
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.

**FROM THE DEPARTMENT OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION**

**EMERGENCY PETITION FOR A WRIT OF MANDAMUS, AND
REQUEST FOR EXPEDITED BRIEFING AND DISPOSITION**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 21 and 28(a)(1), Petitioners, United Mine Workers of America International Union and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, “Union Petitioners”) submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, intervenors, and amici who appeared below: Under D.C.

Circuit Rule 28(a)(1)(A), the requirement to identify parties, intervenors, and amici who appeared below is inapplicable because the Petition in this case seeks a writ of mandamus with direct review of final agency action, not an appeal from the ruling of a district court.

(ii) Persons who are parties, intervenors, and amici in this Court:

a. Petitioners in this matter: Petitioners are the 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 and

b. Respondents in this matter: The Mine Safety and Health Administration, United States Department of Labor.

c. Intervenors in this matter: None at present.

d. Amici in this matter: None at present.

e. Circuit Rule 26.1 Disclosures: See disclosure form.

(B) Rulings Under Review

Petitioners challenge the Mine Safety and Health Administration's April 14, 2020, and continuing, decision not to issue an Emergency Temporary Standard under Section 101(b) of the Mine Act, 30 U.S.C. §811(b).

(C) Related Cases

None at Present.

Respectfully Submitted,

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 21(d) and 26.1, Petitioners, the United Mine Workers of America International Union (“United Mine Workers”), and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (“United Steelworkers”), make the following disclosures:

Non-Governmental Parties to this Action: The United Mine Workers of America International Union, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC.

Parent Corporations: None.

Publicly Held Company that Owns 10% of More of Party’s Stock: None.

Parties’ General Nature and Purpose: The United Mine Workers and the United Steelworkers are labor organizations within the meaning of section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, and are unincorporated associations whose members have no ownership interests in the associations. The United Mine Workers represents thousands of miners throughout the United States, primarily in the coal industry. The United Steelworkers

likewise represents thousands of miners throughout the United States, primarily in the metal/nonmetal sector.

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30 C.F.R. § 77.171022

RULES

D.C. Cir. R. 211

Fed. R. App. P. 211

OTHER AUTHORITIES

Ca. Dep’t of Pub. Health, Ctr. for Infectious Diseases –Div. of
Communicable Disease Control, *COVID-19 by the Numbers*,
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers>19

CARES Act, Pub. Law 116-136, 134 Stat. 281 (2020)31

Coal Mine Conditions Make It Hard For Miners To Socially Distance, NPR (May 19, 2020) <https://www.npr.org/2020/05/19/858499057/coal-mine-conditions-make-it-hard-for-miners-to-socially-distance> COVID-19 Statistics by Ill. Dep’t of Pub. Health, <https://www.dph.illinois.gov/COVID19/COVID19-statistics>.....20

Emergency Use of Authorization Declaration, 85 Fed. Reg. 17,335 (March 27, 2020).....31

Families First Coronavirus Response Act, Pub. Law 116-127, 134 Stat. 178 (2020).....31

H.R. Rep. No. 312, 9th Cong., 1st Sess. 17-18 (1977).....33

Laurel Wamsley and Selena Simmons-Duffin, The Science Behind A 14-Day Quarantine After Possible COVID-19 Exposure, NPR (April 1, 2020) <https://www.npr.org/sections/health-shots/2020/04/01/824903684/the-science-behind-a-14-day-quarantine-after-possible-covid-19-exposure>27

Mass. Dep’t of Pub. Health, *COVID-19 Dashboard – Thursday, May 14, 2020*, <https://www.mass.gov/info-details/COVID-19-responsereporting#> COVID-19-cases-in-massachusetts-19

Matt Krpunick, *Appalachian Coal Communities Brace For Coronavirus: It’s Going ‘To Wipe Us Out’*, Huffpost (April 4, 2020), https://www.huffpost.com/entry/coronavirus-coal-miners-black-lung_n_5e862723c5b6a949183323d7?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20vc2VhcmNoP3E9Y29hbCUyMG1pbmVyJTIwY292aWQmcXM9biZmb3JtPVFCUkUmc3A9LTEmcHE9Y29hbCUyMG1pbmVyJTIwY292aWQmc2M9My0xNiZzaz0mY3ZpZD1CNUVBOERCODFDMzE0QzVFOTc1QTg2MTA3NkQ4REQxRA&guce_referrer_sig=AQAAAFFOh59jT9PUwcFzR4ukmVT7xVSrhHJ-N77xG710LLO_f1FoDik8ti5uuaZEpqt9aneIBxJmsHp4ac2b1yJO_ZR9J3vP_1JynKLiLjtDpSipkSGHhMU2oUg5m4fubeU2EG80YpUPgRrvXT6hWkQEqfHr6k98WsboqpfZm0Oy8gaw 20

Mike Dorning et al., <i>Infections Near U.S. Meat Plants Rise at Twice the National Rate</i> , Bloomberg News (May 11, 2020, 1:45 PM), https://www.bloomberg.com/news/articles/2020-05-11/u-s-meat-plant-areas-seevirus-spreading-at-twice-national-rate	21
MSHA, <i>MSHA Response to COVID-19</i> , https://www.msha.gov/msha-response-covid-19	18
N.J. Dep’t of Health, <i>COVID-19 Confirmed Case Summary</i> , https://www.nj.gov/health/cd/documents/topics/NCOV/COVID_Confirmed_Case_Summary.pdf	19
NYC Health, <i>Coronavirus Disease 2019 (COVID-19) Daily Data Summary</i> , https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-datasummary-05142020-1.pdf	19
Office of the Secretary, Department of Health and Human Services, <i>Determination of Public Health Emergency</i> , 85 Fed. Reg. 7316 (Feb. 7, 2020) https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx	31
<i>Proclamation No. 9994</i> , 85 Fed. Reg. 15,337 (2020).....	30
Sky Chadde, <i>Tracking Covid-19’s impact on meatpacking workers and industry</i> , Midwest Center for Investigative Reporting (April 16, 2020), https://investigatemidwest.org/2020/04/16/tracking-covid-19s-impact-onmeatpacking-workers-and-industry/	21
S. Rep. No. 95–181, 95th Cong., 1st Sess. 25 (1977) <i>U.S. Ctrs. for Disease Control & Prevention, Case Count Reported in Case-Based Surveillance for COVID-19</i> , https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html	29-30
Sydney Boles, <i>Coal and COVID-19: Lung Impairment Makes Miners Especially Vulnerable to Coronavirus</i> , WOUB (May 5, 2020), https://woub.org/2020/05/05/coal-and-covid-19-lung-impairment-makes-miners-especially-vulnerable-to-coronavirus/	19

No. _____

**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.

Mine Safety and Health Administration, United States Department of Labor

Respondent.

**EMERGENCY PETITION FOR A WRIT OF MANDAMUS, AND
REQUEST FOR EXPEDITED BRIEFING AND DISPOSITION**

Pursuant to Federal Rule of Appellate Procedure and Circuit Rule 21, and in accordance with the established precedent in this Court as provided by *Telecomm. Research & Action Ctr. v. FCC* (“TRAC”), 750 F.2d 70 (D.C. Cir. 1984), and its progeny, Petitioner United Mine Workers of America, International Union (the “UMWA” or “the Mine Workers”) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (the “Steelworkers”) (jointly the “Unions”) hereby petition this Court to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), and section 101(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”),

30 U.S.C. § 811(d), compelling Respondent Mine Safety and Health Administration, United States Department of Labor (“MSHA”) to issue—within thirty (30) days of this Court’s grant of the writ—an Emergency Temporary Standard for Infectious Diseases (“ETS”), under section 101(b) of the Mine Act, 30 U.S.C. § 811(b), aimed at protecting the life and health of tens of thousands of miners throughout the United States who are in grave danger from the deadly COVID-19 pandemic.

The situation confronting miners is urgent. Miners have largely been designated as “essential” workers and thus are currently working at mine sites across the country. Further, as government-imposed stay-at-home orders are lifted and demand for mine-produced resources increases, more miners will return to work at pre-pandemic levels. Given the urgency of the situation confronting miners in the United States, the Unions further request that this Court establish an expedited briefing and disposition of the petition. With respect to the briefing, the Unions propose that MSHA be allowed ten (10) days to respond to the petition and that the Unions be required to submit their reply within two (2) days of MSHA’s response.

INTRODUCTION

Section 101(b) of the Mine Act states that MSHA:

shall provide . . . for an emergency temporary standard to take immediate effect upon publication in the Federal Register if [it] 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 employees from such danger.

30 U.S.C. § 811(b) (emphasis supplied). This Court has jurisdiction to review MSHA's failure to issue an ETS for COVID-19 under section 811(b). *See Oil and Chemical and Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1481 (D.C. Cir. 1985).

The COVID-19 global pandemic has produced exactly the type of workplace catastrophe that Congress intended MSHA to address with an Emergency Temporary Standard. While the numbers change daily, as of this writing, more than 2 million people in the United States have tested positive for COVID-19, and more than 115,000 people in the United States have died from the disease. Many more likely have the disease but have not been tested; many others likely died of the disease but have not been counted.

A significant portion of those infected and dying from COVID-19 are classified as "essential" workers. Infection rates are particularly high for industrial workers who operate in close proximity, most notably meatpackers. The working conditions at the meat packing plants are similar, but generally not as dangerous, to those found in the nation's mines. As the economy reopens, production increases, and more miners return to work for a greater number of hours, person-to-person contact in the nation's mines will increase and health experts predict that the already shocking number of infections and deaths among workers will worsen.

On March 24, 2020, the UMWA petitioned MSHA to issue an ETS under section 101(b) of the Mine Act, “to protect the most valuable resource in the mine – the miner.” *See* Addendum, Tab 3 at 2. The UMWA premised the March 24, 2020 petition on the unique challenges faced by miners, including their close proximity while working underground in mines and the threat of occupational diseases like pneumoconiosis which “the UMWA believes will greatly exacerbate the severity of the symptoms related to COVID-19....” The UMWA demanded that MSHA take immediate action to protect miners from this grave threat.

On April 14, 2020, MSHA responded to the UMWA’s petition. *See* Addendum Tab 4. In that response, MSHA declined to issue an ETS, instead claiming that “the risks miners face from exposure to coronavirus are quite similar to the risks encountered by other Americans,” and merely recommended a variety of voluntary actions that miners could take to mitigate the risk of COVID-19. *Id.* at 1.

On May 20, 2020, the UMWA submitted another petition to MSHA, repeating its request for an COVID-19 ETS. *See* Addendum Tab 5. The UMWA argued that, in the face of an expanding pandemic, MSHA’s evolving voluntary guidance to employers was no substitute for the immediate imposition of mandatory, legally-enforceable, COVID-19-specific duties on operators to protect miners from grave danger. *Id.*, Tab 5 at 2.

COVID-19's toll in mortality and morbidity among workers and the general public has exceeded the expectations of most prognosticators. Yet in a stunning act of agency nonfeasance in the midst of a workplace health emergency of a magnitude not seen in this country for over a century, MSHA declined to respond to the UMWA's renewed ETS petition and has failed to adopt mandatory, legally enforceable, COVID-19 specific rules to protect miners. *See* Addendum, Tab 4.

This Court recognized that under Section 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) (emphasis added). MSHA likely maintains a degree of discretion in determining whether those factors are met. *See In re Int’l Chem. Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987) (citing the nearly identical language in the Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651 *et seq.*, (“OSH Act”)). But MSHA’s discretion is *not* unlimited. *See Zegeer*, 768 F.2d at 1487 (Congress “could not have intended to give MSHA unbridled discretion to withhold or delay development and promulgation of ‘improved mandatory health or safety standards.’”). Further, the Administrative Procedure Act (APA) directs agencies to conclude matters presented to them “within a reasonable time,” 5 U.S.C. § 555(b), and specifies that the reviewing court shall

compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). Although the APA does not confer an independent grant of jurisdiction, it does indicate a Congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed.

In the face of a health emergency causing more deaths in less time than any workplace catastrophe since the passage of the Mine Act, MSHA's refusal to issue an ETS constitutes an abuse of agency discretion so blatant and of "such magnitude" as to amount to a clear "abdication of statutory responsibility." *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin. ("FDA")*, 740 F.2d 21, 32 (D.C. Cir. 1984). Based on what is known about COVID-19 and its anticipated impact in the coming months, the statutory requirements for issuance of an ETS are satisfied here.

Indeed, the grave danger to miners from the COVID-19 pandemic and the necessity of an ETS to protect miners from that danger could not be clearer. Moreover, there is an urgent need for an ETS without further delay because states and localities have already initiated the process of allowing businesses within their jurisdictions to reopen—under a hodgepodge of standards and recommendations—and are facing pressure to do so at an accelerated pace. This reopening process will

undoubtedly result in a greater number of miners working a larger number of hours in mining environments that do not readily accommodate measures to mitigate against COVID-19 exposures including social distancing of at least six feet, regular handwashing and sanitizing of equipment. See Declaration of Josh Roberts Addendum, Tab 7 at 3-4; Declaration of Mike Wright Addendum, Tab 8 at 8 and 12.¹ If MSHA fails to issue an ETS to address this unprecedented crisis, the life and health of tens of thousands of miners will be placed in grave danger as a result of the miners' increased exposure to COVID-19.

When, as here, “agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates.” *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d at 32. The Unions respectfully request this Court to exercise that power in this case and direct MSHA to issue an ETS under the Mine Act to protect miners from the grave danger posed by COVID-19.

PETITIONERS HAVE STANDING TO REQUEST THE WRIT

Petitioners have constitutional and associational standing to bring this petition for writ of mandamus. An association has standing to bring a petition for writ of

¹ Addendum tabs referenced in this petition are not in sequential order because tabs containing declarations were incorporated into the petition as they were received.

mandamus on behalf of its members when: (i) a member would otherwise have standing to sue in his/her own right; (ii) the interests it seeks to protect are germane to the organization's purpose; and (iii) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *In re Public Employees for Environmental Responsibility*, 957 F.3d 267, 272 (D.C. Cir. 2020). Only one petitioner organization must prove standing to meet the threshold. *Air Alliance Houston v. Environmental Protection Agency*, 906 F.3d 1049, 1058 (D.C. Cir. 2018).

This petition for writ of mandamus is germane to the Unions' respective organizational purposes. The "germaneness" prong "require[s] only that an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." *Humane Soc. Of the U.S. v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988). *See* Addendum, Tab 7 at 1-2; Addendum, Tab 8 at 2-5.

This petition for writ of mandamus does not require participation of individual members. Whether the claim asserted or the relief requested requires such participation hinges on the nature of what is asserted. As a general matter, a requested rulemaking does not require participation by individual members. *See, e.g., Flyers Rights Education Fund, Inc. v. United States Department of Transportation*, 957 F.3d 1359, 1362 (D.C. Cir. 2020) ("the relief requested – a rulemaking – does not require participation by individual members."). The Unions'

petition concerns the health and welfare of all of their members employed as miners and seeks only rulemaking. No individual damages or remedies are sought. Therefore, this prong is also met.

To establish that the Unions' members have standing to seek a writ of mandamus in their own right, the Unions must show that their members suffered an injury in fact, that this injury was caused by the agency's failure to act, and the injury is redressable. *In re Public Employees for Environmental Responsibility*, 957 F.3d at 272 citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). Each of these elements must be established by a "substantial probability." *Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002).

The Unions' members have suffered an injury in fact. An "injury in fact" must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Sierra Club v. Federal Energy Regulatory Commission*, 827 F.3d 59, 65 (D.C. Cir. 2016). *See* Addendum, Tab 7, at 3-4; Addendum, Tab 8, at 17.

Further, this injury is, or imminently will be, traceable to MSHA's refusal to issue an ETS under the Mine Act. As noted *supra* at page 5-6, Congress obligated the Secretary of Labor to promulgate an ETS if he/she determines that miners are exposed to a grave danger and an emergency standard is necessary to protect miners from such danger. 30 U.S.C. § 811(b)(1). For the reasons outlined *infra* at p. 17-22, miners (including those who are the Unions' members) face particularly grave

dangers associated with the COVID-19 pandemic that can only be redressed by issuance of an ETS. Responsibility for the fact that no COVID-19 related ETS has been promulgated rests solely with MSHA, which has a duty to act and has explicitly refused to do so. The injuries that flow as a result of that decision are therefore entirely traceable to MSHA. *See* Addendum, Tab 7 at 4; Addendum, Tab 8 at 17.

Finally, this injury is redressable. The redressability prong often overlaps with the causation prong: a decision here eliminating the source of the harm to the Unions (the “fairly traceable” requirement) will necessarily redress the injuries (the “redressability” requirement). *National Wildlife Federation v. Hodel*, 839 F.2d 694, 709, n. 11 (D.C. Cir. 1988). Further, note that a party seeking judicial relief need not show to a certainty that a favorable decision will redress the injury, “a mere likelihood will do.” *Id.* at 705. When MSHA ceases to unlawfully withhold the ETS, the harm will be redressed. A mandatory standard will be in place that will protect miners from the hazards associated with COVID-19.

Beyond the fact the Unions meet the test for associational and constitutional standing, the Court has, without controversy, recognized previously the UMWA as a proper party to petition for a writ of mandamus compelling MSHA to issue regulations under the Mine Act. *See, e.g., In re United Mine Workers of America Intern. Union*, 231 F.3d 51, 55 (D.C. Cir. 2000) (holding that the UMWA’s petition for writ of mandamus compelling an ETS on exposure to respirable coal dust was

moot because MSHA subsequently filed proposed rulemakings, but stating “of course, UMWA and other parties with standing” could seek judicial review of the final standard once promulgated); *In re United Mine Workers of America Intern. Union*, 190 F.3d 545, 546 (D.C. Cir. 1999) (ordering MSHA to complete rulemaking on a definite schedule based upon petition for writ of mandamus filed by UMWA).

More broadly, this Court has recognized both the UMWA and the Steelworkers as proper parties to challenge MSHA regulations in court. *See, e.g., United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Service Workers Int’l Union v. MSHA*, 925 F.3d 1279 (D.C. Cir. 2019) (finding that MSHA rule was *ultra vires* and unenforceable based upon petition for review filed by the Steelworkers and the UMWA); *Intern. Union, United Mine Workers of America v. MSHA*, 636 F.3d 84 (D.C. Cir. 2010) (finding MSHA rule was arbitrary and capricious based upon petition for review filed by UMWA); *Intern. Union, United Mine Workers of America v. MSHA*, 554 F.3d 150 (D.C. Cir. 2009) (invalidating several MSHA regulations based upon petition filed by UMWA). Furthermore, there is no question that Petitioners are each a “representative of miners” as that term is used in Section 103(f) of the Act, and therefore have an interest in the lawful implementation of the Mine Act. *See* Addendum, Tab 7 at 2; Addendum, Tab 8 at 4.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS EXCLUSIVE JURISDICTION TO REVIEW MSHA'S REFUSAL TO ISSUE AN ETS

Under settled law, “where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court’s future jurisdiction is subject to the exclusive review of the Court of Appeals.” *TRAC*, 750 F.2d 70. This Court has recognized that “Congress lodged authority to review a Mine Act mandatory health and safety standard, once promulgated, exclusively in the courts of appeals.” *Zegeer*, 768 F.2d at 1485-86. Therefore, based upon *TRAC*, federal appellate courts have exclusive jurisdiction to review claims that MSHA has unlawfully withheld or delayed issuance of an ETS. *Id.*; *see also In re Howard*, 570 F.3d 752, 756 (6th Cir. 2009).

As this Court explained in *TRAC*, when judicial review of a particular agency action *if taken* is committed by statute to the courts of appeals—as it would have been had MSHA issued an ETS, *see* 30 U.S.C. § 811(d)—the appellate courts also have exclusive jurisdiction under the All Writs Act to consider a claim that the agency has “unlawfully withheld or unreasonably delayed” that action and to “compel” the agency to take the action that the law requires. *See TRAC*, 750 F.2d at 75-77. Because the essence of the Unions’ claim here is that MSHA “unlawfully withheld” the issuance of an ETS and should be “compel[led]” to issue one, the

Unions' claim plainly falls within this Court's exclusive jurisdiction. *See also Int'l Union, UAW v. Donovan*, 756 F.2d 162, 163 (D.C. Cir. 1985).

MSHA's failure to respond to the UMWA's May 20, 2020 petition for an ETS constructively and effectively denies that petition and certainly "unreasonably delayed" the statutorily mandated action. As a result, judicial review is proper. This Court has made it clear that when agency delay under "'exigent circumstances render[s] it equivalent to a final denial of petitioners' request,' . . . the court can undertake review as though the agency had denied the requested relief and can order [the] agency to either act or provide a reasoned explanation for its failure to act.'" *Pub. Citizen Health Research Grp. v. FDA, supra*, 740 F.2d at 32 (quoting *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970)). The unparalleled "exigent circumstances" existing here dictate that MSHA's more than two-month delay in acting on the UMWA's March 24, 2020 petition be treated as "a final denial" of that petition.

During the period of this unreasonable delay, the feared COVID-19 pandemic has expanded with grave consequences for workers in the U.S. In these circumstances, MSHA's inexplicable failure even to respond to the UMWA's May 20, 2020 petition "is tantamount to an order denying" that petition, because it threatens "irreparable injury on a massive scale" of the very kind an ETS is designed to prevent. *Cf. Env'tl. Def. Fund*, 428 F.2d at 1099 (concluding that EPA inaction

following a petition calling for emergency EPA action under a statute “designed to protect the public from an ‘imminent hazard’” is “tantamount to an order denying” the requested emergency action).

MSHA’s failure to respond to the UMWA’s May 20, 2020 petition constitutes “a final denial” as the Assistant Secretary of Labor clearly indicated that MSHA will not issue an ETS. Specifically, in the April 14, 2020 letter to UMWA President Cecil E. Roberts, Assistant Secretary Zatezalo acknowledged that the UMWA “requested that MSHA issue an Emergency Temporary Standard,” but stated that, “MSHA believes that at this time there is no additional benefit from an ETS and concluding that “[r]ather than issuing an ETS, we believe that MSHA can best protect miners and operators from the COVID-19 danger by responding rapidly in a fluid environment...” through non-mandatory measures. *See* Addendum, Tab 4, at 2. MSHA may not evade judicial review by declining to formalize a decision that MSHA has made; the Secretary’s letter recognizes that MSHA has decided not to issue an ETS. *See In re Aiken Cty.*, 645 F.3d 428, 436 (D.C. Cir. 2011) (“We will not permit an agency to insulate itself from judicial review by refusing to act.”).

II. MSHA HAS UNLAWFULLY WITHHELD AN ETS AND SHOULD BE COMPELLED TO ISSUE ONE

To date, COVID-19 has caused more deaths among workers in a shorter time than any other health emergency since the passage of the Mine Act. Many more deaths among workers are predicted in the coming months as the economy

reopens. The COVID-19 pandemic mandates issuance of an ETS under section 101(b) of the Mine Act to protect the life and health of miners in the United States.

A. Standard of Review

While this Court has yet to adopt a specific standard of review under the Mine Act for mandamus actions seeking an ETS, the Court has reviewed ETS mandamus petitions under the OSH Act. *Compare In re Int'l Chem. Workers Union*, 830 F.2d at 372 (suggesting that a “reasonable[ness]” standard applies) *with Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1156 (D.C. Cir. 1983) (suggesting that an “abuse of discretion” standard applies). Under either standard of review, MSHA’s failure to issue an ETS to protect miners from the scourge of COVID-19 represents a clear “abdication of [the agency’s] statutory responsibility.” *See Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d at 32. As such, this Court should direct MSHA to issue an ETS.

While prior decisions have rejected efforts to compel MSHA to issue an ETS, *see, e.g., Zegeer*, 768 F.2d at 1488; *In re UMWA*, 231 F.3d at 54-55, the novel coronavirus now spreading through U.S. workplaces represents an unprecedented workplace health emergency distinguishable from the circumstances in *Zegeer* and *In re UMWA*. Clearly, the risk of workplace exposure to COVID-19 poses a grave danger to miners requiring immediate regulatory action by MSHA to protect miners

from that grave danger—particularly as the country reopens and more miners return to work at pre-pandemic working hours.

As previously noted, while MSHA is accorded some discretion in making a factual determination as to whether the two statutory requirements for issuance of an ETS have been satisfied such discretion is not unfettered. *See Zegeer*, 768 F.2d at 1487. As with similar language from the OSH Act, MSHA’s discretion to not act is limited because of “the mandatory [‘shall’] language,” in the ETS provision, and “the fact that the interests at stake are not merely economic interests in a license or a rate structure, but personal interests in life and health.” *See Auchter*, 702 F.2d at 1156.

In passing the Mine Act, Congress stated that, “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner,” 30 U.S.C. § 801(a). Congress also recognized miners’ need for special protections by passing the Mine Act, thereby separating miners from consideration with other workers under the OSH Act.² In section 101(a) of the Mine Act, Congress authorized MSHA to “develop, promulgate, and revise as may be appropriate, improved *mandatory* health or safety standards for the

² The Mine Act is premised on the principle that work in a mine is inherently unsafe: Congress recognized “the existence of unsafe and unhealthful conditions and practices in the Nation’s coal or other mines” in Section 2(d) of the Mine Act. 30 U.S.C. § 801(d).

protection of life and prevention of injuries in coal or other mines.” 30 U.S.C. § 811(a) (emphasis supplied). However, MSHA rulemaking under Section 101(a) can take years to complete. Obviously, a lengthy regulatory proceeding to address the grave and immediate health risks posed by miners’ exposure to COVID-19 would not protect miners from those risks.

Recognizing that extraordinary circumstances involving “danger” to miners’ life and health may be so “grave” and immediate as to make ordinary section 101(a) rulemaking inadequate and a swifter form of regulatory action “necessary,” Congress provided in section 101(b) of the Mine Act that MSHA “*shall*” issue an “*emergency temporary standard*” to protect miners against grave and immediate danger. 30 U.S.C. § 811(b) (emphasis supplied). Against this background, any suggestion by MSHA that it has *carte blanche* to withhold issuance of an ETS when urgent regulatory action is necessary to protect miners against the grave danger to their lives and health posed by COVID-19 must be rejected.

B. COVID-19 Poses a Grave Danger to Miners

The novel coronavirus clearly poses a “grave danger” to miners within the meaning of 30 U.S.C. § 811(b). The virus is a “new hazard,” *id.*, that plainly creates a “danger of incurable, permanent, or fatal consequences to workers” exposed to that hazard. *See Fla. Peach Growers Ass’n v. Dep’t of Labor*, 489 F.2d 120, 132 (5th Cir. 1974). MSHA has never suggested otherwise. In fact, MSHA created a

COVID-19 web page to discuss the danger posed by COVID-19 specifically to miners.³ That website lists several mandatory actions MSHA has put in place to “minimize the spread of Coronavirus/COVID-19,” but only to shield MSHA’s own employees from the dangers caused by the disease in the mines, not to protect miners.

Specifically, the website indicates that pursuant to the President’s national emergency declaration “MSHA has suspended Educational Field and Small Mine Services visits, as well as special safety and fatality initiatives that normally would gather groups of miners on-site to discuss powered haulage, electrocution, and contractor safety.” Further, “MSHA is following all protocols for identifying MSHA inspectors or other employees exhibiting symptoms or who have had potential exposure, asking them to quarantine at home, and cleaning the relevant offices following CDC [Centers for Disease Control] guidelines.” Finally, MSHA has offered to limit the number of federal inspectors at mines when production levels drop. In short, MSHA identified a hazard and took prompt action to mitigate that hazard for MSHA’s own employees by putting mandatory protections in place. Conversely, MSHA has failed to act consistent with that statutory mandate to

³ MSHA, *MSHA Response to COVID-19*, <https://www.msha.gov/msha-response-covid-19>.

provide mandatory protections to the nation’s miners whose health and safety are a clear statutory priority under the Mine Act.

As of June 14, 2020, 2,063,812 total cases of COVID-19 have been reported to the Centers for Disease Control (“CDC”).⁴ Many of these cases are among “working-age” adults: state level data shows that cases among the working age population account for about 75% in each jurisdiction.⁵ Already, at least one documented case of a COVID-19 outbreak has occurred at a coal mine on the Pennsylvania/West Virginia Border.⁶ Further, at least 1 in 10 underground coal miners suffers from Black Lung disease, though experts say the actual number is

⁴ U.S. Ctrs. for Disease Control & Prevention, *Case Count Reported in Case-Based Surveillance for COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁵ NYC Health, *Coronavirus Disease 2019 (COVID-19) Daily Data Summary*, <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-datasummary-05142020-1.pdf>; Ca. Dep’t of Pub. Health, Ctr. for Infectious Diseases –Div. of Communicable Disease Control, *COVID-19 by the Numbers*, <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers>; N.J. Dep’t of Health, *COVID-19 Confirmed Case Summary*, https://www.nj.gov/health/cd/documents/topics/NCOV/COVID_Confirmed_Case_Summary.pdf; Mass. Dep’t of Pub. Health, *COVID-19 Dashboard – Thursday, May 14, 2020*, <https://www.mass.gov/info-details/COVID-19-responsereporting#COVID-19-cases-in-massachusetts->; COVID-19 Statistics by Ill. Dep’t of Pub. Health, <https://www.dph.illinois.gov/COVID19/COVID19-statistics>.

⁶ Sydney Boles, *Coal and COVID-19: Lung Impairment Makes Miners Especially Vulnerable to Coronavirus*, WOUB (May 5, 2020), <https://woub.org/2020/05/05/coal-and-covid-19-lung-impairment-makes-miners-especially-vulnerable-to-coronavirus/>.

probably higher.⁷ Lung scarring caused by Black Lung disease makes the risk posed by COVID-19 all the greater. Moreover, the nature of mining makes “common sense” preventative measures, as practiced by the general public, nearly impossible. For instance, miners often have difficulty staying six feet apart from one another while working.⁸ See Declaration of Andy Martinez, Addendum, Tab 6 at 2-5; Addendum, Tab 7 at 3-4; Addendum, Tab 8 at 8 and 10.

The nation has already witnessed what happens when COVID-19 gets a foothold in an industrial setting where “essential” workers are in close proximity to each other in the meat packing industry. As of May 16, the Midwest Center for Investigative Reporting identified more than 14,800 COVID-19 infections tied to

⁷ Matt Krpunick, *Appalachian Coal Communities Brace For Coronavirus: It's Going 'To Wipe Us Out'*, Huffpost (April 4, 2020), https://www.huffpost.com/entry/coronavirus-coal-miners-black-lung_n_5e862723c5b6a949183323d7?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20vc2VhcmNoP3E9Y29hbCUyMG1pbmVyJTlwY292aWQmcXM9biZmb3JtPVFCUkUmc3A9LTEmcHE9Y29hbCUyMG1pbmVyJTlwY292aWQmc2M9My0xNiZzaz0mY3ZpZD1CNUVBOERCODFDMzE0QzVFOTc1QTg2MTA3NkQ4REQxRA&guce_referrer_sig=AQAAAFFOh59jT9PUwcFzR4ukmVT7xVSrhHJ-N77xG710LLO_f1FoDik8ti5uuaZEpqt9aneIBxJmsHp4ac2b1yJO_ZR9J3vP_1JynKLiLjtDpSipkSGHhMU2oUg5m4fubeU2EG80YpUPgRrvXT6hWkQEqfHr6k98WsboqpfZm0Oy8gaw.

⁸ Coal Mine Conditions Make It Hard For Miners To Socially Distance, NPR (May 19, 2020) <https://www.npr.org/2020/05/19/858499057/coal-mine-conditions-make-it-hard-for-miners-to-socially-distance>.

meat processing plants and at least 55 worker deaths.⁹ Similarly, an analysis by Bloomberg News of data compiled by Johns Hopkins University found a 40% increase in confirmed COVID-19 cases in counties with major beef or pork slaughterhouses, compared with a 19% rise nationally, during the week of April 28 to May 5.¹⁰ These numbers attest to the risk posed by working in close proximity to other individuals *in an industry that does not create the same level of occupational lung disease as mining*. If a full-blown COVID-19 outbreak occurs in a U.S. mine, the results will likely be catastrophic.

Workplace exposure to the novel coronavirus causing COVID-19 poses a “grave danger” to tens of thousands of miners in the U.S. that requires MSHA to issue an ETS to protect miner health and safety. The fact that the novel coronavirus is not a uniquely work-related hazard does not in any way minimize the “grave danger” facing miners or make that virus an improper subject of a mandatory MSHA standard, as the Assistant Secretary’s April 14, 2020 letter seems to imply. *See* Addendum, Tab 4 at 2. First, MSHA regulates a wide variety of hazards that are not

⁹ Sky Chadde, *Tracking Covid-19’s impact on meatpacking workers and industry*, Midwest Center for Investigative Reporting (April 16, 2020), <https://investigatamidwest.org/2020/04/16/tracking-covid-19s-impact-onmeatpacking-workers-and-industry/>.

¹⁰ Mike Dorning et al., *Infections Near U.S. Meat Plants Rise at Twice the National Rate*, Bloomberg News (May 11, 2020, 1:45 PM), <https://www.bloomberg.com/news/articles/2020-05-11/u-s-meat-plant-areas-seevirus-spreading-at-twice-national-rate>.

mine, or even work, specific. Everything from seatbelts (30 C.F.R. § 77.1710) to sanitary flushing toilets (30 C.F.R § 71.400) are covered by regulations under the Mine Act. Second, the mine environment poses additional risks not borne by the public in general. *See* Addendum, Tab 6, p. 4-5, Addendum, Tab 7, p. 3-4; Addendum, Tab 8 at 12. MSHA acknowledged that fact on their COVID-19 website, stating that miners should avoid “crowding personnel carriers, hoists and elevators, or other means of transportation at the mine.” Obviously, these are particular dangers posed to miners traveling into, working in, and traveling out of mines that are not faced by other workers or the public. MSHA has a duty to protect miners from hazards they are exposed to at work even if the miners are exposed to the same hazards before and after work.

C. An ETS is “Necessary” to Protect Miners

An ETS is “necessary” to protect miners against the grave danger they face from workplace exposure to the coronavirus within the meaning of 30 U.S.C. § 811(b). Neither of the arguments to the contrary in the Assistant Secretary of Labor’s April 14 letter to the UMWA withstand scrutiny. The Secretary’s argument that existing MSHA standards adopted years before the COVID-19 pandemic adequately protect workers from contracting COVID-19 in the workplace argument fails for several reasons.

First, the various standards referred to by the Assistant Secretary were not designed specifically to protect against workplace transmission of COVID-19 or any viral disease. As a result, the existing MSHA standards do not require operators to conduct a worksite hazard assessment to identify sources of potential exposure to or contact with the virus. Nor do the existing standards require operators to adopt any specific COVID-19 mitigating measures as recommended by CDC (which will need to be adapted to address the uniquely hazardous mining environment). *See* Addendum, Tab 6 at 3-5. Moreover, even to the extent that the existing more general MSHA standards might be helpful in limiting workplace transmission of the virus, these standards do not require necessary measures to protect workers from this particular new hazard and thus are insufficient to address risks to miners posed by COVID-19.

The Assistant Secretary's suggestion in his April 14, 2020 letter that existing standards already require that mine operators provide and maintain sanitary facilities, ventilation, and appropriate PPE is unpersuasive and fails to address the unique risks to miners posed by COVID-19. *See* Addendum, Tab 4 at 1. It is true that MSHA has promulgated a number of standards concerning sanitary facilities (*see, e.g.*, 30 C.F.R. § 57.20008, § 71.500, and § 75.1712-3); however, these standards are merely general requirements for providing clean and adequate toilet

facilities. There is no specific regulatory requirements for disinfecting surfaces or providing ready access to hand washing facilities or hand sanitizers.

Similarly, MSHA has promulgated a large number of regulations to ensure adequate ventilation in the mines. However, as is demonstrated in 30 C.F.R. § 75.325, the purpose of MSHA's ventilation regulations is "to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes." That is, mine ventilation is designed to provide fresh air for miners to breathe and to limit the accumulation of combustible gases and dust. Those standards are not designed to prevent the spread of a communicable disease, especially a disease that is transmitted through droplets rather than airborne contamination.

Most of the MSHA standards that concern personal protective equipment ("PPE") likewise fail to address the grave dangers posed to miners by a communicable disease such as COVID-19. For instance, 30 C.F.R. § 75.818 concerns the use of specialized gloves for handling high voltage cables that has little use or relevance to combating COVID-19. Even standards related to respirators are insufficient. First, as noted above, the CDC has advised that the primary route of exposure to the coronavirus is droplet transmission, not airborne contamination, and the CDC has recommended surgical masks and face cloths (which are not PPE under the Mine Act) instead of respirators. Further, the use of respirators under the Mine

Act is only required under specific circumstances and an operator cannot be cited when they are not used. Respirators must simply be made available. *See e.g.*, 30 C.F.R. § 72.700 (“Respiratory equipment...shall be made available to all persons...”). Thus, MSHA’s existing standards do not address how to adapt the CDC recommendations to the mining environment nor rectify the inconsistencies between CDC recommendations and MSHA’s existing regulations.

In addition to the mandatory standards discussed above, the Assistant Secretary’s April 14, 2020 letter also suggests that miners are adequately protected because MSHA trains miners and operators on protective measures they can take against physical and health hazards, including training on respiratory devices. *See* Addendum, Tab 4 at 1. None of MSHA’s current training addresses the steps necessary to avoid transmission of communicable diseases in general or COVID-19 in particular in the mines. As such, the existing MSHA training requirements are inadequate to address the grave dangers currently facing miners by COVID-19.

Finally, the Assistant Secretary’s April 14, 2020 letter states that miners can file hazard complaints under section 103 of the Mine Act incorrectly asserting that section 103(g) hazard complaints provide miners with a mechanism to address COVID-19 risks in the miners. Section 103(g) of the Mine Act states:

whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or

representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

30 U.S.C. § 813(g).

As the plain language of this section makes clear, when submitting a section 103(g) complaint, representatives of miners (or miners themselves), generally have to point to the particular mandatory health or safety standard that has been violated or note an imminent danger. *See* Addendum, Tab 6 at 7 (“the first thing a MSHA inspector asks during a 103(g) hazard complaint inspection is what MSHA standard do you believe is being violated.”) For example, if a miner observes an accumulation of combustible material, the miner must contact MSHA and state that there is a violation of 30 C.F.R. § 75.400. The reason that the Unions are requesting an ETS in the first place is that there is no standard in place that covers the danger posed by COVID-19. Axiomatically, when filing a section 103(g) complaint, a miner will not be able to demonstrate a good faith belief that a violation of a mandatory health or safety standard exists relating to COVID-19 when no such standard exists. *See* Addendum, Tab 6 at 7 (“Since no MSHA standards are in place for COVID-19 hazards, miners will not be able to identify a mandatory standard for MSHA to enforce and the MSHA Inspector will not be able to address any COVID-19 related hazards at the mine.”)

Further, while a miner can file a section 103(g) complaint to point out an “imminent danger,” it is unclear how a miner would do so regarding COVID-19. The disease is invisible to the naked eye. Miners may not be aware they were exposed to an imminent danger until up to two weeks after it occurred.¹¹ Even if miners are able to point out conditions that pose an imminent danger as a result of COVID-19, MSHA inspectors are not trained to recognize or address those dangers. *See* Addendum, Tab 6 at 3. Moreover, such actions most likely would be futile given that as a representative of miners, the UMWA raised the specter of imminent danger posed by COVID-19 in its March 24, 2020 and May 20, 2020 letters to MSHA, and MSHA refused to act.

Finally, section 103(g) complaints are not sufficient to address COVID-19 dangers in this case because unlike the OSH Act, the Mine Act contains no general duty clause. The OSH Act specifically requires every employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). However, the Mine Act does not

¹¹ Laurel Wamsley and Selena Simmons-Duffin, *The Science Behind A 14-Day Quarantine After Possible COVID-19 Exposure*, NPR (April 1, 2020) <https://www.npr.org/sections/health-shots/2020/04/01/824903684/the-science-behind-a-14-day-quarantine-after-possible-covid-19-exposure>. “For the virus that causes COVID-19 . . . researchers have found that the typical incubation period is about five days. About 97% of the people who get infected and develop symptoms will do so within 11 to 12 days, and about 99% will within 14 days.”

contain a broad, “catch-all” general duty statement requiring operators to provide generally “safe” mines. Instead, MSHA mandates the creation of safe mines through standards addressed to specific hazards. In this way, this petition is fundamentally different from a separate petition for mandamus filed by the AFL-CIO regarding OSHA. *In re: American Federal of Labor and Congress of Industrial Organizations*, No. 20-1158, (D.C. Cir. June 11, 2020) (Denial of mandamus under OSH Act in light of section 654(a)(1)).

As noted *supra* at 23, MSHA has no standards in place that address contagious disease in general or COVID-19 in particular. Simply put, MSHA’s general standards and protections that currently exist to protect miners from the dangers normally posed by mining are insufficient to address the grave hazard posed by COVID-19 and to protect miners to the greatest extent possible.

Second, the Assistant Secretary of Labor incorrectly contends that voluntary measures taken by operators are an adequate substitute for an enforceable, COVID-19 specific standard. Specifically, the April 14, 2020 letter states:

At present, the risks miners face from exposure to COVID-19 are quite similar to the risks encountered by other Americans. The steps operators and miners should take to protect themselves are the same precautions the public must take. These steps including avoiding close physical contact to the extent feasible by putting distance between yourself and other people (about 6 feet), washing hands frequently, and staying home if sick.

Addendum, Tab 4 at 1. However, at this time, these steps are simply recommendations that mine operators can choose to follow voluntarily or ignore as the operator sees fit. Without the force and effect of an ETS, vigilantly enforced by MSHA, MSHA's guidance does not effectively address the unique risks posed by COVID-19 to miners.¹²

When Congress enacted the Mine Act, among its central conclusions was that all standards promulgated by MSHA would be mandatory, not advisory standards.

As this Court has observed, Congress has been very clear on this point:

The Secretary is not empowered to regulate by advisory standards. Congress was absolutely clear on this point: "All health and safety standards contemplated by S. 717 are to be mandatory standards. The bill uses the phrase 'mandatory health or safety standard' because this is a defined term under the Coal Act and this bill. **The use of the term 'mandatory standard' should not be interpreted to mean that there also will be non-mandatory standards.**" (Emphasis supplied.)

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, 95th Cong., 1st Sess. 25 (1977), U.S.

¹² Further, even if those measures outlined above became mandatory, the Unions do not believe they would provide sufficient protections to American miners; miners face special dangers that the public at-large does not face. For example, among other hazards miners must ride elevators and mantrips to get to the mine face and they are in close proximity with each other at dinner holes, bathhouses, and shower facilities. MSHA's COVID-19 website recognizes as much, stating that miners should avoid "crowding personnel carriers, hoists and elevators, or other means of transportation at the mine" but provides no direction or standards to achieve these unenforceable goals. Obviously, these conditions present particular dangers to miners traveling into, working in, and traveling out of mines that are not faced by other workers or the public.

Code Cong. & Admin. News 1977, p. 3425. MSHA's use of informal advisory standards to mitigate the dangers posed by COVID-19 is an improper *ultra vires* act.

More pointedly, given the nature of the COVID-19 pandemic, Congress specifically provided in the plain language of section § 811(b) that MSHA "shall" issue mandatory emergency temporary standards to protect miners against a grave and immediate health danger in the workplace. Had Congress considered the issuance of voluntary guidelines a permissible option for MSHA in such urgent circumstances, Congress surely would have provided that mechanism in the Mine Act. The Mine Act simply does not provide MSHA with the authority to address a grave and immediate health danger through voluntary advisory standards.

In addition, MSHA's refusal to adopt an ETS that would impose mandatory, legally enforceable, COVID-19-specific duties on employers stands in marked contrast to the approach taken by other arms of the federal government in response to COVID-19. Putting aside inevitable debates about the sufficiency and timeliness of these actions, some arms of the federal government have taken legally binding actions designed specifically to address COVID-19.

For example, the President issued a proclamation designating the outbreak of COVID-19 a national emergency, *Proclamation No. 9994*, 85 Fed. Reg. 15,337 (2020), and invoking the Defense Production Act to compel responses by employers

to that national emergency related to production of essential equipment and continued operation of meat processing operations. The Department of Health and Human Services has declared a public health emergency and taken a number of regulatory steps authorized by that declaration.¹³ The FDA has exercised its statutory authority to allow emergency use of certain medicines, personal protective equipment and other medical devices. *See Emergency Use of Authorization Declaration*, 85 Fed. Reg. 17,335 (March 27, 2020). And, Congress has enacted laws including unprecedented levels of aid for businesses and individuals affected by the disease and the emergency response to it. *See, e.g., Families First Coronavirus Response Act*, Pub. Law 116-127, 134 Stat. 178 (2020); *CARES Act*, Pub. Law 116-136, 134 Stat. 281 (2020).

Accordingly, the Unions respectfully request that the Court compel MSHA to perform its statutory duty in responding to the COVID-19 pandemic and direct MSHA to exercise its authority under 30 U.S.C. § 811(d) to issue an ETS that is legally binding on all mine operators to protect miner health and safety. Nothing less will adequately protect all miners to the extent feasible from the grave danger miners face on the job in the mines during this pandemic.

¹³ Office of the Secretary, Department of Health and Human Services, *Determination of Public Health Emergency*, 85 Fed. Reg. 7316 (Feb. 7, 2020) <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

III. THE APPROPRIATE REMEDY FOR MSHA’S UNLAWFUL WITHHOLDING OF AN ETS IS A WRIT OF MANDAMUS COMPELLING MSHA TO ISSUE ONE WITHIN THIRTY (30) DAYS

The COVID-19 pandemic warrants an ETS to require mandatory measures to protect the life and health of miners now and as the economy continues to reopen. Given the urgency of the situation, and the additional considerations outlined below, an order from this Court requiring MSHA to promulgate an ETS within thirty (30) days is necessary and appropriate.

This Court has previously held that the time agencies take to make a decision must be governed by a rule of reason. *Zegeer*, 768 F.2d at 1487 *citing* *TRAC*. What is reasonable depends on factors such as congressional indications regarding the pace at which the agency should proceed, the bearing of the decision on human health and welfare, the effect of expediting delayed action on activities of a higher or competing priority, and complexity of the scientific or technological issues. *Id.* at 1487-88.

Consideration of the above “reasonableness” factors fully supports the Unions’ request for relief from this Court. First, the fact that Congress included a provision for promulgating ETSs indicates that Congress intended MSHA to move quickly to address novel or rapidly arising dangers that could not be addressed appropriately under the slower pace of traditional rulemaking—recognizing that this Court has stated that even regular standards should generally only take “months” to

promulgate and that Congress did not intend for MSHA to “tarry for years over its health and safety rulemaking.” *Id. citing* H.R. Rep. No. 312, 9th Cong., 1st Sess. 17-18 (1977). In addition, human life and health are at stake here, as the constantly-rising death toll from COVID-19 attests. Finally, there are no competing regulatory issues or major barriers that make a 30-day deadline unreasonable. Thus, this Court should issue a writ of mandamus directing MSHA to issue an ETS within 30 days of the Court’s order.

CONCLUSION

For the foregoing reasons, the Unions respectfully request that the Court grant their petition for a writ of mandamus forthwith directing MSHA to issue an ETS under 30 U.S.C. § 811(d) that is legally binding on all mine operators to protect miner health and safety from the grave risks posed by the COVID-19 pandemic within thirty days of the grant.

Respectfully submitted,

/s/ Mark J. Murphy

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CERTIFICATE OF COMPLIANCE

1. This petition 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):

this petition contains [7,664] words.

this petition uses a monospaced type and contains [*state the number of*] lines of text.

2. This petition document complies with the typeface and type style requirements because:

this petition has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; or

this petition has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: June 15, 2020

/s/ Mark J. Murphy
*Counsel for the United Mine
Workers of America,
International Union*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of June, 2020, I caused this 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 the following registered CM/ECF users:

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Counsel for Respondent

I further certify that on this 15th day of June, 2020, I caused the required copies of the Emergency Petition to be served, via email and UPS Next Day Air, upon counsel for the Respondent, at the above address.

/s/ Mark J. Murphy
*Counsel for the United Mine
Workers of America,
International Union*

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United Mine Workers of America

CECIL E. ROBERTS
INTERNATIONAL PRESIDENT



TELEPHONE
(703) 291-2420
FAX (703) 291-2451

UNITED MINE WORKERS' HEADQUARTERS
16354 QUANTICO GATEWAY DRIVE, SUITE 200

Triangle, VA

22172-1779

March 24, 2020

SENT VIA E-MAIL: Zatezalo.david@dol.gov

Mr. David G. Zatezalo, Assistant Secretary
Mine Safety and Health Administration
Room 5C330
201 12th Street South
Arlington, VA 22202-5452

Dear Mr. Zatezalo:

I am writing to inquire about what specific actions the Mine Safety and Health Administration (MSHA) is taking to protect miners from the COVID-19 pandemic. The current COVID-19 outbreak is unlike any health and safety situation we have ever witnessed before. It has brought with it many new, demanding challenges in keeping our miners and their work environment safe. While these are certainly difficult times for all workers, it is especially challenging for workers who are unable to work from home and have valid concerns about their health and safety and that of their loved ones.

There are many resources available that can provide workers the best precautions available at this time to follow to reduce the risk of contracting the virus. MSHA's website points to the Occupational Health and Safety Administration's (OSHA) website for their guidance. However, just like the virus we are all trying to protect ourselves from, mining is unique and nothing like the workplaces governed by OSHA. Our miners work in close proximity to one another from the time they arrive at the mine site. They get dressed, travel down the elevator together, ride in the same man trip, work in confined spaces, breathe the same air, operate the same equipment, and use the same shower facilities.

On top of the many challenges miners face at, and in the workplace, many miners are also older and suffer from various underlying health conditions such as pneumoconiosis, which the UMWA believes will greatly exacerbate the severity of the symptoms related to COVID-19; heart disease - a condition that in itself suppresses the immune response leaving the afflicted more susceptible to harmful pathogens; and compromised immune systems. These miners are considered "high risk" and are often located in rural areas that do not provide the same access to healthcare centers as workers in urban areas. This makes miners one of the most vulnerable populations for the virus.

The UMWA has been able to work with various operators and our Local Unions to create some of our own specific precautionary measures to help protect miners from this extremely contagious virus. Some of these precautionary measures are:

- Additional disinfectant in between shifts for toilets, sinks, showers, boot wash areas, bulletin boards, and lunch areas
- Disinfecting all cap lamps, detectors, radios, and any other equipment used by miners after each shift and before other miners are able to use them
- Providing miners with disinfecting wipes and spray
- Disinfecting all equipment before use
- Providing additional medical gloves (nitrile gloves) for miners to wear in addition to their required work gloves
- Limiting the number of miners traveling down/up the elevator and on mantrips
- Suspend the use of hand scanners

We believe these precautions are a good start and would like to see a homogeneous (uniform) implementation of these common-sense practices. However, these alone are not enough. Mine operators need to ensure that miners have:

- Access to obtain at least N-95 respirators
- Policies and procedures in place for disinfecting equipment between shifts and when changing operators
- Extra PPE available for pulling cables, touching shared equipment, and handling materials that may have been contacted by infected persons
- Bathhouse and gathering place disinfectant strategies

The UMWA believes coal mining can survive this crisis. We also believe American Miners can overcome even the greatest of obstacles in order to continue to provide the raw materials that have allowed the United States of America to become the greatest Nation in the history of mankind.

As you are aware, MSHA has the authority to issue a "safeguard" and/or an "emergency standard" that will mandate Operators to comply and adhere to specific precautionary measures that will provide protections to miners as outlined in this letter. The UMWA strongly recommends that MSHA **immediately** issue said safeguard/emergency standards to protect the most valuable resource in the mine --- the miner. I would also inquire if MSHA has developed additional health and safety recommendations that Operators and miners can implement to better protect themselves from the COVID-19 virus. The UMWA stands ready to work with MSHA, the mining industry, and our members to find ways to protect miners in these unprecedented times. Miners are a resilient people and have overcome many challenges throughout time. This will be yet another situation where we will overcome, protecting our miners, their families, their communities, and allow them to continue to provide these valuable resources when our nation needs them most.

Mr. Josh Roberts, the Administrator of the UMWA's Department of Occupational Health and Safety, is the UMWA's liaison in regard to the COVID-19 virus. When responding to this

letter I ask that you please contact Josh. He can be reached at 703-291-2422. I look forward to your response.

Respectfully,



Cecil E. Roberts

cc: Levi Allen, International Secretary-Treasurer
Bob Scaramozzino, Executive Assistant to the President
Tanya James, Executive Assistant to the Secretary-Treasurer
Josh Roberts, Administrator of Occupational Health and Safety
Ron Bowersox, Director of Health and Safety Field Operations



APR 14 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 March 24, 2020 letter regarding the Mine Safety and Health Administration's (MSHA) actions in response to COVID-19. We share your concern that the COVID-19 pandemic creates a unique and challenging situation for mining communities throughout this country. We also applaud the United Mine Workers of America's (UMWA) efforts in working with mine operators and local unions to provide best practices and precautionary measures for miners.

MSHA supports UMWA's work with mine operators to provide personal protective equipment and to develop procedures and measures for disinfecting work areas, as set forth in your letter. MSHA has posted a "Response to COVID-19" webpage at <https://www.msha.gov/msha-response-covid-19> for guidance on how to slow the spread of the virus, as well as actions that MSHA is taking under these unique circumstances. The Department of Labor's Occupational Safety and Health Administration (OSHA), the Centers for Disease Control and Prevention (CDC), and the National Institute for Occupational Safety and Health (NIOSH) also have useful resources available, including ways to reduce exposure to the virus in the workplace. You can access these resources at: <https://www.osha.gov/SLTC/covid-19/> (OSHA), <https://www.cdc.gov/coronavirus/2019-nCoV/index.html> (CDC), and https://www.cdc.gov/niosh/emres/2019_ncov.html (NIOSH).

At present, the risks miners face from exposure to COVID-19 are quite similar to the risks encountered by other Americans. The steps mine operators and miners should take to protect themselves are the same precautions the general public must take. These steps include avoiding close physical contact to the extent feasible by putting distance between yourself and other people (about 6 feet), washing hands frequently, and staying home if sick.

In addition, a number of existing performance-based standards in Title 30 of the Code of Federal Regulations (CFR) may apply and help prevent the spread of COVID-19 in mining environments. Examples include standards that require mine operators to provide and maintain sanitary facilities, ventilation, and appropriate personal protective equipment (including respiratory protection) and to conduct examinations, including those that identify hazardous conditions such as overcrowded areas and inadequately sanitized surfaces (30 CFR Parts 56-57, 71-72, 75, 77). MSHA's training standards also include protective measures miners and mine operators can take against physical and health hazards, including training on respiratory devices

(30 CFR Parts 46, 48). The Federal Mine Safety and Health Act of 1977 (the Mine Act) also includes provisions that enable miners to file hazard complaints (Sec. 103) and that authorize MSHA to address any safety or health conditions that present an imminent danger, including withdrawal of miners from the affected area or closure of the mine (Sec. 107(a)).

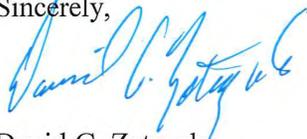
MSHA will continue to perform its statutorily required essential functions within the parameters of the Administration's government-wide guidance. MSHA also continues to work with NIOSH, OSHA, and state and local governments to coordinate any appropriate actions necessary to protect miners and mining communities.

You specifically requested that MSHA issue an Emergency Temporary Standard (ETS) that will require operators to comply with specific precautionary measures (as outlined in your letter). The Mine Act provides that an ETS be issued when MSHA determines that (a) miners are exposed to grave danger from 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 (Sec. 101(b)(1)). For the reasons identified in this letter, however, MSHA believes that at this time there is no additional benefit from an ETS. Rather than issue an ETS, we believe that MSHA can best protect miners and operators from the COVID-19 danger by responding rapidly in a fluid environment through the robust authorities and standards outlined above, consistent with government-wide guidance from the appropriate federal agencies. MSHA continues to monitor COVID-19 and its impact on the mining industry.

You also requested that MSHA issue a safeguard to provide protections to miners. The relevant standard—other safeguards (30 CFR 75.1403)—applies to underground coal mines to minimize hazards with respect to transportation of persons and materials. A safeguard notice, once issued, applies to conditions specific to an individual coal mine. As such, a safeguard standard would be inappropriate to issue as a means of protecting all miners from COVID-19. At this time such a standard would not be useful as MSHA works to protect miners across the country from COVID-19. MSHA will continue to assess the need for such a standard as it relates to an individual coal mine.

We appreciate your commitment to protecting the nation's miners in this challenging time. We are fully committed to working with you and all the stakeholders of the mining community to address this pandemic. Please feel free to contact me if you have any questions or would like to discuss further.

Sincerely,



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

cc: Josh Roberts, Administrator, UMWA Department of Occupational Health and Safety

United Mine Workers of America

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May 20, 2020

SENT VIA E-MAIL: Zatezalo.David@dol.gov

Mr. David G. Zatezalo, Assistant Secretary
Mine Safety and Health Administration
Room 5C330
201 12th Street South
Arlington, VA 22202-5452

Dear Assistant Secretary Zatezalo:

Thank you for your April 14, 2020, response to my letter of March 24, 2020 concerning the Mine Safety and Health Administration's (MSHA's) response to the COVID-19 pandemic. I am gratified that you recognize the grave danger faced by Americans in general, and miners in particular, because of this unprecedented threat to life and health. I agree with you that "the COVID-19 pandemic creates a unique and challenging situation for mining communities throughout the country" and that, as a result, steps must be taken to "protect miners and operators from the COVID-19 danger."

I note from MSHA's COVID-19 website, <https://www.msha.gov/msha-response-covid-19> (which you cite in your April 14, 2020 letter), that the agency has already taken swift, mandatory action to "minimize the spread of Coronavirus/COVID-19" and to protect its employees from the dangers posed by the disease. For example, the website indicates that since the President's national emergency declaration "MSHA has suspended Educational Field and Small Mine Services visits, as well as special safety and fatality initiatives that normally would gather groups of miners on-site to discuss powered haulage, electrocution, and contractor safety." Further, "MSHA is following all protocols for identifying MSHA inspectors or other employees exhibiting symptoms or who have had potential exposure, asking them to quarantine at home, and cleaning the relevant offices following CDC guidelines." Finally, MSHA has offered to limit the number of inspectors at mines when production levels drop. I applaud MSHA for taking these actions to protect inspectors and other MSHA employees from the known dangers of COVID-19. However, the UMWA is very disappointed that, to date, MSHA has failed to act to provide similar mandatory protections to the Nation's miners whose health and safety are a statutory priority under the express provisions of the Federal Mine Safety and Health Act of 1977.

In light of MSHA's recognition of the dangers posed by COVID-19, both to MSHA's own employees and coal miners, I was disappointed that MSHA has refused to issue an Emergency Temporary Standard pursuant to 30 U.S.C. § 811(b). As Governors throughout coal country begin to loosen stay-at-home restrictions and as coal demand and production begins to rise, I ask you to reconsider that decision. The lives of UMWA members, non-union miners, and their families depend upon MSHA taking appropriate action to promulgate emergency standards that will protect them from the hazards of exposure to this deadly pandemic.

Other industries where large numbers of workers are in close proximity, for example the meatpacking industry (<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#hotspots>), have already experienced the deadly, crippling impact of coronavirus outbreaks. In the UMWA's view, it is incumbent upon MSHA to promulgate an appropriate ETS in the face of this deadly and unpredictable disease, before the coal industry suffers the same fate.

In your April 14, 2020 letter, you note that "[a]t present, the risks miners face from exposure to coronavirus are quite similar to the risks encountered by other Americans" and suggest many of the same CDC-approved safety measure that have been urged for all Americans offer sufficient protection for miners. Specifically, you mentioned "social distancing," hand washing, and staying home if sick. MSHA's COVID-19 website offers additional guidance, including wiping down equipment and frequently touched surfaces. The UMWA agrees that these measures can be helpful in mitigating the dangers of COVID-19. However, at this time, these are simply recommendations that operators can choose to follow voluntarily or ignore. Without the force and effect of an Emergency Temporary Standard, vigilantly enforced by MSHA, MSHA's guidance is virtually useless.

Further, even if those measures outlined above became mandatory, the UMWA does not believe they would provide sufficient protections to American miners; miners face special dangers that the public at-large does not face. For example, among other hazards miners must ride elevators and mantrips to get to the mine face and they are in close proximity with each other at dinner holes, bathhouses, and shower facilities. MSHA's COVID-19 website recognizes as much, stating that miners should avoid "crowding personnel carriers, hoists and elevators, or other means of transportation at the mine." Obviously, these are particular dangers posed to miners traveling into, working in, and traveling out of mines that are not faced by other workers or the public.

Please refer again to my March 24, 2020 letter for further mine-specific measures that should be included in an Emergency Temporary Standard. Those measures include providing disinfecting wipes and sprays for cap lamps, detectors, radios and other equipment used by miners; limiting the number of miners in elevators and mantrips; suspension of hand scanners; and access to personal protective equipment (PPE) for pulling cables, touching shared equipment, and handling materials that may have been contacted by infected persons. These, and other measures listed here and in my March 24, 2020 letter, must be mandatory protections offered to all miners.

As the economy begins to return to full production, the danger to miners that MSHA has recognized will increase, rather than decrease. Therefore, the UMWA renews its request for an Emergency Temporary Standard. I, along with UMWA Secretary-Treasurer Levi Allen stand by, with our staff, to provide any assistance that MSHA may require in promulgating an Emergency Temporary Standard. In light of the growing nature of this danger, I ask for your prompt response within seven (7) days of your receipt of this letter.

Respectfully,



Cecil E. Roberts

cc: Levi Allen, International Secretary-Treasurer
International Executive Board
Bob Scaramozzino, Executive Assistant to the President
Josh Roberts, Administrator of Occupational Health and Safety
Ron Bowersox, Director of Health and Safety Field Operations

DECLARATION OF ANDY MARTINEZ

1. My name is Andy Martinez, and I am a member of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the “United Steelworkers”) located at 60 Boulevard of the Allies, Pittsburgh, Pennsylvania, 15222. I reside at 430 Faith Drive, Green River, Wyoming, 82935. I am President of the United Steelworkers Local Union No. 13214 with a mailing address of P.O. Box 1315, Rock Springs, Wyoming 82901. I have served as the President of the United Steelworkers Local Union No. 13214 for three years and have served as the Chief union steward for 4 years and as a union steward for the United Steelworkers for 30 years. I have served as the United Steelworkers’ miner’s representative for 24 years representing miners in the areas of health and safety and participating in the Mine Safety and Health Administration (“MSHA”) inspections on behalf of United Steelworkers members at the mine.
2. I am employed as a miner at the Genesis Alkali, a United Steelworkers represented mine, formerly called FMC, in the metal/nonmetal industry. <https://alkali.genesisenergy.com/our-business/plant-operations/>. I have 31 years of experience working at the surface operations at this mine. Genesis Alkali is located in southwest Wyoming, 26 miles west of the town of Green River, Wyoming and is a trona mine. Trona is a sodium carbonate compound that is processed into soda ash or baking soda. All trona is mined underground and then processed into soda ash or baking soda on the surface of the mine. An underground trona mine is like an underground city with maintenance shops, bathrooms, electricity lines, and streets. <https://www.wyomingmining.org/minerals/trona/>. The mine has 2,500 miles of tunnel systems and spans about nine miles from north to south, and six miles from east to west. Approximately, 200 miners work underground at the Genesis Alkali mine located at 1600 feet below the surface and another 450 miners work at the surface operations of the mine.
3. My duties as a United Steelworkers Local President for Local No. 13214 include negotiating labor agreements, advocating at arbitration proceedings, interfacing with federal and state governmental regulatory agencies such as MSHA and other federal, state local agencies, coordinating Union safety training for our Local Union, and ensuring injured members and their families are cared for after a serious injury or incident at the mine.

4. All miners working at Genesis Alkali both those working on the surface and those working underground are covered by the Federal Mine Safety and Health Act (the “Mine Act”) and are subject to MSHA’s regulations including any Emergency Temporary Standards (“ETSs”) issued by MSHA. My union brothers, sisters and I are directly impacted by MSHA’s decision not to issue an ETS for Infectious Diseases that would reduce the risks to life and health posed by the deadly COVID-19 pandemic while working at the Genesis mine.
5. As I explain below, members of the United Steelworkers Local Union No. 13214 face unique challenges working at the mines as compared to other workers. Our jobs at the Genesis mine require us to work in close proximity to one another in a profession with high incidences of occupational diseases such as silicosis and other pulmonary diseases from dust exposure at our metal/non-metal mine, which have been identified as conditions that may increase the severity of COVID-19 symptoms and related fatalities. At the Genesis mine, some of our miners already have reduced lung capacity from those occupational exposures making them more at risk to the COVID-19’s impacts. Many of our mining workforce is older and is having trouble passing the pulmonary function test indicating an existing reduced lung capacity. For these miners, COVID-19 exposure could be fatal. Under the circumstances, immediate action from MSHA to protect our members from this threat through the issuance of an ETS by MSHA.
6. Members of United Steelworkers Local Union No. 13214 face different and unique coronavirus exposure risks than typically encountered by other Americans because of the hazardous working conditions associated with mining. Voluntary actions, which are not mandatory legally-enforceable standards and do not establish COVID-19-specific duties on operators to protect miners from this grave danger, do not adequately address COVID-19 risks at the Genesis mine and other mines throughout the United States.
7. I recently participated in MSHA’s inspection of the surface area of the Genesis mine while another miner’s representative traveled underground with MSHA during the week of June 3-10, 2020 exercising our rights to walkaround the mine as miner’s representatives on behalf of the members

of United Steelworkers Local Union No. 13214. On an earlier MSHA inspection last month, the MSHA inspector from MSHA's Green River office, was not wearing a mask to protect miners from COVID-19 exposure at the mine during the inspection highlighting the difficulty in protecting our members and the uneven application of the voluntary CDC recommendations even by MSHA. This time when the MSHA inspectors arrived, we requested that the inspectors wear masks to protect our members. When traveling with the inspector this time, I asked the MSHA inspector about whether he was going to inspect the mine to ensure that adequate COVID-19 protections were in place. The MSHA inspector told me that he was not trained or authorized to conduct an inspection on COVID-19 issues. He also told me that there were not any MSHA regulations in place that dealt with COVID-19 issues so he had no enforcement authority for COVID-19 issues as an MSHA inspector. Under the circumstances, if I or one of my members were to contact MSHA to file a section 103(g) hazard complaint relating to COVID-19, the MSHA inspector could not address our COVID-19 health and safety concerns. The MSHA inspector's comments are consistent with my personal experience as a miner's representative; the first thing a MSHA inspector asks during a 103(g) hazard complaint inspection is what MSHA standard do you believe is being violated. Since no MSHA standards are in place for COVID-19 hazards, miners will not be able to identify a mandatory standard for MSHA to enforce and the MSHA Inspector will not be able to address any COVID-19 related hazards at the mine.

8. Moreover, many of the voluntary Centers for Disease Control ("CDC") protocols such as social distancing are difficult to institute at metal/non-metal mine surface and underground operations. For example, on the surface, many miners at the Genesis mine work on maintenance and electrical crews fixing equipment. These jobs typically require 2 persons to work next to each other standing or leaning over the same piece of equipment in close proximity. In such circumstances, our main protection is our mask. But, the wearing of the mask is not a mandatory enforceable MSHA requirement so total compliance with this important approach to limiting COVID-19 exposure is not mandated at the Genesis mine or other mines throughout the United States and is not enforceable by an MSHA inspector.
9. Based on my personal experience as a miner's representative, the problem with voluntary efforts is that they do not require the mine operator to take

any specific steps to protect miners creating a patchwork of efforts depending on the mine and the management's prerogative.

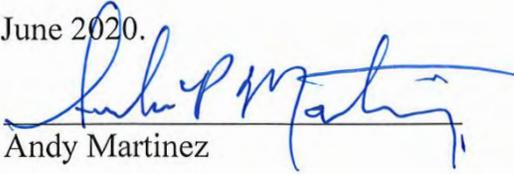
10. For example, I am aware of another trona mine in Green River, Wyoming, called Ciner Wyoming, LLC, which has very different COVID-19 protocols in place than the Genesis Alkali mine. At the Ciner mine, miners still use a crowded bus to travel the 25 miles to and from the mine site from town. Whereas, at the Genesis mine, the bus service has been shut down and a driving stipend instituted to reduce exposure and prevent the spread of COVID-19 in our communities from long travel in a bus by miners without social distancing. Exposure risks posed by Ciner's bus service without social distancing or mask protocols increase COVID-19 exposure risks for everyone in Green River including Local 13214 members and their families as we all live in the same community. I, therefore, believe that uniform mandatory MSHA standards are necessary to limit potential COVID-19 exposure to miners while traveling to and from the work site.
11. Surface mining operations also pose unique COVID-19 exposure risks for miners. For example, miners at the Genesis mine serve as control room operators, control room helpers or are regularly handing off equipment for maintenance and electrical work that require them to work in or regularly enter the mine control room. Moreover, during an outage, the control room may be filled with between 5-15 miners in close proximity. The Genesis mine has posted signs reinforcing the importance of social distancing to address the exposure risks posed by miners congregating in the control room. Leaving aside the relative benefits of this approach, posting of such signage is voluntary and inconsistently applied throughout the mining industry leaving miners throughout the United States at risk.
12. Like many mining facilities, we also have crowded changing rooms, shower facilities, lobbies, walkways and break rooms in the surface operations that are also used by the underground miners at the Genesis mine. Again, certain protocols have been instituted at the Genesis mine to stagger production and shifts in an attempt to lessen the number of miners in these areas, but, such strategies do not completely allow us to distance ourselves from other miners and are difficult to enforce absent clear, enforceable standards. Nor are such protocols being implemented uniformly throughout the United States.

13. In underground operations at the Genesis mine, the miners travel 1,600 feet to the underground areas of the mine in a 50-60 person cage. Until March of this year, miners traveled in this cage face-to-face closely packed in with each other. In response to the pandemic, the mine operator started to stagger miners in the cage with 9 miners per trip; however, this is another voluntary, unenforceable strategy that is not being instituted uniformly at mines throughout the United States.
14. After the miners exit the cage at the Genesis mine underground, they get into mantrips, which are shuttles that transport miners to various sections of the mine. The mantrip is like a jeep that is full of people and the trip can take between 5 to 25 minutes to travel to the particular working area of the mine. There are no social distancing protocols for riding in the mantrip – just a requirement to wear a mask. Absent a mandatory standard for social distancing, such as limiting the number of miners who travel in a mantrip at one time, established and enforced by MSHA, mine operators do not have to institute any specific protocol leaving our members at risk.
15. Also, in the underground areas, the miners take breaks and meals in small niches. The mine has not established any social distancing guidelines for these breaks in the niches, such as limiting the number of miners who congregate in the niche at one time. I have seen 6-10 miners congregating in close proximity without masks during breaks and meals in those areas. The absence of mandatory MSHA standards for social distancing between miners in close mining quarters complicates compliance efforts by the mine operator and inhibits MSHA from taking any enforcement action against the mine operator for allowing these larger gatherings that increase COVID-19 exposure for miners.
16. At the Genesis mine, at least 2 known cases of COVID-19 have been identified and there have been other a number of instances where miners have been ill and exhibited signs of the coronavirus but were not formally diagnosed with COVID-19 due to limited testing availability. The Genesis mine, like many mines in the United States, is located in a rural community with limited hospital equipment and beds. For example, I understand that there are only 7 ventilators in the Rock Springs, Wyoming hospital that services our community. Thus, miners face increased risks from the COVID-19 pandemic compared to other occupations since our local communities and hospitals are likely to be overwhelmed by COVID-19 cases if there is an outbreak at the Genesis or Ciner mines.

17. The lack of mandatory testing protocols or return to work protocols associated with COVID-19 under MSHA also presents exposure risks to miners. Currently, the Genesis mine has established protocols requiring a miner to have 2 negative tests before he can return to work after contracting COVID-19. However, absent a mandatory standard established by MSHA, mine operators do not have to institute any specific testing or return to work protocols throughout the United States. In addition, there are no MSHA standards for protocols establishing who within a mine must be tested if a co-worker tests positive for COVID-19 that leave miners at risk of infection.
18. In conclusion, the failure of MSHA to issue Emergency Temporary Standards (“ETS”) to protect miners from the deadly COVID-19 pandemic poses a real and immediate threat to United Steelworker members who work at the Genesis mine and other metal/non-metal mines throughout the United States, their families and their communities. These threats are unique to the miners and exceed the risks encountered by other Americans in the workplace. Such hazardous conditions include working in dusty and dirty conditions that exacerbate the risks of COVID-19. Miners also are required to travel long distances in crowded transportation and work in close proximity to other miners throughout the day, which increase the risk of COVID-19 exposure and outbreak in rural communities with limited hospital equipment and services. The establishment of clear, mandatory and enforceable MSHA standards to mitigate COVID-19 health risks to miners would allow our members to contact MSHA if standards are not being followed and ensure that the mine operator implement mandatory standards that protect our members’ health and safety.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10 day of June 2020.


Andy Martinez

No. _____

**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.

Mine Safety and Health Administration, United States Department of Labor

Respondent.

**EMERGENCY PETITION FOR A WRIT OF MANDAMUS, AND
REQUEST FOR EXPEDITED BRIEFING AND DISPOSITION**

DECLARATION OF JOSH ROBERTS

I, Josh Roberts, declare under penalty of perjury pursuant to 28 U.S.C. § 1746, as follows:

1. I submit this Declaration in support of the UMWA's Emergency Petition for a Writ of Mandamus in the above-styled case.

2. Since 2016, I have served as the UMWA Administrator of Occupational Health and Safety for the United Mine Workers of America, International Union ("UMWA"), which is the exclusive collective bargaining representative for

thousands of coal miners employed by coal operators throughout the United States. (collectively, “UMWA-represented employees”)

3. From 2014 to 2016, I worked as a UMWA International Safety Representative in West Virginia.

4. From 2004 to 2014 I was an underground coal miner employed at various coal mines in West Virginia.

5. As UMWA Administrator of Occupational Health and Safety, I work with UMWA representatives and rank and file coal miners to ensure that the laws that protect the health and safety of coal miners are enforced, including both state and Federal laws. I also work closely with mine safety committees, which are comprised of rank and file coal miners, to address any safety or health concerns that may arise at a particular mine. Mine safety committees are created by virtue of the collective bargaining agreements the UMWA has negotiated with various coal operators. The rank and file members of these committees are qualified to serve on them due to their experience and training. Under the collective bargaining agreement, mine committees are required to report unsafe conditions to the employer. Sometimes, these conditions are also reported to me or other members of my department. Since the advent of the COVID-19 pandemic, several mine safety committee representatives have contacted me to express concerns to me about the lack of any COVID-19 mitigation at their particular mines.

6. As UMWA Administrator of Occupational Health and Safety, I also provide MSHA with the Union's perspective on various safety and health issues and provide recommendations to MSHA with respect to improving the effectiveness of existing mine safety standards and regulations. I also provide commentary and/or recommendations when the Agency seeks to promulgate or revise mine safety standards and/or regulations.

7. The COVID-19 pandemic exposes coal miners to dangers that are unique to their occupation. From the moment coal miners report to work until they leave the mine site in their personal vehicles, they are exposed to various environments where groups of employees must gather and where social distancing is difficult to practice. Coal miners are exposed to many COVID-19 related hazards. Those hazards include the fact that miners must ride in close proximity to each other on elevators and man trips to get to the mine face (working section). Elevator trips can last up to several minutes travelling depths up to a thousand feet or more. Elevators can hold up to thirty people who must ride in the elevator shoulder to shoulder without any personal protective equipment. Once a miner leaves the elevator he must typically ride a "man-trip" to travel to the coal face. Man trips hold up to fifteen miners who ride in cars shoulder to shoulder with each from thirty minutes up to an hour or more. These trip times increase as coal is mined and the working face advances. At the end of the shift the process is repeated in reverse.

Miners are also in close proximity with one another at dinner holes, bathhouses, shower facilities, and throughout their workday on jobs that require the help of another person such as lifting heavy loads. These are dangers posed to miners traveling into, working in, and traveling out of mines that are not faced by other workers or the public.

8. UMWA-represented miners are older than the median working population, based upon my review of the Bureau of Labor Statistics' 2019 Labor Force Statistics from the Current Population Survey. In addition, coal miners in the United States are facing a historic resurgence in coal workers' pneumoconiosis, also known as Black Lung disease. These conditions make miners particularly susceptible to the risks associated with COVID-19.

9. I believe that the above-described risks can be substantially mitigated by MSHA by the issuance of appropriate Emergency Temporary Standards to address the current COVID-19 pandemic as outlined by UMWA President Roberts in his March 24, 2020 and May 20, 2020 letters to Mr. David G. Zatezalo, Assistant Secretary of the Mine Safety and Health Administration.

10. As it now stands, coal operators are not required to supply personal protective equipment to coal miners and they are not required to implement any sanitation, social distancing, or other mitigation measures in response to the COVID-

19 pandemic. The sum total of MSHA's actions in response to the COVID -19 pandemic with respect to miners is currently set forth on its website as follows:

1) Avoid close contact: Put distance between yourself and other people (about 6 feet). This includes not crowding personnel carriers, hoists and elevators, or other means of transportation at the mine.

2) Clean and disinfect: Wipe down equipment and other frequently touched surfaces.

3) Wash hands: If soap and water are not readily available, use a hand sanitizer that contains at least 60% alcohol. Cover all surfaces of your hands and rub them together until they feel dry. Avoid touching your face, nose, eyes, etc.

4) Stay at home if you are sick.

These precautions are wholly inadequate to address the safety and health hazards that miners face due to this pandemic. The prescribed precautions are nothing more than suggestions that are non-mandatory and legally unenforceable. These precautions do not account for the specific hazards faced by coal miners as described above that could be mitigated if MSHA exercised its statutory authority to issue appropriate Emergency Temporary Standards pursuant to Section 101(b) of the Mine Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of June 2020.



Josh Roberts

DECLARATION OF MICHAEL J. WRIGHT

Background and Experience

1. My name is Michael J. Wright. I am a member of and serve as the Director of the Health, Safety & Environment (“HSE”) Department of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW” or “the United Steelworkers”) located at 60 Boulevard of the Allies, Pittsburgh, Pennsylvania, 15222. I have held this position since 1984.
2. The United Steelworkers is the largest manufacturing and extraction union in North America, representing approximately 850,000 workers employed in metals, mining, rubber, paper and forestry, energy, chemicals, transportation, health care, security, education, hotels, and municipal governments. Significantly, the United Steelworkers represents 13,000 miners working at approximately 130 metal/non-metal mines in thirty-one states that are subject to the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* (the “Mine Act”) and the Mine Act’s mandatory health and safety regulations. The United Steelworkers’ members work at federal Mine Safety and Health Administration (“MSHA”) regulated mines mining and processing a wide variety of minerals including iron ore, trona, copper, salt, nickel, silver, limestone, granite and sand in underground, surface, and processing facilities. The USW also represents more than 700 miners at approximately thirty cement plants and two alumina refineries regulated by MSHA.

USW Health, Safety and Environment Departmental Goals and Responsibilities

3. The USW HSE Department is responsible for providing technical and administrative support to our local unions and their members on matters pertaining to health and safety and the impact of the Mine Act at their workplaces.
4. We negotiate through the collective bargaining process for active labor management health and safety committees at the local union level. These local committees seek to work cooperatively with management to remedy their health and safety problems at the mines. When necessary,

the local may request a USW HSE representative from the International headquarters for assistance with health and safety issues at the mines. We also have rights given to worker representatives under the Mine Act as representatives of miners. A miners' representative is any person, group or organization designated by two or more miners to represent their interest during the health and safety enforcement processes at their mine.

5. The USW HSE Department is devoted to assisting and training more than 10,000 elected and appointed members of local unions, staff representatives, and District HSE Coordinators across all the union's industries on HS&E matters. The International Headquarters in Pittsburgh and the Canadian National Office in Toronto, have health, safety and environmental specialists on staff who support and assist local union officers and members by:

- Conducting education and training programs for the locals' officers and staff representatives.
- Developing educational materials and conducting training on health, safety and environmental regulations to assist our members in making their workplaces and communities safer.
- Offering direct assistance to local unions with health and safety or environmental issues, questions and problems.
- Advocating for more protective government standards and regulations.
- Assisting in the negotiation of strong health, safety and environmental language in Steelworkers collective bargaining agreements.
- Coordinating the union's health, safety and environmental efforts with the AFL-CIO-CLC, other unions, and worldwide labor bodies.
- Working in coalition with common allies in the struggle for social and environmental justice.

USW's Efforts to Advance Safe Working Conditions at Mines in Light of COVID-19

6. During the COVID-19 pandemic, the USW has assisted local unions, members and their families in mining and other industries by publishing factsheets and producing videos on all aspects of infection control as it

pertains to essential workers not subject to stay-at-home orders as well as those returning to their jobs as restrictions begin to ease. In addition, the HSE department has fielded numerous requests for assistance and advice from local unions and members including miners on COVID-19 matters, and attempted to persuade employers to implement the protective measures recommended by the Centers for Disease Control and Prevention (CDC), and the National Institute for Occupational Safety and Health (NIOSH). (Note: We would like to add MSHA recommendations to this list, but the MSHA webpage only references a few CDC recommendations. Most of the webpage is devoted to an explanation of how MSHA is easing the enforcement burden on mine operators during the pandemic.)

7. These efforts have met with varying amounts of success in the mining industry. Some mine operators are diligently following, and in some cases going beyond CDC and NIOSH guidance. Others are not. The problem is that the guidance is entirely voluntary, and some mine operators have not volunteered to implement it. These operators are putting their employees and our members at risk. In addition, they are putting those miners' families and their communities at risk. With other occupational hazards, the tragedy and economic consequences of an injury or illness affects families and communities, but the actual injury or illness does not. A fall may injure a miner, but it does not make his or her family susceptible to falls. A miner may develop cancer from diesel emissions, but that cancer will not spread to others. However, as we have seen in meatpacking plants, COVID-19 acquired in the workplace can and often does spread well beyond the workplace.

8. In the absence of effective infection control measures, miners are in grave danger from COVID-19. The mine environment often features miners working in close proximity to each other, in narrow passages where airborne contaminants can build up. For example, underground miners usually descend to the workings in a "cage," where they are squeezed into a small elevator car, with their bodies compressed together and their faces inches from each other. In addition, miners are subject to the kind of co-morbidities that make COVID-19 much more dangerous. Diesel fumes and silica can both cause respiratory disease. Both are

ubiquitous in metal/non-metal mines. It should be noted that while OSHA has adopted a new silica standard, including a lower permissible exposure limit and provisions for medical surveillance, MSHA has not, thus subjecting miners to a greater risk of severe COVID-19 should they be exposed to the virus.

9. The primary protections for miners represented by the United Steelworkers are the Mine Act and the comprehensive mine safety and health regulations issued under its authority. Those regulations address almost every aspect of mine safety and health, but they do not address COVID-19 or other infectious respiratory diseases.
10. The United Steelworkers strongly support the United Mine Workers of America's (UMWA's) March 24, 2020, petition to MSHA requesting MSHA to issue an Emergency Temporary Standard (ETS) under section 101(b) of the Mine Act. The UMWA premised its petition on the unique challenges faced by miners, including their close proximity to one another while at working underground in mines and the threat of occupational diseases like pneumoconiosis which "the UMWA believes will greatly exacerbate the severity of the symptoms related to COVID-19...." The UMWA demanded that MSHA take immediate action to protect miners from this grave threat. *See Addendum Tab 3.* As noted above, miners represented by the United Steelworkers face similar challenges and similar grave risks.
11. The United Steelworkers disagree with MSHA's April 14, 2020, response letter to the UMWA in which MSHA declined to issue an ETS, instead claiming that "the risks miners face from exposure to coronavirus are quite similar to the risks encountered by other Americans," and merely recommending a variety of voluntary actions that miners – or more properly mine operators – could take to mitigate the risk of COVID-19. *See Addendum Tab 4.*
12. MSHA is wrong to assert that miners face risks similar to the risks faced by other Americans. Most Americans do not work in cramped underground quarters. Most are not exposed to high levels of silica and diesel emissions. Most Americans can choose to follow CDC guidelines on sanitation, social distancing, and the quarantine of symptomatic

individuals. Miners have no such freedom; those choices are made by the mine operator.

13. The United Steelworkers also support the UMWA's May 20, 2020, petition to MSHA, in which the UMWA repeated its request for requesting an ETS regarding the COVID-19 pandemic. *See* Addendum Tab 5 at 2. The UMWA forcefully argued that in the face of an expanding pandemic, the evolving voluntary guidance to the employer community is no substitute for the immediate imposition of mandatory, legally-enforceable, COVID-19-specific duties on operators to protect miners from this grave danger.
14. Only a new MSHA ETS will even minimally protect miners currently at risk from COVID-19. Mine operators control shift schedules, methods of production, and the working environment. Mine operators can freely ignore CDC and NIOSH guidelines. Unions can challenge unsafe working conditions through the grievance procedure, but such cases take many months to resolve, during which a large percentage of miners could become infected. In addition, arbitrators typically defer safety complaints to MSHA. Finally, most miners are not represented by unions, and have no access to labor arbitration.
15. At present, MSHA has no effective tools for addressing the risk of COVID-19. MSHA does not have standard for infectious disease. It has no standard requiring respiratory protection against airborne pathogens. It has no standard requiring infection control. Most important, the Mine Act contains no "general duty clause" equivalent to that of the Occupational Safety and Health Act (29 USC 654(a)(1)), requiring employers to maintain a workplace "... free from recognized hazards..." MSHA can only issue a citation and an order where it can refer to a specific standard, explicitly dealing with a defined hazard. In the absence of such a standard, MSHA is powerless to protect miners whose employers flaunt CDC and NIOSH guidelines, no matter how egregiously.
16. The normal rulemaking process is far too slow for a pandemic crisis like COVID-19. Such standards can take years to promulgate. For example, MSHA proposed a Respirable Coal Mine Dust Rule in 2010, after more than a year of preliminary work. The final rule was issued in

2014. MSHA issued an Advance Notice of Proposed Rulemaking on Diesel Particulates in 1992. The final standards were issued in 2001, and the rule in metal/non-metal mines did not become fully effective until 2006. Miners need protection now. Only an ETS Standard can accomplish that.

17. For the reasons set forth above, I assert that MSHA's refusal to issue an ETS to adopt mandatory, legally enforceable, COVID-19 specific rules to protect miners is a stunning act of agency nonfeasance in the midst of a workplace health emergency of a magnitude not seen in this country for over a century. USW members, their families and communities, therefore, are harmed and will continue to suffer harm as a result of MSHA's refusal to implement an ETS that cannot be addressed by voluntary guidelines. In my opinion, that is why the court should require MSHA to issue an ETS to prevent and reduce our harm, and ensure that our members, their families and their communities are protected from COVID-19.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of June, 2020.

A handwritten signature in black ink that reads "Michael J. Wright". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Michael J. Wright