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November 13, 2023

Douglas Parker
Assistant Secretary of Labor for OSHA
U.S. Department of Labor – OSHA
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Docket No. OSHA-2023-0008
Proposed Rule – Worker Walkaround Representative Designation Process

Dear Assistant Secretary Parker:

On behalf of the *Employers Walkaround Representative Rulemaking Coalition* ("Coalition"), we are pleased to submit comments addressing the Occupational Safety and Health Administration's ("OSHA" or "the Agency") August 30, 2023, proposal to amend 29 C.F.R. 1903.8(c) – the "Worker Walkaround Representative Designation Process" Rule (Docket No. OSHA-2023-0008) (hereafter "the Proposal" or "proposed rule").

The Coalition is composed of a broad and diverse group of employers and trade associations representing many industries, including retail, manufacturing, energy production, petroleum refining and pipeline/terminal operations, construction, logistics, food manufacturing and distribution, grain, feed and agricultural product processing, steel manufacturing, chemical manufacturing, environmental services, and more,[1] with millions of employees across thousands of workplaces in every state in the Nation. The common thread among our members is that they are or represent responsible and conscientious employers who care deeply about their employees' safety and health. As its members will be directly impacted by the proposed rule, the Coalition has a substantial interest in the outcome of this rulemaking.

I. Introduction and Summary

For more than five decades, OSHA has partnered with employers to improve working conditions and increase safety and safety awareness in workplaces across the country. As a result, during that period, worker injuries, illnesses, and deaths have decreased dramatically.[2] While on its face, the Proposal seeks to change only a few words of a single regulation, under the surface, it represents a significant change to the OSHA's longstanding

[1] The federal government has affirmatively recognized many of the entities in our Coalition as essential critical infrastructure, crucial for community resilience and the continuity of significant functions including U.S. supply chains.

[2] OSHA notes that its efforts, and those of employers and others, "have had a dramatic effect on workplace safety." https://www.osha.gov/data/commonstats#:~:text=Worker%20fatalities,full%2Dtime%20equivalent%20workers).

approach to physical inspections of American workplaces and raises novel and complex issues of law. The Proposal represents a noteworthy and unwelcome change to the fifty plus years in which OSHA has focused on its mission – helping make American workplaces safer.

These comments address the lack of a documented workplace safety-related justification for the proposed change in regulatory language. The Proposal does not demonstrate that a single workplace inspection in OSHA's history has been insufficient in any way under the current regulatory scheme, and offers no explanation for how the proposed regulation will improve the quality or outcome of OSHA's workplace inspections.

The comments then address how the Proposal conflicts with various laws. At a fundamental level, we address the Coalition's serious concerns about the constitutionality of the proposed rule, and we note several ways the Proposal conflicts with the OSH Act and established statutory and regulatory interpretations (improperly changing the meaning of the OSH Act and exceeding OSHA's authority), as well as the National Labor Relations Act (ignoring established protocols for the selection of employee representatives). In that regard, the comments address concerns with OSHA inserting itself into an issue – labor union organizing – that has made the National Labor Relations Board a hotbed of contention and dissension, notorious for its partisan oscillation. Workplace safety should never be politicized, and the federal agency responsible for overseeing it should not be seen as pursuing political or ideological goals that distract that Agency from what should be a singular focus on workplace safety.

We then address the many unanswered questions about and practical challenges created by implementation of the amended rule; e.g., how the designation process will work, what standards apply to the various elements of the designation process, and what recourse employers may have if they oppose a particular third party's participation in an inspection.

Finally, we address how the Proposal reflects misguided policy, by failing to acknowledge the substantial risks and burdens on employers caused by the presence of third parties who are traditionally not allowed in workplaces by employers.

For all these reasons, the Coalition urges the Agency to reconsider this ill-advised rulemaking. At a minimum, the proposed rule should be revised consistent with the recommendations herein to promote workplace safety and address legal and operational concerns. Each of these issues is discussed more fully below.

II. OSHA Fails to Demonstrate the Problem that the Proposal Is Designed to Address or How the Proposal Will Improve Workplace Safety.

Executive Order 12866 establishes the guiding principles that executive agencies must follow when developing regulations. It begins with a recitation of "The Principles of Regulation," the very first of which is that "[e]ach agency shall identify the problem that it intends to address … as well as assess the significance of that problem."[3] The Supreme Court agrees, and has stated: "Agencies are free to change their existing policies as long as they

[3] Executive Order 12866, at Sec. 1(b)(1).

provide a reasoned explanation for the change."[4] In so doing, "of course the agency must show that there are good reasons for the new policy."[5] At a minimum, the Agency must establish the existence of a problem, support it with evidence and then show that its proposed solution will address the identified problem.[6] The Proposal falls far short of this basic standard.

The Proposal states at the outset that the Agency "has preliminarily determined that the proposed changes will aid OSHA's workplace inspections by better enabling employees to select a representative of their choice to accompany the CSHO during a physical workplace inspection."[7] Similarly, in Assistant Secretary Doug Parker's written statement before the U.S. House of Representatives' Subcommittee on Workforce Protections, he said: "This proposal aims to make inspections more effective and ultimately make workplaces safer *by increasing opportunities for employees to be represented in the inspection process*."[8] However, the Proposal presents no evidence of a single OSHA inspection that has been negatively impacted in any way, or that any employees have been thwarted in their opportunity or ability to be adequately represented during an OSHA inspection, under the existing regulation, much less explain how the Proposal will "better enable" such employees to select a representative in the future or how that will improve the effectiveness of OSHA inspections.

Under the existing standard, a CSHO already must determine that a third party employee representative's participation is reasonably necessary to the conduct of an effective and thorough inspection, and OSHA conducts, on average, more than 30,000 inspections every year for decades. Therefore, the regulated community should reasonably expect that a proposed rule like this will present data or even anecdotes demonstrating that employees have been prevented from selecting appropriate and effective representatives of under the existing regulatory scheme, or that OSHA's effectiveness in a non-marginal number of its inspections has been hampered by employees' supposed inability to do so. Nor does the Proposal include any information that would demonstrate that:

1. Employees have sought non-employee OSHA inspection representation and been denied;
2. Accompaniment by a non-employee third party benefits the conduct of an effective and thorough physical safety inspection of the workplace;
3. OSHA needs additional resources, personnel, or expertise to conduct effective and thorough physical inspections of the workplace; or
4. A third party is better equipped to provide such resources or expertise to promote workplace safety than OSHA itself, the agency statutorily charged with this mission.

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[4] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

[5] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[6] *Encino Motorcars*, 579 U.S. at 221 ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.").

[7] Federal Register, August 30, 2023 at p. 59826.

[8] https://www.osha.gov/news/testimonies/09272023 (emphasis added).

Absent evidence that OSHA inspections are being detrimentally affected by 1903.8(c) in its current form, the Proposal appears to be a solution in search of a problem.[9]

To be fair, OSHA does claim that for one inspection in 2012 (even before the Agency wrote the so-called "Fairfax Letter" in 2013 that was the precursor to this rulemaking), employees chose a community organization's attorney and a former employee as representatives, which was purportedly "very beneficial" to the inspection because many of the workers "were not fluent in English." The Agency asserts that in that instance, "having representatives who the workers trusted and facilitated communications with the CSHO enabled OSHA to conduct numerous workplace interviews and better investigate workplace conditions."[10] That one inspection took place more than ten years ago, and it proceeded with OSHA's and the employees' desired third party representative under the existing regulation, which again raises the question of why OSHA believes a change is necessary. The example suggests nothing more than a potential need for more or better-skilled language interpreters available to OSHA (or within OSHA). But if OSHA's concern is potential language barriers, it would be better to either hire bilingual CSHOs or directly engage translators as OSHA's agents for use during inspections.

OSHA's failure to identify a purported problem that this rulemaking intends to solve renders the Proposal unnecessary and contrary to the guiding principles of E.O. 12866, so the Agency should withdraw the Proposal.

III. The Proposal Conflicts with the OSH Act and Established Interpretations.

A. The Proposal Conflicts with The OSH Act.

The OSH Act at 29 U.S.C. 657(e) allows for "a representative authorized by his employees" to be given an opportunity to "accompany" a CSHO during the physical inspection of the workplace "for the purpose of aiding such inspection." The term "*a* representative" conveys the straightforward meaning of a single individual. The term "accompany" is defined by the Black's Law Dictionary as "to go along with (another); to attend," in contrast to the term "participation," defined as "the act of taking part in something, such as a partnership, a crime, or a trial."[11] OSHA's proposed amendments to 29 C.F.R. § 1903.8(a) subvert these clear, simple terms in the OSH Act. Although it is established law that a regulation cannot change a statute,[12] the proposed rule attempts to do just that.

Whereas the OSH Act permits employees a single inspection representative, the current version of 29 C.F.R. § 1903.8(a) already purports to permit "additional representative*s*" where the CSHO determines that such additional representatives will further aid the inspection. The

[9] Doug Parker testified to Congress on September 27, 2023, that "what we have seen over the course of the 52 years since the signing of the OSH act, is that there is less and less worker participation," but OSHA has shown no evidence of this.

[10] Federal Register, August 30, 2023 at p. 59830.

[11] ACCOMPANY and PARTICIPATION, Black's Law Dictionary (11th ed. 2019)

[12] *Public Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000).

Proposal would further amend the regulation to reference even more plural pronouns, indicating OSHA's intention to further improperly change the meaning of the OSH Act. The Proposal lacks any defined restrictions on the number of third party representatives that employees can "authorize" or the number that CSHOs can approve. OSHA exceeded its authority when it enacted the current regulation, and it should not compound that error by retaining the same language and adding plural pronouns in the Proposed rule, which only a single employee representative is permitted under the Act. Doing so directly conflicts with the OSH Act and makes the Proposed rule vulnerable to legal challenge.

In addition, the proposed change from "accompaniment" to "participation" implies that authorized representatives will take a more active role in the inspection process, which is not authorized by the OSH Act. The Proposal is silent on what "participation" entails, but the OSH Act and current regulations allow OSHA's CSHOs to "question privately" non-supervisory employees and "review records."[13] Does OSHA intend to permit authorized third party representatives to "participate" in private employee interviews? To ask their own questions during those interviews? To gain access to records that employers are compelled to produce to OSHA pursuant to the Agency's broad administrative subpoena authority? To make their own document requests to employers? This seems inconceivable, but there is no context why the word "participation" was written into the Proposal.

Section 8(e) of the OSH Act underscores that the purpose of allowing a representative authorized by employees to accompany a CSHO during a physical inspection is "for the purpose of aiding such inspection."[14] The intent was for someone familiar with the workplace and the workforce to aid CSHOs with their physical inspections. The OSH Act's legislative history also indicates that there has always been a concern about potential abuse, even when OSHA contemplated only employees and union representatives. "The potential abuse of this device as part of an organizing campaign or as part of an effort to ferment labor unrest is obvious."[15] To avoid such abuse, Congress' stated intent was to align the meaning of *authorized representative* with that term under the National Labor Relations Act ("NLRA"). Hence, in cases where no union had been elected at the workplace, CSHOs would consult with a reasonable number of employees regarding health and safety matters in the workplace, per 29 U.S.C. 657(e). The concern for potential abuse remains valid today, and expanding the scope of who can be designated as an authorized representative significantly exacerbates this concern.

The OSH Act further demonstrates that the designation by employees of an OSHA inspection representative must reflect the will of employees as a whole, not a lone employee or small, non-representative group of employees. Section 8(e) of the OSH Act provides that the walkaround representative must be "authorized by his *employees*[.]"[16] Congress' use of the plural "employees" indicates that the entire body of employees of an employer, acting *as*

[13] 29 C.F.R. § 1903.3(a).

[14] "Aid" means "help, assist, or support (someone or something) in the achievement of something." (Google "aid definition")

[15] *Legislative History of the Occupational Safety and Health Act of 1970*, U.S. Government Printing Office Washington, 1971, page 1224.

[16] 29 U.S.C. § 657(e) (emphasis added).

a whole must "authorize" the walkaround representative to act on their behalf. This is consistent with the fact that the plain language of Section 8(e) of the OSH Act permits only a single authorized representative: thus, "a representative" (singular) "authorized by [the] employees" (plural) "shall be given an opportunity to accompany [the CSHO] during the physical inspection[.]"[17] This statutory language precludes any one-off or ad hoc "authorization" by an individual employee or small group of employees. Instead, acting together, *the employees as a whole* must select and authorize *a single representative* to accompany the CSHO.[18]

B. The Proposal Conflicts with Long-Standing Regulations and Interpretations

As will be discussed below, since 1971 OSHA has defined "authorized employee representative" to mean "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees."[19] Another regulation likewise defines "authorized employee representative" as "an authorized collective bargaining agent of employees."[20] Expanding the meaning of an "authorized employee representative" to any third party with relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills, directly conflicts with these well-established definitions.

Over five decades, a stable interpretation of the meaning of "authorized employee representative" has allowed employers, employees, unions, and OSHA to work efficiently and reasonably with each other, including, where applicable, through joint union-management safety committees. The long-standing interpretation reflects a considered and informed approach to workplace safety inspections. Expanding the definition will disrupt established practices, create substantial financial and operational burdens on companies, and lead to confusion. Because the original legislative intent behind the walkaround rule has not changed, a consistent interpretation that aligns with that intent should be maintained.

IV. The Proposal Conflicts with the National Labor Relations Act

A. The Proposal Undermines the NLRA's Principle of Majority Support

In non-union workplaces, allowing third parties who have not demonstrated majority support to assume and exercise representational rights over employees directly contradicts the NLRA. Section 8(e) of the OSH Act affords an opportunity for "a representative authorized by" the employees of an employer to accompany a CSHO "during the physical inspection" of

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[17] 29 U.S.C. § 657(e).

[18] Because Section 8(e) provides for "a representative," the Proposal cannot allow more than one authorized representative. *See United States v. Larianoff*, 97 S.Ct. 2150, 2156 (1977) ("regulations, in order to be valid must be consistent with the statute under which they are promulgated.").

[19] *See* Footnote 24, *infra*.

[20] 29 C.F.R. § 1904.35(b)(2)(i).

that employer's workplace.[21] Since 1971, the relevant regulation has stated that a walkaround representative "shall be an employee(s) of the employer."[22] Despite this limiting language, where, at the time of a physical inspection, the employees are represented by a labor union certified pursuant to the NLRA, OSHA allows for an exception to the rule and defers to that union to select the walkaround representative, even where the union official or representative is not an employee of the employer.[23] OSHA's proposed amendments to 29 C.F.R. § 1903.8(a), however, would grant that same authority to unions even in workplaces where employees have not elected a union to represent them. In that regard, the Proposal directly contradicts the NLRA, as it would allow labor unions that have not demonstrated majority support to assume and exercise representational rights over employees.

Indeed, OSHA has long treated certified labor unions as the authorized representative of employees for walkaround purposes, operating under a consistent understanding that where the workers are lawfully represented by a labor union as certified pursuant to the NLRA, that certification in effect serves as a proxy for "authorization" within the meaning of the OSH Act's Section 8(e). In fact, OSHA's original procedural rules expressly defined "authorized employee representative" in terms of "certification" by the NLRB: "A labor organization *certified by the National Labor Relations Board* as a bargaining representative for the effected employees,"[24] and OSHA's current Field Operations Manual states that "the highest ranking union employee representative onsite shall designate who will participate in the walkaround."[25]

While Section 8(e) allows an authorized representative "an opportunity to accompany" the CSHO during the physical inspection, it notes that "[w]here there is no authorized employee representative," the CSHO "shall consult with a reasonable number of employees concerning matters of health and safety in the workplace."[26] This language suggests two options: (1) if the employees are represented by a *certified labor union*, that union must be given an opportunity to accompany the CSHO; but (2) where employees are not already represented by a certified labor union, the CSHO will instead consult directly with a reasonable number of employees about workplace conditions, not about inspection representatives. This approach is easy to understand and simple to enforce. Either the

[21] 29 U.S.C. § 657(e).

[22] 29 C.F.R. § 1903.8(c).

[23] The Proposal states that OSHA has encountered third party employee representatives "in union workplaces where employees have designated a union representative, such as an elected local union leader, business agent, or safety and health specialist, to be their representative for the walkaround inspection," and "[t]hese representatives are often employees of the union rather than the employer being inspected." Fed. Reg., August 30, 2023 at p. 59830. Deferring to the certification process under the NLRA may be consistent with Sec. 4(b)(1) of the OSH Act. *See* 29 U.S.C. § 653(b)(1).

[24] 29 C.F.R. § 2200.1(f) (1971) (emphasis added). Although slightly modified over the years, the core of the definition has remained the same. *See* 29 C.F.R. 2200.1(g) ("Authorized employee representative means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees who are members of the collective bargaining unit.") (2019).

[25] *Field Operations Manual*, Ch. 3, Sec. VII(A)(1). (https://www.osha.gov/enforcement/directives/cpl-02-00-164).

[26] 29 U.S.C. § 657(e).

workplace being inspected by OSHA is unionized, or it is not. If there is a certified union at the workplace, a union representative may accompany the CSHO for purposes of aiding the inspection, but if not, the CSHO will consult with employees themselves about working conditions. The CSHO is not in charge of holding a representation election on the spot, or determining the myriad issues that consistently accompany such a designation. Speaking generally, most unionized employers will likely have little difficulty accepting that the "representative authorized by his employees" within the meaning of the OSH Act is the same labor union already certified under the auspices of the NLRA to represent those employees.[27]

The Proposal, however, asserts that third party representation "may also arise" in non-union workplaces "where employees have designated a representative from a … labor union to serve as their representative in an OSHA inspection."[28] But representation rights under the NLRA have always been premised on the concept of majority support.[29] OSHA's proposed rule directly contradicts this principle insofar as it would bestow representational rights on labor unions that have not demonstrated majority support by the employees.[30] Simply stated, labor unions that do not establish majority support do not have representation rights. Indeed, it is unlawful for an employer to recognize a minority union.[31] The Proposal fails to discuss how employees may "designate" a representative from a labor union at a non-union workplace, but if OSHA intends to permit any designation process short of the processes set forth under the NLRA, it would be unlawful.

In addition, the Proposal would violate the Section 7 rights of individual employees by imposing union representation on employees who do not wish to be represented. Except where a certified labor organization has a collective bargaining agreement with an employer requiring membership in the union, Section 7 provides every employee the "right to refrain" from being represented by a labor union for any purpose.[32] Accordingly, unless and until a labor union secures majority support and certification through the NLRA, employees retain the absolute right not to be "represented" or, more accurately, not to have representation thrust upon them by less than a majority of their fellow employees for any purpose, including for purposes of OSHA inspections.

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[27] *See also* 29 U.S.C. § 159(a) (certified representatives "shall be the *exclusive* representatives of all the employees in such unit") (emphasis added).

[28] Federal Register, August 30, 2023 at p. 59830. There may be little distinction between the groups listed, for where a "worker advocacy group" or "community organization" "exists for the purpose, *in whole or in part,* of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work," that entity is a "labor organization" within the meaning of the NLRA. 29 U.S.C. § 152(5) (emphasis added).

[29] 29 U.S.C. § 159(a).

[30] 29 U.S.C. § 159(a) (representatives must be designated or selected "by the majority of employees").

[31] 29 U.S.C. § 158(a)(2).

[32] 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities*[.]") (emphasis added).

The NLRA statutory definition of "employee" excludes supervisors, agricultural laborers, domestic workers, individuals employed by a parent or spouse, independent contractors, 29 U.S.C. § 152(3) excludes managers, guards, and confidential and clerical employees, and 29 U.S.C. § 159(a) limits the representation rights of even certified labor unions to "appropriate" bargaining units. In contrast, the OSH Act has no such limitations and includes all employees of an employer.[33] Because "authorization" under the OSH Act must come from a much broader group of employees, including supervisors, managers, clerical employees and guards, the showing to demonstrate majority support under the OSH Act is higher, not lower, than the standard under the NLRA.

Simply put, a CSHO cannot allow accompaniment by an employee walkaround representative unless that representative has been authorized by a majority of all employees of the employer. Accordingly, to the extent the Proposal would allow a walkaround representative (or, in contradiction with the OSH Act, more than one such representative) to be "authorized" or "designated" by less than a majority of the employer's employees, it marks a drastic and unlawful departure from the concept of majority support underlying both the NLRA and the text of Section 8(e) of the OSH Act.

B. The Proposal Conflicts with the NLRA in Numerous Other Important Ways.

The NLRA states that certified representatives "shall be the *exclusive* representatives of all the employees in such unit[.]"[34] This raises serious questions about application of OSHA's proposed rule. For example, if employees in a unionized workforce authorize a representative from a different union or some other organization, which representative will the CSHO recognize? If a union seeks to persuade employees to vote for a particular union member to be the OSHA workaround representative, could they be considered to be attempting to "restrain or coerce" an employee in the exercise of Section 7 rights in a manner that constitutes an unfair labor practice?[35] If a certified union questions its members during that designation process, or maintains or enforces membership rules requiring members to "authorize" only that union's preferred walkaround representatives, would it be committing an unfair labor practice? Under the NLRA, an employer commits an unfair labor practice when it interrogates or questions employees about union activities or sympathies.[36] Would an employer commit an unfair labor practice under this provision merely by asking a CSHO for proof of which employees "authorized" the purported representative, or by questioning employees about their support for the supposedly authorized representative? In this context, the Proposal raises numerous troubling questions about the procedure (or more accurately, the lack of procedure) by which employees may "authorize" a representative for walkaround purposes.

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[33] See 29 U.S.C. § 652(6) ("The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce."); and 29 C.F.R. § 1910.02(d) (same)

[34] 29 U.S.C. § 159(a) (emphasis added).

[35] 29 U.S.C. § 158(b)(1)(A).

[36] 29 U.S.C. § 158(a)(1).

Whatever its other merits, the Agency's longstanding deferral to the certification process of the NLRA at least establishes certainty. In contrast, the Proposal would create uncertainty and chaos, placing CSHOs squarely in the middle of labor-management disputes, contrary to longstanding OSHA policy.[37] The further OSHA strays from the certification process under the NLRA, the more troubling is the absence of any formal process or standards in the Proposal by which an "authorized representative" is designated. The Proposal states without elaboration that "the CSHO considers a range of factors when determining who can participate in the walkaround inspection as a representative authorized by employees."[38] Who notifies the CSHO? Must the CSHO blindly accept any such notification? What if there are competing notifications? Who gets to authorize a representative? Is there a vote? When and where does that vote take place? Is there a secret ballot, or do employees have to declare their support publicly? Is there a paper ballot, or a show of hands? Do employees from other shifts, or those on vacation or medical leave have a vote? Who counts the votes and when and where does that happen? How are votes challenged, and who resolves those challenges?

Even the existing regulation obliquely recognizes the lack of a formal process for designating an employee representative, stating: "if the Compliance Safety and Health Officer is *unable to determine with reasonable certainty* who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace."[39] Even worse, the Proposal (and especially the questions OSHA presents in the Proposal) treats the CSHO as largely a passive observer in the process, stating: "Once the CSHO *is notified* that the employees have authorized a third party to represent them during a walkaround inspection, the CSHO would allow the third party to participate in the inspection so long as the CSHO determines that they would be reasonably necessary to aid in the inspection."[40]

Finally, the Proposal conflicts with longstanding labor law precedent that employers may exclude union agents from their property, subject only to two very limited exceptions—where the union cannot access the employees through other reasonable means, or when the employer discriminatorily enforces its property rights.[41] While Section 7 of the NLRA provides certain access rights to employees for union purposes, non-employees of the employer, including union representatives, have no right to access an employer's private property. Under Supreme Court precedent in *NLRB* v. *Babcock & Wilcox Co*., OSHA (or any other agency) cannot grant non-certified labor unions access to an employer's private

[37] *Field Operations Manual*, Ch. 3, Sec. IV(G)(3) ("Under no circumstances are CSHOs to become involved in a worksite dispute involving labor management issues or interpretation of collective bargaining agreements."). *See also Field Operations Manual*, Ch. 3, Sec. IV(H)(2)(c) ("During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute.")

[38] Federal Register, August 30, 2023 at p. 59830.

[39] 29 C.F.R. § 1903.8(b) (emphasis added).

[40] Federal Register, August 30, 2023 at p. 59830.

[41] *See NLRB* v. *Babcock & Wilcox Co*., 351 U.S. 105 (1956) (upholding private property rights of owner against intrusion of nonemployee organizers); and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

property. The access rights reflected in OSHA's proposed rule would upend decades of settled labor law under the NLRA.

V. The Proposal is Administratively Unworkable.

A. Scope of Proposed Amendments

In several ways, the Proposal significantly expands the scope of individuals who can be designated as third party authorized representatives, creating unworkable practical challenges for employers. One significant change is the removal of the specific requirement that the authorized representative must be an employee of the employer, with only *limited* exceptions. Instead, the Proposal explicitly states that "the representative(s) authorized by employees may either be an employee of the employer or a third party ...." The Proposal also amends the regulation to reference plural pronouns and lacks any defined restrictions on the number of third party representatives employees can "authorize" or the number that CSHOs can approve. The proposed rule no longer lists only industrial hygienists and safety engineers—credentialled, specially-educated technical safety experts—as the limiting examples of the type of acceptable authorized representatives. Finally, the proposed rule broadens the scope of third party representatives to include anyone having "good cause" to "participate" because of their "relevant knowledge, skills, or experience with hazards or conditions in the workplace *or similar workplaces*, or language skills." These amendments signify a shift away from emphasizing the authorized representative's technical expertise, toward a more generic relationship to the subject of the inspection that is not unique to technical experts or specific to the relevant workplace.

These changes leave room for a litany of third parties not expert in the employer's operations and who may never even have been to the subject workplace to "participate" in the inspection. There are many important concerns that arise from this shift. For example, as discussed above, the Proposal is silent regarding the process CSHOs will follow for making this determination. The Proposal fails to specify whether evidence must be provided to the CSHO before the determination, the required standard of proof CSHOs will apply in making their determinations, employers' avenues for contesting the designation or the CSHOs' determinations, and the existence of any appeal process. These seemingly minor proposed revisions have significant implications that will undoubtedly adversely impact employers and OSHA's inspections.

These changes create a system in which otherwise unauthorized third parties can gain access to employers' private workplaces and their workforces without providing employers any recourse to protect their rights, their employees, and their workplaces. The consequences of these changes are substantial. For instance, union representatives at non-union workplaces might use it to improperly solicit and campaign to employees during work hours on company property. Plaintiffs' attorneys (or their selected "experts") could potentially use this provision to conduct pre-litigation discovery in personal injury or wrongful death actions in a way that is not allowed under the Federal Rules of Civil Procedure. Worker advocacy groups and community organizations without applicable safety

expertise could similarly use it to organize employees in a non-union workplace or scrounge up potential litigation for plaintiff's attorneys. Competitors or security threats could gain access to proprietary or security information and cause great economic or physical harm. These scenarios underscore the potential risks and challenges that employers will encounter as a result of the proposed amendments.

Furthermore, the change from "accompaniment" to "participation" implies that authorized representatives will have a more active role in the OSHA inspection process than under the current rule. This change appears to conflict with the plain meaning of 29 U.S.C. 657, which explicitly states that "a representative authorized by his employees shall be given an opportunity to *accompany* the Secretary or his authorized representative during the physical inspection of any workplace …."[42] The unacknowledged shift from "accompany" (as it is stated in the OSH Act and the existing regulatory text) to "participation" in the proposed rule raises crucial questions about the extent of the authorized representative's involvement, OSHA's authority to make such an amendment, and the legality of delegating CSHO inspection authority to private, non-governmental individuals.

B. Lack of Designation Process

Despite the Proposal being titled "Worker Walkaround Representative *Designation Process*," neither the proposed rule nor its brief preamble say anything about an actual process for selection, designation, and implementation of a third party employee inspection representative. This silence creates confusion regarding how the rule will be implemented in practice. The introduction of a broad array of potential designated representatives likely to be detrimental and prejudicial against employers, makes more pronounced the Proposal's lack of specificity and clarity about the designation process. Differing views on the walkaround requirements and process will ultimately lead to disputes between employers, employees and/or CSHOs, increased administrative and legal costs, inconsistency in application, an overall loss of trust by employers and employees alike, and a waste of OSHA's limited enforcement resources.

The current walkaround rule and the Proposal make clear that representatives are authorized by employees. Below are just a few of the questions that remain unanswered about how employees may engage in this authorization process, questions that are made even more important because of the significant proposed changes to the scope of potential third parties involved:

- Can a CSHO designate a non-employee third party as an employee representative to accompany the inspection without a request or designation by employees?
- Which and how many employees have authority to authorize an inspection representative?
    - Is it limited to employees in the same facility or department where the inspection will focus?

[42] 29 U.S.C. § 657(e) (emphasis added).

  - Does it include all employees within the company?
  - Must all or a majority of employees agree to the representative?
  - For workplaces that have both union and non-union employees, do unionized and non-unionized employees have a say in the designation?

- What is the process for employees to make the designation?
  - Do employees vote, and if so, is it done through a secret ballot?
  - Who administers the vote or selection process?
  - When does the vote take place?

- When does the designation occur?
- How does the designation process work in the case of an unannounced inspection with no authorized representative already selected? Would employees need to conduct an election before the inspection can commence?
- Who will oversee the selection process to ensure that employees are not intimidated by other employees?
- What if certain employees oppose the representative designated by other employees?
- Can employees contest the outcome of the vote or the designation?
- What if different groups of employees designate different representatives?
- Is there a right for employees not to participate in the vote?
- Are employees prohibited from accompanying the CSHO during the inspection if other employees choose an "authorized representative" that they, as individuals, do not authorize?
- Is there a limit to the number of representatives that can be authorized to participate in an inspection? If that number is over one, how is this number determined and where does the authority to make that determination come from?
- How long does a "designation" as a worker representative for purposes of an OSHA inspection last? Is it just for a single inspection or a specific period of time? How is this time period determined and where does the authority to make that determination come from?

The Proposal also lacks a defined process indicating how CSHOs will make their determinations of whether "good cause has been shown" that designated representatives are "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." The following are just a few important questions about that process:

- What is the burden of proof? Is it beyond reasonable doubt, preponderance of the evidence, clear and convincing evidence, or the sole discretion of the CSHO?

- Who has the burden of proof? Does the representative or the employees carry this burden or is it the CSHO's or OSHA's burden or is the burden on employers to prove that good cause has not been shown?
- Is there a different standard to show good cause to "accompany" versus good cause to "participate" in the inspection?
- What is the standard for "reasonable necessity"?
- What is the process, standard, and/or unit of measure for CSHOs to determine what constitutes "relevant knowledge, skills or experience with hazards or conditions in the workplace or similar workplaces"?
- Must the designated representatives provide proof of their relevant knowledge? How will the CSHO verify that the designated representative has knowledge, skills or experience with "similar workplaces"?
- How does the CSHO verify the truthfulness of the evidence?
- Does the employer have access to the evidence and the opportunity to rebut the evidence? What is the timing to do so?
- Is there a process to appeal the CSHO's decision prior to the inspection, and prior to potentially being irrevocably harmed?
- Is there a process to appeal the CSHO's decision after the inspection, and if so, what is the remedy if the decision was incorrect?

There are also many unanswered questions about the role of the designated third party representative. For example:

- Non-supervisory employees already have a right to be questioned privately by CSHOs, but will the designated third parties have a right to participate in those interviews? To ask their own questions? What if the presence of the third party representative intimidates the interviewee or influences their responses to questions?
- Will there need to be an additional showing that the third party is reasonably necessary for the conduct of effective employee interviews (as a separate phase of an OSHA inspection from the walkaround)?
- Will designated third party representatives have access to a company's records?
- How will the Agency exercise oversight over designated third parties? What safeguards will the Agency put into place to protect employees and companies' trade secrets and confidential business information?

The lack of clarity in these processes and elements of the proposed rule will lead to disputes that will require some adjudicatory resolution process solely to ascertain the designated representatives' eligibility to participate in the inspection, causing significant

delays in the inspection process and defeating one of the regulation's intended purposes. We address the problems created by these unanswered questions more fully below.

C. Issues for Employers after Designation of the Representative

Significant liability concerns may arise when employers are compelled to allow non-governmental, non-employee third parties access to their workplaces. Workplaces often present potential hazards, prompting employers to invest in employee training to ensure a safe working environment. The Proposal, however, opens the door for third parties with no knowledge of the workplace's unique hazards. This raises questions about potential liability when a third party, who was not invited to the workplace by the employer, sustains an injury during an inspection. Additionally, allowing third parties with strong self-interest (e.g., union representatives, plaintiffs' attorneys or their experts, activists, terminated disgruntled employees, etc.) to participate in OSHA inspections increases the risk they might make false injury claims to further their agenda.

Employers will be forced to take burdensome and costly steps to mitigate such risks. For example, many employers will be required to provide training and/or special protective equipment to third party representatives. Alternatively, will OSHA assume such responsibility and liability for the actions of these third parties? Our Coalition members are also concerned that the Proposal will create logistical and coordination challenges delaying important workplace inspections and undermining the Agency's critically important safety mission. According to an OSHA report, "the average lapse time for all inspections was 36 days, and the average time per inspection for all inspections was 27.8 hours."[43] Coordinating with non-employee representatives is considerably more cumbersome than working with employees already present in the workplace who are already most knowledgeable about the health and safety concerns at their place of work.

D. Responses to Questions Posed by Agency

The concerns of the Coalition members are compounded by the fact that the wording and framing of the questions posed by the Agency appears to leave room for only one, predetermined outcome, namely, to solicit support for the Agency to move forward with the current proposed amendments. With this in mind, the following responses to the questions are provided based on the concerns of the Coalition members.

Question: *Should OSHA defer to the employees' selection of a representative to aid the inspection when the representative is a 3rd party (i.e., remove the requirement for 3rd party representatives to be reasonably necessary to the inspection)? Why or why not?"*

Response: No. Removing the requirement for third party representatives to be reasonably necessary to the inspection is completely contrary to the stated purpose of the proposed revisions and the purpose of the rule, in general. In a statement to the U.S. House of Representatives' Subcommittee on Workforce Protections Committee on Education and the

[43] *Revision to the OSHA Weighting System* (https://www.osha.gov/sites/default/files/CTS_7132_Whitepaper_FINAL_v2019_9_30.pdf).

Workforce, Assistant Secretary Parker stated: "[t]he proposed rule would clarify that employees may authorize an employee, as they may now do*, or within certain parameters authorize a non-employee*, to participate in the inspection to *help ensure it is effective and thorough*."[44] The Proposal itself states that "[t]he proposed revisions to paragraph (c) *do not change the existing precondition that the CSHO must determine that any third-party employee representative's participation is reasonably necessary* to the conduct of an effective and thorough inspection." Finally, 29 U.S.C. 657 explicitly states "a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) *for the purpose of aiding such inspection*."

Removing the "*reasonably necessary"* requirement removes any and all parameters guaranteed by the OSH Act, and weakens the assurances provided by Assistant Secretary Parker. Additionally, the proposed new policy will undoubtedly impact employers' property rights as guaranteed by the US Constitution. Doing so in circumstances where it is not even necessary for OSHA to do its job effectively would be an unacceptable breach of those rights.

Question: *Should OSHA retain the language as proposed, but add a presumption that a third party representative authorized by employees is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace? Why or why not?*

Response: No. The response to the question above is applicable here. In addition, creating a presumption that a third party representative authorized by employees is reasonably necessary, shifts the burden of proof to the employer to show that the authorized representative is not reasonably necessary. Such a rule would change the existing precondition, which places the burden of proof on the employees or authorized representative by requiring good cause to be shown why the authorized representative should accompany the CSHO.

Question: *Should OSHA expand the criteria for an employees' representative who is a 3rd party to participate in the inspection to include circumstances when the CSHO determines that such participation would aid employees in effectively exercising their rights under the OSH Act? Why or why not? If so, should OSHA defer to employees' selection of a representative who would aid them in effectively exercising their rights?*

Response: No. The responses above apply here also. Further, the OSH Act authorizes an employee inspection representative only where such representation will aid the physical inspection of the workplace.[45] Nowhere does it authorize a representative to accompany the CSHO to aid *employees* in effectively exercising other rights under the OSH Act or any other laws (e.g., the NLRA).

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[44] *Department of Labor announces proposed changes to clarify regulations on authorized employee representation during workplace inspections* (August 29, 2023).

[45] 29 U.S.C. 657.

VI. The Proposal Raises Constitutional Concerns

A. The Proposal Delegates Governmental Authority to Private Individuals

Under the United States Constitution, executive power belongs to the President.[46] This vested power is exclusive and absolute, and cannot be delegated to private entities.[47] As Justice Thomas stated: "When the Government is called upon to perform a function that requires an exercise of legislative, executive or judicial power, only the vested recipient of that power can perform it."[48] Accordingly, the Vesting Clauses "categorically preclude" a private entity or party from "exercising the legislative, executive, or judicial powers of the Federal Government."[49] The OSH Act gives the Secretary of Labor (and her government representatives; i.e., CSHOs) the sole authority to enter, inspect, and privately question employees.[50] Under the "private nondelegation doctrine," the Secretary of Labor – an executive department official – cannot redelegate this authority to a private individual.[51]

As noted, Section 8(a) of the OSH Act delegates to the Secretary of Labor the sole power "to enter" and "to inspect and investigate" a place of employment, and "to question privately" the individuals there.[52] The Proposal conflicts with this delegation of power, as it not only seeks to allow private individuals to enter the workplace, but subtle proposed changes vastly expand the role and authority of these third parties during OSHA inspections. The OSH Act carefully cabins the right of authorized representatives "to accompany the Secretary,"[53] and the existing regulation also speaks in terms of "accompaniment by a third party[.]"[54] However, the Proposal allows a third party representative where "good cause has been shown why their ***participation*** is reasonably necessary" to the inspection.[55] While the statute's use of "accompany" implies merely walking along with a CSHO, the Proposal's use of "participate" implies an entirely different, more active, role – that of taking part or being involved in the inspection. Whatever standard is applied, no private individual may exercise the delegated power of the CSHO to

[46] Constitution, Art. II, Sec. 1, cl. 1.

[47] *Association of American Railroads*, 575 U.S. at 62 (Alito, J., concurring).

[48] *Id*. at 68 (Thomas, J., concurring).

[49] *Id*. at 88 (Thomas, J., concurring).

[50] 29 U.S.C. § 657(a).

[51] *Dept. of Transportation v. Association of American Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring) ("When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.").

[52] 29 U.S.C. § 657(a)(1)-(2).

[53] 29 U.S.C. § 657(e).

[54] 29 C.F.R. § 1903.8(c).

[55] Federal Register, August 30, 2023, at p. 59834 (emphasis added).

inspect the workplace. The Proposal would impermissibly delegate power reserved under the Constitution to the executive branch to private individuals.[56]

B. The Proposal Results in a *Per Se* Taking Under the Fifth Amendment

Similarly, while OSHA may itself enter private workplaces for the purpose of carrying out physical inspections, it has no Constitutional authority to authorize private individuals to enter another's private property, nor can the Agency grant itself the right to authorize private parties to enter with the federal government's own investigators. Because the Proposal "appropriates for the enjoyment of third parties the owners' right to exclude," it cannot stand.[57]

Indeed, the Supreme Court in *Cedar Point Nursery v. Hassid*, struck down a California regulation that, like OSHA's proposed rule, granted labor unions access to private workplaces. In *Cedar Point*, the Supreme Court emphasized that "[t]he right to exclude is one of the most treasured rights of property ownership," a "fundamental element of the property right," and "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[58] Because "government authorized invasions of property … are physical takings requiring just compensation," the government cannot grant any private party the right to enter another's property land, or workplace.[59] As in *Cedar Point*, no one can dispute that absent the proposed regulation, which will mandate third party access, the employer would have the right to exclude any unauthorized third parties (e.g., labor unions, attorneys, community activists and other third parties) from their property. The Proposal would take that constitutional right from them. Nor does it matter that access would be allowed only during an OSHA inspection. As the Supreme Court noted, "[t]he fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction," or save it from its constitutional infirmity.[60]

The Proposal asserts that "[b]ecause OSHA's inspections are conducted in accordance with the Fourth Amendment, they do not constitute a physical taking under the Takings Clause of the Fifth Amendment."[61] Even if that statement were true (which we dispute), OSHA's supposed compliance with the Fourth Amendment (which we also dispute below) would not permit OSHA to violate the Fifth Amendment. In any event, the Agency's right to enter the worksite to conduct a physical inspection is not at issue, only the Agency's

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[56] *Wellness Int'l Network Ltd. v. Sharif*, 135 S.Ct. 1932, 1957 (2015) (Roberts, C.J., dissenting) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions.").

[57] *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021). To the extent the statute or existing regulation authorizes such access, they also violate the Constitution.

[58] *Id.* at 2072. *See also In re Etter*, 756 F.2d 852, 859 (Fed. Cir. 1985), *cert denied*, 474 U.S. 828 (1985) ("The essence of all property is the right to exclude[.]").

[59] *Id.* at 2074.

[60] *Cedar Point*, 141 S.Ct. at 2075.

[61] Federal Register, August 30, 2023 at p. 59829.

purported authority to compel employers to permit non-governmental third parties the same access. Like the regulation struck down in *Cedar Point*, the Proposal "grants labor organizations" and other unwelcome third parties, "a right to invade the [owners'] property.[62] "It therefore constitutes a *per se* physical taking."[63]

C. The Proposal Violates the Fourth Amendment

While Section 8(a) of the OSH Act authorizes the Agency to enter and inspect a place of business, it does not allow the Agency to conduct warrantless searches.[64] As the Supreme Court stated in *Barlow's*, "[t]he owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents."[65] Accordingly, OSHA inspections must comply with the Fourth Amendment and be reasonable in all respects.[66]

Removing the current constraints on third party involvement in OSHA inspections or permitting the participation of a third party not deemed "reasonably necessary" for the execution of an effective and thorough physical inspection (indicated as a possible amendment in the Proposal) would contravene the Fourth Amendment's prohibition against unreasonable searches and seizures.[67] In fact, federal criminal law provides that a search warrant must be served and executed only by an officer mentioned therein and "by no other person, *except in aid of the officer*" executing the warrant.[68] This is consistent with Section 8(e) of the OSH Act, which only permits an authorized employee representative "during the physical inspection of any workplace under subsection (a) *for the purpose of aiding such inspection*."[69] In other words,

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[62] *Cedar Point*, 141 S.Ct. at 2080. In this respect, it is interesting that the Agency "seeks input on whether to maintain the existing requirement … for a third-party employee representative to be 'reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace[.]'" Federal Register, August 30, 2023 at p. 59833. Whatever arguments might exist to allow the government to compel employers to permit on their property individuals who would otherwise be excluded are surely weakened when those would-be trespassers are admittedly not even "reasonably necessary" to the purpose for which the Agency has itself entered the property of the employer.

[63] *Id*.

[64] *Marshall v. Barlow's, Inc.*, 98 S.Ct. 1816, 1827 (1978) (holding Section 8(a) unconstitutional insofar as it purports to authorize warrantless inspections).

[65] *Id*. at 1822. *See also See v. City of Seattle*, 387 U.S. 541, 543 (1967) ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.").

[66] *Ayeni v. Mottola*, 35 F.3d 680, 686 (2nd Cir. 1994) ("The reasonableness requirement of the Fourth Amendment applies not only to prevent searches and seizures that would be unreasonable if conducted at all, but also to ensure reasonableness in the manner and scope of searches and seizures that are carried out.").

[67] *See Buonocore v. Harris*, 65 F.3d 347, 358 (4th Cir. 1995) (private individual must be "assisting or acting 'in aid of' an officer conducting a search authorized by warrant."); and *Hopgood v. Gunnlaugsson*, 284 Fed. Appx. 190, 190 (5th Cir. 2008) ("The presence of third parties in the execution of a warrant is unconstitutional where it is not 'in aid of' the execution of the warrant").

[68] 18 U.S.C. § 3105 (emphasis added).

[69] 29 U.S.C. § 657(e) (emphasis added).

under the OSH Act, federal criminal law, and the Fourth Amendment, before a third party representative may accompany the CSHO during the physical inspection, there must be some demonstrable aid to be provided to the CSHO by the third party for the third party's presence.

Numerous decisions have found that the government violates the Fourth Amendment when it permits private parties with no legitimate role in the execution of a warrant to accompany an officer during the search. For example, the Supreme Court has held that a civilian "ride along" with officers in furtherance of the individual's own private interest violated a defendant's Fourth Amendment rights.[70] Other courts have likewise held that allowing news media organizations to accompany officers makes a search *per se* unreasonable.[71] Other courts have made similar decisions in comparable contexts.[72]

Matter of Establishment Inspection of Caterpillar is not to the contrary. In that case, the authorized employee representative was *an employee* (albeit on strike), and the Court specifically noted "he was well positioned to assist OSHA, having been the UAW safety and health representative of a plant division for five years."[73] Moreover, the employer apparently argued the representative was *not* acting as a government agent.[74] "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities[.]"[75] Where the government has knowledge of and authorizes the third party's participation, that private party is acting under color of law and is a state actor.[76] Indeed, a search by a civilian that occurs during a "joint operation" with government officials is a *governmental search*.[77]

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[70] *Wilson v. Layne*, 526 U.S. 603, 613-14 (1999) (holding that officers violated a defendant's Fourth Amendment rights by inviting a news crew along on a search).

[71] *Ayeni*, 35 F.3d at 686 (noting "an objectively reasonable officer" could not have concluded that inviting a third party not providing assistance to law enforcement to participate in a search was in accordance with the Fourth Amendment).

[72] *See Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) ("The warrant in this case implicitly authorized the police officers to control and secure the premises during their search for a generator. It did not implicitly authorize them to invite a private security officer to tour plaintiff's home for the purpose of finding General Motors property"); and *United States v. Sparks*, 265 F.3d 825, 832 (9th Cir. 2001) ("Police cannot invite civilians to perform searches on a whim; there must be some reason why a law enforcement officer cannot himself conduct the search and some reason to believe that postponing the search until an officer is available might raise a safety risk.").

[73] *Matter of Establishment Inspection of Caterpillar, Inc.*, 55 F.3d 334, 339, fn. 5 (7th Cir. 1995).

[74] *Caterpillar*, 55 F.3d at 337, fn. 2.

[75] *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 614 (1989).

[76] *See United States v. Price*, 383 U.S. 787, 794 (1966) (noting that private persons jointly engaged with state officials are acting under color of law).

[77] *See Lugar v. Edmondson Oil*, 457 U.S. 922, 941 (1982) ("[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the 14th Am.."). See also *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984) (private citizen may be a police agent if acting "with the participation" of an officer).

Thus, while the presence of a third party *necessary to and assisting authorized officers* in a governmental inspection might not violate the Fourth Amendment's reasonableness requirement, absent the possession of some technical expertise lacking in the CSHO and necessary to the physical inspection of the workplace, the presence of a third party outsider (e.g., union organizer, plaintiff's attorney, etc.) with no connection to the workplace and acting in his own interests violates the Fourth Amendment's prohibition against unreasonable searches and seizures.[78] Simply put, if a third party's presence without the employer's consent would normally be considered trespass, that party's presence cannot be rendered lawful simply because OSHA is conducting an inspection and invited the third party along, nor can the employees "authorize" the Agency to violate their employer's constitutional rights.[79]

VII. The Proposal is Misguided.

A. The Proposal Fails to Acknowledge That the Presence of Third Parties Traditionally Barred by Employers Introduces Substantial Risks and Increases the Burdens and Costs on Employers.

Although the existing regulation includes an exception with narrow criteria (i.e., accompanying a CSHO to offer technical expertise), the proposed rule would greatly expand the involvement of third parties by putting third parties on equal footing with employees, and broadening their role from merely accompaniment to some form of participation. With that background, the Proposal does not sufficiently address the reality that introducing into workplaces non-governmental third parties who are not traditionally permitted creates additional risks for employers, employees, and the community alike. Employees have a statutory duty to comply with occupational safety and health standards, rules, regulations, and orders, while non-employees have no such duty.[80] In addition, allowing non-employees to enter and walk around an employer's premises will create obvious third party liability issues. Non-employees will not be familiar with potential workplace hazards, processes, or procedures, and could be injured even if the employer assigns personnel to accompany the walkaround. Employers should not be forced to assume responsibility for injury to a third party (or injuries to its employees caused by the third party) during the walkaround when OSHA itself required the employer to allow that third party on the employer's property.

Requiring employers to allow disgruntled former employees, individuals on strike against the company, or relatives of injured or deceased employees as authorized inspection

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[78] Given that OSHA is authorized to "employ experts and consultants or organizations thereof," 29 U.S.C. § 656(c)(2), and to use the services and personnel of other agencies, both federal 29 U.S.C. § 656(c)(1), and state, 29 U.S.C. § 673(d), in carrying out its responsibilities, it will surely be the rare inspection which requires "outside" expertise or individuals.

[79] Employers subjected to violations of their Fourth Amendment rights could even bring civil suits for damages under Section 1983 or other theories. *Ayeni*, 35 F.3d at 686. In such a suit, both the Agency and the private third party could potentially be liable. Indeed, the private third party would likely be found to be a "state actor" simply because the Agency's own regulation and officials facilitated the access and the individual participated jointly in the violative inspection alongside the government officials.

[80] 29 U.S.C. § 654(b).

representatives is fraught with the potential for disruptive confrontations or even violent altercations. In fact, that exact scenario has already arisen for members of our Coalition, where former employees or employees on strike have attempted to gain access to the employer's workplace with intent to intimidate other employees, damage the employer's property or reputation, and/or to share information about the workplace and workers there on social media.

At a minimum, employers will have to put additional measures in place to protect their employees and other third parties from the increased risk of disruption, distraction, and injury from having unknown and potentially hostile personnel on their site, inflating the financial burden, especially on small business owners. In such situations, employers must also concern themselves with the possibility that a third party may be injured at their workplace and how to handle potential personal injury claims from individuals not covered by workers' compensation.

The presence of non-governmental third parties also creates a substantial risk to companies committed to protecting trade secrets and proprietary information at their worksite, as well as the national and community security interests that could be threatened. Such individuals would not be subjected to background checks (like OSHA and most employers do when they hire employees). As written, the proposed rule includes no limitations that would bar competitors invited by an aggrieved employee or corporate spies seeking to profit from their access. Indeed, the proposed rule, which endorses third parties with experience at "similar workplaces," makes it more likely that a corporate competitor would be allowed onsite by a CSHO. These third parties could use their time at the worksite to misappropriate and/or misuse or publicize proprietary information, causing untold economic damage to the employer. The proposed rule is silent about whether employers can condition entry of non-governmental third parties on signing NDA or similar agreements, but OSHA has long refused to sign such agreements when it enters private workplaces.[81] Even if using NDAs were a viable option, NDAs may not provide adequate protection to employers and would require companies to spend resources enforcing the NDAs in court.

Allowing third parties into an employer's workplace could pose significant security risks at facilities that handle hazardous substances. Nefarious third parties would present a particularly great risk to whole communities or broader supply chains from potential physical security events at workplaces that support energy production and distribution, as well as logistics and storage in many U.S. industries.

In addition, requiring employers to allow unvetted third parties into an employer's workplace to participate in an OSHA inspection raises a serious cybersecurity risk. Any ill-intentioned party including a corporate spy, former aggrieved employee, or unscrupulous

[81] The Agency affirms it is not seeking to alter or limit other protective regulations. Federal Register, August 30, 2023 at p. 59831. Accordingly, where an inspection involves an area containing trade secrets, a non-employee could not serve as representative. 29 C.F.R. §1903.9(d) ("Upon the request of an employer, any authorized representative of employees under §1903.8 in an area containing trade secrets *shall be an employee in that area or an employee authorized by the employer* to enter that area.") (emphasis added).

activist, need only insert a malware-infected USB drive into a computer connected to a company's network to allow hackers access to the network to conduct cyber espionage, steal sensitive information, or install ransomware or other malware. Such a breach of a company's cybersecurity protocols and procedures could cause extensive financial and operational damage.

The Proposal contemplates allowing attorneys to be designated as third party worker representatives. This inclusion of attorneys raises troubling issues. In most instances, contrary to the Proposal, parties are not allowed pre-suit discovery in civil litigation (e.g., personal injury actions). Federal Rule of Civil Procedure 34 allows only a "party" to civil litigation to serve a request on another party "to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it."[82] Most states have ethical rules that forbid attorneys from communicating with persons represented by counsel.[83] Thus, the Proposal would provide litigants with unintended advantages not otherwise permissible in civil litigation. Moreover, despite the Proposal's assumptions, it is not clear that allowing an attorney into the workplace will increase the employees' willingness to communicate with the CSHO during the walkaround inspection. Indeed, the presence of third party attorneys is much more likely to have the opposite effect—chilling discussions among and between OSHA, employees and employers.

In discussing the costs and burdens associated with the Proposal, the Agency repeatedly declares that the Proposal "imposes no new burdens on employers and does not require them to take any action to comply."[84] While it may be easy for the Agency to minimize costs it will not bear, the OSH Act itself requires that "[a]ny information" obtained by the Agency "shall be obtained with a *minimum burden* upon employers, especially those operating small businesses."[85]

In fact, OSHA's conclusion that there are no costs associated with the proposed rule is not supported by the facts. The fact is that as written, the Proposal will impose new and increased direct costs on employers. These include costs related to preparing or updating policies to deal with mandated non-employee third parties as part of OSHA inspections, pre-entry screening and site-specific safety awareness training, increased costs associated with escorting a potentially hostile third party, legal fees for managing more complex and fraught inspection interactions, evaluating and/or supplying PPE or sanitation equipment, getting NDAs or other agreements prepared and executed, increased insurance costs, and even additional parking fees. Employers will also need to train employees to educate them on the new rule, and either train existing

[82] Fed. R. Civ. Pro. 34(a)(2).

[83] *See* Rule 4.2, Model Rules of Professional Conduct.

[84] Federal Register, August 30, 2023 at p. 59831. The Agency further claims that "[t]he proposed clarification does not impose any costs on employers," "there would be no real cost to an employer to have an additional visitor on site," and "OSHA has preliminarily determined that this proposed rule does not impose costs on employers." *Id*.

[85] 29 U.S.C. § 657(d) (emphasis added).

employees or hire security personnel to screen and escort third parties. Finally, there could be increased costs for liability or workers compensation insurance.

Despite these numerous direct costs, as well as the potentially huge indirect costs discussed above (e.g., liability for injuries to third parties, theft of proprietary information, increased risk of workplace violence, etc.), the Agency asserts that the Proposal "is not significant under section 3(f)(1) of Executive Order 12866."[86] Whether or not the Agency's assessment is correct, that section establishes four alternate ways in which a regulatory action may be deemed significant. In particular, a regulatory action is significant where it "may … [r]aise novel legal or policy issues arising out of legal mandates[.]"[87] As shown above, that is the case here, as the Proposal raises serious constitutional and statutory issues that arise out of the mandate to allow non-employee third parties, who would otherwise be considered trespassers, to enter into private property of another. Accordingly, the Coalition urges the Agency to re-engage with OMB and undertake all aspects of a full EO 12866 review, including stakeholder meetings and a proper analysis of the impacts of its rulemaking.

B. Inserting Unions at Non-Union Workplaces or Other Third Party "Representatives" Into OSHA Inspections Will Reduce OSHA's Effectiveness as a Workplace Safety Agency.

It is no secret that the Biden Administration holds itself out as labor's biggest ally. As President Biden stated more than two years ago, "I intend to be the most pro-union President leading the most pro-union administration in American history."[88] Rather than focusing on enhancing workplace safety, it appears that the Proposal is primarily intended to advance the Biden Administration's pro-labor agenda. Just weeks after the Proposal was published in the Federal Register, Assistant Secretary Parker asserted that "Unions play a critical role in representing workers in health and safety matters and have demonstrated repeatedly that workers who have a voice at work through effective representation have safer working conditions. We strongly encourage employer and union partnership in addressing workplace hazards and building a mutual commitment to safety and health on the job."[89]

However, it is not OSHA's statutory mission to "strongly encourage employer and union partnership." Rather, the Agency's authorizing statute requires OSHA "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources[.]"[90] However, as discussed above, the Proposal provides no basis or evidence that the proposed rule will improve workplace safety. The Agency should not let its focus on "encouraging" unions distract it from its statutory purpose.

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[86] Federal Register, August 30, 2023, at p. 59831.

[87] Executive Order 12866 at Section 3(f)(4).

[88] "Remarks by Pres. Biden in Honor of Labor Unions," September 8, 2021. (available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions)

[89] https://www.osha.gov/news/testimonies/09272023#

[90] 29 U.S.C. § 651(b).

The decision to be represented by a labor union must be made by a majority of employees in a bargaining unit. OSHA's labor/management neutrality, and therefore its effectiveness as a workplace safety agency, is damaged when its actions appear to be based on political considerations rather than safety. OSHA need look no farther than the National Labor Relations Board, whose policy oscillations with every new Administration strain labor/management relations and are a burden on economic efficiency. Respectfully, politicized agencies lack credibility, and are contrary to OSHA's stated goal of "ensuring that [OSHA's] actions are not interpreted as supporting either party."[91] OSHA's mission promoting workplace safety is too important to risk politicization.

The Assistant Secretary recently stated that the Agency's "goal is to develop rules that are highly protective of workers, are workable for employers, and provide predictability and clarity for both."[92] For fifty years, the walkaround rules have done just that, and the Proposal has failed to demonstrate the need to change anything. The Agency should reconsider this rulemaking.

C. The Proposal Will Harm OSHA's Enforcement Program in Individual Inspections and the Volume of Inspections It Conducts.

OSHA's ability to achieve its mission of helping to ensure safe workplaces depends in part on its ability to maximize the number of workplace inspections that it conducts, and therefore, the efficiency with which it conducts each workplace inspection. One of the reasons OSHA is able to conduct tens of thousands of inspection every year, is that most employers engage collaboratively and cooperatively with OSHA; i.e., employers rarely demand that OSHA obtain an inspection warrant or go to court to fight over the scope of such warrants. Similarly, employers rarely demand or quibble over subpoenas for records or employee interviews, and employers rarely require formal processes for the collection of evidence and testimony. As a result, OSHA is able to move efficiently from an Opening Conference through an inspection, limiting the manhours required for each inspection.

The Proposal, however, will undoubtedly result in greater contention between employers and OSHA and result in vastly more instances of employers demanding and challenging OSHA inspection warrants, and requiring and challenging subpoenas for records and testimony. Look no further than the blogs of every serious law firm with an OSHA practice, and you will see that they all advise that if OSHA arrives to begin an inspection with an unwelcome and potentially hostile non-governmental third party participant, employers should consent only to entry by the OSHA compliance officer, and insist on and move to quash a warrant that would include the third party. The process for OSHA to obtain, defend, and enforce inspection warrants adds significant delay to the start of OSHA's inspections and consumes significant time and resources that will necessarily result in OSHA conducting fewer workplace inspections. It is not uncommon for it to take weeks for OSHA to obtain a warrant and return to start an inspection after an employer refuses to consent to the inspection. If the employer engages in litigation to challenge the warrant, weeks can become

[91] Field Operations Manual, Ch. 3, Sec. IV(H)(2)(c).

[92] https://www.osha.gov/news/testimonies/09272023#

months before OSHA can even begin the inspection. During that interval, hazards may continue unabated or the conditions that OSHA could have observed to enforce its standards more effectively may change, making the compliance officer's job much more difficult. In addition, the inspection will, from the outset, take on an adversarial posture, further straining the compliance officer's chances for an efficient, effective inspection.

According to OSHA's enforcement data (*see* below), in FY 2022, the average number of manhours OSHA dedicated per inspection was only 20 hours, and OSHA was able to complete five workplace inspection per 100 manhours.

Inspection Summary

		Total
Avg Insp Hrs	Health	25.47
	Safety	18.56
Total		20.00

		Total
Insp per 100 Insp Hrs	Health	3.93
	Safety	5.39
Total		5.00

Getting turned away at the initial visit to a workplace, preparing the pleadings and declarations associated with a warrant application, the court time associated with that, and then returning to the worksite, possibly to be turned away again to begin a warrant challenge, would surely consume more than the average number of hours for an inspection, before even laying eyes on the working conditions at the workplace or conducting any inspection activities. If warrant demands and challenges become pervasive, as we expect they would in this context, OSHA could easily see the average manhours per inspection double or worse, and without commensurate increase in OSHA's budget, that will mean many fewer inspection.

VIII. Recommendations

The foregoing comments establish that the Proposal should be withdrawn immediately and fully, and that is what our Coalition recommends. However, should the Agency press forward, we recommend that OSHA correct its mistaken certification that this is Not a Significant Rule. OSHA has ignored (and caused OMB to ignore) the Section 3(f)(4) element of E.O. 128666. This Proposal clearly raises novel legal or policy issues arising out of a legal mandate. Accordingly, OSHA should address all of the rulemaking process provided for by E.O. 12866, including ensuring stakeholder meetings with OMB, and a thorough (and more accurate) analysis of the impacts of the rulemaking. Also, because of the unique impacts the proposed rule would have on small businesses, we encourage OSHA to voluntarily establish a SBREFA Panel, and hear directly from small businesses.

Beyond that, if OSHA ultimately chooses to finalize this Rule, at the very least, we recommend the following changes:

1) Permit non-employee inspection representatives only by consent of the employer.

2) Establish a clear process for employees to manifest their designation of an inspection representative, which process involves a majority vote of the relevant workforce.

3) Establish a limit of a single employee walkaround representative (regardless of the employment status of the representative) as required by Section 8(e) of the OSH Act.

4) Exclude from eligibility as a third party employee walkaround representative any person with a potential litigation interest or potential litigation interest adverse to the employer (e.g., potential plaintiffs' or third party attorneys or their experts, family members of an injured or deceased worker, terminated disgruntled employees, etc.).

5) Exclude from eligibility as a third party employee walkaround representative any attorney who is potentially on a fishing expedition for evidence to bring a lawsuit.

6) Exclude from eligibility as a third party employee walkaround representative any person with the reasonable potential to commit an act of workplace violence (e.g., family members of an injured or deceased worker, terminated disgruntled employees, etc.).

7) Define clear standards CSHOs must apply for findings of "reasonable necessity" as well as the credentials or expertise of the designated third party representative.

8) Establish employers' rights to access the evidence considered by CSHOs when determining that a third party's accompaniment is reasonably necessary and a mechanism to challenge that evidence.

9) Establish a mechanism for employers to challenge the designation or the CSHO's determination that the third party's accompaniment is reasonably necessary.

10) Clarify that the third party's role is limited only to accompaniment during the physical walkaround and does not include any other aspects of the OSHA inspection, excluding specifically any right to accompany or participate in employee interviews (whether in private or not) or to access to the Employer's records and physical evidence (e.g., monitoring data, physical samples, etc.).

11) Clarify that the third party's right to accompany the CSHO does not extend to any area in the workplace identified by the employer as containing or revealing a trade secret, confidential business information, or sensitive security information.

IX. Conclusion

For the foregoing reasons, the Coalition respectfully urges the Agency to withdraw the Proposal. It is neither necessary nor prudent and will serve only to create confusion and contention around the important issue of workplace safety. In the alternative, we request

that the Agency engage in a more complete rulemaking process, pursuant to E.O. 128666, and adopt the recommended changes proposed above. We appreciate this opportunity and your consideration of these important issues.

Thank you for your consideration of these comments. If you have any questions or need further information, please do not hesitate to contact us at econn@connmaciel.com / 202-909-2737 and/or mtrapp@connmaciel.com or (312) 809-8122.

Sincerely,

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