

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

**MOTION OF *AMICI CURIAE* THE WEST VIRGINIA COAL ASSOCIATION,
THE KENTUCKY COAL ASSOCIATION AND
THE VIRGINIA COAL AND ENERGY ALLIANCE
TO FILE BRIEF IN SUPPORT OF RESPONDENT**

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CERTIFICATE PURSUANT TO CIRCUIT RULE 27(a)(4)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Proposed *Amici* state that:

Amicus curiae West Virginia Coal Association is an incorporated nonprofit association. It is not a publicly held corporation and has no parent corporation, and,

Amicus curiae Kentucky Coal Association is an incorporated nonprofit association. It is not a publicly held corporation and has no parent corporation, and,

Amicus curiae Virginia Coal and Energy Alliance is an incorporated nonprofit association. It is not a publicly held corporation and has no parent corporation.

Pursuant to Circuit Rules 21(a) and 29(b), the West Virginia Coal Association, the Kentucky Coal Association and the Virginia Coal and Energy Alliance ("Proposed *Amici*") hereby seek leave to file a brief as *amici curiae*. **Further, the parties do not oppose this motion.**

Proposed *Amici* have a compelling interest in the disposition of this case as they represent the majority of bituminous coal mining companies, surface and underground, in West Virginia, Kentucky and Virginia. Further, West Virginia currently is the state with the largest underground coal mine production in the country with almost 75 million tons. In total, the three states produce approximately 141 million tons of coal yearly and employ over 23,000 coal miners. Because Petitioner seeks a new safety standard that would govern all coal producers in these states, Proposed *Amici's* interests are directly at stake in this lawsuit.

Proposed Amicus brief will assist the Court by explaining that a new standard is unnecessary because existing workplace safety standards — combined with flexible and evolving industry-specific guidance issued by federal, and state governments and private institutions during the COVID-19 pandemic — already protect the health and safety of America's miners. Additionally, Proposed Amicus briefs will address why potential exposures of coal miners are quite low compared to the general public, factories and close work environments, and its members already use Mine Safety and Health Administration (MSHA) and Center for Disease Control (CDC) guidance to establish safe work practices. All of these factors counsel against judicial intervention in the form of an Emergency Temporary Standard, which was correctly reviewed and denied by MSHA.

Dated: June 29, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains a total of 355 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

/ s / D o n C A P a r k e r

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 29th day of June 2020, I filed the foregoing document using this Court's Appellate CM/ECF system, which effected service on all parties.

/ s / D o n C A P a r k e r

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**A. Parties and Amici**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, amici curiae West Virginia Coal Association ("WVCA"), the Virginia Coal and Energy Alliance ("VCEA"), and the Kentucky Coal Association ("KCA") (sometimes collectively referred to as "State Coal Associations") state that they are incorporated nonprofit associations. WVCA, KCA and VCEA are not publicly held corporations and none have a parent corporation.

B. Ruling Under Review

References to the challenged actions of Respondent Mine Safety and Health Review Administration ("MSHA") appear in the Emergency Petition.

C. Related Cases

Amici curiae are not aware of any current related cases involving the parties involved in this Emergency Petition for a Writ of Mandamus. However, as articulated in the Response Brief filed by Respondent Mine Safety and Health Administration, the Court recently decided a related case filed by affiliated Petitioner, American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), which similarly sought review of the Occupational Safety and Health Administrations' decision not to issue an Emergency Temporary Standard related to COVID-19, *In re: American Federation of Labor and Congress of Industrial Organizations*, No. 20-1158. On June 11, 2020, this Court issued an order denying that petition for review, *see* ECF No. 1846700 (D.C.

Cir. June 11, 2020), and the AFL-CIO, in June 18, 2020, filed a petition for rehearing en banc. *See* ECF No. 1848004.

/s/ Don C A Parker

Don C A Parker

CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)

These Amici understand the National Mining Association (NMA) will also be filing an Amicus Brief. NMA, while representing some coal mines, represents far more metal/non metal mines, which mine a wide range of other minerals extracted in United States. The State Coal Associations have a unique perspective and encountered COVID-related obstacles distinct from those of other amici's members, particularly metal/ non-metal operators.

The parties have consented to the filing of this brief and NMA amicus brief. However, due to the rapid briefing schedule in this appeal, Petitioners requested that both amicus briefs be finalized and provided to UMWA counsel 48 hours after MSHA's Reply Brief was submitted. This extraordinarily short time frame made it effectively impossible to coordinate briefing with NMA. However, the State Coal Associations have tried to avoid duplication by focusing our brief on the impact of bituminous coal mines to inform the court of issues specific to their members.

/s/ Don C A Parker

Don C A Parker

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), WVCA, KCA, and VCEA state that no party or party's counsel authored any portion of this brief in whole or in part. In addition, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person—other than WVCA, KCA and VCEA, their members, and their counsel—contributed money that was intended to fund preparing or submitting the brief.

/s/ Don C A Parker
Don C A Parker

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GLOSSARY OF ABBREVIATIONS

CDC	Centers for Disease Control and Prevention
COVID-19	Coronavirus Disease
ETS	Emergency Temporary Standard
OSHA	Occupational Safety and Health Administration
MSHA	Mine 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

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

Amici are the West Virginia Coal Association, the Kentucky Coal Association and the Virginia Coal and Energy Alliance (sometimes collectively referred to as "the State Coal Associations"), the coal industry groups for three of the original coal producing states. This brief is filed in support of the Department of Labor's Mine Safety and Health Administration Brief filed at 4 p.m., June 26, 2020.

West Virginia produces some 97.3 million tons a year from 163 coal mines, 92 surface and 71 underground. It is the state with the largest underground coal mine production in the United States. West Virginia mines employ 16,039 miners. Addendum Tab 1, C. Hamilton Aff. at ¶¶ 2, 3. The West Virginia Coal Association ("WVCA") membership consists of the majority of the coal companies that operate in West Virginia and is governed by a board of directors.

The Kentucky Coal Association (KCA) represents the coal industry in Kentucky and its membership consists of companies that operate in Kentucky's eastern and western coalfields and businesses that provide services to those companies. KCA's organization is comprised of 10 coal producing members and about 111 associate members. In 2020, Kentucky is expected to mine approximately 28 million tons of coal with 4,533 miners. In 2019, Kentucky produced 35 million tons with an average of 6,000 miners. Addendum Tab 2, T. White Aff. at ¶¶ 2, 3, 4, and 5.

The Virginia Coal and Energy Alliance (VCEA) has 75 coal mining and associate members in Virginia. Some 2,800 miners produce 12 million tons of coal a year from 35 active mines. Addendum Tab. 3, H. Childress Aff. at ¶ 5.

These three states produce almost 141 million tons of coal, which is almost 20 percent of US production, and West Virginia is the largest bituminous coal mining state for underground mining by tonnage.¹ There are approximately 23,372 miners employed in West Virginia, Virginia and Kentucky.

The State Coal Associations and its members have a strong interest in this case and can provide a unique viewpoint to the Court, along with a more complete and more accurate understanding of the work environments faced by coal miners.

¹ According to the US Energy Information Agency (EIA), the US produced 705.2 million tons of coal in 2019 and West Virginia, Kentucky, and Virginia produced 141.1 million tons, or 20 % of US Production. West Virginia mined 72.2 million tons from underground mines in 2018, which led US underground production. (eia.gov/coal/production).

STATUTES AND REGULATIONS

Pursuant to D.C. Cir. Rule 28(a)(5), the relevant statutes and regulations are set forth in the foregoing Table of Authorities and are also contained in the Emergency Petition and Addenda.

SUMMARY OF ARGUMENT

The State Coal Associations believe a new ETS is unnecessary. Existing performance-based safety standards, which MSHA is already enforcing with respect to COVID-19 issues, along with flexible and evolving industry-specific COVID-19 guidance issued by MSHA and other state and federal agencies, already provide the necessary framework and detailed information to help coal mine operators protect the health and safety of their employees.

Mine operators - like thousands of other employers across the country - have been working with employees to responsibly address the concerns presented by COVID-19. Tab 1, Hamilton Aff. at ¶ 11. Indeed, the effectiveness of MSHA's approach to protect against spread of the COVID-19 in coal mines is proven by the numbers. Members of these State Coal Associations have reported no COVID-19 infections found to be due to occupational exposures. Tab 1, C. Hamilton Aff. at ¶ 4; Tab 2, T. White Aff. at ¶ 6; Tab 3, H. Childress Aff. at ¶ 6. MSHA has been monitoring and reporting COVID-19 cases of which they are aware and reports there is "no evidence to date that any miner has contracted COVID-19 at or in a mine." Resp't Br., Addendum Tab 2, Denial Letter of June 26, 2020 at 2. This is a testament to the efforts

of MSHA and the miner operators in the region of the State Coal Associations to keep miners safe.

While the State Coal Associations share the public-health concerns over COVID-19 and agree operators must take measures to protect miners from exposure in the workplace, hastily drafted regulations are not the answer.

ARGUMENT

A. Petitioners Failed to Meet Their Burden of Showing that a Writ of Mandamus is Warranted.

The State Coal Associations concur with MSHA's analysis of the standard of review in this case. Petitioners request this Court to employ "one of the most potent weapons in [its] judicial arsenal, a drastic and extraordinary remedy reserved for really extraordinary causes," the writ of mandamus. *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 944 F.3d 945, 949 (D.C. Cir. 2019) (quoted source omitted). As this Court has stated, the issuance of the writ is "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) (quoted source omitted). Even in less historic times, "the writ's extraordinary and intrusive nature ... risks infringing on the authority and discretion of the executive branch." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016). In essence, Petitioners ask this Court to place its judgment over MSHA's in the area of mine safety.

In fact, this Court has never issued a writ of mandamus compelling MSHA to enact an ETS. *See In re UMWA*, 231 F.3d 51 (D.C. 2000). Similarly, for writs filed to

compel OSHA's issuance of an ETS pursuant to 29 U.S.C. § 655(c), which is identical to MSHA's ETS provision found in 30 U.S.C. § 811(b)(1), this Court has been similarly reticent to compel such drastic actions. *See e.g., In re: American Federation of Labor and Congress of Industrial Organizations*, No. 20-1158. Regardless, as fully articulated by the MSHA's Response Brief,² Petitioners have failed to show that MSHA violated a clear duty to act or that it unreasonably delayed acting as required by statute.

B. Petitioners Failed to Satisfy Their Burden of Showing that an Emergency Standard is Warranted at this time.

Petitioners' burden is even greater here because they seek to compel MSHA to issue an ETS, which, in the context of OSHA ETS actions, this Court has described as "the most drastic measure in [its] standard-setting arsenal[.]" *Pub. Citizen Health Research Grp. v. Aucter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983) (per curiam). Indeed, this Court has previously recognized, "emergency standards are an 'unusual response' to 'exceptional circumstances.'" *See e.g., Int'l Chem. Workers Union*, 830 F.2d 369, 370-371 (D.C. Cir. 1987) (per curiam) (quoted sources omitted). Because ETS actions are the "most dramatic weapon" in MSHA's enforcement arsenal, Congress "narrowly circumscribed the Secretary's power to issue" them. *See Int'l Union, United Auto.*,

² Amici agrees fully with the Secretary of Labor's analysis and position expressing the Petitioners' comprehensive failure to meet their burden for the issuance of a writ of mandamus. To avoid repetition, and as directed by the D.C. Circuit Court of Appeal Appellate Rule 29(a), those reasons are not restated in this brief.

Aerospace, and Agric. Implement Workers of Am., UAW, 590 F. Supp. 747 (D.C. Distr. 1984) adopted by 756 F.2d 162 (D.C. Cir. 1985) (cited sources omitted).

1. Claims of Necessity and Gravity Are Undermined By the Lack of COVID-19 Impacts in the Coal Mining Industry.

Here, Petitioners have shown neither the gravity nor the necessity for issuing an ETS. The ETS seeks to solve a problem that has not been shown to exist in coal mining. Tab 1, C. Hamilton Aff. at ¶11. There is no indication that COVID-19 presents any greater risk to miners than the risk it poses to society in general. To date, these amici are unaware of any positive cases of COVID-19 that have been determined to have been contracted due to working conditions or employment at coal mines in Virginia, West Virginia or Kentucky. Tab 1, C. Hamilton Aff. at ¶ 4; Tab 2, T. White Aff. at ¶ 6; Tab 3, H. Childress Aff. at ¶ 6. As stated in MSHA's June 26, 2020 Denial Letter, there is "no evidence to date that any miner has contracted COVID-19 at or in a mine." Resp't Br., Addendum Tab 2, Denial Letter of June 26, 2020 at 2.

2. Claims of Gravity and Necessity Are Undermined By Relatively Low COVID-19 Rates in Coal Mining States.

While Petitioners seek to conflate infection rates in certain metropolitan areas with the coal fields, the gravity and need for a COVID-19-related ETS must also be considered in context of the general population where mines are located. To date, West Virginia, which employs the most underground miners by far, has 2,761 COVID-

19 cases³ and the local incidence rate of COVID-19 is “a mere 20 percent of the national average” as noted by MSHA’s Denial Letter of June 26, 2020. *See* Resp’t Br. Addendum 2 at 2. Similarly, in Virginia, where the local incidence rate more generally approaches the national average for COVID-19 cases, the local incidence rate drops to 64 percent of the national average when the Northern Virginia MSA (which has no underground mines) is excluded.⁴ *Id.* Kentucky’s overall COVID-19 incidence rate is even lower at 44.4% of the national average. Excluding COVID-19 incidence rates from large metropolitan areas, where no mines are located, the nation’s top 10 underground mining states⁵ (based on the number of underground miners), have overall COVID-19 infection rates that are 40% lower than the national average. Resp’t Br., Addendum 2 Attach.

3. Claims of Gravity and Need are Undermined By the Nature of Coal Mining Work, Which is Far Different From Industries Suffering COVID-19 Outbreaks.

Notwithstanding the comparably low COVID-19 infection rates for coal mining states, the need for an ETS is further undermined when one considers the nature and realities of underground and surface coal mining work. The work of a modern-day coal miner is very different from a meat packer or poultry processor. Generally, employees

³ <https://dhhr.wv.gov/COVID-19/Pages/default.aspx>

⁴ <https://www.cdc.gov/covid-data-tracker/index.html#cases>

⁵ West Virginia, Pennsylvania, Kentucky, Nevada, Illinois, Alabama, Montana, Virginia, Utah, and Indiana

in coal mines do not work in the close proximity of one another for extended periods of time. Tab 1, C. Hamilton Aff. at ¶ 16; Tab 3, H. Childress Aff. at ¶ 11.

Even prior to COVID-19, the vast majority of coal mining jobs were already performed with adequate spacing between persons and constant movement throughout the shift. Tab 1, C. Hamilton Aff. at ¶ 20. Underground coal mining is a particularly unique environment. Many underground mine workers are separated from other crew members for large portions of their shifts, such as continuous mining machine operators, coal hauling equipment operators, and other mobile equipment operated by lone individuals (such as scoops and , graders). *Id.* The only piece of equipment typically requiring two employees is a roof-bolting machine. *Id.* However, in such cases, the two operators are positioned on opposite sides of the machine, with independent controls, spaced at least six feet away from each other. *Id.* Also, even prior to COVID-19, miners are trained to stay distanced from other mobile equipment to reduce the possibility of them being struck or run over. *Id.*

Additionally, underground coal miners primarily work on mining units that are hundreds of feet deep and wide, with approximately 20-foot wide corridors in which to travel, while having tens of thousands of cubic feet per minute of air constantly coursing the area. *Id.* at ¶18. Underground mine operators are required to provide continuous ventilation (fresh air from the surface) to remove “dangerous and noxious gases” and respirable coal dust. Indeed, ventilation current requirements are essential to safe and healthful mining and must be maintained by each coal mine operator on a consistent

basis. *Id.* at ¶17. The mine atmosphere is not recirculated air: it enters the mine through intake air courses in large volumes through large mechanical mine fans and exits the mine through return air courses to the surface, all of which is powered by large mine fans. *Id.* The differences in such a work environment from the indoor recirculated airflow environments of factories and meat packing plants are numerous and obvious.

At surface mines, the majority of the work is performed outdoors with many miners working within the solitary confines of an enclosed cab of assigned mobile equipment. *Id.* at ¶ 21; Tab 3, H. Childress at ¶ 8. Those typically working alone include shovel operators, rock truck drivers, drillers, dozer operators and others operating mechanic vehicles. Tab 1, C. Hamilton at ¶ 21. Even foremen generally work from their truck traveling throughout the mine during a shift. *Id.* The nature and layout of the work environment on surface mine allows workers to maintain a proper social distance and use their radio systems to communicate. Tab 3, H. Childress at ¶ 8.

4. Any Alleged Necessity for an ETS is Undermined By Coal Mine Operators' Current and Effective COVID-19 Prevention Efforts.

Amici members have been and are still following and implementing COVID-19 prevention guidance given by MSHA, Centers for Disease Control and Prevention (“CDC”), and/or respective state governments, agencies, and public health officials. Tab 1, C. Hamilton at ¶ 23. MSHA continues to carry out mandatory inspections, serious accident investigations, and investigations of hazard complaints (imminent

danger or serious in nature)⁶, all of which are conducted at the mine site. MSHA continues to enforce COVID-19 related precautions via its performance-based standards and has cited operators for violations of those standards. Resp't Br. Addendum Tab 2 at 3-4.

Petitioners have presented no evidence, even anecdotally, that coal mining operators are failing to take necessary precautions to prevent a COVID-19 outbreak. In reality, State Coal Associations' members have taken COVID-19 seriously and continue to do so. Given the essential benefit coal mining provides to our nation and its economic well-being, mine operators are vigilant to maintain a safe and healthful work environment, and they are taking into consideration the ever-changing nature of the COVID-19 pandemic within the communities in which they operate. *See* Tab 1, C. Hamilton Aff. at ¶7. Presently, the mining industry has the flexibility and ingenuity to engage in measured responses that minimize the risk to miners as those risks evolve and our knowledge of COVID-19 expands. The mining industry's current environment of being able to work cooperatively with MSHA in this regard has yielded positive results, such that the experience suggests there is an overall greater risk of COVID-19 to miners when they are *outside* the workplace than when they are in the workplace.

When concerns surrounding the COVID-19 virus first arose, the Virginia Department of Mines, Minerals and Energy (DMME) met with mine managers and

⁶ <https://www.msha.gov/msha-response-covid-19>

recommended they follow CDC guidelines as closely as possible. Tab 3, H. Childress Aff. at ¶ 7. This includes social distancing, limiting numbers of miners in elevators and mantrips and frequent sanitizing of workspaces and equipment. *Id.* VCEA members have worked in concert with the DMME to operate underground mines and preparation plants in line with such recommendations. Miners are instructed to maintain proper social distancing (i.e., at least six feet distance from one another). Tab 3, H. Childress Aff. at ¶ 9. Usage of the mantrip, a vehicle used to transport miners underground to where the coal is to be removed, has also been restricted to the number of miners recommended by DMME per each ride. *Id.*

Similarly, the number of miners permitted to use shaft elevators at one time has been limited. *Id.* The mantrips and shaft elevators are cleaned after each ride. *Id.* Start times and shifts are staggered so workers from one shift will not come into contact with those from another. *Id.* Access to bathhouses are limited to one person at a time. *Id.* Further, VCEA member companies require workers to stay at home if they become sick or a family member becomes sick, and the miner does not return to work until they have been tested. *Id.* at ¶ 10.

WVCA's coal-producing members have also implemented extensive COVID-19 precautions and guidelines at the mine level. Tab 1, C. Hamilton Aff. at ¶ 8. Each mine tailors the precautions needed based on their operating procedures and their unique needs. *Id.* at ¶ 9. Examples of steps being taken at West Virginia coal mines include: (1) training on ways to prevent or lessen COVID-19 exposure; (2) temperature checks

prior to or upon entering mine property; (3) reduced capacity on mantrips and hoists (elevators) for travel to working areas; (4) promoting use of gloves and masks; (5) encouraging the use of appropriate personal protection equipment (PPE); (6) staggering shift times to reduce employee interactions, reduce mass gatherings, and reduce common shower facility usage; (7) conducting safety talks outside or on the working section while remaining socially distant; (8) increased cleaning of operators' compartments, man trips, elevators and bathhouses; (9) developing plans and procedures for supervisors on how to handle and respond to a suspected COVID-19 case; (10) developing visitor screening, and travel restrictions; (11) screening employees when they return to work from such things as vacations/time off or returning to work after furloughs/shutdowns; and (12) keeping employees off the job site if they report being exposed to someone who is COVID-19 positive and requiring they self-quarantine. Tab 1, C. Hamilton Aff. at ¶ 9. There is no indication or evidence that these efforts have not been effective. KCA's members have adopted similar measures based on CDC and state of Kentucky guidance. Tab 2, T. White Aff. at ¶¶ 7, 8, 9 and 10.

C. There is Ample Support and Sound Reasoning for MSHA's Decision Not to Issue an ETS.

Here, after extensive research, coordination and consultation with infectious disease experts at CDC and continuous monitoring of COVID-19 transmissions in the coal industry and mining states, MSHA concluded an ETS was not necessary based upon the available scientific evidence, its tool kit of regulatory options and the potential

for unintended consequences. Because the Secretary of Labor “must make both factual and policy judgments on the basis of information that may be incomplete,” this “is a decision largely entrusted to the expertise of the agency.” *In re Int’l Chem. Workers Union*, 830 F.2d at 372. More specifically, the determination of what constitutes a risk worthy of Agency action is a policy consideration that belongs, in the first instance to the Agency. *See Industrial Workers Union*, 448 U.S. 607, 655-656 and n. 62, 100 S. Ct. 2844, 2871 and n. 62, 65 L. Ed. 2d 1010, 1043 and n. 62. MSHA’s determination that an ETS is not “necessary” is decision “committed to the agency’s expertise in the first instance,” *In re UMW*, 231 F.3d at 54, and, therefore, cannot and should not be disturbed. More importantly, the decision is well-reasoned, amply supported by the evidence, and exhibits a thoughtful exercise of its legislatively granted authority.

In its April 14, 2020 and June 26, 2020, Denial Letters, MSHA discussed, in great detail, the reasons, evidence and data supporting its determination not to issue an ETS. Pet’rs Br., Attach. 2; Resp’t Br., Addendum Tab 2. It concluded that it lacked sufficient evidence to find COVID-19 poses a grave danger to miner and, even if it did, the evidence did not indicate an ETS is necessary to protect miners. *Id.* MSHA’s June 26, 2020 letter cites comprehensive statistical evidence of COVID-19 rates in mining states, the lack of any COVID-19 infection shown to be contracted due to exposure at a mine, and the myriad of regulatory tools and guidelines it is employing to prevent COVID-19 outbreaks in mines. Resp’t Br., Addendum Tab 2 at 2-4.

MSHA further notes it is investigating all COVID-19 complaints and “[w]here such investigations have resulted in positive findings, MSHA has issued citations under its existing standards.” *Id.* at 4. It correctly concluded that an ETS is “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.” *Id.*

Also factoring in MSHA’s decision to forgo issuance of an ETS is its finding that an ETS would be counterproductive and possibly be harmful to miners. This determination is based upon the agency’s continuing coordination with the CDC and its close monitoring of the ever-evolving scientific medical data on COVID-19 transmissions and most effective measures to reduce exposure risks. Resp’t Br., Addendum Tab. 1, Palmer Decl. at ¶¶ 27-28. MSHA correctly concludes “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.” Resp’t Br., Addendum Tab. 2 at 5. Further, MSHA correctly notes enforcement flexibility is imperative given “[t]he variety of working environments at the nation’s thousands of mines, which range from small surface operations to extremely large underground operations” *Id.*

CONCLUSION

In sum, Petitioners have failed to meet its doubly high burden of (1) demonstrating its “clear and indisputable” entitlement to the writ, *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (quoted source omitted), and (2) overcoming the “great

deference” due MSHA’s assessment of facts and policies underlying its determination that an ETS is not necessary at this time, *In re Int’l Chem. Workers Union*, 830 F.2d at 371. MSHA already has available mandatory standards being used to address the potential spread of COVID-19, and has issued specific guidance on COVID-19, and collaborated with the CDC to issue further guidelines specific to the mining industry. Further, there are ample state directives on the protective measures mine operators should take to safeguard employees against COVID-19 infection.

State Coal Associations are following these guidelines and have been proactive at taking measures to protect their employees. This comprehensive approach already undertaken significantly reduces the need for an ETS in coal mining. MSHA’s current approach is working. There have been no COVID-19 outbreaks in the coal mining industry and transmission rates even in areas where mining is conducted are below national average. The Petition should be denied.

/s/ Don C A Parker

Don C A Parker

Mark E. Heath

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*Counsel for the West Virginia Coal
Association,
the Kentucky Coal Association,
and the Virginia Coal and Energy
Alliance*

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

[X] this brief contains [3,661] words.

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Dated: June 29, 2020

/s/ Don C A Parker

Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of June, 2020, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that on this 29th day of June, 2020, I caused the required copies of the Brief of *Amici Curiae* to be hand filed with the Clerk of the Court.

/s/ Don C A Parker

Counsel for Amici Curiae

ADDENDUM

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ADDENDUM TAB A
C. HAMILTON AFFIDAVIT

State of West Virginia
County of Kanawha, to wit:

AFFIDAVIT

I, Chris R. Hamilton, this 28th of June, 2020, being first duly sworn, state as follows:

1. I am the Senior Vice-President of the West Virginia Coal Association, PO Box 3923 Charleston WV 25339, Phone: 304-342-4153.
2. The West Virginia Coal Association ("WVCA") has been in existence for over 100 years to represent the coal industry in West Virginia. Our membership consists of the majority of the coal companies that operate in West Virginia. The WVCA is a non-profit membership organization governed by a board of directors which oversee the direction of the organization.
3. In 2019, West Virginia mining companies employed 16,039 miners and produced 97.3 million tons of coal. Currently, West Virginia has 163 coal mines, 92 surface and 71 underground. West Virginia currently has the largest underground coal mining production in the U.S.
4. To my knowledge, no positive cases of COVID-19 established to have been contracted at or in a mine environment exposure have been reported in any West Virginia's coal operations by our association members. In addition, the state mining agency has also not told me of any COVID-19 cases where it was established the mine was the alleged place the person contracted COVID-19.
5. I am also a board member of the West Virginia Board of Coal Mine Health and Safety ("State Mine Safety Board " or "Board") in addition to my job as Senior Vice President of WVCA. The State Mine Safety Board is comprised of three industry and three union members and Director of the West Virginia Office of Miners' Health Safety and Training ("WVOMHST") The State Mine Safety Board evaluates the conditions in mines and decides whether any additional regulations are needed. The State Mine Safety Board has the authority to issue emergency regulations, as well. In recent meetings, the suggestion for the Board to issue safe guards or accepted protocols to the industry was discussed, but not advanced or acted upon by any of its members. At no time did any member (management or union or the state director) raise, or advance the need for, an emergency regulation on COVID-19.
6. During the current crisis, the majority of West Virginia coal mines remain operational with alternating or intermittent work schedules to prevent massive layoffs or work stoppages and to help with social distancing by staggering shifts and to minimize the number of miners in mine facilities.
7. Given the essential role that coal and coal mining provides to our nation and its economic well-being, mine operators are being vigilant in maintaining a safe and healthful work environment.

8. Our coal-producing members have implemented extensive COVID-19 precautions and guidelines at the mine level. According to the WVOMHST, there are no confirmed "positive" cases recorded as occurring at mines from mine exposures.

9. Each mine tailors the precautions needed based on their operating procedures and their unique needs. Examples of the various steps being taken across mines in West Virginia include:

- Training on ways to prevent or lessen COVID-19 exposure including meetings, posters and other ways to educate workforces on safe work practices.
- Temperature checks prior to or upon entering mine property.
- Reduced capacity on mantrips and hoists (elevators) for travel to working areas.
- Promoting use of gloves and masks,
- Use of personal protection equipment (PPE) at all possible places and in accord with all CDC guidelines,
- Changing schedules to meet social distancing guidelines, such as staggered shifts to reduce employee interaction, reduced gatherings at staging areas and reduced numbers at shower facilities.
- Conducting safety talks outside or on section socially distant.
- Acquiring and ensuring the presence of cleaning supplies,
- Cleaning and wiping down operators' compartments, man trips and elevators on each trip,
- Bathhouses cleansed in accordance with CDC guidelines for cleaning and disinfecting,
- Development of plans and procedures for supervisors on how to handle and respond to a suspected COVID-19 case, and
- Development of visitor screening, and travel restrictions.
- Screening employees when they return to work from such things as vacations/time off or returning to work after furloughs/shutdowns.
- Keeping employees off the job site if they report exposure to someone who is COVID-19 positive off the job site while they self-quarantine.

10. As greater COVID-19 knowledge is acquired, the mining industry designs and implements training programs so every miner and mine visitor receives appropriate hazard alerts and training.

11. Mine operators - like thousands of other employers across the country - have been working with employees to responsibly address the concerns presented by COVID-19. The ETS seeks to solve a problem that has not been shown to exist in coal mining.

12. COVID-19 did not originate within U.S. mines. Indeed, there is no indication that COVID-19 presents a risk to mine operators and miners any greater than the risk it poses to society, generally. As we look at COVID-19 (and other infectious pathogens), the propensity for infection is largely based upon things like population density and regionally or locally based, prolonged exposures. COVID-19 and other outbreaks often require drastically different steps from one location to the next. Taking a one-size-fits-all approach with Emergency Temporary and Mandatory Permanent MSHA standards would be incredibly irresponsible and inconsistent with changing precautions urged by the CDC and the unique approaches and deadlines taken by each state around the country.

13. To propose an ETS or set of ETSs that govern the entire mining industry (metal/non-metal and coal, surface and underground, Powder River and Illinois Basins, Northern and Southern Appalachia, etc.) could be counterproductive to a constantly evolving understanding of the virus and strategy to protect persons from the dangers it poses.

14. MSHA's approach of providing considerable guidance and recommendations to the mining industry while continuing to monitor the situation is very prudent in light of the current state of affairs. It prevents the agency from being hamstrung by a mandatory standard that may be obsolete or ineffective within weeks or months of its issuance, and allows them the flexibility to take properly effective action when it sees fit.

15. While there is no doubt COVID-19 is a more serious illness than typically occurs each year, the fact remains the US has flu season every year that produces significant illness and deaths. There has never been a move to require an ETS to slow the spread of the flu, which is an even more common illness.

16. I have reviewed the Petition for an Emergency Temporary Standard that cites COVID-19 outbreaks in meat processing plants and similar industries. I have seen photographs of the conditions in these plants and they are quite different from the working environment in coal mines. Employees in coal mines do not work in the close proximity of one another for extended periods of time on production lines.

17. There are also very specific differences in mines vs. factory settings. First, an underground coal mine has copious amounts of ventilation to remove "dangerous and noxious gases" and respirable coal dust. In fact, high volumes and continuous air flows are essential to safe and healthful mining. Those airflows help lessen COVID-19 exposure as, according to what is commonly known so about the coronavirus, it seems to spread more effectively in tight, indoor spaces with little airflow. In addition, mine air is not recirculated - it enters the mine in intake air

courses in large volumes blown in by large mine fans and leaves the mine by return air courses to the surface.

18. Coal miners primarily work on mining units that are hundreds of feet deep and wide, with approximately 20-foot wide corridors in which to travel, while having tens of thousands of cubic feet per minute of air constantly coursing the area. The differences between an underground coal mining environment and the indoor recirculated airflow environments of factories and meat packing plants are numerous and obvious.

19. Additionally, many industrial facilities have fixed start and stop times for their entire workforce, as they require all persons working at once to be productive. Many coal mines have taken affirmative steps to protect against this concern, as they have instituted staggered shift times, so miners are not congregating together before and after work, and keeping groupings of co-workers limited to 10-15 persons, which is consistent with social distancing guidelines in many states.

20. Contrary to industrial settings where persons generally work in very close proximity to one another along a line for an entire shift, the vast majority of coal mining jobs are performed with adequate spacing between persons and constant motion throughout the shift. In fact, at both surface and underground coal mines, miners generally work alone and not in close distance to other employees. The following positions at an underground mine generally work alone: 1) continuous miner operator and coal hauling equipment that take coal from the continuous miner to the beltline are driven by one person, and 2) one miner drive scoops, graders and other equipment operated underground. The only piece of equipment with two employees is a roof bolter. Two employees operate a roof bolter, each on opposite sides, and are spaced some 7 to 10 feet away from each other. Miners also are taught to stay away from other equipment to reduce the possibility of them being struck or run over.

21. At surface mines, the same situation applies except the majority of the work is done outdoors and workers generally work alone in enclosed cabs. Those typically working alone include shovel operators, rock truck drivers, drillers, dozer operator and others operating mechanic vehicles. Even foreman generally work from their truck and drive around the mines.

22. Finally, mine operators have strong economic reasons to stay very vigilant to any threat from COVID-19. United States coal markets have been decimated by drops in demand due to economic slowdowns and a changing energy market. Any COVID-19 outbreak would result in closing of mines for two or three weeks at time with severe economic losses. To protect their employees and keep their business operational, mine operators understand the importance of controlling the threat and spread of COVID-19 and they have done so.

23. The guidance given by MSHA and West Virginia state government has been followed in West Virginia. We have had no issue of COVID-19 being shown to have been contracted at or in our mines. We do not believe there is any emergency ongoing that requires a temporary regulatory standard to be issued by MSHA.

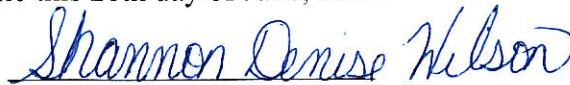
Further, this affiant sayeth not.



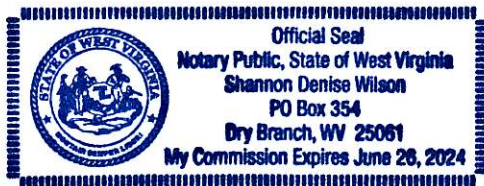
Chris R. Hamilton,
Senior Vice President,
West Virginia Coal Association
PO Box 3824
Charleston WV 25339
Office: 304-342-4153

State of West Virginia
County of Kanawha, to wit:

Sworn to before the undersigned Notary Public this 26th day of June, 2020.


Notary Public

My commission expires: June 26, 2024



ADDENDUM TAB B
T. WHITE AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF HAMBLLEN:

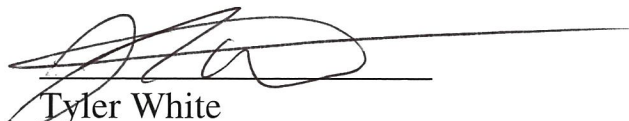
AFFIDAVIT

I, Tyler White, this 27th of June, 2020, being first duly sworn, state as follows:

1. I am the President of the Kentucky Coal Association, 880 Corporate Drive, Suite 101, Lexington, KY 40503. My office telephone number is 859-233-4743.
2. The Kentucky Coal Association (KCA) represents the coal industry in Kentucky. Our membership consists of companies that operate in Kentucky's eastern and western coalfields and business that provide services to those companies.
3. As part of our mission, KCA monitors and studies proposed regulatory changes that would impact how its members do business.
4. KCA, founded in 1942, is a non-profit membership organization governed by a board of directors, which oversees the direction of the organization. KCA has 10 coal producing members and about 111 associate members.
5. On a yearly basis in 2020, Kentucky is mining approximately 28 million tons of coal with 4,533 miners. In 2019, Kentucky produced 35 million tons with an average of 6,000 miners.
6. No positive cases of COVID-19 have been reported at any of Kentucky's coal operations. We also know of no COVID-19 cases traced back to exposure at a coal mine
7. Kentucky Coal companies are following the Centers for Disease Control and National Institute for Health (NIH) guidelines to reduce COVID-19 exposure and information put out by MSHA. Each mine has tailored plans for their operations.

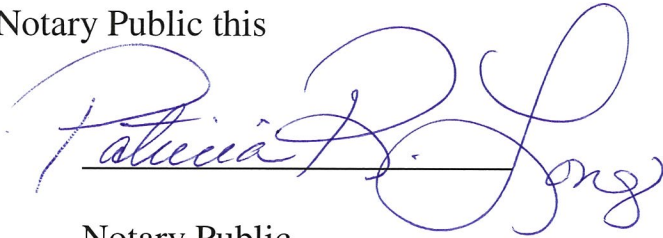
8. Surface mine operations follow proper social distance and use their radio systems to communicate. Equipment is sanitized after each shift and gatherings of employees are limited.
9. At underground mines and preparation plants, miners are instructed to maintain proper social distancing (i.e., at least six feet distance from one another). Usage of the mantrip and elevators have been restricted to limit the number of miners on the mantrip or elevator. Mantrips and shaft elevators are cleaned after each ride. Start times and shifts are staggered so workers from one shift will not come into contact with those from another. Access to bathhouses are limited.
10. All companies have required workers to stay at home if he or she becomes sick or a family member becomes sick and the miner does not return to work until he or she has been tested and found to be negative.
11. I have reviewed the Petition for an Emergency Temporary Standard that cites COVID-19 outbreaks. A regulation is not needed. Employees in coal mines do not work in the close proximity of one another for extended periods of time or on production lines.
12. The guidance given by MSHA and CDC/NIH and our state government has been followed in Kentucky and we have had no COVID-19 issues. We do not believe there is an emergency ongoing that requires a temporary regulatory standard to be issued by MSHA.

Further, this affiant sayeth not.


Tyler White
President
Kentucky Coal Association
880 Corporate Drive, Suite 101
Lexington, KY 40503
859-233-4743

STATE OF TENNESSEE
COUNTY OF HAMBLLEN

Sworn to before the undersigned Notary Public this
29 day of June, 2020.

A handwritten signature in blue ink, reading "Patricia R. Long", written over a horizontal line.

Notary Public

My commission expires: 11/28/2022.



ADDENDUM TAB C

H. CHILDRESS AFFIDAVIT

COMMONWEALTH OF VIRGINIA
COUNTY OF Russell, to wit:

AFFIDAVIT

I, Harry D. Childress, this 25th of June, 2020, being first duly sworn, state as follows:

1. I am the President of the Virginia Coal and Energy Alliance, P.O. Box 339, Lebanon, Virginia 24266. My office telephone number is 276-889-4001.
2. The Virginia Coal and Energy Alliance ("VCEA") is the voice of the coal industry in Virginia. Our membership consists of companies that operate in and around Virginia's coalfields and whose business depends, directly or indirectly, on coal extraction and distribution within the State. As part of our mission, VCEA monitors and studies proposed regulatory changes that would impact how its members do business.
3. VCEA was formed in January 2014 by way of a merger of three existing state coal associations; the Virginia Coal Association, the Eastern Coal Council and the Virginia Mining Association. Thereafter, the Virginia Mining Issues Group was also merged into, and subsumed by, the VCEA.
4. VCEA is a non-profit membership organization that promotes and highlights the coal, rail and power industries and businesses affiliated with these industries through its advocacy, education and outreach programs. VCEA is governed by a board of directors which oversees the direction of the organization. VCEA has approximately 75 members.
5. In 2019, Virginia mining companies employed 2,800 miners and produced 12 million tons of coal. Currently, Virginia has 35 of 42 coal mines (surface and underground) actively producing coal. A majority of those not operational are temporarily idled due to a lack of coal sales caused by economic slowdown associated with COVID-19.
6. To my knowledge, no positive cases of COVID-19 have been reported in any of Virginia's coal operations by our association members. In addition, the state mining agency has also not told me of any COVID-19 cases where a mine was the alleged place the person contracted COVID-19.
7. When concerns surrounding the COVID-19 virus first arose, the Virginia Department of Mines, Minerals and Energy (DMME) met with mine managers and recommended they follow Center for Disease Control (CDC) guidelines as closely as possible. This includes social distancing, limiting numbers of miners in elevators and mantrips and frequent sanitizing of work spaces and equipment.
8. Surface mine operations are largely conducted outdoors. The nature and layout of the work environment allows workers to maintain a proper social distance and use their radio systems to communicate. All shared equipment is sanitized after each shift and no staff meetings

are being held at this time. In general, on a surface mine, a single miner operates a rock truck or a dozer so miners work by themselves and have limited interaction during a shift.

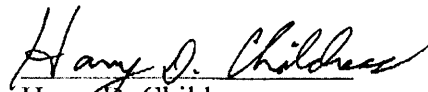
9. VCEA members that operate underground mines and preparation plants are also following those recommendations made by DMME. DMME has reported to me that miners are instructed to maintain proper social distancing (i.e., at least six feet distance from one another). Usage of the mantrip, a vehicle used to transport miners underground to where the coal is to be removed, has also been restricted to the number of miners recommended by DMME per each ride. Also, per DMME recommendations, the number of miners permitted to use shaft elevators at one time has been limited. The mantrips and shaft elevators are cleaned after each ride. Start times and shifts are staggered so workers from one shift will not come into contact with those from another. Access to bathhouses are limited to one person at a time.

10. All our Virginia companies have required workers to stay at home if they become sick or a family member becomes sick and the miner does not return to work until they have been tested.

11. I have reviewed the Petition for an Emergency Temporary Standard that cites COVID-19 outbreaks in meat packing or chicken processing plants and similar industries. The conditions in meat processing or packing plant are very different from the working environment in coal mines. Employees in coal mines do not work in the close proximity of one another for extended periods of time on production lines.

12. The guidance given by MSHA and DMME has been followed in Virginia and we have had no COVID-19 issues. We do not believe there is an emergency ongoing that requires a temporary regulatory standard to be issued by MSHA.

Further, this affiant sayeth not.

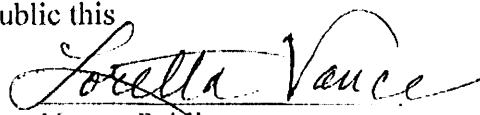

Harry D. Childress
President
Virginia Coal and Energy Alliance
P.O. Box 339
Lebanon, Virginia 24266
Office: 276-889-4001

COMMONWEALTH OF VIRGINIA

COUNTY OF Russell

Sworn to before the undersigned Notary Public this
26th day of June, 2020.

My commission expires: 10/31/2022


Notary Public

