

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union,  Petitioner,  v. Occupational Safety and Health Administration, Respondent.	No. 19-3312
North America's Building Trades Unions Petitioner,  v. Occupational Safety and Health Administration, Respondent.	No. 19-3401
Marine Specialty Painting, Inc. Petitioner,  v. Occupational Safety and Health Administration, et al., Respondents.	No. 19-3886
Mobile Abrasives, Inc. and Harsco Corporation, Petitioners,  v. Occupational Safety and Health Administration, et al., Respondents.	No. 19-3959
National Association of Home Builders of the United States, Mason Contractors Association of America, and Associated Builders and Contractors, Petitioners,  v. Occupational Safety and Health Administration, et al., Respondents.	No. 19-3993

**THE UNION PETITIONERS' OPPOSITION TO THE INDUSTRY  
PETITIONERS' JOINT MOTION TO SEVER/UNCONSOLIDATE THEIR  
PETITIONS AND TRANSFER THEM TO THE EIGHTH CIRCUIT OR,  
ALTERNATIVELY, STAY THEIR PETITIONS  
PENDING COMPLETION OF OSHA'S RULEMAKING PROCESS**

Petitioners United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”) and North America’s Building Trades Unions (“NABTU”) (collectively, “the Union Petitioners”) hereby oppose the Industry Petitioners’ Joint Motion to Sever/Unconsolidate Their Petitions and Transfer Them to the Eighth Circuit or, Alternatively, Stay Their Petitions In This Court Pending Completion of OSHA’s Rulemaking Process (“Industry Motion”). As we demonstrate below, this Industry Motion lacks merit and should be denied.

**COUNTERSTATEMENT OF BACKGROUND/PROCEDURAL HISTORY**

The two Union petitions and three Industry petitions consolidated in this Court challenge different aspects of a Final Rule issued by the Occupational Safety & Health Administration (OSHA) on September 30, 2019. *See* 84 Fed. Reg. 51377. That Final Rule rejected a prior OSHA proposal to revoke the “ancillary” worker protection provisions included in a pair of health standards covering beryllium exposure in shipyards and in construction that OSHA had adopted way back on January 9, 2017. *See* 29 C.F.R. § 1915.1024 (Beryllium Standard for

Shipyards) and 29 C.F.R. § 1926.1124 (Beryllium Standard for Construction), *adopted* 82 Fed. Reg. 2470 (Jan. 9, 2017).

The Industry Petitioners base their challenge to OSHA’s September 30, 2019 Final Rule on the assertion that, under a controlling Supreme Court decision, *Indus. Union Dep’t. v. Am. Petroleum Inst.*, 448 U.S. 607 (1980), OSHA did not have the statutory authority to adopt *any* of the worker protection provisions included in OSHA’s two beryllium standards, including the “ancillary” worker protection provisions at issue here. *See* Industry Motion at 9. The Union Petitioners, in turn, assume the legal validity of OSHA’s adoption of all such worker protection provisions, but challenge OSHA’s decision, in its September 30, 2019 Final Rule, to delay employer compliance with the “ancillary” worker protection provisions until September 30, 2020. *See id.* at 8.

In keeping with the time-sensitive nature of their challenge to OSHA’s employer compliance delay, the Unions filed their petitions for review from OSHA’s September 30, 2019 Final Rule on October 8, 2019. The Industry Petitioners, in turn, waited until November 27, 2019 to file their respective petitions—the day before the “prior to the sixtieth day” deadline imposed by § 6(f) of the Occupational Safety & Health Act (OSH Act), 29 U.S.C. § 655(f), was about to expire, and the same day that this Court issued a briefing and scheduling order on the Unions’ Petitions. In accordance with § 6(f), each of the three Industry

petitions and each of the two Union petitions were filed in the Circuit in which the Petitioner maintains its “principal place of business.” Because the only Petitioner that maintains its principal place of business in this Circuit is the USW, the only petition filed in this Circuit was the USW’s petition. None of the other petitions were filed in the Eighth Circuit, since none of the other Petitioners in these consolidated cases maintain their principal place of business in the Eighth Circuit.

All the petitions were consolidated in this Circuit under the rather elaborate procedures established by Congress in 28 U.S.C. § 2112(a) for dealing with cases involving multiple petitions for review from a single federal agency order.

Specifically, in accordance with 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation, by random selection, chose this Circuit to hear the two Union petitions filed on October 8, 2019, and issued an order “consolidating” those Union petitions in this Circuit. And, pursuant to 28 U.S.C. § 2112(a)(5)—the key statutory provision at issue here for the reasons set out *infra* pp. 8-9—the three Industry petitions filed on November 27, 2019 were transferred to this Court by the respective Circuits in which those three petitions were filed.

This Court docketed the last of the Industry petitions (Case No. 19-3993) transferred to this Court pursuant to 28 U.S.C. § 2112(a)(5) on December 26, 2019. On January 7, 2020, this Court formally consolidated the Industry petitions with the previously-consolidated Union petitions, as clearly contemplated by 28 U.S.C.

§ 2112(a)(5). And, on February 4, 2020, this Court issued a second Briefing and Scheduling Order, requiring that all Petitioners file their opening briefs and a Joint Appendix on or before March 16, 2020.

The Industry Petitioners filed their Motion asking this Court to “sever/unconsolidate” their petitions from the Union petitions and then transfer their petitions to the Eighth Circuit on February 20, 2020—nearly *two months* after the last of the Industry petitions transferred to this Court pursuant to 28 U.S.C. § 2112(a)(5) had been docketed in this Court, and an additional sixteen (16) days after this Court issued the Briefing and Scheduling Order covering all the petitions. And, on February 21, 2020, this Court stayed that Briefing and Scheduling Order pending the disposition of the Industry Motion.

## **ARGUMENT**

### **I. THE INDUSTRY PETITIONERS’ MOTION SHOULD BE DENIED IN ITS ENTIRETY ON THE THRESHOLD PROCEDURAL GROUND OF UNREASONABLE DELAY**

As we show in Parts II and III below, respectively, the Industry Petitioners plainly are *not* entitled *on the merits* to either the primary relief – transfer of their petitions to the Eighth Circuit – or the alternative relief – stay of briefing on their petitions in this Court – that they seek in their Motion. However, for the reasons set out below, this Court would be justified in denying the Industry Petitioners’ Motion in its entirety on the threshold procedural ground of unreasonable delay.

Needless to say, the Industry Petitioners could have filed their Motion at any time after the last of their petitions was docketed in this Court *on December 26, 2019*.<sup>1</sup> Yet without offering any explanation whatsoever in their Motion for not acting sooner, the Industry Petitioners sat idly by for nearly *two months* while this Court processed their initial case filings (including their respective statements of the case) and then issued a Briefing and Scheduling Order on February 4, 2020; and then sat idly by for an additional sixteen (16) days after this Court issued that Briefing and Scheduling Order. This unexplained delay was wholly unreasonable under the circumstances, and it has already resulted in prejudice to the Unions in the form of a stay in the briefing schedule covering all of the petitions.<sup>2</sup> In fact, the Industry Petitioners' conduct has significantly interfered with the Union Petitioners' objective in filing their petitions expeditiously: to secure employer compliance with the ancillary provisions of the beryllium standard in advance of September 30, 2020.

While our research discloses no appellate cases considering the implications of unreasonable delay under 28 U.S.C. § 2112(a), district court cases decided

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<sup>1</sup> For that matter, the Industry Petitioners could have filed their petitions long before the “prior to the sixtieth day” statutory deadline was about to expire.

<sup>2</sup> Although the stay does not by its terms foreclose the Unions from filing a brief on the issues raised by their petitions, it would make no sense for the Unions to do so given the fact that those issues are inextricably intertwined with the issues raised by the Industry petitions. *See infra* p. 10.

under the federal change-of-venue statute, 28 U.S.C. § 1404, support the denial of the Industry Petitioners' Motion on that basis: *See E.E.O.C. v. Lockheed Martin*, No. 05-479, 2007 WL 2746800, at \*5 (D. Haw. Sept. 19, 2007) (denying motion to transfer in part because "the facts relied upon by Lockheed to support transfer were evident long before it filed the instant Motion, some even as early as the commencement of the lawsuit"); *Martin v. BNSF Ry. Co.*, No. 07-154, 2007 WL 4333341, at \*4 (E.D. Tex. Dec. 10, 2007) ("Defendant argues that it filed its motion to transfer two days before the deadline provided by the Scheduling Order. The court's deadline was set to allow for any discovery that would warrant transfer and not to encourage gamesmanship. Defendant had all the information it needed to file a motion to transfer when it filed its answer. The court finds that the motion to transfer was filed merely for tactical delay and not for the convenience of any witness or party. This factor weighs strongly against transfer."); *Marino v. Kent Line Int'l*, No. 02-4488, 2002 WL 31618496, at \*4 (E.D. Pa. Nov. 20, 2002) ("The Court and the parties do not appear to have invested vast amounts of time and effort to date in the litigation. However, a scheduling order has issued and it is reasonable to conclude that expectations of litigation in this forum have developed . . . . Plaintiff's failure to [move for transfer] until the date of the scheduling conference . . . does not help his cause.").

At a minimum, the Industry Petitioners’ unreasonable delay should weigh heavily against granting the relief they seek to the extent, if any, that the Court sees a glimmer of merit in their arguments.

**II. THE PRIMARY RELIEF SOUGHT BY THE INDUSTRY PETITIONERS PLAINLY IS NOT AVAILABLE TO THEM UNDER 28 U.S.C. § 2112(a), AND SHOULD BE DENIED ON THAT GROUND**

The primary relief the Industry Petitioners seek in their Motion—the “severing/unconsolidation” of their petitions from the Union petitions and the transfer of only their severed/unconsolidated petitions to the Eighth Circuit—is not available to them under the plain language of 28 U.S.C. § 2112(a). It would also, if granted, contravene the manifest purpose behind 28 U.S.C. § 2112(a), which is to ensure that all petitions for review arising out of a single agency order be litigated and decided *together* in the interests of judicial economy and fairness to all parties affected by that order. *See Westinghouse Elec. Corp. v. Nuclear Regulatory Comm’n*, 598 F.2d 759, 766 (3d Cir. 1979) (observing that § 2112(a) “contemplates judicial review of particular agency action by the same court,” so that “the parties are spared simultaneous participation in proceedings in more than one circuit . . .”) (internal quotation marks omitted). Thus, if the Court reaches the merits here, it should deny this primary relief sought by the Industry Petitioners.

As previously noted, 28 U.S.C. § 2112(a)(3) provides a rather elaborate set of procedures for “consolidating” multiple petitions for review of a single agency

order in a single court of appeals—procedures that were scrupulously followed here in every respect. *See supra* pp. 3-4. And the statute further provides that once this required consolidation has been accomplished, the court of appeals in which the multiple petitions have been consolidated “may thereafter transfer *all* the [consolidated] proceedings with respect to that [single agency] order to any other court of appeals” if “the convenience of the parties [and] the interest of justice” warrant such action. *See* 28 U.S.C. § 2112(a)(5) (emphasis added).

On its face, this statutory provision expressly authorizing a court of appeals in specified circumstances to transfer “*all* the [consolidated] proceedings” with respect to a single agency order to another court of appeals negates the Industry Petitioners’ claim that this Court has the statutory authority to transfer only their petitions to the Eighth Circuit, while at the same time retaining jurisdiction over the Unions’ petitions from the very same agency order. Indeed, given the statute’s plain language, it is unsurprising that the Industry Petitioners have failed to cite a single case in which relief of this nature has been granted, although the operative statutory provisions have been in effect in their current form since 1988. *See* Wright & Miller, *Fed. Prac. & Proc.* § 3944, at 1022-28 (3d. ed. 2012). In short, given the statute’s plain language, the primary relief sought by the Industry Petitioners is unavailable to them, and should be denied.

Moreover, although the plain language of the statute is dispositive here, granting the primary relief sought by the Industry Petitioners would also contravene the manifest purpose behind 28 U.S.C. § 2112(a), which is to ensure that all challenges to the same agency order are litigated and decided *together* in the interests of judicial economy and fairness to all parties affected by that order.

In an effort to obscure this point, the Industry Petitioners seek to leave the impression that their petitions and the Unions' petitions are like two ships passing in the night, *see* Industry Motion at 8-9, but nothing could be further from the truth. Because the Union petitions challenge OSHA's delay in implementing a set of worker protection provisions that the Industry petitions claim OSHA had no legal authority to adopt in the first place, *see supra* pp. 2-3, the two sets of petitions are inextricably intertwined. Thus, it would be nonsensical from a judicial economy standpoint and highly unfair to both the Union Petitioners and OSHA to have those petitions taken up by two different courts of appeals and litigated and decided on two separate tracks.<sup>3</sup>

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<sup>3</sup> While the Industry and Union challenges to OSHA's 2019 Final Rule are inextricably intertwined, we agree with OSHA that the Industry challenges to that 2019 Rule are completely distinct from those that Industry may seek to raise in the Eighth Circuit with respect to OSHA's 2017 Rule. *See* OSHA Response at 6-10. As OSHA notes, the significant risk finding underlying the 2017 Rule has been superseded by OSHA's reaffirmation of that finding in the 2019 Rule, and therefore has effectively been removed from the Eighth Circuit challenges. We can only speculate about what (if any) other issues the Industry Petitioners may seek to raise in the Eighth Circuit, as their petitions pending in that Circuit have

### III. THE ALTERNATIVE RELIEF SOUGHT BY THE INDUSTRY PETITIONERS SHOULD BE DENIED AS WELL

The Industry Petitioners' request for alternative relief—a stay of further proceedings on their petitions (and their petitions only) pending the completion of an ongoing OSHA rulemaking proceeding, *see* Industry Motion at 9-11—should be denied on two independent grounds.

*First*, although the alternative relief industry seeks might technically be within this Court's authority under 28 U.S.C. § 2112(a), the granting of that alternative relief would undeniably contravene the statute's manifest purpose that the inherently-related issues raised by multiple petitions for review of a single agency order be litigated and decided *together* in the interests of judicial economy and fairness to all parties affected by that agency order. Further, it has been the consistent practice of the courts of appeals to hear and decide all petitions challenging an OSHA standard in one proceeding. Many such cases involve petitions for review from industry challenging OSHA's authority to regulate and

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been held in abeyance since being filed, and the Industry Petitioners have not even filed a statement of the issues presented by their petitions. But insofar as they may seek to challenge OSHA's feasibility determinations and adherence to procedural requirements, as OSHA suggests in its Response at 7-8, such hypothetical challenges can readily be pursued separately from the instant petitions, as a finding for the Industry Petitioners on issues of this kind would not lead to vacating the beryllium standards. *See Public Citizen v. U.S. Dep't of Labor*, 557 F.3d 165, 191 (3d Cir. 2009) (leaving chromium standard in place while OSHA revises its explanation); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1311 (D.C. Cir. 1980) (leaving lead standard in place while OSHA reconsiders feasibility issues).

from unions challenging OSHA's failure adequately to protect workers.<sup>4</sup> We are not aware of any challenges to an OSHA standard where multiple petitions for review of that standard were litigated separately, on separate schedules.

*Second*, the Industry Petitioners' request for this alternative relief makes no sense at all taken on its own terms. In its ongoing rulemaking proceeding, OSHA is considering relatively modest changes in a set of worker protection provisions that the Industry Petitioners here contend should never have been adopted in the first place. Logic dictates that a sweeping industry challenge to OSHA's statutory authority to adopt such worker protection provisions should be litigated and decided *before, and not after*, OSHA completes an ongoing rulemaking in which it is considering relatively modest changes to those provisions. Indeed, if this Court were to uphold the Industry Petitioners' claims that beryllium exposures do not pose significant risks to workers, the Court's ruling would moot OSHA's ongoing rulemaking proceeding and leave nothing further to be done there.

By the same token, the relief the Union Petitioners seek—enforcement of the ancillary worker protection provisions—presupposes the health need for worker protections from beryllium exposure. One way or another, this Court will have to

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<sup>4</sup> See, e.g., *United Steelworkers v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (reviewing consolidated challenges to OSHA's hazard communication standard); *United Steelworkers v. Marshall*, *supra*, 647 F.2d 1189 (reviewing consolidated challenges to OSHA's lead standard); *NABTU v. OSHA*, 878 F.3d 271 (D.C. Cir. 2017) (reviewing consolidated challenges to OSHA's silica standard).

confront whether—contrary to the Industry Petitioners’ claims—OSHA met the “threshold requirements for promulgating” the 2019 Final Rule, Industry Motion at 9, in order to evaluate the Union Petitioners’ claims.

To put this second point another way, if the Industry Petitioners genuinely believe that OSHA had no scientific basis for concluding that beryllium exposed workers face significant risks, they should be willing—indeed, anxious—to move forward with their petitions in this case raising that challenge to OSHA’s authority. Against that background, we respectfully request that this Court lift the stay on the Court’s Briefing and Scheduling Order in this case—with any modifications to that Order the Court may deem appropriate under the circumstances—and force the Industry Petitioners to choose between pressing their challenge without further delay or abandoning it altogether.

### **CONCLUSION**

For the foregoing reasons, this Court should deny the Industry Petitioners’ Motion and lift the stay on the Court’s previously-issued Briefing and Scheduling Order, with any modifications to that Order the Court may deem appropriate.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of March, 2020, I caused a copy of this Opposition to be served by electronic means through the Court's filing system on counsel for all parties required to be served, as follows:

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