 9, 18, 27. But in *Auchter*, as here, OSHA had not yet explicitly determined that there was a "significant risk" of harm nor had it issued an NPRM. At most, OSHA had expressed that the then-current standard was "not [] sufficiently protective," which the court interpreted as an "obvious need, apparent to OSHA" for an updated standard. *Auchter*, 702 F.2d at 1152, 1154. Similarly, here OSHA found both that the risk posed by infectious diseases was "well-recognized" back in 2014 – *before* conditions worsened catastrophically

under the pandemic – and that the General Duty Clause does not "adequately protect workers with occupational exposure to infectious diseases." Pet'rs' Br. Tab C (SER Background Doc.) at A25-26, A131-32.

Respondents' characterization of the rulemaking process as only OSHA's "initial thinking" disregards all context. Following its clear determinations in the SER Background Document, OSHA set an NPRM date for the Infectious Diseases Standard of October 2017, signaling that the problem warranted further action. In setting that date, OSHA announced that it was "developing a standard to ensure that employers establish ... comprehensive infection control program[s] and control measures to protect employees from ... exposure[ ] to pathogens that can cause significant disease."[6] That OSHA had not yet selected the precise final regulatory framework is not the relevant inquiry – after all, a standard is subject to modifications until it is issued – it is whether the risk was so "apparent" and "obvious" that it triggered OSHA's duty to act.[7] *In re A Cmty. Voice*, 878 F.3d

[6] *See* DOL/OSHA Spring 2016 Agenda, RIN 1218-AC46, Office of Information and Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=1218-AC46.

[7] *Chao* also supports mandamus here. The Third Circuit found that OSHA's nine-year rulemaking delay on a hexavalent chromium standard "exceeded the bounds of reasonableness" after OSHA acknowledged that there was "clear evidence" of occupational risk from exposure and announced, but repeatedly postponed, an NPRM date. 314 F.3d at 158. The court explained that OSHA's discretion to "allocate [its] resources and set its priorities ... is not unbounded" and compelled

779, 785 (9th Cir. 2017) (quoting *Auchter*, 702 F.2d at 1154). OSHA's own statements and conduct, before its unexplained decision to delay the precedent, demonstrate that that is the case here.

### B. OSHA's delay in issuing the Infectious Diseases Standard is unreasonable.

Respondents argue that their extensive delay in issuing an Infectious Diseases Standard is reasonable because OSHA under the Trump Administration deprioritized the Standard before the pandemic, preferred alternative nonregulatory actions to issuing a permanent standard, and decided that issuing the Standard would have diverted resources from undisclosed priorities. These excuses fall far short under *Telecommunications Research and Action Center ("TRAC") v. Federal Communications Commission*¸ 750 F.2d 70, 79-80 (D.C. Cir. 1984).

On the first two, and most important, *TRAC* factors (length of delay and the existence of any statutory deadlines), Respondents contend that the decade-long delay in issuing the Infectious Diseases Standard is reasonable because OSHA under the Trump Administration determined that the OSH Act's General Duty Clause and other standards were sufficient to address the risks posed by infectious diseases. Resp'ts' Br. at 31-33.

---

OSHA to "proceed expeditiously" with its rulemaking. *Id.* at 151, 159. Likewise, the Court should compel action here.

This rationale is directly at odds with OSHA's previous position in the SER Background Document that it "*does not believe* that [the General Duty Clause] would adequately protect workers with occupational exposure to infectious diseases." Pet'rs' Br. Tab C at A131-32 (emphasis added). OSHA explained that enforcement actions under the Clause "would be a much less comprehensive approach to addressing workplace exposures to infectious diseases." *Id.* Also, "the General Duty Clause would not necessarily protect employees in the 25 states and 2 U.S. Territories that operate their own OSHA-approved occupational safety and health plans[,]" because those states "need not enforce such statutory provisions to the same extent as federal OSHA." *Id.* at A132. Enforcement "solely through the General Duty Clause is disfavored because it can impose heavy litigation burdens on both OSHA and employers." *Id.* As a result, "choosing this non-regulatory alternative would not do as much to accomplish the goals of the OSH Act as the promulgation of a comprehensive standard on workplace exposures to infectious diseases." *Id.*

Respondents now attempt to reverse course without sufficient explanation. They contend that a small business panel recommended considering if the General Duty Clause would be sufficient to address the risks posed by infectious diseases, Resp'ts' Br. at 31-32, but the panel made no recommendation about that sufficiency. By contrast, OSHA left no doubt that the General Duty Clause was

insufficient to protect workers from infectious diseases. No court has found a delay of this length to be reasonable, let alone on grounds that the agency had so thoroughly disclaimed previously. *See In re Nat. Res. Def. Council, Inc*., 956 F.3d 1134, 1139 (9th Cir. 2020) ("'[The D.C.] Circuit,' has held that a 'six-year-plus delay is nothing less than egregious.' Our own case law is no different.") (citations omitted).

Respondents then attempt to contort the third and fifth *TRAC* factors (the extent to which human health and welfare are at stake) to their benefit. Courts are more willing to compel action when the regulated matter affects public health. *Auchter*, 702 F.2d at 1154; *see also Natural Res. Def. Council*, 956 F.3d at 1142 (explaining that the agency's "years-long delay on this critical matter of public health has been nothing short of egregious"). Yet Respondents argue that the severity of the pandemic counsels *against* further action on the standard because the "current enforcement approach" under the General Duty Clause is a more effective use of agency resources. Resp'ts' Br. at 33-34.

There are several problems with this argument. First, it again relies on the efficacy of the General Duty Clause to address this risk, which OSHA previously found wholly deficient. Second, the Court need not ignore the overwhelming publicly available evidence that OSHA's enforcement approach has failed in practice. Despite the actions that OSHA touts, the number of healthcare workers

infected and dying from just one infectious disease has risen dramatically since Petitioners filed this action just a few weeks ago.[8] It does not stand to reason that measures OSHA publicly stated were insufficient, and that have proven insufficient, absolve it of its duties under the OSH Act to issue a standard. Finally, the argument fails to consider the risks of all non-COVID diseases, both those that already exist and those around the corner. With public health at stake, OSHA "must move expeditiously to consider and resolve the issues before it." *Pub. Citizen Health Resource Grp. v. Comm'r, FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984).

Similarly, Respondents argue that the fourth *TRAC* factor (effect of mandamus on other agency priorities), also weighs in their favor because the promulgation of a standard, OSHA's strongest and most effective tool, would divert too many resources during the pandemic. Resp'ts' Br. at 34. This argument glosses over the amount of work that has been completed on the Standard over the past decade, including data and comments gathered from OSHA's Request for Information, stakeholder meetings, and the SBREFA process (which resulted in the SER Background Document and proposed regulatory framework). It also disregards the OSH Act's mandate that OSHA "give due regard to the urgency of the need" for a new standard in setting priorities. 29 U.S.C. § 655(g). The risks posed by infectious diseases warrant the prioritization of the Standard, especially

[8] *See* CDC, *supra* n. 1.

because OSHA has not indicated what matters would be disturbed by a speedier rulemaking and why those matters should take precedence. *See Auchter*, 702 F.2d at 1158 (explaining that "[n]one of [OSHA's other] proceedings appear to approach in urgency the need for prompt issuance of a new EtO exposure standard, and OSHA has provided us with no reasoned explanation why it has protracted the EtO rulemaking despite the documented risks to workers' lives ...."). Thus the Court should mandate that OSHA issue an NPRM and prioritize this rulemaking.

## CONCLUSION

Petitioners respectfully urge this Court to issue a writ of mandamus compelling OSHA to issue an NPRM for the Infectious Diseases Standard within 90 days of the Court's mandamus order and prioritize the rulemaking.

Dated: January 28, 2021

Respectfully submitted,

/s/ *Michael C. Martinez*
Michael C. Martinez
Jeffrey B. Dubner
Sean A. Lev
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
Telephone: (202) 448-9090
Facsimile: (202) 701-1775

## CERTIFICATE OF COMPLIANCE

This reply in support of Petitioners' writ of mandamus complies with the type volume limitation of Ninth Circuit Rules 21-2(c) and 32-3 because it contains 4,139 words, which is fewer than 280 times the 15-page word limit (4,200), excluding the parts exempted by Federal Rules of Appellate Procedure 21(a)(2)(C) and 32(f).

The petition also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Dated: January 28, 2021

*/s/ Michael C. Martinez*
Michael C. Martinez

*Counsel for Petitioners*

## CERTIFICATE OF SERVICE

I certify that on this 28th day of January, 2021, I caused the Petitioners' Reply in Support of Their Petition for Writ of Mandamus to be electronically filed via the Court's CM/ECF system, providing service on all counsel of record.

Dated: January 28, 2021

*/s/ Michael C. Martinez*
Michael C. Martinez

*Counsel for Petitioners*