No. 20-1158

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

In re: American Federation of Labor and Congress of Industrial Organizations

Petitioner

Occupational Safety and Health Administration, United States Department of Labor

Respondent.

PETITION FOR REHEARING *EN BANC* ON BEHALF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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RULE 35(b) STATEMENT

More than 116,000 people in the United States have died from COVID-19 since late February and more than 2,100,000 in all have been infected by the novel coronavirus based on the CDC's count of confirmed cases as of June 17th. A large proportion of those people have been exposed to the virus at work—in hospitals, prisons, meatpacking plants, transit facilities, grocery stores, and numerous other workplaces. Since the AFL-CIO's petition for a writ of mandamus was filed on May 18, 2020, the number of confirmed cases of COVID-19 has increased by 50%. *See* Petition 13; 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.

Section 6(c)(1) of the Occupational Safety & Health Act of 1970 ("the OSH Act"), 29 U.S.C. § 655(c)(1), directs that the Occupational Safety and Health Administration (OSHA) "shall provide, without regard to the [notice-and-comments] requirements of [the APA], for an emergency temporary standard ['ETS'] to take immediate effect" imposing specific, mandatory obligations on covered employers

> if [OSHA] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

In denying the AFL-CIO's administrative petition for issuance of an ETS imposing specific, mandatory obligations on employers to protect employees from the "new" workplace hazard of the novel coronavirus, OSHA did *not* dispute the AFL-CIO's claim that workplace exposure to the virus poses a "grave danger" to workers within the meaning of 29 U.S.C. § 655(c)(1)(A). Nor could OSHA reasonably have done so given what the special panel in this emergency matter aptly characterized as "the unprecedented nature of the COVID-19 pandemic," *see* Addendum Tab 1, and the number of worker deaths COVID-19 already has caused. Instead, OSHA determined that an ETS was not "necessary," within the meaning of 29 U.S.C. § 655(c)(1)(B), to protect workers from this "grave danger."

Whether OSHA acted lawfully in refusing to issue an ETS on this basis is undeniably a question "of exceptional importance," Fed. R. App. P. 35(b)(1)(B), inasmuch as that refusal is likely to cost many workers their lives in the immediate future. The risk to workers' lives is heightened now that the economy is reopening and millions of workers are returning to workplaces where many of them are certain to be exposed to the undisputed "grave danger" posed by the coronavirus due to inadequate safety and health practices.

The AFL-CIO contends that where, as here, it is undisputed that workers face a "grave danger" from a new workplace hazard—especially a new workplace hazard like COVID-19 that can cause illness and death within weeks, not years—

an ETS is "necessary to protect employees from such danger" when two conditions are met: (1) existing mandatory health and safety standards do not adequately address the grave danger posed by the new hazard; and (2) OSHA cannot promulgate a new permanent mandatory standard to address the new hazard swiftly enough to mitigate the grave danger workers face. Both conditions are met here.

In a brief *per curiam* Order disposing of this question of exceptional importance without the benefit of oral argument, the panel held that OSHA's determination "that an ETS is not necessary" was "reasonabl[e]" in light of the unprecedented nature of the COVID-19 pandemic and two "regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments." In the latter regard, the panel pointed specifically, but without any discussion, to 29 U.S.C. § 654(a)—the OSH Act provision imposing on employers a general duty to provide employees a safe workplace, *see* § 654(a)(1), and a specific duty to comply with existing mandatory safety and health standards promulgated by OSHA, *see* § 654(a)(2).

As we develop below, the panel's holding misstates OSHA's express rationale as to why an ETS "is not necessary." In deciding that an ETS was not necessary, OSHA relied primarily on its issuance of non-binding guidance, while also citing actions by other governmental entities and private industry as well as existing mandatory standards and the general duty clause. And, OSHA explicitly

based its conclusion on the "*combination*" of those various actions—three of which were not even mentioned by the panel. OSHA did *not* find that its existing mandatory standards along with the general duty clause were alone sufficient to support its conclusion that an ETS "is not necessary," and thus tacitly admitted otherwise. Having misstated the express rationale for OSHA's refusal to issue an ETS, the panel wholly failed to address the AFL-CIO's argument that OSHA's actual rationale is flatly inconsistent with the OSH Act. Given the exceptional importance of the question of whether OSHA's refusal to issue an ETS was lawful and the mortal danger faced by workers now being required to return to work as the economy reopens, *en banc* review is warranted to address the AFL-CIO's heretofore unaddressed argument that OSHA's refusal was plainly unlawful and puts countless workers' lives in immediate jeopardy.

REASONS FOR GRANTING REHEARING *EN BANC*

On March 6, 2020, the AFL-CIO and other unions petitioned OSHA to issue an ETS addressing infectious diseases generally and the "new hazard[]," 29 U.S.C. § 655(c)(1)(A), of COVID-19 in particular. Although the Secretary of Labor stated in a letter to the President of the AFL-CIO that OSHA had no intention of issuing such an ETS, OSHA took no formal action on the AFL-CIO's administrative petition for over two months, prompting the AFL-CIO to file an emergency petition for a writ of mandamus in this Court on May 18, 2020, seeking

to compel OSHA to issue an ETS. On that same day, this Court issued an Order requiring OSHA to respond to the mandamus petition by May 29 and the AFL-CIO to reply by June 2.

Less than two hours before filing its response, OSHA delivered via email to the President of the AFL-CIO a 10-page letter formally denying the AFL-CIO's administrative petition and setting out its rationale for doing so. OSHA also appended a copy of this denial letter to its May 29 response as Addendum Tab 2.

In its denial letter, OSHA did *not* dispute the AFL-CIO's claim that the unprecedented COVID-19 pandemic poses a "grave danger" to workers within the meaning of 29 U.S.C. § 655(c)(1)(A). That is unsurprising, given the fact, as shown in the AFL-CIO's mandamus petition, that the pandemic has already caused more illness and death among workers in a shorter period of time than any other workplace health crisis since the OSH Act's adoption in 1970. *See* Petition 2-3, 12-17; *see also* Reply to OSHA's Response ("Reply") 1 & n.1. The toll from COVID-19 has increased since the AFL-CIO's mandamus petition was filed and experts predict it will accelerate in the coming months.

Effectively conceding the "grave danger," OSHA rested its refusal to issue an ETS on a "determin[ation]" that "it is not necessary to issue an ETS to specifically protect workers from COVID-19." *See* Denial Ltr. 1. And, OSHA based this determination on the assertion that both OSHA itself and "other entities"

were using "many different tools" to protect workers from COVID-19 that, "*in combination*," were adequate alternatives to an ETS. *Id.* 1-2 ("OSHA has concluded that its provision of guidance and enforcement of employers' existing legal obligations under the [OSH Act], in combination with COVID-19-related requirements and guidelines by other entities renders an ETS unnecessary.") (emphasis added); *see also* OSHA Response 34 ("OSHA has concluded, tailored guidance and enforcement of the general duty clause and existing standards, plus robust legal protections for complaints, is the best approach for protecting workers at this time. . . . Here, OSHA is employing many different tools to combat the coronavirus—as are other government entities and private industry—and AFL-CIO has failed to show that an ETS is necessary despite these alternatives.").

OSHA proceeded in its denial letter to enumerate the "many different tools" being used or purportedly being used by OSHA itself as well as other entities to protect workers from COVID-19, thus rendering the tool of an ETS unnecessary in the agency's view. Only two of the "many different tools," which OSHA concluded *in combination* negated the necessity of an ETS, were even adverted to, without discussion, in the panel's Order. Those two tools were OSHA's *claimed* "enforcement of": (1) the duty of employers under 29 U.S.C. § 654(a)(2) to comply with three existing mandatory OSHA standards not specifically addressed to the undisputed "grave danger" posed by the "new hazard[]" of COVID-19; and

(2) the general duty of employers under 29 U.S.C. § 654(a)(1) "to furnish their employees with a workplace that is 'free from recognized hazards that are causing or are likely to cause death or serious physical harm.'" Denial Ltr. 1, 5-6.[1]

But OSHA did *not* find that those two tools were adequate, singly or in combination, to protect workers against the undisputed "grave danger" posed by COVID-19. Rather, in its denial letter, OSHA tacitly admitted otherwise by resting its conclusion that an ETS was unnecessary on the *combination* of those two tools with three *additional* tools being used by OSHA and other entities: (1) OSHA's issuance of "extensive" "*non*-mandatory" guidance materials of various types "advis[ing]" employers of the measures they "can" or "should"—*but are not legally required to*—take to protect employees from COVID-19, *id.* 3 (emphasis added), 4, 6-7; (2) "a vast range of federal, state, and local authorities[']" issuance of "an array of guidelines and directives to protect workers from coronavirus," *id.* 7; and (3) voluntary "[p]rivate industry . . . efforts to protect workers" by "leverag[ing] their expertise to offer industry-specific guidance," *id.* 8.

[1] We emphasize the word *claimed* here because, as of the June 2 date of the AFL-CIO's reply to OSHA's response and, indeed, to date, OSHA had not issued a single citation alleging employer non-compliance with either subsection of 29 U.S.C. § 654(a) in relation to the protection of workers from COVID-19. *See* Reply 10-11. In fact, OSHA has issued only one COVID-19-related citation and that citation was for a record-keeping violation. *Id.*

OSHA relied on its issuance of extensive non-mandatory guidance to employers as the primary rationale for its conclusion that an ETS was not "necessary." *See id.* 1, 4, 6-7 ("Over the past few months, OSHA has developed . . . a broad arsenal of guidance documents, alerts, enforcement memoranda, news releases, posters, and videos addressing COVID-19-related health and safety issues."). And, OSHA sought to defend that use of extensive non-mandatory guidance on the ground that using this tool afforded the agency greater "flexibility," *id.* 5, in combating the coronavirus than an ETS would. *See also id.* 8 ("OSHA's ability to quickly amend and supplement its guidance to employers and workers is paramount."); OSHA Response 28 ("guidance . . . can be swiftly updated and tailored to industry-specific needs").[2]

The AFL-CIO's Reply demonstrated that the OSH Act's language, structure, purposes, and history make clear that OSHA's express rationale for its finding of a

[2] In point of fact, the issuance of an ETS imposing specific, mandatory duties on employers to protect workers from COVID-19 would afford OSHA the same "flexibility" as the issuance of non-mandatory guidance, inasmuch as an ETS can be issued *and modified* without notice and comment. *See* Reply 13-14. Accordingly, to the extent that the panel's vague reference to "the unprecedented nature of the COVID-19 pandemic" can be taken as an endorsement of OSHA's position that the use of non-mandatory guidance gives OSHA the "flexibility" it needs to respond to an "unprecedented" emergency, that endorsement is wholly unjustified. OSHA's position on this point is simply wrong—in reality, what OSHA's use of non-mandatory guidance does is afford *employers* the "flexibility" to ignore the guidance and continue to put their employees in grave danger.

lack of "necessity" is wrong *as a matter of law* for two interconnected reasons, neither of which were addressed in the panel's Order.

First, Congress intended for OSHA to find that an ETS is "necessary" and to use that specific, statutory tool in order to achieve the OSH Act's central purpose of protecting workers to the greatest extent "possible," 29 U.S.C. § 651(b), where, as here, it is undeniably true (and tacitly admitted by OSHA in its express reliance on other tools to support its conclusion) that: (1) enforcing existing *mandatory* OSHA standards binding on employers under 29 U.S.C. § 654(a)(2) is, standing alone, inadequate to protect workers against a "grave danger" from a new hazard that those existing mandatory standards were not designed specifically to address;[3] and (2) the "grave danger" to workers is so immediate that time precludes OSHA from promulgating *a new permanent mandatory* standard specifically addressing

[3] The only specific standards cited by OSHA in its denial letter were its respirator, personal protective equipment (PPE), and sanitation standards. Denial Ltr. 5-6. OSHA did not conclude that those three standards were sufficient standing alone, and we demonstrated why such a conclusion would be unsupportable in both our Petition at 19-20 and in our Reply at 6. Most obviously, those existing standards do not require essential measures for protecting workers from COVID-19 such as social distancing and removal of infected employees from the workplace, and they do not even require employers to take the rudimentary but equally essential step of preparing a written plan for protecting their workers against the specific risks posed by the coronavirus in their own workplaces. *See id.*

that "grave danger" through the statutorily required, 29 U.S.C. § 655(b), notice-and-comment rulemaking process. *See* Reply 4-7.[4]

Second, Congress did not intend to allow OSHA to refuse to issue an ETS in the urgent circumstances existing here and rely instead on a smorgasbord of tools that have a fundamentally different character than does a specific, mandatory standard binding on employers under 29 U.S.C. § 654(a)(2), including the four specific alternative measures relied on by OSHA for this purpose in its denial letter. *See* Reply 7-12.

In this latter regard, OSHA's primary reliance on the tool of providing non-mandatory guidance to employers—an express and central part of the agency's own rationale not mentioned, much less addressed, in the panel's Order[5]—is especially problematic given clear congressional intent as embodied in the OSH Act's language, structure, purposes, and history. As Congress explicitly recognized in enacting the OSH Act, it is inevitable that in the absence of a

[4] OSHA did not state in its determination or argue to this Court that it plans to issue a new permanent mandatory standard addressing the coronavirus in the near future or, indeed, at any time.

[5] "It is not the role of the courts to speculate on reasons that might have supported an agency's decision." *Encino Motorcars, LLC v. Navarro*, 579 U.S. __, 136 S. Ct. 2117, 2127 (2016). For that reason, a court "'may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

mandatory requirement to do otherwise, at least some bad actors and economically pressed businesses will skimp on "invest[ing] in worker health and safety" to "obtain a competitive advantage." *Am. Textile Mfrs. v. Donovan*, 452 U.S. 490, 521 n.38 (1981) (internal quotation marks and citation omitted). Taking cognizance of this reality, Congress charged OSHA with imposing "*mandatory* safety and health standards" on employers—either on a permanent basis through notice-and-comment rulemaking or on an emergency temporary basis without notice-and-comment rulemaking, depending on the gravity and immediacy of the danger to worker safety and health. *See* 29 U.S.C. § 655(b), (c) & (g) (emphasis added). Against this background, OSHA's primary reliance on the tool of non-mandatory guidance in addressing the undisputed "grave danger" to workers from COVID-19—guidance that employers are free to interpret narrowly or to ignore altogether—stands the OSH Act on its head. As this Court bluntly put it in *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983), in response to OSHA's similar reliance on non-mandatory guidance and "voluntary efforts of employers" based on that guidance, "OSHA has embarked upon the least responsive course short of inaction."

As a matter of law and common sense, OSHA cannot conclude that an ETS is unnecessary based on the assumption rejected by Congress that all (or even most) employers will voluntarily and rigorously comply with non-enforceable

guidance. Simply put, for OSHA to proceed on that rejected assumption defies congressional intent and inevitably exposes countless workers to the very "grave danger" that an ETS is designed to forestall. The panel wholly failed to consider the fact that OSHA's refusal to issue an ETS was primarily based on its issuance of non-enforceable guidance—an express agency rationale that suffers from a fatal legal flaw and puts countless workers' lives in immediate jeopardy.

The panel also wholly failed to address the AFL-CIO's showing that OSHA's reliance on its claimed enforcement of the general duty clause in 29 U.S.C. § 654(a)(1) and on the actions of "other entities" was likewise contrary to law and the OSH Act's central worker-protection purpose. *See* Reply 9-11 (showing (1) that OSHA's reliance on its claimed enforcement of the general duty clause defies both common sense and congressional intent as reflected by authoritative statements in the OSH Act's legislative history that OSHA should *not* rely on the general duty clause as a "substitute" for reliance on specific mandatory standards generally and on "temporary emergency standards" in particular; and (2) that OSHA lacks authority to enforce the general duty clause in almost half the states where state OSH plans exist and the state agencies are not bound to follow OSHA's enforcement practices); *id.* 11-12 (showing that OSHA's reliance on a patchwork of actions being taken by other governmental entities represents an abdication of the statutory responsibilities that Congress assigned to OSHA

precisely because of Congress' dissatisfaction with the dismal worker-protection results flowing from such a patchwork of actions by other governmental entities); *id.* 12 (showing that OSHA's reliance on non-mandatory guidance developed by private industry is equally if not more improper than OSHA's reliance on its own non-mandatory guidance).

While wholly failing to address the AFL-CIO's arguments on these critical points, the panel's Order does note that in *In re Int'l Chem. Workers Union*, 830 F.2d 369 (D.C. Cir. 1987) and *Auchter, supra*, 702 F.2d 1150, this Court stated that OSHA's decision not to issue an ETS is entitled to considerable deference. But in both cases, OSHA determined that there was no "grave danger" to workers necessitating an ETS—a determination typically "rooted in inferences from complex scientific and factual data." *Auchter*, 702 F.2d at 1156 (internal quotation marks omitted). Under elementary principles of judicial review, OSHA is *not* entitled to deference in determining that an ETS is unnecessary to address an *undisputed* "grave danger" to workers where, as here, OSHA's determination rests on grounds such as reliance on non-enforceable guidance that defy congressional intent or are otherwise contrary to law. Moreover, even if OSHA were entitled to some deference in these circumstances, this Court recognized in *Auchter* that "our review of [OSHA's] refusal to issue an ETS . . . must take into account the mandatory language of 29 U.S.C. § 655(c) 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." *Id.* (internal quotation marks and footnote omitted).

The present posture of this case does not permit us to fully present our argument that OSHA's express rationale for its conclusion that an ETS "is not necessary" is wrong as a matter of law. But the panel's failure to "rigorously review," *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1206 (D.C. Cir. 1980), OSHA's interpretation and application of a statutory provision designed to empower OSHA to achieve a "statutory mandate," *id.*, to protect worker lives and health from "grave danger" deserves to be rectified by the *en banc* Court. Indeed, given the unprecedented grave danger now faced by workers throughout the nation, if the panel's decision is permitted to stand, the Court will effectively have renounced the need for meaningful judicial review of OSHA's refusal to use the very tool Congress gave it to protect workers from a danger of this magnitude.

In sum, the panel's brief *per curiam* Order, rendered without the benefit of oral argument, misstates OSHA's express rationale for its conclusion that an ETS "is not necessary" and wholly fails to address the AFL-CIO's argument that OSHA's actual rationale is flatly inconsistent with the OSH Act. Given the exceptional importance of the question of whether OSHA's refusal to issue an ETS was lawful and the mortal danger faced by workers now being required to return to work as the economy reopens, *en banc* review is warranted to address the AFL-

CIO's heretofore unaddressed claim that OSHA's refusal to issue an ETS was a plainly unlawful act that puts countless workers' lives in immediate jeopardy.

CONCLUSION

For the foregoing reasons, the AFL-CIO's petition for rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Rehearing *En Banc* contains 3,526 words, excluding those portions of the Petition excluded from the word count under Fed. R. App. P. 32(f), and thus complies with the word limit set by Fed. R. App. P. 35(b)(2)(A).

/s/ Andrew D. Roth

Counsel for Petitioner AFL-CIO

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on this 18th day of June, 2020, I caused a copy of this Petition For Rehearing *En Banc* to be served electronically via the Court's CM/ECF system, providing service to all counsel of record.

/s/ Andrew D. Roth

Counsel for Petitioner AFL-CIO

Addendum Tab 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1158 **September Term, 2019**

Filed On: June 11, 2020

In re: American Federation of Labor and Congress of Industrial Organizations,

Petitioner

BEFORE: Henderson, Wilkins, and Rao, Circuit Judges

O R D E R

Upon consideration of the emergency petition for a writ of mandamus, the opposition thereto, and the corrected reply; and the motions for leave to participate as amici curiae and the lodged amici briefs, it is

ORDERED that the motions for leave to participate as amici curiae be granted. The Clerk is directed to file the lodged briefs. It is

FURTHER ORDERED that the emergency petition for a writ of mandamus, which the court construes as a petition for review of the Occupational Safety and Health Administration's ("OSHA") denial of the March 6, 2020, administrative petition for an emergency temporary standard ("ETS"), see In re Int'l Chem. Workers Union, 830 F.2d 369 (D.C. Cir. 1987), be denied. Petitioner challenges the OSHA's decision not to issue an ETS to protect working people from occupational exposure to infectious disease, including COVID-19. The agency is authorized to issue an ETS if it determines that "employees are exposed to grave danger" from a new hazard in the workplace, and an ETS is "necessary" to protect them from that danger. 29 U.S.C. § 655(c). The OSHA's decision not to issue an ETS is entitled to considerable deference. See In re Int'l Chem. Workers Union, 830 F.2d at 371; Pub. Citizen Health Research Grp. v. Auchter, 702 F.2d 1150, 1156–57 (D.C. Cir. 1983). In light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments, see 29 U.S.C. § 654(a), the OSHA reasonably determined that an ETS is not necessary at this time.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1158 **September Term, 2019**

is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Manuel J. Castro
Deputy Clerk

Addendum Tab 2

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rules 35(c) and 28(a)(1)(A), undersigned counsel for Petitioner hereby certifies the following:

1. Petitioner is the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).
2. Respondent is the Occupational Safety and Health Administration, United States Department of Labor (OSHA).
3. Two groups of *amici curiae* have filed briefs in support of Respondent. One group consists of the Chamber of Commerce of the United States, the National Federation of Independent Business, Restaurant Law Center, the Air Conditioning Contractors of America, Independent Electrical Contractors, and the National Fisheries Institute. The other group consists of the National Association of Home Builders of the United States, Associated Builders and Contractors, American Road and Transportation Builders Association, Leading Builders of America, Mason Contractors Association of America, and American Subcontractors Association.

/s/Andrew D. Roth
Andrew D. Roth

Addendum Tab 3

DISCLOSURE STATEMENT

Pursuant to Circuit Rules 35(c) and 26.1, Petitioner American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby makes the following disclosure:

The AFL-CIO is an unincorporated association of 55 national and international labor unions representing 13 million working men and woman in every sector of the economy. The AFL-CIO has no parent corporation and has not issued any stock. The AFL-CIO's general purposes include advocating for and taking appropriate legal action to protect and advance the interests of working men and women throughout the United States, including, insofar as is relevant here, their interests in a safe and healthy workplace.