UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, Plaintiff, v. DOROTHY DOUGHERTY, in her official capacity as Deputy Assistant Secretary of Labor for the Occupational Safety and Health Administration; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; and ERIC HARBIN, in his official capacity as Regional Administrator for Region 6 of the Occupational Safety and Health Administration, Defendants.	No. 3:16-cv-02568-D **PLAINTIFF'S BRIEF IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS**

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INTRODUCTION

Plaintiff National Federation of Independent Business (NFIB) brings this action to challenge the illegal administrative expansion of the "walk-around" right created by the Williams-Steiger Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. *See id.* § 657(e). From 1971 to 2013, Defendant Occupational Safety and Health Administration (OSHA) construed the Act to afford employees a limited right to accompany a compliance safety and health officer during a workplace inspection. *See* 29 C.F.R. § 1903.8(c). According to the agency's longstanding approach, an employee representative had to be an employee of the employer whose workplace was the subject of the inspection. *Id.* Under the same framework, however, OSHA made reasonable allowance for third-party specialists (such as industrial hygienists or safety engineers) to accompany the compliance officer. *Id.* The agency's construction accurately captured a delicate legislative balance. Congress reasonably concluded that employees should be allowed to participate in inspections meant to protect their health and safety. But Congress also recognized that this participatory right should not be used as a pretext to facilitate union access to proselytize employees of open-shop businesses.

In 2013, OSHA deviated significantly from its established construction of the Act's walk-around provisions by promulgating the Fairfax Memo. In two key ways, the Fairfax Memo departs from the walk-around right created by the Act and implemented by OSHA's regulations. First, it relaxes the categorical requirement that an employee representative must be an employee, and instead allows non-employees to serve in that role. Second, it substantially moderates the standard for determining when a third party may participate in a workplace inspection—namely, from "reasonably necessary" to "will make a positive contribution." NFIB contends that the Fairfax Memo contravenes the Administrative Procedure Act's rule-making requirements, 5 U.S.C.

§ 553(b)-(c), and exceeds the authority granted by the Occupational Safety and Health Act, 29 U.S.C. § 657(e).

OSHA now moves to dismiss the complaint on jurisdictional and substantive grounds. But its arguments based on justiciability—standing, ripeness, finality—are largely a repackaging of the agency's merits arguments. For example, the agency contends that, because the Fairfax Memo merely restates existing law, it is an interpretative rule which does not injure NFIB and which does not have legal consequences. And as shown below, none of the agency's merits arguments convinces: the Fairfax Memo imposes immediate and substantial burdens on employers, and does so without compliance with the Administrative Procedure Act or the Occupational Safety and Health Act. Therefore, the motion to dismiss should be denied.

BACKGROUND

The Occupational Safety and Health Act regulates the safety and healthfulness of the nation's workplaces. The Act entrusts the Secretary of Labor (and by delegation OSHA) with the authority, among other things, to issue safety and health standards for workplaces. 29 U.S.C. § 655. To enforce these standards, the Act authorizes the investigation and inspection of workplaces. *Id.* § 657(a). When a workplace inspection is carried out, the Act grants to the employer and to the authorized representative of the employees the right to accompany the compliance officer during the workplace's physical inspection, for the purpose of aiding the inspection. *Id.* § 657(e). This so-called "walk-around" right is subject to regulations issued by the Secretary. *See id.*

Shortly after the Act's passage, the Secretary promulgated regulations implementing the Act's inspection and related provisions, including the walk-around right. *See* 36 Fed. Reg. 17,850 (Sept. 4, 1971) (creating a new 29 C.F.R. Part 1903). Under the pertinent regulation, the authorized employee representative must be an employee. 29 C.F.R. § 1903.8(c). But the regulation also gives the compliance officer limited discretion to allow a non-employee to accompany the inspection. Specifically,

a non-employee may participate in the walk-around if such participation is "reasonably necessary" to conduct a physical inspection of the workplace. *Id.* The regulation offers "an industrial hygienist or a safety engineer" as examples of such reasonably necessary third parties. *Id.*

In 2013, OSHA issued the Fairfax Memo, which, as noted above, makes two key changes to existing law governing the walk-around right. First, the Fairfax Memo provides that "an employee representative" can include someone "who is not an employee of the employer." Fairfax Memo at 2. Second, the Fairfax Memo substantially lowers the standard for determining whether a third-party specialist may accompany the compliance officer—namely, from "reasonably necessary" to "will make a positive contribution." *Id.* These changes have had serious consequences for employers throughout the country.

One such employer is NFIB member Professional Janitorial Service, Inc. (PJS), a Houston-based, locally owned and operated cleaning service company. Compl. ¶ 23. Prior to the Fairfax Memo, PJS—an open-shop company—had never received any worker safety or health citation from any agency. *Id.* ¶ 24. In October, 2013, an OSHA compliance officer appeared at one of PJS's workplaces accompanied by three non-employee representatives from the Service Employees International Union, one of the country's largest unions representing janitors, among other tradesmen. *Id.* ¶ 25. PJS objected to the onsite presence of these Union members, but was required to allow their presence on account of the Fairfax Memo. *Id.* The Union representatives did not appear to have any specialized training or knowledge of industrial hygiene or safety engineering. *Id.* That same day the compliance officer inspected a second PJS workplace, again accompanied by the three Union representatives. *Id.* ¶ 26. In November, 2013, the same compliance officer, again accompanied by the same three Union representatives, inspected a third PJS worksite. *Id.* ¶ 27. And in February,

2014, the compliance officer inspected a fourth PJS worksite, this time accompanied by two Union representatives. *Id.* ¶ 28.

On account of these prior inspections and disputes PJS has had with the Union, PJS reasonably fears that it again will be required, against its will, to allow non-employee Union representatives onto its workplaces. *Id.* ¶ 30. NFIB therefore brought this action to, among other things, vindicate the interests that PJS and all NFIB members have in controlling access to their workplaces free from unfair union proselytizing. *See id.* ¶¶ 32-35.

STANDARD OF REVIEW

In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a court may look to the complaint, either alone or in combination with undisputed or adjudicated facts, to determine whether sufficient facts exist to establish jurisdiction. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id.*

A motion to dismiss for failure to state a claim under Rule 12(b)(6) may be granted only if the complaint fails to plead enough facts "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is plausible if its alleged facts permit a court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In considering the motion, a court must accept all well-pled facts as true, and must draw all reasonable inferences in the plaintiff's favor. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232-33 (5th Cir. 2009). An Administrative Procedure Act claim that presents purely legal issues may be resolved on a Rule 12(b)(6) motion. *See Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).

ARGUMENT

I

NFIB HAS STANDING TO CHALLENGE THE FAIRFAX MEMO

To bring an action in federal court, a party must show that it has suffered an injury-in-fact that is fairly traceable to the challenged conduct and that is likely to be redressed by favorable judicial decision. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). OSHA contends that NFIB's members have suffered no injury-in-fact. That is so, the agency explains, because the only conceivable injury that could befall NFIB's members is a citation issued to them either in retaliation for failing to allow access, or on account of health and safety violations having been found in the workplace once access has been taken. MTD 7-8. The agency is mistaken for several reasons.

First, the actual and imminent injury of which NFIB's members complain is not the civil penalties or other negative consequences that would follow upon disobedience to the Fairfax Memo, but rather the steps that members, such as PJS, must take *to avoid* such liability—namely, allowing persons onto their property whom they would otherwise exclude, but for the Fairfax Memo. *See* Compl. ¶ 34 ("PJS does not wish to allow access to Union third-parties, but it nevertheless fears substantial civil penalties and practical business injuries should it not acquiesce in OSHA's and its officers' enforcement of the Fairfax Memo."). Such an infringement on members' property rights qualifies as an injury-in-fact. *See Virginia v. Hicks*, 539 U.S. 113, 121 (2003) (the inability to prosecute for trespass is sufficient to establish standing); *Bailey v. Spangler*, No. 3:14cv556, 2015 WL 3545964, at *3 (E.D. Va. June 4, 2015) (the loss of the right to exclude others from one's property is sufficient to establish standing).

Second, the imminence of legal liability for employers is much greater than OSHA portrays. Contrary to the agency's characterization, OSHA's walk-around regulations do *not* categorically require a compliance officer to terminate *all* initial

inspections in the face of an employer objection. Rather, the regulations only require a compliance officer to terminate an inspection if the officer has not already obtained a warrant. *See* 29 C.F.R. § 1903.4(a). But the regulations *do* authorize the seeking of a *pre-objection* warrant on a variety of grounds, some having nothing to do with the employer's attitude toward access. *See id*. § 1903.4(b)(2)-(3) (authorizing compulsory process in advance of an attempted inspection if "circumstances exist which make such preinspection process desirable or necessary," including, for example, when "an inspection is scheduled far from the local office" or "an inspection includes the use of special equipment"). Thus, an employer could easily find itself in a situation in which, notwithstanding having made an objection to an initial inspection, the employer must allow the inspection to proceed upon pain of contempt of court.[1] Ultimately, OSHA's focus on the supposed remoteness of injuries traceable to the Act's administrative citation process is simply misplaced: a party need not risk violating the law in order to challenge a government regulation that the party contends is illegal. *Free Enterp. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (courts "normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law'") (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)).

Third, and related to the preceding point, the legal liability for disobeying the agency's walk-around rules is real and substantial. NFIB argues that the Fairfax Memo is a de facto amendment to OSHA's walk-around regulation. That regulation was promulgated pursuant to the Act. *See* 36 Fed. Reg. at 17,850 (citing, inter alia, Section 8(e), 29 U.S.C. § 657(e)). Significant civil penalty liability is triggered by an employer's wilful violation of, among other things, "regulations prescribed pursuant to"

[1] It is hardly implausible to imagine OSHA determining, for example, that pre-inspection process would be "desirable" for a future inspection of a PJS worksite.

the Act. 29 U.S.C. § 666(a). *See* 29 C.F.R. § 1903.15(d)(1) (prescribing a maximum penalty of $124,709 per wilful violation of Section 666(a)). Thus, the violation of the walk-around regulation, as ostensibly amended by the Fairfax Memo, incurs substantial liability. NFIB members who must conform their conduct to the Fairfax Memo's dictates, such as PJS, are therefore directly regulated parties who presumptively have standing to sue. *See U.S. Telecom. Ass'n v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016) ("When a person or company that is the direct object of an action petitions for review, 'there is ordinarily little question that the action . . . has caused [it] injury, and that a judgment preventing . . . the action will redress it.'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)).

Finally, injury-in-fact is supplied by NFIB members' reasonable fear of future enforcement. NFIB member PJS already has been subjected to the Fairfax Memo four times. Compl. ¶¶ 25-28. *Cf. Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) ("[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'") (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Moreover, because OSHA's access framework generally does not afford employers prior notice, *see* 29 C.F.R. § 1903.6(a)-(b), an employer likely will never have an opportunity to contest the Fairfax Memo's authorization of third-party access without having to risk substantial civil liability if Administrative Procedure Act review is precluded here. *Cf. MedImmune*, 549 U.S. at 128-29 ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat . . . ."). Therefore, NFIB's members—and thus NFIB itself—have suffered injury-in-fact.[2]

[2] OSHA does not appear to contest that the interests NFIB seeks to protect in this action are germane to NFIB's larger mission, or that the direct participation of NFIB's members is unnecessary. *See* Compl. ¶¶ 35-36. *Cf. Ass'n of Am. Phys. & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (discussing requirements for associational standing).

OSHA also contends that NFIB has not met the "fair traceability" and "redressability" elements for standing. MTD 9. But OSHA's argument is founded upon its *merits* contentions—for example, the Fairfax Memo's "positive contribution" standard is just a fleshing out of the existing regulation's "reasonably necessary" standard. *See* MTD 9, 22. In contrast, NFIB contends that the two standards are substantially different, and that this difference is in part what gives rise to NFIB's claims for relief. *See* Compl. ¶¶ 47, 58-59. Resolution of this dispute is therefore appropriately decided on the merits, rather than in the context of standing.[3] *See Club v. Energy Future Holdings Corp.*, No. W-12-cv-108, 2013 WL 12108600, at *4 (W.D. Tex. Nov. 22, 2013) ("Defendants cannot conflate the requirements to succeed on the merits with the requirements of Article III standing.") (citing, inter alia, *Texans United for a Safe Econ. Educ. Fund. v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 793 (5th Cir. 2000)).

II

NFIB'S CHALLENGE TO THE FAIRFAX MEMO IS RIPE

A challenge to administrative action is ripe for judicial review if the issues are purely legal, further factual development would not be significantly helpful, and resolution of the issues would foster effective administration.[4] *Texas v. United States*, 497 F.3d 491, 498-99 (5th Cir. 2007). According to this standard, NFIB's action is ripe.

The issues raised are purely legal, not abstract or hypothetical as OSHA contends, MTD 10-11. The Fairfax Memo, according to NFIB, is a legislative rule which should have been subjected to notice and comment, 5 U.S.C. § 553(b)-(c). The

[3] OSHA is correct that an injunction against the Fairfax Memo's enforcement would not preclude all third parties from attending inspections. MTD 9. But that is beside the point. NFIB does not object to third parties per se, but rather only those whose presence frustrates the legitimate purpose of a workplace inspection. *See* Compl. ¶ 59.

[4] Another relevant factor is whether the action is "final." *Texas*, 497 F.3d at 498. For the reasons stated *infra* Part III, this factor also supports the ripeness of NFIB's claim.

Fairfax Memo amends the agency's existing walk-around regulation by (i) allowing non-employees to serve as employee representatives, and (ii) allowing third parties to accompany inspections so long as their presence will make a "positive contribution" to the inspection, rather than being reasonably necessary to the same. Fairfax Memo 1-2. For its part, OSHA contends that the Fairfax Memo merely interprets rather than amends, and therefore is exempt from notice and comment. MTD 22. Thus, resolution of this dispute requires no factual development, but only an application of the law of notice-and-comment to the legal texts here at issue. *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007) (explaining that it is "well-established that claims that an agency's action is . . . contrary to law present purely legal issues," as do "claims that an agency violated the [Administrative Procedure Act] by failing to provide notice and opportunity for comment" (quotation marks, brackets, and citations omitted)); *Alabama v. Ctrs. for Medicare & Medicaid Servs.*, No. 2:08-cv-881-MEF-TFM, 2010 WL 2271460, at *4 (M.D. Ala. June 4, 2010) ("[A] claim for failure to comply with the notice-and-comment requirement is ripe at the time the alleged failure occurs.").

Also purely legal is NFIB's substantive challenge under the Act to the Fairfax Memo. NFIB contends that the Fairfax Memo's allowance for a non-employee to accompany an inspection without any showing of specialized need violates the Act's walk-around authorization. Compl. ¶ 59. OSHA contends to the contrary. MTD 23-25. But again, resolution of this issue is purely legal: no factual development is necessary to divine congressional intent. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (that an issue is "one purely of congressional intent" militates against the need for factual development to ripen it).

The D.C. Circuit's decision in *National Environmental Development Association's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014), is illustrative. There, an industry group challenged EPA's interpretation of what constitutes a "major source"

under the Clean Air Act. The group argued that the interpretation was inconsistent with the statute as well as existing regulation. EPA responded that the claim was not ripe, because "it is entirely speculative how EPA's interpretation . . . will impact any source." *Id*. at 1008 (citation omitted). The D.C. Circuit concluded that EPA's argument "misses the point." *Id*. The challenge to EPA's interpretation presented the "purely legal question" of whether EPA's interpretation "violates the strictures of the [Act] or EPA regulations." *Id*. Therefore, it was "unnecessary to wait for the [interpretation] to be applied in order to determine its legality." *Id*. The same is true here: the Court need not await further application of the Fairfax Memo to determine whether it constitutes a legislative rule or whether it can be reconciled with the statute. *See Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 267-68 (5th Cir. 2015) (a challenge to an agency regulation on the ground that it exceeds its delegated authority is ripe without need for further application).

In addition, the Fairfax Memo has a direct and immediate impact on NFIB's members, as they must change their behavior in order to comply with it. For example, PJS has been subjected to the Fairfax Memo four times. It would prefer not to allow Union members onto its workplaces, but PJS cannot refuse entry without risking legal liability. *See La. State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016) ("Judicially reviewable agency actions normally affect a regulated party's possible legal liability; these consequences tend to expose parties to civil or criminal liability for non-compliance with the agency's view of the law . . . ."). *Cf. Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 624 (M.D. La. 2015) ("[R]ipeness is seldom an obstacle to a pre-enforcement challenge . . . where the plaintiff faces a credible threat of enforcement.") (quoting *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 907 (10th Cir. 2012)). PJS's predicament further supports immediate review.

For similar reasons, NFIB members would suffer significant hardship should review be denied for lack of ripeness. The Fairfax Memo has caused PJS to suffer the

presence of unwanted third parties in its workplaces. Without review under the Administrative Procedure Act, PJS and similarly situated NFIB members could obtain review only by refusing consent to the inspection, thereby triggering substantial civil penalty liability. *See* 29 U.S.C. § 666(a); 29 C.F.R. § 1903.15(d)(1) (prescribing a maximum penalty of $124,709 per wilful violation of Section 666(a)). Conditioning review on accepting such liability would impose an intolerable hardship. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("[P]arties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'") (quoting *Abbott Labs.*, 387 U.S. at 153).

Finally, allowing judicial review would, contrary to OSHA's contention, foster effective enforcement and administration. The agency can have no overriding interest in delaying judicial review of an inspection regime if that regime is contrary to law. *Cf. Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) ("The [Administrative Procedure Act's] presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."). Moreover here, in contrast to OSHA's cited authority, there is no ongoing administrative process that NFIB's action seeks to frustrate or to stop. *Cf.* MTD 13 (citing *In re Establishment Inspection of Manganas Painting Co., Inc.*, 104 F.3d 801, 802 (6th Cir. 1997)) ("Manganas filed an action in district court to enjoin OSHA from inspecting the site, executing warrants and issuing citations until the Commission rendered its decision [on Manganas' administrative appeal]."). NFIB's action is ripe for review.

III

THE FAIRFAX MEMO IS A FINAL AGENCY ACTION

An agency action is final under the Administrative Procedure Act, 5 U.S.C. § 704, if it marks the consummation of the agency's decision-making, and if it affects

legal rights or obligations, or produces legal consequences. *See Sackett*, 132 S. Ct. at 1371-72. The Fairfax Memo satisfies these requirements.

The Fairfax Memo is the consummation of OSHA's administrative process. It represents the agency's current and considered view of the scope of the walk-around right—namely, non-employees may serve as employee representatives, and the determination of whether a third party may participate in an inspection is to be made by using a "positive contribution" standard. Fairfax Memo 1-2. This is a change from the published regulation, which requires that the employee representative be an employee as well, and which imposes a "reasonably necessary" standard for third-party participation. 29 C.F.R. § 1903.8(e). *Cf. Nat'l Envtl. Dev. Ass'n v. EPA*, 752 F.3d at 1007 ("If an agency action announces a binding change in its enforcement policy which immediately affects the rights and obligations of regulated parties, then the action is likely final and subject to review."); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755 (5th Cir. 2011) (noting that even "guidance letters can mark the 'consummation' of an agency's decision-making process"). Also, the Fairfax Memo contemplates no future agency action for its strictures to be effective, further indicating its finality. *Cf. La. State*, 834 F.3d at 584 (action is not final if "it necessarily contemplates future agency action"). And that finality is not undercut simply because OSHA retains the authority to withdraw the Fairfax Memo. *See Hawkes Co.*, 136 S. Ct. at 1814 (that agency decisions may be revised "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal").

The Fairfax Memo also produces legal consequences. It requires an employer to allow third parties onto a workplace even if those parties' presence is not reasonably necessary to an inspection. Prior to the Fairfax Memo's promulgation, an employer could have excluded such third parties. To exclude them now carries the risk of significant legal liability. *See* 29 U.S.C. § 666(a); 29 C.F.R. § 1903.15(d)(1) (prescribing a maximum penalty of $124,709 per wilful violation of Section 666(a)). Such risk is

enough to make the Fairfax Memo reviewable. *See La. State*, 834 F.3d at 583 ("Judicially reviewable agency actions normally affect a regulated party's possible legal liability; these consequences tend to expose parties to civil or criminal liability for non-compliance with the agency's view of the law . . . ."). Buttressing that conclusion is OSHA's insertion of the Fairfax Memo into the agency's field manual, Field Operations Manual 3-14, which establishes the policies and procedures to be followed by the agency's compliance officers.[5] *Cf. Hawkes Co.*, 136 S. Ct. at 1814 (a jurisdictional determination that binds the agency thereby produces "direct and appreciable legal consequences") (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

OSHA nevertheless contends that the Fairfax Memo has no legal consequence because it merely restates or interprets the existing walk-around regulation,[6] and therefore is like other OSHA guidance documents courts have declined to review. MTD 14-15. OSHA's argument fails because it begs the question of whether the Fairfax Memo is an interpretative or legislative rule, and thus whether it changes the relevant legal standards. It is precisely because the Fairfax Memo seeks to amend rather than interpret existing regulation that it has legal consequences, and can be distinguished from other OSHA documents that authentically interpret rather than legislate. OSHA does not prove otherwise by simply assuming the contrary.

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[5] To be sure, the Field Operations Manual contains a prominent disclaimer that the Manual creates no rights or duties in non-OSHA personnel. *See* Field Operations Manual at Abstract-3. But an agency pronouncement can be binding notwithstanding agency disclaimers, particularly when, as here, "an agency acts as if a document issued at headquarters is controlling in the field." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

[6] Of course, that the Fairfax Memo considers itself to be interpretative does not decide the issue. *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) ("[I]f an agency issues a statement that is labeled an interpretative rule [but] it has all of the indicia of a final legislative rule, then the rule will be subject to review.").

IV

JUDICIAL REVIEW OF THE FAIRFAX MEMO IS NOT PRECLUDED

The Administrative Procedure Act does not allow for review of otherwise final agency action if such review is precluded by statute. 5 U.S.C. § 701(a)(1). OSHA contends that the Occupational Safety and Health Act precludes review here. The agency is incorrect.

Whether and to what extent a particular statute precludes judicial review depends on a variety of factors, such as the statute's text, structure, purpose, and legislative history, as well as the availability of other meaningful avenues of review. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). In its motion to dismiss, OSHA briefly addresses some of these factors, but relies principally on a series of cases holding that regulated parties cannot use the Administrative Procedure Act to circumvent a specific statutory review process. *See Thunder Basin*, 510 U.S. at 216 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) (noting that the plaintiff "sought to make an end run around" the "statutory review process" by "seek[ing] an injunction . . . that would terminate the proceeding currently pending before the [agency]"); *Manganas Painting*, 104 F.3d at 802 (noting that the plaintiff "filed an action in district court to enjoin OSHA from inspecting the site, executing warrants and issuing citations until the Commission rendered its decision" in the plaintiff's pending administrative appeal).

OSHA's cited authority is irrelevant. NFIB does not seek review of any threatened or issued administrative citation. Moreover, NFIB does not seek to enjoin any ongoing administrative process, or to prevent OSHA from initiating any process. Instead, NFIB seeks review of a de facto amendment to OSHA's walk-around

regulation, which was promulgated under Section 8(e), 29 U.S.C. § 657(e), of the Act. NFIB is aware of no decision, and OSHA has cited none, holding that such a regulation—or an amendment to such a regulation—may be reviewed only through the Occupational Safety and Health Act's statutory enforcement process. *Cf. Sackett*, 132 S. Ct. at 1373 ("[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the [Administrative Procedure Act's] presumption of reviewability . . . , it would not be much of a presumption at all.").

OSHA acknowledges that direct review of OSHA regulations is permissible, but it contends that NFIB should receive no such review here because it does not challenge a "formal" regulation issued pursuant to notice and comment. MTD 17 n.7. The agency's argument is backwards. Again, it is precisely because the Fairfax Memo amends existing regulation *without* providing notice and comment that it is illegal. *Cf. Sturm, Ruger & Co.*, 300 F.3d at 875 (noting that the plaintiff "d[id] not challenge the validity of an OSHA regulation" but instead contended that the absence of regulation made the agency's decision *ultra vires*). It would be perverse to allow an agency to make judicial review harder to obtain by not providing notice and comment when such notice and comment is otherwise legally compelled.

Finally, OSHA contends that review should be denied because NFIB has meaningful, *see Thunder Basin*, 510 U.S. at 207, or otherwise adequate, *see* 5 U.S.C. § 704, means of review available. MTD 18-19. The two supposedly adequate alternatives OSHA offers—seeking to quash a warrant or seeking review of an OSHA citation—both presuppose disobedience on the part of an employer. In other words, OSHA wants employers to test the Fairfax Memo's legality by ostensibly breaking the law. But regulated parties are not required to do so in order to obtain judicial review. *See Sackett*, 132 S. Ct. at 1372 (review is not adequate if it cannot be "initiate[d]" by the regulated party or if it exposes the party to substantial "potential liability"). *See*

also Hawkes Co., 136 S. Ct. at 1815; *Free Enterp. Fund*, 561 U.S. at 490. Judicial review of NFIB's claims is not precluded.

V

THE FAIRFAX MEMO IS A LEGISLATIVE NOT INTERPRETATIVE RULE, AND THEREFORE SHOULD HAVE BEEN SUBJECTED TO NOTICE AND COMMENT

The Administrative Procedure Act presumptively requires that the public be given notice of, and an opportunity to participate in rule-making before, a rule may go into effect. *See* 5 U.S.C. § 553(b)-(c). Exempted from the notice-and-comment requirements are, among other things, "interpretative" rules. *Id.* § 553(b)(3)(A). OSHA argues that the Fairfax Memo merely interprets, rather than amends, the existing walk-around regulation, and therefore is exempt from notice and comment. MTD 22-23. The agency is incorrect.

Whether a rule is interpretative and exempt, or instead legislative and therefore not exempt, "is [a] vexing conundrum in the field of administrative law." David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 278 (2010). That being said, the distinction as applied to NFIB's action is relatively straightforward. Generally, a legislative rule "effects a substantive regulatory change to the statutory or regulatory regime." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec. (EPIC)*, 653 F.3d 1, 6-7 (D.C. Cir. 2011)). In contrast, an interpretative rule merely "advise[s] the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)). Thus, to be an interpretative rule, an agency pronouncement "cannot effect a substantive change in the regulations." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 602 (5th Cir. 1995) (brackets and citation omitted). *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (a rule is legislative if "the rule

effectively amends a prior legislative rule"). The Fairfax Memo, however, is a legislative rule because it effectively amends Section 1903.8, itself a legislative rule.[7]

The Fairfax Memo creates an exception to Section 1903.8's categorical rule that the employee representative also must be an employee. *Compare* 29 C.F.R. § 1903.8(c) ("The representative(s) authorized by employees shall be an employee(s) of the employer.") *with* Fairfax Memo at 2 (affirming that "an employee representative who is not an employee of the employer" may serve as the "employee representative"). OSHA responds that Section 1903.8 does *not* establish such a categorical rule, and therefore the Fairfax Memo changes nothing. But OSHA's argument cannot be squared with the plain meaning of the walk-around regulation. *Cf. Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (an agency interpretation inconsistent with a regulation's plain meaning merits no deference).

OSHA's existing walk-around regulation provides that a "representative of the employer and a representative authorized by his employees" shall have the right to accompany an inspection. 29 C.F.R. § 1903.8(a). The regulation makes clear that the employees' representative must himself be an employee. *Id.* § 1903.8(c). Also, in addition to the employer and employee representative, the regulation allows, in limited circumstances, for a "third party" who is not an employee to accompany the inspection. *See id.* Thus, the regulation establishes three classes of non-agency persons relevant to an inspection: (i) the employer representative; (ii) the employee representative; and (iii) a "third party." The plain meaning of "third party" is someone other than the

[7] OSHA does not deny that Section 1903.8 is a legislative rule, and any such denial would be unconvincing. Section 1903.8 was subjected to notice and comment, *see* 36 Fed. Reg. at 17,851, is published in the Code of Federal Regulations, and is binding on the agency as well as the public as to the scope of the walk-around right. *See* 29 U.S.C. § 657(e) (establishing the walk-around right "[s]ubject to regulations issued by the Secretary"); *id.* § 666(a)-(c) (prescribing various penalties for violation of "regulations prescribed pursuant to [the Act]"). The regulation therefore qualifies as a legislative rule on a variety of grounds. *See Am. Mining Congress*, 995 F.2d at 1112.

classes of persons already designated. *See Norfolk Shipbuilding & Drydock Corp. v. Seabulk Transmarine Partnership, Ltd.*, 274 F.3d 249, 254 (5th Cir. 2001) (the plain meaning of "third party" in an insurance contract does not include parties previously identified); *Rhodes, Inc. v. Morrow*, 937 F. Supp. 1202, 1214 (M.D.N.C. 1996) (the plain meaning of third party is "another party"). Section 1903.8(c)'s reference to a "third party" only comes after the regulation has identified two other classes of parties—the employer representative and the employee representative. Hence, according to the plain meaning of "third party," the term as used in Section 1903.8(c) cannot refer to the employee representative. Thus, the Fairfax Memo's allowance for a non-employee to serve as the formal representative of the employees during a workplace inspection—as opposed to serving as a true "third party" neutral—is an expansion of the existing walk-around right. This expansion supports the conclusion that the Fairfax Memo is a legislative rule. *See Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) ("[An agency's] subsequent interpretation [that] runs 180 degrees counter to the plain meaning of the regulation gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation.").

Besides its reworking of the definition of employee representative, the Fairfax Memo makes a material change in the standard for determining whether a non-employee may accompany the compliance officer as a third-party neutral. Under Section 1903.8(c), such a third party must have some specialized knowledge germane to the inspection. *See* 29 C.F.R. § 1903.8(c) (offering as examples of an appropriate third party "an industrial hygienist or a safety engineer"). OSHA contends that the regulation merely provides two examples of persons whose presence may be reasonably necessary, without also imposing a requirement for specialized knowledge. MTD 22-23. But OSHA's gloss is directly contrary to the canon of *ejusdem generis*, according to which "general words are read to apply only to other items like those specifically

enumerated." *United States v. Kaluza*, 780 F.3d 647, 661 (5th Cir. 2015) (quoting *Garcia v. United States*, 469 U.S. 70, 74 (1984)). According to that canon, Section 1903.8(c)'s reference to "a third party who is not an employee of the employer" should encompass only those third parties who are like an "industrial hygienist" or "safety engineer"—namely, persons who have specialized technical knowledge relevant to the physical inspection of a workplace. *See Kaluza*, 780 F.3d at 661-62 (the phrase "other person employed on any . . . vessel," when paired with examples of "captain," "engineer," and "pilot," means only those persons concerned with a vessel's operation).

Even without the specialized knowledge requirement, Section 1903.8(c)'s "reasonably necessary" standard is more demanding than the Fairfax Memo's "positive contribution" benchmark. As a matter of commonly accepted usage, showing that one's presence will make a "positive contribution" is much easier than showing that one's presence will be "reasonably necessary." To provide input that is "positive" means simply to add something worthwhile, no matter how small. *See* Webster's 3d New Int'l Dictionary 1770 (1993) (defining "positive" as [4a] "having or expressing [something] actually present in a real manner . . . as distinguished from merely lacking or failing to express an opposed quality"). In contrast, to provide input that is "reasonably necessary" implies the addition of something more than *de minimis* help. *See W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 421 (1985) ("reasonably necessary" means more than "rational basis in fact"). For example, providing a cup of coffee for the compliance officer could fairly be described as a "positive contribution" to an inspection but it could not fairly be described as "reasonably necessary."

Accordingly, the substantial differences between Section 1903.8(c) and the Fairfax Memo demonstrate that the latter's "interpretation" of Section 1903.8's walk-around right is in reality a de facto amendment of the regulation, and therefore that the Fairfax Memo should have been subjected to notice and comment before promulgation.

VI

THE FAIRFAX MEMO CONFLICTS WITH THE OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act grants the right to "a representative authorized by [an employer's] employees" to accompany the compliance officer during the inspection of a workplace. 29 U.S.C. § 657(e). The Act contains no express authorization for a non-employee to accompany the compliance officer. *See id.* OSHA's existing walk-around regulation allows for limited circumstances in which a non-employee may accompany an inspection. *See* 29 C.F.R. § 1903.8(c). But the Fairfax Memo goes impermissibly beyond Congress' authorization by granting a wide allowance for non-employees to participate.

The walk-around right that the Act creates reflects a careful legislative compromise. An overly broad walk-around right—one that would allow third parties with no workplace-specific or technical knowledge to infiltrate a workplace—would frustrate the inspection regime's principal purpose of identifying and resolving workplace health and safety issues.[8] *See* S. Rep. No. 91-1282, at 11 (1970) (observing that the walk-around process should "be undertaken with a view both to apprising the inspector of all possible hazards to be found in the workplace, as well as to insure that employees generally will be informed of the inspector's presence and the purpose and manner of his inspection"); Cong. Rec. S18264 (Nov. 16, 1970) (statement of the Act's Senate sponsor Senator Williams) (justifying a walk-around right for an employee

[8] Because the relevant portion of the Occupational Safety and Health Act is silent on whether non-employees may accompany a compliance officer, the Court can look to the statute's legislative history. *See La. Envtl. Action Network v. EPA*, 382 F.3d 575, 583 (5th Cir. 2004); *Rainbow Gun Club, Inc. v. Denbury Onshore, LLC*, 760 F.3d 405, 410 (5th Cir. 2014). For the reasons stated in the text, OSHA's construction of that silence, contained in the Fairfax Memo, is unreasonable, since it would frustrate Congress' intent. Thus, even assuming application of *Chevron*, the agency would be entitled to no deference here. *See CHW West Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) ("[D]eference is not owed to an agency decision if it construes a statute in a way that is contrary to congressional intent or frustrates congressional policy.").

representative because "no one knows better than the working man what the conditions are, where the failures are, where the hazards are"); Cong. Rec. S18512 (Nov. 19, 1970) (statement of Senator Javitts) (observing that limitations on the walk-around right are necessary to avoid inserting into the inspection process "union organizing issues which have no relationship to this legislation"). Indeed, concern that a broad walk-around right would be counterproductive to the Act's health and safety goals was so great that the House version of the Act made the employee walk-around right entirely contingent on the employer's decision whether to accompany the compliance officer, Cong. Rec. H8752 (Sept. 15, 1970).[9] *See* Lee Hornberger, *Occupational Safety & Health Act of 1970*, 21 Cleve. St. L. Rev. 1, 11 (1972).

Accordingly, for over 40 years OSHA reasonably construed the Act to allow, in very limited circumstances, for a non-employee to accompany the compliance officer. As noted above, such a non-employee was allowed if, but only if, the non-employee had special skills or knowledge directly pertinent to evaluating the physical safety and healthfulness of a workplace. *See* 29 C.F.R. § 1903.8(c). The Fairfax Memo contravenes the Act by allowing non-employees to accompany compliance officers without any showing that these third parties' presence is reasonably necessary to vindicate the inspection's safety- and health-related purposes. The Fairfax Memo therefore upsets Congress's careful legislative balance between giving employees a fair opportunity to participate in safety- and health-related inspections, and precluding such walk-around opportunities from being used for purposes unrelated to safety and health, such as union organizing campaigns. *See, e.g.*, Cong. Rec. S17975 (Oct. 13, 1970) (amendment explanation offered by Senator Dominick) (noting the risk that a

[9] Although failed legislative proposals generally do not carry much interpretive weight, here it makes sense to afford more significance to the House of Representatives' bill, given that it was passed by one House of Congress and given the compromise nature of the final walk-around provision adopted in the Conference Bill.

walk-around "could, under some circumstances, lead to 'collective bargaining' sessions during the course of an inspection and could therefore interfere . . . with the inspection").

CONCLUSION

The Fairfax Memo substantially impinges on employers' rights to determine who can enter their workplaces. Employers who do not accede to its onerous demands risk significant legal liability. Yet the Fairfax Memo was never subjected to notice and comment, and has never been authorized by Congress. The motion to dismiss should be denied.

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Respectfully submitted,

ADAM H. CHARNES
DAMIEN M. SCHIFF
JOSHUA P. THOMPSON

By s/ Damien M. Schiff

DAMIEN M. SCHIFF, Cal. Bar No. 235101*
E-mail: dms@pacificlegal.org
JOSHUA P. THOMPSON, Cal. Bar No. 250955*
E-mail: jpt@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
**Pro Hac Vice*

ADAM H. CHARNES, Tex. Bar No. 24090629
E-mail: acharnes@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP
2001 Ross Avenue, Suite 4400
Dallas, Texas 75201
Telephone: (214) 922-7106
Facsimile: (214) 481-0517

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on December 5, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Northern District of Texas using the Court's electronic filing system. That system sends a Notice of Electronic Filing to Defendants' counsel:

Lisa R. Hasday
Assistant United States Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8737
Facsimile: 214-659-8807
lisa.hasday@usdoj.gov

s/ Damien M. Schiff
DAMIEN M. SCHIFF