

☐ EXPEDITE
☒ No hearing set.
☐ Hearing set for:

Date: _____

Time: _____

Judge/Calendar: _____

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FAMILIAS UNIDAS POR LA JUSTICIA,
AFL-CIO, a labor organization,

Petitioner,

vs.

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

Respondents.

No. 20-2-01556-34

PETITION FOR JUDICIAL REVIEW,
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. Familias Unidas por la Justicia, AFL-CIO (FUJ) seeks immediate injunctive relief to require the repeal of certain portions of emergency temporary farmworker housing rules adopted by the Department of Labor & Industries and the Department of Health related to the COVID-19 pandemic to protect the lives of all Washington farmworkers. FUJ also seeks immediate injunctive relief ordering the respondents to adopt rules consistent with duties imposed under RCW 49.17 *et seq.*

PETITION FOR JUDICIAL REVIEW,
DECLARATORY JUDGMENT AND
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Columbia Legal Services
711 Capitol Way S #706
Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

1 2. These emergency housing rules are WAC 296-307-16102 and WAC 246-358-002
2 which were filed with the Code Reviser on May 13, 2020. *See* Exhibit 1. These regulations are
3 duplicates, codified in both the Administrative Code Titles for the Department of Health and the
4 Department of Labor & Industries.

5 3. The way portions of the housing rules should be repealed and modified is set forth
6 in Exhibit 2. Specifically, Petitioner identifies the following arbitrary deficiencies in the rules:
7 failure to increase square footage per person, permitting the use of bunkbeds where both upper
8 and lower bunks are occupied by unrelated individuals, permitting the use of plastic sheeting as
9 “protective barriers,” failure to require proper ventilation, failure to assure adequate social
10 distancing in common cooking areas, and the failure to inspect housing modified to comply with
11 the emergency rules.

12 4. The emergency rules became effective on May 18, 2020. *Id.*

13 5. Washington adopted emergency rules allowing for bunkbeds despite the fact that
14 on May 11, 2020, Oregon implemented emergency housing rules for farmworkers that banned
15 the simultaneous use of upper and lower bunks of bunkbeds for unrelated workers. OAR 437-
16 001-0749(12)(aa)(K). <https://osha.oregon.gov/OSHARules/div1/437-001-0749.pdf>

17 6. FUJ asked Governor Inslee to repeal or modify certain provisions of the
18 emergency rules on May 20, 2020. *See* Exhibit 3.

19 7. Governor Inslee did not respond to this request.
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1 8. FUF now turns to this Court for determinations that the challenged emergency
2 rules are invalid because they interfere with or impair, or immediately threaten to interfere with
3 or impair, the legal rights or privileges of the petitioner and are arbitrary and capricious.

4 II. JURISDICTION AND VENUE

5 9. This action arises under the Washington Administrative Procedure Act, RCW
6 34.05.001 *et seq.*

7 10. Proper venue for this action is in Thurston County, pursuant to RCW
8 34.05.570(2)(b)(i).

9 III. PARTIES

10 11. Petitioner Familias Unidas por la Justicia, AFL-CIO, is a labor union affiliated
11 with the Washington State Labor Council. Its objectives are set forth in its Constitution: “the
12 elevation of the position of its members, and further: to conduct a Union of persons engaged in
13 the performance of work within its jurisdictions; to organize, unite, and assist persons, without
14 regard to race, creed, color, sex, religion, age, disability, sexual orientation, national origin, or
15 ethnic background, engaged in the performance of work within its jurisdiction for the purpose of
16 improving wages, hours, benefits, and working conditions . . .; to obtain the status of exclusive
17 bargaining representative of persons employed within the jurisdiction of the Union and to
18 process and resolve grievances and enforce all other rights arising out of such collective
19 bargaining relationships; to advance and safeguard the full employment, economic security, and
20 social welfare of its members and of workers generally; to protect and extend democratic
21 institutions, civil rights and liberties, and the traditions of social and economic justice; to
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1 function as an autonomous Union . . .” Its principal mailing address is P.O. Box 1206,
2 Burlington, WA 98233.

3 12. Respondent Washington State Department of Labor & Industries (L&I) is
4 responsible for promulgating safety and health standards of general and specific application
5 governing the conditions of employment in all workplaces, including agriculture, pursuant to the
6 Washington Industrial Safety and Health Act, RCW 49.17 *et seq.*

7 13. Respondent Washington State Department of Health (DOH) is responsible for
8 licensing and inspecting temporary farmworker housing. RCW 43.70.334-.340 and RCW
9 70.114A *et seq.*

10 14. The principal mailing address for each respondent is P.O. Box 40121, Olympia,
11 WA 98504-0121 (L&I) and Town Center 3, 243 Israel Road SE, Tumwater, WA 98501 (DOH).

12 IV. STATUTORY AND REGULATORY BACKGROUND

13 15. DOH and L&I are required to adopt joint rules for the “licensing, operation, or
14 inspection of temporary worker housing [TWH], and the enforcement thereof.” RCW 49.17.310;
15 RCW 70.114A.065. These rules shall establish standards that are as effective as the standards
16 developed under the Washington Industrial Safety and Health Act (WISHA), chapter 49.17
17 RCW.

18 16. DOH adopted the challenged emergency rules, citing RCW 70.114A.065 as its
19 statutory authority.

20 17. L&I adopted the challenged emergency rules, citing as statutory authority the
21 following WISHA provisions: RCW 49.17.010, .040, .050 and .060.
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1 18. The cited WISHA provisions require L&I to regulate “conditions of
2 employment”, RCW 49.17.010,.040, and .050, and require employers to “furnish to each of his
3 or her employees a place of employment free from recognized hazards that are causing or likely
4 to cause serious injury or death to his or her employees: PROVIDED, That no citation or order
5 assessing a penalty shall be issued to any employer solely under the authority of this subsection
6 except where no applicable rule or regulation has been adopted by the department covering the
7 unsafe or unhealthful condition of employment at the workplace.” RCW 49.17.060.

8 19. The challenged emergency rules and the basis for rulemaking authority cited in
9 these rules constitute L&I and DOH recognition that worker housing must be regulated as both a
10 condition of employment and workplace/place of employment.

11 20. WISHA imposes a duty on both agencies to regulate conditions of employment
12 and workplaces/places of employment.

13 21. COVID-19 is a recognized hazard that has caused serious injury or death to
14 employees.

15 V. FACTUAL ALLEGATIONS

16 22. The COVID-19 disease is caused by a virus that spreads easily from person to
17 person which may result in serious illness or death and has been classified by the World Health
18 Organization as a worldwide pandemic. It has broadly spread throughout Washington State,
19 significantly increasing the threat of serious associated health risks statewide. Proclamation 20-
20 25 by Governor Jay Inslee issued March 23, 2020.

1 23. Washington agricultural employers plan to bring in approximately 30,000
2 farmworkers from rural, impoverished villages from all corners of Mexico this spring and
3 summer.

4 24. Agricultural employers will apply for non-immigrant, temporary H-2A work visas
5 for these workers from the United States government.

6 25. On information and belief, none of the H-2A workers will be tested for COVID-
7 19 before leaving their villages in Mexico, they will not be tested after a lengthy bus ride to the
8 border, nor will they be tested after being bussed from the border and their arrival in
9 Washington.

10 26. Agricultural employers typically house H-2A farmworkers in on-farm labor
11 camps that consist of dormitory-style housing where several hundred workers occupy tight
12 quarters (50 square feet per person). Upon arrival, the workers are assigned bedrooms with other
13 unrelated workers to sleep in bunkbeds. The labor camps have group cooking facilities (common
14 refrigerators; 10 workers per stove), and common bathing facilities (1 shower for each 10
15 workers; 6 workers per sink). They are commonly bussed to and from work daily in old school
16 buses or vans, and once a week to town for groceries and banking services.

17 27. H-2A workers are highly vulnerable for several reasons. Their work visas tie them
18 to a single employer, making them unable to seek work elsewhere if conditions are poor. There is
19 a large power imbalance between the workers and their employers because if a worker is fired,
20 they must return to their home country and pay their own transportation costs. They are
21 commonly and easily blacklisted from future employment if they speak up. They are far from
22 home, often isolated outside rural communities, and entirely dependent on their employers for
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1 transportation and other basic needs. They almost always have significant language barriers and
2 lack knowledge of Washington-State systems and how to get help when they need it.

3 28. FUJ and others sent a plea to Governor Inslee on March 19, 2020 for emergency
4 orders to protect farmworkers from COVID-19 in their housing, transportation, and workplaces.
5 *See* Exhibit 4.

6 29. L&I and DOH responded on April 3, 2020 by putting forth non-binding guidance.
7 *See* Exhibit 5.

8 30. Frustrated by the failure to issue binding regulations to provide clear guidance to
9 protect farmworkers, FUJ and others petitioned L&I and DOH on April 6, 2020 to adopt
10 emergency rules pursuant to RCW 34.05.350(1)(a) no later than April 10, 2020 to protect
11 farmworkers' lives and their health. *See* Exhibit 6.

12 31. Instead of adopting emergency rules, L&I staff attended a public meeting on
13 farmworker issues on April 9, 2020 and provided updated drafts of non-binding "Fact Sheets"
14 largely consisting of suggested best practices. In that meeting, DOH admitted that it had already
15 licensed virtually all labor camps based on its existing rules, i.e., without taking into account the
16 existence of COVID-19. *See* Exhibit 7.

17 32. Drs. Anjum Hajat, Ph.D., MPH, and Catherine Karr, Ph.D, M.S., M.D., two
18 University of Washington epidemiologists, reviewed the April 9, 2020 Fact Sheets. Their
19 professional opinions on the Fact Sheets and other relevant matters were sent to the agencies on
20 April 14, 2020 and are attached as Exhibit 8.

21 33. As to the housing guidance, Drs. Hajat and Karr wrote:
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- Housing facilities that ensure one or no more than two persons per room of 150-200 square feet are necessary to meaningfully reduce the risk of transmission of COVID-19 in farmworker housing.
- If individual rooms are impractical, the numbers of farmworkers per room should be reduced and beds should be separated by 6 feet.
- Bunk beds that cannot meet this standard should be disallowed.

34. On April 15, 2020, nearly four weeks after farmworker groups first wrote to Governor Inslee, and because the agencies' decided to pursue non-binding guidance instead of binding regulations, FUJ filed a petition for judicial review in Skagit County Superior Court. The cause number is 20-2-00368-29.

35. A copy of the Skagit County petition is Exhibit 9.

36. The purpose of the Skagit County case was to compel L&I and DOH to adopt emergency rules related to the COVID-19 to protect the lives of all Washington farmworkers.

37. The parties will soon execute a final order in the Skagit County case, as the state has now responded to the farmworkers' requests for safety mandates on farmworker housing, transportation, and workplaces.

38. On April 23, 2020, the agencies circulated draft emergency farmworker housing rules for comment. *See* Exhibit 10.

39. Drs. Hajat and Karr sent comments on these draft rules to the agencies on April 27, 2020. *See* Exhibit 11

40. Drs. Hajat and Karr opined in those comments, in part, that:

- Recent evidence regarding density and transmission of upper respiratory infections (URI) indicates that an increase in space by 100 square feet reduced URI by almost 13%. Thus from this

1 paper and other evidence, allowing no more than two people per
2 room of 150-200 square feet is needed to meaningfully reduce
the risk of transmission of COVID-19.

- 3 • More stringent protections are needed for farm workers at highest
4 risk of severe disease. The CDC recognizes individuals over age 65
5 years of age are higher risk of severe health consequences. In
6 addition, workers of any age with preexisting conditions including
7 chronic lung disease, moderate to severe asthma, serious heart
8 conditions, immunocompromised states, severe obesity, diabetes,
9 chronic kidney disease or liver disease are at highest risk of severe
10 health consequences. Research indicates that farmworkers have a
higher prevalence of TB and have higher exposure to agricultural
dust which has been shown to result in a variety of respiratory
conditions. These conditions which may be more unique to
farmworkers would put them at higher risk for complications of
COVID-19. We recommend that such high risk individuals not be
housed with more than 1 person per room of 150 square feet.
- 11 • Plastic barriers: The extent to which these barriers will impede
12 ventilation and air flow is unknown. However, this must be
monitored closely and if found that these barriers do impede
ventilation/air flow a new solution must be found.
- 13 • It is critical to ensure that the plastic barriers to be used for sinks are
14 robust and durable rather than thin plastic sheeting. The latter is
vulnerable to movement and will be more challenging to clean. The
15 risk is that these plastic barriers themselves will become a vector of
transmission.
- 16 • This rule does not appear to contemplate inspection of housing.
17 Providing a provision for inspection, including by video as a means
of protecting inspectors, would increase assurance that barriers used
18 and other unidentified “engineering controls,” achieve the intent of
this rule to reduce transmission.

19 41. After Skagit County Superior Court Judge Dave Needy scheduled a review
20 hearing for June 14, 2020 to examine the state’s progress, the agencies promulgated the
21 emergency housing rules on June 13, 2020. *See Exhibit 1.*
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1 42. The adopted emergency rules ignored Drs. Hajat and Karr’s April 14th and April
2 27th expert opinions.

3 43. Contrary to Drs. Hajat and Karr’s expert opinions, the emergency rules permit:

- 4 • Workers to be required to sleep in top and bottom bunks;
- 5 • Workers to be required to sleep less than six feet apart;
- 6 • Workers to be housed in rooms that are too small;
- 7 • The use of thin plastic sheeting for protective barriers;

8 44. The emergency rules also failed to provide additional space in common cooking
9 facilities and failed to provide specific standards for ventilation in sleeping areas.

10 45. On information and belief, no DOH staff with expertise in epidemiology or public
11 health expertise disagreed with Drs. Hajat and Karr’s opinions.

12 46. In fact, DOH staff dismissed a request for permission to use bunkbeds with plastic
13 and fabric barriers, saying that plan “still has people less than 6 feet apart.” *See* Exhibit 12.

14 47. The emergency rules also ignore Dr. Hajat and Karr’s opinions about other living
15 conditions including common bathing and cooking facilities.

16 48. The emergency rules permit agricultural employers to unilaterally force H-2A
17 farmworkers to sleep in bunkbeds in rooms with up to fifteen unrelated persons.

18 49. Once assigned, these unrelated groups of workers are required to spend all their
19 time together.
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1 50. On information and belief, H-2A workers will not be notified prior to leaving
2 Mexico or arriving in Washington State that being placed into mandatory fifteen-person groups
3 with dangerous housing conditions may be a requirement of their employment.

4 51. On information and belief, the agencies failed to gather adequate scientific
5 information about ventilation necessary to protect occupants of congregate housing.

6 52. Respondent L&I has a non-discretionary duty under chapter 49.17 RCW to
7 regulate conditions of employment and places of employment/workplaces. Respondent DOH has
8 a non-discretionary duty under RCW 70.114A.065 to promulgate standards in temporary
9 farmworker housing consistent with chapter 49.17 RCW.

10 53. The agencies developed a revised checklist to determine whether a facility
11 complies with the emergency regulations. There is nothing in the checklist that states the use of
12 both upper and lower bunks of bunkbeds is prohibited unless a housing operator fully complies
13 with all group housing requirements. *See* Exhibit 13.

14 54. No state agency plans to inspect farmworker housing before it is occupied to
15 determine if that housing meets the requirements of the emergency rules.

16 55. On information and belief, no state agency plans to enforce the requirements of
17 the emergency rules *unless* that agency receives a complaint.

18 56. H-2A workers are unlikely to make complaints due to the power imbalance
19 between them and their employers and their fear of retaliation for making complaints.

20 VI. EXHAUSTION, TIMELINESS OF PETITION, AND IRREPARABLE INJURY
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57. Exhaustion of administrative remedies is not required to the extent that the APA or any other statute states that exhaustion is not required. RCW 34.05.534(2).

58. The agencies have adopted emergency rules which are now subject to judicial review under both RCW 34.05.570(2).

59. Additionally, the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that the remedies would be patently inadequate; the exhaustion of remedies would be futile; or grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies. RCW 34.05.534(3).

60. All three requirements of RCW 34.05.534(3) are met here.

61. COVID-19 presents a potentially fatal risk to virtually every human being.

62. Grave, irreparable harm to farmworkers would result from permitting the emergency rules to govern H-2A farmworkers.

VII. STANDING

65. FUJ's domestic and H-2A members are aggrieved by the emergency rules.

66. The agencies' actions and inaction will cause substantial and imminent harm to FUJ's members.

67. FUJ's asserted interests are among those that the agencies were required to consider when it engaged in emergency rule making.

68. A judgment in favor of FUJ would substantially eliminate or redress the prejudice to their members caused or likely to be caused by the agency action.

VIII. REQUEST FOR RELIEF

Petitioners respectfully request that the Court:

Assume jurisdiction of this case.

Enter declaratory judgment pursuant to RCW 34.05.574 and RCW 34.05.570(2) finding that the challenged portions of the emergency rules interfere with or impair or immediately threaten to interfere with or impair the legal rights or privileges of the petitioner, and that those challenged portions are arbitrary and capricious.

Enter declaratory judgment pursuant to RCW 34.05.574 finding that petitioner has met the requirements of RCW 34.05.570(1) and (2).

Enter a Permanent Injunction pursuant to RCW 34.05.574 requiring L&I and DOH to immediately adopt emergency rules that fulfill the requirements imposed on the agencies by chapter 49.17 RCW and chapter 70.114A RCW with respect to farmworker housing that are consistent with current science-based guidance on preventing exposure to COVID-19.

Award Plaintiffs their costs and reasonable attorneys' fees pursuant to RCW 4.84.350 or other applicable statute.

DATED this 4th day of June, 2020

COLUMBIA LEGAL SERVICES

s/Amy Crewdson

Amy L. Crewdson, WSBA #9468

amy.crewdson@columbialegal.org

Andrea Schmitt, WSBA #39759

andrea.schmitt@columbialegal.org

Xaxira Velasco Ponce de Leon, WSBA #55646

xaxira.poncedeleon@columbialegal.org

1 711 Capitol Way South, #706
2 Olympia, WA 98501
3 (360) 943-6260

4 BARNARD, IGLITZIN & LAVITT

5 *s/Kathleen Phair Barnard*
6 Kathleen Phair Barnard, WSBA #17896
7 barnard@workerlaw.com
8 18 West Mercer Street, Ste. 400
9 Seattle, WA 98119-3971
10 (206) 285-2828

11 Attorneys for Petitioner Familias Unidas por la Justicia
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19
20
21
22
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