RECORD NO. 20-1215

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

In re: United Mine Workers of America, International Union and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC,

Petitioners,

v.

Mine Safety and Health Administration, United States Department of Labor,

Respondent.

ON EMERGENCY PETITION FOR A WRIT OF MANDAMUS

REPLY TO RESPONSE TO EMERGENCY PETITION FOR A WRIT OF MANDAMUS, AND REQUEST FOR EXPEDITED BRIEFING AND DISPOSITION

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No. 20-1215

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

In re: United Mine Workers of America, International Union and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC

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REPLY TO RESPONSE TO EMERGENCY PETITION FOR A WRIT OF MANDAMUS

SUMMARY OF ARGUMENT

In support of its refusal to issue an Emergency Temporary Standard ("ETS") regarding the hazards posed by COVID-19, the Mine Safety and Health Administration ("MSHA") asks this court to defer to MSHA's judgment despite MSHA's *ad hoc* inconsistent determinations that leave miners with inadequate protections as COVID-19 cases surge in states such as Arizona and California, home

to hundreds of active mines.[1] (Brief for Secretary of Labor (June 26, 2020) ("MSHA Br.") at 16-33).[2] MSHA argues COVID-19 does not pose a grave danger to miners, while asserting that MSHA is taking sweeping action to eliminate COVID-19 risks with its existing tools. *Id*. at 16-33. MSHA incongruously asserts that the existing, broadly-worded standards that were not promulgated to guard against contagious disease will protect miners from COVID-19, while a more narrowly tailored COVID-19 ETS would be too broad and result in unforeseen consequences. *Id*. In

[1] "Arizona COVID-19 case surge continues, setting care records," (June 20, 2020), Associated Press, https://www.fox10phoenix.com/news/arizona-covid-19-case-surge-continues-setting-care-records1; "California breaks coronavirus records…." (June 25, 2020), CNN, https://www.cnn.com/2020/06/25/health/california-coronavirus-cases-surge/index.html; Arizona Geological Survey, "Active Mines in Arizona –Directory and Map" (Dec. 3, 2019) https://azgs.arizona.edu/news/2019/12/active-mines-arizona-directory-and-map; California Department of Conservation, "California's Non-Fuel Mineral Production" (2019) https://www.conservation.ca.gov/cgs/minerals/mineral-production.

[2] MSHA also argues that the Unions lack standing to bring this action. MSHA Br. at 14-15. This Court has long recognized the Unions as proper parties to seek a writ of mandamus for an ETS on behalf of their members. *In re United Mine Workers of America Intern. Union*, 231 F.3d 51, 55 (D.C. Cir. 2000); *In re United Mine Workers of America Intern. Union*, 190 F.3d 545, 546 (D.C. Cir. 1999). For the reasons outlined in the Unions' "Emergency Petition For Writ Of Mandamus, And Request For Expedited Briefing And Disposition" ("Union Pet."), the Unions have standing. Union Pet. at 7-11. Also, MSHA incorrectly asserts that the USW should be dismissed as a party for failing to exhaust administrative remedies citing *Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158-59 (D.C. Cir. 2007). MSHA Br. at n. 4, 11. To the extent that exhaustion is required, the Court should excuse exhaustion as futile in light of MSHA's repeated denials of the UMWA's petitions. *Id.* at 159; Pet. Addendum Tab 5; MSHA Addendum Tab 2.

short, MSHA argues that this Court should defer to MSHA's judgment despite MSHA's adoption of diametrically opposed, inconsistent positions on COVID-19.

MSHA's voluntary COVID-19 measures amount at best to a patchwork, "wait and see" approach to a global pandemic the likes of which have not been seen in more than a century. Given that the pandemic is currently spiraling out of control in a number of areas within the United States, a more responsible and robust response from MSHA is desperately needed. This is particularly true given the underlying health conditions many miners suffer that render them a vulnerable population susceptible to significant injury and death when exposed to COVID-19. Accordingly, the Unions ask this Court to order MSHA to issue a COVID-19 ETS to protect miners under mandatory enforceable standards.

ARGUMENT

I. THE MINE ACT REQUIRES MSHA TO ACT QUICKLY IN ISSUING AN ETS.

Under § 101(b)(1) of the Mine Act, "the Secretary must issue an emergency temporary standard if [he] finds that 'miners are exposed to a grave danger" and that an "emergency standard is necessary to protect miners from that danger." *In re International Union, United Mine Workers of America*, 231 F.3d 51, 54 (D.C. Cir. 2000).

MSHA argues, without any statutory basis, that Congress set a "high standard" for issuing an ETS, because of the gravity of promulgating rules without

public participation (MSHA Br. at 5-6) when Congress explicitly addressed this issue in providing MSHA with ETS authority:

> The Committee fully realizes the serious nature of permitting the Secretary to issue an enforceable standard without hearings and other means of more precisely determining in advance the myriad ramifications of his actions. **These provisions do not require the Secretary to prove the existence of a grave danger as a matter of record evidence prior to taking action, but permit him to take immediate action as a matter of preventive policy**. In short, the Committee realizes the need to act quickly where, in the judgment of the Secretary, a grave danger to miners exists. To strike a balance between these two considerations, the bill permits the emergency temporary standard to remain in effect for only nine months. (Emphasis supplied.).

S. Rep. No. 95-181, at 24 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 612 (1978) ("*Legis. Hist.*").[3]

MSHA's argument that upon issuance of a COVID-19 standard, it will be difficult to change the standard if the ETS is converted into a final rule because of the Mine Act's "one-way ratchet" provision at § 811(a)(9) is a red herring. MSHA Br. at 3, 30. First of all, the Mine Act states that the temporary standards remain in effect for only nine months under § 101(b)(3) and then are subject to the safeguards of notice and comment rulemaking like any final rule under § 101(a). Moreover,

[3] The Congressional dictate that MSHA take immediate preventative action through the issuance of an ETS belies MSHA's assertion that an ETS should only be issued after a mining disaster occurs. MSHA Br. at n.1, 6.

§ 811(a)(9) simply states that no standard, after promulgation, may "reduce the protection afforded to miners." 30 U.S.C. § 811(a)(9); *See*, *e.g.*, *United Steel Workers Int'l Union v. MSHA*, 925 F.3d 1279 (D.C. Cir. 2019). MSHA will not run afoul of § 811(a)(9) if MSHA subsequently finds the need to promulgate improvements to any COVID-19 ETS adopted.

Neither of MSHA's arguments trump MSHA's obligation to "act quickly" by issuing an ETS where, as in the case of COVID-19, a grave danger to miners exists requiring action "as a matter of preventative policy."

II. MSHA'S DETERMINATION THAT COVID-19 POSES NO DANGER TO MINERS IS CONTRARY TO ITS OWN ACTIONS AND CANNOT STAND.

MSHA's assertion that COVID-19 does not pose a danger to miners because, at this time, few miners have contracted the disease, and none have died (MSHA Br. at 16-17) callously ignores Congress's mandate that MSHA proactively take action as a matter of preventative policy instead of waiting for miners to die from an unregulated grave danger:

> **[T]his provision is designed to allow the Secretary to react quickly to grave dangers which threaten miners before those dangers manifest themselves in serious or fatal injuries or illnesses**. The Committee emphasizes that **these provisions should not be interpreted as suggesting that a record of fatalities or serious injuries is necessary before an emergency temporary standard can be issued. Disasters, fatalities, and disabilities are the very things this provision is designed to prevent;** The Committee, therefore intends that **emergency temporary standards should be issued under**

> **this section when the Secretary determines that miners are exposed to a working environment which contains dangers with the potential to threaten human life, health and safety and there is no adequate enforceable safety or health standard to protect them against that potential. Waiting until those dangers manifest themselves as fatalities or disabling injuries or illnesses, frustrates the purpose of the provision.** (Emphasis supplied.)

S. Rep. No. 95-181, at 23-24, *Legis. History* at 611-612.

Further, that the grave dangers posed by the coronavirus are not "traditional" mine hazards in no way alters MSHA's obligation to promulgate an ETS. Union Pet. at 21-22. As Congress stated, the ETS provision:

> … does not exclude any particular classes of grave dangers from those for which an emergency temporary standard is available. **For example, it is intended that emergency temporary standards be issued in response to grave dangers that are of novel as well as of longstanding causes; or of dangers that result from conditions whose harmful potential has just been discovered, or from those to which large numbers of miners are being newly exposed**. To exclude any kind of grave danger would contradict the basic purpose of emergency temporary standards-- protecting miners from grave dangers. (Emphasis supplied.)

S. Rep. No. 95-181, at 24, *Legis. History* at 612.

MSHA's assertion that COVID-19 does not pose a grave danger is contrary to the evidence presented by the Unions (Union Pet. at 17-22) and belied by MSHA's actions taken to mitigate the dangers posed by COVID-19: MSHA claims to have

(i) monitored COVID-19 since December 2019[4]; (ii) held regular conference calls since March 2020; (iii), stockpiled supplies; (iv) created a website and guidance materials; (v) communicated regularly with interested parties; and (vi) cited operators for hazards related to COVID-19.[5] MSHA Br. at 6-7, 7-8, 18-21.

What MSHA has not done is establish "adequate enforceable safety or health standard to protect them against that potential"[6] as required by the Mine Act. Thus, MSHA's steps to mitigate against COVID-19 are inapposite with MSHA's assertion that COVID-19 does not pose a grave danger and must fail because MSHA's own actions support the Unions' contention that COVID-19 poses a grave danger to miners.

III. MSHA'S DISCRETION IS NOT UNLIMITED.

MSHA argues that, in its discretion, MSHA properly determined that an ETS is not "necessary" to protect miners from the hazards posed by COVID-19. MSHA

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[4] MSHA's unfounded assertion that the Unions are rushing MSHA into issuing a COVID-19 ETS, *see* MSHA Br. at 2, is undercut by MSHA's acknowledgement that MSHA has been monitoring COVID-19 for over six months.

[5] MSHA offers no authority for citing operators under the Mine Act for conditions that MSHA asserts are not hazardous. Moreover, in the Unions' experience, these hazards have not been cited by MSHA and such citations represent isolated incidents at best that do not meet the mandate for MSHA to issue adequate enforceable safety or health standard in the face of grave dangers to miners. Union Pet. at Tab 6, 7, and 8.

[6] S. Rep. No. 95-181, at 23-24, *Legis. History* at 611-612.

Br. at 17.[7] MSHA's discretion, however, does not allow the agency to willfully ignore grave hazards and the need for mandatory protections against those hazards that amounts to an "abdication of MSHA's statutory responsibility." *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984). As this Court has recognized, Congress "could not have intended to give MSHA unbridled discretion to withhold or delay development and promulgation of 'improved mandatory health or safety standards.'" *See Oil and Chemical and Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487 (D.C. Cir. 1985).

MSHA's discretion to determine whether an ETS is necessary is limited by its congressionally mandated obligations set forth in the Mine Act. As noted at 5 *supra*, Congress made clear that an ETS is to be issued by MSHA to address grave dangers to miners **before** serious injury or fatalities occur. Further, as noted at 3-4, *supra*, Congress directed MSHA to act quickly to resolve identified dangers. An ETS is a quick, preventative, and temporary measure that must be taken without regard to non-mandatory actions taken by operators to mitigate the danger:

> [O]nce the Secretary has identified a grave danger that threatens miners the Committee expects the Secretary to issue an emergency temporary standard as quickly as possible, not necessarily waiting until he can

[7] MSHA cites to *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (per curiam) (unpublished) ("*AFL-CIO*") to assert that MSHA is entitled to "considerable deference." As an unpublished decision, the panel "sees no precedential value in that disposition." MSHA Br. at 5, 9; D.C. Cir. Rule 32.1(b)(1) and 36(e)(2).

> investigate how well that grave danger is being managed or controlled in particular mines.

S. Rep. No. 95-181, at 24, *Legis. History* at 612.

MSHA's discretion to issue an ETS is, therefore, defined and limited by Congress's purpose in creating the ETS provision. The implications for COVID-19 are obvious – a new and grave danger exists and no mandatory standard is in place to control the dangers. Therefore, MSHA must act quickly to issue an ETS regardless of any voluntary actions taken by operators.

Moreover, MSHA has already determined that mandatory measures are needed to protect against the dangers of COVID-19 as witnessed by MSHA's actions to protect MSHA's mine inspectors who are exposed to the same mine conditions as miners. *See* Union Pet. at 18-19. MSHA, thus, has recognized the necessity of protecting mine inspectors traveling to mines through mandatory COVID-19 measures, yet MSHA declined to ensure the same kinds of mandatory protections for miners.

The Unions applaud MSHA for taking actions to mitigate the dangers facing MSHA inspectors and other staff members and hope that all employers demonstrate such concern for their employees. However, hope and voluntary efforts are not enough; adequate enforceable standards in the form of an ETS are necessary to meet the grave danger posed by COVID-19. MSHA is not only an employer, but also a regulator tasked by Congress to regulate the mining industry to promote the safety

of the nation's miners. And so the Unions ask: why shouldn't miners enjoy the same level of safety and protection that MSHA affords its own employees?

IV. MSHA'S CURRENT TOOLS ARE INADEQUATE TO REDUCE THE GRAVE DANGERS POSED BY COVID-19.

In lieu of issuing an ETS, MSHA argues that existing procedures and methods provide a greater degree of "flexibility" and protection to address COVID-19. MSHA Br. at 17. In essence, MSHA argues that an ETS is not necessary because other protections are in place. However, these purported protections are inadequate to address the dangers posed by COVID-19.

First, MSHA argues that it is currently citing operators under a variety of "general" standards that were not promulgated to combat the hazards posed by COVID-19. MSHA Br. at 7-8, 18-22. This argument is inconsistent with MSHA's later argument that a "broad" COVID-19 specific standard should not be issued because of "unintended consequences."[8] MSHA Br. at 27-30. MSHA contradicts itself by arguing that MSHA may appropriately expand broad, general standards

[8] MSHA argues that the danger of "unintended consequences" is particularly acute because there are a variety of mines and a "one-sized fits all" approach would not only be unwise, but dangerous. MSHA Br. at 27-30. MSHA provides no support for its claim that COVID-19 is more dangerous in one mine as opposed to another. This argument is particularly unpersuasive since MSHA's "One MSHA" initiative seeks to break down MSHA's distinction between coal and metal/nonmetal mines (https://edlabor.house.gov/imo/media/doc/ZatezaloTestimony0620191.pdf), and MSHA has promulgated numerous regulations that apply to both coal and metal/nonmetal mines as well as surface and underground mines since MSHA's creation in 1977.

unrelated to contagious disease to cover hazards posed by COVID-19, while simultaneously arguing that a targeted COVID-19-specific standard could be overly broad and dangerous.[9]

MSHA's argument that an ETS is not necessary because miners are protected by § 103(g) of the Mine Act (MSHA Br. at 23-24) also falls short of the Mine Act's mandate to issue an ETS with adequate enforceable safety or health standards in the face of grave danger to miners. Individual investigations and enforcement actions in response to a § 103(g) complaint are reactive at best and no substitute for an ETS with clear enforceable standards applicable to all mine operators.

While § 103(g) of the Mine Act protects miners' rights to anonymously request that MSHA inspect their mine when there is a violation of a mandatory standard or there is an "imminent danger" (*Marshall County Coal Co. v. Fed. Min. Safety and Health Review Comm'n*, 923 F.3d 192, 205 (D.C. Cir. 2019). (Feb. 2016)), in practice when a miner "calls in a 103(g)," he/she is required to state exactly which MSHA standard was violated or what imminent danger exists. *See* Union Pet. at 26. If MSHA arrives and finds that a violation of the specific standard or the reported "imminent" danger is deemed not to be present, the inspector will

[9] In its brief, MSHA first asserts that it has required operators to change their training plans to include social distancing (MSHA Br. at 8) but later inexplicably argues that social distancing should not be required because it could be the proximate cause of a mine explosion. MSHA Br. at 29.

issue a "negative finding" and will not issue a citation for that condition. *United Mine Workers of America o/b/o Burgess*, 20 FMSHRC 691, 691 n. 2 (Jul. 1998) *citing* 30 C.F.R. § 43.6(a).

A miner's 103(g) complaint regarding COVID-19 dangers is futile because no mandatory MSHA standard concerning COVID-19 exists. *See* Union Pet. at 26. Given the lack of mandatory standards for COVID-19 specific risks, requesting a 103(g) inspection based on any current standard will inevitably result in reactive and inconsistent responses by MSHA falling far short of Congress's mandate to issue an ETS when miners face a grave danger. In addition, MSHA's assertion that its existing standards – none of which were promulgated to address an infectious disease like COVID-19 – are sufficiently broad enough to address COVID-19 is disingenuous. MSHA Br.at 17-22. None of the standards cited by MSHA, including rules for workplace examinations, safeguards, personal protective equipment and training address how to adapt the CDC recommendations for COVID-19 to the mining environment nor rectify the inconsistencies between CDC recommendations and MSHA's existing regulations.[10] Union Pet. at 22-26.

[10] MSHA now argues that it can use safeguards to control the hazards posed by COVID-19. MSHA Br. at 19. The UMWA requested the use of safeguards in response to COVID-19, but MSHA explicitly rejected that request, calling safeguards "inappropriate." See Pet. at Tab 4.

Similarly, a 103(g) complaint alleging an "imminent danger" would be equally unavailing. MSHA apparently is not training its inspectors to recognize the dangers posed by COVID-19, even if the dangers constitute an "imminent danger." *See*, *e.g.*, *Union Pet. at* Tab 6 (Martinez Declaration), at 3. Absent training for MSHA inspectors on COVID-19 dangers and issuance of related withdrawal orders, a 103(g) complaint alleging an "imminent danger" is unlikely to result in any remediation. Therefore, § 103(g) complaints are inadequate to protect miners from the grave dangers posed by COVID-19.

The ineffectiveness of § 103(g) complaints in eliminating dangers posed by COVID-19 highlights a significant feature of the Mine Act: there is no General Duty Clause like found in the OSH Act. *See* 29 U.S.C. § 654(a)(1). Congress explicitly rejected including a General Duty Clause in the Mine Act that could be used to establish enforceable obligations upon mine operators in responding to § 103(g) complaints. *See* S. Rep. No. 95-181, at 38-39 (1977), *Legis. History* at 1316-17. In sum, nothing in MSHA's current regulatory arsenal effectively addresses the dangers posed by COVID-19: MSHA lacks a General Duty Clause, the application of the imminent danger provision to COVID-19 is flawed, and MSHA lacks any specific enforceable safety or health standards that adequately address the risks to miners posed by COVID-19 and other contagious diseases.

MSHA's "Pollyannaish" assertion that voluntary actions by operators will mitigate the dangers posed by COVID-19 is meritless. MSHA Br. at 27. First of all, as noted *supra* at 8, Congress did not intend for MSHA to consider piecemeal actions taken by operators as a factor to consider in determining whether to issue an ETS. In fact, MSHA's use of "advisory standards" is unlawful. *See* Union Pet. at 29. The Secretary is not empowered to regulate by advisory standards. *United Mine Workers of America*, *Intern. Union v. Dole*, 870 F.2d 662, 670, n. 12 (D.C. Cir. 1989), *citing* S. Rep. No. 95-181, at 23, *Legis. History* at 611. The use of the term "mandatory standard" indicates Congress's intention that there would be no non-mandatory standards issued under the Mine Act. The need for an ETS is clear: MSHA has determined that COVID-19 creates a danger to miners and that operators should take action to protect miners. Since MSHA has no authority to advise operators on potential voluntary actions, MSHA must issue an ETS to address MSHA's findings under these circumstances.

MSHA unreasonably argues that an ETS is not necessary to protect miners against COVID-19 because some operators may choose to take voluntary actions to protect miners. MSHA, however, may not rely upon advisory standards under the Mine Act, and there is no reason to believe that all operators will follow advisory standards thereby leaving some miners unprotected. MSHA can only remedy this situation by issuing an ETS.

Moreover, MSHA's *ultra vires* reliance upon voluntary actions rather than an ETS creates an uneven playing field and a competitive economic advantage to mine operators who avoid the costs of instituting preventative measures thereby providing disincentives for mine operators to institute COVID-19 precautions. In short, operators who take the grave danger posed by COVID-19 seriously and institute necessary precautions such as those outlined in the Amici Curiae briefs – provide miners with face coverings, require social distancing while working and being transported to and from the mines in elevators and mantrips, and allow time off if sick – all of which may slow production, are at a competitive disadvantage. *See*, *e.g.*, *In Re Public Employees for Environmental Responsibility*, 957 F.3d 267, 270-71 (D.C. Cir. 2020) (air tour operators gain a "competitive advantage" when they resist regulatory restrictions that their rivals voluntarily accept).

CONCLUSION

The number of COVID-19 cases in the United States have peaked in the last few days[11] providing a grave reminder that the COVID-19 pandemic continues to rage throughout our country and presents the most significant public health threat to the citizens of the United States in more than a century. Recommendations from MSHA, which are nothing more than voluntary measures that mine operators may

[11] CDC COVID-Data Tracker, Cases in the Last Seven Days, https://www.cdc.gov/covid-data-tracker/#cases.

choose to adopt or ignore at their wont, and individual enforcement actions in the absence of a general duty clause without adequate enforceable safety or health standards in the form of an ETS fall far short of the Mine Act's mandate that MSHA issue an ETS when miners are confronted by a grave danger.

The "once in a lifetime" nature of this global pandemic and the dire threat it poses to miners demands a proactive approach that makes full use of every weapon available in MSHA's arsenal – including the promulgation of an ETS in conjunction with the other regulatory tools discussed in MSHA's brief. Now is not the time to leave any stone unturned, or hold any option in reserve, waiting for an outbreak to occur, as MSHA remarkably suggests should be done in refusing to issue an ETS. To do so, would lead to the very real possibility of the government reckoning with the fact that it could have done more to protect miners in the face of a global pandemic but failed to do so.

In sum, waiting for a COVID-19 outbreak at a mine before issuing an ETS is foolhardy and an abdication of MSHA's obligation to protect miner health and safety as COVID-19 moves from urban areas to rural settings in recent weeks where mines are typically located. The Unions, therefore, respectfully request this Court to order MSHA to issue a COVID-19 ETS to prevent risks to miners from the grave dangers posed by COVID-19 before an outbreak occurs.

Respectfully submitted,

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Dated: June 29, 2020

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of June, 2020, I caused this Reply to Response to Emergency Petition to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users:

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