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**SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY**

FAMILIAS UNIDAS POR LA JUSTICIA,
AFL-CIO AND UNITED FARM WORKERS
OF AMERICA, labor organizations,

Petitioners,

vs.

WASHINGTON STATE DEPARTMENT OF
LABOR & INDUSTRIES and
WASHINGTON STATE DEPARTMENT OF
HEALTH,

Respondents.

No.

**PETITIONERS' MOTION FOR
DECLARATORY JUDGMENT AND
PERMANENT INJUNCTIVE RELIEF,
OR ALTERNATIVELY FOR
PRELIMINARY INJUNCTIVE
RELIEF**

I. INTRODUCTION AND RELIEF REQUESTED

Just as the United States could watch its COVID-19 future unfold by reading the daily news from Italy, Washington State is watching its immediate future unfold in the news from Kelowna, British Columbia where twenty (20) H-2A farmworkers from Mexico tested positive for COVID-19 and another sixty (60) farmworkers are in isolation in their labor camp. Yet, instead of promptly and proactively drafting emergency regulations with clear, mandatory guidance that could help farmers enact enforceable standards designed to save lives, the

1 Department of Labor and Industries (L&I) and Department of Health (DOH) have produced
2 garbled, non-mandatory “Fact Sheets” that have both grower and farmworker advocates
3 confused, stuck in neutral and wasting precious time while increasing numbers of farmworkers
4 labor and live in conditions that imperil their lives. As a recent University of Texas study shows,
5 the deadly COVID-19 is likely an epidemic in every rural county in Washington state where
6 domestic farmworkers and thousands of H-2A visa workers from other countries are currently
7 working, and where H2-A workers are residing in labor camps in Okanogan, Skagit, Yakima,
8 Chelan, Grant, Douglas, and Adams counties.

9 Families Unidas por la Justicia, AFL-CIO (FUJ) and United Farm Workers of America
10 (UFW) are farmworker unions fighting for the lives of their members, and through this lawsuit,
11 for all farmworker families and farm communities in Washington.¹ They respectfully move this
12 Court for a permanent injunction, or alternatively a preliminary injunction, requiring DOH and
13 L&I to immediately commence emergency rulemaking consistent with the statutory mandate
14 both agencies have under RCW 49.17.050(4) to: “promulgat[e] health and safety standards
15 which most adequately assure[, . . .] on the basis of the best available evidence, that no
16 employee will suffer material impairment of health.” The agencies’ failure to act and promulgate
17 emergency rules is arbitrary and capricious and violates their duties under Washington state law.
18 This court has the power under the Washington Administrative Procedure Act, RCW
19 34.05.574(1)(b), to order DOH and L&I “to take action *required by law*” and engage in

20 ¹ FUJ is an independent farmworker union which advocates for improved working conditions for farm workers, with
21 members that are both domestic farm workers and H-2A farm workers currently employed on Washington farms
22 and, some of whom, are currently residing in temporary labor camps licensed by the Washington State Department
23 of Health. *Declaration of Ramon Torres (Torres Decl.)* ¶¶ 3-5. UFW is a farmworker union representing
farmworker members in Washington, which among other things, works to protect the health and safety of farm
workers from unsafe working conditions. *Declaration of Erik Nicholson (Nicholson Decl.)* ¶¶ 1-2. Both unions act
to protect their members’ safety at work and have associational standing to bring this suit. *International Ass’n of
Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 215-216, 45 P.3d 186 (2002).

1 emergency rulemaking to protect the lives of Washington’s farmworkers and the health of their
2 communities.

3 **II. STATEMENT OF FACTS**

4 **a) Farmworkers and their Rural Communities Are Currently Being Exposed to
5 Risk of Infection by COVID-19 Because Adequate Precautions Are Not Taken.**

6 Domestic farm workers at Yakima Valley farm have stated publicly that no social
7 distancing is taking place at their worksite and that a complaint was lodged with the Department
8 of Labor & Industries on April 1, 2020 that workers had to bring their own soap and water from
9 home to wash their hands. PAR 0197-0198.² Farmworkers at that orchard may have contracted
10 COVID-19, as many workers were sent home in early April. PAR 0198. A 37-year-old worker at
11 that orchard told a reporter that workers “were feeling very desperate, very helpless, very
12 disillusioned, because no one was supporting [them] or giving [them] anything to protect
13 [them]selves. No gloves, masks or disinfectant – nothing.” PAR 0150. She explained that many
14 workers are staying home out of fear for their safety, but that is not an option for her as she has
15 no savings. PAR 0151. Most farmworkers have no health insurance and are afraid to seek
16 medical attention out of fear of being unable to pay the bill or facing immigration consequences.
17 PAR 0259 at ¶¶ 5-6; PAR 0061-0063.

18 A recent University of Texas at Austin study concluded that even though many eastern
19 Washington counties had relatively low reported COVID-19 cases, those areas had an extremely
20 high probability of having an epidemic – an undetected outbreak. PAR 0263-271; PAR 0058-59.
21 The Grant County Health Officer, Dr. Alex Brzezny, reported on April 13, 2020 that Grant

22 _____
23 ²² This statement of facts is drawn from the Proposed Administrative Record (PAR), which includes the materials provided to the Department of Labor and Industries (L&I) and DOH in the rule making process and from declarations filed in support of the instant motion.

1 County continues to see increases in positive COVID-19 tests and stated, “We’re not even close
2 to containment.” PAR 0273-0274.

3 In Kelowna, B.C., there are 20 confirmed COVID-19 cases at a farm labor camp among
4 foreign farmworkers who arrived in Canada in March through work visas. PAR 0153-154; PAR
5 272. Another 63 migrant workers in the camp are in isolation. *Id.* The labor camp is located less
6 than 80 miles from the U.S. border, just north of Okanogan County. PAR 0296.

7 Presently, there are approximately 9,000 H-2A farmworkers living in Washington labor
8 camps in Okanogan, Skagit, Yakima, Chelan, Douglas, Grant, and Adams counties. PAR 0260 at
9 ¶¶10 & 12. There are H-2A workers presently residing in a labor camp in Mattawa, Washington
10 where over 100 H-2A Mexican workers had to be quarantined in 2019 after an outbreak of
11 mumps. PAR 0064-70; PAR 0071-72.

12 H-2A workers do not have their own transportation, and so they rely on their employer to
13 be transported to work on a daily basis and to be taken to the store for groceries and supplies.
14 PAR 0258; *Torres Decl.* ¶17. Some H-2A workers spend up to 3 hours a day being bussed by
15 their employer from their labor camps to various fields in eastern Washington. PAR 0262 at ¶22.
16 A Community Health Center worker in Quincy, Washington observed in March and April
17 “busloads” of H-2A workers who live nearby being unable to observe social distancing on the
18 employer’s busses when they were being transported to town. PAR 0257-258. Grocery shopping
19 and banking trips usually happen on Friday evenings or weekends and can involve large groups
20 of workers (50-100) being dropped off in parking lots for an hour or two. *Id.* The Community
21 Health worker is “extremely concerned” about a rapid spread of COVID-19, that there are
22 insufficient medical resources to treat affected people, and is aware of “only a handful of testing
23 being done on farm workers in eastern Washington.” *Id.*

1 Presently no COVID-19 testing is being performed on any H-2A workers before they
2 depart for Washington or after they arrive. PAR 0260 ¶11.

3 Approximately 20,000 additional H-2A farmworkers will be arriving very soon.
4 Washington relies on approximately 80,000 farmworkers to tend and harvest crops, with about
5 30,000 of those jobs filled by H-2A workers, largely from Mexico, that come to the United
6 States on temporary work visas; the remaining farmworkers are domestic workers. PAR 0198;
7 *Torres Decl.*, ¶ 20; *Declaration of Joachim Morrison (Morrison Decl.)* ¶¶ 31 & 36; PAR 0138.
8 Those H-2A farmworkers will be housed in crowded “dormitory” style labor camps.

9 Labor camp housing is regulated and licensed by the Washington Department of Health
10 (DOH). According to DOH, virtually all labor camps were inspected and licensed prior to the
11 COVID-19 outbreak in Washington. Because the current regulations under which they were
12 licensed “are not set up for this situation,” DOH has no plan to re-inspect the housing to assure
13 that COVID-19 precautions are in place.³ *Morrison Decl.* ¶¶ 33-38. DOH has maintained this
14 refusal to re-inspect labor camp housing despite the many studies confirming that dormitory-
15 style housing can rapidly lead to the spread of respiratory diseases, and despite the call for
16 emergency rulemaking. PAR 0207-256.

17 L&I is taking a similar approach to worker protections, stating that enforcement of the
18 proposed draft “facts sheets” that contain suggestions regarding COVID-19 will not be proactive,
19 but rather complaint-driven, mostly due to limited enforcement staff. This means that
20 farmworkers, who are reasonably concerned that retaliation will occur if they complain about
21

22 ³ Washington temporary worker housing regulations ([WAC 246-358-029](#)) set a minimum of only 50 square feet of
23 floor space per occupant. That amounts to about a seven-foot square. A standard-size twin bed occupies close to half
of that space. Temporary worker housing regulations also allow beds to be closer together than six feet and within
three feet of cooking surfaces. ([WAC 246-358-135](#)).

1 working or housing conditions, must do so before L&I will determine whether their employer is
2 complying with COVID-19 precautions. *Morrison Decl.* ¶ 39, PAR 0138. This is clearly not an
3 effective enforcement regime, and the risk is compounded as “farmworkers may come to work
4 sick with increased frequency due to fear of retaliation, economic hardship, and lack of
5 knowledge about paid leave available to them.” *Declaration of Experts Anjum Hajat, PhD, MPH*
6 *and Catherine Karr, PHD, MS, MD (Hajat-Karr Decl.)* ¶ 7. PAR 0276.

7 On March 16, 2020, Governor Inslee issued Proclamation 20-16 which states: “There is
8 an increased risk of rapid spread of COVID-19 among persons who are living in congregated
9 residential settings.” PAR 0194. H-2A workers are housed in congregated residential settings,
10 i.e., dormitory-style housing that consists of bedrooms with bunkbeds and shared bathroom and
11 kitchen facilities. *Torres Decl.* ¶¶8-13, Exhibits A and B; *Administrative Declaration of Ramon*
12 *Torres (Torres Admin. Decl.)* ¶¶4-5, Exhibit A. PAR 0203-206. Some labor camps house 200
13 workers in manufactured homes where 16 workers live and share common cooking, dining, and
14 bathroom facilities. PAR 0260-261 at ¶16.

15 Farmworker labor camp housing routinely contains several bunkbeds in each one-room
16 cabin. *Morrison Decl.* ¶ 28 (Michael Gempler, Executive Director of the Washington Growers
17 League: “So many of the facilities that we have and other people have [use] bunkbeds”); *Torres*
18 *Decl.* ¶¶ 8-13, Exhibits A and B; *Torres Admin. Decl.* ¶¶4-5, Exhibit A. PAR 0203-206.
19 Bunkbeds are used at the labor camp in Mattawa that saw the outbreak of mumps last year. *Id.*

20 Assistant Director for the Department of Labor and Industries (L&I) Anne Soiza stated
21 her department was aware that the use of common bathroom and food facility in farmworker
22 housing, “was a main transmission route” for COVID-19 and that “prompt isolation of a person
23 who has symptoms” was crucial to protect workers. *Morrison Decl.* ¶¶25-26. Further, given that

1 asymptomatic transmission is quite possible, with farmworkers living in such close quarters,
2 COVID-19 infection could possibly “spread undeterred within the farmworker community for
3 many days” and possibly spread “to the neighboring community.” *Hajat-Karr Decl.* ¶19. PAR
4 0278.

5 Yet, despite these close sleeping quarters and common shared cooking and bathroom
6 facilities, on March 23, 2020, DOH responded to the crisis created by the spread of COVID-19
7 with mere “Recommendations for Temporary Worker Housing” during the COVID-19 outbreak.
8 Those recommendations suggest that “Facilities with a single room should assign sick occupants
9 to one side and occupants without symptoms to the opposite side.” PAR 0167. This
10 recommendation is plainly inadequate in any context to prevent the transmission of COVID-19,
11 **but egregiously dangerous to farmworkers** because their congregate housing situation presents
12 a “unique risk for the spread” of the disease. *Hajat-K* set forth in RCW 49.17.050(4). ¶¶10, 16.
13 PAR 0277.

14 Grower advocates are presently requesting an emergency determination from DOH and
15 L&I to allow the use of bunkbeds throughout 2020. *Morrison Decl.* ¶¶ 28-29; PAR 0138.
16 Grower advocates admit the bunkbeds do not meet social distancing standards because the
17 distance between the top and bottom bunk is only 3.5 feet, not 6 feet but seek approval to use
18 plastic on the lower bunk and a curtain – “similar to a train berth.” *Id.* ¶ 28; PAR 0138. The
19 suggestion to drape the individual beds as a preventative measure **is in fact more likely to**
20 **increase the risk of infection rather than reduce the risk.** *Hajat-Karr Decl.* ¶¶10; 16, 17. PAR
21 0277-278. At the time of filing, the only response from L&I to this suggestion, that Petitioners
22 are aware of, is only that, “We are working with our Department of Health partners, and we
23 anticipate giving them feedback within a matter of days.” *Id.* ¶29; PAR 0138.

1 b) **Farmworker Attempts to Obtain Emergency Rules.**

2 On February 29, 2020, Governor Inslee exercised his emergency powers to issue
3 Proclamation 20-05 declaring a State of Emergency in all counties in the state of Washington
4 citing:

5 The worldwide outbreak of COVID-19 and the effects of its **extreme risk of**
6 **person-to-person transmission throughout the United States and Washington**
7 **State significantly impacts the life and health of our people**, as well as the
economy of Washington State, **and is a public disaster** that affects life, health,
property or the public peace.

8 PAR 0171(emphasis added). On March 23, 2020, Governor Inslee issued Proclamation 20-25
9 amending his initial Proclamation and issuing a Stay Home order prohibiting all people in
10 Washington State from leaving their homes, effective March 25, 2020, except to conduct
11 essential activities citing:

12 The COVID-19 disease, caused by a virus **that spreads easily from person to**
13 **person which may result in serious illness or death and** has been classified by
14 the World Health Organization as a worldwide pandemic, **has broadly spread**
throughout Washington State, significantly increasing the threat of serious
associated health risks statewide.

15 PAR 0172 (emphasis added). In an appendix to Proclamation 20-25, Governor Inslee designated
16 agriculture as an essential industry and farmworkers were designated as essential workers. PAR
17 0179-180. The Stay Home order was to remain in effect until April 6, 2020. On April 2, 2020,
18 Governor Inslee signed Proclamation 20-25.1 amending both of the above Proclamations and
19 extended the Stay Home order until May 4, 2020 citing:

20 Since Proclamation 20-25 was issued on March 23, **the number of confirmed**
21 **cases and deaths in Washington State has more than doubled**, and there are
22 currently at least 5,984 cases of COVID-19 in Washington State with 247
23 associated deaths; **and, furthermore, models predict that many hospitals in**
Washington State will reach capacity or become overwhelmed with COVID-
19 patients within the next few weeks unless we significantly slow its spread
throughout the state

1 PAR 0191(emphasis added).

2 On April 4, 2020, Dr. Deborah Birx, the White House’s coronavirus response coordinator
3 stated: **“The next two weeks are extraordinarily important.** This is the moment to not be
4 going to the grocery store, not going to the pharmacy, but **doing everything you can to keep**
5 **your family and your friends safe and that means everybody doing the six-foot distancing,**
6 **washing their hands.”** PAR 0045.

7 On March 19, 2020, FUJ, UFW and Community to Community Development (C2C), sent
8 a detailed letter to Governor Inslee requesting immediate action to protect the health and safety
9 of all farmworkers. PAR 0017-0020. The letter requested that the Governor enact additional
10 emergency orders to protect H-2A farmworkers in housing (by adding additional requirement
11 before issuing licenses) and transportation, and all farmworkers in the fields (through social
12 distancing and other measures). *Id.* On April 3, 2020, L&I issued a draft document titled,
13 “(COVID-19) Prevention in Agriculture, Temporary Worker Housing and Related Operations”
14 (hereinafter referred to as the “Prevention Guidance”) PAR 0005-10.

15 The draft Prevention Guidance contained a mix of statements with agricultural employers
16 being instructed they must implement social distancing at the workplace, but the guidance was
17 couched in suggestions, not mandates (“Ideas for social distancing,” “Ideas for an effective
18 handwashing plan,” etc.). *Id.* There were no references to Washington Administrative Code
19 sections, nothing about emergency rulemaking, and nothing to indicate that fines can be imposed
20 or licenses suspended for non-compliance. *Id.* In short, the “guidance” lacked the force of law.

21 On April 6, 2020, FUJ, UFW and C2C filed an emergency rulemaking petition with L&I
22 and DOH because the draft Prevention Guidance did not contain enforceable standards and was
23 “entirely insufficient given the life and death stakes facing workers on the front line of this

1 pandemic.” PAR 0002. The petition further stated that emergency rules were necessary “to
2 provide clarity to all agricultural employers and farmworkers.” *Id.*

3 The request included a set of emergency draft rules related to COVID-19 protections
4 related to housing and transportation to supplement the Department of Health’s temporary
5 worker housing regulations found at WAC 246-358 *et. seq.* PAR 0011-13. The request also
6 included a copy of the Washington Supreme Court’s 2002 *Rios v. Department of Labor and*
7 *Industries* decision holding that L&I had previously violated its duty under RCW 49.17.050 to
8 promulgate standards that protect farmworkers and abused its discretion by pursuing
9 “nonmandatory guidelines” instead. PAR 0022-0043.⁴

10 On April 8, 2020, L&I issued three Fact Sheets as a substitute for the department’s draft
11 Prevention Guidance. PAR 0155-157; PAR 0160-163; PAR 0164-166. L&I broke up the
12 previous guidance into three separate documents: a “Coronavirus Prevention in Agriculture”
13 baseline document “that applies across agriculture and agriculture-related businesses” and “two
14 supplemental Fact Sheets – one for temporary worker housing and one for food processing and
15 warehouse operations.” *Morrison Decl.* ¶ 15.

16 A Senior Manager for L&I stated at an April 9, 2020 public meeting of the Agricultural
17 and Seasonal Workforce Services Advisory Committee⁵ that: “We’re just trying to make sure . . .
18 that the Fact Sheets are clear as to what is required versus what is a suggestion, an idea, to
19 achieve the expectations that are delineated.” *Id.* ¶ 18. When asked by a voting farmworker
20 member of the Committee who expressed confusion as to what was an expectation and what was

21 _____
22 ⁴ That decision is found at 145 Wn.2d 483, 486, 39 P.3d 961, 963 (2002).

23 ⁵ Per RCW 50.75.040 this Committee reviews issues related to agricultural and seasonal workers and makes reports to the Governor and to the Legislature.

1 required, Assistant Director Soiza stated: “When we use the word ‘must,’ it means must. It
2 means that’s what an employer must do . . . but when we say ‘suggestions’ those are ideas about
3 how an employer can meet our expectations for the code we have.” *Id.* ¶ 20. Ms. Soiza added:
4 “I’m not sure if that’s clear, and it’s okay if that’s not clear.” *Id.* ¶ 21.

5 Jon Devaney, President of the Washington State Tree Fruit Association and a voting
6 member of the ESD Committee, stated: “I do want to point out, I know there was some
7 frustration about things that are or are not happening. **I want to remind everyone that we are**
8 **talking about looking at draft guidance that hasn’t even gone out yet.** So, I will just remind
9 everyone that a lot of employers are going to be taking more actions once they know more
10 clearly what the expectations are.” *Id.* ¶ 44 (emphasis added).

11 Rosalinda Guillen, Executive Director of Community to Community and a voting
12 member of the ESD Committee on behalf of farmworkers stated: “**What I’m most concerned**
13 **about is trying to see what is actually enforceable and trying to drill down on that. The**
14 **farmers are waiting about what are the requirements. The longer that takes the more**
15 **people are being exposed.**” *Id.* ¶ 45 (emphasis added).⁶

16 In response to a follow-up question about why the agency had not written emergency
17 rules, Assistant Director Soiza stated: “We can do [Fact Sheets] faster, and we already have rules
18 on the books that are enforceable that cover these issues. Are rules a possibility? Sure. But, we
19 need to get this information out in a matter of days, and that’s why we want to do [Fact Sheets]
20 at least first as we’re working through coordinating with the Department of Health and others on
21 emergency rules and how that might, basically looking at all the emergency rule proposal that

22 ⁶ Indeed, the “[c]urrent draft guidance provided by the Department of Labor & Industries is unclear and in some
23 cases contradictory. Rules should be specific and measurable. In the absence of clear, specific rules workers are
unable to identify violations and thus will be unable to file complaints.” *Hajat-Karr Decl.* ¶ 8. PAR 0276.

1 was put forward, that’s a concurrent process.” *Id.* ¶ 22. To date, no emergency rules have been
2 promulgated by either L&I or DOH and there has been no commitment by either agency as to
3 issuing them by any date certain.

4 c) **Substantial harm will result to farmworkers and their communities because of**
5 **the failure of the Respondents to enact clear, effective, enforceable emergency**
6 **rules.**

7 Lack of enforceable rules regarding social distancing, protective facemasks, access to
8 soap and water, and to environmental cleaning allows conditions to continue in which virus can
9 spread easily and quickly. *Hajat-Karr Decl.* ¶¶2, 9, 11, 12. PAR 0275-277. Crowding, such as
10 that in farmworker housing, work areas and transportation, increases the risk of transmission of
11 influenza and similar illnesses. *Hajat-Karr Decl.* ¶10. Failure to adequately isolate ill workers
12 will likely lead to the spread of the disease through the farmworker community. *See Hajat-Karr*
Decl. ¶16. PAR 0277.

13 Most farmworkers are living and working in rural areas, in which medical infrastructure
14 can quickly be overwhelmed. Not only does infection of groups of farmworkers cause risk of
15 overwhelming medical infrastructure, but visits from large groups of farmworkers to rural
16 communities’ stores and other businesses poses a risk of transmission in those communities as a
17 whole. *Hajat-Karr Decl.* ¶6. PAR 0276.

18 **III. STATEMENT OF THE ISSUES**

- 19 1. Whether the Department of Labor and Industries and the Department of Health, in the
20 context of Governor Inslee’s multiple proclamations declaring a state of emergency
21 related to COVID-19, and the context in which the essential labor of farmworkers is
22 occurring, have a statutory duty under RCW 49.17.050(4) to: “promulgat[e] health and
23 safety standards . . . on the basis of the best available evidence, that no employee will

1 suffer material impairment of health” in agricultural worksites and temporary agricultural
2 worker housing labor camps.

- 3 2. Whether the failure of Department of Labor and Industries and the Department of Health
4 to promulgate mandatory emergency rules, and instead issuing nonmandatory Fact
5 Sheets, related to agricultural worksites and temporary agricultural worker housing is
6 arbitrary and capricious under Washington’s Administrative Procedure Act.

7 **IV. EVIDENCE**

8 The Petitioners rely on their April 6, 2020 petition for emergency rulemaking and all
9 related documents and correspondence provided to the agencies and compiled by the Petitioners
10 in a Proposed Agency Record (PAR) that has been Bates stamped and attached for the Court’s
11 review. *Declaration of Joachim Morrison Regarding Creation of Proposed Administrative
12 Record ¶¶ 3-12.* Petitioners also rely upon the Declarations of Ramon Torres and Erik Nicholson.

13 **V. ARGUMENT**

14 **a) Permanent Injunction Standard**

15 Under the APA, a court may enjoin agency action. RCW 34.05.574(1)(b). The
16 requirements for permanent injunctions are well settled: A party must show (1) a clear legal or
17 equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts
18 complained of are either resulting in or will result in actual and substantial injury. *Kucera v.
19 State, Dep’t of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000).⁷ Since injunctions are
20 addressed to the equitable powers of the court, the listed criteria must be examined in light of

21 _____
22 ⁷ Should the court not grant FUJ’s request to consolidate, the above arguments would certainly meet the lesser
23 standard of a preliminary injunction where FUJ must only show a “likelihood of prevailing at a trial on the merits”
concerning those same elements. *Ameriquist Mortgage Co. v. State Atty. Gen.*, 148 Wn. App. 145, 157, 199 P.3d
468, 473 (2009) (citing *Tyler Pipe Indus., Inc. v. State, Dep’t of Revenue*, 96 Wn.2d 785, 792-93, 638 P.2d 1213,
1217 (1982)).

1 equity including balancing the relative interests of the parties and, if appropriate, the interests of
2 the public. *Id.*

3 i. **Clear Legal or Equitable Right.**

4 FUJ and UFW have clear legal and equitable rights to a permanent injunction under the
5 Washington Industrial Safety and Health Act (WISHA) which requires that the director of L&I:

6 Shall provide for the promulgation of health and safety standards and the control
7 of conditions in all workplaces concerning . . . vapors . . . or other airborne
8 particles . . . or harmful physical agents which shall set a standard which most
adequately assures, to the extent feasible, on the basis of the best available
evidence, that no employee will suffer material impairment of health.

9 RCW 49.17.050(4)(emphasis added). DOH is similarly obligated to comply with WISHA as it is
10 required to “establish rules for the licensing, operation and inspection of temporary agricultural
11 worker housing” that are “*as effective as* the standards developed under [WISHA], chapter 49.17
12 RCW.” RCW 70.114A.065 (emphasis added).

13 Because both agencies have a non-discretionary duty to promulgate rules that comply
14 with WISHA, the decision in *Rios v. Department of Labor and Industries* is particularly
15 instructive. There, the Washington Supreme Court concluded that “even though we recognize
16 [L&I’s] wide discretion in choosing and scheduling its rulemaking efforts,” the agency acted
17 arbitrarily when it refused to act on a pesticide safety rulemaking petition from two farmworkers
18 after the Department had already “draft[ed] nonmandatory guidelines and convene[d] a team of
19 experts” to accomplish the same objectives the farmworkers were proposing through mandatory
20 rulemaking. *Rios v. Washington Dep’t of Labor & Indus.*, 145 Wn.2d 483, 507, 39 P.3d 961,
21 973–74 (2002).

22 The court found that L&I’s failure to act violated RCW 49.17.050(4), its obligation under
23 WISHA, requiring the agency to “set a standard which most adequately assures, to the extent

1 feasible, on the basis of the best available evidence, that no employee will suffer material
2 impairment of health.” *Id.* at 508. Because L&I had acted arbitrarily, the court ordered L&I to
3 initiate rulemaking pursuant to the APA’s remedy provision, RCW 34.05.574(1)(b), which
4 allows a court to “order an agency to take action required by law.” *Id.*

5 Like the *Rios* petitioners, FUJ, UFW and others petitioned L&I and DOH on April 6,
6 2020 to engage in rulemaking that would adequately ensure that agricultural farmworkers would
7 not suffer material impairment of health because of the COVID-19 pandemic.⁸ Prior to the April
8 6 petition, both agencies had formed internal teams to draft and issue non-mandatory guidance to
9 agricultural employers related to protect farmworkers from COVID-19 work-related dangers at
10 work and in farmworker housing.

11 On March 23, 2020, DOH issued non-mandatory “Recommendations during a COVID-
12 19 Outbreak - Temporary Worker Housing Facilities.” PAR 0167-169. That document stated:
13 “The Washington State Department of Health *has developed this guidance* to assist temporary
14 worker housing facilities in response to the 2019 novel coronavirus disease (COVID-19)
15 outbreak.” PAR 0165 (emphasis added). While DOH was acting in an attempt to protect
16 farmworkers, the language of the document made it clear it was non-binding: “Facilities with a
17 single room *should* assign sick occupants to one side and occupants without symptoms to the
18 opposite side.” PAR 0166 (emphasis added).

19 Similarly, on April 3, 2020, L&I issued non-mandatory draft guidance labeled,
20 “(COVID-19) Prevention in Agriculture, Temporary Worker Housing and Related Operations.”
21 PAR 0005-0010. The primary problem with the document is every bolded header starts with the

23 ⁸ The *Rios* petition did not request emergency rulemaking.

1 words “Employers must,” which is immediately followed by another bolded header that suggest
2 “Ideas” for planning purposes which signal that these are best practices, not mandates. *Id.* For
3 example, L&I first writes: “Employers Must Ensure Frequent and Adequate Handwashing,”
4 which is immediately followed with nonmandatory “Ideas for an Effective Handwashing Plan”
5 which does not convey that the suggestions listed underneath are mandates. PAR 0006.

6 The April 6, 2020 FUJ and UWF petition points out the contradictory mix of statements
7 in L&I’s April 3 guidance stating:

8 There is nothing in the document referencing specific Washington Administrative
9 Code sections, nothing about emergency rulemaking, and nothing to indicate that
10 fines can be imposed or licenses suspended for non-compliance. At best, the
guidance mandates general end goals without requiring specific actions; at worst,
it is merely aspirational.

11 PAR 0002. The Unions provided specific draft emergency rules that would cover key areas such
12 as housing and transportation and suggested that L&I’s April 3 draft document “along with other
13 measure, could simply be converted into [emergency] regulations.” PAR 0003; PAR 0011-13.

14 Instead of considering the Union’s proposed emergency rules and suggestion for
15 converting nonmandatory guidance into enforceable regulations, L&I, in conjunction with DOH,
16 issued three, unenforceable “Fact Sheets” on April, 8, 2020 which both agricultural employers
17 and farmworker advocates panned at an April 9, 2020 public meeting as a confusing mess that
18 provided no clear guidance to protect farmworkers from the COVID-19 pandemic.

19 Both agencies are well aware of the risks that COVID-19 poses for its licensees and the
20 workers they are mandated to protect. Both agencies are well aware that social distancing,
21 separation of ill workers from other workers, water and soap in the fields, and other well-known
22 steps are required to stem the transmission of COVID-19. Both agencies know that dormitory
23 style housing and bus transportation pose significant risk not only of illness, but of death for

1 farmworkers. Yet, the agencies refused to promulgate mandatory emergency rules to protect
2 Washington’s agricultural workers. The agencies also knew that the Fact Sheets were not
3 sufficient to communicate to growers or workers what was required. The agencies refused to
4 issue clear emergency enforceable rules, despite the ongoing and indeed exponentially growing
5 threat to farmworkers. This failure to act with alacrity to promulgate enforceable protections for
6 farmworkers violates the agencies’ duty to protect farmworkers under WISHA (RCW
7 49.17.050(4)), and is arbitrary agency action in violation of RCW 49.17.050(4) and the
8 requirement that the Department “set a standard which most adequately assures, to the extent
9 feasible, on the basis of the best available evidence, that no employee will suffer material
10 impairment of health.” *Rios*, 145 Wn.2d at 508.

11 Petitioners thus have a clear legal and equitable right to declaratory judgment and,
12 because of the imminent invasion of that right, the legal and equitable right to permanent
13 injunctive relief.

14 ii. **Well-Founded Fear of Immediate Invasion of that Right.**

15 FUJ, UFW and its members have a fear of immediate invasion of their rights. *See Hajat-*
16 *Karr Decl., in passim.* PAR 0291-295. The recent Seattle Times article adequately sets forth that
17 the lack of enforceable protections is having a true impact on the front lines. In that article, a 37-
18 year-old woman at that orchard, where workers are bringing their own soap and water to work,
19 stated workers “were feeling very desperate, very helpless, very disillusioned, because no one
20 was supporting [them] or giving [them] anything to protect [them]selves. No gloves, masks or
21 disinfectant – nothing.” PAR 0150. Yet, although many workers are staying home out of fear for
22 their safety, that is not an option for others because of their financial situations. PAR 0151.

1 A Community Health Center worker in Quincy, Washington has recently observed
2 “busloads” of H-2A workers not observing social distancing on the employer-provided busses
3 that brought them into town for necessary supplies and financial tasks. PAR 0257-258. She
4 expressed extreme concern about a rapid spread of COVID-19, especially given that there are
5 insufficient medical resources to treat affected people, and “only a handful of testing being done
6 or farmworkers in eastern Washington.” *Id.* Her fears are well-placed given the COVID-19
7 outbreak in nearby Kelowna labor camp involving H-2A workers and the possibility of
8 farmworker labor and housing conditions providing the context for the outbreak and rapid spread
9 of COVID-19 within the farmworker camps and to the broader community. *Hajat-Karr Decl.* ¶¶
10 6, 10, 11, 16, 19, 21. PAR 0276-277.

11 The lack of scientifically supported enforceable requirements in the Fact Sheets for
12 sleeping and cooking arrangements, for transportation, and for sanitization in the housing and
13 during harvesting are not designed to “adequately assure[], to the extent feasible, on the basis of
14 the best available evidence, that no employee will suffer material impairment of health or
15 functional capacity”. RCW 49.17.050(4). PAR 0275-279. Moreover, it is undisputed that DOH,
16 having already licensed virtually all labor camp farmworker housing based on regulations not
17 designed for the COVID-19 pandemic, refuses to re-inspect farmworker housing with new
18 enforceable standards that meet the requirements that “on the basis of the best available
19 evidence, that no employee will suffer material impairment of health.” RCW 49.17.050(4).
20 DOH’s refusal to re-inspect housing for compliance with promulgated COVID-19 emergency
21 rules is not excused because the agency is currently “not set up for this situation.” *Morrison*
22 *Decl.* ¶¶ 33-38. PAR 0138. That refusal is arbitrary and capricious. *Rios*, 245 Wn.2d 483
23 (concluding that the reasoning that “substantial new rulemaking project would require new

1 budget or the displacement of other agency activities,” was arbitrary and capricious in light of
2 the harm potentially to be caused by the unregulated pesticide at issue). L&I fact sheets that do
3 not require complete isolation of ill farmworkers from others is arbitrary and capricious because,
4 not only is it not supported by science, it is actually contrary to all scientific evidence.

5 The entirely foreseeable, indeed inevitable, result is that those labor camps, which are
6 already filled with thousands of untested H-2A workers and with thousands more on the way,
7 will seriously harm and in some cases, kill farmworkers, and become incubators for infection
8 throughout their communities, overwhelming the already limited capacity of medical services in
9 rural areas. Petitioners have established their members’ well-grounded fear of invasion of their
10 right to assurance, “to the extent feasible, on the basis of the best available evidence, that no
11 [farmworker] will suffer material impairment of health or functional capacity”. RCW
12 49.17.050(4).

13 **iii. Acts Complained of Will Result in Actual and Substantial Injury and the**
14 **Balance of Relative Interests Favors Farmworkers and the Public.**

15 Governor Inslee’s multiple proclamations easily set forth the actual and substantial injury
16 that all front-line workers face - that COVID-19 “spreads easily from person to person which
17 may result in serious illness or death” – and will not be further addressed. The failure to
18 promulgate enforceable emergency regulations that mandate: social distancing; adequate
19 sanitation supplies and practices in the fields, on busses, and in housing; isolation of ill workers
20 from others; that require DOH to re-inspect housing with updated COVID-19 protections; and,
21 require L&I to engage in monitoring and enforcement, will cause not only farmworkers to be
22 exposed to real and substantial harm, the failure to promulgate such emergency rules will also
23

1 put the general public in grave harm. *See Hajat-Karr Decl.* ¶¶ 6, 10, 11, 16, 19, 21. PAR 0276-
2 278. Thus, the equities favor the immediate issuance of a permanent injunction.

3 **b) There Is Good Cause for the Adoption of Emergency Rules.**

4 Based on the record, the existence of the COVID-19 pandemic, and Governor Inslee's
5 Proclamations, there is good cause for the immediate adoption of emergency rules for the
6 preservation of public health, safety, and general welfare such that observing the time
7 requirements of notice and opportunity to comment upon adoption of a permanent rule would be
8 contrary to the public interest. RCW 34.05.350(1). It is difficult to imagine a more urgent need
9 for emergency rules.

10 **VI. CONCLUSION**

11 For the reasons above, the Court should grant the Petitioners' request for a declaration
12 and an injunction ordering L&I and DOH to make emergency rules to protect farmworkers from
13 COVID-19.

14 DATED this 15th day of April, 2020.

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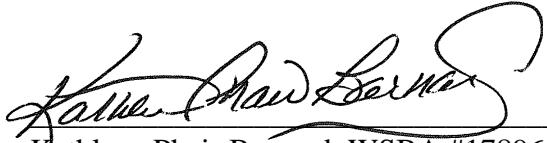
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