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

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BRIEF OF AMICI CURIAE, FORMER SENIOR OFFICIALS OF THE UNITED STATES DEPARTMENT OF LABOR, IN SUPPORT OF APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici are former high-level officials of the U.S. Department of Labor ("the Department") who worked in the Occupational Safety and Health Administration ("OSHA") or the Department's Office of the Solicitor. In this capacity, they were charged with enforcing the statutory rights and obligations enacted by Congress for the benefit of worker safety and health. Amici have committed their careers to supporting and advocating for worker health and safety through service in government, academia, unions, and non-profit organizations. They have an interest in ensuring that the Court interprets the provisions of the Act in a manner that fully protects worker health and safety and that aligns with the practical realities of the Department of Labor and OSHA.

Amici understand the critical importance of § 13(d) of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. § 662(d), as the

[1] All parties have consented in writing to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. Amici are individuals rather than nongovernmental corporate parties, and thus have no corporate disclosures. *See* 3rd Cir. LAR 26.1.1 (2011).

means by which workers facing an imminent danger can seek redress in court if and when the government arbitrarily or capriciously fails to act. Amici are concerned that the district court's interpretation of § 13(d) renders this right to redress illusory. Specifically, the district court's interpretation of § 13(d) misunderstands how OSHA operates in practice, contravenes the Act's purpose, and does not comport with the various regulatory and investigative procedures promulgated under the Act.

Amici respectfully submit this brief in the hope that it will assist the Court in interpreting § 13(d) and in understanding the practical implications of the district court's misguided decision. As detailed below, amici have extensive experience and real-world expertise in the interpretation, implementation, and enforcement of the Act's statutory and regulatory scheme.

David Michaels, PhD, MPH, was the longest serving administrator in the history of OSHA. He served as Assistant Secretary of Labor for Occupational Safety and Health from December 2009 to January 2016. Prior to that post, he served as the Department of Energy's Assistant Secretary for Environment, Safety and Health from 1998 to 2001. Dr. Michaels is an epidemiologist and is currently a professor at George

Washington University School of Public Health in the Departments of Environmental and Occupational Health and Epidemiology. As such, he has a continuing personal and professional interest in ensuring that the Court interprets the Act in a manner that promotes occupational health and safety.

Charles Jeffress served as Assistant Secretary of Labor for Occupational Safety and Health from October 1997 to January 2001. Prior to joining the U.S. Department of Labor, he served in the North Carolina Department of Labor as the director of its OSHA state plan. He has also served in senior positions at the U.S. Chemical Safety and Hazard Investigation Board, the Legal Services Corporation, and the American Association for Justice. As someone deeply committed to the proper implementation and enforcement of health and safety standards, he has an interest in ensuring the Court's interpretation of the Act promotes those goals.

Jordan Barab served as Deputy Assistant Secretary of Labor for Occupational Safety and Health from 2009 to 2017. He was also Senior Labor Policy Advisor to the House Education and Labor Committee from 2019 to 2021. As someone who has committed his career to advancing

worker safety and health, including through the appropriate enforcement and interpretation of labor standards by the government, he has an interest in ensuring the Court's interpretation of the Act aligns with administrative practices and effectuates Congress's broad remedial purposes.

Debbie Berkowitz served as Chief of Staff and then Senior Policy Advisor at OSHA from 2009 to 2016. She is the former Director of the Worker Safety and Health Program at the National Employment Law Project and is currently a Practitioner Fellow at Georgetown University's Kalmanovitz Initiative for Labor and the Working Poor. As a lifelong advocate for worker safety and health, she has a strong interest in the proper outcome of this appeal.

Michael Felsen served as the U.S. Department of Labor's Regional Solicitor for the New England Region from 2010 to 2018, capping a 39-year career with the Office of the Solicitor, where he began litigating cases under the Act in 1979. He currently serves as a Senior Advisor to Justice at Work (a non-profit legal office in Boston, unrelated to the Plaintiff-Appellant of the same name), a National Council for Occupational Safety and Health Advisor, and a Strategic Enforcement

Advisor with the Workplace Justice Lab at Rutgers University's School of Management and Labor Relations. Having committed his career, as a government attorney and senior executive, to the appropriate and vigorous enforcement of this nation's worker protection laws, he has a strong interest in this Court's ensuring that § 13 of the Act is properly interpreted.

SUMMARY OF THE ARGUMENT

Congress enacted the Occupational Safety and Health Act with a broad remedial purpose: to ensure health and safety in the workplace and to empower "employees in their efforts to reduce the number of occupational safety and health hazards" in the workplace. 29 U.S.C. § 651(b). To that end, Congress and the Department have established a complex and multi-pronged enforcement regime. *See, e.g.*, *id.* §§ 651-678; 29 C.F.R. §§ 1910.1-1910.1450. One critical component of that regime is § 13, which creates special means for redressing the most time-sensitive safety and health hazards: "imminent dangers." *Id.* § 662.

Section 13 provides two ways for a court to become involved in this time-sensitive imminent-danger determination. First, "the Secretary" can petition a United States district court for an injunction to remedy the

danger if the danger "could reasonably be expected to cause death or serious physical harm" immediately or before it can be eliminated through the Act's enforcement procedures. *Id.* § 662(a). Second, an employee can petition a United States district court for a writ of mandamus if "the Secretary arbitrarily or capriciously fails to seek relief under this section." *Id.* § 662(d).

In a separate subsection, § 13 includes a notice provision that requires an inspector who finds an imminent danger to "inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought." 29 U.S.C. § 662(c).

The district court held that where, in response to a worker's complaint, an OSHA inspector has not found an imminent danger, and therefore has not made a recommendation to "the Secretary," the worker has no recourse. Specifically, the court viewed dismissal of the workers' complaint here as necessary because "the court cannot review the Secretary's decision for arbitrariness or capriciousness where there has been no Secretarial decision." J.A. 35. The district court's decision is wrong and reflects a misunderstanding of the statute and of agency practice.

First, the district court's decision has no foundation in the plain language of the Act or of § 13 in particular. The district court apparently believed a finding of imminent danger by an inspector under subsection (c) was a prerequisite to the availability of private enforcement under subsection (d), but the plain language of the statute says no such thing. 29 U.S.C. § 662.

The district court largely based its decision on its apparent reading of the word "Secretary" in subsection (d) to refer to the actual Secretary of Labor as an individual. J.A. 27-35. Under a proper reading of the Act and of § 13, 29 U.S.C. § 662, however, the word "Secretary" refers not to a particular individual, but to anyone authorized to decide and act on the Secretary's behalf with regard to the relevant issue. The term encompasses OSHA inspectors whose failure to act or finding of no imminent danger ends the agency decision-making tree that might otherwise lead the Secretary to pursue a petition under § 13(a).

This reading also best accords with actual agency practice and the Act's overall regulatory and enforcement scheme. In amici's extensive experience, only rarely if ever does the Secretary of Labor *the individual* become involved in imminent danger determinations. In the majority of

cases, these determinations simply do not proceed in the way the district court presumably imagines. Rather, OSHA utilizes a decision-making tree involving officials in different branches and at various levels within the Department. OSHA Field Operations Manual (hereinafter, "FOM"), Ch. 11, § (I)(D) (2020), *available at* https://www.osha.gov/enforcement/directives/cpl-02-00-164/chapter-11. The district court's conclusion—that workers can only proceed under subsection (d) of § 13 if the Secretary of Labor *himself* arbitrarily and capriciously chooses not to follow an OSHA inspector's recommendation to file a petition under subsection (a)—would render § 13(d)'s critical means of redress almost entirely illusory.

By rendering § 13(d) effectively useless, the district court's decision leads to absurd results where employees are left without recourse in the event of arbitrary and capricious agency conduct related to time-sensitive, imminent dangers. The district court's interpretation would also precipitate serious conflicts within the Department of Labor by necessitating discovery into otherwise privileged communications between officials from various rungs within the agency hierarchy.

The Third Circuit should reverse and instead adopt an interpretation of § 13 that comports with the Act's broad remedial purpose and the manner in which the governmental entity charged with enforcing it actually, and necessarily, operates.

ARGUMENT

I. Nothing in § 13 suggests that an inspector's affirmative finding of imminent danger is a prerequisite to accessing § 13(d)'s judicial enforcement mechanisms.

The district court reads subsection (d) as requiring a finding of imminent danger by the inspector, followed by an arbitrary or capricious refusal by the Secretary of Labor to seek injunctive relief to address the hazard. J.A. 6, 31. This interpretation doesn't withstand scrutiny.

As Plaintiffs-Appellants explain in their brief, nothing in subsection (d) or in § 13 generally suggests that an affirmative finding of danger by an inspector (as referenced in subsection (c)) is a prerequisite for subsection (d) relief. *See* 29 U.S.C. § 662. Instead, the plain language of subsection (c) creates nothing more than a notice requirement, intended to alert workers and the employer to the inspector's conclusion that an imminent danger exists, and, in circumstances where the

employer refuses to voluntarily abate the hazard,[2] that he is recommending "to the Secretary"[3] that relief be sought. *Id.* § 662(c). Nothing in the text of § 13 links this notice provision to the right to mandamus relief. In amici's experience, the Department and OSHA have never previously interpreted subsection (c) as in any way related to, or determinative of, the availability of the relief for workers that § 13(d) provides.

Reading section 13 as a whole leads to the clear conclusion that, for an employee to prevail under subsection (d), the employee must show solely two things: first, as set out in subsection (a), "that a danger exists which could reasonably be expected to cause death or serious physical harm immediately", 29 U.S.C. § 662(a); and, second, as set out in subsection (d), that the Secretary "arbitrarily or capriciously fail[ed]" to take appropriate action (as authorized under subsection (a)) to address the danger, 29 U.S.C. § 662(d). The burden is on the employee to prove

[2] Much of subsection (c) would only come into play if the employer refuses to voluntarily abate the hazard. In most cases, the employer voluntarily abates the hazard, and recourse to the courts and recommendations for such action are unnecessary. *See* FOM, Chapter 11, § (I)(D)(1).

[3] For discussion of the significance of the term "the Secretary," see *infra* Part II.

that an imminent danger exists in the workplace. Once he establishes that, he must further establish that the Secretary arbitrarily or capriciously failed to seek subsection (a) redress, for any reason or no reason at all. The arbitrarily-or-capriciously standard involves a particularly sensitive inquiry for imminent-danger determinations because decisions "that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake." *Public Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 148, 153 (3d Cir. 2002) (quotations omitted). If the employee proves both an immediate danger and an arbitrary or capricious failure to seek redress, the employee is entitled to the subsection (d) relief that could save his and his co-workers' lives.[4]

[4] The district court posits that "[i]f the court were to read Section 13(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. This, however, is not the test employees face when making a § 13(d) claim. As stated above, employees are empowered to obtain a mandamus remedy under subsection (d) not based upon what they "feel" is an imminent danger, and not based upon their ability to "make the argument" that the Secretary's lack of prompt action is arbitrary or capricious, but based upon their ability to actually prove those propositions by a preponderance of evidence.

II. Reference to "the Secretary" in § 13(d) extends beyond the individual who is Secretary of Labor and encompasses anyone who makes a final no-imminent-danger determination.

When § 13 of the Act refers to "the Secretary," that term is properly understood to mean the Secretary of Labor and his designated agents, at various levels and occupying various roles, who are employees of the Department. Nowhere in OSHA's Field Operations Manual, or in regulations promulgated under the Act, is there any suggestion that the actual Secretary of Labor is to be consulted at all regarding imminent danger proceedings.[5] And in practice, the Secretary does not personally undertake all, or even a tiny percentage, of the tasks assigned to him in statutes that invoke his name. Section 13(a)'s reference to "petition of the Secretary" refers to a petition submitted *on behalf of* the Secretary, who has responsibility for overseeing all activities of OSHA and its personnel, and of the many other agencies and personnel within the Department.

[5] The OSHA regulation that describes what an inspector should do when he finds an imminent danger states that "he shall inform the affected employees and employers of the danger and that he is recommending a civil action to restrain such conditions or practices and for other appropriate relief in accordance with the provisions of section 13(a) of the Act." 29 C.F.R. § 1903.13. It makes no mention of the Secretary of Labor.

Likewise, when § 13(d) states that employees may bring an action against the Secretary "if the Secretary arbitrarily or capriciously fails to seek relief under this section," it of necessity refers to any agent of the Secretary who is authorized to decide and act on the Secretary's behalf in regard to the imminent danger complaint. Inspectors, along with their superiors up the chain of command, are all agents of and are, in legal and practical effect, "the Secretary."

This broader reading of the word "Secretary" is also supported by § 8 of the Act, which states: "In order to carry out the purposes of this Act, *the Secretary*, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized" to perform an inspection. 29 U.S.C. § 657(a) (emphasis added). Needless to say, the Secretary of Labor himself doesn't present credentials and do an inspection.

In practice, all employees of the U.S. Department of Labor, unless acting outside the scope of their authority, act on behalf of the Secretary, and the Secretary bears ultimate responsibility for their actions. And when they make agency decisions that impact the public, those decisions are the "Secretary's." Consider, for example, the number of employees involved in an imminent-danger determination. When an inspector finds

an imminent danger and is unable to convince the employer to abate it, operative OSHA protocols require the inspector to consult with his Area Director. FOM, Ch. 11, § (I)(D)(2)(a). If the Area Director agrees with the inspector's assessment, the inspector will give the subsection (c) notification by posting a "Notice of Alleged Imminent Danger." *Id.*; *see also* 29 U.S.C. § 662(c). Thus, even when inspectors post this "imminent danger" notice, they do so on behalf of the Secretary, not as individuals with their own independent opinion and agency. According to the Field Operations Manual, the Area Director, the Regional Administrator, and the Regional Solicitor's Office will then confer and either "make arrangements for the expedited initiation of court action, or instruct the [inspector] to remove the Notice." FOM, Ch. 11, § (I)(D)(2)(e). Thus, a determination might ultimately be made, after consultation with the Solicitor's Office, that the posting was in error or should for other reasons be removed.

All of these acts are, effectively and equally, the Secretary's. Even if the Secretary's position changes through the posting and subsequent un-posting of an "imminent danger" notice as outlined above, the fact

that different government officials made contradictory determinations doesn't alter the fact that "the Secretary" took these actions.[6]

Nothing in the text of section 13 creates the kind of inspector/Secretary distinction the district court suggests. Rather, subsection (c)'s reference to "inspector" and "Secretary" merely reflects the practical reality that, after an affirmative finding of imminent danger, the inspector, though an arm of the Secretary, doesn't have authority to decide whether or not a petition will be filed, but will instead make a recommendation to another person or to other people to whom the Secretary has delegated those litigation decisions. But if the inspector fails to act at all or determines that there is *no* imminent danger, and the agency takes no further action in the matter, the Department as a whole has spoken, and pursuant to plain language of § 13(d), the "Secretary"—through his agents—has "fail[ed]" to seek relief under § 13. 29 U.S.C.

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[6] Perhaps a paraphrase of Walt Whitman is apt here:

> Does [the Secretary] contradict himself?
> Very well then, [he] contradicts himself,
> ([He] is large, [he] contain[s] multitudes.)

See Walt Whitman, "Song of Myself," *Leaves of Grass* 108 (Doubleday, Page 1902) (1855).

§ 662(d). That the failure occurred earlier in the decisionmaking process doesn't make it any less of a failure or any less the Secretary's.

In sum, every official act by an employee of the Department which is not *ultra vires* is, in effect, the Secretary's act. Wherever in the Secretary's chain of command a final decision has been made regarding redress for an actual workplace imminent danger—whether by the inspector, the Area Director, the Regional Administrator, or the Regional Solicitor—if the determination not to proceed was reached arbitrarily or capriciously, the affected, exposed workers may bring suit pursuant to § 13(d).

III. The district court's reading of § 13 would lead to results Congress could not have intended.

Two hypothetical examples illustrate some of the flaws in the district court's reading of § 13. For purposes of the following examples, assume that an imminently dangerous chemical spill is present in the workplace, and that an employee has properly reported it and has initiated the OSHA inspection process.

Scenario 1. The inspector who arrives is tired, distracted, and was inadequately trained on chemical spill hazards. Without any legitimate explanation or even a thorough inspection, the inspector declines to find

the existence of an imminent danger and recommends no further action.[7] Accordingly, by extension he does not recommend the filing of a petition, either. His Area Director, without careful scrutiny, approves his recommendation to close the matter. Under the district court's reading of § 13(d), the workers would be without recourse—even though the inspector's determination, endorsed by his Area Director, is final.

Scenario 2. The inspector finds an imminent danger and is unable to convince the employer to abate it. He confers with the Area Director, who agrees with the inspector's assessment, resulting in posting a "Notice of Alleged Imminent Danger." *See* FOM, Ch.11, § (I)(D)(2)(a). The Area Director, the Regional Administrator, and the Regional Solicitor's Office confer and, arbitrarily or capriciously, decide not to proceed with a court action. *Id.* § (I)(D)(2)(e). They instruct the inspector to remove the Notice, effectively undoing the imminent-danger determination. Since "the Secretary" was not involved, under the district court's analysis, the workers presumably would be out of luck.

[7] Amici intend to cast no aspersion on any OSHA inspector or other official. These examples are given only to demonstrate why the district court's interpretation of subsection (d) cannot be what Congress intended.

Any reading that sanctions results like these should be eschewed. "It is the obligation of the court to construe a statute to avoid absurd results, if alternative interpretations are available and consistent with the legislative purpose." *United States v. Schneider*, 14 F.3d 876, 880 (3d Cir. 1994). The district court's decision also would leave no remedy should an inspector make a finding of "no imminent danger" not because an imminent danger is objectively lacking, but because the inspector complied with an improper informal directive communicated from higher-ups that particular kinds of hazards should not be deemed "imminent dangers"—even if they are.

The district court's interpretation strips § 13(d) of its power and does not further Congress's broad remedial purpose of "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). Accordingly, the Third Circuit should reverse the district court's decision and adopt the interpretation of the Act that reasonably and appropriately accords with the legislative purpose. *Schneider*, 14 F. 3d at 880.

IV. The district court's interpretation would result in irremediable intra-Departmental conflicts.

Litigation under § 13(d), if solely actionable under the interpretation posited by the district court, would lead to highly problematic intra-Departmental conflicts the Act's drafters couldn't possibly have intended. *See Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 63-64 (1st Cir. 1985) (explaining that, in interpreting statutes, courts may consider their "practical understanding of how competing interpretations may affect the agency's regulatory mission").

Proving that the actual Secretary of Labor had arbitrarily or capriciously rejected a recommendation to sue from an inspector (a recommendation which also would have gone through several other layers in the Departmental decision-making process as set forth in the Field Operations Manual, *see supra* at 13-14), would require discovery into the thought process at each level of the Department. This would allow probing into the "deliberative process," long considered a key privilege by the government because it protects the open exchange of ideas at various levels that lead to a final agency decision and action. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (describing the privilege).

Litigation under the district court's interpretation also would pit the Secretary of Labor against those lower in the chain who made and then approved the recommendation to seek a court order, placing these lower-level employees in direct and public conflict with their ultimate boss, since plaintiffs would seek evidence that the subordinates were right and that their boss was arbitrarily or capriciously wrong. Again, the drafters can hardly have intended to impede the Department's functioning in this way, and the Court should avoid this interpretation and these absurd results. *See Schneider*, 14 F. 3d at 880.

V. The historical record does not support the view that the interpretation of subsection (d) urged here will result in waves of litigation.

Finally, the district court suggests that this broader reading of § 13(d) would open the floodgates of litigation. In amici's experience, and as demonstrated by the fact that this case is one of first impression, there has hardly been a tsunami of worker-brought cases under § 13(d) in the more than fifty years of the Act's existence. The reason is that, in the vast majority of cases, OSHA competently conducts imminent danger inspections in response to employee complaints, and most of those inspections are voluntarily resolved by the employer agreeing to abate

the hazard without the need for § 13(a)'s enforcement mechanisms. In other words, the historical lack of litigation brought by workers undermines, rather than supports, the district court's analysis.

Nevertheless, Congress determined that when and if OSHA arbitrarily or capriciously fails to properly respond to an actual imminent danger, workers should be empowered to do something about it. That right is critically important. Government agencies sometimes do make decisions—or fail to make decisions—arbitrarily or capriciously. When that happens, the government needs to be held to account, particularly where workers' very lives are at stake. *See Public Citizen v. Chao*, 314 F.3d at 153. Section 13 must be read so that it can reasonably and realistically accomplish that purpose.

CONCLUSION

Plaintiffs-Appellants' reading of § 13(d) best comports with the plain language of the Act, Congress's broad remedial purposes, the practical experiences of amici, and the practical realities of how OSHA and the Department of Labor make imminent-danger determinations. The district court's interpretation, by contrast, produces absurd results which do not comport with Congress's intent or agency practice and

which would cause intra-agency conflicts. Accordingly, the Court should reverse the district court's order.

February 4, 2022

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

1. I certify that I am a member of the bar of this Court.

2. I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word for Office 365, is 4,216, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

3. I certify that the text of the electronic brief is identical to the text in the paper copies.

4. I certify that a virus detection program (Windows Defender) has been run on the file and that no virus was detected.

/s/ Sarah Schalman-Bergen
Sarah Schalman-Bergen

CERTIFICATE OF SERVICE

I, Sarah Schalman-Bergen, certify that on February 4, 2022, I caused a copy of the foregoing document to be filed with the Clerk of Court using the CM/ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

/s/ Sarah Schalman-Bergen
Sarah Schalman-Bergen