

No. \_\_\_\_\_

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

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In re: American Federation of Labor and Congress of Industrial Organizations

Petitioner.

Occupational Safety and Health Administration, United States Department of  
Labor

Respondent.

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**EMERGENCY PETITION FOR A WRIT OF MANDAMUS, AND  
REQUEST FOR EXPEDITED BRIEFING AND DISPOSITION**

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Pursuant to Federal Rule of Appellate Procedure and Circuit Rule 21, and in accordance with *Telecomm. Research & Action Ctr. v. FCC* (“TRAC”), 750 F.2d 70 (D.C. Cir. 1984), and its progeny, Petitioner American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) hereby petitions this Court to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), compelling Respondent Occupational Safety and Health Administration, United States Department of Labor (“OSHA”) to issue—within thirty (30) days of this Court’s grant of the writ—an Emergency Temporary Standard for Infectious Diseases (“ETS”) aimed at protecting the life and health of millions of workers

throughout the United States in grave danger from the deadly COVID-19 pandemic. Given the urgency of the situation confronting workers in the United States, especially those classified as “essential” workers and thus currently at work as well as those workers being called back to work as government-imposed stay-at-home orders are lifted, the AFL-CIO further requests that this Court provide for expedited briefing and disposition of the petition. With respect to the briefing, the AFL-CIO proposes that OSHA be given ten (10) days to respond to the petition and that the AFL-CIO be given two (2) days to reply to OSHA’s response.

### **INTRODUCTION**

Under section 6(c) of the Occupational Safety & Health Act of 1970 (“the OSH Act”), OSHA “*shall* provide . . . for an emergency temporary standard to take immediate effect upon publication in the Federal Register if [it] 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.” 29 U.S.C. § 655(c)(1) (emphasis added).

The COVID-19 global pandemic caused by the novel coronavirus has produced exactly the type of workplace catastrophe that Congress intended an emergency temporary standard to address. While the numbers change daily, as of this writing, more than 1.4 million people in the United States have tested positive

for COVID-19, and more than 87,000 people in the United States have died from the disease. Many more likely have the disease but have not been tested; many others likely died of the disease but have not been counted. A significant portion of those infected and dying from COVID-19 are classified as “essential” workers—health care providers, nursing home aides, bus drivers and other transit workers, fire fighters and other first responders, grocery store workers, and employees in meatpacking plants and correctional facilities. Many of these workers certainly have been infected at work either because their work requires exposure to infected persons, *e.g.*, nurses and corrections officers, or because their work requires repeated exposure to large numbers of coworkers and members of the general public, *e.g.*, grocery store clerks. As the economy reopens and more workers return to work, person-to-person contact in the workplace will increase and health experts predict that the already shocking number of infections and deaths among workers will get worse.

On March 6, 2020, the AFL-CIO and other unions (collectively, “the Unions”) petitioned OSHA to issue an ETS under section 6(c) of the OSH Act “to protect working people from occupational exposure to infectious diseases, including COVID-19.” *See* Addendum, Tab 3, at 1. Another union affiliated with the AFL-CIO, National Nurses United (“NNU”), filed a separate but parallel

petition on March 4 seeking an ETS specifically protecting nurses. *See id.*, Tab 4.<sup>1</sup> Both petitions were based on the “chilling yet realistic possibility of a coronavirus pandemic and the potential for a catastrophic toll in mortality and morbidity,” *id.*, Tab 3 at 2, and both asked OSHA to take immediate action to protect workers from this grave threat. Both also argued forcefully that in the face of an impending pandemic, OSHA’s evolving voluntary guidance to the employer community was no substitute for the immediate imposition of mandatory, legally-enforceable, COVID-19-specific duties on employers to protect workers from this grave danger. *Id.*, Tab 3 at 6; Tab 4 at 7.

COVID-19’s toll in mortality and morbidity among workers and the general public has exceeded the expectations of many prognosticators. Yet in a stunning act of agency nonfeasance in the midst of a workplace health emergency of a magnitude not seen in this country for over a century (if ever), OSHA has neither

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<sup>1</sup> Indeed, the AFL-CIO together with its affiliates the American Federation of State, County and Municipal Employees; the American Federation of Teachers; the Communications Workers of America; the International Association of Firefighters; the Laborers International Union; the United Automobile Workers; and the United Steelworkers, as well as the Service Employees International Union, filed a petition with OSHA in 2009 seeking a permanent standard governing occupational exposure to infectious diseases. Even earlier, in 2005, unions petitioned OSHA to issue an emergency temporary standard addressing pandemic influenza (2005). Those petitions, and the threat of infectious disease pandemics such as SARS, West Nile virus, Lyme disease, zoonotic influenza and Ebola, led OSHA to initiate a rulemaking on infectious diseases that OSHA has never completed. *See infra* pp. 29-30.

responded directly to, nor taken formal action on, either of the two pending ETS petitions, nor has it shown any inclination to adopt mandatory, legally-enforceable, COVID-19-specific rules to protect workers.<sup>2</sup>

This Court has made clear that OSHA has a degree of discretion in determining whether the two statutory requirements for issuance of an ETS—“whether ‘employees are exposed to grave danger’ and whether an emergency standard is ‘necessary’ to protect them from such danger”—have been satisfied. *In re Int’l Chem. Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987) (quoting 29 U.S.C. § 655(c)); *accord Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1155-56 (D. C. Cir. 1983). But this Court has made it equally clear that OSHA’s discretion is *not* unlimited.

We submit that in the face of a global health emergency causing more deaths in less time than any other workplace crisis OSHA has faced in its fifty-year existence, OSHA’s refusal to issue an ETS constitutes an abuse of agency discretion so blatant and of “such magnitude” as to amount to a clear “abdication of statutory responsibility.” *Pub. Citizen Health Research Grp. v. Comm’r, Food & Drug Admin. (“FDA”)*, 740 F.2d 21, 32 (D.C. Cir. 1984). That is so because,

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<sup>2</sup> We say “respond directly” because, in an April 30, 2020 letter from the Secretary of Labor Eugene Scalia to the AFL-CIO President Richard Trumka, the Secretary defended the adequacy of OSHA’s voluntary guidance and, in the process, made it clear that OSHA has no intention of issuing the ETS requested by the Unions. *See infra* pp. 8-9.

based on what is known about COVID-19 and its anticipated impact in the next few months, the statutory requirements for issuance of an ETS undeniably are satisfied here. Indeed, for the reasons set out *infra* pp. 12-27, the grave danger to workers from the COVID-19 pandemic and the necessity of an ETS adequately to protect workers from that danger could hardly be clearer. Moreover, there is an urgent need for an ETS without further delay because many states and localities have already begun the process of allowing businesses within their jurisdictions to reopen while others are coming under enormous pressure to do so—a reopening process that will expose millions more workers to grave danger to their life and health if OSHA fails to issue an ETS.

When, as here, “agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates.” *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d at 32. This Court should exercise that power here.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT HAS EXCLUSIVE JURISDICTION TO REVIEW OSHA'S REFUSAL TO ISSUE AN ETS

It is settled law in this Circuit that the federal appellate courts have “exclusive jurisdiction to review OSHA’s refusal to issue an ETS pursuant to 29 U.S.C. § 655(c).” *In re Int’l Chem. Workers Union, supra*, 830 F.2d at 372 n.2 (citing *TRAC, supra*, 750 F.2d 70). As this Court explained in *TRAC*, when judicial review of a particular agency action *if taken* is committed by statute to the courts of appeals—as it would have been had OSHA issued an ETS, *see* 29 U.S.C. § 655(f)—the appellate courts also have exclusive jurisdiction under the All Writs Act to consider a claim that the agency has “unlawfully withheld or unreasonably delayed” that action and to “compel” the agency to take the action that the law requires. *See TRAC*, 750 F.2d at 75-77. Because the essence of the AFL-CIO’s claim here is that OSHA has “unlawfully withheld” the issuance of an ETS and should be “compel[led]” to issue one, that claim plainly lies within this Court’s exclusive jurisdiction. *See also Int’l Union, UAW v. Donovan*, 756 F.2d 162, 163 (D.C. Cir. 1985).

OSHA’s failure to respond to the Unions’ petition for an ETS has effectively denied that petition and certainly “unreasonably delayed” the statutorily mandated action. As a result, judicial review now is proper. This Court has made it clear that when agency delay under “exigent circumstances render[s] it equivalent to a

final denial of petitioners' request,' . . . the court can undertake review as though the agency had denied the requested relief and can order [the] agency to either act or provide a reasoned explanation for its failure to act." *Pub. Citizen Health Research Grp. v. FDA, supra*, 740 F.2d at 32 (quoting *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970)). The unparalleled "exigent circumstances" existing here dictate that OSHA's more than two-month delay in acting on the Unions' petition be treated as "a final denial" of that petition. During the period of this delay, the feared COVID-19 pandemic has expanded with horrific consequences for workers in the United States. In these circumstances, OSHA's inexplicable failure even to respond to the Unions' petition "is tantamount to an order denying" that petition, because it threatens "irreparable injury on a massive scale" of the very kind an ETS is designed to prevent. *Cf. Env'tl. Def. Fund*, 428 F.2d at 1099 (concluding that EPA inaction following a petition calling for emergency EPA action under a statute "designed to protect the public from an 'imminent hazard'" is "tantamount to an order denying" the requested emergency action).

An additional reason for treating OSHA's failure to respond to the Unions' petition as "a final denial" is that the Secretary of Labor has made it clear that OSHA will not issue an ETS. Specifically, in an April 30, 2020 letter to AFL-CIO President Richard Trumka, the Secretary expressly acknowledged that the AFL-

CIO “urges OSHA to adopt an emergency temporary standard,” but stated that such a standard is not necessary, asserting that existing standards and guidance are “more valuable than the rule you describe” and concluding that “[g]uidelines allow flexibility and responsiveness . . . in a way a rule would not.” *See* Addendum, Tab 5, at 2. An agency cannot evade judicial review by the simple expedient of declining to formalize a decision that it has already made, and the Secretary’s letter makes clear the agency has decided not to issue an ETS. *See In re Aiken Cty.*, 645 F.3d 428, 436 (D.C. Cir. 2011) (“We will not permit an agency to insulate itself from judicial review by refusing to act.”).

## **II. OSHA HAS UNLAWFULLY WITHHELD AN ETS AND SHOULD BE COMPELLED TO ISSUE ONE**

To date, COVID-19 has caused more deaths among workers in a shorter time than any other health emergency OSHA has faced in its fifty-year existence. Many more deaths among workers are predicted in the next few months as the economy reopens. The COVID-19 pandemic mandates issuance of an ETS to protect the life and health of workers in the United States.

### **A. Standard of Review**

Although this Court has not adopted a specific standard of review against which to judge the lawfulness of OSHA’s failure to issue an ETS, *compare In re Int’l Chem. Workers Union*, 830 F.2d at 372 (suggesting that a “reasonable[ness]” standard applies) *with Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d at

1156 (suggesting that an “abuse of discretion” standard applies), there is no need here for precision on this point. For even under the most deferential standard of review that might apply, OSHA’s failure to issue an ETS to protect workers from the scourge of COVID-19 represents a clear “abdication of [OSHA’s] statutory responsibility,” *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d at 32, that cannot stand.

While prior decisions in this Court have rejected efforts to compel OSHA to issue an ETS, *see In re Int’l Chem. Workers Union*, 830 F.2d 369; *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, the novel coronavirus now spreading through U.S. workplaces represents an unprecedented workplace health emergency. There can be no doubt that the risk of workplace exposure to the novel coronavirus causing COVID-19 poses a grave danger to employees and that immediate regulatory action by OSHA is necessary to protect workers from that grave danger—particularly as the country reopens and millions of workers must return to the workplace.

As previously noted, while this Court has recognized that OSHA has considerable discretion in making a factual determination as to whether the two statutory requirements for issuance of an ETS have been satisfied, the Court has made it equally clear that OSHA’s discretion is *not* unlimited given “the mandatory [‘shall’] language of” section 6(c) of the OSH Act and “the fact that the

interests at stake are not merely economic interests in a license or a rate structure, but personal interests in life and health.” *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d at 1156.

Congress created OSHA “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” 29 U.S.C. § 651(b). In section 6(b) of the OSHA Act, Congress authorized OSHA “to set *mandatory* occupational safety and health standards,” 29 U.S.C. § 655(b) (emphasis added), aimed at achieving this goal through the “uniform[ ]” application of those mandatory standards on “all employers,” *Kiewit Power Constructors Co. v. Sec’y of Labor*, No. 18-1282, 2020 WL 2503469, at \*\*1-2 (D.C. Cir. May 15, 2020) (internal quotation marks omitted). But OSHA rulemaking under section 6(b), on average, takes seven years.<sup>3</sup> Obviously, a lengthy regulatory proceeding to address the grave and immediate health risks posed by worker exposure to the novel coronavirus would not protect workers from those risks.

Recognizing that extraordinary circumstances involving “danger” to worker life and health so “grave” and immediate as to make ordinary section 6(b) rulemaking inadequate and a swifter form of regulatory action “necessary,”

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<sup>3</sup> U.S. Gov’t Accountability Office, GAO-12-330, *Workplace Safety & Health: Multiple Challenges Lengthen OSHA’s Standard Setting* (2012).

Congress provided in section 6(c) of the OSH Act that OSHA “*shall*” issue an “*emergency temporary standard*” to protect workers against grave and immediate danger. 29 U.S.C. § 655(c) (emphasis added). Against this background, any suggestion by OSHA that it has *carte blanche* to withhold issuance of an ETS no matter how necessary and urgent regulatory action may be to protect workers against grave danger to their lives and health must be rejected.

B. COVID-19 Poses a Grave Danger to Workers

There is no question that the novel coronavirus poses a “grave danger” to workers within the meaning of 29 U.S.C. § 655(c)(1)(A). The virus is a “new hazard,” *id.*, that plainly creates a “danger of incurable, permanent, or fatal consequences to workers” exposed to that hazard. *Fla. Peach Growers Ass’n v. Dep’t of Labor*, 489 F.2d 120, 132 (5th Cir. 1974). OSHA has never suggested otherwise, and even in its initial voluntary guidance document issued in early March—when the pandemic was just beginning to spread throughout the United States and fewer than 20,000 cases had been diagnosed—OSHA recognized several classes of workers who were at “high” or “very high” risk from exposure to the virus in their workplaces.<sup>4</sup>

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<sup>4</sup> OSHA, *Guidance for Preparing Workplaces for Covid-19*, <https://www.osha.gov/Publications/OSHA3990.pdf>; *see also* Enforcement Memorandum from Patrick J. Kapust, Acting Director, Directorate of Enforcement, to Regional Administrators and State Plan Designees (April 13,

1,435,098 total cases of COVID-19 have been reported to CDC as of May 16, 2020.<sup>5</sup> Many of these cases are among “working-age” adults: State level data shows that cases among working age population account for about 75% in each jurisdiction.<sup>6</sup> As of May 13, 43,738 COVID-19 infections among healthcare workers had been reported to CDC, with 191 deaths among these workers,<sup>7</sup> up from 9,282 infections and 27 deaths among health care workers reported by CDC as of April 9.<sup>8</sup> CDC has reported that 4,913 meat processing workers have tested

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2020), <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

<sup>5</sup> U.S. Ctrs. for Disease Control & Prevention, Case Count Reported in Case-Based Surveillance for COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

<sup>6</sup> NYC Health, *Coronavirus Disease 2019 (COVID-19) Daily Data Summary*, <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-data-summary-05142020-1.pdf>; Ca. Dep’t of Pub. Health, Ctr. for Infectious Diseases – Div. of Communicable Disease Control, *COVID-19 by the Numbers*, <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers>; N.J. Dep’t of Health, *COVID-19 Confirmed Case Summary*, [https://www.nj.gov/health/cd/documents/topics/NCOV/COVID\\_Confirmed\\_Case\\_Summary.pdf](https://www.nj.gov/health/cd/documents/topics/NCOV/COVID_Confirmed_Case_Summary.pdf); Mass. Dep’t of Pub. Health, *COVID-19 Dashboard – Thursday, May 14, 2020*, <https://www.mass.gov/info-details/COVID-19-response-reporting#COVID-19-cases-in-massachusetts->; COVID-19 Statistics by Ill. Dep’t of Pub. Health, <https://www.dph.illinois.gov/COVID19/COVID19-statistics>.

<sup>7</sup> CDC, Data, Health Care Personnel Case Counts Reported In Case-Based Surveillance for COVID-19 (on file with agency).

<sup>8</sup> CDC COVID-19 Response Team, *Characteristics of Health Care Personnel with COVID-19 — United States, February 12–April 9, 2020*, 69 MMWR 477, 477-481

positive for COVID-19 and 20 have died; four Agriculture Department meat inspectors have also died.<sup>9</sup> These numbers continue to increase. As of May 16, the Midwest Center for Investigative Reporting reported more than 14,800 COVID-19 infections tied to meat processing plants and at least 55 worker deaths.<sup>10</sup> Similarly, an analysis by Bloomberg News of data compiled by Johns Hopkins University found a 40% increase in confirmed COVID-19 cases in counties with major beef or pork slaughterhouses, compared with a 19% rise nationally, during the week of April 28 to May 5.<sup>11</sup> A separate CDC report on COVID-19 infections at

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(2020), <http://dx.doi.org/10.15585/mmwr.mm6915e6>. According to the CDC, the number of COVID-19 infections among healthcare workers is underreported.

<sup>9</sup> Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States, April 2020* 69 MMWR 557, 557–561 (2020), <http://dx.doi.org/10.15585/mmwr.mm6918e3>; Mike Dorning, *Thirty Workers, Four USDA Inspectors Dead Amid Meat Plant Coronavirus Outbreaks*, Time (May 14, 2020, 3:50 PM), <https://time.com/5836973/usda-inspector-meat-workers-dead-coronavirus/>.

<sup>10</sup> Sky Chadde, *Tracking Covid-19's impact on meatpacking workers and industry*, Midwest Center for Investigative Reporting (April 16, 2020), <https://investigatmidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/>.

<sup>11</sup> Mike Dorning et al., *Infections Near U.S. Meat Plants Rise at Twice the National Rate*, Bloomberg News (May 11, 2020, 1:45 PM), <https://www.bloomberg.com/news/articles/2020-05-11/u-s-meat-plant-areas-see-virus-spreading-at-twice-national-rate>.

correctional facilities reported 2,778 infections and 15 deaths among corrections staff as of April 21, representing 36% of all reported infections at these facilities.<sup>12</sup>

News reports also show that many other groups of workers face grave danger from COVID-19.<sup>13</sup> In New York City, the Metropolitan Transit Authority (MTA) reported that 98 transit workers had died from COVID-19 infections as of May 1.<sup>14</sup> Nationally, the Amalgamated Transit Union and Transport Workers Union report at least 135 transit worker deaths from COVID-19.<sup>15</sup> Widespread infections and deaths from COVID-19 also are being reported among nursing

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<sup>12</sup> Megan Wallace, DrPH. et al., *COVID-19 in Correctional and Detention Facilities — United States, February–April 2020*, 69 MMWR 587, 587-590 (2020), <http://dx.doi.org/10.15585/mmwr.mm6919e1>.

<sup>13</sup> Information on occupation and employment is not regularly reported to state and local health departments or the CDC for COVID-19 infections, so news reports have served as a key source of information on infections and deaths in some worker groups.

<sup>14</sup> Clayton Guse & Graham Rayman, *MTA chairman says 98 transit workers dead from coronavirus*, New York Daily News (May 1, 2020, 5:19 PM), <https://www.nydailynews.com/coronavirus/ny-coronavirus-98-mta-workers-dead-20200501-uirfe2gddzdadigpgtehwrvfy-story.html>.

<sup>15</sup> Matt McFarland, *A bus driver told a rider to wear a mask. Then the passenger spit on her*, WICZ-Fox 40 (May 7, 2020, 12:45 PM), <http://www.wicz.com/story/42103034/a-bus-driver-told-a-rider-to-wear-a-mask-then-the-passenger-spit-on-her>; Amalgamated Transit Union, *Remember Our Fallen*, <https://www.atu.org/remember-our-fallen> Transport Workers Union, *TWU COVID-19 Resources: In Memoriam*, <http://www.twu.org/COVID-resources/#resources>.

home, emergency service, postal, grocery, warehouse, manufacturing and other worker groups.<sup>16</sup> These numbers are only predicted to get worse.<sup>17</sup>

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<sup>16</sup> Tracey Tully, *The Whole Place Is Sick Now’: 74 Deaths at a Home for U.S. Veterans*, New York Times (May 10, 2020), <https://www.nytimes.com/2020/05/10/nyregion/new-jersey-military-veterans-home.html?searchResultPosition=10>; Nancy Asiamah, *Death toll at Soldiers’ Home in Holyoke rises to 85; 72 had COVID-19, 83 employees infected*, WWLP (May 6, 2020, 4:52 PM), <https://www.wwlp.com/news/local-news/hampden-county/death-toll-at-soldiers-home-in-holyoke-rises-to-85-72-had-COVID-19-83-employees-infected/>; *COVID-19: Tracking the coronavirus-related deaths of EMTs and paramedics* EMS1.com (May 4, 2020), <https://www.ems1.com/coronavirus-COVID-19/articles/COVID-19-ems-deaths-jk5zWFziwYVYUaM4>; Alanis King, *The supervisor coughed in a coworker’s direction as a joke’: As coronavirus cases at the US Postal Service surpass 1,200, employees say a lack of supplies and care is putting them at risk*, Business Insider (April 25, 2020, 10:15 AM), <https://www.businessinsider.com/postal-workers-usps-worry-for-their-safety-amid-coronavirus-pandemic-2020-4>; Irene Jiang, *At least 30 grocery store workers have died from the coronavirus, and their colleagues are pleading for shoppers to wear masks and respect social distancing*, Business Insider (April 13, 2020, 2:42 PM), <https://www.businessinsider.com/grocery-store-worker-deaths-from-coronavirus-at-least-30-nationwide-2020-4>; Keith Zubrow, *Amazon worker: At least 600 Amazon employees stricken by coronavirus*, CBS News: 60 Minutes Overtime (May 10, 2020), <https://www.cbsnews.com/news/amazon-workers-with-coronavirus-60-minutes-2020-05-10/>; Kalea Hall & Breana Noble, *At least four workers from FCA’s Warren Truck plant died of COVID-19 – The most of any facility operated by Detroit automakers*, The Detroit News (May 4, 2020, 12:01 AM), <https://www.detroitnews.com/story/business/autos/2020/05/04/flat-chryslers-warren-truck-mourns-loss-dead-COVID-19/3050072001/>; Associated Press, *Workplace worries mount as U.S. tracks new coronavirus cases*, WTOP.com <https://investigatemitwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/>.

<sup>17</sup> University of Washington, Institute for Health Metrics and Evaluation, *New IHME Forecast Projects Nearly 135,000 COVID-19 Deaths in US: Rising Mobility in Most States and the Easing of Social Distancing Point to Increases in Personal Contact that Promote Transmission of the Disease* (May 4, 2020),

These statistics show that three groups of “essential” workers are at particularly high risk of COVID-19 infection. At highest risk are those who work directly with COVID patients, such as nurses, emergency medical technicians, and other workers in institutional settings like nursing homes or correctional facilities. Also at high risk are those whose jobs require that they repeatedly come into close contact with unscreened members of the general public throughout the workday, such as grocery and other retail clerks as well as bus drivers and other transit workers. Finally, outbreaks of COVID infection at meatpacking and poultry processing facilities illustrate that workers whose jobs require that they come into close contact with one another in confined areas also are at great risk.

Simply put, workplace exposure to the novel coronavirus causing COVID-19 poses a “grave danger” to millions of workers in the United States that OSHA cannot possibly deny.<sup>18</sup>

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<http://www.healthdata.org/news-release/new-ihme-forecast-projects-nearly-135000-covid-19-deaths-us>; University of Washington, Institute for Health Metrics and Evaluation, *COVID-19: What’s New for May 12, 2020*, <http://www.healthdata.org/covid/updates> (increased the estimate to 147,040 cumulative deaths from COVID-19 in the U.S. by August 2020); Columbia University, Mailman School of Public Health, *Projections Suggest Potential Late May COVID-19 Rebound* (May 7, 2020), <https://www.mailman.columbia.edu/public-health-now/news/projections-suggest-potential-late-may-covid-19-rebound>.

<sup>18</sup> The fact that the novel coronavirus is not a uniquely work-related hazard does not in any way minimize the “grave danger” facing workers or make that virus an improper subject of a mandatory OSHA standard, as the Secretary’s April 30 letter

C. An ETS is “Necessary” to Protect Workers.

It is equally clear that an ETS is “necessary” to protect workers against the grave danger they face from workplace exposure to the coronavirus within the meaning of 29 U.S.C. § 655(c)(1)(B). Neither of the arguments to the contrary in the Secretary of Labor’s April 30 letter to the AFL-CIO bear scrutiny.

1. The Secretary’s first argument is that existing general OSHA standards adopted years before the COVID-19 pandemic, coupled with the OSH Act’s general duty clause, 29 U.S.C. § 654(a)(1), adequately protect workers from contracting COVID-19 in the workplace. This argument fails for several reasons.

First and foremost, the five general standards cited by the Secretary were not designed specifically to protect against workplace transmission of the novel coronavirus or any airborne infectious disease. As a result, they do not require employers to conduct a worksite hazard assessment to identify sources of potential exposure to or contact with the virus. Nor do they require employers to adopt a number of specific measures—in particular, social distancing and post-contact

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seems to imply. *See* Addendum, Tab 5, at 2. Noise is not a uniquely work-related hazard, but the Fourth Circuit has upheld OSHA’s mandatory standard, 29 C.F.R. § 1910.95, regulating workplace exposure to it. *Forging Indus. Ass’n v. Sec’y of Labor*, 773 F.2d 1437, 1444 (4th Cir. 1985). Diseases caused by bloodborne pathogens, including AIDS and hepatitis B, are not uniquely work-related hazards, but that did not stop OSHA from regulating workplace exposure to them. 29 C.F.R. § 1910.1030; *see also Am. Dental Ass’n v. Martin*, 984 F.2d 823 (7th Cir. 1983). OSHA has a duty to protect workers from hazards they are exposed to at work even if they also are exposed to the same hazards before and after work.

isolation—most likely to prevent such transmission. Moreover, even to the extent that those general standards might be helpful in limiting workplace transmission of the virus, they do not require all the measures that would protect workers from this particular hazard and are thus insufficient in the COVID-19 context.

OSHA’s Personal Protective Equipment (PPE) standard, 29 C.F.R. § 1910.132, and its related standard on eye and face protection, 29 C.F.R. §1910.133, leave it entirely up to employers to determine what PPE (including eye and face protection) must be supplied to workers. *See* OSHA, *Standards*, Safety and Health Topics: COVID-19, <https://www.osha.gov/SLTC/covid-19/standards.html>. OSHA’s respiratory protection standard, 29 C.F.R. § 1910.134, requires employers to implement a comprehensive respirator program when employees are exposed to an airborne contaminant or when another OSHA standard requires their use, *see Sec’y of Labor v. Seward Ship's Drydock, Inc.*, 937 F.3d 1301, 1302-03 (9th Cir. 2019). Currently, it is OSHA’s and CDC’s position that the primary route of exposure to the coronavirus is through droplet transmission, not airborne contamination, and neither agency has recommended the use of respiratory protection to limit exposure to COVID-19 in most workplace settings.<sup>19</sup> Instead, surgical masks or cloth face coverings are recommended, but

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<sup>19</sup> Currently, OSHA and CDC only recommend respiratory protection for healthcare workers and other workers at high risk of close contact with individuals with suspected or confirmed COVID-19 infection.

these are not respirators, are not considered PPE, and are not required by current OSHA regulations. The sanitation standard, 29 C.F.R. § 1910.141, includes general requirements for keeping workplaces clean and providing drinking water and toilet facilities. But it includes no requirements for disinfecting surfaces or providing ready access to hand washing facilities or hand sanitizer. And, OSHA’s hazard communication standard, 29 C.F.R. § 1910.1200, merely requires employers to notify employees of the hazards posed by chemicals they use to disinfect surfaces but does not otherwise apply to the COVID-19 crisis.

<https://www.osha.gov/SLTC/covid-19/standards.html>.

Nor is this gaping regulatory hole in worker protection from COVID-19 closed by the OSH Act’s general duty clause, 29 U.S.C. § 654(a)(1), which imposes only a general duty on employers to provide “employment and a place of employment which are free from recognized hazards . . . .” The general duty clause does not require employers to take any specific measure to protect workers from the coronavirus. For that reason, years before the COVID-19 pandemic emerged, OSHA itself acknowledged that the general duty clause does *not* “adequately protect workers with occupational exposure to infectious diseases.” See OSHA, *Infectious Diseases SER Background Document*, pp. 122-123, available at <https://www.osha.gov/dsg/id/OSHA-2010-0003-0239.pdf> (“*SER Backgrounder*”). To prove a violation of that clause, OSHA must prove, on a case-

by-case basis, that a recognized hazard actually is “present[ ]” in the employer’s workplace and that it is “feasible” for the employer to abate that hazard. *SeaWorld v. Perez*, 748 F.3d 1202, 1207 (D.C Cir. 2014); *see also e.g. Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637 (5th Cir. 1979); *Nat’l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). This can often be a difficult burden for OSHA to meet in individual cases, and thus can severely tax OSHA’s limited enforcement resources. For example, in a recent case, the Occupational Safety and Health Review Commission (“OSHRC”), which adjudicates employer challenges to OSHA citations, found that OSHA had not adequately proven that excessive heat was “present” at a roofing company’s work site, even though an employee on the employer’s roofing job had died of heat stroke. *Sec’y of Labor v. A.H. Sturgill Roofing Inc.*, No. 13-0224, 2019 WL 1099857, at \*\*3-5 (Rev. Comm’n Feb. 28, 2019); *see also generally* Allan Ferguson, *OSHA’s General Duty Clause*, Safety + Health (Dec. 20, 2019), <https://www.safetyandhealthmagazine.com/articles/19258-oshas-general-duty-clause> (enumerating the many “hurdles” OSHA faces in enforcing the general duty clause). Moreover, under the general duty clause, employers decide how to abate a cited hazard; OSHA cannot require specific, uniform control methods. *See Sec’y of Labor v. Arcadian Corp.*, No. 93-0628, 2004 WL 2218388 (Rev. Comm’n Sept. 30, 2004). In contrast, when OSHA issues a mandatory standard, employers have clear notice of what worker

protections are required, and OSHA can establish a violation by showing the standard applies and was not met.

Unsurprisingly against this background, these existing mandatory requirements have proven to be toothless as the COVID-19 pandemic has continued to ravage workplaces across the country. As of May 14, OSHA had received 3,8936 COVID-19 related complaints alleging violations of the OSH Act, but had already closed about 2,844 of them without issuing a single citation.

<https://www.osha.gov/enforcement/covid-19-data>. In addition, a search of OSHA's enforcement database conducted on May 13 found that OSHA had opened 181 inspections in healthcare settings (NAICS 62) between March 1 and May 13; 157 of these inspections were initiated only *after* a worker fatality, and not as a preventive action. And, as of May 13, no citations had been issued as a result of any of those inspections.<sup>20</sup> In fact, we are not aware of a single citation under any of the standards cited by the Secretary or under the general duty clause relating to exposure to the coronavirus.<sup>21</sup>

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<sup>20</sup>[https://www.osha.gov/pls/imis/industry.search?sic=&sicgroup=&naicsgroup=&naics=62&state=All&officetype=Fed&office=All&startmonth=05&startday=13&startyear=2020&endmonth=04&endday=01&endyear=2020&opt=&optt=&scope=&fedagncode=&owner=&emph=&emphhp=&p\\_start=120&p\\_finish=140&p\\_sort=&p\\_desc=DESC&p\\_direction=Prev&p\\_show=20](https://www.osha.gov/pls/imis/industry.search?sic=&sicgroup=&naicsgroup=&naics=62&state=All&officetype=Fed&office=All&startmonth=05&startday=13&startyear=2020&endmonth=04&endday=01&endyear=2020&opt=&optt=&scope=&fedagncode=&owner=&emph=&emphhp=&p_start=120&p_finish=140&p_sort=&p_desc=DESC&p_direction=Prev&p_show=20).

<sup>21</sup> The fact that OSHA has not issued any citations is not surprising, since it has directed its own staff that they should “not normally” perform on-site inspections in locations that it considers “medium” or “low” risk, including situations like

Simply put, the five general standards and the general duty clause are insufficient to address the grave hazard and protect workers to the greatest extent possible as required by the OSH Act.

2. The Secretary of Labor also argues that the voluntary guidance materials that OSHA has issued to assist employers in responding to the COVID-19 crisis are an adequate substitute for an enforceable, COVID-19 specific standard. To underscore their voluntary nature, these guidance documents<sup>22</sup> typically begin with the following disclaimer: “This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in

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those existing at meat and poultry processing facilities where workers must stand in close proximity to each other. *See* Enforcement Memorandum from Patrick J. Kapust, Acting Director, Directorate of Enforcement, to Regional Administrators and State Plan Designees (April 13, 2020), <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

<sup>22</sup> Most of these documents are found under “Alerts” on OSHA’s Covid-19 webpage. [https://www.osha.gov/SLTC/covid-19/news\\_updates.html](https://www.osha.gov/SLTC/covid-19/news_updates.html). The OSHA/CDC meatpacking and manufacturing guidance documents are found on the CDC website: <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>. These documents are longer and somewhat more comprehensive than the OSHA “Tips,” but full of the same non-mandatory “Employers should consider;” “Employers should if possible,” and “Employers are encouraged” language.

providing a safe and healthful workplace.”<sup>23</sup> This type of guidance is no substitute for mandatory standards addressing COVID-19 risks.

When Congress enacted the OSH Act, among its central conclusions was that employers cannot be relied on in all cases to take voluntary measures sufficient to protect the health and safety of their workforce. *See Kiewit Power Constructors, supra*, 2020 WL 2503469, at \*1 (“Until [the OSH Act], workplace safety was addressed in a patchwork by federal and state regulations and, to a degree, employers’ voluntary efforts. *See* S. Rep. No. 91-1282, at 3-4 (1970). The measures were largely ineffective.”). That is why Congress crafted a set of detailed statutory provisions imposing on OSHA the statutory duty to adopt *mandatory* health and safety standards adequate to protect workers against known hazards in the workplace, *see* 29 U.S.C. §§ 655(b)(3), 655(b)(5), 655(c), and providing for the imposition of civil penalties against employers who violate those mandatory standards, *see* 29 U.S.C. § 666. More pointedly given the nature of the COVID-19 pandemic, Congress specifically provided in 29 U.S.C. § 655(c) that the mechanism to be used by OSHA in protecting workers against a grave and immediate health danger in the workplace “shall” be the issuance of a *mandatory* emergency temporary standard. Had Congress considered the issuance of

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<sup>23</sup> *See*, OSHA, OSHA 3990-03, Guidance on Preparing Workplaces for COVID-19 (2020), <https://www.osha.gov/Publications/OSHA3990.pdf>.

voluntary guidelines a permissible option for OSHA in such urgent circumstances, Congress surely would have said so.

In his April 30 letter defending OSHA’s reliance on voluntary guidance materials in lieu of a mandatory standard, the Secretary stated, without any support, that “employers are implementing measures to protect workers” against COVID-19. Doubtless, many employers are doing so, for which they should be commended. But that kind of voluntary and inevitably non-uniform implementation of safe practices hardly serves as a substitute for mandatory, legally-enforceable, COVID-19-specific requirements applicable to *all* employers. *See Kiewit Power Constructors*, 2020 WL 2503469, at \*1 (“A key deficiency” of pre- OSH Act federal protections “was that they did not extend to all employers.”). Indeed, given the number of reported illnesses and deaths, it should be obvious that voluntary employer action has not adequately protected workers from COVID-19.<sup>24</sup> Moreover, one of the justifications for mandatory standards is to “level the

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<sup>24</sup> *See e.g.*, Ana Swanson et al., *Pork Chops vs. People: Battling Coronavirus in an Iowa Meat Plant*, New York Times (May 10, 2020), <https://www.nytimes.com/2020/05/10/business/economy/coronavirus-tyson-plant-iowa.html>; Lucas Manfredi, *Three Walmarts close after coronavirus hits employees*, Fox Business (May 10, 2020), <https://www.foxbusiness.com/lifestyle/walmart-stores-close-coronavirus-employees>; Michael Hiltzik, *Nurses know we were unprepared for the coronavirus. They’re being punished for speaking out*, Los Angeles Times (April 17, 2020, 6:00 AM), <https://www.latimes.com/business/story/2020-04-17/nurses-front-lines-punished>.

playing field” so that employers who proactively protect their workforces are not placed at a competitive disadvantage by the actions of unscrupulous or uncaring employers. *Indus. Union Dep’t v. Hodgson*, 499 F.2d 467, 481 (D.C. Cir. 1974).

Indeed, just as OSHA has expressly recognized the insufficiency of regulation under the general duty clause in the context of infectious diseases, OSHA has recognized that voluntary guidelines likewise are insufficient “adequately [to] reduce the risk” to workers posed by infectious diseases because they are not “consistently adopt[ed] or rigorously enforce[d]” by many employers. *See SER Backgrounder, supra* p. 20, at 16. OSHA’s about-face here on this critical point is inexplicable and unconscionable.

OSHA’s refusal to adopt an ETS that would impose mandatory, legally-enforceable, COVID-19-specific duties on employers stands in marked contrast to the approach taken by other arms of the federal government in response to the COVID-19 pandemic. Putting aside inevitable debates about their sufficiency and timeliness, other arms of the federal government have taken at least some legally binding actions designed specifically to address the pandemic. The President himself has issued a proclamation designating the outbreak of COVID-19 a national emergency, Proclamation No. 9994, 85 Fed. Reg. 15,337 (2020), and invoking the Defense Production Act to compel specific responses by employers to that national emergency related to production of essential equipment and continued

operation of meat processing operations. The Department of Health and Human Services has declared a public health emergency and taken a number of regulatory steps authorized by that declaration.<sup>25</sup> The Food and Drug Administration has exercised its statutory authority to allow emergency use of certain medicines, personal protective equipment and other medical devices. *See* Emergency Use of Authorization Declaration, 85 Fed. Reg. 17,335 (March 27, 2020). And, Congress has enacted laws including unprecedented levels of aid for businesses and individuals affected by the disease and the emergency response to it. *See, e.g.*, Families First Coronavirus Response Act, Pub. Law 116-127, 134 Stat. 178 (2020); CARES Act, Pub. Law 116-136, 134 Stat. 281 (2020).

OSHA should be compelled by this Court to do its statutory duty in responding to the COVID-19 pandemic by exercising its authority under 29 U.S.C. § 655(c) to issue an ETS that is legally binding on all employers. Nothing less suffices adequately to protect all workers to the extent feasible from the grave danger they face on the job during this pandemic.

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<sup>25</sup> Office of the Secretary, Department of Health and Human Services, Determination of Public Health Emergency, 85 Fed. Reg. 7316 (Feb. 7, 2020) <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

### **III. THE APPROPRIATE REMEDY FOR OSHA'S UNLAWFUL WITHHOLDING OF AN ETS IS A WRIT OF MANDAMUS COMPELLING OSHA TO ISSUE ONE WITHIN THIRTY (30) DAYS**

The COVID-19 pandemic warrants an ETS to require mandatory protective measures to protect the life and health of workers now and as the economy reopens. Given the urgency of the situation, and the additional considerations outlined below, an order from this Court requiring OSHA to promulgate an ETS within thirty (30) days is both necessary and appropriate.

This Court has not hesitated to impose a timetable to govern OSHA regulatory action when it has found such judicial action necessary. *Pub. Citizen Research Grp. v. Auchter*, 702 F.2d at 1153; *UAW v. Donovan*, 765 F.2d at 165. In *Public Citizen*, the Court ordered OSHA to publish a proposed ethylene oxide standard within thirty days of its order. While OSHA may have discretion as to the content of any standard regulating workplace exposures to the novel coronavirus, it has, as we have shown, a statutory duty to impose some type of mandatory, legally-enforceable obligations on employers aimed at protecting employees from the virus. *Cf. In re: Pub. Emps. for Envtl. Responsibility*, 2020 WL 2090085, at \*4 (D.C. Cir. May 1, 2020) (distinguishing an agency's discretion over the content of a plan from an agency's statutory duty to create a plan). And, absent an order from this Court requiring OSHA to fulfill its statutory duty with extraordinary dispatch, the COVID-19 pandemic will continue to surge across the country and exact its

terrible toll on workers in the United States as they return to work in increasing numbers.

Moreover, compelling OSHA to act within thirty days is appropriate because OSHA has already developed much of the content for an ETS. OSHA has been considering an infectious disease standard for more than a decade; has already issued, and received comment on, a Request for Information;<sup>26</sup> and has drafted a proposed standard that was the subject of a Small Business Regulatory Enforcement Fairness panel report, *see Report of the Small Business Advocacy Review Panel on a Possible OSHA Rule on Occupational Exposure to Infectious Diseases in Healthcare and Other Related Work Settings* (Dec. 22, 2014), <https://www.regulations.gov/document?D=OSHA-2010-0003-0250>. At about the same time, OSHA posted a proposed regulatory framework, *Outline of Key Provisions in OSHA's Infectious Diseases Regulatory Framework* (Oct. 9, 2014) <https://www.regulations.gov/document?D=OSHA-2010-0003-0244>, and a 158-page document laying out its then current view of the infectious disease problem and its proposed regulatory response. *See SER Backgrounder, supra* p. 20. There

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<sup>26</sup> OSHA published a Request for Information on Infectious Diseases on May 6, 2010, *see* 75 Fed. Reg. 24835, and, according to [www.regulations.gov](http://www.regulations.gov), received 226 comments in response. OSHA Docket 2010-003. OSHA held public stakeholder meetings on an infectious disease standard as well. *See* 76 Fed. Reg. 39041 (July 5, 2011).

simply is no good reason why OSHA cannot act within thirty days given the substantial resources it has already invested in the development of a permanent standard.<sup>27</sup> Moreover, OSHA could also borrow from California's existing Aerosol Transmission Disease standard, 8 Cal. Code of Regulations § 5199, as necessary to help meet this court-imposed deadline.

The two ETS petitions filed on March 4 and 6 specifically requested that OSHA adopt an ETS that requires each employer to evaluate its workplace for the risk of airborne disease transmission and to develop a comprehensive infection control plan with specified elements. OSHA's draft infectious disease standard includes the same core requirement, as do the non-mandatory COVID guidance documents that both OSHA itself, *see supra* pp. 23-24, and the CDC have developed, *see* <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.<sup>28</sup> Any or all of these materials could form the basis of an ETS. The important point is that OSHA can and should adopt an emergency

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<sup>27</sup> Indeed, OSHA's December 2016 Regulatory Plan listed the expected date for publication of a NPRM on airborne infectious diseases as October 2017. *See* 81 Fed. Reg. 94601 (Dec. 23, 2016).

<sup>28</sup> OSHA's earlier guidance on pandemic influenza (H1N1) from 2009 contains similar core elements, *see* OSHA 3327-06R, *Guidance on Preparing Workplaces for an Influenza Pandemic* (2009), <https://www.osha.gov/Publications/OSHA3327pandemic.pdf>.

standard imposing a mandatory duty on employers to protect workers from COVID-19 disease without any further delay.

We are not asking the Court to compel OSHA to adopt a one-size-fits-all regulatory response to the workplace threats posed by the novel coronavirus. As noted, a core element of OSHA's draft standard on infectious disease that OSHA may draw on in crafting an ETS is the mandatory requirement that every employer adopt a comprehensive infection control plan that assesses the level of risks that its employees face from infectious diseases like COVID-19 in its own particular workplace, and then complies with a set of mandatory worker protection provisions addressing the workplace-specific risks facing its own employees. Such protections would likely include social distancing measures, supply of appropriate PPE, access to hand sanitizers, testing, and quarantining. Right now, however, no employer is *required* to adopt an infection control plan after assessing the level of risks its employees face from the novel coronavirus or to implement controls to reduce hazards from airborne exposure. Issuing an ETS imposing such a basic requirement is clearly possible within thirty days given the regulatory history, and doing so is clearly reasonable because it would simply require employers to adopt protective measures tailored to the risk in their individual workplaces, backed up by the threat of civil penalties if they fail to do so.

## CONCLUSION

For the foregoing reasons, this Court should grant a writ of mandamus compelling OSHA to issue an ETS within thirty (30) days of that grant.

Respectfully submitted,

/s/ Harold Craig Becker  
Harold Craig Becker  
General Counsel  
AFL-CIO  
815 16<sup>th</sup> St., N.W.  
Washington, D.C. 20006  
(202) 637-5310  
[cbecker@aficio.com](mailto:cbecker@aficio.com)

/s/ Andrew D. Roth  
Andrew D. Roth  
Bredhoff & Kaiser, P.L.L.C.  
805 15<sup>th</sup> Street, N.W.,  
Suite 1000  
(202) 842-2600  
[aroth@bredhoff.com](mailto:aroth@bredhoff.com)

/s/ Randy S. Rabinowitz  
Randy S. Rabinowitz,  
OSH Law Project, LLC,  
PO Box 3769,  
Washington, D.C. 20027  
(202) 256-4080  
[randy@oshlaw.org](mailto:randy@oshlaw.org)

*Counsel for Petitioner AFL-CIO*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Emergency Petition contains 7,090 words, excluding those portions of the Petition excluded from the word count under Fed. R. App. P. 32(f), and thus complies with the word limit set by Fed. R. App. P. 21(d)(1), and that the Petition also conforms to Fed. R. App. P. 32(c)(2), as required by Fed. R. App. P. 21(d).

/s/ Andrew D. Roth

*Counsel for Petitioner AFL-CIO*

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2020, I caused a copy of this Emergency Petition to be served on Respondent by electronic and overnight mail delivery to:

Kate S. O'Scannlain  
Solicitor of Labor  
United States Department of Labor  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
[OScannlain.Kate.S@dol.gov](mailto:OScannlain.Kate.S@dol.gov)

Edmund Baird  
Associate Solicitor (Acting) for Occupational  
Safety & Health  
United States Department of Labor  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
[Baird.edmund@dol.gov](mailto:Baird.edmund@dol.gov)

/s/ Andrew D. Roth

*Counsel for Petitioner AFL-CIO*