

**ORAL ARGUMENT HELD ON APRIL 4, 2022**

No. 22-1002

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

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National Nurses United, *et al.*

Petitioners,

v.

Martin J. Walsh, in his official capacity as Secretary 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

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**DEPARTMENT OF LABOR’S RESPONSE TO PETITIONERS’  
MOTION TO SUPPLEMENT THE RECORD**

On July 15, 2022, Petitioners filed a Motion to Supplement the Record or, in the Alternative, Rule 28(j) Letter Providing Supplemental Authority. The motion directs the Court to Secretary Martin J. Walsh’s June 15, 2022 statement to the Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services, Educated and Related Agencies, that he “believe[d]” a permanent COVID-19 standard for healthcare would be completed in “three to six months.”

The Department of Labor does not oppose Petitioners' motion. However, pursuant to Fed. R. App. P. 27(a)(3), the Agency files the attached Declaration of Douglas Parker, Assistant Secretary of Labor for Occupational Safety and Health, to provide the Court context and a status update on the COVID-19 standard for healthcare.

Respectfully submitted,

SEEMA NANDA  
Solicitor of Labor

EDMUND C. BAIRD  
Associate Solicitor for  
Occupational Safety and Health

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/s/ Joseph Gilliland  
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**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. Since informing the Court in January 2022 of OSHA's intention to develop a permanent COVID-19 standard for healthcare to replace its 2021 Emergency Temporary Standard (ETS) within six to nine months, OSHA has worked aggressively to reach this goal. At the same time, there has been a great deal of work to do.

3. After reviewing the 481 comments OSHA received during the initial comment period in the summer of 2021, OSHA assessed the evolution of the science on COVID-19 and changes in CDC recommendations since the time the first ETS was published in June of 2021. Based on these evaluations, the agency determined in March 2022 that it needed to reopen the record to update the record for a final rule.

4. On March 23, 2022, OSHA published a Federal Register notice announcing a thirty-day limited reopening of the comment period for the Healthcare ETS to run until April 22, 2022. 87 Fed. Reg. 16426 (March 23, 2022).

In the notice, OSHA identified several potential changes from the ETS's requirements and sought new comments and data on a variety of issues. *Id.* at 16427-31. This notice also announced the scheduling of an informal public hearing, required by 29 U.S.C. § 655(b)(3), to be held beginning on April 27, 2022. *Id.* at 16430-31.

5. OSHA held a four-day informal public hearing from April 27 to May 2, 2022. Thirty-nine stakeholder organizations and individuals testified at the hearing, including Petitioners National Nurses United, AFL-CIO, and American Federation of Teachers. At the close of the hearing, the presiding Administrative Law Judge set a twenty-one-day post-hearing comment period for the submission of additional comments and data relevant to the hearing. *See* 29 C.F.R. § 1911.16(g) (giving the presiding officer discretion “to keep the record open for a reasonable, stated time to receive written recommendations, and supporting reasons, and additional data, views, and arguments from any person who has participated in the oral proceeding”). The post-hearing comment period closed on May 23, 2022. From the limited reopening of the comment period and the post-hearing comment period, OSHA received an additional 392 comments.

6. In addition to reviewing and analyzing the hearing testimony and the new comments and data submitted to the rulemaking record, OSHA held a listening session about the proposed rule with Tribal representatives on May 10,

2022, and consulted with the Advisory Committee on Construction Safety and Health on June 15, 2022, in accordance with 29 C.F.R. 1911.10, to address questions about how the rule should apply to construction workers in healthcare settings.

7. For months, many OSHA staff, along with their counterparts in DOL's Office of the Solicitor, have worked tirelessly to review and analyze the rulemaking record and prepare a final rule. Because of their efforts, the Agency remains on track to complete a final healthcare standard in the September to October timeframe that it previously indicated to the Court. It is OSHA's primary goal to finalize a healthcare standard as quickly as possible.

8. 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. It is in this context that Secretary Walsh's June 15, 2022 statement to the Senate Appropriations Committee should be understood.

I declare pursuant to 28 U.S.C. § 1746 under penalty of perjury that the foregoing is true and correct. Executed on this 25th day of July, 2022, at Washington, D.C.



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

**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 Congress 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 Commercial Workers Int'l Union, AFL-CIO, and Am. Fed. of Labor and Congress 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/ Joseph G. Gilliland  
Attorney for the Respondents

## CERTIFICATE OF COMPLIANCE

This response to Petitioners' motion complies with the length and typeface requirements of Fed. R. App. P. 27(d) and Circuit Rule 27 because it contains 121 words, excluding the accompanying documents authorized by Fed. R. App. P. 27(a)(2)(B), and has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

/s/ Joseph G. Gilliland  
Attorney for the Secretary of Labor

July 25, 2022

**CERTIFICATE OF SERVICE**

I certify that on this 25th day of July, 2022, I caused the Department of Labor's Response to Petitioners' Motion to Supplement the Record to be electronically filed via the Court's CM/ECF system, providing service on all counsel of record.

/s/ Joseph G. Gilliland  
Attorney for the Secretary of Labor

July 25, 2021