

NO. 20-1158

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

**AMERICAN FEDERATION OF LABOR AND CONGRESS OF
INDUSTRIAL ORGANIZATIONS**

PETITIONER,

v.

**OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
SECRETARY OF LABOR,**

RESPONDENT.

On Emergency Petition for a Writ of Mandamus

**BRIEF FOR NATIONAL ASSOCIATION OF HOME BUILDERS
OF THE UNITED STATES, ASSOCIATED BUILDERS AND
CONTRACTORS, AMERICAN ROAD AND TRANSPORTATION
BUILDERS ASSOCIATION, LEADING BUILDERS OF AMERICA,
MASON CONTRACTORS ASSOCIATION OF AMERICA, AND
AMERICAN SUBCONTRACTORS ASSOCIATION AS *AMICUS CURIAE*
IN OPPOSITION TO EMERGENCY PETITION FOR A WRIT OF
MANDAMUS AND IN SUPPORT OF RESPONDENT**

Dated: May 29, 2020

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Petitioner,

V.

**OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT
OF LABOR,**

Respondent.

[illegible]

Case No. 20-1158

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rules 26.1 and 28.1(a), *Amicus Curiae* provides the following information:

A. Parties And *Amici*

All parties appearing before the Court are listed in the Brief for Petitioner, American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”).

The *amici* are The Chamber of Commerce of the United States of America (“Chamber”), along with other industry trade associations, and the proposed *amici* in this brief, the National Association of Home Builders of the United States (“NAHB”), the Associated Builders and Contractors (“ABC”), the American Road

and Transportation Builders Association (“ARTBA”), the Leading Builders of America (“LBA”), the Mason Contractors Association of America (“MCAA”), and the American Subcontractors Association (“ASA”).

B. Rulings Under Review

There are no rulings under review.

C. Related Cases

There are no related cases.

Dated: May 29, 2020

Respectfully submitted,

LITTLER MENDELSON, P.C.

/s/ Bradford T. Hammock

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GLOSSARY OF ABBREVIATIONS**Abbreviation****Reference**

DOL: United States Department of Labor

OSHA: Occupational Safety and Health Administration

STATUTES AND REGULATIONS

Pursuant to D.C. Cir. Rule 28(a)(5), the relevant statutes and regulations are set out in the foregoing Table of Authorities (p. viii, above).

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The National Association of Home Builders of the United States ("NAHB"), the Associated Builders and Contractors ("ABC"), the American Road and Transportation Builders Association ("ARTBA"), the Leading Builders of America ("LBA"), the Mason Contractors Association of America ("MCAA"), and the American Subcontractors Association ("ASA") (collectively referred to as the "construction *amici*") are filing this *amicus curiae* brief in opposition to the AFL-CIO's Petition for a Writ of Mandamus to compel the Occupational Safety and Health Administration ("OSHA") to issue an emergency temporary standard for infectious diseases ("ETS"), in order to protect employees from SARS-CoV-2 ("COVID-19").

The NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members nationwide who are construction employers involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 700 state and local home-builder associations around the country.

The ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

The ARTBA's membership includes private and public-sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. The transportation construction industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. ARTBA is a 501(c)(6) trade association headquartered in Washington, D.C.

The LBA represents twenty of the nation's largest homebuilding companies. Its members construct about one third of the new homes sold annually in the United States, generating over \$33 billion in revenue and accounting for over 350,000 jobs through direct employment and the engagement of subcontractors. LBA's primary goal is ensuring that new homes remain affordable for American families.

The MCAA is the national trade association representing mason contractors both union and open shop. MCAA was incorporated in 1950. Its purpose is to help educate, train, and represent the mason contractor through its various programs

aiding members to maintain their competitive edge against other construction methods.

The ASA, founded in 1966, is an IRS section 501(c)(6) non-profit, national, membership trade association of construction specialty trade contractors, suppliers, and service providers in the United States and Canada. It charters local chapters and state organizations across the United States, and its national headquarters is located in Alexandria, Virginia.

This case involves the issue of whether this Court is *compelled* to force OSHA to issue an ETS applicable to all employers in the United States to protect employees from infectious diseases, and most specifically COVID-19. Should the Court grant the Petition, the construction *amici* will be directly impacted as employers. Moreover, the construction *amici*'s members, as employers in residential and commercial construction operating throughout the country, will be significantly impacted. Many of the construction *amici*'s members have been deemed essential by state and local governments during the COVID-19 pandemic and, thus, have continued to work. The construction *amici* and its members have a strong interest in this case and believe they can provide a unique viewpoint to the Court.

The construction *amici* are seeking to participate in this case as *amicus curiae* without objection from Respondent. Petitioner does not consent to the participation, but does not object to it, provided the construction *amici* file this brief by 4:00 pm

ET on May 29, 2020 and it is limited to 3,900 words. This brief complies with these parameters. *See* Motion for Leave to File *Amicus Curiae* Brief. Doc. # [____].

CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)

Construction *amici* are aware that the U.S. Chamber of Commerce and other industry trade associations also intend to file a Motion for Leave to File an *amicus curiae* brief in support of Respondent. Construction *amici's* brief focuses specifically on the construction industry and the unique experiences and work practices of construction employers with respect to COVID-19. The U.S. Chamber of Commerce and other industry associations will instead focus on how an ETS would affect a wide range of business interests generally. However, OSHA has historically treated general industry and construction differently from a regulatory perspective, therefore, two separate briefs focused on each “industry” would provide specific and unique value to the Court.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party to this appeal authored any part of this brief. No person who is not an *amicus*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioner American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) seeks to compel this Court to order the Occupational Safety and Health Administration (“OSHA”) to issue an Emergency Temporary Standard (“ETS”) for infectious diseases that would apply to all employers in all industries to protect employees from SARS-CoV-2 (“COVID-19”). Citing the number of confirmed positive cases of COVID-19 in the United States and cases in certain high-risk industries, the Petition urges swift action by this Court and OSHA.

Construction *amici* appreciate the concerns of Petitioner and share the Petitioner’s desire to protect employees from exposure to COVID-19. This is an unprecedented pandemic and one that calls for a significant public health response. Notwithstanding this, construction *amici* strongly disagree that Petitioner has demonstrated that an ETS is required at this time across all industries, and in particular, the construction industry.

- *First*, the data cited by the Petitioner of overall cases or purported high-risk industries does not support the need for a standard that applies to *all* industries. Indeed, construction *amici* could not find one specific reference to construction or construction risk in Petitioner’s brief. There is nothing to suggest a wide-ranging infectious disease rule applicable to all of construction is needed at this time.

- *Second*, Petitioner does not address the industry guidance put forth to address COVID-19 or the state and local orders that have been issued across the country – *specific to construction* – mandating that contractors take protective measures to safeguard employees. The comprehensive approach already undertaken by all stakeholders significantly reduces the need for an ETS in construction.

In addition, promulgation of a mandatory infectious disease rule applicable to all industries in 30 days, as sought by Petitioner, would not permit OSHA to adequately assess how such a rule would be applied in all industries, and the ramifications of such application. Construction is very different from other industries, as OSHA has historically recognized. OSHA has never considered the application of any aerosol transmissible disease standard to the construction industry and its current “draft” aerosol transmissible disease standard was never intended to apply *outside* of the healthcare industry.

Finally, as representatives of construction contractors across the country who are continually assessing and seeking guidance on the virus and how to protect construction employees, OSHA’s resources are better served by developing fluid guidance documents, which can be quickly changed and adapted as the Agency and public health authorities better understand the pandemic. On an almost daily or even

hourly basis, the knowledge of COVID-19 changes. Such a developing hazard is not appropriate to be addressed with a static, intransigent rule.

ARGUMENT

A. Petitioners Have Not Met The High Threshold For This Court to Grant The Writ Compelling An ETS Applicable To The Construction Industry.

Federal appellate courts have “exclusive jurisdiction over mandamus petitions alleging unreasonable agency delay whenever a statute commits review of the relevant action to the courts of appeals.” *In re Public Employees for Environmental Responsibility*, 957 F.3d 267, 272 (D.C. Cir. 2020) (citing *Telecomms. Research & Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d 70, 75 (D.C. 1984)). However, as set forth in the Petition, the standard for granting the requested relief is extremely high. Mandamus is “an extraordinary remedy [and the Court requires] similarly extraordinary circumstances to be present before [it] will interfere with an ongoing agency process.” *In re United Mine Workers of America Int’l Union.*, 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting *Community Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985)). The court must “satisfy [itself] that the agency has a duty to act and that it has ‘unreasonably delayed’ in discharging that duty.” *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (internal quotations omitted).

Petitioner is seeking for this Court to compel OSHA to issue an ETS regarding infectious disease that would be applicable to *all* employers, including the entire

construction industry. This is a high burden to meet, as Congress correctly delegated to OSHA – not the courts – the authority to issue mandatory standards protecting the safety and health of employees. 29 U.S.C. § 655(b). As set forth below, the Petition fails to meet this burden and, in particular, as the request relates to the construction industry. Petitioner presents no evidence of particularized need or risk specific to construction. And the Petition trivializes the extensive industry efforts to implement control measures and the active involvement of state and local authorities in the public health response.

1. Generalized information regarding COVID-19 infections is not probative of whether an OSHA infectious disease standard covering all industries – including construction – is necessary.

In support of its Petition, Petitioner has highlighted certain aspects of the ongoing COVID-19 pandemic. The Petition states that “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.” *See* Petition, p. 3. And on a more specific level, Petitioner states that “[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.” *Id.* at 9.

The construction *amici* appreciates and understands the historic nature of this pandemic and the toll that it has taken on the country. The construction industry has mobilized in a significant way to protect employees during this time, particularly since many construction employees have been deemed essential during the pandemic. Notwithstanding this, the large number of cases across the country is not persuasive in requiring OSHA to issue an ETS on infectious disease applicable to all industries.

The ongoing COVID-19 pandemic is a unique situation involving a highly contagious virus with exposures *inside and outside* of the workplace. As even OSHA has stated, determining whether a confirmed-positive COVID-19 case is caused by exposures at work is *very* difficult to determine. *See* Jillings Memo. to Reg. Admins., Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>

(“Given the nature of the disease and ubiquity of community spread ... in many instances it remains difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace.”). The significant numbers correctly noted by Petitioner demonstrate a large public health problem, but not one necessarily driven by the work environment, and certainly not *all* work environments in *all* industries.

The Petitioner also relies on information specifically relating to certain front-line industries. Indeed, Petitioner individually cites the COVID-19 infections among healthcare, meat processing, correctional facility, transit, nursing home, emergency service, postal, grocery, warehouse, and manufacturing workers. *See* Petition, pp. 13-16. Extrapolating from this data, Petitioner categorizes three groups of “essential” workers as being at particularly high risk of COVID-19 infection:

- (1) “those who work directly with COVID patients, such as nurses, emergency medical technicians, and other workers in institutional settings”;
- (2) “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”; and
- (3) those “whose jobs require that they come into close contact with one another in confined areas.” Petition, p. 17.

Even if the Petitioner were correct here, this just belies the request that OSHA issue an ETS applicable to all industries. Evidence alleging high exposures in certain industries does not support the need for a standard that applies to *all* industries.

The construction industry does not fit into any of the Petitioner’s identified three categories of workers at high risk of exposure and infection to the virus. Indeed, construction *amici* could not find one specific reference to construction or

construction risk in Petitioner's brief. Petitioner has identified no examples of particular concern with respect to construction or exposure scenarios that could be addressed by the desired ETS. In fact, OSHA recently issued guidance related to COVID-19 in construction and categorized the vast majority of construction work as low or medium risk. *See* Construction Work, OSHA, available at: <https://www.osha.gov/SLTC/covid-19/construction.html>. There is nothing to suggest a wide-ranging rule applicable to all of construction is needed at this time to address the COVID-19 pandemic.¹

2. The Petition Ignores The Numerous State And Local Orders Requiring Construction Contractors To Implement Protective Measures.

One reason behind the Petition's silence with respect to construction may be the extensive efforts of the construction industry and state and local authorities in addressing COVID-19. At the very outset of the pandemic, the construction industry moved on its own to provide guidance and outreach to large and small contractors to address and minimize exposure to the virus.

¹ Petitioner references the COVID-19-related complaints alleging violations of the Occupational Safety and Health Act of 1970 ("OSH Act") as additional evidence that "the COVID-19 pandemic has continued to ravage workplaces." Petition, p. 22. This evidence does not support issuing an ETS applicable to all industries. The number of complaints that have been filed with OSHA represent opportunities for employers to investigate potential issues in the workplace, but does not necessarily equate to known hazards. There is no information regarding industries receiving the complaints, and therefore, no evidence of whether the large number of complaints would demonstrate a need for a broad standard covering all industries.

As just one example, a group of construction industry trade associations representing virtually every aspect of the industry, the Construction Safety Industry Coalition (“CISC”), developed a COVID-19 Prevention, Preparedness, and Response Plan (“Response Plan”) for the broad use of construction contractors throughout the country. This plan has been widely implemented throughout the industry and adopted by large and small contractors. The CISC’s Response Plan was initially issued in March 2020, and subsequently updated in late April 2020. *See* CISC Response Plan, (April 22, 2020), <http://www.buildingsafely.org/wp-content/uploads/2020/04/CISC-COVID-19-Exposure-Prevention-Preparedness-and-Response-Plan-Version-2-4838-8641-5802-3.docx>.

Moreover, state and local authorities have been engaged in the pandemic response in an unprecedented way. State and local health departments have been heavily involved in workplace investigations and contact tracing protocols. Many have mandated requirements applicable to worksites as part of their general authority to protect public health. This is unlike other hazardous conditions that OSHA has regulated, where the hazard was specific to the work environment (e.g., respirable crystalline silica exposure in the work environment, or bloodborne pathogen exposures). The conditions did not include such a large workplace *and* public health component, which involved a multi-level public health response. The ubiquitous state and local orders regarding COVID-19 – which are more appropriate because

they consider unique local circumstances of community spread – have the effect of further mitigating the risk that the Petitioner purports to address.

Indeed, all 50 states, the District of Columbia, 5 territories and at least 134 local municipalities have implemented some version of either a shelter-in-place or stay-at-home order restricting their residents and visitors from certain activities. Additionally, 48 states, the District of Columbia, and at least 141 local municipalities have issued orders either requiring or recommending that the general public wear face coverings while conducting certain activities or in public.

With respect to construction, however, the state and local activity has even been *more* pronounced. The Petition fails to mention that state and local jurisdictions have already implemented regional-specific requirements directed to construction employers in their respective jurisdictions. Some examples of these jurisdictional-specific construction requirements include, but are not limited to, the following:

- *Dallas County, Texas*: On March 29, 2020, the County of Dallas, Texas issued rules for the construction industry on how to prevent worker exposure to COVID-19. *See* Stay Home Stay Safe: Rules for the Construction Industry, (March 29, 2020), <https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/032920-Order-RulesfortheConstructionIndustry.pdf>. The construction *amici* note that these issued

rules require “all employers involved in construction activity [to] follow the requirements set forth in the COVID-19 Safety Recommendations issued by the Construction Industry Safety Coalition,” discussed above.

- *Kentucky*: On May 11, 2020, Kentucky issued requirements for construction businesses, outlining specific social distancing, cleaning and disinfecting, personal protective equipment, and training and safety requirements that needed to be met in order to re-open and remain open. *See* Healthy at Work: Requirements for Construction Businesses, (May 11, 2020), https://govsite-assets.s3.amazonaws.com/Ojb2DhQPRtqyReAmkJyQ_Healthy%20at%20Work%20Reqs%20-%20Construction%20-%20Final%20Version%201.1.pdf.
- *New Jersey*: On May 13, 2020, Governor Phil Murphy issued Executive Order No. 142 permitting non-essential construction to resume subject to strict social distancing measures. *See* Governor Philip D. Murphy, Executive Order No. 142, (May 13, 2020), <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-142.pdf>.
- *New York*: Around May 16, 2020, Governor Andrew Cuomo issued mandatory guidelines as well as recommended best practices for New York construction employers. *See* Reopening New York: Construction

Guidelines for Employers and Employees, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ConstructionShortGuidelines.pdf>.

- *Pennsylvania*: On April 23, 2020, Governor Tom Wolf issued statewide rules for construction employers, which outlined mandatory administrative and engineering controls. *See* Guidance for Businesses in the Construction Industry Permitted to Operate During the COVID-19 Disaster Emergency, (April 23, 2020), <https://www.governor.pa.gov/wpcontent/uploads/2020/04/20200423-Construction-Industry-Guidance.pdf>.
- *San Francisco, California*: Construction projects in San Francisco are only permitted to continue operating if such operations follow required safety protocols, which vary depending on project size. *See* Information on construction projects during the coronavirus outbreak, (May 11, 2020), <https://sf.gov/information-construction-projects-during-coronavirus-outbreak>.
- *Washington*: In his “Stay Home, Stay Healthy” Gubernatorial Proclamation 20-25, issued on April 27, 2020, Governor Jay Inslee outlined that all construction employers would need to comply with certain statewide COVID-19 construction worksite-specific safety practices. *See* Phase 2 Construction: COVID-19 Job Site Requirements, (April 23, 2020),

https://www.governor.wa.gov/sites/default/files/COVID19Phase2ConstructionSafetyGuidance.pdf?utm_medium=email&utm_source=govdelivery.

The Petition does not address the extensive nature of these state and local orders and the impact that they have not only on public health, but also on workplace safety and health. Because of the unique nature of the virus, the lines between public health and employee health are blurred in a way that complicates OSHA's traditional rulemaking function and authority. With respect to construction, the industry and state and local governments have been – and are – aggressively addressing the risk of COVID-19. Additional rulemaking by OSHA is not needed.

B. The Requested ETS Would Not Provide For Needed Construction-Specific Analysis By The Agency.

Petitioners request that OSHA issue a standard requiring all employers to take a specific action to protect employees from COVID-19 within 30 days. Construction *amici* appreciate the historic and fast-moving nature of the pandemic, but such an approach would not permit OSHA to account for the unique aspects of the construction industry.

Construction work is very different from general industry work. Construction work is frequently performed outside, in ever-changing conditions and varied work environments. A construction project can span for miles with work being performed at various stages along the span. In the context of certain OSHA rulemakings, the unique nature of construction work has been highlighted and has been a driving

factor in OSHA's approach to addressing hazards. Most recently, OSHA promulgated a comprehensive standard regulating exposure to respirable crystalline silica in general industry, maritime, and construction workplaces. *See Occupational Exposure to Respirable Crystalline Silica*, 81 Fed. Reg. 16286 (Mar. 25, 2016). Recognizing the unique nature of construction work and the significant differences between general industry environments and construction environments, OSHA adopted separate standards for general industry and construction with completely different approaches to addressing the hazards posed. 81 Fed. Reg. at 16702 (noting the "intrinsic differences" between construction and other industries and recognizing the promulgation of two separate standards to account for "the different work activities, anticipated exposures, and other conditions in these sectors"). Forcing through a comprehensive standard in just 30 days does not provide OSHA with an adequate opportunity to develop an effective, workable approach for the industry.

As just one example, studies have shown that the risk of infection of a viral disease is greatest in indoor environments where there is a higher likelihood of "possible buildup of the airborne virus-carrying droplets" and the virus likely has "higher stability in indoor air." Lidia Morawska & Junji Cao, *Airborne transmission of SARS-CoV-2: The world should face the reality*, *Env. Int'l* 139 (2020) 105730, <https://reader.elsevier.com/reader/sd/pii/S016041202031254X?token=29CDAF87898139FDC6A3571D438BBDA3407024E5FD47B25BEE93EB9744A95C164CC8>

9A44BDFB7267470F5AE5D9FEEF0. As stated above, construction work often occurs outdoors with continuous air flow and this could substantially impact an appropriate regulatory approach. This is precisely the type of scientific information that OSHA should consider if it were putting forth a regulatory approach to any infectious disease. Promulgating an ETS in 30 days does not provide for these considerations.

Perhaps anticipating this argument, Petitioner cites to OSHA's previous work on an aerosol transmissible disease standard as a basis for a potential ETS here. In effect, Petitioner suggests that OSHA has already done the "leg work" for a mandatory standard and, thus, can just promulgate that rule within 30 days. A close look at that standard, however, belies the argument.

Petitioner is correct that OSHA has been working on an aerosol transmissible disease standard for several years. But that standard is completely irrelevant to construction. By its terms, the draft standard would have only applied to healthcare industries. It would not have applied to construction – nor would it have made sense to apply it to construction. OSHA has never even preliminarily looked at how such a standard would be applicable to construction. The idea that OSHA already has a rule that is "ready-made" to be put in final form and applied to every industry and industry sector is simply untrue.

Petitioner also cites to California's aerosol transmissible disease standard as an approach that OSHA could potentially take. The California standard, however, is only applicable to a few industries that California OSHA determined were high hazard, such as healthcare, hospitals, first responders, correctional facilities, and the like. *See* Title 8, Subchapter 7, § 5199, Aerosol Transmissible Diseases.

At bottom, Petitioner is requesting that this Court order OSHA to issue an ETS within 30 days regarding infectious disease that would be applicable to all industries: from law firms, to banks, to grocery stores, and to construction. Given the recognized community spread of COVID-19, this would be an extraordinary undertaking and the broadest OSHA standard that has ever been promulgated. OSHA standards are typically directed toward an occupational hazard (e.g., lead, asbestos) or a specific limited industry (e.g., electric power generation, transmission, and distribution). While occupational hazards can exist in multiple industries, a rulemaking related to COVID-19 would quite literally touch every workplace and employer in the country. The Petitioner's approach does not consider – nor provide time for OSHA to consider – the differences between various industries and the unique aspect of the construction environment.

C. Requiring OSHA To Issue An ETS Will Divert Resources From Developing Industry-Specific Guidance, Including For Construction.

COVID-19 is commonly referred to as a “novel” coronavirus. That is true in a number of respects. What medical professionals and public health authorities

know about the virus changes on an almost daily or even hourly basis. The public health community is rigorously studying COVID-19 and, despite this, its understanding of the risks, potential exposures, and health effects is constantly changing.

As just one example, the Centers for Disease Control and Prevention (“CDC”) has changed its list of symptoms associated with COVID-19 *at least five times*. Initially, in early March 2020, the CDC stated that fever, cough, and shortness of breath are symptoms of COVID-19 illness. *Watch for symptoms*, CDC, (March 14, 2020), <https://web.archive.org/web/20200314183946/https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. However, on April 18, 2020, the CDC added six new symptoms (chills, repeated shaking with chills, muscle pain, headache, sore throat, and new loss of taste or smell) and added “difficulty breathing” to its original “shortness of breath” symptom. *Id.* (April 18, 2020), <https://web.archive.org/web/20200418024620/https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. Ten days later, on April 28, 2020, the CDC revised its symptoms list again, this time elevating cough and shortness of breath or difficulty breathing as primary symptoms and grouping the other symptoms separately. *Id.* (April 28, 2020), <https://web.archive.org/web/20200428021329/https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. Another ten days later, on May 8, 2020, the CDC removed repeated

shaking with chills and headache from its list of symptoms and regrouped the remaining symptoms together. *Id.* (May 8, 2020), <https://web.archive.org/web/20200508101158/https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. And on May 13, 2020, the CDC indicated that additional “less common symptoms have been reported, including gastrointestinal symptoms like nausea, vomiting, or diarrhea.” *Id.* (May 13, 2020), <https://web.archive.org/web/20200513154857/https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. Finally, on May 26, 2020, the CDC again changed its list of symptoms by adding fatigue, muscle or body aches, congestion or runny nose, and nausea or vomiting, and re-added headache. *Id.* (last visited May 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptomstesting/symptoms.html>.

As another example, the CDC originally allowed discontinuation of self-quarantine related to COVID-19 under all circumstances once 14 days had passed. Now the CDC has developed multiple strategies for discontinuing home-isolation depending upon whether the individual received a positive test result for COVID-19 and whether the individual ever exhibited COVID-19 symptoms. Construction *amici* point these changes out not to be critical of the efforts of the public health

community, but to highlight the novel nature of the pandemic and the suitability of guidance to address the health crisis, rather than mandatory rulemaking.²

Not only should OSHA's efforts and resources be focused on issuing guidance, such guidance would be best served if it were industry-specific. It would be disingenuous for any party to argue that infection control measures would be the same across all industries. For example, guidance on how to maintain the spread of COVID-19 in the aviation industry would naturally be different from guidance directed at the banking industry or the construction industry. Given the vast range of industries operating in the United States, the best approach for OSHA to effectively provide logical and valuable guidance would be to issue specific guidance tailored to each industry or, at the very least, each natural grouping of industries. Construction *amici* contend that in this instance industry-specific information is needed, not a mandatory rule.

Construction *amici* also note that OSHA, in concert with the CDC, has already issued interim guidance for certain industries including meat and poultry processors, manufacturing employers, hospitality employers, and most recently construction.

² Construction *amici* note that if OSHA were to devote resources to an ETS, it would take resources away from the development of guidance, as the same personnel involved in rulemaking also lead the OSHA's major guidance initiatives.

Further development of such guidance and additional guidance for other industries would be a more beneficial and valuable use of OSHA.

D. Conclusion

Petitioners' attempt to use the COVID-19 pandemic as a catalyst to force OSHA to issue an all-inclusive infectious disease standard applicable to all industries through an ETS is misplaced. For the foregoing reasons, construction *amici* respectfully request that the Emergency Petition for a Writ of Mandamus be denied.

Dated: May 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for *Amicus Curiae*, furnishes the following:

I hereby certify that the length of this brief is 3,893 words, excluding the portions of the brief exempted by F.R.A.P. 32(f) and Circuit Rule 32(E)(1), and complies with the type-volume limitations in F.R.A.P. 29(a)(5). This brief complies with the typeface and type style requirements of F.R.A.P. 32(a)(5) and (6) because it is produced in a Times New Roman, 14 pt. font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing *Brief of Amicus Curiae National Association of Home Builders of the United States et al.* with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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