

No. 20-1158

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

**IN RE: AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS,**

Petitioner

On Emergency Petition for a Writ of Mandamus

**DEPARTMENT OF LABOR'S RESPONSE TO THE
EMERGENCY PETITION FOR A WRIT OF MANDAMUS**

KATE S. O'SCANNLAIN
Solicitor of Labor

TIMOTHY J. TAYLOR
Deputy Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave., NW,
Room S-4004
Washington, DC 20210
(202) 693-5460

May 29, 2020

**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND
RELATED CASES**

All parties, intervenors, and amici appearing in this court are listed in the Petitioner's Emergency Petition for a Writ of Mandamus except for the U.S. Chamber of Commerce *et al.* and the National Association of Home Builders, which intend to file amici briefs. There are no rulings under review or related cases.

TABLE OF CONTENTS

| | |
|--|-----|
| CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| GLOSSARY OF ABBREVIATIONS | vi |
| ORAL ARGUMENT NOT SCHEDULED | vii |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 3 |
| I. Statutory Framework | 3 |
| II. Background | 4 |
| STANDARD OF REVIEW | 13 |
| ARGUMENT | 15 |
| I. The Court Lacks Jurisdiction Because Petitioner Lacks Standing | 18 |
| II. Petitioner Has Not Demonstrated Clearly And Indisputably That An ETS Is Necessary, Especially Given The Deference Due OSHA's Determination To The Contrary | 19 |
| A. Existing Standards Render An ETS Unnecessary | 21 |
| 1. OSHA's Existing Specific Rules Require Employers To Take Precautions Against COVID-19 | 21 |
| 2. OSHA's General Duty Clause Requires Employers To Take Precautions Against COVID-19 | 24 |
| B. An ETS Is Not Necessary Because It Would Be Counterproductive To OSHA's COVID-19 Related Efforts | 28 |
| III. Petitioner Has An Adequate Alternative Remedy, And The Equities Do Not Weigh In Its Favor | 34 |
| CONCLUSION | 36 |
| CERTIFICATE OF SERVICE AND ECF COMPLIANCE | |
| CERTIFICATE OF COMPLIANCE | |

TABLE OF AUTHORITIES

Cases

| | |
|--|---------------|
| <i>Action on Smoking & Health v. OSHA</i> , No. 89-1656, 1990 WL 294219 (D.C. Cir. May 10, 1991)..... | 30 |
| <i>AFL-CIO v. OSHA</i> , 965 F.2d 962 (11th Cir. 1992)..... | 33 |
| <i>Am. Hosp. Ass’n v. Burwell</i> , 812 F.3d 183 (D.C. Cir. 2016)..... | passim |
| <i>Asbestos Info. Ass’n/N. Am. v. OSHA</i> , 727 F.2d 415 (5th Cir. 1984)..... | 3, 20, 24 |
| <i>Beverly Enters., Inc.</i> , 19 BNA OSHC 1161 (No. 91-3144, 2000)..... | 25 |
| <i>BHC Nw. Psychiatric Hosp., LLC v. Sec’y of Labor</i> , 951 F.3d 558 (D.C. Cir. 2020)..... | 24 |
| <i>Dry Color Mfrs. Ass’n v. Dep’t of Labor</i> , 486 F.2d 98 (3d Cir. 1973) | 33 |
| <i>Dunlap v. Presidential Advisory Comm’n on Election Integrity</i> , 944 F.3d 945 (D.C. Cir. 2019)..... | 2 |
| <i>Fornaro v. James</i> , 416 F.3d 63 (D.C. Cir. 2005)..... | 13 |
| <i>In re Core Commc’ns, Inc.</i> , 531 F.3d 849 (D.C. Cir. 2008)..... | 13 |
| <i>In re Int’l Chem. Workers Union, (ICWU)</i> , 830 F.2d 369 (D.C. Cir. 1987)..... | 2, 14, 30, 34 |

| | |
|--|---------------|
| <i>In re Int’l Union, United Mine Workers of Am. (UMWA),</i> 231 F.3d 51 (D.C. Cir. 2000)..... | 16, 28 |
| <i>In re Pub. Emps. for Envtl. Responsibility,</i> 957 F.3d 267 (D.C. Cir. 2020)..... | 13, 19 |
| <i>Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.,</i> 448 U.S. 607 (1980) | 33 |
| <i>Int’l Union, United Auto., Aerospace, & Agr. Implement Workers of Am., UAW v. Donovan,</i> 590 F. Supp. 747 (D.D.C. 1984)..... | 30 |
| <i>Kan. City Power & Light Co.,</i> 10 BNA OSHC 1417 (No. 76-5255, 1982)..... | 25 |
| <i>Nat’l Realty & Constr. Co. v. OSHRC,</i> 489 F.2d 1257 (D.C. Cir. 1973)..... | 25 |
| <i>Oil, Chem. & Atomic Workers Int’l Union v. Zegeer,</i> 768 F.2d 1480 (D.C. Cir. 1985)..... | 28 |
| <i>Owens-Corning Fiberglas Corp.,</i> 7 BNA OSHC 1291 (No. 76-4990, 1979)..... | 22 |
| <i>Peter Cooper Corps.,</i> 10 BNA OSHC 1203 (No. 76-596, 1981)..... | 26 |
| <i>Power v. Barnhart,</i> 292 F.3d 781 (D.C. Cir. 2002)..... | 2 |
| <i>Pub. Citizen Health Research Grp. v. Auchter,</i> 702 F.2d 1150 (D.C. Cir. 1983)..... | 2, 14, 20, 34 |
| <i>Ryder Truck Lines, Inc.,</i> 497 F.2d 230 (5th Cir. 1974)..... | 22 |
| <i>St. Joe Minerals Corp. v. OSHRC,</i> 647 F.2d 840 (8th Cir. 1981)..... | 25 |

| | |
|---|----|
| <i>Telecommunications Research & Action Center v. FCC,</i> (<i>TRAC</i>), 750 F.2d 70 (D.C. Cir. 1984) | 15 |
|---|----|

| | |
|--|----|
| <i>United Transp. Union v. ICC,</i> 891 F.2d 908 (D.C. Cir. 1989) | 18 |
|--|----|

Regulations

| | |
|-----------------------------------|----|
| 29 C.F.R. § 1910.132(a)-(h) | 22 |
|-----------------------------------|----|

| | |
|-----------------------------------|----|
| 29 C.F.R. § 1910.134(a)-(d) | 21 |
|-----------------------------------|----|

| | |
|----------------------------|----|
| 29 C.F.R. § 1910.141 | 23 |
|----------------------------|----|

| | |
|--------------------------------------|----|
| 29 C.F.R. §§ 1910.141(d)(2)(i) | 23 |
|--------------------------------------|----|

Rules

| | |
|-----------------------------|----|
| D.C. Cir. R. 28(a)(7) | 18 |
|-----------------------------|----|

Statutes

| | |
|-----------------------------|-------|
| 29 U.S.C. § 654(a)(1) | 3, 24 |
|-----------------------------|-------|

| | |
|-----------------------------|----|
| 29 U.S.C. § 654(a)(2) | 21 |
|-----------------------------|----|

| | |
|-----------------------------|------------|
| 29 U.S.C. § 655(c)(1) | 14, 16, 19 |
|-----------------------------|------------|

| | |
|-----------------------------|----|
| 29 U.S.C. § 655(c)(3) | 30 |
|-----------------------------|----|

| | |
|-----------------------|----|
| 29 U.S.C. § 666 | 25 |
|-----------------------|----|

GLOSSARY OF ABBREVIATIONS

| | |
|-----------|---|
| AFL-CIO | American Federation of Labor and Congress of Industrial Organizations |
| APA | Administrative Procedure Act |
| CARES Act | Coronavirus Aid, Relief, and Economic Security Act |
| CDC | Centers for Disease Control and Prevention |
| COVID-19 | Coronavirus Disease 2019 |
| ETS | Emergency Temporary Standard |
| NIOSH | National Institute for Occupational Safety and Health |
| OSH Act | Occupational Safety and Health Act |
| OSHA | Occupational Safety and Health Administration |
| PPE | Personal Protective Equipment |

ORAL ARGUMENT NOT SCHEDULED

INTRODUCTION

In the midst of a far-reaching and unprecedented global pandemic, this Court is being asked to arrogate to a single petitioner the power to resolve—nationwide—unsettled scientific and political questions and to ignore the careful, expert judgments of the federal agency tasked with this crucial work and accountable to Congress for its faithful discharge.

From the outset of the COVID-19 crisis, OSHA has worked tirelessly to further its mission to protect the health and safety of America's workers. OSHA has a two-pronged strategy for combatting the danger of COVID-19 in the workplace. The first element is enforcement of existing rules and statutory requirements. Drawing on its existing framework of mandatory, enforceable authorities, both specific and general, OSHA has conducted thousands of COVID-19 investigations. The second element is rapid, flexible guidance. OSHA and other agencies have issued extensive guidance, much of which is industry-specific and all of which may be easily updated as information regarding COVID-19 and spread prevention continues to evolve.

Petitioner, however, wants OSHA to divert its resources amidst this pandemic toward a different action: issuing an Emergency Temporary Standard (ETS). An ETS is a rarely used mechanism, which imposes a mandatory standard immediately without public input. And an ETS stays in place not until the emergency subsides

but instead, according to the statute, until a *permanent* rule informed by comment is put in place just six months later. That is warp-speed for an agency like OSHA that must act upon substantial evidence and with extensive public input, and ill-suited for an evolving hazard. Notably, AFL-CIO's present request is not its first; it also sought an infectious disease standard over a decade ago from the previous Administration. *See* Pet. 4 n.1.

The extraordinary nature of AFL-CIO's request cannot be overstated. AFL-CIO would have this Court force OSHA to deploy an ETS—"the most drastic measure in [its] standard-setting arsenal," *Pub. Citizen Health Research Grp. v. Aucther*, 702 F.2d 1150, 1153 (D.C. Cir. 1983) (per curiam)—using one of the most drastic measures in the Court's—a writ of mandamus, *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 944 F.3d 945, 949 (D.C. Cir. 2019) ("Mandamus is one of the most potent weapons in the judicial arsenal, a drastic and extraordinary remedy reserved for really extraordinary causes." (quoted source omitted)). AFL-CIO fails to meet its doubly high burden of (1) demonstrating its "clear and indisputable" entitlement to the writ, *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (quoted source omitted), and (2) overcoming the "great deference" due OSHA's assessment of facts and policies underlying its determination that an ETS is not necessary at this time, *In re Int'l Chem. Workers Union (ICWU)*, 830 F.2d 369, 371 (D.C. Cir. 1987) (per curiam).

This Court has *never* required OSHA to issue an ETS, and it should not start now. OSHA—together with countless federal, state, and local authorities—is addressing COVID-19 in a rigorous and comprehensive manner, with more time, energy, and resources devoted to this public health threat than any other in the agency’s history. An ETS is an extreme step; in the present circumstances, it would afford a single private litigant a privileged position in the expansive scientific, economic, and political examination of how best to combat and ameliorate the COVID-19 pandemic. Such questions should be resolved by scientific discovery and political consensus, not by litigation.

STATEMENT OF THE CASE

I. Statutory Framework

The OSH Act imposes two duties on an employer: a “general duty” to provide employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees, 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable standards promulgated under the Act, *id.* § 654(a)(2). While the vast majority of OSHA standards are promulgated through notice-and-comment rulemaking, *see id.* § 655(b), indeed *every* standard since 1983 (an ETS on asbestos held invalid by the Fifth Circuit¹), the Secretary has authority

¹ *See Asbestos Info. Ass’n/N. Am. v. OSHA*, 727 F.2d 415 (5th Cir. 1984).

in very limited circumstances to immediately impose an emergency standard without first using the notice-and-comment process:

The Secretary shall provide, without regard to the [APA's] requirements ... for an emergency temporary standard to take immediate effect upon publication in the Federal Register *if he determines* (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

Id. § 655(c)(1) (emphasis added). If the Secretary issues an ETS, he then must commence a rulemaking proceeding, in which the ETS serves as the proposed rule, and the statute requires the Secretary to promulgate a permanent standard within six months. *Id.* § 655(c)(3).

II. Background

At the end of December 2019, OSHA began monitoring an uptick in unidentified pneumonia-like illnesses being reported in China. *See* Declaration of Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health (Sweatt Decl.), Addendum Tab 1, ¶ 4. As it became apparent in January 2020 that a novel coronavirus had emerged in China, OSHA immediately set to action as part of a concerted whole-of-government approach to addressing the emerging pandemic. *Id.* ¶ 5. That month, OSHA began coordinating with sister agencies across the federal government and launched a dedicated website about the

coronavirus to readily publish and distribute critical information for workers, employers, and the general public. *Id.* ¶ 6.

All told, OSHA has developed a broad collection of guidance materials, including detailed elaborations of recommended mitigation measures, shorter alerts, news releases, posters, and videos addressing COVID-19-related health and safety issues. *Id.* ¶ 7. These guidance materials incorporate the fundamental hierarchy of controls applicable to occupational safety and health and are designed to be flexible and responsive in light of the rapidly changing circumstances at workplaces across the country, as well as the evolving understanding of the virus. *Id.*

- OSHA issued general guidance to all employers on the importance of taking immediate action to prepare their workplaces for the impact of COVID-19. This guidance (i) outlines multiple measures that all employers should take to reduce workers' exposure to the coronavirus, including social distancing, good hygiene, workplace controls, PPE, worker training, and anti-retaliation, among many more; and (ii) advises employers on proper classification of workers' risk of coronavirus exposure—with recommended appropriate measures for each risk category. *Id.* ¶ 8.
- OSHA thus far has issued specific guidance for employers in meat and poultry processing, healthcare, nursing homes, restaurants (including

curbside pickup), dentistry, retail, construction, pharmacies, rideshare services, mortuary services, emergency response, laboratories, border protection and transportation security, solid waste and wastewater management, environmental services, in-home repair services, package delivery, and manufacturing, among others, some of which has been translated into Spanish. In particular, OSHA has collaborated with CDC on joint guidance for meat and poultry processing and manufacturing. *Id.* ¶ 11.

- OSHA released nine safety videos addressing important safe-work practices in both English and Spanish and developed employment-based posters demonstrating the seven steps for properly wearing a respirator. *Id.* ¶ 15.

In conjunction with this extensive guidance, OSHA has worked to ensure its enforcement program prioritizes the COVID-19 hazard, promotes the availability of respirators for high-risk industries, and allows employers flexibility regarding certain OSHA standards where compliance has been complicated by widespread state and local stay-at-home orders. *Id.* ¶ 20.

- OSHA issued an interim enforcement response plan (Enforcement Plan) on April 13, outlining OSHA's COVID-19 enforcement approach. *Id.* ¶ 21. The Enforcement Plan prioritized for inspection

complaints and referrals from establishments at high risk for COVID-19 exposure, including healthcare and emergency response, as well as reports of fatalities and imminent danger exposures related to COVID-19. *Id.* It discusses applicable OSHA standards, including standards governing respiratory protection, PPE, eye and face protection, and sanitation, as well as the general duty clause. *Id.*

- On May 19, OSHA issued an updated interim enforcement response plan (Updated Enforcement Plan), which became effective on May 26. *Id.* ¶ 22. The Updated Enforcement Plan maintains many of the policies of the earlier plan, including general prioritization of COVID-19 inspections, but reflects a return to normal inspection procedure in areas of decreased community spread, to ensure all workplaces receive appropriate inspection coverage. *Id.*
- As of May 29, 2020, OSHA has conducted over 4,000 investigations into COVID-19 related complaints, initiated over 350 workplace inspections, and issued one citation. *Id.* ¶ 25.
- OSHA has repeatedly emphasized to employers that it is illegal to retaliate against workers because they report unsafe or unhealthful working conditions during the coronavirus pandemic. *Id.* ¶ 27. OSHA has investigated 247 whistleblower or retaliation complaints and has

obtained a remedy for twelve workers, including back and lost wages, reinstatement, neutral job references, and an agreement that no further retaliation would occur for engaging in protected conduct. *Id.* ¶ 26.

- OSHA has issued five enforcement memoranda addressing measures that can be taken to alleviate the national shortage of critically needed respirators for high-risk industries. *Id.* ¶ 23.
- On April 10, OSHA issued initial enforcement guidance for recording work-related COVID-19 cases and revised that policy on May 19 in light of better understanding of the virus' transmission and means of preventing infection, as well as the reopening of economies and workplaces. *Id.* ¶ 12.

Throughout the crisis, OSHA and the Department of Labor (Department) as a whole have worked closely with interested stakeholders. Together, OSHA's efforts constitute its most thorough and comprehensive response to a public health crisis ever—and yet it is only one part of the most massive public health response in the nation's history. For while coronavirus presents a hazard in the workplace, it is not uniquely a workplace hazard, and a vast range of federal, state, and local authorities have therefore, simultaneous with OSHA's efforts, been issuing an array of guidelines and directives to protect everyone from coronavirus, including in places where men and women are at work.

- OSHA has supported the Administration's whole-of-government approach by working closely with a plethora of federal agencies, including: the Department of Health and Human Services (including CDC; NIOSH; the Centers for Medicare and Medicaid Services; and the Food and Drug Administration); the Department of Transportation (including the Federal Transit Administration; Federal Aviation Administration; and Pipeline and Hazardous Materials Safety Administration); the Department of Agriculture (including the Food Safety and Inspection Service); the Department of Homeland Security (including the Federal Emergency Management Agency); the Environmental Protection Agency; and the Departments of Justice, Commerce, State, and Defense. *Id.* ¶ 16.
- OSHA has discussed its response to the pandemic with dozens of business and employee groups, including AFL-CIO and many of its affiliated unions. *Id.* ¶ 17.
- OSHA has kept in near-constant contact with OSHA State Plans in states that have established them. *Id.* ¶ 18.
- The Department issued a statement of enforcement policy regarding meat and poultry processing facilities in response to the President's invocation of the Defense Production Act and reiterated that it is

critically important that those employers seek to adhere to the joint meatpacking guidance OSHA issued with the CDC. *Id.* ¶ 13. The Secretary of Agriculture has instructed those employers to use the joint meatpacking guidance.²

- OSHA has issued interim guidance that advises compliance safety and health officers to evaluate an employer's good faith efforts to comply with safety and health standards during the coronavirus pandemic and the need to take corrective action. *Id.* ¶ 14.

Moreover, OSHA and the Department as a whole have closely monitored state and local government orders and guidance related to coronavirus, as well as guidance developed by private industry. *Id.* ¶ 19.

- Each of the fifty states has issued at least some orders and guidance on COVID-19, many of which speak—often in mandatory ways—to the issues which AFL-CIO suggests OSHA should address.³ Georgia, for example, has promulgated detailed requirements specific to a wide variety of businesses, including restaurants; tattoo parlors, estheticians,

² Letter from Sec. Perdue to Stakeholders, May 5, 2020, <https://tinyurl.com/y9t4jl2c>; Letter from Sec. Perdue to Governors, May 5, 2020, <https://tinyurl.com/y9d3s3x8>.

³ The U.S. Chamber of Commerce maintains a website that tracks states' reopening guidance. U.S. Chamber Staff, *State-by-State Business Reopening Guidance* (May 4, 2020), tinyurl.com/ybd7dupt.

massage therapists, tanning salons, and hair salons; movie theaters; bowling alleys; ambulatory surgical centers; childcare facilities; and summer camps. Ga. Exec. Order, *Reviving a Healthy Georgia* (May 12, 2020), tinyurl.com/y8vrdr7f. Texas has no fewer than sixty checklists containing a mixture of required and minimum recommended measures to mitigate coronavirus transmission and covering everything from manufacturers and retailers to museums, wedding venues, and rodeos. Office of the Tex. Governor, *Governor's Strike Force to Open Texas*, tinyurl.com/ybbfmjhy. Other states have enacted similar protections on an emergency basis.⁴

⁴ Exec. Order 63, Governor Ralph S. Northam (May 26, 2020), <https://tinyurl.com/y7y9jtal>; Wash. Dep't of Labor & Indus. (May 26, 2020), <https://tinyurl.com/y7novtqk>.

- Cities such as New York,⁵ Los Angeles,⁶ San Francisco,⁷ and Chicago⁸ have provided detailed requirements and recommendations for employers as well.
- As Petitioner concedes, private industry has similarly taken efforts to protect workers. Pet. 25 (“[M]any employers ... should be commended.”). Several entities have leveraged their expertise to offer industry-specific guidance. For example, the International Franchise Association has established uniform guidelines for fitness centers, restaurants, and hotels, among other industries. Int’l Franchise Ass’n, *Franchise Reopening Blueprint* (May 2020), tinyurl.com/y86rusfe. Target Corporation has published its approach to retail operations during the pandemic for others to consider using or adapting, suggesting policies and mitigation measures, checklists, and sample

⁵ NYC Health, *General Guidance for Business and Other Non-Healthcare Settings* (Apr. 16, 2020), tinyurl.com/y94zs86n (“Employers must provide face coverings for employees at no cost to employees.”).

⁶ Cnty. of L.A. Pub. Health, tinyurl.com/y87xehtl (interpreting the “Most Current Health Officer Order” for specific industries).

⁷ SF.Gov, *Operate Your Essential and Outdoor Business*, tinyurl.com/ycl2cofa (“If your business is open during the coronavirus pandemic, you must follow best practices to keep your patrons and employees safe.”).

⁸ Chi. Dep’t of Pub. Health, *COVID-19 Guidance for Businesses and Employers* (May 6, 2020), tinyurl.com/y7nkzfqj.

posters in English and Spanish. Target Corp., *SAFE Retail* (May 1, 2020), tinyurl.com/y8mawruv. Similarly, Kroger, the grocery-store chain, has offered a “blueprint for businesses.” Kroger Co., *Sharing What We’ve Learned: A Blueprint for Businesses*, May 13, 2020, tinyurl.com/y86wfywv.

On March 6, 2020, AFL-CIO petitioned OSHA for an ETS. The ETS Petition was submitted while Americans were still just beginning to learn about the virus and before any reasonable safety and health official could have responsibly ruled either way on the ETS Petition. OSHA carefully and thoughtfully considered AFL-CIO’s ETS Petition. OSHA has now denied the ETS Petition for the reasons described in the attached denial letter (Addendum Tab 2) and discussed below.

STANDARD OF REVIEW

Mandamus “is a drastic remedy ... invoked only in extraordinary circumstances.” *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (internal quotations omitted). The issuance of the writ is “reserved only for the most transparent violations of a clear duty to act.” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoted source omitted). AFL-CIO “must demonstrate (1) a clear and indisputable right to relief, (2) that the government ... is violating a clear duty to act, and (3) that no adequate alternative remedy exists.” *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016); see also *In re Pub. Emps. for*

Envtl. Responsibility, 957 F.3d 267, 273 (D.C. Cir. 2020) (mandamus relief only available for violation of a “nondiscretionary duty”). Even after that, the court “may grant relief only when it finds compelling equitable grounds.” *Am. Hosp. Ass’n*, 812 F.3d at 189 (quoted source omitted).

AFL-CIO’s burden is even greater because it is seeking to compel OSHA to issue an ETS. OSHA’s authority to impose an ETS “is an extraordinary power ... to be delicately exercised in only certain limited situations.” *ICWU*, 830 F.2d at 370 (cleaned up). The OSH Act provides that the Secretary may only issue an ETS *if* he determines that employees are exposed to a “grave danger” *and* determines that an ETS is “necessary” to protect those employees from such danger. 29 U.S.C. § 655(c)(1); *Auchter*, 702 F.2d at 1155. That determination is freighted with “considerations of policy as well as empirically verifiable facts,” *id.* at 1156 (quoted source omitted), and requires assessment of “often scientifically complex” facts and the “balancing of ... competing policies.” *ICWU*, 830 F.2d at 371 (quoted source omitted). Accordingly, those assessments are “entitled to great deference.” *Id.* The Court’s “limited review” is to assess whether OSHA’s decision “lacks support in the record.” *Id.*

Finally, the Court’s review should be especially deferential in this particular case because it involves political, economic, and scientific questions of national importance that are being reviewed and debated by both political branches and the

states. Even in less historic times, “the writ’s extraordinary and intrusive nature ... risks infringing on the authority and discretion of the executive branch.” *Am. Hosp.*, 812 F.3d at 192. That risk is multiplied here, where a judicially ordered ETS in response to a single mandamus petition could overrule OSHA’s response strategy, short-circuit legislative debate, and foreclose state-level decisions about how best to combat and ameliorate the effects of COVID-19.

ARGUMENT

Although AFL-CIO frames its Petition as falling under *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984), and its progeny, this is not an unreasonable-delay case. AFL-CIO argues that OSHA effectively denied AFL-CIO’s petition for an ETS, and OSHA has since formally done so. AFL-CIO requests not that the Court order OSHA to take action on its petition but instead that the Court order OSHA to issue an ETS *regardless* of that petition, its contents, or OSHA’s action upon it (whether “effective” or actual). AFL-CIO provides no authority for such a freewheeling mandamus power, untethered to the agency’s determination and instead based on a record composed largely of news articles.

Petitioner’s request fails for other reasons. First, Petitioner has not demonstrated its standing. COVID-19 has wrought devastating and tragic consequences. But Petitioner has not demonstrated that the lack of *an ETS* is the

fairly traceable cause of any injury, nor a substantial likelihood that its imposition would remedy such injury or threatened injury. Petitioner fails to demonstrate that any employer has or would forgo compliance with any of the potential standards to which Petitioner alludes, simply because they are not set forth in an ETS. Nor could Petitioner do so, because the standards Petitioner seeks are largely already mandatory and enforceable either through existing OSHA requirements or the veritable gamut of non-OSHA public safety requirements enacted by federal, state, and local officials in response to the pandemic.

Second, OSHA's determination that an ETS is not "necessary" and therefore cannot and should not issue, 29 U.S.C. § 655(c)(1), is "committed to the agency's expertise in the first instance," *In re Int'l Union, United Mine Workers of Am. (UMWA)*, 231 F.3d 51, 54 (D.C. Cir. 2000), and should not be disturbed. COVID-19 is a community-wide hazard that is not unique to the workplace.⁹ Based on substantial evidence, OSHA determined that an ETS is not necessary both because there are existing OSHA and non-OSHA standards that address COVID-19 and because an ETS would actually be counterproductive. The risk of COVID-19 is

⁹ For example, a recent CDC report studying meat and poultry facilities concluded that "many workers live in crowded, multigenerational settings and sometimes share transportation to and from work, contributing to increased risk for transmission of COVID-19 outside the facility itself." CDC, *Morbidity and Mortality Weekly Report: COVID-19 Among Workers in Meat and Poultry Processing Facilities – 19 States, April 2020*, tinyurl.com/yd2aehgo.

acutely recognized by the American people at large, and one would be hard-pressed to find an individual who cannot recite the basic precautionary measures: social distancing, use of PPE, cleanliness (both personal and surface), and quarantine of symptomatic persons. Indeed, these are the very measures that AFL-CIO suggests should be implemented through an ETS. Pet. 31. To address all employers and to do so with the requisite dispatch, an ETS would at best be an enshrinement of these general and universally known measures that are already enforceable through existing OSHA tools that require employers to assess and address extant hazards. OSHA's time and resources are better spent issuing industry-specific guidance that adds real substance and permits flexibility as we learn more about this virus. Given that we learn more about COVID-19 every day, setting rules in stone through an ETS (and later a permanent rule) may undermine worker protection by permanently mandating precautions that later prove to be inefficacious.

Finally, an ETS must be viewed in the context of the larger scientific, economic, and political examination of how best to combat and ameliorate the effects of the COVID-19 pandemic. A writ of mandamus directing an ETS would foreclose ongoing policy assessments by the executive branch, Congress, and the states.

I. The Court Lacks Jurisdiction Because Petitioner Lacks Standing

AFL-CIO does not address standing. *See* D.C. Cir. R. 28(a)(7). Notably, AFL-CIO attaches no affidavits to its Mandamus Petition and instead relies largely on news articles, which can contain false and misleading information.¹⁰ Because AFL-CIO identifies no cognizable organizational harm, its asserted injury appears to be that workers, including its members, will contract COVID-19 in the workplace unless OSHA adopts an ETS. Article III of the Constitution demands, however, that the alleged injury be fairly traceable to the agency's challenged action (or inaction) and that it be redressable by the Court's ruling. *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989). Accordingly, AFL-CIO must set forth a non-speculative causal chain, *id.* at 912, demonstrating a substantial likelihood that *an ETS* would require or cause employers to take precautionary measures that they are not already taking pursuant to OSHA or non-OSHA mandatory requirements (or through voluntary compliance with government and industry guidance). AFL-CIO has not done so.

¹⁰ Indeed, just this morning, the *Washington Post* reported that "OSHA is facing a lawsuit from the AFL-CIO, the nation's largest federation of unions, which is seeking to compel the agency to issue an enforceable emergency temporary standard, as it did during the H1N1 outbreak in 2009." Taylor Telford, *Democrat Accuses OSHA of Being "Invisible" While Infections Rise Among Essential Workers*, WASH. POST (May 29, 2020), [tinyurl.com/ycpgqcgl](https://www.washingtonpost.com/health/democrat-accuses-osha-of-being-invisible-while-infections-rise-among-essential-workers/2020/05/29/). This is demonstrably false. The last time OSHA issued an ETS was 1983. *See supra* p. 3.

There is no dispute COVID-19 has wrought devastating consequences across the country. But, given the overlap between what employers are already required to do and what AFL-CIO proposes be required in an ETS, AFL-CIO fails to demonstrate that any of the deaths it cites could have been prevented by (1) employers taking additional or different precautionary measures in the workplace than they already were and (2) that an ETS would have uniquely required or caused them to implement those measures. AFL-CIO instead provides only general conjecture that an ETS would alter the landscape, the speculative nature of which is compounded by the fact that, as Petitioner acknowledges, neither it nor this Court may dictate the content or parameters of an ETS. Pet. 28. Instead, the most this Court could do would be to issue a writ of mandamus requiring OSHA to issue an ETS, without telling it how to do so. *See id.* (citing *In re: Pub. Emps. for Envtl. Responsibility*, 957 F.3d at 273).

II. Petitioner Has Not Demonstrated Clearly And Indisputably That An ETS Is Necessary, Especially Given The Deference Due OSHA's Determination To The Contrary

OSHA may issue an ETS only if it is “necessary to protect employees from” an identified grave danger. 29 U.S.C. § 655(c)(1). And an ETS is necessary only where it would substantially reduce the grave danger during the six months it serves as the standard (before the statute requires a permanent rule) and that such reduction in danger could not be obtained by enforcement of existing standards, requirements

administered by other health authorities, or by widespread voluntary compliance. *See, e.g., Asbestos Info. Ass'n*, 727 F.2d at 426; *Auchter*, 702 F.2d at 1156. OSHA has determined this steep threshold is not met here, at least not at this time.

Never in the last century have the American people been as mindful, wary, and cautious about a health risk as they are now with respect to COVID-19. This elevated caution extends to the workplace. Indeed, many of the locations AFL-CIO identifies are not merely workplaces: they are stores, restaurants, and other places occupied by workers and the general public alike, in which the measures called for require a broader lens—and at times a broader mandate—than available to OSHA. Many workplaces have been (and remain) closed. Those that are open are subject to a range of measures to guard against transmission. Typical precautions are themselves acutely and ubiquitously recognized, *e.g.*, social distancing, cleanliness, the use of PPE, and quarantine of symptomatic persons. These measures, and many more, are already required by state and local authorities—and OSHA. Further, many other protective measures are being implemented voluntarily, as reflected in a plethora of industry guidelines, company-specific plans, and other sources. Given the unprecedented broad scope of the hazard, an ETS addressing COVID-19 would need to be general enough to govern virtually the entire economy. And if the petition were granted, the ETS would have to be issued too quickly for OSHA to differentiate among the many different circumstances across the national economy where

transmission of the disease might pose distinct risks and require different safeguards. Accordingly, an ETS could only enshrine broad standards that are already in place or direct employers to develop COVID-19 response plans specific to their businesses, something employers are already doing. Such a step would be superfluous at best and could be counterproductive to ongoing state, local, and private efforts.

A. Existing Standards Render An ETS Unnecessary

1. OSHA's Existing Specific Rules Require Employers To Take Precautions Against COVID-19

Under the OSH Act, employers have a duty to comply with all applicable OSHA standards. 29 U.S.C. § 654(a)(2). Several of OSHA's existing specific standards—including respiratory protection, PPE, and sanitation—impose enforceable obligations on employers to protect workers from COVID-19. *First*, under OSHA's respiratory protection standard, all employers are required to assess for any potential overexposure to atmospheric contamination and establish a respiratory protection plan to protect employee health. 29 C.F.R. § 1910.134(a)-(d). Further obligations are triggered where employees voluntarily wear respirators or are required to do so by their employer. *Id.* This standard is intended to protect against, *inter alia*, airborne biological diseases such as the coronavirus. Sweatt Decl., Addendum Tab 1, ¶ 28. OSHA has consistently advised employers of the applicability of the respiratory protection standard to COVID-19. *Id.* ¶ 29.

Second, OSHA’s PPE standard requires employers to assess for workplace hazards, select and provide appropriate PPE—whether for eyes, face, head and extremities, protective clothing, respiratory devices, and protective shields—at no cost to the employee, and provide training. 29 C.F.R. § 1910.132(a)-(h). OSHA has previously recognized this standard’s applicability to hazards posed by infectious diseases. *See* Denial Letter, Addendum Tab 2, at 5. And OSHA has repeatedly advised employers to be cognizant of their PPE obligations in the context of COVID-19, particularly for workers in regular contact with the general public. Sweatt Decl., Addendum Tab 1, ¶ 30. Contrary to AFL-CIO’s suggestion that it is “entirely up to employers to determine what PPE ... must be supplied to workers,” Pet. 19, the PPE standard does not provide employers with unfettered discretion. Instead, § 1910.132 requires that, generally, where a reasonable person would recognize a workplace hazard necessitating certain PPE, employers must provide that PPE. *See, e.g., Ryder Truck Lines, Inc.*, 497 F.2d 230, 233 (5th Cir. 1974) (protective footwear required to protect against foot injuries, given history of their occurrence); *Owens-Corning Fiberglas Corp.*, 7 BNA OSHC 1291, 1295-96 (No. 76-4990, 1979) (gloves required to protect from burn injuries and fiberglass irritation, given employees’ request for such PPE). With respect to the pandemic, this reasonable person analysis will necessarily be informed—and employer discretion limited by—the extensive

guidance from CDC, OSHA, and others regarding PPE necessary to protect workers from COVID-19.

Third, OSHA's sanitation standard provides hygiene requirements that, directly and indirectly, address the potential for infectious disease agents to spread at the workplace. 29 C.F.R. § 1910.141. It requires employers to keep workplaces clean to the extent possible; provide potable water of sufficient quality for personal washing and drinking; provide sufficient toilet and washing facilities, to include running water, hand soap or a similar cleansing agent, and adequate means of hand-drying; provide showers where applicable, with adequate body soap, hot and cold water, and clean towels; and provide change rooms where necessary for removal of contaminated protective clothing. *Id.* § 1910.141(a)-(e). OSHA has repeatedly advised employers that this standard can apply to COVID-19 hazards. Sweatt Decl., Addendum Tab 1, ¶ 31. Contrary to AFL-CIO's assertion, Pet. 20, the standard does require employers to provide "ready access to hand washing facilities or hand sanitizer." *See* 29 C.F.R. §§ 1910.141(d)(2)(i) ("[l]avatories shall be made available"), (iii) ("[h]and soap or similar cleansing agents shall be provided").

AFL-CIO's petition for a writ nevertheless presses for these or extremely similar requirements to be included as part of their proposed ETS. Pet. 31.¹¹ This

¹¹ AFL-CIO argues that OSHA's existing standards were not "designed specifically" to protect against transmission of airborne infectious disease. Pet. 18. But the

extreme step is unnecessary. *See Asbestos Info. Ass'n*, 727 F.2d at 426 (ETS unnecessary where redundant with current regulations). OSHA has trained its inspectors regarding these standards and their applicability to COVID-19. Sweatt Decl., Addendum Tab 1, ¶ 32. Where appropriate, OSHA has and will take enforcement action for violations.

2. OSHA's General Duty Clause Requires Employers To Take Precautions Against COVID-19

The OSH Act's general duty clause imposes additional mandatory obligations. The clause requires every employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must show that: (1) an activity or condition in the employer's workplace presented a hazard to an employee; (2) either the employer or the industry recognized the condition or activity as a hazard; (3) the hazard was likely to or actually did cause death or serious physical harm; and (4) a feasible means to eliminate or materially reduce the hazard existed. *BHC Nw. Psychiatric Hosp., LLC v. Sec'y of Labor*, 951 F.3d 558, 563 (D.C. Cir. 2020) (citation omitted). Tellingly,

standards were designed to protect against a variety of hazards and have been applied to infectious disease and are effective in doing so. That guarding against infectious disease broadly or COVID-19 specifically is not their sole aim is a red herring.

nowhere in its brief does AFL-CIO assert or explain that OSHA could not satisfy those elements in the case of an employer that took no measures to assess and address COVID-19 risk in a location with community spread.

There can be no dispute that COVID-19 is a recognized hazard. The entire American public is acutely aware of the threat; indeed our day-to-day lives have been uprooted as the nation works together to reduce the disease's spread. *See, e.g., Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973) (hazard is "recognized" where it is "common knowledge of safety experts"); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 (8th Cir. 1981) (hazard is "recognized" where it is "either actually known to the particular employer or generally known in the industry"). Abundant, industry-specific guidance has been issued by OSHA, CDC, state and local governments, and industry associations. *See, e.g., Kan. City Power & Light Co.*, 10 BNA OSHC 1417, 1422 (No. 76-5255, 1982) (advisory industry standards relevant to recognition inquiry); *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000) (same). Every employer should be aware of the hazard in question and the types of measures effective in mitigating the hazard. Accordingly, employers who fail to take preventative measures against COVID-19 face potential liability under the general duty clause. *See* 29 U.S.C. § 666.

The only remaining statutory requirement is feasibility, and guidance from CDC, OSHA, and countless other government authorities and private entities demonstrate feasible methods employers may use. An employer that fails to abate the hazard may be liable for violating the general duty clause if feasible methods were available. *See, e.g., Peter Cooper Corps.*, 10 BNA OSHC 1203, 1210 (No. 76-596, 1981) (finding in general-duty-clause case that vaccinating employees was a feasible method of abating the hazard of anthrax infection in part because the CDC recommended vaccination). The public availability of so much COVID-19 guidance thereby enhances the power of the general duty clause as an enforcement tool, as AFL-CIO appeared to recognize in correspondence with the Secretary. *See* Pet. Addendum, Tab 5 at 1.

Additionally, employers may choose any effective method to abate a recognized hazard under the general duty clause. Contrary to AFL-CIO's argument, this flexibility is likely to improve worker safety, because employers must choose a means of abatement that eliminates the hazard or materially reduces it to the extent feasible. AFL-CIO's desire for OSHA to impose a uniform method of abatement would instead reduce innovation and employer drive to abate the hazard under this demanding standard.

AFL-CIO argues that a preliminary document addressing infectious diseases, promulgated in 2010, demonstrates that OSHA acknowledged that the general duty

clause alone would not provide adequate protection for workers. Pet. 20. But the situation contemplated by the 2010 document did not involve a global pandemic or even an imminent crisis. Indeed, at the time that document was drafted, OSHA did not consider the alternative of providing substantial guidance that would aid in general duty clause enforcement. Nor did the document address the other protections being provided by innumerable other authorities, as is the case here. OSHA, *Infectious Diseases SER Background Document (SER Backgrounder)* 29-30, tinyurl.com/y9bflv1k. Thus, OSHA's earlier infectious disease assessment, which was preliminary in any event, is not meaningfully relevant here, where OSHA and other entities have promulgated abundant guidance, targeted in many instances to individual industries, addressing the specific hazards posed by COVID-19.

The suggestion that the legal obligations outlined above are “toothless” based solely on AFL-CIO's reading of COVID-19 enforcement statistics, Pet. 22, is without merit. OSHA has initiated thousands of investigations of COVID-19 complaints and opened hundreds of inspections. Sweatt Decl., Addendum Tab 1, ¶ 25. Although in some cases investigations closed after OSHA received adequate assurances regarding worker protection, in other cases investigations and inspections remain open and could result in citations. *Id.* OSHA's investigatory process is resource-intensive and time-consuming. *Id.* Accordingly, the absence of citations

over a few months for COVID-19-related violations is not surprising. It would be no different under an ETS.

AFL-CIO's request for an ETS ultimately distills to a claim not that more guidance is needed, but that a particular enforcement mechanism be used, because that is all AFL-CIO claims a rule would provide. The Secretary's judgment that the agency has the requisite enforcement tools merits maximum deference.

B. An ETS Is Not Necessary Because It Would Be Counterproductive To OSHA's COVID-19 Related Efforts

Faced with a new, dynamic threat to the nation's workers, OSHA has pursued a strategy of comprehensive guidance, from a variety of sources, which can be swiftly updated and tailored to industry-specific needs, coupled with enforcement of employers' existing legal obligations. This strategy offers advantages over a rigid and necessarily general regulation, especially when scientific understanding is still evolving. *See UMWA*, 231 F.3d at 54 (concluding agency decision not to issue ETS under similar Mine Act provision in face of serious occupational hazard, when it was "far from clear" what standards should be adopted, was "a matter that is committed to the agency's expertise in the first instance" and that the court was "in no position to pretermitt the prescribed statutory process"); *see also Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1482 n.4 (D.C. Cir. 1985) (Mine Act's ETS provision "tracks" OSH Act's).

Even since AFL-CIO first petitioned OSHA to issue an ETS on March 6—fewer than three months ago—our knowledge about COVID-19 has changed in many important ways. Sweatt Decl., Addendum Tab 1, ¶ 35. For example, when the ETS Petition was first received, known symptoms of COVID-19 were limited to fever, cough, or shortness of breath but have since grown to encompass chills, muscle pain, sore throat, and loss of taste or smell; there was little appreciation for the prevalence of asymptomatic carriers compared to our current understanding; CDC had not yet begun affirmatively advising the general public to use face coverings, now considered an important tool for source control; testing availability for COVID-19 was substantially more limited; CDC was not yet advising employers to conduct daily health checks or on the appropriate disinfection procedures following a confirmed case; and CDC had not yet identified increased ventilation as a protective measure to help combat infection. *Id.* Additionally, some of OSHA’s own materials have changed, even since the mandamus petition was filed eleven days ago. *Id.*; *see, e.g.*, Pet. 22 n.21 (citing now-rescinded enforcement memo, *see* tinyurl.com/yawh9fuf).

Even with this growth in understanding, the virus continues to present uncertainties. For example, we are still learning about the virus’s modes of transmission, which may affect guidance on appropriate social distancing; and we are learning about immunities the virus produces in recovered individuals, which

could substantially affect future guidance. Sweatt Decl., Addendum Tab 1, ¶ 35. The pandemic continues to receive robust engagement from federal, state, and local public health agencies, which are well-situated to analyze these scientific questions. Appropriate protective advice will necessarily change as these agencies generate further data.

OSHA's strategy allows it to quickly and easily update its COVID-19 guidance and policies when critical new or different information is learned. *See ICWU*, 830 F.2d at 372 ("The determination on when it may be appropriate to proceed on the basis of incomplete data ... is a decision largely entrusted to the expertise of the agency."); *cf. Action on Smoking & Health v. OSHA*, No. 89-1656, 1990 WL 294219, at *1 (D.C. Cir. May 10, 1991) (per curiam) ("OSHA reasonably determined that it could not at this time sufficiently quantify the degree of risk ... to justify issuing an ETS"). By contrast, an ETS once issued could very well become ineffective or counterproductive, as it may be informed by incomplete or ultimately inaccurate information. Further, the ETS would lead to a permanent final rule within six months of its promulgation, *see* 29 U.S.C. § 655(c)(3), an extraordinarily rapid pace for OSHA rulemaking necessitating substantial agency resources amidst this crisis. Faulty requirements ensconced in the final rule would be changeable only through additional, laborious notice-and-comment rulemaking, further sapping agency resources. *Id.* § 655(b). OSHA's current strategy avoids those problems.

This kind of decision, one “necessarily based upon considerations of policy as well as empirically verifiable facts,” is precisely the kind of decision best left to the agency’s expert judgment. *ICWU*, 830 F.2d at 371 (quotation marks omitted); *see also Int’l Union, United Auto., Aerospace, & Agr. Implement Workers of Am., UAW v. Donovan*, 590 F. Supp. 747, 749 (D.D.C. 1984), *adopted*, 756 F.2d 162 (D.C. Cir. 1985) (“These observations are but manifestations in the ETS setting of a general principle of administrative law: when an agency makes predictions, within its area of special expertise, at the frontiers of science, a reviewing court must generally be at its most deferential.”) (cleaned up).

Relatedly, as alluded to above, no “one-size-fits-all” response would protect all the nation’s workers equally. *See* Pet. 31. Petitioner states that it is not seeking to dictate the content of an ETS. *See id.* But in reality, the 30-day deadline it seeks for an ETS would require OSHA to draft only a broad rule, even though what would be required of employers in diverse industries—including retail, restaurants, transportation, health care, manufacturing, meat processing, education, construction,

office work, and many more—is likely to differ in substantial ways.¹² *See, e.g., SER Backgrounder* 29-30 (discussing how even within the healthcare industry, while “best practices” may be similar, numerous factors affect assessment of most appropriate protections in a given workplace). Take, for example, the meatpacking industry. When clusters of cases began appearing among workers in that industry and the surrounding community, OSHA joined CDC in quickly drafting extensive, detailed guidance specific to the circumstances and conditions in that industry, and continues to collaborate closely with the CDC and Department of Agriculture. The CDC has conducted studies of at least seven meat-processing plants, while the Department of Agriculture has issued letters to stakeholders and state governors. *See supra* p. 10.

Furthermore, adequate safeguards for workers could differ substantially based on geographic location, as the pandemic has had dramatically different impacts on different parts of the country. State and local requirements and guidance on COVID-19 are thus critical to employers in determining how to best protect workers, and

¹² There are additional difficulties in preparing the broadly applicable ETS within 30 days requested by AFL-CIO. Its request is premised largely on the assumption that much of the groundwork for such an ETS has been laid in OSHA’s earlier work on a potential infectious disease standard. *Pet.* 29-30. However, that standard is targeted toward healthcare workers, so there is no existing framework for a rule that would have a much broader scope. Moreover, AFL-CIO fails to appreciate the many time-consuming and resource-intensive legal requirements OSHA would need to satisfy before issuing an ETS sufficient to withstand judicial scrutiny.

OSHA must retain flexibility to adapt its advice regarding incorporation of such local guidance, where appropriate. Sweatt Decl., Addendum Tab 1, ¶ 24.

Accordingly, OSHA's strategy allows the agency to offer guidance tailored to industry and location. An ETS would not have those qualities. Indeed, an ETS meant to broadly cover all workers with potential exposure to COVID-19—effectively *all* workers across the country—would have to be written at such a general level that it would risk providing very little assistance at all.

Finally, to the extent the ETS petition is even broader, asking OSHA to issue a sweeping infectious disease standard beyond COVID-19, the ETS petition does not identify a specific workplace-related grave danger that can permissibly be addressed by an ETS. A “grave danger” is a degree of risk higher than the “significant risk” required to promulgate a permanent safety and health standard under Section 6(b) of the OSH Act. *Compare Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 639 (1980) (permanent standard), *with Dry Color Mfrs. Ass'n v. Dep't of Labor*, 486 F.2d 98, 104-05 (3d Cir. 1973) (ETS). As explained in OSHA's Denial Letter, AFL-CIO has not provided compelling evidence that an undefined category of “infectious diseases” pose a grave and urgent threat to workers. Denial Letter, Addendum Tab 2, at 1. The OSH Act does not authorize OSHA to issue sweeping health standards to address entire classes of known and unknown infectious diseases on an emergency basis without notice and

comment. *Cf. AFL-CIO v. OSHA*, 965 F.2d 962, 972 (11th Cir. 1992) (vacating standard that regulated hundreds of “diverse” airborne substances without “substantial evidence in the record” to support the regulation of each).

III. Petitioner Has An Adequate Alternative Remedy, And The Equities Do Not Weigh In Its Favor

A broad and rushed standard promulgated by OSHA is not the *only* means of protecting AFL-CIO’s workers from COVID-19. As described above, and as OSHA has concluded, tailored guidance and enforcement of the general duty clause and existing standards, plus robust legal protections for complaints, is the best approach for protecting workers at this time. Workers can continue filing complaints to request that OSHA investigate potential violations of the law, and employers are prohibited from retaliating against employees for filing complaints. AFL-CIO can also petition Congress and state and local officials, as well as work with its workers’ employers, with proposals related to safe workplaces. The coronavirus is not like cadmium or ethylene oxide, where there is a single, identifiable means of abating a uniquely workplace-based hazard, for example by lowering a permissible exposure limit. *Cf. ICWU*, 830 F.2d at 370; *Auchter*, 702 F.2d at 1152. Here, OSHA is employing many different tools to combat the coronavirus—as are other government entities and private industry—and AFL-CIO has failed to show that an ETS is necessary despite these alternatives.

Moreover, a writ of mandamus has an “extraordinary and intrusive nature, which risks infringing on the authority and discretion of the executive branch.” *Am. Hosp.*, 812 F.3d at 192. OSHA has designed its flexible approach to enforcement and compliance assistance to complement the Administration’s whole-of-government response to the pandemic. Compelling OSHA to issue an ETS would upset that careful balance. The Court should be all the more wary of granting mandamus where, as here, doing so would “probably require the agency to make major changes to its operations and priorities.” *Id.* Granting mandamus would force OSHA to focus on writing a new standard instead of publishing additional, industry-specific guidance, responding to complaints, and evaluating possible enforcement actions.

Further, “Congress’s awareness of and attention to the situation counsel against issuance of the writ.” *Id.* Bills requiring the Secretary to issue a COVID-19-related ETS have been introduced three times in the House of Representatives.¹³ The House passed one such bill, and the CARES Act enacted by Congress contained no such mandate. The third and current proposal has attracted attention from the

¹³ See H.R. 6139, 116th Cong. (2020), [tinyurl.com/y8cvh9f4](https://www.congress.gov/bills/116/6139); H.R. 6559 116th Cong. (2020), [tinyurl.com/y8r54nn6](https://www.congress.gov/bills/116/6559); H.R. 6800, 116th Cong. § 120302 (2020), [tinyurl.com/yatwzj6e](https://www.congress.gov/bills/116/6800/sections/120302).

Speaker of the House.¹⁴ Still other legislators have pressed for broad liability protections for employers, which could be tied to compliance with new OSHA standards.¹⁵ This Court should not insert itself in that debate, disturbing a resolution that may be reached by Congress. Rather, the virus is a problem of extraordinary magnitude and complexity, and one that implicates good-faith but contested political, economic, and scientific premises; it should remain with “the political branches” to decide whether to issue an ETS. *Id.*

CONCLUSION

For the foregoing reasons, the Emergency Petition for Writ of Mandamus should be denied.

¹⁴ Alex Gangitano, *Unions Worry Congress Is One Step Closer to a Liability Shield*, THE HILL (May 21, 2020) (“[T]he best protection for our workers and our employers is to follow very good OSHA mandatory guidelines, and we have that in our bill,” [Speaker] Pelosi said”), [tinyurl.com/ybayxq5b](https://www.thehill.com/policy/healthcare/2020/05/21/congress-liability-shield/511111/).

¹⁵ See *id.*; Susan Jaffe, *As Congress Weighs COVID Liability Protections, States Shield Health Providers*, KAISER HEALTH NEWS (May 15, 2020), [tinyurl.com/y8zoh4dc](https://www.khn.org/news/covid-19/as-congress-weighs-covid-liability-protections-states-shield-health-providers).

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

TIMOTHY J. TAYLOR
Deputy Solicitor of Labor

/s/ Edmund C. Baird
EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave., NW,
Room S-4004
Washington, DC 20210
(202) 693-5460

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 29th day of May, 2020, I caused the Department of Labor's Response to the Emergency Petition for a Writ of Mandamus to be electronically filed via the Court's CM/ECF system, providing service on all counsel of record.

/s/ Edmund C. Baird
EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave., NW,
Room S-4004
Washington, DC 20210
(202) 693-5460

May 29, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Secretary of Labor's response contains 7,799 words, excluding the parts of the response exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1), and complies with the type-volume limitations in Fed. R. App. P. 21(d) and D.C. Cir. Rule 21(a). The font used was Times New Roman 14-point proportional spaced type. This brief was prepared using Microsoft Word 2016.

/s/ Edmund C. Baird
EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave., NW,
Room S-4004
Washington, DC 20210
(202) 693-5460

May 29, 2020

ADDENDUM TAB 1

Declaration of Loren E. Sweatt

No. 20-1158

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

**IN RE: AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS,**

Petitioner

On Emergency Petition for a Writ of Mandamus

DECLARATION OF LOREN E. SWEATT

I, Loren E. Sweatt, am the Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health. I possess personal knowledge of the matters set forth in this declaration and am competent to testify to the same.

Overview of the Occupational Safety and Health Administration (OSHA)

1. The United States Department of Labor is responsible for enforcing the Occupational Safety and Health Act of 1970 (OSH Act or the Act), 29 U.S.C. §§ 651-678.

2. The OSH Act covers most private sector employers and their workers, in addition to some state and local government employers and workers in the 50 states and certain territories and jurisdictions under federal authority. Those

jurisdictions include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Northern Mariana Islands, Wake Island, Johnston Island, and the Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act.

3. Some states and U.S. territories operate their own OSHA-approved job safety and health programs, known as State Plans. There are currently 22 State Plans covering both private sector and state and local government workers, and there are six State Plans covering only state and local government workers. OSHA, State Plans, <https://www.osha.gov/stateplans>.

Coronavirus Disease 2019 Outbreak and OSHA's Response

4. At the end of December 2019, OSHA began monitoring an uptick in unidentified pneumonia-like illnesses reported in China.

5. As it became apparent in January 2020 that a novel coronavirus had emerged in Wuhan, China, OSHA immediately set to action as part of a concerted whole-of-government approach to addressing the emerging pandemic.

6. Also in January 2020, OSHA began coordinating with sister agencies across the federal government and launched a dedicated website about the coronavirus to readily publish and distribute critical information about the coronavirus for workers, employers, and the general public.

7. OSHA has developed a broad arsenal of guidance materials, including very detailed elaborations of recommended mitigation measures, shorter alerts, news releases, posters, and videos addressing Coronavirus Disease 2019 (COVID-19) related health and safety issues. These guidance materials incorporate the fundamental hierarchy of controls applicable to occupational safety and health and are designed to be flexible and responsive in light of the rapidly changing circumstances at workplaces across the country, as well as the evolving understanding of the virus. *See generally* OSHA, Safety and Health Topics Page (SHTP) COVID-19, News and Updates, https://www.osha.gov/SLTC/covid-19/news_updates.html.

8. On March 9, 2020, OSHA issued initial guidance advising employers in every industry on the importance of taking immediate action to prepare their workplace for the impact of COVID-19. OSHA, Guidance for Preparing Workplaces for Covid-19 (March 9 Guidance), <https://www.osha.gov/Publications/OSHA3990.pdf>. The March 9 Guidance outlines multiple measures that all employers should take to reduce workers' exposure to the coronavirus, including social distancing, good hygiene, workplace controls, personal protective equipment (PPE), worker training, and anti-retaliation, among many more. The March 9 Guidance also advises employers on

proper classification of worker risk to coronavirus exposure—with recommended appropriate measures for each risk category.

9. OSHA has continued to produce and disseminate dozens of alerts, guidance documents, enforcement memoranda, news releases, and other educational tools. OSHA has also issued a series of alerts providing targeted guidance on practices and procedures to protect workers in numerous specific industries.

10. OSHA has issued joint guidance with the Centers for Disease Control and Prevention (CDC) specifically tailored to two industries: Meat and Poultry Processing Workers and Employers, issued on April 26, 2020 and Manufacturing Workers and Employers, issued on May 12, 2020 (hereinafter “Meat Processing Guidance” and “Manufacturing Guidance”),

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html>. These documents discuss the specific COVID-19 exposure risks present in these industries and identify the steps employers should take to protect workers.

11. To date, OSHA has issued specific guidance for employers in meat and poultry processing, healthcare, nursing homes, restaurants (including curbside pickup), dentistry, retail, construction, pharmacies, rideshare services, mortuary services, emergency responders, laboratories, border protection and transportation

security, solid waste and wastewater management, environmental services, in-home repair services, package delivery, and manufacturing, among others, some of which has been translated into Spanish. In particular, OSHA has collaborated with CDC on joint guidance for meat and poultry processing and manufacturing.

12. On April 10, 2020, OSHA issued an initial enforcement guidance for recording work-related COVID-19 cases and revised that policy on May 19, 2020 in light of better understanding of the virus' transmission and means of preventing infection, as well as the reopening of economies and workplaces.

13. On April 28, 2020, the Department issued a statement of Enforcement Policy regarding Meat and Poultry Processing Facilities in response to President Trump's invocation of the Defense Production Act informing employers in that industry that they must seek to adhere to the Joint Meatpacking Guidance OSHA issued with the CDC.

<https://www.dol.gov/newsroom/releases/osha/osha20200428-1>. The statement, which addresses guidance and enforcement actions regarding worker safety at meat, pork and poultry processing facilities, provides clarity for businesses whose continued operation will be critical to America's food supply.

14. OSHA also issued interim guidance that advises compliance safety and health officers (*i.e.*, inspectors) to evaluate an employer's good faith efforts to

comply with safety and health standards during the coronavirus pandemic and the need to take corrective action.

15. To date, OSHA has released nine safety videos addressing important safe-work practices in both English and Spanish and developed employment-based posters demonstrating the seven steps for properly wearing a respirator.

16. OSHA has worked closely with a plethora of federal agencies, specifically: the Department of Health and Human Services (including CDC; the National Institute for Occupational Safety and Health (NIOSH); the Centers for Medicare and Medicaid Services; and the Food and Drug Administration); the Department of Transportation (including the Federal Transit Administration; Federal Aviation Administration; and Pipeline and Hazardous Materials Safety Administration); the Department of Agriculture (including the Food Safety and Inspection Service); the Department of Homeland Security (including the Federal Emergency Management Agency); the Environmental Protection Agency; and the Departments of Justice, Commerce, State, and Defense.

17. OSHA has discussed its response to the pandemic with dozens of business and employee groups, including AFL-CIO and many of its affiliate unions.

18. OSHA has kept in near-constant contact with OSHA state plans in states that have established them.

19. The Department has closely monitored state and local government orders and guidance related to coronavirus, as well as guidance developed by private industry.

20. In conjunction with this extensive guidance, OSHA has worked to ensure its enforcement program prioritizes COVID-19-related hazards, promotes the availability of respirators for high-risk industries, and allows employers flexibility regarding certain OSHA standards where compliance has been complicated by widespread state and local stay-at-home orders.

21. On April 13, 2020, OSHA issued an interim enforcement response plan (Enforcement Plan), outlining OSHA's COVID-19 enforcement approach. OSHA, Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19), <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>. The Enforcement Plan prioritized for inspection complaints and referrals from establishments at high risk for COVID-19 exposure, including healthcare and emergency response, as well as reports of fatalities and imminent danger exposures related to COVID-19. It discusses applicable OSHA standards, including standards governing respiratory protection, PPE, eye and face protection, and sanitation, as well as the general duty clause.

22. On May 19, 2020, OSHA issued an updated interim enforcement response plan (Updated Enforcement Plan), which became effective on May 26, 2020. OSHA, Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19), <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>. It maintains many of the policies of the earlier plan, including general prioritization of COVID-19 inspections, but reflects a return to normal inspection procedure in areas of decreased community spread, to ensure all workplaces receive appropriate inspection coverage.

23. OSHA has issued five enforcement memoranda addressing measures that can be taken to alleviate the national shortage of critically needed respirators for high-risk industries.

COVID-19-related Investigations and Enforcement

24. OSHA has worked tirelessly to ensure its enforcement program prioritizes COVID-19-related hazards. OSHA—together with countless federal, state, and local authorities—is addressing COVID-19 in a rigorous and comprehensive manner, with more time, energy, and resources devoted to this public health threat than any other in the agency's history. Adequate safeguards for workers could differ substantially based on geographic location, as the pandemic has had dramatically different impacts on different parts of the

country. State and local requirements and guidance on COVID-19 are thus critical to employers in determining how to best protect workers, and OSHA must retain flexibility to adapt its advice regarding incorporation of such local guidance, where appropriate. *See* March 9 Guidance at 7–12, 26 (advising employers to keep abreast of local guidance).

25. As of May 29, 2020, OSHA has conducted over 4,000 investigations into COVID-19 related complaints, initiated over 350 workplace inspections, and issued one citation. OSHA, COVID-19 Response Summary, <https://www.osha.gov/enforcement/covid-19-data> (last accessed May 29, 2020).

Although in some cases, investigations closed after OSHA received adequate assurances regarding worker protection, in other cases, investigations and inspections remain open and could result in citations. OSHA's investigatory process is resource-intensive and time-consuming.

26. OSHA has investigated 247 whistleblower or retaliation complaints and has obtained a remedy for twelve workers, including back and lost wages, reinstatement, neutral job references, and an agreement that no further retaliation would occur for engaging in protected conduct.

27. OSHA repeatedly emphasized to employers that it is illegal to retaliate against workers because they report unsafe or unhealthful working conditions

during the coronavirus pandemic. *See, e.g.*, OSHA National News Release (Apr. 8, 2020), <https://www.osha.gov/news/newsreleases/national/04082020>.

OSH Act Standards

28. OSHA's respiratory protection standard, 29 C.F.R. § 1910.134(a)-(d), is intended to protect against, *inter alia*, airborne biological diseases such as the coronavirus. *See, e.g.*, Respiratory Protection Final Rule, 63 Fed. Reg. 1152, 1180 (Jan. 8, 1998) ("OSHA emphasizes that this respiratory protection standard does apply to biological hazards."); OSHA, Small Entity Compliance Guide for the Respiratory Protection Standard at 17 (2014), <https://www.osha.gov/Publications/3384small-entity-for-respiratory-protection-standard-rev.pdf> (noting "potential respiratory hazards" include biological hazards such as "viruses (e.g., coronavirus which causes severe acute respiratory syndrome [SARS])"); SER Backgrounder at 37–38, 44, 75 (noting applicability of 1910.134 to infectious diseases).

29. OSHA has consistently advised employers of the applicability of the respiratory protection standard to COVID-19. *See, e.g.*, SHTP COVID-19, Standards, <https://www.osha.gov/SLTC/covid-19/standards.html>; March 9 Guidance at 17. The agency has specifically affirmed that appropriate respiratory protection is necessary for all workers providing direct care to patients with suspected or confirmed COVID-19. March 9 Guidance at 15–16. To ensure

appropriate enforcement, OSHA has instructed its inspectors to evaluate whether workers in very high and high-risk exposure settings in particular have necessary respiratory protection.

30. OSHA has repeatedly advised employers that the PPE standard can apply to COVID-19. *See, e.g.*, SHTP COVID-19, Standards; March 9 Guidance at 17. OSHA's March 9 Guidance notes that to prevent certain exposures to COVID-19, PPE such as gloves, goggles, face shields, facemasks, or respiratory protection may be necessary. It recommends consideration of such PPE for at least all workers at medium exposure risk—including all workers in regular contact with the general public—and above.

31. OSHA has repeatedly advised employers of the applicability of its sanitation standard, 29 C.F.R. § 1910.141, to COVID-19 hazards. *See, e.g.*, SHTP COVID-19, Standards; March 9 Guidance at 18.

OSHA Compliance Safety and Health Officer Training

32. OSHA has trained its compliance safety and health officers (*i.e.*, its inspectors) regarding the respiratory protection, PPE, and sanitation standards and their applicability to COVID-19.

AFL-CIO Petition for Emergency Temporary Standard (ETS)

33. On March 6, 2020, OSHA received a petition from the AFL-CIO and other unions requesting that OSHA issue an ETS to protect certain working people from exposure to infectious diseases, including COVID-19.

34. Even since the AFL-CIO submitted its petition—fewer than three months ago—our knowledge about COVID-19 has changed in many important ways. For example, when the ETS Petition was first received, known symptoms of COVID-19 were limited to fever, cough, or shortness of breath but have since grown to encompass chills, muscle pain, sore throat, and loss of taste or smell; there was little appreciation for the prevalence of asymptomatic carriers compared to our current understanding; CDC had not yet begun affirmatively advising the general public to use face coverings, now considered an important tool for source control; testing availability for COVID-19 was substantially more limited; CDC was not yet advising employers to conduct daily health checks or on the appropriate disinfection procedures following a confirmed case; and CDC had not yet identified increased ventilation as a protective measure to help combat infection. Additionally, much of OSHA's own materials have changed, even since the mandamus petition was filed eleven days ago.

35. Even with this growth in understanding, the virus continues to present substantial uncertainty. For example, we are still learning about the virus's modes

of transmission, which may affect guidance on appropriate social distancing, and we are learning about immunities the virus produces in recovered individuals, which could substantially affect future guidance.

36. On April 30, 2020, Secretary of Labor Eugene Scalia sent a letter to AFL-CIO President Richard Trumka addressing concerns the latter had raised about the workplace threat posed by COVID-19 (hereinafter "April 30 Letter"). In the April 30 Letter, Secretary Scalia discussed OSHA's ongoing response to the pandemic, emphasized employers' existing compliance obligations implicated by COVID-19, and explained why OSHA has thus far considered tailored guidance to be more valuable than an ETS in protecting workers.

37. On May 29, 2020, I sent the AFL-CIO a formal denial of their ETS petition (Addendum Tab 2).

I declare pursuant to 28 U.S.C. §1746 under penalty of perjury that the foregoing is true and correct. Executed on this 29 day of May, 2020 at Washington, D.C.



Loren E. Sweatt

Principal Deputy Assistant Secretary of Labor
for Occupational Safety and Health

ADDENDUM TAB 2

May 29, 2020 ETS Denial Letter

U.S. Department of Labor

Office of the Assistant Secretary
For Occupational Safety and Health
Washington, D.C. 20210



May 29, 2020

Richard L. Trumka
President, AFL-CIO
815 16th St. NW
Washington, D.C. 20210

Dear President Trumka:

This letter is in response to your correspondence, dated March 6, 2020, in which the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), on behalf of several labor organizations, petitioned the Occupational Safety and Health Administration (OSHA) to promulgate an emergency temporary standard (ETS) to protect working people from occupational exposure to infectious diseases, including coronavirus disease 2019 (COVID-19).

As an initial matter, I appreciate you sharing your suggestions regarding OSHA's response to the COVID-19 pandemic. Ensuring worker safety and health during this unprecedented crisis remains the agency's top priority, and we value your feedback regarding OSHA's efforts to-date. I share your concern for the health and safety of America's workers during this challenging time, and mourn the workers we have lost to COVID-19.

That said, after thorough review and consideration of your petition, as well as your post-petition correspondence,¹ OSHA has decided to deny your petition for an ETS for infectious diseases. At this juncture, OSHA has determined that it lacks compelling evidence to find that an undefined category of infectious diseases generally pose a grave danger for which an ETS would be an appropriate remedy, and even if it did, it would not be necessary for OSHA to issue an ETS to protect workers from infectious diseases.

Although not specifically requested in your petition, OSHA also has also determined that it is not necessary to issue an ETS to specifically protect workers from COVID-19, which can result from exposure to the novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). OSHA has concluded that its provision of guidance and enforcement of employers' existing legal obligations under the Occupational Safety and Health Act (OSH

¹ This includes your post-petition letters to Secretary Scalia, dated April 28, 2020 ("April 28 Letter") and May 7, 2020 ("May 7 Letter").

Act), in combination with COVID-19-related requirements and guidelines by other entities, renders an ETS unnecessary.

Moreover, given that the SARS-CoV-2 virus is a novel infectious pathogen that poses danger inside and outside of the workplace, and is the subject of a constantly-evolving multi-agency response, it would be counter-productive for OSHA to attempt to fashion a SARS-CoV-2 exposure standard at this juncture. OSHA has determined that the best approach for responding to the pandemic is to enforce the existing OSH Act requirements that address infectious disease hazards, while also issuing detailed, industry-specific guidance that can be quickly amended and adjusted as its understanding of the virus grows. This approach is more effective than promulgating a rigid set of requirements for all employers in all industries based on limited information, and best utilizes OSHA resources.

Background

Section 6(c) of the OSH Act authorizes OSHA to issue an ETS only if the Secretary of Labor determines (1) that employees are exposed to a grave danger from exposure to substances or agents determined to be toxic or physically harmful, and (2) that issuance of an ETS is necessary to protect employees from that danger. An ETS is promulgated without the benefit of notice and comment, and becomes effective immediately upon publication in the Federal Register. As such, ETSs have been referred to as the “most dramatic weapon in [OSHA’s] arsenal.” *Asbestos Info. Ass’n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984). Once an ETS is published, section 6(c) requires OSHA to commence a rulemaking proceeding under its regular rulemaking procedures and issue a permanent standard to replace the ETS within six months of the ETS’ publication.

To find that a “grave danger” exists, OSHA must have compelling evidence of a serious health impairment involving incurable, permanent, or fatal consequences. *See Fla. Peach Growers Ass’n Inc. v. U.S. Dept. of Labor*, 489 F.2d 120, 132 (11th Cir. 1974). A “grave danger” poses a degree of risk that is higher than the “significant risk” that is required to promulgate a permanent safety and health standard under Section 6(b) of the OSH Act. *Compare Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 640 (1980) (permanent standard) to *Dry Color Mfrs. Ass’n. v. Dept. of Labor*, 486 F.2d 98, 104-105 (ETS). To find that an ETS is “necessary” to address a grave danger specific to the workplace, OSHA must be able to show that the ETS would substantially reduce the grave danger during the time the ETS would be in effect, and that such a reduction could not be obtained by enforcing existing OSH Act requirements or widespread voluntary efforts to address the hazard. *See Asbestos Info.*, 727 F.2d at 422, 426; *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983) (per curiam)

Accordingly, to issue the ETS that you request in your petition, OSHA would need compelling evidence that all infectious diseases collectively pose a grave danger to workers, and that enforcement of existing OSHA requirements and/or widespread voluntary efforts would not substantially reduce that danger. As discussed below, OSHA lacks sufficient evidence to find that infectious diseases generally pose a grave danger to

worker safety, and even if they did, an ETS would not be necessary because enforcement of existing OSH Act requirements can substantially reduce hazards related to infectious diseases.

Additionally, although such an ETS was not specifically requested in your petition, OSHA has also determined that it is not necessary to issue an ETS addressing the specific danger of COVID-19. Employers are already obligated under the OSH Act to protect workers from exposure to infectious disease agents, including the SARS-CoV-2 virus. Doubtless, all across the country, many employers are making good faith efforts to comply with the OSH Act's requirements, as well as with the myriad guidance on controlling exposure to the SARS-CoV-2 virus that has been issued by OSHA, other federal agencies including the Centers for Disease Control and Prevention (CDC), and industry associations, and with the requirements and guidance from State and local officials. OSHA's enforcement of its applicable mandatory standards, combined with the regulated community's compliance with existing requirements and non-mandatory guidelines for limiting exposure to the SARS-CoV-2 virus, renders an ETS unnecessary.

Furthermore, OSHA has determined that, as a policy matter, attempting to issue an ETS to regulate workplace exposure to COVID-19 would not just be inappropriate, but potentially damaging to the pandemic response effort: Rather than attempting to construct a standard based on today's evolving understanding of the virus and workplace exposure realities, OSHA's time and resources are better spent enforcing the OSH Act and issuing industry-specific guidance to help employers protect workers from COVID-19 based on the best information that is currently available.

An ETS is Not Necessary to Generally Protect Employees from Infectious Diseases.

Though much of your petition discusses the specific danger of COVID-19, the remedy that your petition requests is "an Emergency Temporary Standard to protect working people from occupational exposure to infectious diseases, including COVID-19." Petition ("Pet."), p. 1; *see also* Pet., p. 12. Your petition argues that "[w]hile COVID-19 is the most recent global health threat, infectious disease outbreaks and other biological threats will continue to occur," and therefore OSHA should issue an ETS that "comprehensively addresses an employer's responsibility to protect workers from infectious diseases," including "future infectious agents." *Id.* at 6. You state that the scope of the ETS should be "comprehensive," and that the ETS "should apply to all workers who perform essential functions and are at an elevated risk of occupational exposure to coronavirus," as well as to "workers with close contact to potential zoonotic sources of infection." *Id.* at 9.

OSHA lacks evidence to conclude that all infectious diseases to which employees may be exposed at a workplace constitute a "grave danger" for which an ETS is an appropriate remedy. Your petition does not explain how infectious diseases as a group pose a grave and urgent threat to workers, let alone provide compelling evidence that those diseases pose a grave danger to worker health. Section 6(c) does not authorize OSHA to issue broad-sweeping health standards to address entire classes of known and unknown substances and agents; rather, it provides extremely limited authority to immediately issue

a standard if it is necessary to address *specific* substances or agents that are proven to pose a grave danger to workers. *See Fla. Peach Growers*, 489 F.2d at 120, 129-30, 132 (11th Cir. 1974) (an ETS may be issued “only in those emergency situations which require it” to remedy a specific danger with “incurable, permanent, or fatal consequences”); *Dry Color Mfrs.*, 486 F.2d at 104-05 (evidence showing that a particular agent has the potential to cause harm is insufficient to support an ETS). Your petition does not support that such action is necessary.

Moreover, the OSH Act already requires employers to address hazards related to infectious disease exposure at the workplace. As you acknowledge in your petition, *see* Pet., p. 8, several existing OSHA standards play a role in protecting workers from infectious diseases at the workplace, including OSHA’s personal protective equipment standard (§ 1910.132), respiratory protection standard (§ 1910.134), sanitation standard (§ 1910.141), and bloodborne pathogens standard (§ 1910.1030). Additional protection is provided by the OSH Act’s general duty clause, which requires employers to furnish their employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” To clarify how employers can fulfill their obligation to protect their employees from infectious diseases at the workplace, OSHA has published numerous guidance materials,² including (as discussed below) extensive specific guidance on how employers can protect employees from COVID-19.

You do not dispute in your petition that OSHA standards and the general duty clause currently protect against infectious disease hazards, but instead contend that those requirements are “not enough,” and that only a comprehensive infectious disease standard can effectively control workplace exposure to infectious diseases. *See* Pet. at 8-9. However, the Act does not authorize the issuance of an ETS merely to supplement an existing regulatory scheme. Rather, OSHA must be able to show that existing protections are wholly inadequate, leaving an ETS as the only means of substantially reducing the grave danger. The mandatory OSHA standards outlined above in conjunction with industry-specific guidance can substantially reduce the general threat that infectious diseases pose to worker health. Accordingly, OSHA cannot find that an ETS is necessary, even setting aside the lack of evidence indicating that infectious diseases categorically pose a grave danger to workers.

An ETS is Not Necessary to Protect Employees from the Specific Danger Posed By COVID-19.

As discussed above, your March 6, 2020 petition requests an ETS to comprehensively address the danger posed by *all* infectious diseases, both known and unknown. However, your post-petition correspondence suggests that you may also seek an ETS to specifically address the danger posed by COVID-19. *See* April 28 Letter, pp. 5-6; May 7 Letter, p. 2. OSHA has determined that issuing an ETS to specifically protect employees from COVID-19 is not necessary. Putting aside whether COVID-19 qualifies as a “grave danger” under section 6(c), issuing an ETS is not necessary. Enforcement of existing OSH Act

² *See, e.g.*, OSHA’s Hospital Respiratory Protection Program Tool Kit (May 2015), available at: <https://www.osha.gov/Publications/OSHA3767.pdf>.

requirements, paired with OSHA's publication of extensive COVID-19 guidance, can substantially reduce the hazard of COVID-19, and provides a superior method for responding to the challenges posed by a novel infectious agent than the issuance of an ETS. Moreover, attempting to permanently address workplace exposure to SARS-CoV-2 based on the evolving information that is currently available to the agency could have counterproductive consequences, and would deprive the agency of the flexibility that it needs to respond to new information during the current pandemic.

Within the workplace, the OSH Act requires employers to take action to protect employees from hazards associated with exposure to infectious disease agents. Several OSHA standards are particularly relevant to preventing exposure to the SARS-CoV-2 virus at the workplace:³

- *Respiratory Protection Standard* (§ 1910.134): OSHA's respiratory protection standard requires the use of respirators whenever it is necessary to protect the health of an employee. The standard requires employers to assess whether respiratory protection is necessary whenever there is potential for employees to be overexposed to atmospheric contamination, and if respiratory protection is necessary, the employer must implement a comprehensive respiratory protection program. Respiratory protection is required under this standard whenever airborne biological agents pose a hazard to employees. *See* Respiratory Protection Final Rule, 63 Fed. Reg. 1152, 1180 (Jan 8, 1998).
- *Personal Protective Equipment Standard* (§ 1910.132): OSHA's general PPE standard imposes a number of obligations on employers to ensure that workers have and use necessary protective equipment to keep them safe from workplace hazards, including infectious disease agents. The standard requires employers to: conduct an assessment of the hazards employees are likely to be exposed to; select appropriate PPE based on the assessment; provide the PPE at no cost to employees; train employees; and assure that employees have understood the training. Employers must consider the use of a wide variety of PPE, including "for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers." § 1910.132(a). Application of OSHA's PPE standard, 29 C.F.R. § 1910.132(a)-(h), to COVID-19 is consistent with how the agency has historically treated the standard.⁴

³ A more comprehensive listing of pertinent OSHA standards is available at: <https://www.osha.gov/SLTC/covid-19/standards.html>.

⁴ *See, e.g.*, Letter of Interpretation (LOI) to Vivian Erickson (Jan. 19, 2010), available at: <https://www.osha.gov/laws-regs/standardinterpretations/2010-01-19> (noting 1910.132 "would apply where [PPE] is deemed necessary to protect workers from infectious diseases" not covered elsewhere); LOI to Allen Cooper (Aug. 7, 2007), <https://www.osha.gov/laws-regs/standardinterpretations/2007-08-07> (noting 1910.132 requires employers to "provide adequate measures to protect employees who may be exposed to potentially hazardous agents, including infectious materials"); OSHA

- *Sanitation Standard* (§ 1910.141): OSHA’s sanitation standard provides hygiene requirements that, directly and indirectly, address the potential for infectious disease agents to spread at the workplace. Specifically, the sanitation standard requires that employers: keep workplaces clean to the extent possible; provide potable water of sufficient quality for personal washing and drinking; provide sufficient toilet and washing facilities, to include hot and cold or tepid running water, hand soap or a similar cleansing agent, and adequate means of hand-drying; provide showers where applicable, with adequate body soap, hot and cold water, and clean towels; and provide change rooms where necessary for removal of contaminated protective clothing. § 1910.141(a)–(e).

Additionally, OSHA’s general duty clause requires employers to furnish their employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” There can be no dispute that COVID-19 is a recognized hazard. Indeed, the entire American public is acutely aware of the threat, and our day-to-day lives have been uprooted as the nation works together to reduce the disease’s spread.

To assist employers’ efforts to fulfill their duty of protecting workers from exposure to the SARS-CoV-2 virus, OSHA has published numerous guidance documents, often in conjunction with the CDC. Over the past few months, OSHA has developed—both independently and in conjunction with several federal partners⁵—a broad arsenal of

Instruction CPL 02-01-050, Enforcement Guidance for Personal Protective Equipment in General Industry (“PPE Directive”) at 30 (Feb. 10, 2011), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-050.pdf (listing as examples of PPE required to be provided by employer “[i]tems used in medical/laboratory settings to protect from exposure to infectious agents (aprons, lab coats, goggles, disposable gloves, shoe covers, etc.)”); *Peter Cooper Corp.*, 10 BNA OSHC 1203, 1204 n.4, 1211 (No. 76–596, 1981) (affirming 1910.132(a) citation for failure to provide necessary protective clothing and respirators to employees exposed to infectious disease anthrax); *Am. Dental Ctrs.*, 14 BNA OSHC 1710, 1990 WL 118162, at *1–3 (Nos. 89–1369 & –1857, 1990) (ALJ) (affirming application of 1910.132(a) to employer’s failure to provide safety goggles with masks or face shields against potential exposure to saliva containing infectious diseases).

⁵ At the federal level, OSHA has worked closely with a plethora of federal agencies, specifically: the Department of Health and Human Services (including CDC; NIOSH; the Centers for Medicare and Medicaid Services; and the Food and Drug Administration); the Department of Transportation (including the Federal Transit Administration; Federal Aviation Administration; and Pipeline and Hazardous Materials Safety Administration); the Department of Agriculture (including the Food Safety and Inspection Service); the Department of Homeland Security (including the Federal Emergency Management Agency); the Environmental Protection Agency; and the Departments of Justice,

guidance documents, alerts, enforcement memoranda, news releases, posters, and videos addressing COVID-19–related health and safety issues.⁶ For example:

- On March 9, 2020, OSHA issued initial and comprehensive “Guidance on Preparing Workplaces for COVID-19,” which advised employers in every industry on the importance of taking immediate action to prepare their workplace for the impact of COVID-19, including outlining steps that all employers should take to reduce workers’ exposure to the coronavirus. OSHA Publication No. 3990-03-2020 (available at: <https://www.osha.gov/Publications/OSHA3990.pdf>)
- More recently, OSHA issued comprehensive joint interim guidance with the CDC specifically tailored to the Meat and Poultry Processing Workers and Employers, issued on April 26, 2020; and Manufacturing Workers and Employers, issued on May 12, 2020. See <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>; <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html>
- OSHA has also issued a series of industry-specific alerts that provide targeted guidance on practices and procedures that will help protect workers’ health and safety in numerous specific industries, including retail, package delivery, manufacturing, construction, restaurants, dentistry, rideshare and taxi service, retail pharmacies, and nursing home and long term care facilities. See https://www.osha.gov/SLTC/covid-19/news_updates.html.

Not only does this abundant, industry-specific guidance regarding COVID-19 guide employers’ efforts to comply with the OSH Act, but also—as you noted in your April 28 letter, p. 6—such guidance documents can support enforcement actions taken under the general duty clause.

Of course, SARS-CoV-2 is not uniquely a workplace hazard, and a vast range of federal, state, and local authorities have, simultaneous with OSHA’s efforts, been issuing an array of guidelines and directives to protect workers from coronavirus. Each of the fifty states has issued at least some orders and guidance on COVID, many of which speak—often in mandatory ways—on the issues which your petition suggests OSHA should address.⁷

Commerce, State, and Defense. OSHA has kept in near-constant contact with OSHA state plans in states that have established them.

⁶ All of OSHA’s guidance materials pertaining to COVID-19 can be found on the agency’s COVID-19 webpage, <https://www.osha.gov/SLTC/covid-19/index.html>.

⁷ The State of Georgia, for example, has promulgated detailed requirements specific to a wide variety of businesses, including restaurants; tattoo parlors, estheticians, massage therapists, tanning salons, and hair salons; movie theaters; bowling alleys; ambulatory surgical centers; childcare facilities; and summer camps. Ga. Exec. Order, Reviving a

Cities such as New York, Los Angeles, San Francisco, and Chicago have provided detailed requirements and recommendations for employers as well. Private industry has also taken efforts to protect workers, and have leveraged their expertise to offer industry-specific guidance.⁸ OSHA, and the Department as a whole, has closely monitored state and local government orders and guidance related to coronavirus, as well as guidance developed by private industry. When combined with OSHA's diligent enforcement of existing OSH Act requirements related to infectious disease exposure at the workplace, the regulated community's widespread compliance with COVID-19-related safety guidelines and directives further evinces that an ETS is unnecessary.

Furthermore, OSHA, within its discretion, has determined that this two-pronged approach—*i.e.*, enforcing existing OSH Act requirements related to infectious disease hazards, while also continuing to publish detailed and industry-specific guidance to employers on COVID-19—is the best method for ensuring that workers are protected from COVID-19. As you note in your petition, there are many “unknowns” regarding the novel SARS-CoV-2 virus, Pet., p. 10, and given that the world's understanding of the virus is evolving on a daily basis, OSHA's ability to quickly amend and supplement its guidance to employers and workers is paramount. For example, when your petition was first received, known symptoms of COVID-19 were limited to fever, cough, or shortness of breath, and the CDC was advising that general members of the public not wear masks; now, the list of symptoms has grown to encompass chills, muscle pain, sore throat, loss of taste or smell, and more, and the CDC recommends wearing cloth face coverings in all

Healthy Georgia (May 12, 2020), available at: <https://gov.georgia.gov/document/2020-executive-order/05122002/download>. The State of Texas has issued no fewer than sixty checklists containing a mixture of required and minimum recommended measures to mitigate coronavirus transmission and covering everything from manufacturers and retailers to museums, wedding venues, and rodeos. Governor's Strike Force to Open Texas, Office of the Texas Governor, available at: <https://gov.texas.gov/organization/opentexas> (last visited May 27, 2020). Other states have enacted similar protections on an emergency basis.

⁸ For example, the International Franchise Association has established uniform guidelines for fitness centers, restaurants, and hotels, among other industries. Int'l Franchise Ass'n, Franchise Reopening Blueprint, May 2020, available at: https://community.franchise.org/sites/default/files/2020-05/franchise-reopening-blueprint_05082020_0.pdf. Additionally, Target has published its approach to retail operations during the pandemic for others to consider using or adapting, suggesting policies and mitigation measures, checklists, and sample posters in English and Spanish. Target Corp., SAFE Retail, May 1, 2020, https://corporate.target.com/_media/TargetCorp/about/pdf/Target_SAFE_Retail_Considerations-for-Retail-Operations-Post-COVID-19.pdf. Similarly, Kroger has offered a “blueprint for businesses.” Kroger Co., Sharing What We've Learned: A Blueprint for Businesses, May 13, 2020, available at: <https://www.thekrogerco.com/wp-content/uploads/2020/04/Krogers-Blueprint-for-Businesses.pdf>.

public settings. See CDC Coronavirus Disease 2019 (COVID-19) Topic Page, Symptoms of Coronavirus, available at: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>; Use of Cloth Face Coverings to Help Slow the Spread of COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>. See also Jacey Fortin, *Surfaces Are 'Not the Main Way' Coronavirus Spreads, C.D.C. Says*, New York Times (May 22, 2020), available at: <https://www.nytimes.com/2020/05/22/health/cdc-coronavirus-touching-surfaces.html> (reporting that “[e]xperts at the C.D.C. and elsewhere are still learning about the new coronavirus”). Unlike an ETS—which would necessarily be based on today’s limited understanding of the SARS-CoV-2 virus, and would be onerous to modify once promulgated⁹—OSHA’s two-pronged approach allows the agency to tailor guidance to specific industries and work settings, and gives the agency the flexibility to quickly adjust its guidance as necessary. Given that we learn more about COVID-19 every day, setting rules in stone through an ETS (and later a permanent rule) may undermine worker protection by permanently mandating precautions that later prove to be inefficacious.

Moreover, as a practical matter, an ETS is a poorly-suited approach for protecting workers against SARS-CoV-2 because no standard that covers all of the Nation’s workers would protect all of those workers equally. Hastily manufacturing an exposure standard that would cover all workers (as you request) would be ineffectual, as the appropriate protections for protecting workers from infectious diseases vary widely from industry-to-industry. See OSHA, Infectious Diseases SER Background Document (“SER Background”) 29-30, [osha.gov/dsg/id/OSHA-2010-0003-0239.pdf](https://www.osha.gov/dsg/id/OSHA-2010-0003-0239.pdf) (discussing how even within healthcare industry, while “best practices” may be similar, numerous factors affect assessment of most appropriate protections in a given workplace). Further complicating such an endeavor, adequate safeguards for workers could differ substantially based on their geographic location, as the pandemic has had dramatically different impacts on different parts of the country. Unlike an ETS, OSHA’s strategy for responding to the pandemic allows the agency to offer tailored guidance that takes into account the realities of specific industry settings and locations.

In your petition, you claim that OSHA’s guidelines regarding COVID-19 (including those jointly published with the CDC) are “largely voluntary,” and that absent a comprehensive ETS, employers have “the discretion to implement, ignore, or selectively follow the guidelines issued by the agencies.” Pet., p. 6; see also April 28 Letter, p. 3 (arguing that OSHA and the CDC’s joint meat and poultry processing guidelines are insufficient because they are “only voluntary guidelines, and according to the agencies, impose no obligations on employers to comply”). Your argument overlooks the existing legal authorities, discussed above, that require employers to take action to protect employees from infectious diseases, including COVID-19. Furthermore, you recognize that such guidelines can

⁹ An ETS once issued could very well become ineffective or counterproductive, as it may be informed by incomplete or ultimately inaccurate information. Even worse, under the statute the ETS would lead to a permanent final rule within six months of its promulgation, see 29 U.S.C. § 655(c)(3), an extraordinarily rapid pace for OSHA rulemaking. Faulty requirements ensconced in the final rule would be changeable only through additional, laborious notice-and-comment rulemaking, further sapping agency resources.

support an action under the OSH Act's general duty clause. *See* April 28 Letter, p. 6; May 7 Letter, p. 2. Enforcement of existing OSH Act requirements, paired with OSHA's publication of extensive COVID-19 guidance, can substantially reduce the hazard of COVID-19, and provides a superior method for responding to the challenges posed by a novel infectious agent than the issuance of an ETS.

Your post-petition correspondence also contests whether OSHA is, in fact enforcing the existing OSH Act requirements related to infectious disease exposure. April 28 Letter, p. 5; May 7 Letter, p. 2. Let me assure you that OSHA is taking appropriate enforcement action. The pandemic continues to receive OSHA's unflinching attention. Throughout the pandemic, OSHA has used its existing arsenal of enforcement tools to compel employers to protect their workers from COVID-19. To date, OSHA has initiated thousands of investigations of complaints related to COVID-19, opened hundreds of inspections, and repeatedly emphasized the rights of workers to report, without retaliation, unsafe and unhealthful working conditions. Many investigations have closed after OSHA received adequate assurances from employers that workers were being appropriately protected. In other cases, investigations and inspections are still open and could result in citations either under the general duty clause or under one of the mandatory standards discussed above. OSHA's investigatory process is resource-intensive and time consuming, sometimes taking six months to complete. Accordingly, OSHA's issuance of only one citation thus far for COVID-19 related violations resulting from OSHA's enforcement efforts to date is not surprising. It would be no different under an ETS.

Finally, your April 28 letter criticizes various OSHA policy actions taken in response to the pandemic, including OSHA's April 3, 2020 enforcement memorandum regarding "Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic," April 10, 2020 memorandum on Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), and April 13, 2020 Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19).¹⁰ *See* April 28 Letter, pp. 3-5. Your April 28 letter also provides various suggestions on policy actions that OSHA should take to better respond to the pandemic, including issuing "an interim final rule that requires all employers to maintain a COVID-19 log of all worker infections and deaths from COVID-19," *Id.* at p. 3, conducting "off-site investigations to fully enforce the law, including the issuance of citations for violations, as a supplement to onsite inspections," *Id.* p. 7, and "launch[ing] a major training and education initiative to protect workers from COVID-19." *Id.* at p. 10. While we appreciate your feedback and constructive suggestions, these matters of policy are within OSHA's discretion and do not affect the agency's determination that its existing legal authorities, buttressed by the extensive and specific guidance that OSHA has published regarding COVID-19, render it unnecessary to issue an ETS for COVID-19.

¹⁰ OSHA updated this guidance on May 19, 2020 by issuing an Updated Interim Enforcement Response Plan (Updated Enforcement Plan), which became effective on May 26, 2020. *See* <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

OSHA appreciates your interest in occupational safety and health, and the passion with which you seek to protect workers from the SARS-CoV-2 virus.

Sincerely,

A handwritten signature in black ink, appearing to read "Loren Sweatt". The signature is fluid and cursive, with a large initial "L" and a stylized "S".

Loren Sweatt

Principal Deputy Assistant Secretary