

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

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

**MEMORANDUM**

Presently before the court is a complaint filed by plaintiffs Jane Does I, II, and III and Friends of Farmworkers, Inc. d/b/a Justice at Work (collectively, “Plaintiffs”), which seeks a writ of mandamus pursuant to Section 13(d) of the Occupational Safety and Health Act of 1970 (the “Act”), [29 U.S.C. §662\(d\)](#), compelling defendants the Secretary of Labor Eugene Scalia (the “Secretary”) and the Occupational Safety and Health Administration (“OSHA”), (collectively, “Defendants”), to seek a court order that directs Plaintiffs’ employer, Maid-Rite Specialty Foods (the “Plant”), to take steps to abate imminent dangers to its employees related to the transmission of COVID-19.<sup>1</sup> ([Doc. 1](#)). Defendants have filed a motion to dismiss, ([Doc. 23](#)),

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<sup>1</sup> The court notes that the Secretary has delegated most of his responsibilities under the Act to the Assistant Secretary of OSHA. See

as well as a motion to strike certain exhibits attached to Plaintiffs' post-hearing brief, ([Doc. 44](#)).

In this case of first impression, the court is called upon to determine whether a district 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 and, accordingly, has not rejected a recommendation to initiate imminent danger proceedings. For the reasons set forth below, the court finds that it does not and, accordingly, Defendants' motion to dismiss will be **GRANTED** and the Complaint will be **DISMISSED**. Additionally, the court will **GRANT** the motion to strike.

## I. BACKGROUND

As by now many courts have noted, coronavirus disease 2019, or COVID-19, which emerged in late 2019, is a respiratory illness that can cause serious health problems, including death, and poses unique risks in population-dense facilities. See [United States v. Raia](#), 954 F.3d 594, 595-96 (3d Cir. 2020). Plaintiffs filed this suit on July 22, 2020, seeking, *inter alia*, to

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Delegation of Authority and Assignment of Responsibility to Assistant Secretary for Occupational Safety and Health, [77 Fed.Reg. 3912-01 \(Jan. 25, 2012\)](#).

require OSHA to investigate conditions of the Plant which Plaintiffs believe, if left unabated, pose an imminent danger to the Plant's employees of contracting COVID-19. ([Doc. 1](#)). They simultaneously filed a motion for leave to proceed under pseudonym. ([Doc. 3](#)). By order dated July 23, 2020, the court scheduled a hearing, and directed the parties to "be prepared to present evidence" on whether the Secretary acted arbitrarily and capriciously in failing to seek an injunction to restrain the Employer from practices, as they relate to COVID-19, that could reasonably be expected to imminently cause death or serious physical harm to employees. ([Doc. 6, at 2](#)).

On July 28, 2020, Defendants filed a response to the motion for leave to proceed under pseudonym, indicating that they did not oppose the motion but felt the court should require some evidence beyond Plaintiffs' declarations in order to ensure they had standing. ([Doc. 20](#)). Defendants also filed a motion to dismiss for failure to state a claim, ([Doc. 23](#)), and a brief in support, ([Doc. 24](#)). On July 30, 2020, Defendants filed a motion to stay the hearing scheduled for July 31 pending the disposition of their motion to dismiss, ([Doc. 30](#)), which the court denied, ([Doc. 33](#)).

The court conducted a hearing on Friday, July 31, 2020, at which both sides appeared and were permitted to present evidence and testimony.<sup>2</sup> At the beginning of the hearing the court granted Plaintiffs' motion for leave to proceed under pseudonym, ([Doc. 3](#)), in light of Defendants' concurrence in the motion, as well as Defendants' failure to articulate any good faith basis for challenging Plaintiffs' standing. ([Doc. 42, at 11](#)).

At the conclusion of the hearing, the court set a briefing schedule. Plaintiffs filed their post-hearing brief and brief in opposition to the motion to dismiss. ([Doc. 43](#)). Defendants filed their post-hearing brief. ([Doc. 46](#)). Plaintiffs then filed a reply brief. ([Doc. 47](#)).

Defendants separately filed a motion to strike three exhibits from Plaintiffs' brief, ([Doc. 44](#)), as well as a brief in support, ([Doc. 45](#)). Plaintiffs filed a brief in opposition, ([Doc. 48](#)), and Defendants filed a reply brief, ([Doc. 49](#)).

On December 2, 2020, Defendants filed a letter informing the court that OSHA had concluded its investigation of the Plant and would not be issuing a citation—that is, it would not be instituting any enforcement proceedings

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<sup>2</sup> The court notes that, despite its order specifically directing lead counsel to appear in person at the hearing, ([Doc. 17](#)), and despite Plaintiffs' indication that "lead counsel for Plaintiffs will be physically present at the courthouse in Scranton," ([Doc. 27, at 2](#)), Plaintiffs' lead counsel appeared remotely.

against the Plant under the Act. ([Doc. 51](#)). Defendants attached two letters dated December 2, 2020: one addressed to Plaintiffs, ([Doc. 51-1](#)), and one addressed to the Plant, ([Doc. 51-2](#)). The letter to the Plaintiffs detailed the findings of OSHA's inspection with respect to each of the seven separate items of concern in their complaint, 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. The letter to the Plant recounted the steps the Plant took in response to the COVID-19 workplace concerns raised and additionally suggested several other practices the Plant might consider implementing to control exposure to COVID-19.

On December 8, 2020, Plaintiffs responded with a letter to the court, indicating that they had requested an informal review. ([Doc. 52](#)). Plaintiffs also attached a December 7, 2020 letter to OSHA, "object[ing] to the results of [its] inspection." ([Doc. 52-1, at 1](#)). In it, Plaintiffs reiterate many of their earlier concerns about the conditions of the Plant, arguing that OSHA did not sufficiently address whether various conditions and policies were sufficiently remedied and that, in concluding certain conditions were acceptable, OSHA chose to ignore the CDC's, and its own, guidance—namely, that "COVID-19 pandemic control requires a multipronged application of evidence-based

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