

ORAL ARGUMENT NOT YET SCHEDULED

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.

ON EMERGENCY PETITION FOR WRIT OF MANDAMUS TO THE OCCUPATIONAL
SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

**BRIEF OF *AMICI CURIAE* 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 IN SUPPORT OF RESPONDENT OCCUPATIONAL
SAFETY AND HEALTH ADMINISTRATION AND DENIAL OF THE
EMERGENCY PETITION**

Steven P. Lehotsky
Emily J. Kennedy
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 659-6000

*Counsel for Chamber of Commerce of
the United States*

Brett A. Shumate
John M. Gore
Jacqueline M. Holmes
Kathryn Kimball Mizelle
J. Benjamin Aguiñaga
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bshumate@jonesday.com

Counsel for Amici Curiae

Additional counsel located on inside cover

Continued from front cover

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street, NW
Seventh Floor
Washington, DC 20036
(202) 331-5913

Counsel for Restaurant Law Center

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

Except for *amici curiae* 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, The National Fisheries Institute, and National Association of Home Builders, all parties, intervenors, and *amici* appearing in this Court are listed in the Emergency Petition.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* state that:

Amicus curiae Chamber of Commerce of the United States of America has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has 10% or greater ownership interest in the Chamber.

Amicus curiae The National Federation of Independent Business is an incorporated nonprofit association. It is not a publicly held corporation and has no parent corporation.

Amicus curiae Restaurant Law Center has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has 10% or greater ownership interest in the Law Center.

Amicus curiae The Air Conditioning Contractors of America is not a publicly held corporation and there is no parent corporation that owns 10 percent or more of this entity's stock.

Amicus curiae Independent Electrical Contractors is an incorporated nonprofit association. It is not a publicly held corporation and has no parent corporation.

Amicus curiae The National Fisheries Institute is not a publicly held corporation, and there is no parent corporation that owns 10 percent or more of this entity's stock.

B. Ruling Under Review

References to the challenged actions and omissions of Respondent Occupational Safety and Health Administration appear in the Emergency Petition.

C. Related Cases

Amici curiae are not aware of any related cases.

/s/ Brett A. Shumate

CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)

Amici have been notified that the National Association of Home Builders and other construction industry trade associations also intend to file an *amicus curiae* brief in support of Respondent. *Amici*'s brief is necessary because it focuses on how an emergency temporary standard would impact many different industries. The National Association of Home Builders, however, has a unique perspective focused on the construction industry, which has encountered COVID-related obstacles distinct from those of *amicus*'s members. The Court would therefore benefit from the two separate briefs to understand how Petitioner's request would harm the various regulated industries in different ways.

/s/ Brett A. Shumate

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

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

TABLE OF CONTENTS

	Page
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)	iii
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS	iv
TABLE OF AUTHORITIES	vi
GLOSSARY.....	x
STATUTES AND REGULATIONS	xi
STATEMENT OF IDENTITIES, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE AS <i>AMICI CURIAE</i>	1
INTRODUCTION.....	4
ARGUMENT	6
I. The Secretary’s Flexible Approach Has Ample Record Support.....	6
A. OSHA’s Existing Standards and Industry-Specific Guidance Protect Workers From The Coronavirus	6
B. Businesses Are Innovating To Protect Workers During The COVID-19 Pandemic	12
II. The Petition Raises Separation-Of-Powers Concerns.....	17
CONCLUSION	18
CERTIFICATE OF COMPLIANCE	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Chamber of Commerce of U.S. v. U.S. Dep’t of Labor</i> , 174 F.3d 206 (D.C. Cir. 1999).....	11
<i>In re Int’l Chem. Workers Union</i> , 830 F.2d 369 (D.C. Cir. 1987) (per curiam).....	4, 6, 17
<i>Reid v. Universal Mar. Serv. Corp.</i> , 41 F.3d 200 (4th Cir. 1994).....	17
<i>Rural Cmty. Workers All. v. Smithfield Foods, Inc.</i> , No. 5:20-CV-06063-DGK, 2020 WL 2145350 (W.D. Mo. May 5, 2020)	10, 11
<i>WildEarth Guardians v. EPA</i> , 751 F.3d 649 (D.C. Cir. 2014).....	17
STATUTES	
29 U.S.C. § 654.....	3, 6
29 U.S.C. § 655.....	4
OTHER AUTHORITIES	
29 C.F.R. § 1910.132.....	6
29 C.F.R. § 1910.133.....	6, 7
29 C.F.R. § 1910.134.....	7
29 C.F.R. § 1910.141.....	7
29 C.F.R. § 1910.1200.....	7
Am. Indus. Hygiene Ass’n, Reopening: Guidance for General Office Settings (May 26, 2020)	13
Am. Indus. Hygiene Ass’n, Reopening: Guidance for Gyms and Workout Facilities (May 6, 2020).....	13
Am. Indus. Hygiene Ass’n, Returning to Work: Construction Environment (May 6, 2020)	13
Am. Soc’y of Heating, Refrigerating and Air-Conditioning Eng’rs, ASHRAE Offers COVID-19 Building Readiness/Reopening Guidance (May 7, 2020).....	13

TABLE OF AUTHORITIES

(continued)

	Page(s)
Am. Soc’y of Heating, Refrigerating and Air-Conditioning Eng’rs, Position Document on Infectious Aerosols (Apr. 14, 2020)	13
Lindsay Cates, <i>How 10 Small Businesses are Fighting Coronavirus in Creative Ways</i> , U.S. Chamber: Above the Fold (Mar. 27, 2020)	16
CBRE, Reopening The World’s Workplaces (May 19, 2020).....	13
Ctr. for Disease Control and Prevention, <i>CDC Activities and Initiatives Supporting the COVID-19 Response and the President’s Plan for Opening America Up Again</i> (May 2020)	9
Ctr. for Disease Control and Prevention, <i>Cleaning and Disinfecting Your Facility</i> (last updated Apr. 14, 2020)	9
Ctr. for Disease Control and Prevention, <i>COVID-19 Employer Information for Office Buildings, May 2020</i> (last updated May 27, 2020)	9
Ctr. for Disease Control and Prevention, <i>COVID-19 Guidance for Shared or Congregate Housing</i> (last updated Apr. 25, 2020)	9
Ctr. for Disease Control and Prevention, <i>Guidance for Reopening Buildings After Prolonged Shutdown or Reduced Operation</i> (last updated May 17, 2020).....	9
Ctr. for Disease Control and Prevention, <i>Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19</i> (last updated Apr. 20, 2020)	9
Ctr. for Disease Control and Prevention, <i>Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020</i> (last updated May 6, 2020).....	8
Ctr. for Disease Control and Prevention, <i>Meat and Poultry Processing Workers and Employers</i> (last updated May 12, 2020).....	9
Ctr. for Disease Control and Prevention, <i>Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes</i> (last updated May 7, 2020).....	9
Ctr. for Disease Control and Prevention, <i>Restaurants and Bars During the COVID-19 Pandemic Decision Tree</i> (last updated May 15, 2020)	9
Ctr. for Disease Control and Prevention, <i>Use of Cloth Face Coverings to Help Slow the Spread of COVID-19</i> (last updated May 23, 2020)	10

TABLE OF AUTHORITIES

(continued)

	Page(s)
Ctr. for Disease Control and Prevention, <i>Workplaces During the COVID-19 Pandemic Decision Tree</i> (last updated May 15, 2020).....	9
Exec. Order 13892, 84 Fed. Reg. 55,239 (Oct. 9, 2019).....	11
Exec. Order 13924, 85 Fed. Reg. 31,354 (May 19, 2020).....	10
Nicole Fallon, <i>4 Business Owners on How They're Reopening Their Businesses Post-Coronavirus</i> , CO—by U.S. Chamber of Commerce (May 4, 2020).....	15, 16
Health and Economic Recovery Omnibus Emergency Solutions Act § 120302, H.R. 6800, 116th Cong.....	17
Heating, Refrigerating and Air-Conditioning Eng'rs, <i>ASHRAE Offers COVID-19 Building Readiness/ Reopening Guidance</i> (May 7, 2020).....	13
Letter from Secretary Scalia to President Trump (Apr. 30, 2020).....	6, 10, 11, 12
McDonald's, <i>Our Goal: Safety First</i> (May 19, 2020).....	14
National Restaurant Ass'n, <i>Reopening Guidance: A Guide for the Restaurant Industry</i> (April 22, 2020).....	13
National Retail Federation, <i>Operation Open Doors Checklist - Version 2.0</i> (updated May 15, 2020).....	13
Seven Reasons, <i>Our Reopening Plan</i> (May 28, 2020).....	15
U.S. Chamber of Commerce, Found., <i>Corporate Aid Tracker: COVID-19 Business in Action</i> (last visited May 26, 2020).....	16
U.S. Chamber of Commerce, <i>Reopening Business: Digital Resources Center</i> (last updated May 22, 2020).....	13
U.S. Dep't of Labor, OSHA 3327-06R, <i>Guidance on Preparing Workplaces for an Influenza Pandemic</i> (2009).....	7
U.S. Dep't of Labor, OSHA 3990-03, <i>Guidance on Preparing Workplaces for COVID-19</i> (2020).....	7
U.S. Dep't of Labor, <i>U.S. Department of Labor Adopts Revised Enforcement Policies For Coronavirus</i> (May 19, 2020).....	7
U.S. Dep't of Labor, <i>U.S. Department of Labor Issues Alert for Rideshare, Taxi And Car Service Safety During Coronavirus Pandemic</i> (May 14, 2020).....	8
U.S. Dep't of Labor, <i>U.S. Department of Labor Issues Alert to Help Keep Construction Workers Safe during the Coronavirus Pandemic</i> (Apr. 21, 2020).....	7

TABLE OF AUTHORITIES

(continued)

	Page(s)
U.S. Dep’t of Labor, <i>U.S. Department of Labor Issues Alert to Help Keep Dental Industry Practitioners Safe During the Coronavirus Pandemic</i> (May 11, 2020).....	8
U.S. Dep’t of Labor, <i>U.S. Department of Labor Issues Alert to Help Keep Manufacturing Workers Safe During Coronavirus Pandemic</i> (Apr. 16, 2020)	7, 8
U.S. Dep’t of Labor, <i>U.S. Department of Labor Issues Alert to Help Keep Retail Pharmacy Workers Safe During the Coronavirus Pandemic</i> (May 14, 2020).....	8
U.S. Dep’t of Labor, <i>U.S. Department of Labor Issues Alert to Keep Nursing Home and Long-Term Care Facility Workers Safe During Coronavirus Pandemic</i> (May 14, 2020)	8
U.S. Dep’t of Labor, <i>U.S. Department of Labor Issues Alert to Keep Package Delivery Workers Safe During COVID-19 Pandemic</i> (Apr. 13, 2020)	7
U.S. Dep’t of Labor, <i>U.S. Department of Labor Issues Alert to Keep Retail Workers Safe During Coronavirus Pandemic</i> (Apr. 8, 2020).....	7
U.S. Dep’t of Labor, <i>U.S. Department of Labor Issues Safety Alert for Restaurant, Food and Beverage Businesses Providing Curbside Pickup and Takeout Service</i> (May 1, 2020).....	8

GLOSSARY

CDC	Centers for Disease Control and Prevention
COVID	Coronavirus Disease
OSHA	Occupational Safety and Health Administration

STATUTES AND REGULATIONS

All applicable statutes and other pertinent materials are contained in the Emergency Petition and Addenda.

**STATEMENT OF IDENTITIES, INTEREST IN CASE, AND SOURCE OF
AUTHORITY TO FILE AS *AMICI CURIAE***

Amici curiae represent the nation's leading commercial, energy, and manufacturing sectors. Our members are firmly committed to promoting a safe, healthy, and productive workplace for all Americans.

The Chamber of Commerce of the United States is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, DC, and all 50 state capitals. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The Law

Center provides courts with the industry's perspective on significant legal issues. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases, such as this one, through *amicus* briefs. Currently, the restaurant industry, more than any other industry in the nation, has suffered the most significant sales and job losses since the COVID-19 outbreak began, with over eight million restaurant employees either laid off or furlough and over \$240 billion worth of losses expected by the end of the year. Thus, the Law Center has a unique perspective that can help the Court beyond the assistance that the lawyers for the parties are able to provide. This Court's ruling may have broad ramifications for this industry, given the extensive federal, state, and local regulatory framework that governs health and safety within all restaurants. The emergency standard Petitioner seeks would affect numerous state and federal agencies with jurisdiction over such matters and would in all likelihood expose the industry to inconsistent and perhaps even contradictory obligations.

The Air Conditioning Contractors of America (ACCA) represents nearly 60,000 heating, ventilation, air conditioning, and refrigeration professionals across the U.S. These contractors are a backbone of the economy, responsible for ensuring modern medicine is possible, ensuring information technology centers are operational, maintaining a fresh supply of food, and providing essential comfort for nearly every hospital, office building, and home in the country. ACCA is the premier trade association representing this pillar of the economy.

Independent Electrical Contractors (IEC) is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,400 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition and economic opportunity for all.

The National Fisheries Institute (NFI), established in 1947, is the nation's largest commercial seafood association and represents seafood businesses across the full length of the seafood value chain. NFI member company harvesters, vessel owners, processors, distributors, exporters, retailers, and seafood restaurants together supply tens of millions of seafood meals to American and global consumers annually. These companies offer premium, sustainable products for consumers while providing high-quality harvesting and manufacturing jobs in coastal and other communities across the United States.

Amici are interested in this case because a new emergency temporary standard issued by the Occupational Safety and Health Administration (OSHA) would require their members to adopt a single one-size-fits-all approach to combatting COVID-19 in the workplace, regardless of their size, industry, operational needs, physical workplace configuration, or location. *Amici* believe a new standard is unnecessary because the Occupational Safety and Health Act's General Duty Clause, 29 U.S.C. § 654(a)(1), and existing workplace safety standards—combined with flexible and evolving industry-

specific guidance issued by agencies and private institutions during the COVID-19 pandemic—already provide the necessary framework and, most importantly, detailed information to help employers protect the health and safety of America’s workers. The Secretary of Labor’s reasoned approach provides businesses with the flexibility they need to respond to the unfolding challenges posed by the pandemic. *Amici* seek leave to file this brief to explain how businesses, consistent with the adaptable and tailored approach implemented by the Secretary, are already working to protect workers and customers from the spread of the novel coronavirus.

INTRODUCTION

The Secretary reasonably decided that coupling OSHA’s existing safety standards with flexible, industry-specific guidance informed by evolving scientific understanding is the best approach to ensuring workplace health and safety during the COVID-19 pandemic. This Court accords “great deference” to that policy judgment, which can be overturned only if it “lacks support in the record.” *In re Int’l Chem. Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987) (per curiam).

Nonetheless, Petitioner AFL-CIO seeks a writ of mandamus compelling the co-equal Executive branch to exercise its “extraordinary power” to impose on the vast and diversified American economy an emergency temporary standard that would mandate a new, inflexible, one-size-fits-all workplace safety requirement. *Id.* (quotation omitted). But the AFL-CIO cannot show that the Secretary’s preferred approach lacks record

support, much less that an emergency temporary standard is necessary to protect workers from COVID-19. 29 U.S.C. § 655(c)(1).

To the contrary, ample evidence supports the Secretary's decision. Enforceable OSHA workplace safety standards already protect workers from hazards such as the novel coronavirus. In addition, OSHA and other federal agencies have issued a steady stream of industry-specific guidance explaining how these existing standards apply during this pandemic, and articulating best practices for businesses and employers to follow in light of evolving scientific understanding of COVID-19. Private industry groups also have provided guidance on best practices for protecting health and safety.

The Secretary's decision to augment existing OSHA safety standards with guidance documents that can be—and have been—adapted in light of unfolding scientific understanding is eminently reasonable and affirmatively preferable for American workplaces. Because data on COVID-19 continues to develop, regulators and businesses must be able to adapt to changing circumstances. The Secretary's flexible approach empowers them with necessary agility and has already yielded results for American workers and businesses. Businesses across the country have availed themselves of this flexibility not only to ensure that their workers remain healthy and safe in a vast array of workplace settings, industries, and locations, but also to make vital contributions to the global fight against the coronavirus. The Secretary's approach is working; no more standards are needed.

At bottom, the unprecedented relief sought by the AFL-CIO strikes at the heart of policy judgments reserved to the co-equal Executive and Legislative branches. Granting the petition would award relief through the courts that the AFL-CIO has so far failed to obtain from two other branches of government.

The Court should deny the petition.

ARGUMENT

There is ample support for the Secretary's decision to address the evolving COVID-19 pandemic by supplementing existing OSHA safety standards with flexible, data-driven, and industry-specific guidance. Because the Secretary "must make both factual and policy judgments on the basis of information that may be incomplete," this "is a decision largely entrusted to the expertise of the agency." *In re Int'l Chem. Workers Union*, 830 F.2d at 372.

I. The Secretary's Flexible Approach Has Ample Record Support.

The Secretary's approach protects workers and empowers businesses with the flexibility they need to respond to the unfolding COVID-19 pandemic. A rigid national rule freezing current scientific understanding into place is unnecessary.

A. OSHA's Existing Standards and Industry-Specific Guidance Protect Workers From The Coronavirus.

As the Secretary explained, OSHA already has enforceable standards, in addition to its General Duty Clause, 29 U.S.C. § 654(a)(1), protecting workers during the COVID-19 pandemic. Letter from Secretary Scalia to President Trumka at 1 (Apr. 30,

2020) (Addendum Tab 5 of Petition) (“Scalia Letter”). These standards include personal protective equipment, 29 C.F.R. § 1910.132(a), eye and face protection, *id.* § 1910.133(a)(1), respiratory protection, *id.* § 1910.134(a)(2), sanitation, *id.* § 1910.141(a)(3)(i), and hazard communication, *id.* § 1910.1200(e)(1).

In addition to these mandatory standards, federal agencies have issued numerous guidance documents regarding the protection of workers from the coronavirus. Even before this pandemic, OSHA had issued guidance on preparing workplaces for an influenza pandemic.¹ OSHA has since issued new guidance on preparing workplaces for COVID-19,² enforcement guidance,³ and specific guidance for a number of industries, including: retail,⁴ package delivery,⁵ manufacturing,⁶ construction,⁷

¹ U.S. Dep’t of Labor, OSHA 3327-06R, Guidance on Preparing Workplaces for an Influenza Pandemic (2009).

² U.S. Dep’t of Labor, OSHA 3990-03, Guidance on Preparing Workplaces for COVID-19 (2020).

³ U.S. Dep’t of Labor, *U.S. Department of Labor Adopts Revised Enforcement Policies For Coronavirus* (May 19, 2020).

⁴ U.S. Dep’t of Labor, *U.S. Department of Labor Issues Alert to Keep Retail Workers Safe During Coronavirus Pandemic* (Apr. 8, 2020).

⁵ U.S. Dep’t of Labor, *U.S. Department of Labor Issues Alert to Keep Package Delivery Workers Safe During COVID-19 Pandemic* (Apr. 13, 2020).

⁶ U.S. Dep’t of Labor, *U.S. Department of Labor Issues Alert to Help Keep Manufacturing Workers Safe During Coronavirus Pandemic* (Apr. 16, 2020).

⁷ U.S. Dep’t of Labor, *U.S. Department of Labor Issues Alert to Help Keep Construction Workers Safe during the Coronavirus Pandemic* (Apr. 21, 2020).

restaurants,⁸ dental,⁹ rideshare,¹⁰ pharmacies,¹¹ nursing homes,¹² and meatpacking.¹³

These guidance documents reflect the vastly different working environments in each of these industries and provide safety recommendations on measures such as social distancing, flexible work hours, use of personal protective equipment and masks, sanitizing workplaces and promoting personal hygiene, and encouraging workers who are sick not to report to work.¹⁴

Likewise, the Centers for Disease Control and Prevention, often working with OSHA, has issued detailed guidance to various industries during the COVID-19 pandemic, including guidance for: businesses and employers;¹⁵ cleaning and disinfecting

⁸ U.S. Dep't of Labor, *U.S. Department of Labor Issues Safety Alert for Restaurant, Food and Beverage Businesses Providing Curbside Pickup and Takeout Service* (May 1, 2020).

⁹ U.S. Dep't of Labor, *U.S. Department of Labor Issues Alert to Help Keep Dental Industry Practitioners Safe During the Coronavirus Pandemic* (May 11, 2020).

¹⁰ U.S. Dep't of Labor, *U.S. Department of Labor Issues Alert for Rideshare, Taxi And Car Service Safety During Coronavirus Pandemic* (May 14, 2020).

¹¹ U.S. Dep't of Labor, *U.S. Department of Labor Issues Alert to Help Keep Retail Pharmacy Workers Safe During the Coronavirus Pandemic* (May 14, 2020).

¹² U.S. Dep't of Labor, *U.S. Department of Labor Issues Alert to Keep Nursing Home and Long-Term Care Facility Workers Safe During Coronavirus Pandemic* (May 14, 2020).

¹³ *Id.*

¹⁴ *See e.g.*, U.S. Dep't of Labor, *U.S. Department of Labor Issues Alert to Help Keep Manufacturing Workers Safe During Coronavirus Pandemic* (Apr. 16, 2020).

¹⁵ Ctr. for Disease Control and Prevention, *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020* (last updated May 6, 2020).

facilities;¹⁶ critical infrastructure workers;¹⁷ shared or congregate housing;¹⁸ manufacturing workers and employers;¹⁹ reopening workplaces;²⁰ reopening restaurants and bars;²¹ cleaning and disinfecting workplaces;²² meat and poultry packing industry;²³ reopening buildings;²⁴ office buildings;²⁵ and other topics.²⁶ These guidance documents provide an array of workplace safety recommendations and reflect that the most

¹⁶ Ctr. for Disease Control and Prevention, *Cleaning and Disinfecting Your Facility* (last updated Apr. 14, 2020).

¹⁷ Ctr. for Disease Control and Prevention, *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19* (last updated Apr. 20, 2020).

¹⁸ Ctr. for Disease Control and Prevention, *COVID-19 Guidance for Shared or Congregate Housing* (last updated Apr. 25, 2020).

¹⁹ *Id.*

²⁰ Ctr. for Disease Control and Prevention, *Workplaces During the COVID-19 Pandemic Decision Tree* (last updated May 15, 2020).

²¹ Ctr. for Disease Control and Prevention, *Restaurants and Bars During the COVID-19 Pandemic Decision Tree* (last updated May 15, 2020).

²² Ctr. for Disease Control and Prevention, *Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes* (last updated May 7, 2020).

²³ Ctr. for Disease Control and Prevention, *Meat and Poultry Processing Workers and Employers* (last updated May 12, 2020).

²⁴ Ctr. for Disease Control and Prevention, *Guidance for Reopening Buildings After Prolonged Shutdown or Reduced Operation* (last updated May 17, 2020).

²⁵ Ctr. for Disease Control and Prevention, *COVID-19 Employer Information for Office Buildings, May 2020* (last updated May 27, 2020).

²⁶ Ctr. for Disease Control and Prevention, *CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again* (May 2020).

effective safety measures differ depending on workplace setting, industry, location, and other factors.

For *amici* and their members, this industry-specific guidance is far more effective at protecting workers from the coronavirus than any rigid uniform standard could be.

First, scientific and public-health understanding of COVID-19 continues to evolve. Because “the virus is ‘novel’ and there is little ‘scientific certainty,’” Scalia Letter at 2, the medical community’s understanding of best practices to combat COVID-19 is still developing. For example, health officials initially advised against wearing masks, but now they recommend wearing masks.²⁷ The data will continue to evolve because the government, scientific community, and public health specialists are still collecting information and conducting research.

Second, agencies can quickly revise guidance—unlike a standard. Given the novelty of the virus, regulators and businesses must be agile to adapt to “swiftly changing circumstances.” Exec. Order 13924, 85 Fed. Reg. 31,354 (May 19, 2020). “Guidelines allow flexibility and responsiveness to that change, in a way a rule would not.” Scalia Letter at 2. Indeed, “national and local guidance on COVID-19 is continuously evolving and changing.” *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 WL 2145350, at *10 (W.D. Mo. May 5, 2020). But

²⁷ See Ctr. for Disease Control and Prevention, *Use of Cloth Face Coverings to Help Slow the Spread of COVID-19* (last updated May 23, 2020).

rules can deprive businesses of “the flexibility needed to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic.”

Id.

Third, agencies can tailor guidance to the needs of specific industries and workplaces more precisely. “OSHA’s industry-specific guidance is far more informative for workers and companies about the steps to be taken in *their* particular workplaces.” Scalia Letter at 2. Businesses need industry-specific guidance in responding to the COVID-19 pandemic because different workplaces face different hazards depending such factors as physical layout of the work environment, staffing, extent of interaction with the public, degree of vulnerability of the worker and customer populations, materials and equipment used at work, location, and more. Because standards address broad categories, they would not respond to the unique and wide-ranging needs of specific workplaces in responding to the COVID-19 pandemic. What works for package delivery or agriculture may be inappropriate for nursing homes.

The AFL-CIO complains that this guidance does not contain binding legal standards. But that is a feature of guidance, not a failure. “Guidance documents may not be used to impose new standards of conduct,” Exec. Order 13892 § 3, 84 Fed. Reg. 55,239, 55,240 (Oct. 9, 2019), because agencies can issue certain guidance quickly without following notice-and-comment rulemaking procedures, *see, e.g., Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 174 F.3d 206 (D.C. Cir. 1999). As public-health knowledge of COVID-19 continues to crystalize, agencies need the flexibility to adapt

guidance accordingly. And in the face of uncertain and changing circumstances, *guidance* is what businesses need—not more red tape.

Finally, the AFL-CIO’s claim that OSHA can simply finalize the existing draft infectious disease standard developed during the last administration misses the mark. As the AFL-CIO acknowledges, “OSHA has been considering an infectious disease standard for more than a decade,” Petition at 29, but OSHA’s efforts never culminated in a Notice of Proposed Rulemaking, perhaps because infectious diseases are so difficult to regulate. It would be misguided to require OSHA to propose and finalize a rule now, without public input, when data about the coronavirus and the most effective countermeasures continues to develop.

B. Businesses Are Innovating To Protect Workers During The COVID-19 Pandemic.

Businesses and workers are benefiting from the Secretary’s flexible and targeted approach to protecting workers’ health and safety from the novel coronavirus. As the Secretary put it, “employers *are* implementing measures to protect workers, in workplaces across the country.” Scalia Letter at 2.

First, the private sector has issued numerous guidelines to help businesses reopen safely while protecting workers from the coronavirus. For example, the U.S. Chamber of Commerce issued a comprehensive guide to help businesses keep employees and

customers healthy, including sector-specific guidance.²⁸ Working with a group of experts, the National Restaurant Association issued a “Restaurant Reopening Guidance” that includes information concerning cleaning and sanitation, personal hygiene, social distancing and health monitoring.²⁹ The American Industrial Hygiene Association issued reopening guidance for various settings, including offices,³⁰ construction,³¹ and gyms.³² And the American Society of Heating, Refrigerating and Air-Conditioning Engineers issued guidance on infectious aerosols³³ and building reopening guidance.³⁴ Other private sector industry groups like CBRE Group³⁵ and the National Retail Federation³⁶ have similarly produced guidance for their members.

²⁸ U.S. Chamber of Commerce, Reopening Business: Digital Resources Center (last updated May 22, 2020).

²⁹ National Restaurant Ass’n, Reopening Guidance: A Guide for the Restaurant Industry (April 22, 2020).

³⁰ Am. Indus. Hygiene Ass’n, Reopening: Guidance for General Office Settings (May 26, 2020).

³¹ Am. Indus. Hygiene Ass’n, Returning to Work: Construction Environment (May 6, 2020).

³² Am. Indus. Hygiene Ass’n, Reopening: Guidance for Gyms and Workout Facilities (May 6, 2020).

³³ Am. Soc’y of Heating, Refrigerating and Air-Conditioning Eng’rs, Position Document on Infectious Aerosols (Apr. 14, 2020).

³⁴ Am. Soc’y of Heating, Refrigerating and Air-Conditioning Eng’rs, *ASHRAE Offers COVID-19 Building Readiness/ Reopening Guidance* (May 7, 2020).

³⁵ CBRE, Reopening The World’s Workplaces (May 19, 2020).

³⁶ National Retail Federation, Operation Open Doors Checklist - Version 2.0 (updated May 15, 2020).

These private guidelines buttress the substantial protection of worker health and safety already provided by OSHA's existing standards and new COVID-19 agency guidance.

Second, countless businesses are implementing this abundance of guidance, often in their own innovative ways, to protect the health and safety of workers and customers during the COVID-19 pandemic. Here are just a few examples:

- **McDonald's USA (Nationally).** Since February, McDonald's USA has worked to update and enhance nearly 50 processes to keep restaurant employees and customers safe and issued a 59-page guide outlining national restaurant minimum standards, including wellness and temperature checks, protective barriers, adhering to social distancing guidelines for customers and crew, requiring gloves and masks, and increasing the frequency of handwashing and providing contactless purchasing options to customers. Personal protective equipment is in ample supply for all restaurants and more than 100 million masks have been sourced for crew and managers in restaurants. McDonald's also provided detailed direction for taking certain high-risk components, such as Self-Service Soda Dispensers temporarily out of service or converting them to team-member operated. Notably, some of McDonald's published procedures, such as this temporary elimination of self-service soda dispensers for customer use, have subsequently been incorporated in industry best practices guidance.³⁷

³⁷ McDonald's, Our Goal: Safety First (May 19, 2020).

- **Seven Reasons (Washington, DC).** In preparation for resuming in-restaurant dining after two months of providing only take-out service, Seven Reasons announced the many steps it has taken to protect workers and the public. Among other things, the restaurant checks and logs employee temperatures daily, requires all employees to wear gloves and masks, directs workers to wash their hands and to change gloves every 30 minutes, sanitizes tables and everything that touches a table after each course and each seating, and carefully regulates customer flow.³⁸
- **CrossFit 11:24 (Marietta, Georgia).** Before the governor's order closed their business, the owners fogged and disinfected their facility and stocked up on disinfecting products for their eventual reopening. They also began thoroughly planning and documenting their reopening procedures while they were closed. Since reopening, they taped the floor to ensure everyone remains six feet apart, coaches wear masks during the class, and classes are staggered to allow extra time for disinfecting between classes.³⁹
- **Premier Podiatry (Clifton, New Jersey).** Dr. Velimir Petkov has encouraged virtual visits throughout the COVID-19 pandemic. For emergency in-person visits, Premier Podiatry has implemented a phone pre-screening process.

³⁸ Seven Reasons, Our Reopening Plan (May 28, 2020).

³⁹ Nicole Fallon, *4 Business Owners on How They're Reopening Their Businesses Post-Coronavirus*, CO—by U.S. Chamber of Commerce (May 4, 2020).

Patients call when they arrive in the parking lot, and the staff bring patients inside one by one to avoid unnecessary contact. The staff sanitizes common areas and surfaces after each visit, and professionals deep clean the office daily.⁴⁰

- **Brinton Vision (St. Louis, Missouri).** Before reopening his laser vision correction practice, Dr. Jason Brinton spent time training his receptionists and other non-clinical staff. He provides face masks on arrival to anyone visiting the office, and he trained reception staff on how to demonstrate how to wear a mask. He is carefully following precautions for medical facilities: masking of customers and staff, hand-washing, careful phone screening, temperature checks, thorough disinfection protocols and social distancing to the extent possible on premises.⁴¹

For these and so many other businesses, the Secretary's approach is working.

Third, large and small businesses across the country are contributing their facilities and know-how in the fight against the coronavirus. Countless businesses have shifted their operations to bring much-needed supplies to workers and the public.⁴² For example, Brooks Brothers and MyPillow are using their facilities to produce thousands of face masks each day; General Motors and Ford Motor Company retooled their plants

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See U.S. Chamber of Commerce Found., *Corporate Aid Tracker: COVID-19 Business in Action* (last visited May 26, 2020); Lindsay Cates, *How 10 Small Businesses are Fighting Coronavirus in Creative Ways*, U.S. Chamber: Above the Fold (Mar. 27, 2020).

to manufacture ventilators; Toyota and Bauer are using their facilities to produce face shields; ExxonMobil and Honeywell reconfigured their manufacturing operations to produce and donate hand sanitizer. The Secretary's flexible approach helps support these efforts to quickly and efficiently shift production while operating in accordance with commonsense protections for workers, customers, and business owners alike.

II. The Petition Raises Separation-Of-Powers Concerns.

The AFL-CIO's requested relief also raises serious constitutional concerns.

First, it would usurp the Executive's discretion to decline to engage in rulemaking. This Court's "limited review," *In re Int'l Chem. Workers Union*, 830 F.2d at 371, is consistent with "the 'extremely limited' and 'highly deferential' standard that governs [judicial] review of an agency's denial of a rulemaking petition," *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014).

Second, the Court would usurp the Legislature's role because the House of Representatives recently passed a bill requiring the Secretary to adopt the same standard that the AFL-CIO seeks here. Health and Economic Recovery Omnibus Emergency Solutions Act § 120302, H.R. 6800, 116th Cong. The AFL-CIO's "attempt to achieve judicial results where legislative efforts have been unavailing is nothing more than a prescription for augmenting the influence of the courts at the expense of a healthy climate of democracy." *Reid v. Universal Mar. Serv. Corp.*, 41 F.3d 200, 202 (4th Cir. 1994).

CONCLUSION

The emergency petition for a writ of mandamus should be denied.

Dated: May 29, 2020

Respectfully Submitted,

Steven P. Lehotsky
Emily J. Kennedy
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 659-6000
*Counsel for Chamber
of Commerce of the
United States*

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street, NW
Seventh Floor
Washington, DC 20036
(202) 331-5913
Counsel for Restaurant Law Center

/s/ Brett A. Shumate

Brett A. Shumate
John M. Gore
Jacqueline M. Holmes
Kathryn Kimball Mizelle
J. Benjamin Aguiñaga
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bshumate@jonesday.com
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and D.C. Circuit Rules 28 and 29 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 3,878 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

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

/s/ Brett A. Shumate _____