

ORAL ARGUMENT NOT SCHEDULED

No. 20-1215

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

In re: United Mine Workers of America, et al.

Petitioners

On Emergency Petition for a Writ of Mandamus

Mine Safety and Health Administration's Response
to Emergency Petition for a Writ of Mandamus

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Certificate of Parties, Ruling, and Related Cases

This Court recently decided a related case, *In re: American Federation of Labor and Congress of Industrial Organizations*, No. 20-1158. In that case, the American Federation of Labor and Congress of Industrial Organizations, with which both petitioners are affiliated, sought review of the Occupational Safety and Health Administration's decision not to issue an Emergency Temporary Standard. On June 11, 2020, this Court denied that petition for review. *See* ECF No. 1846700 (D.C. Cir. June 11, 2020). On June 18, 2020, the AFL-CIO filed a petition for rehearing en banc. *See* ECF No. 1848004.

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Glossary

CDC Centers for Disease Control and Prevention

ETS Emergency Temporary Standard

MSHA Mine Safety and Health Administration

NIOSH National Institute for Occupational Safety and Health

OSHA Occupational Safety and Health Administration

PPE Personal Protective Equipment

UMWA United Mine Workers of America International Union

USW United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

Introduction

Mines are among the most heavily regulated workplaces in America.

Congress has long-prioritized their safety, requiring by statute that the Mine Safety and Health Administration (MSHA) inspect *every* mine in the country at least two or four times per year (above ground or below ground, respectively) for compliance with *all* health and safety requirements. Those requirements include a mandate for mine operators to inspect their workplaces for dangerous conditions before miners begin working on *every* shift. And mine operators must comply with not only those inspection standards, but with requirements for mine-specific safeguards, personal protective equipment, miner safety training, and sanitation, as well as a host of provisions protecting whistleblowers and miners' rights. MSHA may seek injunctions and even shut down mines, while mine operators are strictly liable for violations of standards. And MSHA must impose—and operators must meet—deadlines for correcting hazards even if an operator intends to contest a violation.

These standards and accompanying enforcement mechanisms are broad yet adaptable, including to the COVID-19 pandemic. MSHA has also worked with stakeholders and CDC/NIOSH to issue guidance on safety measures. MSHA has thus determined that an emergency temporary standard specific to COVID-19 is not necessary at this time. MSHA has already cited operators for COVID-related

violations of its standards, and it can continue doing so. Its phalanx of legal tools is up to the task of protecting miners from COVID-19.

Despite this, the petitioners ask the Court to require MSHA to issue an emergency temporary standard (ETS), a type of regulation contemplated in both the Mine Act and the Occupational Safety and Health Act (OSH Act). That relief would be extraordinary; this Court has *never* ordered promulgation of an ETS in the combined 93-year history of the Mine Act and the OSH Act. If the request seems familiar, that's because it is: the petitioners recycle much of a petition for an ETS under the OSH Act that a panel of this Court unanimously rejected just two weeks ago. The reasons for rejection are just as strong here: MSHA has uniquely powerful enforcement tools, and mines—which range from acre-lot gravel-crushers to subterranean metropolises—are both incredibly diverse and required to follow elaborate safety regimes, making them ill-suited to the kind of ETS sought by the petitioners. A rushed, one-size-fits-all ETS could jeopardize miner safety by compromising or complicating these other safety requirements.

This Court has long afforded tremendous deference to Department of Labor agencies for ETS determinations. There is a good reason for that, and not only the fact that Congress and the country are actively debating ETS requirements for both MSHA and OSHA. This Court already found it reasonable that an ETS not be adopted for general industry, and the Unions wholly fail to carry their heavy

burden of establishing that an ETS is required for mining specifically. MSHA has decades of experience regulating mines, and it knows its needs for executing its mission. An ETS for COVID-19 is not one of them.

Statement of Facts

I. Statutory framework

The Mine Act includes requirements for both comprehensive substantive standards and a robust monitoring and enforcement regime.

Standards. Under the Mine Act, mine operators must comply with mandatory safety and health standards that MSHA promulgates. 30 U.S.C. §§ 811, 820(a). Many of these standards reflect the dangers of mines: they regulate electricity, drilling, machinery, illumination, travelways, dust, ventilation, and so on. Certain standards apply to all or particular types of mines. Some standards are general and quite flexible, including, for example, requirements for workplace examinations for hazards every shift, for mine-specific safeguards, for personal protective equipment, for miner safety and health training, and for sanitation. Somewhat unusually, the Mine Act contains a one-way ratchet for MSHA standards: no standard thereafter “shall reduce the protection afforded miners by an existing mandatory health or safety standard.” *Id.* § 811(a)(9).

Enforcement. Congress also has empowered MSHA to monitor and enforce compliance with these standards. MSHA is required to inspect *all* surface mines in their entirety at least twice each year, and *all* underground mines in their entirety at least four times each year. 30 U.S.C. § 813(a). MSHA conducts these inspections without obtaining a warrant or giving advance notice. *Donovan v. Dewey*, 452 U.S. 594 (1981). At mines where MSHA finds an “especially hazardous condition,” MSHA conducts “spot inspections” at least once every five working days. 30 U.S.C. § 813(i). Miners also may obtain an immediate inspection by filing anonymous hazard complaints with MSHA, *id.* § 813(g), and may accompany inspectors during inspections in order to aid in those inspections, *id.* § 813(f).

The Mine Act also gives MSHA an array of enforcement tools to ensure compliance—and when necessary, to achieve it. Operators are strictly liable for violations of mandatory standards, *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 360 (D.C. Cir. 1997), and must abate (take action to correct) every hazard within MSHA’s deadlines, even if an operator contests the violation. 30 U.S.C. § 814(a); *see Energy Fuels Corp.*, 1 FMSHRC 299 (1979). In addition to assessing civil penalties for every violation, 30 U.S.C. § 820(a), MSHA has the authority to order miners withdrawn and kept from parts of a mine or even the entire mine. MSHA can do so if it discovers an imminent danger, *id.* § 817(a); that a miner has not received required safety training, *id.* § 814(g)(1); that an operator

failed to timely abate a violation, *id.* § 814(b); or violations that are the result of an operator’s unwarrantable failure to comply with mandatory standards, *id.* § 814(d). Each of these measures effectively shuts down part of a mine, or the entire mine, until the violation or hazard is abated.

MSHA also can obtain injunctions against operators that refuse to comply with MSHA’s orders or that interfere with or refuse MSHA’s enforcement of the Mine Act. 30 U.S.C. § 818(a)(1). MSHA can assess civil penalties against individual agents for knowing violations of mandatory standards. *Id.* § 820(c). And the Mine Act imposes criminal penalties for willful violations. *Id.* § 820(d).

Emergency temporary standards. MSHA has authority to impose an ETS without public comment—but only if MSHA determines “(A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger.” 30 U.S.C. § 811(b)(1). This provision is very similar to the ETS provision in the Occupational Safety and Health Act, 29 U.S.C. § 655(c), for which this Court recently gave OSHA’s determinations “considerable deference,” *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (per curiam) (unpublished) (“*AFL-CIO*”).

The high statutory burden Congress set for an ETS reflects not only the gravity of imposing requirements without the benefit of public participation, but

also the enduring consequences that an ETS can have. If MSHA issues an ETS, the agency then must commence a rulemaking proceeding in which the ETS serves as the proposed rule, and must promulgate a permanent standard within nine months. 30 U.S.C. § 811(b)(3). In MSHA’s forty-two-year existence, nearly all of its standards have been promulgated through notice-and-comment rulemaking.¹

II. Background

MSHA has been monitoring COVID-19 since December of 2019. *See* Palmer Decl. ¶ 5. MSHA leadership began daily COVID-19 conference calls in March 2020. *Id.* ¶ 8. At that time, MSHA leadership also began ordering COVID-related supplies to ensure inspectors were not exposing operators and miners during inspections, and holding daily COVID-19 conference calls with MSHA field personnel to discuss MSHA’s response to the disease. *Id.* ¶¶ 6, 8. Field personnel, who work closely with the mine operators and miners in their areas, on a daily basis report to headquarters a variety of COVID-related information, including whether operators have reported any suspected or confirmed cases and

¹ MSHA’s few emergency temporary standards were prompted by disasters at specific mines. *Maintenance of Incombustible Content of Rock Dust in Underground Coal Mines*, 75 Fed. Reg. 57,849 (Sept. 23, 2010); *Sealing of Abandoned Areas*, 72 Fed. Reg. 28,796 (May 22, 2007); *Emergency Mine Evacuation*, 71 Fed. Reg. 12,252 (Mar. 9, 2006); *Emergency Evacuations*, 67 Fed. Reg. 76,658 (Dec. 12, 2002); *Self-Contained Self-Rescue Devices*, 52 Fed. Reg. 24,374 (June 30, 1987).

how operators and miners are addressing those situations. *Id.* ¶ 8. This real-time information, together with MSHA’s regular presence at mines, allows MSHA the opportunity to respond appropriately in a timely fashion.

MSHA established a COVID-19 website designed for mine operators and miners. Palmer Decl. ¶ 7. MSHA collaborated with CDC/NIOSH to develop and publish co-branded COVID-19 guidance materials specific to mines and to miners, including miners who may be at heightened risk, and cross-posted these materials on its website. *Id.* ¶ 13. MSHA also has communicated regularly with its mine operator and miner stakeholders, offering guidance and best practices related to COVID-19. *Id.* ¶¶ 9, 11, 15.² During these calls and meetings—one of which was a Quarterly Stakeholder Call with 600+ participants—MSHA has discussed (and plans to continue discussing) COVID-related guidance and its COVID-related responses. *Id.* ¶¶ 9, 11, 14-15.

During the pandemic, MSHA has continued to perform its essential statutory functions. Palmer Decl. ¶ 18. These include investigating fatalities and serious accidents, responding to reports of imminent dangers, investigating cases of alleged discrimination against miners, conducting regular inspections, and

² MSHA does not inspect mines when they are shut down with no miners working. To the extent possible, for regular inspections, MSHA has limited the number of inspectors sent to a mine in proportion to the mine’s operational status during the pandemic. Palmer Decl. ¶ 18.

responding to miners' hazard complaints. *Id.* ¶¶ 18, 22. During their regular inspections, MSHA inspectors look for compliance with all mandatory standards, including standards that protect miners from COVID-related hazards. *Id.* ¶ 19. Standards cover important and relevant safety and health practices such as sanitation, workplace examinations, personal protective equipment, training, and safeguards. *Id.* As described in detail below, these mandatory standards can and have been applied to address COVID-related hazards. *Id.* ¶¶ 19-21.

MSHA has received more than 125 COVID-related complaints, and has investigated each one. *Id.* ¶ 20. In complaint investigations that it has completed, MSHA has found that some conditions violated mandatory standards and has issued citations directly related to the spread of COVID-19. *Id.* For example, on June 24, 2020, MSHA received a hazardous condition complaint late at night regarding a lack of social distancing and sanitation. In response, MSHA sent inspectors to the mine that very night and required the operator to revise its training plan under 30 C.F.R. § 48.3(m) to address the hazards associated with COVID-19. *Id.* ¶ 21. MSHA also has issued citations during regular inspections related to COVID-19 control. *Id.* ¶ 19. In addition, the Mine Act prohibits discrimination or retaliation against miners who complain of COVID-19 hazards, and MSHA investigates discrimination cases vigorously. *Id.* ¶ 22.

On March 24, 2020, MSHA received a petition from the UMWA asking MSHA to issue an ETS to protect miners from COVID-19. Palmer Decl. ¶ 26; Unions' Attachments 1-3. On April 14, 2020, MSHA responded, explaining why an ETS was unnecessary. Palmer Decl. ¶ 29; Unions' Attachments 4-5. MSHA identified its ongoing response to the pandemic, emphasized operators' existing compliance obligations that addressed COVID-19, noted the evidence did not point to particular problems at mines, and explained why it had determined that existing standards and authorities rendered an ETS unnecessary. Palmer Decl. ¶ 29; Unions' Attachments 4-5.

On May 20, 2020, the UMWA submitted a second petition for an ETS. Palmer Decl. ¶ 30; Unions' Attachments 6-8. On June 11, 2020, this Court concluded that “OSHA reasonably determined that an ETS is not necessary at this time.” *AFL-CIO*, 2020 WL 3125324, at *1. On June 26, 2020, MSHA denied the Unions’ May 20 petition, explaining again its determination not to issue an ETS because no grave danger exists at this time and in light of MSHA’s existing mandatory standards and robust enforcement tools. Palmer Decl. ¶ 31; *see Addendum Tab 2*. MSHA also explained that it adapts and evolves as it continues inspections, taking into account information it receives about COVID-related issues at mines; MSHA guidance; and state, local, other federal, and mining-

industry orders and guidance, including the President’s Coronavirus Guidelines for America. Addendum Tab 2.

Standard of Review

The Unions seek a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), to “compel agency action” they allege MSHA “unlawfully withheld,” under the Administrative Procedure Act, 5 U.S.C. § 706(1), by deciding not to issue an ETS at this time. Pet. 12-14.³ A writ of mandamus is an extraordinary remedy “reserved only for the most transparent violations of a clear duty to act.” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quotation omitted). The Unions “must demonstrate (1) a clear and indisputable right to relief, (2) that the government … is violating a clear duty to act, and (3) that no adequate alternative remedy exists.” *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Even after that, the Court “may grant relief only when it finds compelling equitable grounds.” *Id.* (quotation omitted).

³ The Unions describe MSHA’s denial of UMWA’s second petition for an ETS as “constructive[],” “effective[],” and “final.” Pet. 12-14. Thus, the Unions’ complaint is not that MSHA has unreasonably delayed action, but that MSHA has not taken the action UMWA requested. Moreover, MSHA has since formally denied the UMWA’s second petition. Therefore, the six-factor test in *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), does not apply.

Should the Court construe the Unions' petition as one for judicial review of agency action, *see AFL-CIO*, 2020 WL 3125324, at *1, its review of MSHA's determination not to issue an ETS and thereby not to initiate a rulemaking process, is "extremely limited," "highly deferential," and "akin to non-reviewability." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 330-31 (D.C. Cir. 2017) (quotations omitted).⁴ Courts will disrupt an agency's decision not to engage in rulemaking "only for compelling cause such as plain error of law or a fundamental change in the factual premises previously considered by the agency," and their review of such a decision turns on whether the agency "adequately explained the facts and policy concerns it relied on and [whether] ... those facts have some basis in the record." *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014) (alterations in original and citations omitted). As in mandamus, if any relief is ordered it should stop short of compelling a rulemaking. *See, e.g., Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 747 (D.C. Cir. 2017) (ordering remand for further explanation as opposed to compelling a rulemaking); *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (collecting cases).

⁴ Only UMWA was party to either one of the petitions for an ETS. Because USW did not present their request to MSHA prior to requesting it here from the Court, USW should be dismissed for failure to exhaust its administrative remedies. *See, e.g., Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158-59 (D.C. Cir. 2007).

Regardless how the Unions' petition is construed, MSHA is afforded particular deference because the Unions request an ETS. “[T]he authority to establish emergency standards … is an ‘extraordinary power’ that is to be ‘delicately exercised’ in only certain ‘limited situations.’” *In re Int'l Chem. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (“*ICWU*”) (quoting *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983) and discussing the analogous provision of the OSH Act); *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1482 n.4 (D.C. Cir. 1985) (Mine Act's ETS provision “tracks” OSH Act's). MSHA may issue an ETS only if it determines that “miners are exposed to grave danger” and that an ETS is “necessary to protect miners from such danger.” 30 U.S.C. § 811(b)(1). That determination is freighted with “considerations of policy as well as empirically verifiable facts” and requires MSHA to assess “often scientifically complex” issues and to balance “competing policies.” *ICWU*, 830 F.2d at 371 (quotation omitted). MSHA's assessment of these facts and policies is “entitled to great deference.” *Id.*; *AFL-CIO*, 2020 WL 3125324, at *1 (“OSHA's decision not to issue an ETS is entitled to considerable deference”). The Court does not review MSHA's determination to decide whether the Court would issue an ETS; its “limited review” is to assess whether MSHA's decision “lacks support in the record.” *ICWU*, 830 F.2d at 371.

Argument

The Unions make an extraordinary request: that this Court order MSHA, within a month and despite rapidly evolving facts and scientific understanding of COVID-19, to promulgate an ETS that will apply to every mine in the country. This Court already rejected a similar request as to OSHA, *AFL-CIO*, 2020 WL 3125324, at *1, and the Unions' request as to MSHA is not justified here for three main reasons.

First, the Unions have not shown standing to seek an ETS. Their claim that any future miner's COVID-19 would be attributable solely to the lack of an ETS is too speculative; it cannot be fairly traced to MSHA's determination not to issue an ETS nor redressed by it.

Second, MSHA's decision not to issue an ETS at this time is supported by the information before the agency. While COVID-19 is undoubtedly serious as a general matter, MSHA is monitoring mines for signs that COVID-19 is a grave danger *at mines*. Based on the information currently available, MSHA has determined that no grave danger exists at mines. *See Addendum Tab 2*. That is especially true given our evolving understanding of the disease. MSHA has also reasonably determined that an ETS is not necessary at this time, since MSHA can enforce existing mandatory standards to protect miners. Because MSHA is so often

at mines to inspect them, MSHA is well-positioned to enforce those standards—and and to use its array of enforcement tools to do so.

Third, ordering MSHA to issue an ETS would not guarantee an effective response to COVID-19, and in fact could have the opposite effect. The Unions seek what seems to be a broad standard covering not just COVID-19 but infectious diseases generally; but there are significant differences among mines (like their locations, their sizes, their geologies, and their mining methods) and among infectious diseases, and a broad ETS may not effectively address those differences. Our understanding of COVID-19 also is evolving rapidly; compelling MSHA to adopt even an ETS specific to COVID-19 would hamstring MSHA’s ability to adjust its approach quickly based on new information. And it would be difficult, if not impossible, for MSHA to anticipate and avert the unintended collateral consequences that an ETS might have on the thousands of mine-specific rules that apply across the country, including the many underground coal mines—mines at which the risk of major disasters is often acute.

I. The Unions lack standing.

To invoke this Court’s jurisdiction, the Unions must establish standing. *See* D.C. Cir. R. 28(a)(7). The Unions assert that they have associational standing. Pet. 7-9. They must establish that their members suffered an injury in fact, that the alleged injury is fairly traceable to MSHA’s challenged inaction, and that the

alleged injury is redressable by a favorable decision. *In re Pub. Emps. for Envtl. Responsibility*, 957 F.3d 267, 272 (D.C. Cir. 2020); *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989).

In the declarations attached to their petition, the Unions do not assert that any of their members has actually contracted COVID-19 or that the miners who contracted COVID-19 got it from exposure at a mine. Rather, the Unions' assert that COVID-19 poses a risk to miners and that the danger "can *only* be redressed by" an ETS, so the danger is fairly traceable to MSHA's decision to decline issuing an ETS. Pet. 10 (emphasis added). This syllogism posits, essentially, that any miner's contracting COVID-19 at a mine would be solely attributable to the lack of an ETS. That is too speculative. *See United Transp. Union*, 891 F.2d at 912. It does not account for the legal regime already protecting miners, nor miners' and mine operators' independent behavior. It also assumes that an ETS would be a panacea, but neither the Unions nor this Court may dictate the content of an ETS, which further undermines the idea that the Unions' claimed injury is attributable to and redressable by an ETS. *See In re Int'l Union, United Mine Workers of Am.*, 231 F.3d 51, 54 (D.C. Cir. 2000) ("UMWA") (denying UMWA's request for an ETS in part because "[i]t is far from clear at this juncture what standards should be adopted to address the problem.... This is a matter that is committed to the agency's expertise in the first instance..."); *Burwell*, 812 F.3d at 191.

II. The Unions have not shown entitlement to an ETS.

a. The information before MSHA at this time does not support a determination of a grave danger to miners.

MSHA cannot issue an ETS unless it determines that one is “necessary to protect miners from” a “grave danger,” 30 U.S.C. § 811(b)(1), and any standard dealing with harmful physical agents must be promulgated “on the basis of the best available evidence,” *id.* § 811(a)(6)(A). MSHA headquarters and offices around the country are monitoring mines for evidence of COVID-19, and the agency recognizes the seriousness of the pandemic generally. *See* Palmer Decl. ¶¶ 6-15. But for purposes of an ETS, it is incumbent upon MSHA to justify any determination of grave danger to miners with facts and evidence, and at this time, the facts do not support finding a grave danger *at mines*. *See* Addendum Tab 2.

Of course, the Unions must do more than establish that the evidence weighs in favor of an ETS (which it does not) or that MSHA’s finding was unreasonable (which it is not). The Unions must instead establish that MSHA’s grave danger determination “lacks support in the record.” *ICWU*, 830 F.2d at 371. The Unions offer a declaration discussing two diagnosed cases in miners who work at the Genesis Alkali mine (Martinez Decl. ¶ 16) and a general argument that, at another mine, there have been two diagnosed cases of COVID-19. Pet. 19. The Unions mischaracterize these second two cases as an “outbreak,” *id.*, based on only a single news article, which itself cites to a separate news article, *id.* at 19 n.6. That

evidence, such as it is,⁵ is insufficient to mandate that MSHA exercise its extraordinary power to issue an ETS.

The Unions' declarations do not state that the two people at the Genesis Alkali mine contracted the disease at the mine. In fact, none of the declarations identifies a single miner that has been infected at a mine. While MSHA acknowledges that COVID-19 is present in the general population and that there is no reason to believe miners are exempt,⁶ speculation about the possibility of future infection at mines is not sufficient evidence for MSHA to find that a "grave danger" exists in mines. 30 U.S.C. § 811(b)(1).

b. MSHA's powerful and flexible enforcement regime effectively addresses COVID-19 at mines.

The Court should also deny the Unions' petition for a second independently sufficient reason: MSHA has reasonably determined that an ETS is not necessary at

⁵ As OSHA pointed out in successfully opposing the AFL-CIO's attempt to secure an ETS from this Court, cherry-picked news articles, which can contain false and misleading information, are an unreliable basis on which to grant the extraordinary remedy of mandamus.

⁶ The Unions state that miners with Black Lung disease are at heightened risk if they contract COVID-19. The scientific understanding of COVID-19 is in flux. Regardless, a determination to issue an ETS determination must focus not only on what might happen if miners contract COVID-19, but on their risk of contracting it in a mine in the first place. Such a determination is not supported by the record here.

this time. The agency’s arsenal of legal authorities is well-stocked to protect miners from COVID-19 without the need to resort to an ETS. Many MSHA standards may be readily employed to address COVID-19; we highlight five of them here. These standards are both flexible and broad. Taken together, they allow MSHA to require mine operators to take steps specific at each mine to abate a variety of health hazards. Combined with the other powerful tools Congress has given MSHA—frequent mandatory inspections at *all* mines, robust whistleblower and miners’ rights, and broad enforcement powers (including temporarily shutting down mines)—MSHA has what it needs. An ETS is unnecessary and counterproductive, at least at this time.

Workplace examinations. Mine operators are required to examine workplaces for hazards. Operators of metal and nonmetal mines must “examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health,” must record hazards and conditions found, and must promptly initiate action to correct those hazards. 30 C.F.R. §§ 56.18002, 57.18002. Operators of surface coal mines must examine each active working area at least once each shift for hazardous conditions and must correct those conditions and keep a record of them. 30 C.F.R. § 77.1713. Operators of underground coal mines must conduct preshift, on-shift, supplemental, and weekly examinations for hazardous conditions, and must record conditions found

and corrective actions taken. 30 C.F.R. §§ 75.360, .361, .362, .364. And MSHA can, at the District Manager’s discretion, require the preshift examination to include examination for specific additional or newly evolving hazards. 30 C.F.R. § 75.360(e). Hazardous conditions or conditions that may adversely affect safety or health include COVID-related hazards. MSHA enforcement personnel have reviewed mine operators’ examination records to ensure appropriate examination for and correction of COVID-related hazards. *See* Palmer Decl. ¶ 19.

Safeguards. Miners in underground coal mines have an additional protection that can address, for instance, crowded conditions: the Mine Act authorizes MSHA to issue *safeguards*—orders specific to a particular mine that cover equipment and practices related to transportation of miners and materials. 30 U.S.C. § 874(b). MSHA may issue any safeguards that are “adequate, in [its] judgment … to minimize hazards with respect to transportation of men and materials.” *Id.* These safeguards are enforceable mandatory standards. *See* 30 C.F.R. § 75.1403. MSHA already has advised miners and operators to avoid crowded conditions on personnel carriers, hoists, elevators, and other means of transportation. Palmer Decl. ¶ 11; MSHA, *MSHA Response to COVID-19*, <https://www.msha.gov/msha-response-covid-19>. MSHA could choose to issue a safeguard (and does not need an ETS to do so) if transportation-related hazards continue to exist.

Personal Protective Equipment (PPE). MSHA already has the authority to require PPE that would protect miners from airborne hazards such as COVID-19. Operators of metal and nonmetal mines must provide (and miners must use) “special protective equipment and special protective clothing … whenever hazards of process or environment … are encountered in a manner capable of causing injury or impairment.” 30 C.F.R. §§ 56.15006, 57.15006. Operators of coal mines must provide NIOSH-approved respiratory equipment to miners who are “exposed for short periods to inhalation hazards from gas, dusts, fumes, or mists,” and must take additional measures to protect those miners or reduce the hazard if exposure is prolonged. *Id.* § 72.701.⁷ This standard is well-suited for requiring PPE when and if appropriate to protect miners from COVID-19. MSHA would not need an ETS to impose such a requirement.

Training. Mine operators are required to maintain, and train miners in accordance with, MSHA-approved training plans. 30 C.F.R. § 48.3. MSHA evaluates these plans and “may require changes in, or additions to” them if necessary. *Id.* § 48.3(e), (m). If MSHA determines that training on COVID-related hazards is necessary at a particular mine, MSHA can require it—and can

⁷ Miners in underground coal mines also are protected by other standards requiring mines to be well-ventilated by air that moves continuously through the mine. See 30 C.F.R. §§ 75.300-389.

vigorously enforce that requirement. For example, in response to a recent hazard complaint, MSHA recently required a mine operator to update its training plan to include training on the mine’s existing COVID-19 prevention policies. Palmer Decl. ¶ 21. Similarly, operators must train miners at least once every 12 months on “hazard recognition and avoidance,” including additional instruction that MSHA may require “based on circumstances and conditions at the mine.” 30 C.F.R. §§ 48.11(a)(1), (a)(5), (b). Miners at sand, gravel, and surface stone mines are covered by a different set of training standards, *see id.* §§ 46.1-12, but those standards are similar: training plans must be approved by MSHA, *id.* § 46.3, and must include training on hazard awareness, including “site-specific health and safety risks” and “special safety procedures,” *id.* § 46.11(d). Properly trained miners are especially important: if MSHA discovers untrained or improperly trained miners employed at a mine, MSHA must issue an order declaring those miners “to be a hazard to [themselves] and to others” and withdrawing them from the mine until they have been trained. 30 U.S.C. § 814(g)(1).

Sanitation. MSHA’s sanitation standards require operators of coal mines to provide hot water, suitable cleansing agents, and adequate handwashing facilities. 30 C.F.R. §§ 71.402, 75.1712-3. They require operators of metal/nonmetal mines to provide clean and sanitary toilet facilities. 30 C.F.R. §§ 56.20008(b), 57.20008(b). These requirements facilitate handwashing, a well-known precaution

against COVID-19. And MSHA takes these requirements seriously: it has already issued citations in response to COVID-related hazard complaints alleging that mines did not adequately clean sanitary facilities. *See* Palmer Decl. ¶ 20. The existing standard was violated; no ETS was needed.

The Unions argue (Pet. 25) that these standards are not adaptable to COVID-19. Quite the opposite. These performance-based standards⁸ are broad, flexible, and highly adaptable to COVID-19 and the highly variable conditions at specific mines. Courts often interpret MSHA standards like these by determining whether a reasonably prudent person, familiar with the circumstances and with any facts specific to the mining industry, would recognize that the hazard is covered by the standard. *See, e.g., Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012); *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1291 (D.C. Cir. 1990). With respect to the pandemic, this reasonable person analysis will necessarily be informed—and operator discretion limited—by the extensive guidance from MSHA, CDC, NIOSH, the President’s Coronavirus Guidelines for America, state and local governments, and others regarding what steps must be taken to protect miners.

⁸ See Cary Coglianese, Jennifer Nash & Todd Olmstead, *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 Admin. L. Rev. 705, 709 (2003).

These considerations are at the forefront for mine operators and MSHA given the agency’s comprehensive enforcement regime. For example, MSHA is looking at operators’ examination records and training plans for evidence of operator attention to COVID-related hazards. Palmer Decl. ¶ 19. Congress requires MSHA to be at *every* mine on multiple days each year and (in practice, given the time required to inspect the entire mine) at large mines on multiple days each week, and at mines with especially hazardous conditions at least once every five working days. 30 U.S.C. §§ 813(a), (i). MSHA inspects for compliance with *all* applicable mandatory standards. *See id.* § 813(a). Because of this frequent presence, MSHA inspectors are familiar with conditions at mines, know the miners at mines, and recognize subtle changes at mines. Therefore, MSHA is poised to respond almost immediately to any COVID-related hazards with the appropriate enforcement tools at its disposal.

Congress also has empowered and protected miners to raise safety concerns to MSHA. Miners play an essential part in MSHA’s enforcement efforts, and in ensuring safe and healthful mines generally. *See* 30 U.S.C. § 801(e). One key role miners play is accompanying MSHA inspectors while they conduct inspections. *See* 30 U.S.C. § 813(f). This “walkaround” right (with pay) is “vitally important” to ensuring safe and healthful mines. *Emery Mining Corp.*, 10 FMSHRC 276, 284

(1988). Miners may raise and discuss their concerns with inspectors, including about COVID-19.

Hazard complaints, which may be made anonymously (and which MSHA must keep anonymous), also play a key role in MSHA’s enforcement scheme. 30 U.S.C. § 813(g); *see* S. Rep. No. 95-181, at 29-30 (1977) (hazard complaints “play an integral part in the enforcement” of the Mine Act); *Meredith v. FMSHRC*, 177 F.3d 1042, 1056 (D.C. Cir. 1999). The Unions’ belief (Pet. 26-27) that MSHA processes hazard complaints ineffectively does not prove the need for an ETS.⁹ Regardless, the Union mischaracterizes how MSHA responds to those complaints. MSHA does not require miners to list which sections of the Code of Federal Regulations have been violated; instead, inspectors are trained to respond even to informal complaints and to “listen to all interested parties alleging violations, imminent dangers *or hazards.*” III MSHA, *Program Policy Manual* 7 (Feb. 2003), [bit.ly/2Z1wePZ](https://www.osha.gov/program-policy-manual/program-manuals/program-manuals-iii) (emphasis added). (Importantly, MSHA investigates complaints filed not just by miners, but also by “all interested parties,” such as miners’ spouses and children, or others who may know about hazards at mines. *Id.*). MSHA has been investigating the more than 125 COVID-related hazard complaints it has

⁹ The same goes for the Unions' allegation that an MSHA inspector stated that he was not trained or authorized to inspect a mine for COVID-19 dangers. See Martinez Decl. ¶ 7. (MSHA holds daily calls with field offices and they are addressing COVID-19 hazards in mines. Palmer Decl. ¶¶ 8, 19-21.)

received, and has already taken enforcement actions in response, including issuing citations and requiring an operator to revise its training plan. Palmer Decl. ¶¶ 20-21. And miners who file hazard complaints, or who engage in other protected activity (including COVID-related protected activity), are protected from discrimination and retaliation because of that activity and from interference with their right to engage in that activity. 30 U.S.C. § 815(c).

MSHA's stockpile of enforcement tools also enables it to respond meaningfully to COVID-19 hazards that may arise as it hears from miners and conducts its frequent, comprehensive inspections. MSHA can issue citations and orders for COVID-related violations of mandatory standards and require operators to abate those violations immediately. *See* 30 U.S.C. § 814(a). If an operator does not abate the violations, MSHA can seek an injunction, *id.* § 818(a)(1), issue daily civil penalties, *id.* § 820(b)(1), and even shut down the affected area of the mine (which may be the entire mine), *id.* § 814(b). And if MSHA determines that COVID-19 poses an *imminent* danger at a particular mine, it can shut down the affected area of the mine (which also may be the entire mine) until the danger is eliminated. *See id.* § 817(a).¹⁰

¹⁰ A finding that COVID-19 poses an imminent danger at a particular mine is different from a finding that COVID-19 poses a grave danger at mines writ large. An imminent danger is a condition or practice that could kill or seriously harm a

The Unions note that, unlike the OSH Act, the Mine Act does not contain a general duty clause. Pet. 27-28. But that does not mean that MSHA needs an ETS to respond effectively to COVID-19. MSHA has the authority to issue imminent danger orders, withdrawing miners from all or part of a mine, if it discovers any hazard that could reasonably be expected to kill or seriously injure a miner before it can be corrected, even if the hazard does not necessarily violate any particular standard. *See* 30 U.S.C. §§ 802(j), 817(a). MSHA’s existing standards, inspection regime, and enforcement tools enable the agency to identify hazards and respond to them quickly, effectively, and robustly. Unlike employers who receive OSHA citations, operators who receive MSHA citations must abate the violations quickly, even if they plan to contest the citations. *See id.* § 814(a); *Gilbert Mfg. Co., Inc.*, 7 BNA OSHC 1611 (No. 76-4719, 1979) (if an employer contests an OSHA citation and “the Commission affirms the citation, the employer must abate the violation, but if the contest was filed in good faith, the abatement date does not begin to run until the entry of a final order by the Commission”). Requiring operators to abate quickly any COVID-related violations can eliminate or significantly mitigate risks.

miner at a particular mine before the operator could abate the condition. 30 U.S.C. §§ 802(j), 817(a). The fact that MSHA may determine that there are COVID-related imminent dangers at a *particular mine* is not inconsistent with its determination that there are not COVID-related grave dangers at *all mines*.

MSHA is issuing citations and views its existing standards as imposing COVID-related duties on operators. *See* Palmer Decl. ¶¶ 19-21. MSHA has also promulgated guidance and is working closely with operators and miners. *See id.* ¶¶ 7-11, 13-15. Even the Unions' affidavits note operators acting proactively by, for example, shutting down bus service, staggering miners to prevent crowding, and requiring COVID-19 negative tests. *See* Martinez Decl. ¶¶ 10, 13, 17. Operator actions to the contrary can be corrected by MSHA without an ETS.

c. An ETS would not effectively address the variety of the nation's mines and could jeopardize miners' safety.

MSHA's strategy is reasonable, especially since an ETS would hamper MSHA's ability to adapt its approach and likely have unintended and potentially harmful consequences. The Unions' request for an ETS focuses largely on COVID-19 hazards in underground mines, especially underground coal mines. *See* Pet. 19-22. But a rushed, one-size-fits-all response is not suited to mining and would not protect all miners appropriately and effectively. There are more than 12,000 mines operating in the United States, ranging from large, well-ventilated underground coal mines in Appalachia, to a salt mine under Lake Erie, to vast surface copper mines in Nevada, to mom-and-pop sand and gravel mines nationwide. The vast majority of these are surface operations. *See* Palmer Decl. ¶ 3. Every mine is different, and regulating those differences presents challenges even in normal

notice-and-comment rulemaking.¹¹ The short 30-day deadline the Unions seek to impose would foreclose MSHA from drafting anything other than a broad rule. That would come at the cost of addressing important differences among mines. This Court rejected a previous request for an ETS where its substance would require further development under MSHA expertise. *See UMWA*, 231 F.3d at 54.

Requiring MSHA to issue an ETS also may have unintended and potentially harmful consequences for mines that operate under mine-specific rules, including underground coal mines in particular. Underground coal mines operate under mine-specific ventilation and dust control plans, roof control plans, and emergency response plans. *See* 30 U.S.C. §§ 862(a), 863(o), 876(b)(2); 30 C.F.R. §§ 75.220-223, .370-371, .1507. These plans address the specific conditions and practices at each mine, so they are highly technical and complex and often idiosyncratic. They also protect miners from some of the most dangerous hazards in underground mines. *See* S. Rep. No. 95-181, *supra*, at 25. For instance, a lack of proper ventilation in coal mines may lead to the accumulation of combustible material; if

¹¹ That is one reason why many of MSHA's safety standards are performance-oriented and apply to specific types of mines. *See* 30 C.F.R. Part 56 (surface metal/nonmetal mines), Part 57 (underground metal/nonmetal mines), Part 75 (underground coal mines), Part 77 (surface coal mines and surface areas of underground coal mines).

it ignites, it explodes, and miners die. *See, e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 745-46 (7th Cir. 1974).

And because ventilation and roof control plans must be approved by MSHA, they are the result of substantive, lengthy, and frequent negotiations between operators and MSHA, with input from miners’ representatives. *See Prairie State Generating Co. LLC v. Sec’y of Labor*, 792 F.3d 82, 86-87 (D.C. Cir. 2015). It would be extremely difficult—if not impossible—for MSHA both to develop an ETS and to evaluate how the ETS will affect every provision of every plan at every underground coal mine—all within 30 days. Because those plans are crucial to the safety and health of miners, any unintended consequences could be catastrophic. For example, if an ETS imposes social distancing requirements that inadvertently prevent an operator from effectively evaluating whether its ventilation system is working, defects or hazards could go unnoticed and result in fires or explosions.¹²

Balancing the types of “competing policies” sampled above is precisely why the decision to issue an ETS is a decision for which MSHA is entitled “great deference.” *ICWU*, 830 F.2d at 371. MSHA’s strategy allows the agency to enforce existing standards in ways that quickly and appropriately respond to the conditions

¹² MSHA reviews these plans every six months. 30 C.F.R. §§ 75.223(d), 75.370(g). If MSHA learns that additional provisions in these plans could protect miners from COVID-19, MSHA may require operators to include those provisions. *See id.* §§ 75.222, 75.371.

at particular mines, and to issue new guidance or even mine-specific requirements, such as safeguards, where that is appropriate. In contrast, an ETS meant to cover all miners with potential exposure to COVID-19—effectively every miner at every mine across the country—would have to be written at such a general level that it would risk providing very little assistance at all and potentially causing unintended harm.

d. An ETS would reduce MSHA’s flexibility when it is needed most.

Requiring MSHA to issue an ETS also would hamper its ability to adapt its approach in response to new information. MSHA operates under an unusual statutory provision that prevents the agency from reducing any safety protections, even modest ones, once a standard establishes those protections. *See 30 U.S.C. § 811(a)(9).* Under this Court’s interpretation of that rule, it can be especially difficult to change a standard—including an ETS, which serves as the proposed rule in the required subsequent rulemaking proceeding for a final mandatory standard, 30 U.S.C. § 811(b)(3)—even if a continuing need for the standard is questionable and compliance is costly. *See United Steel Workers Int’l Union v. MSHA*, 925 F.3d 1279 (D.C. Cir. 2019) (vacating a revised MSHA standard because it violated the no-less-protection rule).

Regulatory rigidity is precisely the wrong strategy right now. Our collective understanding of and response to COVID-19 is rapidly evolving. For example,

since MSHA received the UMWA’s first petition for an ETS in March 2020, known symptoms of the disease have more than doubled. Palmer Decl. ¶ 27. We have begun to appreciate the prevalence of asymptomatic carriers. CDC has advised the public to wear face coverings, advised employers to conduct daily screenings, and identified increased ventilation as a protective measure to help combat infection. *Id.* We are still learning about the virus’s modes of transmission, which may affect guidance on appropriate social distancing; and we are learning about immunities the virus produces in recovered individuals, which could substantially affect future guidance. *Id.* ¶ 28. The pandemic continues to prompt robust engagement from federal, state, and local public health agencies, which are well-situated to analyze these scientific questions. International governments are similarly updating their guidelines. The United Kingdom, for example, recently announced it would change its social distancing rule to require less distancing, effective July 4, but that the change was “conditional and reversible,” if necessary. Prime Minister Boris Johnson, Prime Minister’s Statement to the House on COVID-19 (June 23, 2020), <https://www.gov.uk/government/speeches/prime-ministers-statement-to-the-house-on-covid-19-23-june-2020>. MSHA is not endorsing the U.K.’s particular approach, but it shows the evolving scientific understanding.

The protective measures adopted by other government entities—federal, state, local, and international—have changed with time and most likely will continue to change as we learn more. MSHA must be free to adapt its approach as well. The Unions remain free to seek additional policies from Congress, state and local governments, and mine operators. Indeed, this is an active political issue. The House of Representatives has introduced several bills that would require OSHA to issue a COVID-19 ETS, and another to require MSHA to issue an ETS has been introduced in the Senate.¹³ “Congress’s awareness of and attention to the situation counsel against issuance of the writ [of mandamus].” *Burwell*, 812 F.3d at 192.

The Unions provide no support for the idea that MSHA can or should determine that any particular emergency standard is “necessary” in the face of such a novel threat and evolving information. *See UMWA*, 231 F.3d at 54; *AFL-CIO*, 2020 WL 3125324, at *1. MSHA’s current approach avoids the risks associated with an ETS, while at the same time allowing MSHA the flexibility to respond nimbly to new information through the use of existing enforcement tools.

* * *

¹³ *See* H.R. 6139, 116th Cong. (2020), bit.ly/3i4VjlS; H.R. 6559 116th Cong. (2020), bit.ly/3eAQ7UC; H.R. 6800, 116th Cong. § 120302 (2020), bit.ly/2Z8JRgl; COVID-19 Mine Worker Protection Act, S.3710, 116th Cong. (2020), bit.ly/2NwccaV.

The Unions have not met their burden to demonstrate their “clear and indisputable” entitlement to a writ of mandamus, nor have they given the Court any reason to override the considerable deference MSHA is afforded here. To date, there is no evidence suggesting COVID-19 is specifically manifesting in mines. And yet, MSHA is actively enforcing in mines through both frequently scheduled inspections and immediate investigations triggered by complaints. MSHA is applying existing mandatory standards applicable and adaptable to COVID-19 and, where necessary, has the enforcement tools to compel compliance. And it is important to remember that MSHA’s tremendous efforts are just one part of the most massive public health response in the nation’s history to a threat that is not unique to workplaces, let alone to mines. MSHA’s determination that no grave danger exists at this time and an ETS is not necessary is entitled to considerable deference.

Worse, an ETS would be counterproductive, even harmful, especially on the Unions’ requested timetable. Such a rushed standard could become outdated or ineffective based on new information, and would not address the country’s diverse types of mines—but it would tie MSHA’s hands with future standards (including any future COVID-related standards). MSHA would also need to carefully consider how the new standard would interact with existing standards, including those designed to prevent mining catastrophes. Applying its substantive expertise

to balance these various and potentially competing safety considerations is precisely the sort of endeavor to which an administrative agency like MSHA is entitled maximum deference.

This Court should accordingly reject the Unions' invitation for it to disrupt MSHA's assessment of sensitive and expertise-laden factors and for the Court to thereby interject itself into an ongoing political examination by the elected branches as to how best to combat and ameliorate the COVID-19 pandemic.

Conclusion

The Unions' petition should be denied.

Respectfully submitted,

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s/ Emily Toler Scott

Certificate of Service

I certify that I electronically filed the foregoing 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 on June 26, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Emily Toler Scott

Addendum Tab 1

Declaration of Wayne D. Palmer

No. 20-1215

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

In re: United Mine Workers of America, et al.

Petitioners

On Emergency Petition for a Writ of Mandamus

Declaration of Wayne D. Palmer

I, Wayne D. Palmer, am the Principal Deputy Assistant Secretary of Labor for Policy for the Mine Safety and Health Administration (MSHA). I possess personal knowledge of the matters set forth in this declaration and am competent to testify to the same.

Overview of the Mine Safety and Health Administration

1. The United States Department of Labor, MSHA, is responsible for enforcing the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq., and the MINER Act of 2006, Pub. L. No. 109-236 (June 15, 2006) (Mine Act).
2. The Mine Act covers safety and health for all underground and surface mining operations in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands. 30 U.S.C. § 802(c).

3. The Mine Act requires MSHA to inspect all surface mining operations at least two times per year and all underground mining operations at least four times per year. These inspections must cover the mine in its entirety. In addition, when MSHA determines that there is an especially hazardous condition in a mine, it must provide a minimum of one spot inspection every five working days. 30 U.S.C. § 813(a),(i). There are approximately 11,781 surface operations and 462 underground operations under MSHA's jurisdiction.
4. The Mine Act requires underground coal mines to operate under MSHA-approved ventilation and dust control plans, roof control plans, and emergency response plans. These mine-specific plans supplement the standards that apply to all underground coal mines. Roof control plans, for example, are specific to the geology of a particular mine and protect miners from the hazards of inadequate roof support, including collapses of mine roofs, which historically has been a leading cause of fatalities in underground coal mines. Ventilation plans, for example, ensure that an adequate supply of clean air is moved through underground mines to prevent the buildup of explosive gases and highly flammable coal dust. Preventing that buildup is essential to safe and healthful mining in part because coal dust explosions, which can be triggered by ignitions of explosive gas, have also historically (and, unfortunately, even in recent years) been lethal hazards.

The COVID-19 Outbreak and MSHA's Response

5. At the end of December 2019, MSHA, along with other federal agencies, began monitoring an uptick in unidentified pneumonia-like illnesses reported in China.
6. In early 2020, MSHA recognized the need to focus its regulated community toward all available recommendations, data, and information associated with keeping miners safe and healthy in light of the growing concerns from President Trump and the White House Corona Task Force created to provide current, ongoing, and reliable sources regarding the illness. To that end, early in March MSHA began ordering PPE and other safety supplies for its inspectors.

7. To aid its communication with the regulated community, MSHA created and maintains a centralized webpage discussing its COVID-19 response at <https://www.msha.gov/msha-response-covid-19>.
8. MSHA leadership began daily COVID-19 conference calls in March 2020 with all Regional Administrators and District Managers. On the very first call, leadership emphasized that all field staff must follow CDC guidelines in performance of their duties. On this and all subsequent calls, Regional Administrators and District Managers reported on mine closures (due to economic reasons or for temporary COVID-related quarantining) and mine reopenings, and on any suspected or confirmed COVID-19 cases among MSHA inspectors or at mines where the operator voluntarily reported such information to the appropriate field office. Assistant Secretary David G. Zatezalo personally reviewed (and continues to review) data on a daily basis checking for mining regions and mining outbreaks. These data also are reviewed and discussed each day in the COVID-19 conference calls.
9. MSHA has been in regular communication with operators and trade associations. Many inquired whether the Agency was continuing to inspect mines during COVID-19. MSHA assured its operators that Agency would continue to inspect (in accordance with CDC guidelines, to the extent practicable) mines with miners present during the pandemic and also explained that the Agency would not inspect a mine that had closed entirely.
10. MSHA posted COVID-19 guidelines and flexibilities with links to CDC guidelines and DOL's COVID-19 webpage, both on MSHA's internal website for its employees as well as for miners on a new page within MSHA's COVID-19 website.
11. MSHA held its Quarterly Stakeholder Call with 600+ participants on April 16, 2020. Assistant Secretary Zatezalo reminded participants that MSHA had posted COVID-19 guidance on its website. He personally detailed precautions miners should take (e.g., "not crowding personnel carriers, hoists, and elevators and other means of transportation at the mine site"). MSHA leadership also answered several COVID-19 related questions following the formal presentations. Leaders from the United Mine Workers of America and United Steelworkers are among those who registered for the call.

MSHA posted a transcript of the call on its website at <https://www.msha.gov/sites/default/files/events/Quarterly%20Stakeholder%20Meeting%20Transcript%20April%202016%2C%202020.pdf>.

12. MSHA also posted a 10-minute video on its intranet site in which leadership apprised MSHA employees of measures the Agency is taking to prevent COVID-19 from spreading among MSHA employees and miners, instructed them on what to do if they believe they have been exposed, and encouraged inspectors to wear respirators when visiting mines. The Assistant Secretary stated that: “In addition to protecting yourself, by wearing one [a respirator], you visibly signal to the mines you visit that you are serious about protecting their miners from possible exposure.”
13. MSHA also collaborated with CDC/NIOSH to produce two cobranded fliers covering COVID-19 precautions specific to miners, including miners with underlying conditions (such as chronic lung disease, black lung, or silicosis). MSHA posted these fliers on MSHA’s COVID-19 page on June 12, 2020, and the Department of Labor’s Office of Public Affairs sent out several tweets with links to them.
14. MSHA’s next Quarterly Stakeholder Call is scheduled for June 30, 2020. MSHA intends to provide an update on efforts to contain the spread of COVID-19.
15. MSHA leadership has discussed the Agency’s COVID-19 measures through opportunities that occurred organically in the course of Agency business. These opportunities included a National Mining Association Safety Committee conference call (May 20, 2020); Oregon Concrete & Aggregate Producers Association Spring Thaw (May 21, 2020); May 22 Small Business Labor Safety (OSHA/MSHA) Roundtable Skype Webinar (May 22, 2020); and the Association of Equipment Manufacturers Earthmoving & Mining Equipment Council WebEx (May 28, 2020).
16. As discussed, MSHA has been monitoring data for evidence of COVID-19 infections at mines. The data does not show that miners face a high risk of infection at mines. The average COVID-19 incidence rate for the ten states employing the most underground miners closely mirrors the national average for the general population, according to the official U.S. Government tracking

site maintained by Johns Hopkins Center for Systems Science and Engineering. But in the State of West Virginia, which employs the most underground miners by far, the incidence rate is a mere 20% of the national average. And the incidence rate in other mining states is lower as well, when urban areas are excluded. Among the other top ten states, only one (Illinois) has a top-ten COVID-19 incidence rate. In Illinois, county-level data confirm a low COVID-19 incidence rate in mining communities: over 90 percent of Illinois's underground miners work in a Downstate region that accounts for only 10 percent of the State's confirmed cases. In Pennsylvania, the only other top-ten underground mining state whose rate exceeds the national average, the rate drops to 60 percent of the national average when the Philadelphia MSA (which has no underground mines) is excluded. Similarly, in Virginia where the incidence rate approaches the national average, the rate drops to 64 percent of the national average when the Northern Virginia MSA (which has no underground mines) is excluded. When all three of those urban COVID-19 hotspots are excluded, the average incidence rate across the top ten states in terms of underground miners drops to 60 percent of the national average.

17. The statistics for states when including underground and surface mines are even more compelling. Surface mines vastly outnumber underground mines in this country, at a ratio of 24 to one, employing 4.76 surface miners for every underground miner. Not one of the top ten states in terms of all types of miners (metal/nonmetal and coal, surface and underground) has a top-ten COVID-19 incidence rate. In fact, the average incidence rate across those ten states is only 54 percent of the national average.

MSHA's Enforcement Activity and Functions During the Pandemic

18. MSHA has continued to perform essential functions, including investigating fatalities and serious accidents, responding to reports of imminent dangers, investigating discrimination cases, conducting regular inspections, and responding to miners' hazard complaints. To the extent possible, for regular inspections, MSHA has limited the number of inspectors sent to a mine proportional to the mine's operational status during the pandemic.
19. Several of MSHA's existing performance-based standards impose COVID-related duties on operators. These include standards covering sanitation,

workplace examinations, personal protective equipment, training, and safeguards. During regular inspections, MSHA has issued citations for COVID-19 related violations of these standards, including failure to clean sanitary facilities. In addition, MSHA's workplace examinations rules require operators to make records of adverse conditions, violations and hazards found. We are aware that enforcement personnel have reviewed operators' exam records to ensure appropriate examination for and correction of COVID-related hazards.

20. Through its Accident & Hazard Reporting Hotline, MSHA has received more than 125 miner complaints pertaining to COVID-19. As an essential function, MSHA investigated and continues to investigate all complaints (except those that fall outside its jurisdiction). MSHA has found that some conditions violated mandatory standards related to the spread of COVID-19, and has issued citations under MSHA's existing performance-based standards. MSHA is continuing to investigate a number of these complaints. With each investigation, MSHA reminds miners and operators that any report of unsafe or unhealthful conditions at a mine may not be used in any discriminatory or retaliatory manner, which would violate the Mine Act. 30 U.S.C. § 815(c).
21. If MSHA determines that training on COVID-related hazards is necessary at a particular mine, MSHA can require it—and can vigorously enforce that requirement. For example, on June 24, 2020, MSHA received another hazardous condition complaint late at night alleging "Not maintaining and enforcing a safe 6 foot social distance requirement at the workplace. More tha[n] 10 people in the elevator, forced to ride shoulder to shoulder in the diesel mantrips. No cleaning material to clean the rides. Shuttling people back and forth in and out of the ride without wiping down the ride between groups of people." In response, MSHA sent inspectors to the mine right away that night, and then, although the operator already had a voluntary plan to address COVID-19 hazards, MSHA required the operator to revise its training plan under 30 C.F.R. § 48.3(m) to address the hazards associated with COVID-19.
22. As discussed, Mine Act § 105(c) (30 U.S.C. § 815(c)) prohibits adverse action when miners file a COVID-19-related hazard complaint. Throughout the pandemic, MSHA has continued to investigate discrimination cases vigorously, as an essential function.
23. As a part of continuing its enforcement functions in a manner promoting safety for miners, MSHA has suspended educational visits and other special

initiatives that normally would gather groups of miners on-site to discuss powered haulage, electrocution, and contractor safety.

24. In conjunction with its extensive guidance, MSHA has worked to ensure its enforcement program can continue to function and can, where appropriate, prioritize COVID-19-related hazards. MSHA has issued its inspectors PPE and other COVID-related supplies, and allows only apparently healthy inspectors to visit mines. MSHA has quarantined inspectors with symptoms or who believed they were exposed to someone with COVID-19. These precautions ensure that MSHA can continue to safely conduct regular inspections required by the Mine Act and can respond to miners' hazard complaints or reports of imminent dangers, while protecting miners from potential exposure from MSHA inspectors.
25. The Department has closely monitored state, local, and federal government orders and guidance related to COVID-19, as well as guidance developed by mine operators. This information guides MSHA's ongoing evaluation of needs for the mining industry.

UMWA's Petitions for Emergency Temporary Standards

26. On March 24, 2020, MSHA received a petition from the UMWA asking MSHA to issue an emergency temporary standard to protect miners from exposure to COVID-19.
27. Even since the UMWA submitted its petition three months ago, our knowledge about COVID-19 has evolved in many important ways. For example, when we received this March 24 petition, known symptoms of COVID-19 were limited to fever, cough, or shortness of breath, but have since grown to encompass chills, muscle pain, sore throat, and loss of taste or smell. There was little appreciation for the prevalence of asymptomatic carriers compared to our current understanding. CDC had not yet begun affirmatively advising the general public to use face coverings, now considered an important tool for source control, and testing availability for COVID-19 was substantially more limited. CDC was not yet advising employers to conduct daily health checks or advising on the appropriate disinfection procedures following a confirmed case, and CDC had not yet identified increased ventilation as a protective measure to help combat infection.

28. Even with this growth in understanding, the virus continues to present substantial uncertainty. For example, we are still learning about the virus's modes of transmission, which may affect guidance on appropriate social distancing, and we are learning about immunities the virus produces in recovered individuals, which also could substantially affect future guidance. We believe it is important to retain the tools and flexibility to adjust as needed to adequately protect miners.
29. Assistant Secretary Zatezalo sent the UMWA a formal denial of its ETS petition on April 14, 2020, describing MSHA's ongoing response to the pandemic, emphasizing operators' existing compliance obligations in response to COVID-19, and explaining why MSHA has thus far considered responding through existing standards and authorities to be more valuable than an ETS in protecting miners.
30. The UMWA submitted a second petition for an ETS to MSHA on May 20, 2020, reiterating that mining is unique and taking issue with the response previously provided from the agency. A response to that request was being finalized when the UMWA/USW filed this mandamus action.
31. On June 26, 2020, MSHA sent the UMWA a response denying this second petition for an ETS.

I declare under 28 U.S.C. § 1746 and under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of June, 2020 at Arlington, VA



Wayne D. Palmer

Principal Deputy Assistant Secretary of Labor for Policy
Mine Safety and Health Administration

Addendum Tab 2

June 26, 2020 ETS Denial Letter



June 26, 2020

Cecil E. Roberts
International President
United Mine Workers of America
18354 Quantico Gateway Dr., Suite 200
Triangle, VA 22172

Dear Mr. Roberts:

Thank you for your May 20, 2020 letter requesting that the Mine Safety and Health Administration (MSHA) reconsider its decision not to issue an emergency temporary standard (ETS) in response to COVID-19. I appreciate you once again sharing your concerns for the health of our nation's metal/nonmetal and coal miners. I also appreciate your acknowledgment of MSHA's response to the COVID-19 pandemic to date as this situation rapidly evolves. Ensuring miner safety and health during this unprecedented crisis remains MSHA's top priority, and we value your feedback. Rest assured that we share your concern for the health and safety of America's miners during this challenging time.

After thorough review and consideration of your letter, along with your March 24, 2020 letter presenting your initial request for an ETS, MSHA has decided not to issue an ETS for infectious disease at this time. As discussed in our April 14, 2020 response, MSHA may issue an ETS only if it determines that miners are exposed to a grave danger and that an ETS is necessary to protect them from that danger. 30 U.S.C. § 811(b)(1). In its 42-year history MSHA has issued only a handful of ETSs—each prompted by specific, grave dangers widely acknowledged in the aftermath of serious mine disasters.

At this juncture, MSHA has determined it lacks evidence that COVID-19 poses a grave danger to miners, and even if it did, an ETS would not be necessary to protect miners. As you are aware, these findings leave MSHA with *no* legal authority to issue an ETS. We wish to assure you, however, that MSHA has sufficient legal authority and enforcement tools to take action to protect miners from COVID-19.

Both your May and March letters focused on conditions and practices in underground mines, particularly those where coal is mined. Underground mining has continued to operate throughout the pandemic. As of June 22, 2020, there were 192 underground metal/nonmetal mines and 154 underground coal mines actively producing in this country, which constitutes a majority of such mines. States mostly have refrained from imposing on mines the type of closures that have affected so many workplaces across the country. Setting aside Pennsylvania's one-day shuttering of mines statewide, only two state governments of which we are aware decided to close their mines as "non-essential" businesses during the pandemic: Washington (ranked 28th in terms of underground miners) and Vermont (ranked 30th in terms of underground miners).

While we appreciate the seriousness of COVID-19 in the U.S. population generally, no data available at this time suggests higher incidence rates among miners specifically, despite the fact that so many mines have continued to operate. We also have no evidence to date that any miner has contracted COVID-19 at or in a mine. MSHA's three Regional Administrators and fifteen District Managers continually monitor the mines in their areas and report to headquarters daily on any cases of COVID-19 of which they are aware. They have brought to our attention instances of individual COVID-19 cases among miners. We are aware of the miners you mentioned in an affidavit attached to the mandamus action you filed on June 15, 2020, in the United States Court of Appeals for the District of Columbia Circuit (*In re: United Mine Workers of America, et al.*, Case No. 20-1215). But it is far from clear that they or any other individual contracted COVID-19 due to exposure at a mine.

We also note that the average COVID-19 incidence rate for the top ten states in terms of underground miners closely mirrors the national average for the general population, according to the official U.S. Government tracking site maintained by Johns Hopkins Center for Systems Science and Engineering. But in West Virginia, which employs the most underground miners by far, the incidence rate is far lower—a mere 20 percent of the national average. And the incidence rate in other mining states is lower as well, when urban areas are excluded. Among the other top-ten states, only one (Illinois) has a top-ten COVID-19 incidence rate. Regarding Illinois, county-level data confirm a low COVID-19 incidence rate in mining communities: over 90 percent of Illinois's underground miners work in a downstate region that accounts for only 10 percent of the state's confirmed cases. In Pennsylvania, the only other top-ten underground mining state whose rate exceeds the national average, the rate drops to 60 percent of the national average when the Philadelphia MSA (which has no underground mines) is excluded. Similarly, in Virginia, where the incidence rate approaches the national average, the rate drops to 64 percent of the national average when the Northern Virginia MSA (which has no underground mines) is excluded. When all three of those urban COVID-19 hotspots are excluded, the average incidence rate across the top ten states in terms of underground miners drops to 60 percent of the national average. See Figure 1, attached.

The statistics for states when including underground and surface mines are even more compelling. As you know, surface mines vastly outnumber underground mines in this country, at a ratio of 24 to 1, employing 4.76 surface miners for every underground miner. As Figure 2 illustrates, not one of the top ten states in terms of all types of miners (metal/nonmetal and coal, surface and underground) has a top-ten COVID-19 incidence rate. In fact, the average incidence rate across those ten states is only 54 percent of the national average.

Your March 24, 2020 letter mentioned unique challenges certain miners face, including working underground and in close proximity to one another, but these realities of the mining industry have prompted the mandatory standards discussed below, which are adaptable to the threat of COVID-19. Existing mandatory standards regarding, for example, sanitation and respiration in mines, actually render MSHA more equipped, not less, to address the threat of COVID-19.

You have also mentioned potential comorbidities in some miners that you say could render miners more susceptible to serious symptoms of COVID-19. MSHA is always mindful of actual

and potential comorbidities in miners. While again not diminishing the seriousness of the COVID-19 pandemic generally, to issue an ETS MSHA must determine specifically that miners are exposed to a grave danger, and that determination must be supported by facts and evidence. This determination must focus not only on what might happen if and after miners contract COVID-19, but on their risk of contracting it in a mine in the first instance. Based on all available evidence and data, and the evolving nature of the facts, MSHA continues to believe that the evidence regarding the current COVID-19 situation among miners does not rise to the high statutory threshold for MSHA to determine that a grave danger to miners exists.

MSHA has further concluded as an independent reason not to issue an ETS that an ETS is not necessary, given its existing and adaptable mandatory standards and enforcement tools, which are backed by MSHA's presence in and inspection of mines and allow MSHA to respond quickly and meaningfully to COVID-19 hazards that may arise.

As you know, the Mine Act is an unusually strong enforcement statute and MSHA has many enforcement tools at its disposal. MSHA frequently inspects every mine in the country to ensure that operators are complying with standards: MSHA is required to inspect all surface mines in their entirety at least twice each year, and all underground mines in their entirety at least four times each year. 30 U.S.C. § 813(a). Miners also may obtain an immediate inspection by filing hazard complaints (which may be anonymous) with MSHA. Indeed, just this Wednesday evening (June 24, 2020), late at night, MSHA received a hazardous condition complaint alleging "Not maintaining and enforcing a safe 6 foot social distance requirement at the workplace. More tha[n] 10 people in the elevator, forced to ride shoulder to shoulder in the diesel mantrips. No cleaning material to clean the rides. Shutting people back and forth in and out of the ride without wiping down the ride between groups of people." In response, MSHA sent inspectors to the mine that very night, and then required the operator to revise its training plan under 30 C.F.R. § 48.3(m) to address the hazards associated with COVID-19. In addition, representatives of miners may travel with MSHA inspectors during inspections, aiding MSHA in identifying hazardous conditions at mines.

MSHA has an arsenal of enforcement tools to combat violations. Operators are strictly liable for violations of mandatory standards, and must abate every alleged violation within a timetable MSHA establishes, regardless of whether they contest the violation. MSHA may obtain injunctions against operators who refuse to comply with MSHA's orders or that interfere with or refuse MSHA's enforcement of the Mine Act. MSHA may assess civil penalties against individual agents for knowing violations of mandatory standards. And the Mine Act imposes criminal penalties for willful violations. In addition to assessing penalties, MSHA has the authority to order miners withdrawn and kept from parts of a mine or even the entire mine. MSHA can do so if it discovers an imminent danger, that an operator failed to timely abate a violation, or violations that are the result of an operator's unwarrantable failure to comply with mandatory standards. Each of these measures shuts down part of a mine, or even the entire mine, until the violation or hazard is abated. MSHA also may withdraw untrained miners.

Against this backdrop of MSHA's frequent presence at every mine in the country—and its ability to require immediate corrective action—MSHA has a number of performance-based standards available in response to COVID-related complaints or conditions inspectors encounter. Your

letters suggests that MSHA currently lacks the authority to address potential exposure hazards to miners from, among other things, riding elevators and mantrips, crowding in dinner holes, using bathhouses and shower facilities, and touching or handling shared equipment. This is not the case.

MSHA's available standards include, but are not limited to, sanitation (30 C.F.R. §§ 56.20008(b), 57.20008(b), 71.402, 75.1712-3); workplace examinations to identify hazards and adverse conditions (30 C.F.R. §§ 56.18002, 57.1002, 75.360, 75.361, 75.362, 75.364, 77.1713); training on any hazards at the mine (30 C.F.R. § 46.11(d), 48.3, 48.3(e), 48.11(a)(1), (a)(5), (b)); transportation-related safeguards, which may apply to personnel carriers, hoists, elevators and other means of transportation (30 C.F.R. § 75.1403); and personal protective equipment, including respirators (30 C.F.R. §§ 56.15006, 57.15006, 72.701). These standards are highly adaptable to COVID-related hazards in mines, because they are performance-based: they specify the required outcome but do not specify how the operator must achieve it. MSHA has continued to enforce these standards during the pandemic and an ETS would reduce MSHA's flexibility when it is needed most.

MSHA has stated from the beginning of the pandemic that, as long as miners continue to work in mines, MSHA will continue to perform its statutorily required essential functions. Through its Accident and Hazard Reporting Hotline, MSHA has received miner complaints pertaining to COVID-19. As an essential function, MSHA investigates all complaints except those that fall outside its jurisdiction. Where such investigations have resulted in positive findings, MSHA has issued citations under its existing standards. Moreover, during the pandemic MSHA has proactively issued more citations under those same standards during the routine course of inspections not prompted by miner complaints. If a complainant suffers repercussions at work, MSHA may pursue a case of discrimination for adverse action after filing such a complaint. 30 U.S.C. § 815(c). Throughout the pandemic, MSHA has continued to vigorously investigate discrimination cases as an essential function.

MSHA has also provided guidance, and is monitoring the COVID-related requirements and guidelines from other entities, such as state, local, and federal government agencies, the Centers for Disease Control and Prevention (CDC), the National Institute for Occupational Safety and Health (NIOSH), and the President's Coronavirus Guidelines for America. This is reasonable because COVID-19 is not uniquely a threat to miners or mines; instead it is a community-wide hazard across the nation. The mandatory and voluntary efforts being undertaken across the country to prevent the spread of this virus likewise serve to prevent its spread in workplaces, including mines. Moreover, through its regular stakeholder meetings and calls and its daily meetings with MSHA field personnel to discuss COVID-related conditions at mines, MSHA is also cognizant of voluntary compliance measures taken by mine operators. Such voluntary efforts are relevant to the necessity of an ETS.

Not only is an ETS unnecessary in light of MSHA's existing standards and enforcement tools, the nationwide and inter-governmental efforts to combat the spread of COVID-19, and the voluntary efforts undertaken by miners, an ETS would actually be counterproductive for several reasons. First, MSHA is adapting to the situation as it evolves; etching a COVID-19 standard in regulatory stone now would limit MSHA's ability to adapt quickly to changing circumstances

and new facts in the future. An ETS triggers a final rulemaking within nine months. And under the Mine Act, once MSHA promulgates a safety or health standard, any subsequent standard cannot reduce protections under existing ones. 30 U.S.C. § 811(a)(9). We continue to believe that MSHA can best protect miners and operators from COVID-19 by responding rapidly in a fluid environment through the robust yet flexible authorities and standards it already has in 30 CFR.

Second, MSHA's consideration of an ETS is not done in a vacuum; in determining whether an ETS is necessary, MSHA must balance various and potentially competing safety considerations, compounded by the fact that the mining industry is extremely diverse. The variety of working environments at the nation's thousands of mines, which range from small surface operations to extremely large underground operations, require that MSHA retain enforcement flexibility to act effectively, especially as information about COVID-19 continues to evolve. In addition, MSHA is mindful of the variation that is a necessary feature of its regulatory regime: a number of mine-specific requirements, including mine-specific roof-control, ventilation, and escape and evacuation plans; safeguards applicable at different mines; and a panoply of different standards that apply among coal, metal and nonmetal, surface and underground mines. An ETS, which does not allow time for public input, much less for careful study of mine-specific implications, would necessarily be an ineffective, one-size-fits-all approach. An ETS could even jeopardize miners' safety, as compliance with it could interfere inadvertently with other mine-specific safety requirements.

We are grateful that to date the COVID-19 pandemic has spared America's mining workplaces, and that the risks miners face from COVID-19 have been demonstrably lower than in certain other industries and occupations. Nevertheless, rest assured that MSHA remains vigilant, continues to perform its essential functions, and will continue to take all appropriate measures to prevent the virus's spread in mines.

Please feel free to contact me if you would like to discuss MSHA's efforts further.

Sincerely,



David G. Zatezalo
Assistant Secretary of Labor for
Mine Safety and Health Administration

Enclosure

Figure 1: COVID-19 Incidence Rates for Top 10 Underground Mining States by Number of Underground Miners

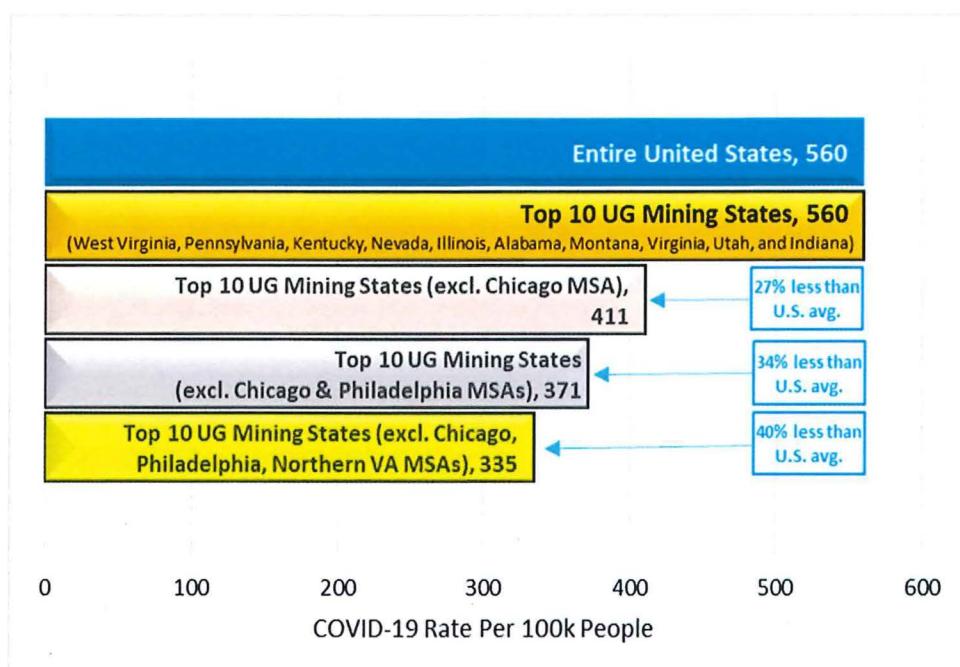
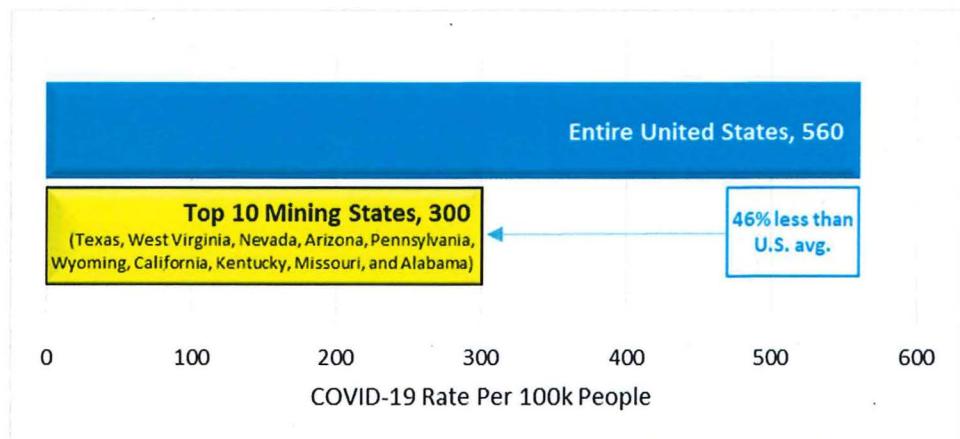


Figure 2: COVID-19 Incidence Rates for Top 10 Mining States by Number of Miners



NOTES:

1. COVID-19 data were obtained from the Johns Hopkins University of Medicine's Corona Virus Resource Center, <https://coronavirus.jhu.edu/>. Accessed on June 1, 2020; testing data were current as of May 27, 2020.
2. COVID-19 rates were computed using the US Census Bureau's 2018 census population data, <https://data.census.gov/cedsci/table?q=dp&tid=ACSDP1Y2018.DP02&hidePreview=true>.
3. Mining employment data were obtained from mine operator filings of MSHA 7000-2 Quarterly Mine Employment and Coal Production Report for activity during CY2020 Q1.
 - a. The top 10 underground mining states by number of underground miners listed in Figure 1 are presented in order of most to least miners.
 - b. The top 10 mining states by number miners listed in Figure 2 are presented in order of most to least miners.
4. Metropolitan Statistical Areas (MSA) referenced in Table 1 include the following counties:
 - a. Philadelphia – Bucks, Chester, Montgomery, Delaware, Philadelphia.
 - b. Chicago – Cook, DuPage, DeKalb, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, and Will.
 - c. Virginia – Alexandria (city), Arlington, Falls Church (city), Fairfax, Fairfax (city), Loudoun, Manassas (city), and Prince William.