

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

JANE DOES I, II, III and FRIENDS  
OF FARMWORKERS, INC. D/B/A  
JUSTICE AT WORK IN ITS  
CAPACITY AS EMPLOYEE  
REPRESENTATIVE,

Plaintiffs,

EUGENE SCALIA, IN HIS OFFICIAL  
CAPACITY AS UNITED STATES  
SECRETARY OF LABOR;  
OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION,  
UNITED STATES notice  
DEPARTMENT OF LABOR,

Defendants.

Case No.: 3:20-cv-01260

**PLAINTIFFS' RESPONSE TO DEFENDANTS' "SUGGESTION OF  
MOOTNESS"**

## INTRODUCTION

Plaintiffs brought this action under 29 U.S.C. § 662(d), a provision of the Occupational Safety and Health Act designed to allow judicial remedies against the Occupational Safety and Health Administration (OSHA) when it declines to protect workers from imminent dangers. Plaintiffs have repeatedly informed OSHA that their workplace contains, and continues to subject them to, various imminent dangers. These dangers include requiring workers along production lines to work elbow to elbow without opportunities for physical distancing, a practice that has resulted in deadly outbreaks at meat-processing plants around the country. *See, e.g.*, ECF Doc. 45 at 5; ECF Doc. 52.

OSHA has not denied the essential facts and has not denied the dangers that Maid-Rite’s practices create for Maid-Rite’s workers. In fact, OSHA’s inspection of the Maid-Rite facility—even though undermined by OSHA arbitrarily and capriciously giving Maid-Rite advance notice, ECF Doc. 43 at 22—revealed that “[e]mployees were not social distancing in production areas, putting workers at risk for exposure to SARS-CoV-2.” ECF Doc. 51-2. Yet, OSHA continually refused to take any action to protect workers at the Maid-Rite Plant, only going as far as to “bring Maid-Rite’s attention” to strategies used to protect workers at other facilities. *See, e.g., id.*

A lot has changed over the past week, however. While COVID-19 continues

to rage across the country and meat-processing workers remain particularly vulnerable, on Friday, January 29, OSHA issued updated COVID-19 guidance for employers, U.S. Dep't of Labor, OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* (Updated Jan. 29, 2021), <https://bit.ly/3j4oeYg> (“Updated Guidance”), due to instructions from President Biden.<sup>1</sup> The Updated Guidance bears directly on some of the core issues in this case. Among other things, the Updated Guidance specifies that employers should increase physical space “between workers at the worksite to at least 6 feet” and that this is necessary even if it will require “modifying the workspace or slowing production lines.” *Id.*

As OSHA’s Updated Guidance reinforces, Maid-Rite’s refusal to allow spacing along production lines constitutes an ongoing imminent danger to workers at the facility. There is also every reason to believe that if OSHA were to conduct a new inspection of the Maid-Rite facility in light of the Updated Guidance, it would come to a different conclusion than it did in early December 2020. But currently before this Court is a January 12, 2020 filing wherein Defendants argued to this

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<sup>1</sup> Exec. Order on Protecting Worker Health & Safety (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/> (providing, among other things, that OSHA shall “issue, within 2 weeks of the date of this order and in conjunction or consultation with the heads of any other appropriate executive departments and agencies (agencies), revised guidance to employers on workplace safety during the COVID-19 pandemic”).

Court that they had unilaterally stripped this Court of jurisdiction by choosing to formalize their decision not to act days before the change in administration. ECF Doc. 53 (Defs.' Br.).

For the reasons explained in Part I of this response, even without the Updated Guidance, this case is not moot. OSHA's argument that the agency can act unilaterally and moot a case at its discretion is contrary to the language and purposes of § 662(d). Notwithstanding OSHA's arbitrary and capricious failure to intervene, Maid-Rite's practices continue to constitute an imminent danger to workers. Section 662(d) was designed as a check on OSHA's failure to act in precisely these circumstances. It formalizing that failure does not change § 662(d)'s reach. Moreover, even if OSHA's decision not to issue a citation deprives the Court of authority to order OSHA to seek an imminent danger order under § 662(b), § 662(d) allows the Court to order "further relief as may be appropriate," including a new inspection. And, under the "capable of repetition yet evading review" exception to mootness, this Court should adjudicate this action to prevent OSHA's continued failure to act in the future.

In Part II, this response describes the remedies available to the Court in the wake of the conflicting events of the past two months, including (1) OSHA's decision not to issue a citation to Maid-Rite in December 2020, and (2) OSHA's issuance of Updated Guidance in January 2021 that directly bears on the conditions

at the Maid-Rite plant. Considering the imminent danger that Maid-Rite continues to present to workers and OSHA's persistent arbitrary and capricious conduct amplified by its own revised view of the science, the Court should order that OSHA seek an imminent danger order under § 662(b) or reinspect Maid-Rite under the Updated Guidance. Before deciding what steps are appropriate to redress OSHA's failures, the Court could also stay resolution of this matter and order the parties to mediate their dispute and to assess whether OSHA's Updated Guidance provides a basis for an out-of-court resolution.<sup>2</sup>

## ARGUMENT

### **(I) This Action is Not Moot.**

#### **(A) The Court Still May Order OSHA to Resolve the Imminent Danger That Continues to Confront Maid-Rites Workers.**

Defendants begin their argument with the strawman assertion that the Court does not have authority to review Defendants' decision not to issue a citation to Maid-Rite. Defs.' Br. at 4. Of course, Defendants' decision to issue or not issue a citation to Maid-Rite is not the subject of this litigation. This case is not about how much money OSHA has required Maid-Rite to pay (or not pay) for its violations. This case is about OSHA's ongoing decision not to protect workers at the Maid-

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<sup>2</sup> Plaintiffs' counsel conferred with Defendants' counsel today about the possibility of a stay, and Defendants' counsel expressed opposition. Plaintiffs' counsel remains optimistic, however, that because of the recent Updated Guidance, an out-of-court resolution is achievable.

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