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

Occupational Safety and Health Administration, United States Department of Labor

Respondent.

REPLY IN SUPPORT OF EMERGENCY PETITION FOR A WRIT OF MANDAMUS

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INTRODUCTION

At the outset of its Response (Resp.) to the AFL-CIO's Petition to compel OSHA to issue an emergency temporary standard (ETS) regulating workplace exposure to the novel coronavirus, OSHA decries the purported efforts of a "single private litigant" to obtain "a privileged position" for itself by seeking relief so "extraordinary" that this Court "*never*" has seen fit to grant it. Resp. 1-3 (emphasis in original). But that rhetorical flourish loses sight of the fact that the AFL-CIO has brought this matter before this Court not to benefit itself, but to benefit millions of workers in this country, union and non-union alike, who face a grave and immediate danger to their lives from COVID-19 as they return to work in increasing numbers—a grave and immediate danger that OSHA *does not deny* and that is more "extraordinary" from a historical perspective than the relief sought here. Indeed, OSHA cannot deny the gravity and immediacy of the workplace emergency in this country as the worker death toll from COVID-19 mounts, especially in the healthcare and meatpacking sectors.[1]

OSHA's opposition reduces to two propositions. First, an ETS is not "necessary" within the meaning of section 6(c) of the OSH Act, 29 U.S.C.

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[1] *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (healthcare); https://investigatemidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/ (meatpacking).

§ 655(c), to save worker lives because OSHA itself, as well as "other government entities and private industry," are "employing many different tools to combat the coronavirus" that together constitute legally satisfactory "alternatives" to an ETS. Resp. 34. Second, there are, in any event, practical obstacles to issuance of an ETS that justify OSHA's "strategy" of eschewing one. *Id.* 28-34.

As we show in Part I below, there is no legal merit in OSHA's claim that an ETS is not "necessary" here because, even combined, the tools OSHA is relying on are both legally and factually insufficient to meet the grave danger posed by COVID-19. In Part II, we show that OSHA's practical objections to the issuance of an ETS also are without merit.[2]

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[2] OSHA's preliminary jurisdictional arguments are baseless. OSHA questions this Court's jurisdiction under *Telecomm. Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70 (D.C. Cir. 1984), Resp. 15, but this Court found jurisdiction under *TRAC* on identical jurisdictional facts in *In re Chemical Workers Union*, 830 F.2d 369 (D.C. Cir. 1987). OSHA also questions the AFL-CIO's standing on the ground that it has not shown a "substantial likelihood" that an ETS is necessary to protect workers against contracting COVID-19 disease, Resp. 15-16, 18-19, but whether the AFL-CIO has made that showing is the dispositive merits issue here, and this Court has held that "[w]hether a plaintiff has a legally protected interest that supports standing does not require that he show he will succeed on the merits;" in fact, "[i]n assessing standing, [this Court will] assume that plaintiffs could prevail on those claims." *Estate of Boyland v. Dep't of Agric.*, 913 F.3d 117, 123, 119 (D.C. Cir. 2019). The AFL-CIO plainly has standing under the well-established test for associational standing. *See e.g. Air All. of Hous. v. EPA*, 906 F.3d 1049, 1058 (D.C. Cir. 2018). The AFL-CIO is the largest organization of workers protected by the OSH Act, with 55 national affiliates representing approximately 13 million workers. The AFL-CIO's affiliates include unions that represent workers in every industry where the incidence of illness and death is substantially greater than among the general public, including healthcare,

ARGUMENT

I. AN ETS PLAINLY IS "NECESSARY," AND OSHA'S CONTRARY DETERMINATION IS WITHOUT LEGAL MERIT

The OSH Act, its purposes, and its legislative history compel the conclusion that an ETS is "necessary" within the meaning of section 6(c) of the Act where, *as here*, OSHA's existing permanent standards are inadequate to protect workers from a grave danger to their lives posed by a workplace hazard and the grave danger is so immediate that *the specific tool* Congress intended for OSHA to use in an effort to save those worker lives is an ETS, and that OSHA cannot negate this "necessity" of an ETS by pointing to the "many different tools" the agency and others are employing "to combat" the workplace hazard—including, specifically, the *non*-statutory tool of providing extensive but *non*-binding guidance materials to employers, Resp. 4-6; reliance on the general duty clause in section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), *id.* 7, 24-27; actions by other federal, state and local governments, *id.* 9-12; and "guidance developed by private industry," *id.* 10, 12-13.

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meatpacking, public transit, and corrections. Grimly, injury in fact is shown by the list on the AFL-CIO's website of 660 union members who already have died as a result of contracting COVID-19 disease. https://aflcio.org/covid-19/memoriam.

A. An ETS Plainly is "Necessary"

As set out in our Petition at 11-12, the primary statutory tool that Congress gave OSHA to fulfill its mandate to protect the lives of workers to the greatest extent possible is the section 6(b) authority to "set mandatory occupational safety and health standards," 29 U.S.C. § 651(b)(3), that impose specific, legally-binding obligations on employers. At the same time, however, Congress recognized that urgent situations might arise—including the emergence of "new" and deadly hazards like the novel coronavirus—in which existing permanent standards would be inadequate to protect workers from a grave danger, and in which the grave danger would be so immediate as to effectively prevent OSHA from protecting workers' lives through the notice-and-comment rulemaking process required to issue new permanent standards or to amend existing ones. *See* 29 U.S.C. §§ 655(b)(1)-(4). Congress therefore gave OSHA in section 6(c) the specific statutory tool of an ETS that can be issued without notice-and-comment to fill the regulatory void that otherwise would have existed in such urgent situations.

It follows from this statutory structure that an ETS is "necessary" within the meaning of section 6(c) where OSHA's existing permanent standards are inadequate to protect workers from a grave danger to their lives posed by a workplace hazard, and the danger is so immediate that *the specific tool* Congress intended for OSHA to use in an effort to save those worker lives is an ETS.

In this regard, it speaks volumes that one of the two decisions that OSHA cites (Resp. 19-20) in ostensible support of a different test of "necessity," *see Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415 (5th Cir. 1984), actually lends support to our proposed test.[3] There, in invalidating an ETS lowering the existing permissible exposure level to asbestos, the court held that the "necessity" requirement was not met because, "[e]ven assuming" that the higher exposure allowed under OSHA's then-current standard posed a grave danger of worker deaths, the "added saving" of life the ETS would likely produce was "obtainable by" the enforcement of a specific, legally-binding obligation in that "current standard" with regard to respirator use. *Id.* at 426. By a parity of reasoning, the "necessity" requirement of section 6(c) *is* met where existing OSHA standards do *not* impose specific, legally-binding obligations on employers the enforcement of which would substitute for an ETS as the means of trying to save worker lives immediately threatened by a new workplace hazard like COVID-19.[4]

[3] The other cited decision, *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983), is inapposite because there the Court rested its decision on lack-of-grave-danger grounds and did not address the "necessity" requirement.

[4] No court has evaluated the "necessity" of an ETS by considering measures short of an enforceable standard, as OSHA asks this Court to do here. Rather, courts have uniformly asked whether the evidence of a grave danger was certain enough or the danger presented serious enough that it must be addressed on an interim basis through an enforceable standard. *See, e.g., Dry Color Mfrs. Ass'n v. DOL*, 486 F.2d 98, 105 (3d Cir. 1973) (explaining that "necessary to protect employees"

That is precisely the urgent situation presented here. Although existing OSHA standards provide some protection against the grave danger of severe illness and death from workplace exposure to COVID-19, OSHA itself concedes, as it must, that those existing standards do not require "social distancing," "quarantin[ing] of symptomatic persons," and other specific measures that are recognized as essential to the protection of workers against this new hazard. Resp. 20. *See also id.* 29 (recognizing importance of "daily health checks," "appropriate disinfection procedures following a confirmed case," and "increased ventilation as a protective measure to help combat infection"). Nor do the respirator, PPE and sanitation standards of general applicability singled out by OSHA, Resp. 21-23, specifically address what employers must do to protect workers against the specific risks posed by COVID-19, thus greatly complicating any effort by OSHA to enforce these standards against employers in the COVID-19 context. Finally, OSHA's existing standards do not impose on employers the legally-binding requirement, essential to the protection of workers against any type of airborne infectious disease, that each employer evaluate its workplace to identify risks of transmission of the coronavirus and develop a comprehensive infection and exposure control plan addressing the risks. *See* Petition 30.

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means "provid[ing] immediate protection to employees exposed to a grave danger" that would not otherwise exist).

Given this existing regulatory gap, and the time that would be involved in closing it through notice-and-comment rulemaking, an ETS plainly is *the* "necessary" statutory tool that Congress intended for OSHA to use in urgent circumstances of the kind now confronting millions of workers in the United States. That being so, OSHA's withholding of an ETS under the present circumstances is precisely the kind of clear abdication of statutory duty that warrants the extraordinary relief requested.

B. OSHA's Contrary Determination That an ETS is Unnecessary is Without Legal Merit

OSHA's effort to negate the "necessity" of an ETS by pointing to the "many different tools" that the agency and others are employing "to combat the coronavirus" is without legal merit because Congress did not deem *any* of those tools an adequate substitute for OSHA's adoption of specific, legally-binding standards addressing workplace hazards—much less grave and immediate new hazards like COVID-19.

1. The "different tool" relied on most heavily by OSHA as a substitute for an ETS is the *non*-statutory tool of providing employers with an extensive collection of guidance materials offering recommendations and "tips" on what employers can do to combat the coronavirus in their workplaces. Needless to say, the defining characteristic of this *non*-statutory tool is that OSHA's guidance is not legally binding on employers. And, as Congress explicitly recognized in

enacting the OSH Act, it is inevitable that in the absence of a legally-binding requirement to do otherwise, at least some bad actors and economically pressed businesses will skimp on "invest[ing] in worker health and safety" to "obtain a competitive advantage." *Am. Textile Mfrs. v. Donovan*, 452 U.S. 490, 521 n.38 (1981) (quotations omitted). Taking cognizance of this reality, Congress gave OSHA the *statutory* tool of imposing "mandatory occupational safety and health standards" on employers after notice-and-comment rulemaking, as well as the *statutory* tool of imposing legally-binding temporary obligations on employers without notice-and-comment when emergency circumstances so require. Because, as we have shown, emergency circumstances so require here, OSHA's heavy reliance on non-statutory guidance materials that employers are free to interpret narrowly or ignore altogether stands the OSH Act on its head. As this Court bluntly put it in *Auchter* in response to OSHA's similar reliance on non-statutory guidance and "voluntary efforts of employers" based on that guidance, "OSHA has embarked upon the least responsive course short of inaction." 702 F.2d at 1153. As a matter of law and common sense, OSHA cannot conclude that an ETS is unnecessary on the assumption that all employers will rigorously comply voluntarily with non-enforceable guidance.[5]

[5] In fact, uncontested empirical evidence demonstrates that when OSHA has replaced guidance with standards it has led to measurable improvements in worker health. *See, e.g.*, https://jamanetwork.com/journals/jamainternalmedicine/article-

2. OSHA's substantial reliance on the general duty clause of the OSH Act, 29 U.S.C. § 654(a)(1), likewise stands the statute on its head. It is no doubt a truism that the imposition of *general* duties on regulated persons or entities is bound to be less effective in achieving the desired benefits of a regulatory scheme than the imposition of *specific* duties. The imposition of a general tort duty to avoid negligent conduct, for example, is bound to be less effective than the setting of a speed limit for operating motor vehicles. Unsurprisingly against this background, the OSH Act's legislative history contains authoritative statements evincing a congressional intent that OSHA *not* rely on the general duty clause as a "substitute" for reliance on specific standards generally, *see* S. Rep. No. 91-1282, at 10, and on "temporary emergency standards" in particular, *see* December 17, 1970 Congressional Record-House, *reprinted in* Subcommittee on Labor's Compiled Legislative History of the OSH Act ("Compiled Leg. Hist."), at 1217 (report of Congressman Steiger, a House manager of the Conference Committee, in recommending the Conference Report for final adoption).[6] In the latter regard, Congressman Steiger stated:

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abstract/624150 (finding that promulgation of the bloodborne pathogen standard in 1991 led to a reduction in hepatitis B infections among healthcare workers from 17,000 in 1983 to 400 in 1995).

[6] The first cited report was treated as authoritative in this Court's recent decision in *Kiewit Power Constructors Co. v. Sec'y of Labor*, No. 18-1282, 2020 WL

> [T]he general duty requirement should not be used to set ad hoc standards. *The bill already provides for establishing temporary emergency standards.* It is expected that the general duty requirement will be relied upon infrequently and that primary reliance will be placed on specific standards which will be promulgated under the act.

Id. (emphasis added).[7]

OSHA itself has recognized that a specific standard "is more protective of employee health than an enforcement program that is based upon a general provision." 56 Fed. Reg. 64,004, 64,007 (Dec. 6, 1991) (concluding that general duty clause enforcement could not substitute for a bloodborne pathogen standard).[8] In any event, general duty clause enforcement could only help protect workers if OSHA actually cited employers for failing to comply. Since the COVID-19

2503469, at **1-2 (D.C. Cir. May 15, 2020), and the second was treated as such in *Auchter*, 702 F.2d at 1155 & n.19.

[7] OSHA's suggestion that it can enforce its guidance through the general duty clause is contradicted by *amicus* Chamber of Commerce at 11, citing the President's recent Executive Order, which is binding on OSHA. The Order provides that an "agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations." Exec. Order No. 13892, § 3, 84 Fed. Reg. 55,240 (Oct. 9, 2019).

[8] Among the many reasons given by OSHA for this conclusion were that enforcement through the general duty clause imposes "heavy litigation burdens on OSHA" and that state plan states (then 23 in number, now 21) are not required to follow OSHA enforcement practices, whereas they are required to adopt standards as effective as those of federal OSHA. 56 Fed. Reg. at 64,007 (citing 29 U.S.C. § 667(c)(2)). Thus, reliance on general duty clause enforcement could leave workers in nearly half the states unprotected.

outbreak began, OSHA has not cited a single employer for failing to protect workers from the coronavirus under the general duty clause. Indeed, OSHA admits it has issued only one citation since the onset of the outbreak, Sweatt Decl. ¶ 25, and that citation was for failing timely to report employee hospitalizations from COVID-19, not for failing adequately to protect workers from infection. *See* https://aboutblaw.com/Q9u.

3. Finally, OSHA is wrong as a matter of law in citing, among the legally satisfactory "alternatives" to an ETS, the various tools being employed by "other government entities and private industry." Resp. 34.

As to the former, OSHA points to a patchwork of federal, state, and local directives and guidance materials, *id.* 9-12, but as this Court recently observed in *Kiewit Power Constructors*, 2020 WL 2503469, at *1, congressional dissatisfaction with the dismal results produced by "a patchwork" of "federal and state regulation" contributed substantially to enactment of the OSH Act. *See also Farmworker Justice Fund v. Brock*, 811 F.2d 613, 625 (D.C. Cir 1987) (although the Secretary might prefer that state governments regulate, "Congress, in adopting the OSH Act, decided that the federal government would take the lead in regulating the field of occupational health" and "the Secretary may not withhold or delay issuance of a standard within his jurisdiction because he holds a different

vision of the federal government's role in this field than the role . . . enacted into law in the OSH statute.").[9]

Similarly, OSHA cannot rely on "guidance developed by private industry," Resp. 10, 12-13, because that private guidance is also not legally binding on employers and thus cannot substitute for a "standard . . . necessary to protect employees" "exposed to [a] grave danger," 29 U.S.C. § 655(c), any more than OSHA's guidance can. *See* Compiled Leg. Hist. at 146 (Congress recognized that "[m]any" industry consensus standards, like industry guidance, "represent merely the lowest common denominator of acceptance by interested private groups.").

While guidance, state and local requirements, and voluntary action may be helpful, they are inadequate as a matter of law to negate the "necessity" of an ETS, which indisputably will do vastly more to protect workers' lives.

[9] This decision was vacated as moot, 817 F.2d 890 (D.C. Cir. 1987), only because OSHA complied with the Court's order. It has been cited as authority by both this Court, *Pub. Citizen Research Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir 1987), and the Supreme Court, *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 97 n.1 (1992).

II. OSHA'S PRACTICAL OBJECTIONS TO THE ISSUANCE OF AN ETS ARE ALSO WITHOUT MERIT

Unable to demonstrate that an ETS is not "necessary" under the OSH Act, OSHA argues that adoption of an ETS would be impracticable. That argument is baseless.

OSHA claims an ETS would be too inflexible to protect employees from COVID-19 because we are still learning about the coronavirus and different industries might warrant different regulatory approaches. According to OSHA, these conditions mean an ETS might be counterproductive, whereas non-binding guidance is not.

But Congress required OSHA to issue standards despite inevitable scientific uncertainty. Congress directed OSHA that, even when "the factual finger points, [but] does not conclude," it "remains the duty of the Secretary to act to protect the workingman [and woman]." *Soc'y of Plastics Indus. v. OSHA*, 509 F.2d 1301, 1308 (2d Cir. 1975). This Court has instructed OSHA not to be "paralyzed" by scientific debate. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1252 (D.C. Cir. 1980) (internal quotation marks omitted). OSHA can adjust its regulations as circumstances or knowledge changes. *Id.* at 1273 (if OSHA's predictions about feasibility are wrong, it may modify a standard). Indeed, such adjustments are far easier to make in the ETS context, inasmuch as an ETS can be issued *and modified* without notice and comment. *Fla. Peach Growers v. DOL*, 489 F.2d 120, 126 (5th

Cir. 1974). In other words, contrary to OSHA's suggestion, an ETS is no less flexible and adjustable than guidance.

Moreover, the ETS we have suggested—which mirrors the regulatory framework OSHA itself drafted to regulate infectious diseases—embodies a flexible, workplace-specific approach that requires each employer to evaluate the hazards in its own workplace and develop an infection and exposure control plan with certain basic provisions. OSHA has used a similar approach to address other hazards. For example, OSHA's hazard communication standard requires employers to assess the chemical hazards in their workplace, and as new information about a chemical's dangers becomes available, to update their hazard communication program. 29 C.F.R. § 1910.1200(f)(11), (g)(5). There is no reason a COVID-19 ETS could not contain similar, self-adjusting requirements.

In addition, OSHA itself will decide on the scope and contours of an ETS; we are not asking the Court to do so. OSHA might decide that an ETS applies only to some industries where workers are at greatest risk, such as when workers have direct contact with COVID patients or the general public, or work closely with one another. For the same reasons OSHA has issued industry-specific guidance, it might decide that different rules should apply to specific industries.

We have suggested only that the Act requires OSHA to issue an ETS; not that it requires a static, uniform, or all-encompassing ETS.[10]

Finally, there is no merit in OSHA's concern that because issuance of an ETS would trigger the requirement in section 6(c)(3) that OSHA promulgate a permanent standard within an "extraordinarily rapid" six-month period, its issuance of an ETS could lead to "[f]aulty requirements" being "ensconced" in that permanent standard that "would be changeable only through additional, laborious notice-and-comment rulemaking, further sapping agency resources." Resp. 30.[11] That concern ignores this Court's decision in *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196, 1200 (D.C. Cir. 1977), holding that the Act affords OSHA discretion to "defer" statutorily-required action "due to

[10] Thus, the suggestion by *amicus* National Association of Home Builders (NAHB) that an ETS necessarily "would be applicable to *all* employers" in a uniform manner, NAHB 3, is incorrect. Nothing prevents OSHA from issuing an ETS that "account[s] for the unique aspects of the construction industry." *Id.* 12.

[11] Of course, nothing in the Act requires that OSHA adopt a permanent standard identical to the ETS (so long as the resulting standard is a "logical outgrowth" of the ETS). The very purpose of designating the ETS as a NPRM is to permit OSHA to gather further information about the nature of the hazard and feasible means of control. OSHA can, and should, adapt any permanent standard to address experience under the ETS, the comments it receives during the rulemaking process, and additional scientific and other knowledge it gains during that period. *See Dry Colors Mfrs. Ass'n*, 486 F.2d at 105 ("[I]n order to provide immediate protection to employees exposed to a grave danger, emergency temporary regulations may necessarily be somewhat general. Some room must be left for further refinement in the subsequent permanent standard.").

legitimate statutory considerations." Under that decision, OSHA could issue an ETS and then defer final action on a permanent standard beyond the statutorily-prescribed six-month period if necessary, especially considering the fact that any justifiable delay would leave the ETS in place under section 6(c)(2) and thus maintain the protections afforded workers by that ETS while OSHA works to complete an appropriate final rule. Indeed, it would be a cruel irony if OSHA were allowed to avoid its statutory duty to issue an ETS to protect workers from the scourge of COVID-19 in the present moment in anticipation that the agency will be unable to meet its statutory obligation to adopt a permanent COVID-19 standard six months down the road.

CONCLUSION

Because a COVID-19-specific ETS is not only "necessary" but *urgently* "necessary" to protect workers' lives from the acknowledged "grave danger from exposure" to the novel coronavirus as millions of workers return to their jobs over the next few months, OSHA has a clear statutory duty to issue one. This Court, in turn, "has the power to order the agency to act to carry out" that duty. *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). OSHA has provided no colorable reasons why this Court should not exercise that power.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply in Support of Emergency Petition for a Writ of Mandamus contains 3,893 words, excluding those portions of the Reply excluded from the word count under Fed. R. App. P. 32(f), and thus complies with the word limit set by the Court's May 18, 2020 order.

/s/ Andrew D. Roth

Counsel for Petitioner AFL-CIO

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on this 2nd day of June, 2020, I caused a copy of this Reply in Support of Emergency Petition for a Writ of Mandamus to be served electronically via the Court's CM/ECF system, providing service to all counsel of record.

/s/ Andrew D. Roth

Counsel for Petitioner AFL-CIO