Case No. 21-2057

In the United States Court of Appeals
for the Third Circuit

JANE DOE I; JANE DOE III; FRIENDS OF FARMWORKERS, INC. d/b/a JUSTICE AT WORK AS EMPLOYEE REPRESENTATIVE,
Plaintiffs-Appellants

v.

MARTIN J. WALSH, in his official capacity as United States Secretary of Labor; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

OPENING BRIEF OF APPELLANTS AND JOINT APPENDIX VOLUME I (J.A. 1-39)

Karla Gilbride
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
kgilbride@publicjustice.net
dmuraskin@publicjustice.net
Counsel for Plaintiff-Appellant Justice at Work

Lerae Kroon
Samuel Datlof
Justice at Work
Spring Garden Street, Suite 300
Philadelphia, PA 19123
(215) 733-0878
lkroon@justiceatworklegalaid.org
sdatlof@justiceatworklegalaid.org
Counsel for Plaintiffs-Appellants Jane Doe I and III

(additional counsel listed on inside cover)

David H. Seligman*
Towards Justice
2840 Fairfax Street, Suite 220
Denver, CO 80207
(720) 248-8426
david@towardsjustice.org
Counsel for Plaintiff-Appellant
Justice at Work

** application for admission forthcoming*

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants ("Plaintiffs") do not issue stock and have no parent corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Rules

Secondary Sources

I. JURISDICTIONAL STATEMENT.

Plaintiffs brought an action under the Occupational Health and Safety Act (the "OSH Act" or "Act"), Section 13(d), 29 U.S.C. § 662(d), which authorizes individuals to seek "a writ of mandamus to compel" the Occupational Safety and Health Administration ("OSHA") to mitigate the risk of serious injury or death in a workplace. The district court had federal-question jurisdiction to hear that claim under 28 U.S.C. § 1331 and § 1361.

The district court entered a final judgment dismissing the claim on March 30, 2021. J.A. 38-39. Plaintiffs filed their notice of appeal on May 28, 2021. J.A. 1. Thus, this appeal is timely, Fed. R. App. P. 4(a)(1)(B), and this Court has appellate jurisdiction under 28 U.S.C. § 1291.

II. ISSUES PRESENTED.

1. Whether 29 U.S.C. § 662(d) means what the district court itself recognized the plain text says, that individuals can bring suit to address imminent dangers—the risks of serious injury or death in the workplace—"[i]f the Secretary [of Labor] arbitrarily or capriciously fails" to do so; or whether it contains atextual requirements that cut off the remedy in most instances, as OSHA argued and the district court held below. *See* J.A. 96 (district court Complaint ("Comp.") ¶¶ 147-52) (Plaintiffs' articulation of their cause of action); J.A. 31-32 (district court's ruling dismissing

same); *see also* Dkt. No. 53 (OSHA offering another limitation on the § 662(d) cause of action).

2. Whether this case is moot because, approximately six months after Plaintiffs alerted OSHA that workers faced imminent dangers, OSHA declared the agency would not cite the employer for those workplace conditions. *See* Dkt. No. 53 (OSHA's district court filing "suggesting" mootness on this basis); J.A. 11-14 (district court ruling declining to find mootness).

III. RELATED CASES.

Plaintiffs raised concerns about the continuing dangers in their workplace in a subsequent complaint to OSHA. J.A. 235-38. Following the decision below, OSHA informed Plaintiffs it would not act on that second complaint. Thus, Plaintiffs are not aware of any ongoing administrative or judicial action related to any of the facts at issue here. Plaintiffs are also not aware of any related litigation in state or federal court. This case has not previously been heard by this Court.

IV. INTRODUCTION.

At the start of the COVID-19 pandemic, "meatpacking facilities" like the Maid-Rite Specialty Foods plant (the "Maid-Rite plant" or the "Plant") where the Jane Doe Plaintiffs work, "became hotspots for outbreaks that sickened and killed meatpacking workers and likely caused significant spread in surrounding

communities." Memorandum from the Majority Staff, to Members, H. Select Subcomm. on the Coronavirus Crisis, 117th Cong., *re: Coronavirus Infections and Deaths Among Meatpacking Workers* ("House Memorandum") 1 (Oct. 27, 2021).[1] In fact, by April 2020, the Maid-Rite plant experienced a large-scale outbreak of COVID-19. J.A. 140-41 (OSHA records).

However, Maid-Rite failed to take the most basic precautions in response, including failing to provide clean masks or arrange for physical distancing. J.A. 175, 182-83, 189-90 (Jane Doe I Decl. ¶¶ 4-8, 11; Jane Doe II Decl. ¶¶ 6, 8-10, 15; Jane Doe III Decl. ¶¶ 5-8, 12, 23). It even affirmatively implemented an attendance bonus, available only if workers did not identify as sick. J.A. 176, 183 (Jane Doe I Decl. ¶ 14; Jane Doe II Decl. ¶ 18).

Numerous Plant workers turned to OSHA for help. The agency took no enforcement action, and for months failed to inform workers if it would do anything. Such disregard was part of a broader pattern by OSHA to "delay[] … respond[ing] to the dozens of reports of [COVID-19] outbreaks affecting thousands of workers in hundreds of meatpacking facilities across the country." Letter from Sens. Elizabeth

---

[1] *Available at* https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.10.27%20Meatpacking%20Report.Final_.pdf.

Warren & Cory Booker, to Loren Sweatt, Principal Deputy Assistant Sec'y of Lab. 1 (Sept. 22, 2020).[2]

To protect themselves, and their families, neighbors, and co-workers, the Jane Doe Plaintiffs—with Plaintiff Justice at Work serving as their statutorily-authorized representative—attempted to force OSHA to act. *See* J.A. 5 (decision below). They turned to a provision in the OSH Act that workers had not previously needed, as 2020's combination of dire workplace risks and systemic agency inaction was unprecedented in the Act's 50-year history.

Plaintiffs proceeded under a provision providing that when employees face an imminent danger—defined as a risk that could cause death or serious physical harm imminently—and OSHA "arbitrarily or capriciously" fails to work to correct that danger, they or their representative "might bring an action against the Secretary" to "compel the Secretary" to seek to enjoin that danger and obtain "further relief as may be appropriate." 29 U.S.C. § 662(d). As the district court stated, based on this text, "it would appear that [Plaintiffs] [were] entitled to petition" for and obtain

[2] *Available at* https://www.warren.senate.gov/imo/media/doc/Letter%20from%20Senators%20Warren,%20Booker%20to%20OSHA%209-22-20.pdf.

judicial relief, if they could prove the agency improperly failed to act. J.A. 30 (decision below).

Nonetheless, the district court dismissed Plaintiffs' complaint without considering their argument that the agency's failure was arbitrary or capricious. In its view, § 662(d) can only be invoked "where the Secretary has been presented with a finding of imminent danger by an OSHA inspector" and an employee facing an imminent danger can allege the agency "arbitrarily and capriciously rejected the [inspector's] recommendation" that the agency address that danger. J.A. 31. According to the district court, § 662(d) allows employees to challenge the superiors' decision to overrule an inspector, but not an inspector's error in failing to find an imminent danger. *Id.*

The district court's reading has no basis in law. It is inconsistent with the statutory text, the surrounding text, the OSH Act's legislative history, and the statute's purpose. Indeed, the district court largely ignored the tools of statutory interpretation, focusing on courts' dicta concerning § 662(d)—decisions which, when read in full, do not support its outcome. It should be reversed.

In addition to promoting this unsubstantiated (and unsubstantiate-able) interpretation of the statute, Defendants (collectively, "OSHA") also argued below that the case was moot because—approximately six months after Plaintiffs notified

the agency of imminent dangers—OSHA closed its investigation into Maid-Rite, declining to cite the company for its workplace conditions. *E.g.*, Dkt. No. 53. OSHA argued that because the OSH Act limits the agency's power to obtain injunctive relief to stop an imminent danger to the period before the agency makes a formal citation decision, employees' ability to correct agency inaction under § 662(d) must have the same temporal limit.

In case OSHA repeats that argument on appeal, Plaintiffs address it too. OSHA's self-serving interpretation of § 662(d) does not moot this action. An agency's litigation position as to what a statute allows cannot remove a court's ability to interpret that statute and determine if the agency's interpretation is correct. Courts always have jurisdiction to determine their jurisdiction. Moreover, the temporal limit OSHA grafts onto § 662(d) is no more in line with the text than the district court's reading of the statute. Section 662(d) states its remedy is not limited by the agency's powers. It authorizes employees or their representatives to petition the courts to: (1) compel the agency to invoke its powers to enjoin an imminent danger; and (2) obtain "further relief" as may be warranted to mitigate the danger. 29 U.S.C. § 662(d).

The elements and limits of § 662(d) is an issue of "first impression." J.A. 6 (decision below). Thus, it is critically important this Court exercise its jurisdiction

to bring the interpretation of § 662(d) into line with the OSH Act's text and purpose. Both the district court's and OSHA's interpretation will leave workers facing imminent dangers without redress. Prior to the next outbreak—be it of COVID-19 or another disease whose transmissibility can be addressed through workplace modifications—employees are entitled to know they can look to the courts if OSHA again turns a blind eye to their risk of death or serious injury.

V. STATEMENT OF THE CASE.

A. Meatpacking plants and the COVID-19 pandemic.

"Meat processing plants have had some of the highest rates of COVID-19 infections, harming a workforce predominately comprised of immigrants, refugees, and People of Color who are at a higher risk for COVID-19." Letter from Sen. Michael Bennet, to Phyllis Fong, Inspector Gen. of the U.S. Dep't of Agric., & Larry Turner, Acting Inspector Gen. of the U.S. Dep't of Lab. 1 (Aug. 10, 2020)[3]; *see also* House Memorandum, *supra*, at 1. While public reports initially identified "high volumes of coronavirus infections and deaths" at these facilities, recent disclosures to Congress by the largest meatpacking companies reveal infections were almost

[3] *Available at* https://www.bennet.senate.gov/public/_cache/files/c/c/cca307e4-300c-4c4b-af58-a296e4a6cc3f/B0654ACAA53FCC5C9FB8CA24124D817B.bennet-letter-to-ig-re-meat-processing-covid-19-investigation-request.pdf.

three-fold greater than previously reported. House Memorandum, *supra*, at 1-2. The actual number of infections is "likely much worse" still because many companies only disclosed infections identified through onsite testing or self-reporting. *Id* at 2.[4]

As OSHA and the Centers for Disease Control ("CDC") recognized early in the pandemic, the spread of COVID-19 at meatpacking plants is the result of several "[d]istinctive factors" of these workplaces that place their employees at higher risk. OSHA & CDC, *Meat and Poultry Processing Workers and Emp'rs* (updated June 11, 2021)[5]; *see also* J.A. 71-76 ("Compl.") ¶¶ 68-79) (relying on earlier version of same OSHA and CDC guidance). "[M]eat and poultry processing workers often work close to one another on processing lines." OSHA & CDC, *supra*. This is "prolonged closeness," as workers regularly work "10-12 hours per shift." *Id.* "Workers may also be near one another at other times, such as when clocking in or out, during breaks, or in locker/changing rooms." *Id.* Further, the workplace is infected with both "respiratory droplets in the air," and through numerous

---

[4] This Court can and has taken judicial notice of government materials and proceedings, including congressional and agency documents. *Yeboah v. U.S. Dep't of Just.*, 345 F.3d 216, 222 (3d Cir. 2003); *Furnari v. Warden, Allenwood Fed. Corr. Inst.*, 218 F.3d 250, 255 (3d Cir. 2000).

[5] *Available at* https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html.

"contaminated surfaces or objects, such as tools, workstations, or break room tables." *Id.* In addition, there is a "common practice" at these workplaces of workers "sharing transportation such as ride-share vans or shuttle vehicles, car-pools, and public transportation" to and from the worksite, increasing the potential for transmission among the workforce. *Id.*

These factors, among others, create a "pervasive presence of coronavirus infections in meatpacking facilities." House Memorandum, *supra*, at 8. "Coronavirus outbreaks at meatpacking facilities also likely increased the infection rates in the surrounding communities by significant margins." *Id.*

As a result—and because the threat posed by meat processing plants quickly came to fruition, requiring several plants to close—by April 2020, OSHA and CDC issued special guidance to meatpacking facilities. These are one of the few industry-specific guidelines OSHA and CDC promulgated during the pandemic.[6] The guidance recommends:

- **Provide Protective Equipment**: Provide workers masks and face shields.
- **Space Workers**: Alter the layout of facilities, breaktimes, and restroom policies to reduce workers' proximity to one another, and provide "visual cues" to encourage distancing.

---

[6] OSHA industry guidance can be found here: https://www.osha.gov/coronavirus/guidance/industry.

- **Change Workstations**: "[M]odify the alignment of workstations, including along processing lines … so that workers are at least six feet apart in all directions (e.g., side-to-side and when facing one another)[.]"

- **Increase Opportunities for Personal Hygiene**: Increase employees' opportunities to engage in handwashing throughout the day.

- **Alter Incentive and Leave Policies**: Cease incentive policies that reward attendance; discourage sick workers from coming to work.

- **Minimize Employee Rotation**: "[C]ohort[]" workers so they work with the same set of workers across shifts, reducing the number of potential exposures.

OSHA & CDC, *supra*; *see also* J.A. 72-76 (Compl. ¶¶ 69-79) (detailing that the OSHA and CDC guidance at the time of the complaint was the same).

For several of these recommendations, such as altering workstations, the OSHA and CDC guidance observes the recommendations only need to be implemented where "feasible" or "possible." OSHA & CDC, *supra*. But, the guidance notes, feasibility does not turn on whether or not a particular change is consistent with current practices. *Id.* Rather, the guidance states, "[c]hanges in production practices may be necessary in order to maintain appropriate distances among workers." *Id.*; *see also* J.A. 72 (Compl. ¶ 76) (detailing that the OSHA and CDC guidance at the time of the complaint was the same).

B. The conditions at the Maid-Rite plant.

The Jane Doe Plaintiffs' employer, Maid-Rite, refused to implement the OSHA and CDC guidance. By mid-2020, Maid-Rite had only provided workers masks on three occasions. J.A. 175, 183, 189 (Jane Doe I Decl. ¶ 11; Jane Doe II Decl. ¶ 15; Jane Doe III Decl. ¶ 12). Workers were forced to stand shoulder-to-shoulder, sometimes physically touching, because Maid-Rite declined to adjust its existing workstations. J.A. 175-76, 182-83, 189-90 (Jane Doe I Decl. ¶¶ 4, 6, 20; Jane Doe II Decl. ¶¶ 6, 25; Jane Doe III Decl. ¶¶ 5, 23). Certain workstations also positioned employees across from one another, so the employees were face-to-face, separated only by a three-to-four-foot production line. J.A. 176, 182, 189-90 (Jane Doe I Decl. ¶ 20; Jane Doe II Decl. ¶ 9; Jane Doe III Decl. ¶¶ 7, 23). No additional breaks were provided to allow workers to wash their hands or to reduce congestion in the restrooms. J.A. 175-76, 182-84, 189-90 (Jane Doe I Decl. ¶¶ 10, 23; Jane Doe II Decl. ¶¶ 13-14, 28; Jane Doe III Decl. ¶¶ 10-11, 26). Maid-Rite added a new bonus, which was only available to workers who declined to take an absence due to illness. J.A. 176, 183 (Jane Doe I Decl. ¶ 14; Jane Doe II Decl. ¶ 18). It refused to cohort workers, so a constant flow of new individuals was introduced into the plant. J.A. 176, 183, 190 (Jane Doe I Decl. ¶¶ 16-17; Jane Doe II Decl. ¶¶ 20-21; Jane Doe III Decl. ¶¶ 17-18). It even failed to place markings on the floor to indicate proper

social distancing. J.A. 175, 182-84, 189-190 (Jane Doe I Decl. ¶ 9; Jane Doe II Decl. ¶¶ 11, 27; Jane Doe III Decl. ¶¶ 9, 25).

Within months of the start of the pandemic, the Maid-Rite plant experienced COVID-19 outbreaks, causing workers—including two of the Jane Doe complainants—to bring the virus home to their families. J.A. 176, 183-84, 190 (Jane Doe I Decl. ¶ 18; Jane Doe II Decl. ¶ 22, 30; Jane Doe III Decl. ¶ 19). However, Maid-Rite failed to inform close contacts of the infected workers about their exposure. J.A. 176, 183, 190 (Jane Doe I Decl. ¶ 15; Jane Doe II Decl. ¶ 19; Jane Doe III Decl. ¶ 15). By spring 2020, the COVID-19 spread at the Plant was already dire. J.A. 140-41 (OSHA records); J.A. 176, 183 (Jane Doe I Decl. ¶ 18; Jane Doe II Decl. ¶ 22).

A Plant worker—unaffiliated with this action—filed a complaint with OSHA. In that worker's words, "I'm scared to go to work everyday I'm risking my life[.] … [I]t's sad and scary[.] I'm sorry[.]" J.A. 141 (OSHA records).

Other workers unaffiliated with this action confirmed the conditions, and that they remained during the proceedings below. J.A. 196-98, 200-01 (John Doe I Decl. ¶¶ 7, 9, 15-17, 21; John Doe II Decl. ¶¶ 8-13, 15, 17, 19-22).

C. The OSH Act.

i. The standard OSHA process.

Normally, OSHA acts through a lengthy process to first determine if there is a violation of agency standards or the OSH Act's requirements, generate a formal citation, and then enforce its selected remedy. This provides numerous avenues to delay corrective measures, exposing employees to risk.

OSHA only must investigate a workplace if it concludes there are "reasonable grounds" to believe workers are at risk, and then only needs to act "as soon as practicable." 29 U.S.C. § 657(f). Thus, while workers or their representatives can request action by filing a complaint with OSHA, the agency has discretion to determine when and how it will respond, if at all. *Id.* § 657(f).

Assuming the agency chooses to investigate, that process can involve an onsite inspection, testimony, and document productions. 29 U.S.C. § 657(a)-(c).[7] OSHA has six months from the date of the violation to issue a formal citation. *Id.* § 658(c); *see also* 29 C.F.R. § 1903.14.

---

[7] Often, as with these provisions and in § 662, the statute refers to the Secretary of Labor exercising authority under the OSH Act. As the district court recognized, the Secretary's authority is delegated to subordinate agency officials within OSHA. J.A. 5 n.1 (decision below). Hence, Plaintiffs speak of OSHA acting, rather than the Department or Secretary acting.

When OSHA issues a citation, employers can stay its effect by contesting it. *Id.* § 659(a). No employer is required to abate a violation identified by OSHA until the agency's appeals process has been resolved.

If an employer brings a contest, OSHA must initiate a proceeding before the Occupational Safety and Health Review Commission ("OSHRC"), an independent body that adjudicates OSHA citations. *Id.* § 659(c). OSHRC is required to provide the employer a hearing, and only then can it issue an opinion. *Id.* § 659(c). Those hearings occur before Administrative Law Judges. OSHRC, *Performance and Accountability Rep.: FY 2021* 1 (Nov. 15, 2021).[8] Presently, those judge's "performance goals" only request that they resolve most cases within 17 months. *Id.* Executive Summary.

An employer may request review of the Administrative Law Judge's decision by OSHRC, and any single commissioner can designate a case for review. *Id.* 1, 3. However, OSHRC is a three-member body of political appointees subject to Senate confirmation, which must have a quorum of two members to resolve any matter, and a full slate of appointees to issue a ruling when the members are divided, 29 U.S.C.

[8] *Available at* https://www.oshrc.gov/assets/1/6/OSHRC_FY_2021_PAR.pdf.

§ 661(a), (f). Most recently, OSHRC took on average 15 months to resolve a case before it. OSHRC, *supra*, at 4.

Once OSHRC is positioned to issue an opinion and does so, the opinion only takes effect 30 days later. 29 U.S.C. § 659(c). That opinion can be appealed to the relevant court of appeals, where the employer can request a stay of enforcement. *Id.* § 660.

Throughout this process, employees' ability to ensure their own safety is extremely limited. If the agency elects to conduct a "physical inspection" of the workplace, "[a] representative authorized by" the employees at that workplace can "accompany" the OSHA inspector. *Id.* § 657(e). Employees or their representatives can also participate in the hearing before OSHRC and may "file[] a notice" with OSHA stating that the deadline set in a citation to abate a danger "is unreasonable." *Id.* § 659(c). However, OSHA has no obligation to respond to such a notice, nor does the notice alter OSHRC's process that stays an employer's obligation to comply, although OSHA is obligated to tell OSHRC of the employee's objection. 29 C.F.R. § 1903.17(b). Further still, OSHA retains unlimited discretion to settle a matter, at any time, on any basis. *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 6 (1985).

ii. The exception established by § 662.

Recognizing that certain dangers cannot wait years to remedy and, particularly when faced with grave dangers, employees require some ability to protect themselves, Congress provided a carveout to the slow-moving, employer-focused procedures described above, 29 U.S.C. § 662. Where employees face an "imminent danger"—defined as one that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures" above—§ 662(a) provides "[t]he United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment" that create the danger. *Id.* § 662(a). "Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger[.]" *Id*.

Section 662(b) confirms the district court's authority to enter "such petition." *Id.* § 662(b). It also states the district court should use the procedures set forth in Federal Rule of Civil Procedure 65. *Id.* § 662(b). But, it limits the courts' powers so an injunction requested "[u]pon the filing of any such petition" may only remain in force "pending the outcome of an enforcement proceeding pursuant to this chapter,"

and "no temporary restraining order issued without notice" may remain in force for more than five days. *Id.* § 662(b).

Section 662(c) is titled a "Notification" provision and provides no additional remedies. It states, "[w]henever and as soon as an inspector concludes that conditions or practices described in subsection (a) exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought." *Id.* § 662(c).

Section 662(d), the provision at issue, is titled "Failure of Secretary to seek relief; writ of mandamus." *Id.* § 662(d). It states, "[i]f the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary … for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate." *Id.* § 662(d).[9]

D. OSHA failed to respond to imminent dangers at the Maid-Rite plant.

On May 19, 2020—following the large-scale COVID-19 outbreak at the Plant—using the procedures detailed in the OSH Act to initiate an agency response

[9] Section 662 is reprinted in full in the addendum. The omitted language concerns proper venue, which is not in dispute here.

to imminent dangers, Plaintiffs presented a written, signed complaint to OSHA describing the conditions at the Plant and asking the agency to invoke its powers under § 662(a). *See* 29 U.S.C. § 657(f)(1) (stating complaint to OSHA alleging an imminent danger "shall be reduced to writing," "set forth with reasonable particularity the grounds for the notice," and "be signed by the employees or representative"). The complaint underscored Maid-Rite's failure to provide Plant workers adequate face coverings, social distancing, and opportunities for handwashing. J.A. 52-53 (Compl. ¶ 4). Plaintiffs also explained that Maid-Rite incentivized workers to show up to the Plant while sick and had failed to cohort workers or inform them of known COVID-19 exposures. *Id.*

OSHA failed to act. Over the ensuing weeks, Plaintiff Justice at Work sent several follow-up letters to the OSHA Area Office handling the OSHA complaint, including providing sworn statements from the Jane Doe complainants corroborating the unsafe conditions. J.A. 171-91 (Jane Doe Decls.); *see also* J.A. 145 (Justice at Work Decl. ¶ 26). Each of these letters asked what OSHA planned to do to address the imminent danger. J.A. 86-89 (Compl. ¶¶ 115-27); *see also* J.A. 143-45 (Justice at Work Decl.). The Assistant Area Director merely responded that OSHA's investigation was ongoing and could take up to six months. J.A. 88 (Compl. ¶ 123).

E. The proceedings below.

With the imminent dangers unabated, two months after they filed their complaint with OSHA, and with no word from the agency that it intended to act, Plaintiffs filed an action in district court against OSHA under 29 U.S.C. § 662(d). Consistent with the statutory text, Plaintiffs requested an order from the district court compelling OSHA to seek a court order that Maid-Rite abate the imminent dangers at the Plant. J.A. 96-97 (Compl. ¶ 153). Relying on § 662(d)'s provision authorizing "further relief," Plaintiffs also requested additional relief to address the imminent dangers. J.A. 97 (Compl. ¶ 154).

OSHA moved to dismiss, and the Court held a hearing for the parties to "present evidence on whether [OSHA] acted arbitrarily and capriciously in failing to seek an injunction to restrain the [e]mployer practices." J.A. 7 (decision below). As a result, Plaintiffs learned of the agency's response to their letters. The Director of the OSHA Area Office that received Plaintiffs' OSHA complaint testified he had an unwritten rule that the Area Office would never consider the absence of social distancing or masks to constitute an imminent danger. J.A. 214-15 (Hearing Tr. 174:21-175:6). Building on this, upon reviewing Plaintiffs' documents, the Area Office concluded none of Plaintiffs' allegations could lead it to "believe that there was an imminent danger situation at Maid-Rite." J.A. 214 (Hearing Tr. 174:11-15).

Therefore, the Area Office re-classified Plaintiffs' formal written complaint as "non-formal," allowing it to be initially addressed through an exchange of documents between the agency and Maid-Rite. J.A. 153 (OSHA Area Office letter); J.A. 209, 212-213 (Hearing Tr. 79:15-21, 136:8-137:13).

More than seven weeks after Plaintiffs filed their complaint with OSHA, the Area Office decided to conduct an inspection of the Plant. J.A. 217 (Hearing Tr. 189:6-15). That inspection largely confirmed Plaintiffs' allegations.

OSHA's inspector identified that numerous workstations were "2 to 3 feet apart." J.A. 218 (Hearing Tr. 191:8-12). While some workstations were "naturally" set up to permit physical distancing, Maid-Rite had not changed any aspect of the Plant's layout or practices in response to COVID-19. *Id.* Maid-Rite had also not put-up physical barriers between Plant workstations or identified proper physical distancing with markers on the floor. J.A. 219-21 (Hearing Tr. 192:23-193:2, 196:17-21). The inspector further learned that, as of the time of the inspection, Maid-Rite only provided fresh masks to Plant workers "approximately every 2 weeks." J.A. 216 (Hearing Tr. 188:12-22).

These findings were all the more remarkable because the hearing revealed—contrary to OSHA's initial representations to the district court, J.A. 208 (Hearing Tr. 63:7-11)—that the OSHA Area Office had warned Maid-Rite about the upcoming

inspection the day prior, allowing Maid-Rite to direct its employees to change their conduct and create the appearance the facility was closer in line with the OSHA and CDC guidance. J.A. 217 (Hearing Tr. 189:9-15). Precisely to avoid that potential, announcing an inspection before it occurs is normally criminal. 29 C.F.R. § 1903.6(c). The Area Office, however, stated that it needed to provide such notice to protect its inspector from the "imminent danger" of COVID-19 spread in the plant. J.A. 222-23 (Hearing Tr. 197:17-198:17); *see also* 29 C.F.R. § 1903.6(a) ("Advance notice of inspections may not be given, except … [i]n cases of apparent imminent danger" and other inapplicable exceptions).

Despite the factual findings, and the Area Office's determination its own employee faced an "imminent danger" from her walkthrough of the Plant, the Area Office declined to take any immediate action to protect Plant workers. OSHA stated to the district court that no action was warranted following the inspection because OSHA could not identify any "hospitaliz[ations of Plant workers] since May 19," the date that Plaintiffs filed their complaint with OSHA, and no workers had "died since May 19." J.A. 204-05 (Hearing Tr. 35:21-36:6). In other words, offering a different view of an imminent danger than the Area Office officials, these OSHA representatives stated that unless COVID-19 spread was present at the exact moment an inspection happened to occur or "shortly before," an OSHA inspector could not

find that there is an imminent danger from the risk of disease spread. J.A. 206-07 (Hearing Tr. 55:25-56:7).

Subsequently, near the end of its six-month window to issue a citation, but before the district court issued its opinion, OSHA informed the district court it had "concluded its investigation" of Maid-Rite and that OSHA would "not be issuing a citation" of any form against Maid-Rite for its workplace conditions identified in Plaintiffs' complaint and confirmed during the inspection. Dkt. No. 51. Still, OSHA issued a letter to Maid-Rite confirming its Plant workers faced some of the primary dangers alleged by Plaintiffs: "Employees were not social distancing in production areas, putting workers at risk for exposure to SARS-CoV-2," and the Plant had not installed physical barriers between workstations, nor had it placed markers on the floor identifying proper distancing. J.A. 227-28.

OSHA then filed papers suggesting that its letter to Maid-Rite mooted the action. Dkt. No. 53. It argued that because the ability of the agency to obtain an injunction against an imminent danger under § 662(a)-(b) is limited to the period before "the outcome of an enforcement proceeding," 29 U.S.C. § 662(b), and because the agency had now formally decided not to take enforcement action, the district court lacked authority to consider Plaintiffs' § 662(d) complaint. Dkt. No. 53, at 9-10. This was the case, the agency posited, even though § 662(d) authorizes

employees to seek, and courts to provide, "further relief" beyond forcing the agency to proceed under § 662(a). 29 U.S.C. § 662(d).

Plaintiffs responded that they had requested OSHA reconsider its determination, keeping the issues live, and that the case fell within the well-established exception to mootness for events capable of repetition yet evading review. Dkt. Nos. 52, 56. They submitted additional declarations establishing that the conditions at the Maid-Rite plant remained essentially the same as OSHA's inspector had witnessed and Plaintiffs had described in their original complaint to OSHA. J.A. 229-31.

Plaintiffs subsequently informed the Court that Jane Doe III and Justice at Work had filed another complaint with OSHA alleging imminent dangers from conditions at the Plant. *See* J.A. 234-38. OSHA did not enter any response to this second imminent danger complaint into the district court record. Following the close of the case below, OSHA notified Justice at Work it would not be citing Maid-Rite in response to the second imminent danger complaint.

F. The decision on appeal.

A month after Plaintiffs notified the district court of the second OSHA complaint, still without OSHA having taken any action against Maid-Rite, the district court issued its opinion. The district court concluded that OSHA's decision

to not cite Maid-Rite in response to Plaintiffs' May 2020 OSHA complaint did not moot the § 662(d) proceedings, but it dismissed the action because it believed Plaintiffs were not entitled to bring their claim.

Starting with OSHA's suggestion of mootness, the district court explained a central dispute in this action was whether § 662(d) allows employees to "petition a court for relief whenever the Secretary arbitrarily and capriciously fails to take action under the Act" to cure an imminent danger. J.A. 13. In other words, despite OSHA's determination that it did not need to address the conditions at the Maid-Rite plant, "[i]t remains true that if Plaintiffs' reading of [§ 662(d)] is correct, they are still able to obtain relief regardless" of OSHA's decision not to act. J.A. 14. If Plaintiffs' reading is accurate, "Plaintiffs would be able to petition a court for relief whenever the Secretary arbitrarily and capriciously fails to take action in response to an imminent danger, regardless of whether OSHA believes action should be taken." *Id.* Thus, since OSHA's decision it would not act does "not alter the court's ability to grant Plaintiffs the relief which they seek, mootness does not apply." *Id*.[10]

[10] Because the court concluded the case was live, it rejected Plaintiffs' argument that the case fell within the capable-of-repetition-yet-evading-review exception to mootness. J.A. 12.

However, the district court went on, § 662(d) does not authorize Plaintiffs to seek their requested relief. It read § 662(d) to only authorize employees to seek judicial intervention if "the Secretary has [] received a recommendation to take legal action" under § 662(a) "from an OSHA inspector," and a superior at the agency arbitrarily or capriciously "reject[s] [that] recommendation." J.A. 6; *see also id.* at 31 (same). According to the district court, § 662(d) solely allows workers or their representative to challenge the agency's decision to overrule an inspector. J.A. 31.

The district court acknowledged that its reading is inconsistent with the text of § 662(d). "If the court were to read Section 13(d) [§ 662(d)] in isolation, it would appear that employees are entitled to petition a court anytime that they feel they face imminent danger and at least make the argument that the Secretary's lack of prompt action is arbitrary and capricious." J.A. 30-31.

However, the district court continued, the right referenced in § 662(d) is triggered when the agency fails to "seek relief *under this section*," which the court interpreted to mean it needed to read the other subsections of § 662 to understand § 662(d)'s scope. J.A. 31 (emphasis in original). According to the district court, subsections § 662(a) and (b) establish that the § 662 "process begins when an OSHA inspector makes a finding of imminent danger and recommends that the Secretary seek court intervention." J.A. 31-32. It then narrowed this reading, stating the

requirement that an inspector determine there is an imminent danger only ties the hands of employees acting under § 662(d), not the agency acting under § 662(a), as "nothing in the Act prevents an OSHA inspector's superiors from determining that an imminent danger exists" and proceeding under § 662(a). J.A. 32. Yet, because the court thought the § 662 "process" for proceedings under § 662(d) begins with an inspector's finding of an imminent danger, § 662(d) could only be invoked if the inspector's recommendation that OSHA employ § 662(a) is rejected. J.A. 31-32. The district court did not reconcile this position with its recognition that neither § 662(a) nor (b) are conditioned on an inspector's recommendation or even mention an inspector or inspection.

Instead, the court indicated there is "good reason" for Congress to have limited § 662(d) in the way the district court described. J.A. 27. Such a system requires a "trained" official to confirm the workers' allegations, which—despite this case being the first one ever filed under § 662(d)—would avoid an "avalanche" of meritless cases. J.A. 27.

While recognizing "no court has ever confronted a complaint in mandamus under Section 13(d) [§ 662(d)]," the district court stated the "sparse" case law that mentions § 662 as part of analyzing other claims further supported its reading. J.A. 32. The court pointed to *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 720 (6th Cir.

1979), *aff'd sub nom*. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), because that case described § 662 "seriately," which the district court took as corroboration of its view that § 662 lays out a "process." *See* J.A. 32 & n.11. In other words, the court believed that because *Whirlpool* cited the agency's ability to seek court review under § 662(a)-(b), and then the inspector's obligation to provide notice of its determination there was an imminent danger under § 662(c), before describing workers' right to sue under § 662(d), *Whirlpool* meant to suggest a worker could only invoke § 662(d) if the notice described in § 662(c) had already occurred, and still the agency had not sought relief. *Id.*

The court also relied on *Marshall v. Daniel Construction Co*., 563 F.2d 707, 711 (5th Cir. 1977). The district court noted that in explaining how § 662 can operate, *Daniel Construction* wrote § 662(d) allows workers to petition for a writ of mandamus "'against the Secretary if he arbitrarily or capriciously fails to seek the injunctive *relief requested by the OSHA inspector*.'" *See* J.A. 32-33 (quoting *Daniel Constr.*, 563 F.2d at 711) (emphasis in original). The district court took this to mean § 662(d) could only be invoked in this circumstance, despite acknowledging *Daniel Construction* has nothing to do with the scope of § 662(d). *See* J.A. 33 & n.12.

The district court similarly relied on inference to reject Plaintiffs' contention that more recent authority is in tension with its analysis. In *Rural Community*

Workers Alliance v. Smithfield Foods, Inc., a court refused to allow workers to proceed with state law torts authorizing courts to enjoin unsafe working conditions, explaining such enforcement actions should be left to OSHA under the primary jurisdiction doctrine. 459 F. Supp. 3d 1228, 1241 (W.D. Mo. 2020). The *Smithfield Foods* court stated such a rule would not disadvantage workers' ability to protect themselves because "'if OSHA fails to act quickly, [employees] have a remedy: they may receive emergency relief through OSHA's statutory framework.'" J.A. 33-34 (quoting *Smithfield Foods*, 459 F. Supp. 3d at 1241, in turn citing 29 U.S.C. § 662(d)). The district court here stated this did not suggest employees could proceed under § 662(d) to protect themselves if OSHA fails to act. Instead, it stated that because *Smithfield Foods* recognized "'there may be some delay before Plaintiffs can invoke this procedure,'" it implied workers would have to wait for an inspector to identify an imminent danger and be overruled by a superior before they could proceed under § 662(d). J.A. 34 (quoting *Smithfield Foods*, 459 F. Supp. 3d at 1241)).

Therefore, the district court concluded "Plaintiffs' [§ 662(d)] Complaint is not properly before this court as no OSHA inspector has found that [the Maid-Rite plant] presents an imminent danger to its employees and, consequently, no recommendation had been made to the Secretary to take action" under § 662(a). J.A.

34. Because, in the district court's view, courts can only entertain employees' requests for relief under § 662(d) "when the specific aforementioned actions have been taken by the OSHA inspector" and the inspector's superior, "and because the OSHA inspector and the Secretary have not taken those actions here, Plaintiffs have failed to state a 13(d) [§ 662(d)] claim and dismissal of the Complaint is required." *Id.*

Nonetheless, the district court did acknowledge that "Plaintiffs have raised some troubling claims." J.A. 35. In particular, the court had "serious concerns about whether OSHA is in fact fulfilling its duty to ensure workers' rights to safe and healthful working conditions, particularly given the nature of the work Plaintiffs are employed to do." J.A. 36-37 (citation omitted).

Moreover, the court recognized that its ruling left employees without an "apparent remedy … in the event that an OSHA inspector declines to find imminent danger or if the investigation takes an excessive length of time before a finding of imminent danger is made." J.A. 37. "Plaintiffs' valid concerns about continuing to be subject to the apparent imminent danger in the interim are well taken." *Id.* But, the district court concluded, "Plaintiffs' remedy lies with the Legislature," because the court read § 662(d) to prohibit judicial intervention where workers face the risk of death or serious injury, but a single agency inspector decides otherwise. *Id.*

VI. SUMMARY OF ARGUMENT.

Although § 662(d) has not been subject to much review, the legal analysis and proper outcome here are straightforward. This Court has jurisdiction to determine whether Plaintiffs can proceed because, as the district court below explained, the dispute is live. Where the parties contest the elements of a cause of action that authorizes access to court, one interpretation of which allows the case to proceed while another renders the authorizing statute inapplicable, courts can always resolve that dispute. Courts have jurisdiction to determine their jurisdiction. Plaintiffs contend § 662(d) provides for judicial intervention when OSHA arbitrarily or capriciously fails to act in response to an imminent danger. OSHA argued below that § 662(d) actions are conditioned on an inspector finding an imminent danger and can only be brought in advance of OSHA making a formal citation decision. OSHA cannot simply assert its interpretation is correct, act on that interpretation, and claim its conduct has mooted the case. It must prove its reading is correct. Further, even were this Court to disagree that the case is live, this case falls cleanly within the capable-of-repetition-yet-evading-review exception to mootness, allowing this Court to reach the merits.

On the merits, every method of statutory interpretation favors Plaintiffs. Section 662(d)'s plain language and the surrounding statutory text both support

Plaintiffs' reading and are inconsistent with that of the lower court and OSHA. Plaintiffs' reading is also the only one that does not lead to absurd results. To the extent the Court moves beyond the text, the legislative history and statutory purpose both counsel in favor of Plaintiffs' analysis and require that any ambiguity be resolved in their favor—a canon of construction ignored entirely below. Finally, if, like the lower court, this Court turns to secondary authority—despite this not being a standard tool of construction—the vast weight of authority supports Plaintiffs.

The implications of this case for workers are extraordinary. It will resolve whether the OSH Act provides workers any mechanism to protect themselves from the most extreme dangers they face. However, the Court need not break new ground, nor establish any new principles to reverse the district court's interpretation and adopt that of Plaintiffs.

VII. ARGUMENT.

A. This case presents a live controversy or falls within an exception to mootness, allowing the Court to reach the merits.

i. Standard of review.

This Court's "standard of review concerning questions of [its] own jurisdiction, including whether a claim has been rendered moot, is plenary." *Abreu v. Superintendent Smithfield SCI*, 971 F.3d 403, 405 (3d Cir. 2020).

* * *

Logic dictates OSHA's decision not to cite Maid-Rite—despite acknowledging Maid-Rite had failed to take basic precautions—does not moot the question of whether § 662(d) allows employees to challenge OSHA's arbitrary or capricious failure to protect workers, as Plaintiffs contend. Moreover, even if this Court were to disagree, this case fits comfortably within the well-known exception to mootness for disputes that are "capable of repetition, yet evad[e] review." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

ii. This case presents a live controversy.

"[A] federal court always has jurisdiction to determine its own jurisdiction." *Brownback v. King*, 141 S. Ct. 740, 750 (2021). Therefore, in considering the Federal Tort Claims Act, where the statute provides jurisdiction only over "claims if they are actionable," the Supreme Court explained it is proper to analyze the "elements" of the claim as part of assessing jurisdiction. *Id.* at 746, 749. In other words, it authorized lower courts to issue decisions on the merits, despite that such a ruling could cause a court to lose "subject-matter jurisdiction," because the failure to state a claim means the case does not fall within the Act's waiver of sovereign immunity. *Id.* at 749. "[E]ven though [such a] ruling in effect deprive[s] the court of jurisdiction," it properly "passe[s] on the substance" of the claim. *Id.* at 749-50. Where a purported jurisdictional dispute concerns the scope of a cause of action,

courts must be able to assess what is needed to state a claim under the statute, and whether those elements are met, prior to determining jurisdiction. Put simply, where the same questions bear on "subject-matter jurisdiction" and "the merits or the remedy … the court may—indeed, must—address these questions at the outset." *Sisney v. Kaemingk*, 15 F.4th 1181, 1195 n.4 (8th Cir. 2021) (citing *Brownback*, 141 S. Ct. at 749-50, among others).

This case is controlled by *Brownback*. Below, OSHA characterized the interpretive dispute as jurisdictional. *E.g.*, Dkt. No. 46, at 2. The parties disagree regarding what is necessary to state a claim that authorizes employees to bring "an action against the Secretary" under 29 U.S.C. § 662(d). Plaintiffs contend § 662(d) authorizes employees to seek relief if OSHA arbitrarily or capriciously fails to use its own powers to prevent an imminent danger. Therefore, the agency's decision not to cite Maid-Rite, in Plaintiffs' view, is merely part and parcel of the agency's pattern of failing to seek relief that justifies proceeding under § 662(d). OSHA argues that Plaintiffs' rights under § 662(d) are narrower, either because an inspector must first find an imminent danger (as it initially argued), or because it can cut off employees' ability to seek relief under § 662(d) by declining to cite and in turn ending OSHA's ability to seek relief under § 662(a) (as it suggested in its mootness papers). The parties are engaged in a live controversy over the elements. By

resolving that controversy, the Court will resolve its ability to hear the claim. That controversy cannot be defeated by OSHA's claim of mootness.

iii. This case also presents an issue capable of repetition yet evading review.

Even were the Court to disagree that the case is live, the Court should decide the merits because the issues are capable of repetition yet evading review. A dispute falls within this exception to mootness if: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life,* 551 U.S. at 462.

Assuming for the purposes of this argument that OSHA is correct, and its inaction has mooted Plaintiffs' ability to invoke § 662(d), the period to adjudicate a § 662(d) action would at most be six months. While an OSHA inspector could decline to find an imminent danger or OSHA could declare it will not cite an employer at any time prior to six months, OSHA must decide what action to take within six months. 29 U.S.C. § 658(c); *see also* 29 C.F.R. § 1903.14(a).

Six months is too short to fully litigate a matter. *Wis. Right to Life,* 551 U.S. at 462 (emphasizing the issue was capable of repetition yet evaded review because it took more than four years to litigate the matter to that point); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 (3d Cir. 2003) ("election season" is too short a period

to fully litigate a case); *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1213-14 (6th Cir. 1995) (an administrative decision six months before an election provided insufficient opportunity to litigate case). Indeed, this case required eight months for the district court to reach a decision on the motion to dismiss, after conducting an expedited hearing.

Turning to the second prong of the capable-of-repetition-yet-evading-review exception, it is reasonable Plaintiffs could suffer from OSHA's disregard again, so they are entitled to know when they can invoke § 662(d)'s protection. To be clear, the second element of the exception does not require the Court to expect "repetition of every 'legally relevant' characteristic" in a case. *Wis. Right to Life*, 551 U.S. at 463; *see also Graveline v. Benson*, 992 F.3d 524, 534 (6th Cir. 2021) ("the Supreme Court did not adopt a strict 'same plaintiff same facts' requirement" in *Wisconsin Right to Life*). Rather, if "materially similar" circumstances are reasonably likely to present themselves again to similarly situated people, courts should adjudicate the issue. *Wis. Right to Life*, 551 U.S. at 463. For instance, the fact that the same statute challenged in an election case would have "applied in future elections" to third-party candidates like the plaintiffs was sufficient to bring a case within the capable-of-repetition exception. *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). Likewise, the exception applies to claims by workers challenging union dues because "similarly

situated" workers would be subject to equivalent deductions in the future, even if the specific deductions at issue had stopped. *Belgau v. Inslee*, 975 F.3d 940, 949–50 (9th Cir. 2020).

Given past instances of OSHA overlooking dangerous workplace conditions, all workers—and all meatpacking workers especially—face the reasonable prospect that OSHA's future disregard could require they invoke § 662(d). This is especially true of Maid-Rite's workers and these worker Plaintiffs. The Jane Doe Plaintiffs are longtime meatpacking workers, J.A. 175, 182 (Jane Doe I Decl. ¶ 1; Jane Doe II Decl. ¶ 1), who continue to work in Maid-Rite's facilities that have "distinctive factors" exposing them to airborne diseases like COVID-19. OSHA & CDC, *supra*. Moreover, OSHA found that the conditions these Plaintiffs complained of continue to exist at the Plant, exposing all workers to the dangers of COVID-19 or other respiratory illnesses that will develop, although OSHA would not act. J.A. 227-28. Jane Doe III's most recent OSHA complaint confirms the same, J.A. 235-38, and OSHA refused to act in response. Therefore, these specific Plaintiffs or materially similar ones are likely to face identical questions regarding their rights to compel OSHA to act in the future.

This Court has recognized the importance of providing judicial guidance, even in moot cases. Where "a finding that this case is moot would essentially doom all

challenges," this Court instructed lower courts to find an exception to mootness applies. *Belitskus*, 343 F.3d at 648 n.11. Here, the case is not moot because the court must resolve the dispute among the parties prior to resolving its jurisdiction. But, even were the Court to disagree, if these Plaintiffs cannot adjudicate the meaning of § 662(d) now, no worker could. As a result, they and every other worker at the Maid-Rite plant, in other meatpacking plants, and in all dangerous workplaces will remain ignorant of their rights. Plaintiffs here, and those facing materially similar dangers, require a decision on the meaning of § 662(d) to know if and how they can protect themselves against COVID-19 and the future diseases they will be exposed to in their workplaces. Thus, this Court should proceed to analyze the scope of § 662(d).

B. Plaintiffs can proceed under § 662(d) when OSHA arbitrarily or capriciously fails to act against an imminent danger.

i. Standard of review.

The meaning of § 662(d) is a question of statutory interpretation where this Court also applies "a plenary standard of review." *Del. Cty., Pa. v. Fed. Hous. Fin. Agency*, 747 F.3d 215, 220 (3d Cir. 2014). In doing so, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there," and give effect to that text. *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010). While the text at issue is the primary focus, the court may also "consider other parts" of the statute to ensure its "interpretation" of the text "harmonizes with"

the statute as a whole. *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 495 (3d Cir. 2003). Where any ambiguity remains, courts turn to the "statutory purpose or legislative history." *In re Phila. Newspapers, LLC*, 599 F.3d at 304.

* * *

Applying any or all of these rules, and also looking to commentary on § 662(d) on which the district court relied, the decision below was error. Section 662(d) allows employees to bring an action whenever OSHA arbitrarily or capriciously fails to act in response to an imminent danger. It does not contain an unwritten requirement that employees can only proceed if an OSHA inspector first determines there is an imminent danger warranting action under § 662(a) and OSHA overrules that determination. Nor is its remedy limited to the six-month window before OSHA decides whether to issue a citation, as the agency alternatively argued. Thus, the lower court must be reversed on the merits.

ii. Section 662(d) unambiguously provides workers a cause of action to stop an imminent danger when OSHA has arbitrarily or capriciously failed to act, without any other prerequisites.

"'[T]he cardinal canon of statutory interpretation [is] that a court must begin with the statutory language.'" *Del. Cty*, 747 F.3d at 221 (quoting *In re Phila. Newspapers, LLC*, 599 F.3d at 304). "When that meaning is plain, [the courts'] 'sole function ... —at least where the disposition required by the text is not absurd—is to

enforce [the statute] according to its terms.'" *Id.* (quoting *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 302 (3d Cir. 2011)) (ellipsis and second brackets in original); *see also Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (same).

The language of § 662(d) is straightforward, providing Plaintiffs their cause of action. It states:

> If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary in the United States district court for the district in which the imminent danger is alleged to exist or the employer has its principal office, or for the District of Columbia, for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate.

29 U.S.C. § 662(d). It provides "any employee" facing an imminent danger may "bring an action" under § 662(d) against the agency to protect affected workers, by requesting the court compel the agency to act under § 662(a) and that it provide "further relief." *Id.* § 662(d). The only precondition is that the agency's failure to act under "this section," § 662(a), must be "arbitrar[y] or capricious[]." *Id.* § 662(d).

Contrary to the district court's interpretation, nothing defines the relevant failure as the agency's erroneous decision to overrule an inspector's recommendation that it should act. OSHA could have failed in that way. But it also could have failed by all agency personnel unreasonably determining there was no imminent danger. The latter is what happened here, including when the Area

Director declared that failing to distance workers or provide masks in a workplace could not produce an imminent danger, a statement incongruous with OSHA's own guidance; and when the agency inspector decided that Maid-Rite workers did not face an imminent danger, despite believing she faced one herself by visiting the Plant a single time, and despite finding workers were not spaced six-feet apart on production lines and were only provided masks twice a month. The text of § 662(d) allows workers to seek relief based on either of these agency failures.

To support its reading that the agency must overrule an inspector's recommendation that the agency should act under § 662(a) before a § 662(d) claim ripens, the district court stated, "the court cannot review the Secretary's decision for arbitrariness or capriciousness where there has been no Secretarial decision." J.A. 34-35 (decision below). This confirms that the district court's interpretation is unmoored from the text. Section 662(d) does not require a court to review an agency decision. Rather, it is conditioned on the agency's failure "to seek relief," something that can occur because of the absence of a decision as much as formal decision making. 29 U.S.C. § 662(d).

OSHA's suggestion that § 662(d) is limited by § 662(b)'s language that the agency can only obtain an injunction "pending the outcome of an enforcement proceeding pursuant to this chapter," 29 U.S.C. § 662(b), is no more grounded.

Section 662(d) expressly anticipates that workers might need to seek relief beyond that authorized by § 662(a)-(b), authorizing employees to also "bring an action" for "such further relief as may be appropriate" to correct the imminent danger. 29 U.S.C. § 662(d).

The statute's use of the word "and" to link the two types of relief it authorizes under § 662(d)—compelling the agency to act under § 662(a) and further relief—shows they are two "independent ideas" that do not need to both be obtainable. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011); *see also Marcella v. Brandywine Hosp.,* 47 F.3d 618, 624 (3d Cir. 1995) (if a person could sue for "garnishment and execution, prejudgment interest, costs, and civil penalties" any or all of those remedies are available (citations omitted)); *Rux v. Republic of Sudan*, 410 F. App'x 581, 584 (4th Cir. 2011) (unpublished) (statute providing for "economic damages, solatium, pain and suffering, and punitive damages" is authorizing each of those forms of relief). Thus, any limits on forcing the agency to act under § 662(a)-(b) do not prevent employees' ability to obtain further relief under § 662(d).

Plaintiffs' reading is also the only one that does not lead to absurd results. *Del. Cty.*, 747 F.3d at 221; *see also Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting argument because it "would produce an absurd and unjust result which

Congress could not have intended"). With Plaintiffs' reading, the statute provides employees a method for redress where the agency failed to act in the face of extreme risks. Such a claim can be proven through readily accessible evidence, the conditions at the worksite and the absence of agency action, which will show the failure to act was arbitrary or capricious.

OSHA's view that its decision not to issue a citation limits § 662(d) would mean that § 662(d) could not be used when it is most needed: when the agency has formally overlooked an imminent danger. Moreover, OSHA's argument amounts to the claim that the normal citation process will remedy any imminent dangers, but § 662 exists because Congress recognized that imminent dangers require remedies outside the normal citation process.

The district court's reading that an inspector's recommendation that the agency act under § 662(a) is necessary for employees to invoke § 662(d) would lead to an even more convoluted outcome. Under the district court's reasoning, any single OSHA inspector's incorrect determination that workers did not face an imminent danger would leave workers without recourse, regardless of what other OSHA officials might think. There is no "formal appeals process" to challenge the inspector's determination. J.A. 210-11 (Hearing Tr. 88:18-89:1).

Moreover, employees would be unable to prove the narrow § 662(d) claim the district court authorized. In its view, what is under review is internal agency decision making. The failure that employees must show is arbitrary or capricious is a failure to follow the inspector's recommendation. J.A. 31 (decision below) (Section 662(d) "affords employees relief only in those instances where the Secretary has … arbitrarily and capriciously rejected the [inspector's] recommendation[.]"). However, nothing in the statute requires the agency to even keep records that would document this decision making. *Compare* 29 U.S.C. § 657(f)(1) (requiring the agency to maintain records connected with the decision of whether to inspect an imminent danger), *with id.* § 662 (creating no such requirement for decisions not to seek injunctive relief to restrain an imminent danger). Further still, OSHA has successfully argued in this circuit that its "intra-agency documents reflecting [its] decision to sue" are protected by privilege. *Acosta v. Fairmount Foundry, Inc.*, No. CV. 17-4302, 2019 WL 196543, at *4 (E.D. Pa. Jan. 14, 2019).

The district court's interpretation would also lead to prolonged delay. Rather than employees having a cause of action once they believe the agency has failed to reasonably respond to an imminent danger under § 662(a), employees would have been informed of the inspector's positive recommendation under § 662(c), expect agency action, and then must wait some indeterminate and undefined period for the

inspector to be overruled. Only then could employees proceed. Throughout this entire period, culminating in agency inaction, employees would be exposed to the risk of serious illness or death.

As the district court itself recognized, under the language of § 662(d), employees can proceed whenever the agency arbitrarily or capriciously fails to act. J.A. 30-31 (decision below). Nothing in the text of § 662(d) provides for a narrower construction.

iii. The remainder of the OSH Act is consistent with Plaintiffs' reading of § 662(d).

The district court claimed its reading of § 662(d) was motivated by the surrounding text. J.A. 31-32 (decision below). However, a more fulsome review of the OSH Act demonstrates only Plaintiffs have successfully "harmonize[d]" § 662(d) with the statute as a whole. *Bonneville Int'l Corp.*, 347 F.3d at 495.

A "familiar principle of statutory construction" teaches that when Congress burdens a duty or entitlement in one section, and does not do so in a nearby section, "[a] negative inference may be drawn from the exclusion of the language." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). That is, if one provision has a limit and a nearby one does not, the limit should not be read into the broader provision. *Catalyst Pharms., Inc. v. Becerra*, 14 F.4th 1299, 1309 (11th Cir. 2021) ("We must presume

that Congress acts intentionally when it omits language included elsewhere in the same statute[.]").

For example, *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), considered a provision of the Veterans' Reemployment Rights Act that was "free of any express conditions." *Id.* at 218. The employer argued the section, which allowed employees to request a leave of absence to serve in the armed forces, implicitly contained a requirement that the length of leave be reasonable. *See id*. at 219. The Court called the argument "pallid in the light of [the] textual difference[s]" in the statute. *Id.* at 220. While the challenged provision contained no "equivocation" about the employee's right to request leave, "other subsections … expressly limit the period of their protection." *Id.* "Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, [the Court] infer[red] that the simplicity of [the section at issue] was deliberate[.]" *Id.* at 220-21.

The exact same approach establishes that § 662(d)'s cause of action is not implicitly limited to instances where an inspector finds an imminent danger and is overruled. In § 658(a) and § 659(a), Congress detailed the agency's ability to issue citations and spelled out that its authority was limited to instances "upon inspection or investigation" and "after an inspection or investigation occurred," respectively. 29 U.S.C. §§ 658(a), 659(a). In another provision, the Act limits the agency's ability

to issue variances from its rules to circumstances "after opportunity for an inspection." 29 U.S.C. § 655(d). In these neighboring provisions, Congress showed how it limits powers under the Act based on an inspection. Section 662(d) contains no such language, and thus the prerequisite of an inspection—let alone internal agency disagreements regarding the inspector's assessment—should not be read into the provision.

Likewise, when the OSH Act limits remedies, particularly judicial remedies, it makes that limit explicit, undermining OSHA's suggestion § 662(d) must be narrowed due to an implicit relationship between § 662(d) and § 662(a)-(b)—and thus employees can only act if the agency can act. *E.g.*, 29 U.S.C. § 658(c) ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation."); *id.* § 659(a) ("If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment … the citation and the assessment, as proposed, shall be deemed a final order[.]"). Conversely, the OSH Act contains another provision that, like § 662(d), authorizes one Act-specific remedy, followed by a more capacious category of judicial relief, which plainly communicates the remedies are *not* limited by OSHA's powers. Section 660(b) authorizes contempt proceedings that can "assess the penalties

provided in section 666 … in addition to [] any other available remedies." 29 U.S.C. § 660(b). Thus, § 662(d), which contains none of the express limits of § 658(c) or § 659(a), but like § 660(b) provides for "further" judicial "relief" beyond what OSHA can obtain under § 662(a), should be read to mean what it says and not prevent employee actions after OSHA's enforcement proceeding has ended.

a. The district court misread the surrounding text it examined.

The district court failed to look at the neighboring sections at all, and instead claimed that, when read in its entirety, § 662 lays out a sequential "process" that shows an inspector must conclude there is an imminent danger and be overruled before § 662(d) can be invoked. J.A. 31-32 (decision below); *see also* J.A. 32 n.11 (emphasizing that § 662 should be read "seriately"). Of course, as noted above, nothing in any provision of § 662 states an inspector must conclude there is an imminent danger. Section 662(d) speaks of the agency failing to act, and § 662(a) provides the agency a cause of action whenever and however it determines a "danger exists." The other provisions lay out the courts' procedures and provide for notice to employees and employers. 29 U.S.C. § 662(b)-(c).

Overlooking that textual problem, the district court also is simply wrong that the subsections take the reader through an ordered "process." The section contains no ordering words like "first," "second," "third," or "first," "next," or "finally." Nor

does it include a sequence of contingencies like "Upon Y, then Z" or "After X, then Y," as Congress did when it wanted to condition activities upon an inspection in 29 U.S.C. § 655(d), § 658(a) and § 659(a).

Further, leaving aside those additional textual problems, § 662 does not proceed in the order the district court claims, or in any temporal order. An inspector is first (and only) mentioned in § 662(c), the "Notification" provision, which states if the inspector concludes there is an imminent danger warranting judicial intervention "he shall inform the affected employees and employers." 29 U.S.C. § 662(c). Assuming such language is sufficient to establish § 662 presents a "process" beginning with an inspection, a truly ordered statute would proceed (c), (a), (b), (d)—the inspection, followed by the agency's ability to seek judicial intervention, followed by employees' right to seek judicial review. The actual (a), (b), (c), (d) order demonstrates each subsection discusses the rights, roles, and responsibilities of a different actor. The section as a whole does not reflect any sort of temporal sequence.

At bottom, because the text of § 662(d) is abundantly clear, this Court could decide in Plaintiffs' favor without these additional textual sources. *Del. Cty.*, 747 F.3d at 221. But when the broader OSH Act is considered, it only confirms § 662(d)

provides a right for employees to seek judicial intervention when OSHA arbitrarily or capriciously fails to act.

iv. The legislative history and statutory purpose is consistent with Plaintiffs' plain-text reading of § 662(d).

"Although reliance on legislative history is unnecessary in light of the statute's unambiguous language," the OSH Act's purpose further supports Plaintiffs. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010). This is particularly true as the Supreme Court and this Court have explained that where statutes have a remedial purpose—as is the case with the OSH Act—any ambiguities should be resolved in favor of the beneficiaries, here the employees. *E.g.*, *King*, 502 U.S. at 221 n.9 (applying "canon" that "provisions for benefits" of certain people "are to be construed in the beneficiaries' favor" (citation omitted)); *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 367 (3d Cir. 2015) ("As remedial legislation, the [Fair Debt Collection Practices] Act is construed broadly to effectuate those purposes.").

Congress' stated goal with the OSH Act was to ensure safe and healthy working conditions, especially by empowering workers to ensure their own safety. In the Act, "Congress declare[d] to be its purpose and policy" "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," including by "encouraging …

employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment." 29 U.S.C. § 651(b).

Specifically referencing "the legislative provisions authorizing prompt judicial action" to protect employees from imminent dangers, the Supreme Court stated the intent of those provisions was "to give employees full protection in most situations from the risk of injury or death resulting from an imminently dangerous condition." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10 (1980). They also reflect that Congress did not want agency officials to have unilateral authority to order employers to take immediate remedial action. Congressmembers insisted on "judicial safeguards" before any orders could be implemented. *Id.* at 21. Congress believed this necessary to check the power of the Executive and ensure OSHA would remain "neutral [] in labor-management relations." *Id.*

This background supports reading § 662(d) as providing employees a right to seek judicial assistance whenever OSHA arbitrarily or capriciously fails to act in response to an imminent danger. That is the only reading that effectuates Congress' goal to provide "full protection" to workers and "encourag[e]" employee involvement in workplace safety. 29 U.S.C. § 651(b). Further, Plaintiffs' reading ensures that employees can turn to a neutral arbiter for their most pressing safety concerns, insulating the agency against blowback for inaction, as Congress desired.

The district court's and OSHA's readings, in contrast, allow erroneous agency determinations to expose employees to harm and prevent judicial intervention.

Even were the Court to conclude the text and history leaves some room for ambiguity, because 29 U.S.C. § 651 and the legislative history are explicit that the Act provides remedies for workers, any ambiguity must be resolved in favor of Plaintiffs' broader reading of § 662(d). *King*, 502 U.S. at 221 n.9; *Evankavitch*, 793 F.3d at 367. Neither a single inspector's mistaken conclusion nor a systemic agency error should leave workers without any recourse, which is precisely why Congress enacted § 662(d).

v. Judicial decisions and scholarly commentary support Plaintiffs' plain-text reading of § 662(d).

While commentary is not one of the standard tools of statutory construction, the district court relied heavily on its conclusion that dicta in judicial decisions was consistent with its reading of § 662(d). J.A. 32-33 & nn.11-12 (decision below). Should this Court turn to such sources, they are inconsistent with the district court's approach. Not only did the district court overlook substantial authority that omits any requirement an inspector first find an imminent danger, but it also misstated the authority it relied on.

Indeed, literature analyzing § 662(d) states the provision provides employees a right to judicial intervention whenever OSHA arbitrarily or capriciously fails to

protect them from an imminent danger, empowering employees to obtain a court order forcing OSHA's hand, be it through § 662(a) or other relief. In one of these commentators' words, "[i]f the Secretary of Labor, through OSHA, fails to act on a complaint, the individual employee may bring an action for a writ of mandamus to compel the Secretary to act." Larry C. Backer, *Refusals of Hazardous Work Assignments: A Proposal for A Uniform Standard*, 81 Colum. L. Rev. 544, 580 n.99 (1981). Likewise, "[i]f OSHA's inaction [in an imminent danger situation] amounts to 'arbitrary and capricious' conduct, the employee may attempt to secure a writ of mandamus from the court compelling OSHA to take action against the imminent danger." 15 Emp. Coord. Workplace Safety § 9:39 (West 2022).

Two opinions, including one from this circuit, are similar and go entirely unmentioned by the district court—although like the district court's case law these opinions do not directly consider a § 662(d) complaint. In *Scott v. Sysco Food Servs. of Metro N.Y., L.L.C.*, the court explained that § 662(d) provides workers "an avenue for relief" against the agency when any part of OSHA has wrongly "dismissed" workers' alleged concerns. No. CIV.A. 07-3656(SRC), 2007 WL 3170121, at *5 (D.N.J. Oct. 26, 2007). *Marshall v. Klug & Smith Co.* explains § 662(d) allows courts to determine "whether a dangerous condition exists" that warrants action. No. CIV. A77-3012, 1979 WL 23050, at *4 (D.N.D. Mar. 19, 1979).

The district court did consider three other opinions, but misconstrued them. It first cited the lower court ruling in *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979), which, as explained above, resulted in the Supreme Court describing legislative history that supports a broader reading of § 662. Moreover, while the *Whirlpool* court of appeals decision describes § 662(a)-(c) as requiring an inspector to conclude there is an imminent danger before the agency can invoke § 662(a), when it turns to describing § 662(d), it merely summarizes the plain text: "[e]mployees have the right to petition a federal district court for a writ of mandamus against the Secretary if he wrongfully fails to seek injunctive relief." *Id.* at 720. *Whirlpool* then offers a similar review of the legislative history as the Supreme Court. That is, Congress' goal with § 662 was to empower the courts, not the executive branch, to determine when it was appropriate to order a response to an imminent danger. *Id.* at 732. In other words, while *Whirlpool* may provide some—albeit atextual—support for the district court's view that § 662(a)-(c) presents a "process" involving an inspector, it did not read that process as limiting § 662(d), it merely stated § 662(d) requires a failure to act. Further, *Whirlpool*'s discussion of the legislative history would counsel against limiting employees' ability to seek judicial relief.

Next, the district court turned to *Marshall v. Daniel Construction Co.*, 563 F.2d 707 (5th Cir. 1977). That decision does describe § 662(d) as providing employees the ability to seek judicial relief when OSHA "arbitrarily or capriciously fails to seek the injunctive relief requested by the OSHA inspector," but nowhere does it state this is the full extent of the authority granted by § 662(d). *Id*. at 711. Moreover, its statement on the limits of § 662 appear to be motivated by concerns unrelated to defining employees' ability to proceed under § 662(d). In that case, an employee had argued he was wrongfully terminated because he refused to work when he believed he faced an imminent danger. *Id.* at 708-09. *Daniel Construction* cited § 662(d) to explain the OSH Act did not empower the employee to decide on his own that he faced an imminent danger. *Id.* Put another way, in discussing § 662(d), the court was not focused on the extent of the employee's ability to access judicial review, but wished to make clear there needed to be an independent judgment, by someone besides the employee himself, that he faced an imminent danger. *Daniel Construction* goes on to emphasize, consistent with Plaintiffs' view, that § 662 centers the courts as the party adjudicating imminent dangers, noting its language was amended "so that only the courts ha[ve] the authority to enjoin an employer's business operations." *Id*. at 713.

Finally, the district court's effort to reconcile *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228 (W.D. Mo. 2020), with its reading of § 662(d) has no basis in fact. There, the plaintiffs explained that deferring to the primary jurisdiction of OSHA, which would cause the court to dismiss their state law tort claims, would expose them to unnecessary risks. *Id*. at 1241. The court responded this was not the case because "OSHA has already requested information about the [Smithfield] Plant's safety measures. And if OSHA fails to act quickly on this information, Plaintiffs have a remedy: they may receive emergency relief through OSHA's statutory framework." *Id*. (citing 29 U.S.C. § 662(d)). The plain meaning of the *Smithfield Foods* court's statement is that if OSHA failed to act, the employees could seek judicial intervention. While the *Smithfield Foods* court stated, "there may be some delay before Plaintiffs can invoke this procedure," that delay refers to the employees having to notify OSHA of the danger and then wait to see if the agency will act reasonably. It is a leap of imagination to claim the *Smithfield Foods* court read § 662(d) in the same limited manner as the court below, particularly as *Smithfield Foods* never uses the words "inspection" or "inspector."

Therefore, to the extent the Court looks beyond the text and history of the Act, those commentators who have directly considered the scope of § 662 indicate it provides employees access to courts when OSHA fails to act regardless of an

inspector's determination, as do other district courts that have discussed § 662(d). *Whirlpool* and *Smithfield Foods* are actually in tension with the district court's narrower approach. *Daniel Construction* is of limited value in interpreting § 662(d) and deciding between either proposed reading of the statute.

* * *

At bottom, when § 662(d) is read on its own, it provides Plaintiffs a cause of action to seek judicial relief when OSHA arbitrarily or capriciously fails to protect them from an imminent danger. That alone can resolve this matter. If the Court employs the other tools of statutory construction, they consistently lead to the same place. The surrounding text confirms that Congress deliberately excluded language about an inspection from § 662(d), while requiring inspections as a precondition in other provisions; and explicitly limited relief where that was its intent, but purposefully authorized § 662(d) actions to obtain additional relief beyond what OSHA could provide under § 662(a). The district court's theory that § 662 lays out a "process" in serial steps, beginning with an inspection, has no basis in the text of § 662. Moreover, the legislative history and purpose supports Plaintiffs' reading. Finally, a complete review of the case law and literature, on balance, further supports Plaintiffs. The district court's reading of § 662(d) should be reversed. This Court

should hold employees can seek to compel OSHA to act whenever it arbitrarily or capriciously fails to respond to an imminent workplace danger.

VIII. CONCLUSION.

For the foregoing reasons the Court should reverse the district court's decision, vacate its interpretation of § 662(d), and remand for further proceedings consistent with an accurate reading of the statute: it authorizes employees or their representatives to seek judicial relief when OSHA arbitrarily or capriciously fails to address an imminent danger.

IX. REQUEST FOR ORAL ARGUMENT.

Plaintiffs respectfully request this case be set for oral argument with twenty minutes per side. The decision below is the first to decide the scope of 29 U.S.C. § 662(d), defining the ability of workers to protect themselves from the most dangerous working conditions. Its holding is inconsistent with the district court's own reading of the provision and every method of interpretation. Plaintiffs request the opportunity to discuss these errors to ensure workers' rights are protected going forward, especially during the ongoing pandemic.

January 28, 2022

Respectfully submitted,

/s/ David S. Muraskin
David S. Muraskin
Karla Gilbride
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
kgilbride@publicjustice.net
dmuraskin@publicjustice.net
Counsel for Plaintiff-Appellant
Justice at Work

Lerae Kroon
Samuel Datlof
Justice at Work
990 Spring Garden Street, Suite 300
Philadelphia, PA 19123
(215) 733-0878
lkroon@justiceatworklegalaid.org
sdatlof@justiceatworklegalaid.org
Counsel for Plaintiffs-Appellants
Jane Does I and III

David H. Seligman*
Towards Justice
2840 Fairfax Street, Suite 220
Denver, CO 80207
(720) 248-8426
david@towardsjustice.org
Counsel for Plaintiff-Appellant
Justice at Work

** application for admission forthcoming*

X. ADDENDUM OF STATUTORY TEXT.

A. 29 U.S.C. § 655(d).

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

B. 29 U.S.C. § 658(a).

(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations

If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu

of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

C. 29 U.S.C. § 658(c).

(c) Time for issuance

No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

D. 29 U.S.C. § 659(a).

(a) Notification of employer of proposed assessment of penalty subsequent to issuance of citation; time for notification of Secretary by employer of contest by employer of citation or proposed assessment; citation and proposed assessment as final order upon failure of employer to notify of contest and failure of employees to file notice

If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

E. 29 U.S.C. § 660(b).

(b) Filing of petition by Secretary; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; enforcement of orders; contempt proceedings

The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 659 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 666 of this title, in addition to invoking any other available remedies.

F. 29 U.S.C. § 662.

(a) Petition by Secretary to restrain imminent dangers; scope of order

The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

(b) Appropriate injunctive relief or temporary restraining order pending outcome of enforcement proceeding; applicability of Rule 65 of Federal Rules of Civil Procedure

Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this chapter. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.

(c) Notification of affected employees and employers by inspector of danger and of recommendation to Secretary to seek relief

Whenever and as soon as an inspector concludes that conditions or practices described in subsection (a) exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought.

(d) Failure of Secretary to seek relief; writ of mandamus

If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary in the United States district court for the district in which the imminent danger is alleged to exist or the employer has its principal office, or for the District of Columbia, for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate.

CERTIFICATE OF COMPLIANCE

I am admitted to practice before this Court and in good standing.

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments): this brief contains 12,768 words.

This brief complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced, 14-point typeface (Times New Roman) using Microsoft Word.

This document has been scanned for viruses and none were detected. The virus scan was performed using Windows Defender.

Identical copies of this document to the one filed in CM/ECF will provided in hard copy.

Date: January 28, 2022

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 28, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Date: January 28, 2022

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net