

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

JANE DOES I, II, III, et al.,)	
)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 3:20-1260
)	
EUGENE SCALIA, United States)	(JUDGE MANNION)
Secretary of Labor, et al.,)	
)	
)	
Defendants.)	

DEFENDANTS' POST-HEARING BRIEF

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The Occupational Safety and Health Act (OSH Act) entrusts the Occupational Safety and Health Administration (OSHA)—not private litigants—with regulating occupational health and safety. Never in the OSH Act’s fifty year history has a court concluded that § 13 of the OSH Act, 29 U.S.C. § 662, permits private litigants to challenge how OSHA evaluates employee complaints, conducts investigations, issues citations, or handles enforcement actions. Yet Plaintiffs now ask this Court to step into OSHA’s shoes and make investigative and prosecutorial decisions. Section 13’s plain language, plus fundamental principles of separation of powers, however, foreclose such a result. Respectfully, the Court should decline Plaintiffs’ invitation to, in the midst of a global pandemic, second guess the subject-matter expert Agency charged with protecting worker safety and health.

To be sure, § 13 provides a limited right of action for the rare instance where (i) an OSHA “inspector concludes that conditions or practices” at a workplace “are such that a[n imminent] danger exists,” and (ii) “recommend[s] to the Secretary [of Labor] that [extraordinary judicial] relief be sought,” but (iii) “the Secretary arbitrarily or capriciously fails to seek [such] relief.” 29 U.S.C. § 662. In such a scenario, the judicial role is narrow—courts examine a fixed universe of investigative findings and consider whether the Secretary acted arbitrarily or capriciously in rejecting a recommendation from the OSHA inspector to seek injunctive relief from a federal court during the pendency of an OSHA enforcement

action. But here, the OSHA inspector reasonably determined that no imminent danger exists and thus did not recommend that the Secretary seek an injunction. Accordingly, Plaintiffs lack a cause of action under § 13. That is not to say OSHA's work here is done. Far from it. OSHA continues its investigation and will determine whether violations warranting a citation have occurred.

Undeterred, Plaintiffs seek to challenge every aspect of OSHA's handling of this ongoing investigation, asking the Court to review a host of actions, some dating back months. Not only do Plaintiffs fail to explain how such *post-hoc* review is relevant to their claim of imminent danger, they ignore that the Court lacks jurisdiction to review such matters, which are committed to the Secretary's discretion. Section 13(d) is expressly limited to the Secretary's decision "under [§ 13]" whether to seek the injunctive relief recommended by the inspector. 29 U.S.C. § 662(d). OSHA's actions and determinations of which Plaintiffs complain are not Secretarial § 13 determinations and therefore are not subject to review here.

The Court should dismiss this case with prejudice for lack of jurisdiction or, in the alternative, for failure to state a claim. A ruling to the contrary would not only undermine the plain text of § 13 and relevant case law, but would risk requiring the Secretary to detract significant resources from pandemic-related duties in order to defend the avalanche of copycat lawsuits that would be sure to follow.

The Court need not (and should not) evaluate the information submitted by the Parties on the merits. The information offered at the July 31 hearing was presented despite a pending motion to dismiss challenging this Court's jurisdiction and over Defendants' objection that the information be presented in accordance with the Federal Rules of Evidence. Tr. 97-98. Moreover, Defendants have a pending Motion to Strike regarding Plaintiffs' impermissible attachments to their Post-Hearing Brief (Doc. 43). Regardless, Plaintiffs have not met (and cannot meet) their burden on the merits of proving that the Secretary's failure to seek an injunction under § 13(a) is arbitrary or capricious. Even if Plaintiffs' claims were justiciable (they are not), Plaintiffs fail to establish that the Secretary "arbitrarily and capriciously fail[ed] to seek relief" under § 13. The OSHA officials who testified at the July 31, 2020 hearing provided a reasonable, evidence-based explanation for why they determined that no imminent danger existed at the facility. Plaintiffs, who bear a heavy burden of proof, introduced no evidence whatsoever to the contrary. The Court not only lacks jurisdiction, but Plaintiffs' claims are without merit.

I. This Court Lacks Subject-Matter Jurisdiction Or, In The Alternative, Plaintiffs Fail to State A § 13(d) Claim

A. The predicates to a § 13(d) claim are missing here.

A § 13(d) action is only available where the "Secretary arbitrarily or capriciously fails to seek relief under *this section* [13]," 29 U.S.C. § 662(d) (emphasis added). The reference to "section" is critical, as § 13 consists of four

interrelated *subsections*. Thus, evaluating the § 13(d) cause of action requires a consideration of § 13 in its entirety, not only §§ 13(a) and 13(d). *See United States v. Morton*, 467 U.S. 822, 828 (1984) (courts do not “construe statutory phrases in isolation;” rather, they “read statutes as a whole”).

Under § 13(c), the OSHA inspector, also called a Compliance Safety and Health Officer (CSHO), makes a determination as to whether an imminent danger exists. *Id.* § 662(c). If the CSHO determines there is no imminent danger, the § 13 process ends; but OSHA may continue its investigation, issue citations for any violations of the OSH Act or OSHA standards, and seek the employer’s compliance. On the other hand, if the CSHO determines that there is an imminent danger, § 13(c) dictates that she proceed to the next step of informing the affected employees and employer and recommending to the Secretary that he seek injunctive relief against the employer. “At this juncture, the Secretary *can* petition a federal court [under § 13(a)] to restrain the conditions or practices giving rise to the imminent danger” during the pendency of an OSHA enforcement action against the employer. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 9 (1980) (emphasis added); 29 U.S.C.

§ 662(a)–(b).¹ Subsection 13(b), in turn, describes and cabins the injunctive relief such a federal court may provide.

As the plain text and case law confirm, the CSHO’s determination of imminent danger and recommendation of seeking injunctive relief under § 13(c) are prerequisites to the Secretary’s initiation of a § 13(a) action. *Whirlpool Corp.*, 445 U.S. at 9 (only after the inspector’s determination and recommendation “can” the Secretary file a § 13(a) petition); *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 720 (6th Cir. 1979) (the statutory procedure for a § 13(a) action “requires,” *inter alia*, that “the OSHA inspector conclude” that there is an imminent danger); *Marshall v. Daniel Constr. Co. Inc.*, 563 F.2d 707, 711, 714 (5th Cir. 1977) (inspector’s conclusion there is an imminent danger and recommendation of seeking injunctive relief is an “independent judgment” necessary for a § 13(a) action).

It cannot, as a matter of law, be arbitrary and capricious *under § 13(d)* for the Secretary to fail to initiate an action *under § 13(a)* where he does not meet the legal requirements for doing so. Therefore, a § 13(d) claim may only be brought where the inspector has made such a determination and recommendation. *See Whirlpool Corp.*, 445 U.S. 9; *Daniel Const. Co.*, 563 F.2d at 710-11 (“Employees are entitled to petition the federal district court for a writ of mandamus against the Secretary if

¹ Such a proceeding might not be necessary as the employer might voluntarily comply upon receiving the CSHO’s determination. *See Whirlpool*, 445 U.S. at 10.

he arbitrarily or capriciously fails to seek the injunctive relief *requested by the OSHA inspector.*” (emphasis added)); *Whirlpool Corp.*, 593 F.2d at 720 (“[A] worker can petition a federal court for mandamus to order the Secretary to seek an injunction *should he decline to do so on recommendation of the inspector.*” (emphasis added)).

In this case, Plaintiffs have not alleged (and cannot allege) the requisites of a § 13(d) claim. It is undisputed that the CSHO concluded that no imminent danger exists, Tr. 193, and has not recommended that the Secretary seek an order under § 13(a). Her supervisors concurred that no imminent danger exists. Tr. 157. Absent a recommendation from the CSHO under § 13(c), there can be no Secretarial § 13(a) petition and no employee § 13(d) claim that the failure to initiate such a petition was arbitrary or capricious. Accordingly, the Court lacks subject matter jurisdiction over Plaintiffs’ claims, which seek review not of the reasonableness of the Secretary’s failure to seek injunctive relief recommended by a CSHO, but instead of all manner of enforcement-related determinations reached in this ongoing investigation. Such determinations are committed to the Secretary’s discretion and therefore not subject to review. The Complaint should be dismissed.

B. Plaintiffs’ Reading of § 13 Lacks Merit.

Plaintiffs’ reading of § 13(d) renders meaningless any requirement that an inspector determine there is an imminent danger and recommend injunctive relief in order for employees to have a cause of action. Plaintiffs point to a few snippets from

judicial opinions that they say support their untenable position. But, as discussed, the most authoritative and detailed considerations of § 13 support Defendants’ reading. *See supra* 4, 6 (discussing *Whirlpool*, 445 U.S. at 8-10; *Whirlpool*, 593 F.2d at 720; *Daniel Const.*, 563 F.2d at 710-11).²

Plaintiffs rely (Br. at 4) on a case in which several of their own counsel advanced Defendants’ interpretation of § 13, contrary to Plaintiffs’ interpretation here. *See Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 2020 WL 2145350 (W.D. Mo. May 5, 2020). Specifically, counsel there argued that “the Secretary of Labor will request an injunction [under § 13(a)] only in response to a recommendation from an in-person inspector.”³ The court’s holding was limited to the conclusion that subject matter expert agencies within the Executive Branch—and not federal courts—have jurisdiction over employers’ compliance with OSHA’s

² Plaintiffs quote (Br. 3) *Whirlpool*, 445 U.S. at 10, for the proposition that an employee may “bring an action to compel the Secretary to seek [Section 13] injunctive relief if he believes the Secretary has wrongfully declined to do so.” But they ignore *Whirlpool*’s directive that the Secretary may only *rightfully* seek such injunctive relief *after* being recommended by the inspector to do so. *Id.* at 9 (“The OSHA inspector must ... recommend[] to the Secretary that injunctive relief be sought. § 662(c). At this juncture, the Secretary can petition a federal court” under “§ 662(a).”). Plaintiffs fail to explain how it could be arbitrary or capricious for the Secretary to decline to seek relief he is not legally authorized to seek.

³ *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, Civ. No. 20-06063-DGK, 2020 WL 2145350 (W.D. Mo. May 5, 2020), Plaintiffs’ Suggestions in Opposition to Smithfield’s Emergency Motion to Dismiss (Doc. 35) at 9 (citing 29 U.S.C. § 662(c)); compare Pls.’ Br. at 4-5 (describing a reading under which “the Secretary can only seek an order under § 662(a) after receiving such a recommendation from an inspector” as “atextual” and “inherently flaw[ed]”).

health and safety guidelines and regulations, *Rural Cmty*, 2020 WL 2145350, at *9. It did not mention § 13(c), much less accept Plaintiffs' reading. Instead, the court generally acknowledged in dicta that there are prerequisites to bringing a § 13(d) action: "[T]here may be some delay," the court explained, "before [p]laintiffs can invoke [the § 13(d)] procedure."

Plaintiffs' other cases likewise do not address the issue at hand, let alone support their reading. See *Scott v. Sysco Food Serv. of Metro New York, LLC*, 2007 WL 3170121, at *5 (D.N.J. Oct. 26, 2007) (since the plaintiff did not pursue a § 13(d) action, the well-pleaded complaint rule applied); *Marshall v. Klug & Smith Co.*, 1979 WL 23050, at *4 (D.N.D. Mar. 19, 1979) (in a whistleblower case the court need not determine whether an imminent danger was actually present).⁴

Further, nothing in § 13 precludes others in the CSHO's chain of command from also determining whether an imminent danger exists, as was the case here, Tr.

⁴ Plaintiffs read too much into the legislative history (Br. 6), which indicates members of Congress were concerned that "workers . . . might unduly influence OSHA's inspectors," leading to abuse of the injunction provisions against employers. *Daniel Constr.*, 563 F.2d at 714; see also *Whirlpool*, 445 U.S. at 16-17. This legislative history does not demonstrate members of Congress were concerned that CSHOs would *underutilize* § 13 by failing to identify an actual imminent danger or, in the face of an actual imminent danger, fail to recommend that the Secretary seek an injunction, such that a court should step in to make these determinations in their place. Moreover, a fear that injunctions against employers could be abused or politicized is consistent § 13's check on the power to issue them: both the inspector and either the Secretary or a federal court must concur before the Secretary seeks an extraordinary § 13(a) injunction against an employer.

193, 137, 157, or from providing directives to the CSHO as to her conclusions. Although a CSHO could make a recommendation to the Secretary directly if necessary, Congress likely envisioned that recommendation being made in consultation with the CSHO's supervisors—an unobjectionable fact of administrative decision-making that Plaintiffs attempt to undermine by noting (Br. 5) that “the statute nowhere mentions” that a CSHO might consult with her supervisors before asking a cabinet secretary to file a lawsuit.

Plaintiffs next raise the specter (Br. 6) that a Secretary could order OSHA officials “not to find an imminent danger in the workplace at issue,” thereby preempting a § 13(d) action. But that baseless hypothetical impermissibly requires one to presume that the Secretary will engage in bad faith—in contradiction to the presumption of regularity which attaches to agency action. *See, e.g., Kephart v. Richardson*, 505 F.2d 1085, 1090 (3d Cir. 1974).

Plaintiffs further argue (Br. 5-6) that unless their reading of § 13(d) is accepted, they lack a cause of action. But the lack of a right of action is not cause to misconstrue the statute to create one out of whole cloth. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). There are good reasons why § 13(d) has never been utilized before; it is limited, narrow, and arises only in the rarest of circumstances. And the fact that Plaintiffs have no cause of action here is entirely consistent with the reality that OSHA, not employees, enforces the OSH Act. “[A]lthough the Act

is designed to protect workers, their role in enforcing the Act is indirect.” *Whirlpool Corp.*, 593 F.2d at 720. Plaintiffs’ statutory role here is not a direct action against OSHA, but is instead “complain[ing] to the Secretary about hazardous conditions” and “provid[ing] information to the inspector during the investigation.”

Next, Plaintiffs maintain (Br. 6-7) that there is no cause for concern that their reading of § 13(d) may lead to similar suits. Not so, as this case, which already involves over 15 attorneys, 45 docket entries (since July 22, 2020), expedited briefing, and a full-day hearing with testimony from four witnesses, including three OSHA officials, demonstrates. Such cases would severely detract from the Department’s ability to carry out its mission and set priorities, all in the midst of a global pandemic. Congress could not possibly have intended that all complaints alleging imminent danger could trigger an employee right to a mini-trial in federal court.⁵ Resource-related concerns are only compounded by the fact that Plaintiffs do not read § 13(d) to limit judicial review to the Secretary’s determination whether to seek the injunctive relief recommended by the CSHO, but instead to encompass judicial review of every minute detail of worksite conditions and the appropriateness

⁵ Under Plaintiffs’ theory (Br. 7), there is no rule that “workers can only bring a claim if they face an imminent danger,” and instead workers may sue whenever they *believe* there to be an imminent danger, even when (as here) that belief is not shared by OSHA. As this case demonstrates, time-intensive litigation will ensue if employees’ own characterization of a danger as imminent is determinative of a cause of action.

of OSHA's inspection. Even if the Department and federal courts had the resources for such time-consuming litigation, it would inevitably be at the expense of other functions. OSHA officials' time should be spent on worksite inspections and protecting workers, not on witness stands and preparing affidavits.

Relatedly, limiting lawsuits to only those instances in which a Secretary has arbitrarily or capriciously rejected a CSHO's § 13(c) recommendation respects fundamental separation-of-powers principles and thus constitutional avoidance counsels in favor of Defendants' reading. For one thing, it limits a court's inquiry to a discrete set of facts and issues to be litigated, centering on what the CSHO found and whether the Secretary appropriately considered those findings. But Plaintiffs here request sprawling review of investigatory and prosecutorial decisions. The decision to investigate, enforce, and prosecute are decisions that fall squarely within the Executive Branch's authority. *See Martin v. OSHRC*, 499 U.S. 144, 150-54 (1991).⁶ Congress may create opportunities for judicial review of such decisions, but such review must hew closely to the relevant statutory language. And Plaintiffs' recognition that workers "have no right to contest OSHA's failure to issue a citation" (Br. 5) only strengthens the point Congress did not intend to empower private

⁶ *See also Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. Batchelder*, 442 U.S. 114, 124 (1979).

litigants with unconstrained power to “contest” in court the more drastic decision to sue to enjoin an employer, including perhaps even to close the workplace.

Finally, Plaintiffs’ discussion of relief (Br. 25) suggests that they have abandoned certain impermissible aspects of their prayer for relief.⁷ Plaintiffs’ present request for an order requiring OSHA to perform *another* onsite inspection of the facility is plainly inconsistent with § 13(d)’s limitation to § 13. OSHA’s decision to initiate an inspection is made under § 8 of the OSH Act, 29 U.S.C. § 657, and is not subject to review here. It therefore follows that compelling an inspection is outside the scope of § 13(d) relief.

II. Plaintiffs Have Not Demonstrated The Secretary Has Arbitrarily or Capriciously Failed to Seek Relief Under § 13.

Because Plaintiffs cannot show that a CSHO recommended “to the Secretary that relief be sought” under § 13(a), *see* 29 U.S.C. § 622(c), there is no Secretarial determination to review under § 13(d), 29 U.S.C. § 622(d) and therefore no § 13(d) claim. But even assuming *arguendo* Plaintiffs’ claims were justiciable, they fail on the merits. That is because Plaintiffs have not carried their heavy burden of proof under the deferential arbitrary and capricious standard. *See* 29 U.S.C. § 622(d). The

⁷ Compl. ¶ 154(a) (requesting “all communications to and from Maid-Rite regarding this matter); *Id.* ¶ 154(c); Tr. 54 (requesting this Court order OSHA compel actions from Maid-Rite, despite the fact that Maid-Rite is not a party here and that § 13(a), not § 13(d), provides for injunctions against employers in proceedings in which the employers are afforded due process rights).

hearing testimony shows that OSHA, acting through experienced safety professionals, considered all relevant evidence and determined that no imminent danger is present at the Maid-Rite facility. OSHA had a rational basis for concluding no imminent danger exists, and the Compliant should be dismissed.

A. The standard of review is highly deferential and does not allow courts to second-guess OSHA’s technical or policy judgments.

The arbitrary and capricious standard “is highly deferential, with a presumption in favor of finding the agency action valid.” *Ohio Valley Env’tl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). Thus, by incorporating the arbitrary and capricious standard into § 13(d), Congress imposed a “heavy burden indeed” on litigants seeking to compel agency action under § 13(a). *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000); *see also NLRB v. Jas. H. Matthews & Co.*, 342 F.2d 129, 131 (3d Cir. 1965) (“Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis.”).

Arbitrary and capricious review does not permit a court to substitute its judgment for that of the agency, especially where the resolution of issues “requires a high level of technical expertise” within the agency’s ken. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). Indeed, where an agency’s discretionary judgment to forego action is challenged in a highly technical area, that inaction is “scrutinized at

the most deferential end of the arbitrary and capricious spectrum[.]” *International Union v. Chao*, 361 F.3d 249, 254-55 (3d Cir. 2004). Finally, by labelling the available relief under § 13(d) a “writ of mandamus,” Congress further signaled the high level of deference to be accorded the Secretary’s professional judgment.

B. Assuming only arguendo that it is subject to review here, OSHA’s determination there is no imminent danger was not arbitrary or capricious.

Plaintiffs cannot meet their burden of showing arbitrary and capriciousness because there is no evidence that present conditions at the Maid-Rite facility pose an imminent danger to employees.⁸ OSHA’s safety professionals have conducted a site visit, interviewed employees, and reviewed relevant documents; their collective judgment is that no imminent danger exists. Nor is there any evidence that any Maid-Rite worker has tested positive for COVID-19 over the past few months.

⁸ A showing that an imminent danger *presently* exists at the plaintiffs’ workplace must be a precondition to relief, even under Plaintiffs’ theory of § 13(d). This is clear from the OSH Act’s language, which is cast in the present and future tenses. Section 13(a), for example, defines an imminent danger as one “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.*” 29 U.S.C. § 662(a) (emphasis added). And § 13(d) states that an action may be brought by an “employee *who may be injured* by reason of” the Secretary’s failure to seek relief under § 13(a). 29 U.S.C. § 662(d) (emphasis added). *Cf. Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001) (*en banc*) (action under “imminent danger” exception to three strikes rule, 28 U.S.C. § 1915(g), requires that an imminent danger must exist at time action is filed, not at some point in the past).

An imminent danger is one that may reasonably be expected to cause immediate death or serious injury, or may do so in the very near future. *See* 29 U.S.C. § 662(a). The OSHA officials who testified at the hearing rationally explained why they determined that no imminent danger is present at the Maid-Rite facility. Their decision-making process was not arbitrary or capricious.⁹

By way of background, in April and May 2020, OSHA's Wilkes-Barre Area Office received complaints that Maid-Rite's facility was not taking steps to protect employees from the spread of COVID-19. Tr. 141-42, 147, 172. The area office sent the complaints to Maid-Rite and received responses and documentation that detailed the company's efforts to control the virus's spread. Tr. 155-56. Area Director (AD) Mark Stelmack and Assistant Area Director (AAD) Susan Giguere reviewed Maid-Rite's responses and determined, in late May 2020, that a formal investigation should be opened. Tr. 156. OSHA opened the inspection on June 2, 2020, and the case was assigned to CSHO Shannon Warner. Tr. 158, 181. Warner obtained

⁹ The OSH Act is concerned with occupational dangers to workers. A *public* health concern over meat processors' connection to the nation's food supply is outside the scope of inquiry. *Cf. Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 208 (3d Cir. 2007) ("The Act is limited in scope, . . . as jurisdiction under the Act extends only to the employee-employer relationship within the workplace."). But safeguarding our food supply during the COVID-19 pandemic is an issue receiving close attention from the President, the Departments of Labor and Agriculture, and the Centers for Disease Control and Prevention. *See* Defs.' MTD (Doc. 24) at 12–13.

photographs and other documents from Maid-Rite, interviewed 15 to 20 employees, and conducted an on-site inspection of the facility on July 9, 2020. Tr. 182, 185-86.

Based on the evidence they compiled, AD Stelmack, AAD Giguere, and CSHO Warner all concluded that no imminent danger conditions are present at Maid-Rite's facility. Tr. 156, 168-69, 193. AD Stelmack¹⁰ explained that several factors influenced that determination:

What we are considering are the factors, the mitigation factors that have already taken place within the company: Sanitation, staggering work breaks, providing for social distancing in break rooms, installation of additional hand sanitizing stations in the facility, the purchase and distribution of face masks and face shields for employees to wear. We looked at the fact that COVID cases haven't been reported since mid-May, I believe it was, over a month.

Tr. 169. Stelmack testified that he also considered the fact that Maid-Rite takes employees' temperatures when they enter the facility and that "they tell employees if they feel ill not to come into work." Tr. 169.

Upon questioning from the Court, AD Stelmack also flatly denied that the area office has a blanket policy of not treating COVID-related complaints as presenting imminent danger conditions. Tr. 179. Nor could an area office have such a policy,

¹⁰ Stelmack has served as area director of the Wilkes-Barre Area Office for about 12 years. Tr. 166. Prior to that, he served as an assistant area director and a compliance officer. Tr. 166. All told, Stelmack has served as an OSHA official for 32 years. Tr. 167. During his tenure with OSHA, he has personally conducted more than 1,000 inspections. Tr. 168.

as enforcement guidance from OSHA's national office makes clear that "imminent danger exposures related to COVID-19 will be prioritized for inspections."¹¹ Put differently, OSHA recognizes that it is possible for COVID exposure to present an imminent danger, and has therefore prioritized such exposure for inspection.

Consistent with AD Stelmack's testimony, AAD Giguere¹² explained why she believed imminent danger conditions were not present:

In discussions with my supervisor, the area director, we decided that it was not an imminent danger because there were protections in place for the employees. Some of the allegations that were made in this complaint were responded to adequately in the response that we got from the employer, and we looked at everything the employer said that they were doing, and we made a determination at that point in time to do an inspection to see if social distancing was, in fact, not being appropriately done, because we had the response that we needed more information.

Tr. 157. AAD Giguere testified further that Maid-Rite provided photographs and other materials which led OSHA to believe that "the things that they were doing were okay, as far as sanitation and providing masks and face shields and those things, but we did not feel they had enough information about social distancing." Tr. 159.

¹¹ See <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

¹² Giguere has served as an assistant area director in OSHA's Wilkes-Barre Area Office for about nine and a half years. Tr. 119. Prior to becoming an assistant area director, she served as a compliance safety and health officer for 23 years. *Id.* In those roles, Giguere conducted approximately 600 workplace inspections and supervised between 800 and 900 more. Tr. 120. She is a certified safety professional with a B.S. degree in microbiology. *Id.*

CSHO Warner's on-the-ground observations of the facility and her interviews with workers confirmed AD Stelmack's and AAD Giguere's conclusions. CSHO Warner learned that workers at the Maid-Rite facility wore gloves, hair nets, masks, and face shields "as their normal personal protective equipment while working." Tr. 187. It was her understanding that masks were required, and that face shields were likewise required unless an employee presented a doctor's note to excuse that requirement. Tr. 187-88. Interviews with management and employees revealed that the company was providing new masks approximately every two weeks. Tr. 188.

CSHO Warner also obtained information about social distancing during her interviews and on-site visit. Tr. 188-89. According to Warner, "[t]here are some work stations in the facility that are naturally set up so that employees can social distance within 6 feet of the production area, but there are some areas in the facility where employees are approximately 2 to 3 feet apart from one another." Tr. 191. Warner also testified that there were physical barriers in the break rooms so that workers could socially distance during breaks. Tr. 197.

The evidence compiled by OSHA thus shows that Maid Rite is taking various steps to control the spread of COVID, but may be able to do more, especially with regard to social distancing. But there is no evidence that workers face an immediate risk of contracting COVID-19 due to conditions that exist at the facility. *See Reich v. Dayton Tire, A Division of Bridgestone/Firestone, Inc.*, 853 F. Supp. 376, 380

(W.D. Okla. 1994) (“mere possibility” of death or serious physical injury is not enough to show imminent danger). Indeed, as AD Stelmack mentioned, the company has reported no positive COVID-19 tests among its workers since mid-May. Tr. 169; *cf. United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (“the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release”).

Plaintiffs—who have the burden of proof—presented no testimony or other evidence to show that conditions at the facility are different from what OSHA has found.¹³ Nor have they presented evidence that current infection rates at the facility are higher than at any other workplace in the country; again, based on information OSHA has gathered thus far, Maid-Rite has not had a positive case in over two months. Based on the evidence presented, this Court, lacking the technical expertise that OSHA has, should not second-guess the agency’s professional judgment that no imminent danger exists.

C. Plaintiffs’ arguments to the contrary are without merit.

In their brief, Plaintiffs first contend (Br. 17-19) that an imminent danger exists at the Maid-Rite facility because, in their view, Maid-Rite has not fully

¹³ Plaintiffs have tried to remedy that deficiency by attaching (without leave of court) declarations to their post-hearing brief. For the reasons set forth in Defendants’ brief in support of their motion to strike (Doc. 45), those declarations should not be considered in deciding this case.

implemented the CDC/OSHA guidance for the meatpacking industry, especially with regard to social distancing.¹⁴ In so arguing, Plaintiffs misapprehend that guidance's role in the OSHA enforcement scheme. The guidance does not speak to imminent danger conditions at all. Nor does the document even hint that failure to comply with the recommendations set forth therein will give rise to imminent danger conditions.¹⁵ To the contrary, the meatpacking guidance urges six-foot distancing "if possible," and is otherwise cast in hortatory terms, as would be expected of a guidance document issued in response to a constantly evolving global pandemic. Plaintiffs' essentially ask this Court to undermine OSHA's discretion. OSHA has determined that focusing on any single protective measure is misguided; employers should instead incorporate a proper mix of protective measures from OSHA's hierarchy of controls. Thus, OSHA's meatpacking guidance exhorts employers to consider a package of responsible abatement measures to reduce the spread of COVID-19. Plaintiffs cannot show that imminent danger conditions exist at the

¹⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

¹⁵ As Plaintiffs point out (Br. 15), the Secretary has represented to the United States Court of Appeals for the D.C. Circuit that companies failing to take feasible abatement measures to combat the spread of COVID-19 may be cited under the OSH Act's general duty clause, 29 U.S.C. § 654(a)(1). A general duty clause violation, however, does not automatically give rise to imminent danger conditions. Indeed, OSHA has issued thousands of general duty clause citations over its 50-year existence, but the agency has sought imminent danger relief only in a handful of cases.

Maid-Rite facility simply by pointing out that Maid-Rite has not fully implemented each recommended abatement measure.

Plaintiffs also mischaracterize Defendants' position when they claim (Br. 16) that OSHA requires deaths or hospitalizations before deciding that an imminent danger exists. None of the testifying officials said that; OSHA's national enforcement policy prioritizes "[f]atalities *and* imminent danger exposures" for inspection.¹⁶ AD Stelmack did testify that the absence of reported COVID cases among Maid-Rite workers since mid-May informed his decision that no imminent danger was present. Tr. 169. That fact does bear on whether conditions at the facility present an imminent danger; the lack of positive cases over an extended period of time suggests that abatement measures in place have been effective. *Cf. Paige v. Washington*, 2020 WL 4558735, at *6 (W.D. Mich. 2020) (stating where no confirmed cases had been reported in inmate's facility that "[w]hile this Court is sympathetic to Plaintiff's general concern about the COVID-19 virus, speculation about the mere possibility that he will become infected by the virus does not constitute imminent danger").

Finally, Plaintiffs contend (Br. 19-24) that OSHA acted arbitrarily and capriciously by treating their complaint as non-formal and by giving Maid-Rite

¹⁶ <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19> (emphasis added).

notice of the July 9 on-site inspection on the previous afternoon. Tr. 189. This court may not consider these contentions, because an action under § 13(d) only concerns whether the Secretary “arbitrarily or capriciously fails to seek relief *under this section*,” 29 U.S.C. § 662(d), *i.e.*, “section” 13. The only action under review, then, is the Secretary’s decision to not seek an injunction under § 13—not the classification of complaints as formal or non-formal, a § 8 determination. Given that Congress specifically conferred upon district courts a limited mandamus jurisdiction with respect to imminent dangers, the OSH Act cannot be read to confer a general jurisdiction for district courts to police the manner in which OSHA conducts its inspections. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994) (where a statute creates a detailed enforcement scheme with specific judicial review mechanisms, courts lack jurisdiction to act outside those mechanisms).

In any event, the area office handled the in-take of Plaintiffs’ complaint in accord with national enforcement guidance.¹⁷ Tr. 138. Thereafter, the CSHO conducted an on-site inspection and found no imminent danger. Tr. 157, 193. So it is wholly irrelevant whether OSHA properly treated the complaint as formal or non-formal.

¹⁷ *See* <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

Finally, the area office acted within its discretion by giving Maid-Rite notice of the on-site inspection the prior afternoon. *See* 29 C.F.R. § 1903.6(a)(2), (4) (advance notice may be given where “special preparations are necessary for an inspection” or “the Area Director determines that the giving of advance notice would enhance the probability of an effective and thorough inspection”). This discretionary decision is not open to challenge here.

III. Plaintiffs Have Not Alleged Or Established Standing

It is axiomatic that Plaintiffs bear the burden of establishing standing, and that “federal courts are under an independent obligation to examine” Plaintiffs’ standing, *United States v. Hays*, 515 U.S. 737, 742-43 (1995). Here, statutory standing requires that Plaintiffs be “employee[s] who may be injured” by the alleged imminent danger at the facility. 29 U.S.C. § 662(d).¹⁸ Likewise, Article III requires Plaintiffs to have and maintain throughout the litigation a “legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). Here, persons who are not (or no longer are) employees and thus not at risk of an alleged imminent danger lack (or lose), statutory and constitutional standing.

¹⁸ Such an employee’s representative may also serve as a plaintiff under § 13(d). *Id.* But because Plaintiff Justice at Work purports only to represent the three Jane Doe Plaintiffs, not any other employees working at Maid-Rite, its standing rises or falls with the three Jane Does.

The stale allegations the Jane Doe Plaintiffs set forth in the July 22 Complaint and exhibits allege neither current employment nor the current risk of injury by an imminent danger, which is particularly problematic given the rapidly-evolving nature of the COVID-19 pandemic and precautionary measures thereto. *See* Compl. ¶¶ 28, 29, 33, 34, 36 (factual allegations were made May 19 and June 25); Doc. 2-4 (signed May 25, May 26, and June 8). Thus, even if assumed to be true, Plaintiffs' Complaint is facially deficient.

Plaintiffs acknowledge this deficiency by attaching an August 11, 2020 declaration from Jane Doe II to their Post-Hearing Brief that contains allegations that she and the other Jane Doe Plaintiffs remain employed at the Maid-Rite facility and that the conditions at the facility are unchanged (Doc. 43-2); *see also* Pls.' Br. at 3 n.3. This newly-filed declaration cannot be considered when evaluating a facial attack on standing under Rule 12(b)(1).¹⁹ This is especially true here given that Jane Doe II's August 11 declaration contradicts Plaintiffs' operative Complaint. Plaintiffs have not explained how both documents could be true. *Compare* Compl. ¶¶ 13, 108,

¹⁹ *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000), *modified by Simon v. United States*, 341 F.3d 193 (3d Cir. 2003) ("In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff."). Separately, Defendants' Motion to Dismiss asserts a factual attack on jurisdiction, unrelated to standing. Given that, contrary to the allegations in the Complaint, OSHA conducted an onsite evaluation of the facility and that the inspector did not determine an imminent danger exists or recommend the Secretary seek injunctive relief, § 13(d) jurisdiction is lacking.

112 (alleging on July 22 that OSHA had *not* conducted an inspection of the Plant); *with* Doc. 43-2 ¶¶ 3-12 (alleging to have witnessed part of the OSHA inspection “sometime in early July”).

Finally, Plaintiffs must establish standing “with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the merits stage, Plaintiffs must establish standing through affidavits, declarations sworn under penalty of perjury, or other evidence. *Id.* As explained in Defendants’ accompanying Motion to Strike, the Jane Doe II Declaration was not signed under penalty of perjury and therefore cannot be used to prove standing.²⁰ Thus, regardless of whether standing is assessed on the Motion to Dismiss standard or on the merits, the Complaint must be dismissed.

²⁰ Plaintiffs should have known that Defendants had called their standing into question prior to the July 31 hearing, as Defendants had raised the issue (Doc. 20). Plaintiffs could have testified at the hearing in an effort to establish their standing, but they elected not to.

Respectfully submitted.

Date: August 21, 2020

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

JANE DOES I, II, III, et al.,)	
)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 3:20-1260
)	
EUGENE SCALIA, United States)	(JUDGE MANNION)
Secretary of Labor, et al.,)	
)	
)	
Defendants.)	

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania, and is a person of such age and discretion as to be competent to serve papers.

That on August 21, 2020, she served copies of the attached:

DEFENDANTS' POST-HEARING BRIEF

by ECF Filing upon:

David H. Seligman, Esquire
Lerae Kroon, Esquire

/s/ Christina M. Nihen
CHRISTINA M. NIHEN
Legal Assistant