No. 21-2057

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JANE DOE I, et al.,

Plaintiffs-Appellants,

v.

MARTIN J. WALSH, SECRETARY OF LABOR, et al.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Middle District of Pennsylvania
Case No. 3:20-1260 (Hon. Malachy E. Mannion)

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

This matter is an appeal from the district court's order granting the Secretary of Labor's (Secretary) motion to dismiss and dismissing the complaint brought by Jane Doe I, et al. (Plaintiffs), seeking a court order of "emergency mandamus relief" against the Secretary. J.A. 51.[1] The district court's jurisdiction was governed by 29 U.S.C. § 662(d). This Court has jurisdiction over Plaintiffs' appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Plaintiffs' appeal of the district court's decision is moot where Plaintiffs' underlying claim seeks relief – an order altering working conditions at a meatpacking plant – that is, by statute, only available until the conclusion of the Secretary's discretionary enforcement process related to those working conditions, and that process ended more than a year ago, and therefore this Court cannot grant Plaintiffs any cognizable relief on their appeal.

[1] Citations to "J.A." are to the two-volume Joint Appendix submitted by the parties.

STATEMENT OF THE CASE

I. Legal Framework

A. Enforcement Under the OSH Act

This case concerns certain provisions of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651 et seq. The fundamental objective of the OSH Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve the Act's purposes, Congress authorized the Secretary of Labor "to set mandatory occupational safety and health standards." 29 U.S.C. §§ 651(b)(3), 655. The OSH Act also contains a general duty clause, which requires an employer to provide a work environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

The Occupational Safety and Health Administration (OSHA)[2] enforces both standards and the general duty clause by issuing citations requiring the employer to abate violations and, where appropriate, pay a civil penalty. 29 U.S.C. §§ 658-659, 666. Workplace inspections are typically conducted by a trained OSHA inspector called a Compliance Safety and Health Officer (CSHO). If the Secretary believes,

[2] The Secretary has delegated his responsibilities under the OSH Act to an Assistant Secretary who directs OSHA. Secretary's Order 08-2020, 85 Fed. Reg. 58393 (2020). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

as a result of an investigation, that the employer has violated OSHA requirements, he will issue a citation to the employer. 29 U.S.C. § 658(a). OSHA may cite an employer for a workplace violation only up until six months past the date that the violation occurred. 29 U.S.C. § 658(c). The employer has fifteen business days to contest the citation. Contested citations are heard by the Occupational Safety and Health Review Commission (Commission), an independent adjudicatory body that is not a part of the Department of Labor.[3] 29 U.S.C. § 659.

As the Supreme Court has held, the Secretary has sole statutory responsibility to enforce the OSH Act and exclusive prosecutorial discretion. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985); *see also Donovan v. OSHRC* ("*Mobil Oil*"), 713 F.2d 918, 927 (2d Cir. 1983). As the statutory prosecutor, the Secretary has the prosecutor's traditional freedom of discretion to initiate and control the course of his prosecution and to decide if, when, and under what circumstances a violation will be charged, the exact nature of the charge, and whether to withdraw it. "[O]nly the Secretary has the authority

[3] Initially, an ALJ appointed by the Commission adjudicates the dispute. 29 U.S.C. §§ 659(c), 661(j). A party adversely affected by the ALJ's decision may petition for discretionary review of the decision by the full three-member Commission. *Id.* § 661(j); 29 C.F.R. § 2200.91(a). If review is not granted, the ALJ's decision becomes the final order of the Commission thirty days after its issuance. 29 U.S.C. § 661(j). A party adversely affected or aggrieved by the Commission's final order may seek review in the appropriate court of appeals. *Id.* § 660(a), (b).

to determine if a citation should be issued to an employer for unsafe working conditions." *Cuyahoga Valley*, 474 U.S. at 7 (citing 29 U.S.C. § 658).

B. Imminent Danger Procedures in the OSH Act

The OSH Act defines an "imminent danger" as "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 Act." 29 U.S.C. § 662(a). The Act permits employees who believe that an imminent danger exists at their workplace to request an inspection by filing a complaint with the Secretary. 29 U.S.C. § 657(f)(1). If the Secretary determines that there are reasonable grounds to believe that such a danger exists, the Secretary must initiate an inspection "as soon as practicable, to determine if such violation or danger exists." *Id.*

Section 13 of the OSH Act details specific "Procedures to Counteract Imminent Dangers" if such dangers are found during the course of an inspection.[4]

[4] The Secretary's regulations expand on OSHA's handling of employee complaints about perceived imminent dangers. *See* 29 C.F.R. §§ 1903.11-.13. An employee may file such a complaint with the OSHA Area Director or a CSHO. *Id.* § 1903.11(a). The Area Director shall make the determination of whether complaints provide reasonable grounds to believe that the alleged violation exists. *Id.* § 1903.11(b). If the Area Director finds such grounds, the Area Director will "cause an inspection to be made as soon as practicable." *Id.* § 1903.12(a). If the Area Director does not find such grounds, they must "notify the complaining party in writing of such determination." *Id.* § 1903.12(a). If a CSHO "concludes on the

29 U.S.C. § 662. The Secretary may file a petition in a U.S. district court to restrain conditions and practices that create the imminent danger. *Id.* § 662(a). In such actions, the district court has authority to grant injunctive relief or a temporary restraining order to eliminate the hazard pending the outcome of an OSHA enforcement proceeding. *Id.* § 662(b). The final provision in this section provides a private right of action where employees may obtain judicial review if the Secretary arbitrarily or capriciously decides not to pursue a section 13(a) action. The full text of the right-of-action provision states:

> (d) 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).

Imminent danger was a topic of much discussion by Congress preceding the passage of the OSH Act. *See Marshall v. Whirlpool Corp.*, 593 F.2d 715, 732-35 (6th Cir. 1979) (recounting legislative history surrounding the imminent danger

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basis of an inspection that conditions or practices exist" that constitute an imminent danger, the CSHO will "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." *Id.* § 1903.13.

issue). The debate centered around whether an individual OSHA inspector should be able to order the shutdown of workplaces that posed imminent dangers or whether only a district court should have that power. *Id.* In the end, Congress chose to give the courts exclusive power to enjoin imminent dangers, upon application of the Secretary. *Id.* Congress also considered what type of relief to provide should the Secretary arbitrarily and capriciously refuse to seek an injunction to halt an imminent danger. Congress rejected the possibility of giving workers injured in such a situation the right to sue for damages, opting instead to create 29 U.S.C. § 662(d), which provides employees with a cause of action in district court to seek to compel the Secretary to pursue injunctive relief. *See id.* at 729 (describing cause of action for damages provided for in a House version of the bill, which ultimately did not pass).

II. Relevant Facts and Procedural History

Maid-Rite Specialty Foods (Maid-Rite) operates a meatpacking plant in Dunmore, Pennsylvania. J.A. 51. On May 19, 2020, Plaintiffs (who are employees of Maid-Rite and their representatives) submitted a letter to OSHA's Wilkes-Barre Area Office, stating that they believed the potential spread of COVID-19 within the plant posed an imminent danger to the employees and requesting that OSHA immediately inspect the facility. J.A. 147-51. The Area Office designated Plaintiffs' letter as "non-formal complaint," consistent with

OSHA's then-applicable national enforcement guidance. According to the procedures for non-formal complaints, the Area Office informed Maid-Rite of the employee-based complaint and asked for the employer's response. J.A. 154-59.

On June 2, 2020, OSHA's Area Office opened an investigation of the Maid-Rite plant. J.A. 22. The assigned CSHO requested relevant documents from Maid-Rite and interviewed employees. J.A. 22, 158-59, 216-17. The CSHO also conducted an on-site inspection of the plant on July 9, 2020. J.A. 22, 216. Based on what she observed, the CSHO did not believe that an imminent danger existed at the plant; she conferred with her supervisors who, after taking into consideration OSHA's internal guidance and policies, agreed. J.A. 22. The CSHO did not recommend to her supervisors that an imminent danger action be brought under section 13 of the OSH Act. J.A. 22.

On July 22, 2020, Plaintiffs brought suit in the District Court for the Middle District of Pennsylvania, invoking section 13(d) of the OSH Act and seeking "emergency mandamus relief to compel [OSHA] to protect workers at the Maid-Rite Specialty Foods meatpacking plant . . . from the imminent dangers posed by a workplace that has failed to take the most basic precautions to protect against the spread of COVID-19." J.A. 51. This was and is the only time in the fifty-year history of the OSH Act that employees or their representatives have brought a complaint under section 13(d). The Secretary filed a motion to dismiss the

complaint on July 28, 2020, arguing, among other things, that Plaintiffs had no cause of action under section 13(d) of the OSH Act because no CSHO had made a finding of imminent danger or recommended that the Secretary seek injunctive relief in court; the Secretary took the position that such a finding and recommendation was necessary for Plaintiffs to invoke the district court's jurisdiction under section 13(d). *See* J.A. 22. The district court held a hearing on July 31, 2020. J.A. 8.

On December 2, 2020, OSHA concluded its investigation of the Maid-Rite plant and notified both Plaintiffs and Maid-Rite by letter that OSHA would not be issuing any citations to Maid-Rite based on the inspection. J.A. 224-26. The letter to the Plaintiffs detailed the findings of OSHA's inspection with respect to each of the seven separate items of concern in Plaintiffs' letter and indicated that if Plaintiffs did not agree with the inspection results, they could contact OSHA's Acting Area Director for clarification or OSHA's Regional Administrator to request an informal review. *Id.* On December 7, 2020, Plaintiffs requested an informal review of the initial decision. *See* J.A. 233.

On January 12, 2021, OSHA's Regional Administrator responded by letter to Plaintiffs' request for an informal review of the initial decision. J.A. 233-34. The letter addressed the areas of concern Plaintiffs had outlined in their December 7, 2020 letter seeking review and, ultimately, affirmed the determination of the

Area Director that no citation to Maid-Rite would issue. *Id.* The letter indicated that the Regional Administrator's decision was "final and not subject to review." *Id.* at 233. The same day, the Secretary filed a suggestion of mootness with the district court, arguing that because the Secretary's enforcement process was now complete, no further potential relief remained available to the Plaintiffs and the case was therefore moot. Dkt. No. 53.

On March 30, 2021, the district court issued a memorandum opinion granting the Secretary's motion to dismiss Plaintiffs' complaint. The court first addressed the question of mootness and found that the case was not moot. J.A. 14. Framing the issue before it as "whether this court has jurisdiction over a complaint in mandamus pursuant to Section 13(d) of the Act where the Secretary has not received a recommendation to take legal action from an OSHA inspector," the court held that the answer to this question was not affected by whether or not OSHA had concluded its enforcement proceedings. J.A. 12-14. The court then, however, agreed with the Secretary's position that Plaintiffs could not bring a claim under section 13(d) because no CSHO had made a recommendation that the Secretary seek injunctive relief to stop an imminent danger. J.A. 34. The court therefore dismissed Plaintiffs' complaint. On May 28, 2021, Plaintiffs appealed to this Court. J.A. 1.

On February 26, 2021, Plaintiffs filed a second imminent danger complaint with OSHA, requesting that OSHA again inspect the Maid-Rite plant. J.A. 235-38. OSHA conducted a second investigation in response to Plaintiffs' second imminent danger complaint, concluded that investigation, and on August 17, 2021 notified Plaintiffs by letter that it would not be issuing Maid-Rite any citations related to COVID-19 as a result of Plaintiffs' second imminent danger complaint. *See* Pl. Br. 23.

SUMMARY OF THE ARGUMENT

After due consideration, the Secretary has concluded that section 13(d) of the OSH Act does not require a rejected recommendation from a CSHO before an employee plaintiff may bring suit under that provision, contrary to the position taken by the district court and the Secretary below. Nevertheless, Plaintiffs' appeal should be dismissed as moot. Because Plaintiffs brought their underlying suit under a provision of the OSH Act that authorizes judicial intervention to abate imminent dangers at a workplace only during the pendency of the Secretary's enforcement action regarding those dangers, and that enforcement action has concluded, Plaintiffs' statutory cause of action has expired and their underlying claim is moot. Moreover, no citation related to the working conditions Plaintiffs complained about is now possible under the OSH Act because the Act requires the Secretary to issue any citations within six months of the violation occurring, and

more than six months have elapsed since OSHA inspected the Maid-Rite plant. Plaintiffs' appeal to this Court is likewise moot because there is no meaningful relief this Court can grant, since the statutory relief of judicial intervention is no longer available. No exception for controversies "capable of repetition yet evading review" is warranted because there is no reasonable probability that the facts of this case will repeat themselves in the future.

ARGUMENT

I. The Secretary No Longer Maintains That a Section 13(d) Suit Requires a Rejected Recommendation From a CSHO, but This Change in Position Does Not Affect the Outcome of This Appeal.

Before the district court, the Secretary took the position that employees (or their representatives) can only bring a suit under section 13(d) of the OSH Act if a CSHO has recommended to the Secretary that he seek an imminent danger injunction under section 13(a) and the Secretary arbitrarily and capriciously disregarded that recommendation. *See* J.A. 22. The district court agreed, and dismissed Plaintiffs' complaint on this basis, as it was undisputed that no CSHO had made such a recommendation. J.A. 34-35.

The Secretary does not maintain his earlier position on this appeal. After additional analysis of the statutory text and legislative history, and considering these factors in light of the OSH Act's broad purpose of protecting workers, the Secretary has concluded that a specific recommendation from an individual CSHO

is not a prerequisite to employees bringing a suit under section 13(d) of the Act. Rather, as the statute expressly states, employees (or their representatives) may bring suit "[i]f the Secretary arbitrarily or capriciously fails to seek relief under" section 13. 29 U.S.C. § 662(d). Notwithstanding this change in position, Plaintiffs' appeal should be dismissed as moot because their 13(d) claim has expired and there is no further relief this Court or the district court can grant them. Mootness is discussed thoroughly in Section II of this argument, below.

II. Maid-Rite's Claim is Moot Because the Statute Provides a Cause of Action Only Until OSHA Concludes Its Enforcement Process, and Here OSHA Has Concluded Its Enforcement Process; No Citation is Possible Under the OSH Act in Any Event Because the Working Conditions in Question Occurred More Than Six Months Ago.

Standard of Review. This Court exercises plenary review over the question of whether a case is moot. *Belitskus v. Pizzingrilli*, 343 F.3d 632, 639 (3d Cir. 2003) (citing *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 295 (3d Cir. 2001)).

At the outset, for purposes of this mootness discussion it is helpful to separate Plaintiffs' underlying claim – the reason they brought suit under section 13(d) in the first place – from the contentions they now make on appeal, and to note the relief sought for each. Plaintiffs' underlying claim is that the Secretary acted arbitrarily and capriciously in not seeking a section 13(a) injunction; for this claim, they seek the relief of a court order "requiring [the Secretary] to abate the

imminent danger at the Maid-Rite Plant." J.A. 96. In the present appeal, Plaintiffs contend that the district court misinterpreted section 13(d) to require a CSHO's recommendation and improperly dismissed their complaint; accordingly they ask this Court for an order "revers[ing] the district court's decision, vacat[ing] its interpretation of § 662(d), and remand[ing] for further proceedings consistent with an accurate reading of the statute." Pl. Br. 57.

Both aspects of the case are moot. Plaintiffs' underlying claim is moot because section 13 of the OSH Act provides a district court with authority to order injunctive relief only during the pendency of OSHA's enforcement process regarding a particular alleged imminent danger, and the enforcement process in this case ended when the Secretary, after an investigation, determined there was no imminent danger at the Maid-Rite plant. This claim is also moot because the OSH Act permits the Secretary to issue citations only up to six months past the occurrence of any safety or health violation; because more than six months have passed from the alleged unsafe conditions at the Maid-Rite plant, the Secretary cannot issue Maid-Rite any citations related to those conditions, and Plaintiffs are therefore without a remedy under the statute. Plaintiffs' claim on appeal is moot because their underlying claim has expired; even if this Court were to vacate the district court's opinion and remand for "further proceedings," the district court

would not be able to provide any relief because OSHA's enforcement process has concluded. Accordingly, Plaintiffs' appeal should be dismissed.

A. Plaintiffs' Underlying Claim Has Expired Because Section 13 of the OSH Act Provides a District Court the Authority to Order Injunctive Relief Only Pending the Outcome of OSHA's Enforcement Process.

Plaintiffs' underlying claim, in which they sought injunctive relief related to the alleged imminent danger at the Maid-Rite plant, is moot because a district court may enjoin imminent dangers only until OSHA has completed its enforcement process, an end date which in this case occurred in January 2021.[5] This jurisdictional limitation on the district court's authority is found directly in section 13 of the OSH Act. Paragraph (a) of section 13 states that the Secretary may file a petition in district court to "restrain any conditions or practices" that create an imminent danger in a workplace. 29 U.S.C. § 662(a). Paragraph (b) of section 13 provides the district court with the concomitant authority "to grant such injunctive relief or temporary restraining order *pending the outcome of an enforcement proceeding pursuant to this Act*." *Id.* § 662(b) (emphasis added). Taken together,

[5] This brief largely discusses the concept of Plaintiffs' underlying claim having expired in terms of the claim being moot, but it is also possible to frame the issue as one of lack of jurisdiction, because the OSH Act grants district courts jurisdiction to hear claims related to imminent danger only for a certain time period – "pending the outcome of an enforcement proceeding" – and after that time period has ended, a district court lacks jurisdiction over any attempted section 13(d) claim. 29 U.S.C. § 662(b).

these two paragraphs plainly restrict the district court's authority to ordering injunctive relief that immediately halts imminently dangerous conditions in order to protect employees during the pendency of OSHA's ordinary enforcement process, which can last months or years.

As explained above, paragraph (d) of section 13 provides a narrow private right of action where employees may obtain judicial review should the Secretary arbitrarily or capriciously decide not to pursue a section 13(a) action. "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 . . . 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). Plaintiffs contend – and the district court at least implicitly agreed – that the inclusion of the language "such further relief as may be appropriate" means that an employee can sue under section 13(d) *at any time*, regardless of the status of OSHA's enforcement process. Pl. Br. 40-41. According to Plaintiffs, then, even after OSHA has inspected a worksite and determined there is no imminent danger warranting seeking injunctive relief, employees themselves could go to the district court, and that court could, on its own, make findings about OSHA violations and order changes in workplace practices. This interpretation is utterly contrary to decades of case law regarding

the Secretary's exclusive enforcement authority and the plain language of the OSH Act itself.

The Supreme Court has affirmed that Secretary has sole statutory responsibility to enforce the OSH Act and exclusive prosecutorial discretion. *Cuyahoga Valley*, 474 U.S. at 6-7 (1985); *see also Mobil Oil*, 713 F.2d at 927. "[O]nly the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions." *Cuyahoga Valley*, 474 U.S. at 7 (citing 29 U.S.C. § 658). This type of discretionary enforcement authority is not reviewable in court. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)."). It follows that the Secretary's enforcement discretion cannot be usurped by an individual employee seeking relief in court. "[E]mployees have a limited role in the enforcement of the Act. Under OSHA, employees do not have a private right of action. They may not compel the Secretary to adopt a particular standard. As parties, they may not prosecute a citation once the Secretary decides to withdraw it; nor may they continue an appeal of a Commission decision once the Secretary unconditionally asserts that he will not prosecute the citation regardless of the decision by the court of appeals." *Mobil Oil*, 713 F.2d at 927 (citations omitted).

Accordingly, this Court should reject Plaintiffs' effort to stretch the meaning of "such further relief as may be appropriate" so far that the OSH Act's entire enforcement scheme is subverted. The only reasonable interpretation of section 13 as a whole[6] is that an employee may go to district court, and the court may order injunctive relief, only until the conclusion of the Secretary's enforcement proceeding. In this case, the enforcement proceeding ended after the Secretary investigated Plaintiffs' complaint, inspected the Maid-Rite worksite, determined not to issue any citations, notified Plaintiffs and Maid-Rite of its decision, considered Plaintiffs' request for informal review, and – in January 2021, more than a year ago – issued a final determination letter confirming that the Secretary would not be citing Maid-Rite. And when OSHA's enforcement proceeding ended, so did the district court's statutory authority to order injunctive relief. 29 U.S.C. § 662(b).

In addition, the ultimate relief Plaintiffs sought was for OSHA to issue a citation to Maid-Rite for the working conditions at the plant. *See* J.A. 97 (asking district court to order OSHA to conduct an immediate onsite inspection of the plant and take necessary actions to resolve the alleged dangers there). But the OSH Act permits citations only up until six months have passed from the occurrence of a

[6] Plaintiffs criticize the district court for failing to look at neighboring paragraphs of section 13 when interpreting paragraph (d), Pl. Br. 47, but they make the same mistake when urging an isolated reading of the "such further relief" phrase.

violation. 29 U.S.C. § 658(c); *see AKM LLC d/b/a Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012). Because more than six months have passed since the alleged unsafe working conditions, the Secretary is without authority to provide the relief Plaintiffs request. Plaintiffs' underlying claim for injunctive relief related to imminent dangers at the Maid-Rite plant is therefore no longer viable.

B. Plaintiffs' Appeal is Moot Because There is No Further Relief That a Court Can Grant Them.

Likewise, the issues Plaintiffs raise in their appeal to this Court are moot. An appeal is moot when "the court cannot provide the prevailing party with any relief." *Constand v. Cosby*, 833 F.3d 405, 409 (3d Cir. 2016) (citing *Chafin v. Chafin*, 568 U.S. 165, 171 (2013)). "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Calif. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed. *Id.* (quoting *Mills*, 159 U.S. at 653).

Such is the case here. OSHA inspected the Maid-Rite plant at Plaintiffs' behest, found no imminent danger, and determined that no citations were

warranted. The OSH Act's six-month statute of limitations for issuing a citation related to the worksite conditions at the time of Plaintiffs' complaint has long since run. The conclusion of OSHA's enforcement process with respect to Plaintiffs' imminent danger complaint makes it impossible for this Court to grant Plaintiffs any meaningful relief, because the district court now lacks jurisdiction to order injunctive relief relative to that complaint, and any remand from this Court to the district court – which is what Plaintiffs ask for, Pl. Br. 57 – would simply result in a necessary dismissal for lack of jurisdiction. Because there is no relief this Court can provide to Plaintiffs, the appeal should be deemed moot. *See Constand*, 833 F.3d at 412 (appeal of district court's decision to unseal documents was moot where documents had already been unsealed and contents distributed, because court had no power to halt dissemination of documents); *Sierra Club v. U.S. Army Corps of Engineers*, 277 F. App'x 170, 173 (3d Cir. 2008) (appeal of district court's decision allowing the filling of wetlands was moot because the wetlands had already been filled and could not be unfilled).

C. The Case is Not "Capable of Repetition Yet Evading Review."

Contrary to Plaintiffs' contention, this case does not qualify for the mootness exception afforded to controversies that are "capable of repetition, yet evading review." Pl. Br. 34. To fall under this exception, a controversy must satisfy two factors: "(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." *Cty. of Butler v. Governor of Pennsylvania*, 8 F.4th 226, 231 (3d Cir. 2021) (quoting *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017)). "There must be more than a theoretical possibility of the action occurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability." *Id.* (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). The exception "is 'narrow' and 'applies only in exceptional situations.'" *Id.* (quoting *Hamilton*, 862 F.3d at 335). The moving party bears the burden to demonstrate that the exception applies. *New Jersey Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 33 (3d Cir. 1985).

Here, Plaintiffs' underlying claim brought under section 13(d) – asking the district court to require the Secretary to take action vis-à-vis the alleged imminent danger at the Maid-Rite plant – cannot qualify for the exception because it was mooted by operation of the OSH Act. Such a claim can *never* last longer than the pendency of the Secretary's enforcement action, whether the Secretary chooses to issue a citation to an employer or not. 29 U.S.C. § 662(b) (granting the district court jurisdiction to grant injunctive relief "pending the outcome of an enforcement proceeding pursuant to this Act"). The equitable doctrine of "capable of repetition yet evading review" cannot restore jurisdiction where the Act takes it away.

Plaintiffs' claim on appeal – seeking a reversal of the district court decision and remand for further proceedings – fares no better for a different reason. Plaintiffs cannot satisfy the requirement that there be a "reasonable expectation or a demonstrated probability" that they will find themselves in the same situation again. *Cty. of Butler*, 8 F.4th at 231. Given that this is the first and only time in the fifty years since the OSH Act was passed that anyone has brought suit under section 13(d), and given that the COVID-19 pandemic is a once-in-a-century phenomenon, the possibility that Plaintiffs will again find themselves in the situation of (a) believing they face an imminent danger at the workplace, (b) having the Secretary determine there was no imminent danger, and (c) having a district court determine it has no jurisdiction over Plaintiffs' claim is simply too remote to qualify as "capable of repetition." *See Cty. of Butler*, 8 F.4th at 231 (where plaintiffs had challenged governor's orders related to COVID-19 public health measures but the legal and public health landscape had since changed, finding no reasonable expectation that the same plaintiffs would be subject to the same orders again); *Belitskus*, 343 F.3d at 649 (where Pennsylvania voter brought election-related claim but then moved out of the Commonwealth, and no evidence was presented to show he planned to return, finding no reasonable likelihood he would again be subject to Pennsylvania's election laws); *Hamilton*, 862 F.3d at 366 ("more than speculation is required to invoke the capable-of-repetition

exception"). Moreover, should Plaintiffs believe changing conditions pose a new imminent danger at their worksite, they would have the opportunity to bring a new imminent danger complaint and begin the enforcement process anew, unaffected by the events of this case.[7] Accordingly, Plaintiffs have not demonstrated that this case merits an exception to being declared moot.

III. The Appropriate Resolution of This Case is to Vacate the District Court's Opinion and Remand With Directions to Dismiss.

When a case becomes moot while an appeal is pending, the general practice is to vacate the district court's opinion and remand the case with directions that it be dismissed. *Cty. of Butler*, 8 F.4th at 231 (citing *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950); *Khodara Env't, Inc. ex rel. Eagle Env't L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001)). This is because, as the Supreme Court has held, "a judgment that is unreviewable because of mootness should not spawn any legal consequences for the party who sought reversal on appeal." *Id.* at 231-32 (quotation marks and alterations omitted) (quoting *Munsingwear*, 340 U.S. at 41). While Plaintiffs' underlying claim has been moot since the conclusion of OSHA's enforcement process, the principles behind *Munsingwear* still warrant

[7] Indeed, Plaintiffs filed a second imminent danger complaint on February 26, 2021, and OSHA determined not to issue a citation in that case as well. *See supra* p. 10. Notably, Plaintiffs did not commence a new section 13(d) proceeding on that complaint.

vacating the district court opinion here. These principles "should not be applied blindly, but only after a consideration of the equities and the underlying reasons for mootness." *Humphreys v. Drug Enforcement Admin.*, 105 F.3d 112, 114 (3d Cir. 1996).

In general, the *Munsingwear* approach applies to "situations in which a controversy presented for review had become moot due to circumstances unattributable to either party." *Id.* That is the case here – the controversy is moot because of limitations imposed by Congress in the OSH Act, not because of any actions taken by Plaintiffs or the Secretary. Thus, "the party who sought reversal on appeal" – Plaintiffs – should not be required to bear the "legal consequences" of the district court's decision about the limits of section 13(d). *See Cty. of Butler*, 8 F.4th at 232 (vacating district court opinion that had become moot because of a change in Pennsylvania law); *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 218 (3d Cir. 2003) (vacating portion of district court opinion that had become moot due to plaintiff-appellant, a high school student, graduating from high school). Accordingly, the equities warrant vacating the district court's decision.

CONCLUSION

For the reasons stated above, the Court should find the controversy moot and vacate the district court judgment with directions to dismiss the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 14, 2022, I filed a copy of the foregoing brief via the Court's CM/ECF Electronic Filing System, providing service on all registered counsel for Appellants.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Secretary's brief contains 5,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The font used was Times New Roman 14-point proportional spaced type.

I also certify that the ECF document was scanned for viruses with Microsoft Defender and found to be free of viruses and that the paper copies of this brief are identical to the version submitted electronically.

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