DISTRICT COURT, DENVER COUNTY, COLORADO COURT ADDRESS: 1437 Bannock St, Room 256 Denver, CO 80202	DATE FILED: February 7, 2022 8:09 PM FILING ID: 8DC052814BC09 CASE NUMBER: 2022CV30353
Plaintiffs: Patricia Vital Rangel and Colorado Jobs with Justice v. **Defendants:** Jared Polis, in his official capacity as Governor of the State of Colorado; Joseph Barela, in his official capacity as Executive Director of the Colorado Department of Labor and Employment; Colorado Department of Labor and Employment; Division of Labor Standards and Statistics, Colorado Department of Labor and Employment; and Scott Moss, in his official capacity as Director of Colorado Department of Labor and Employment Division of Labor Standards and Statistics	**▲COURT USE ONLY ▲**

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[1] Admitted to practice in Maryland. Colorado bar admission pending. Practice temporarily authorized pending admission under C.R.C.P. 205.6. Pro hac vice forthcoming.
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COMPLAINT

INTRODUCTION

1. Plaintiffs, Colorado Jobs with Justice and Patricia Vital Rangel, bring this action to address the Colorado Department of Labor and Employment's unreasonable and unconstitutional failure to fulfill its statutory obligation to establish equitable overtime standards for agricultural workers.[3]

2. Despite their long hours and work weeks performing intense labor under grueling conditions, agricultural workers are excluded from overtime protections in Colorado that require employers to pay workers time-and-a-half for all work performed in excess of forty hours per week and twelve hours per day.

3. The denial of labor standards protections for agricultural workers is no accident. Rather, it is the result of a racist system that was codified into federal law throughout the New Deal. The Fair Labor Standards Act ("FLSA"), enacted in 1939, for example, was written to exclude Black workers from minimum wage and overtime rights. As a consequence, farmworkers, domestic workers, and others were initially excluded from some of the FLSA's most important protections. States, including Colorado, followed suit by modeling their labor laws on federal standards, further perpetuating systemic and race-based injustice.

4. Senate Bill 87, however, changed this long-standing carve out and required the Colorado Department of Labor and Employment ("CDLE"), the Division of Labor Standards and Statistics ("the Division") to issue an overtime standard for agricultural workers that specifically

[3] This lawsuit is filed at an unfortunate time because of the very recent loss of valued public servant Patrick Teegarden, Director of Policy and Legislation at the Colorado Department of Labor and Employment. Plaintiffs are required to file this action no later than February 7, 2022, the final day permissible under law. *See* C.R.S. 24-4-106(4); Colo. R. Civ. P. 6(a).

addressed: (1) the inequity and racist origins of the exclusion of agricultural employees from overtime and maximum hours protections available to other employees; (2) the fundamental right of all employees to overtime and maximum hours standards that protect the health and welfare of employees; and (3) the unique difficulties agricultural employees have obtaining workplace conditions equal to those provided to other employees.

5. Despite this statutory mandate, the Division maintained an unreasonable and unjustifiable overtime standard for farmworkers that is uniquely weak compared to the overtime requirements applicable to other workers. That double standard is rooted in racially discriminatory federal law. But Colorado law provides no room from CDLE to assume that denying agricultural workers standard overtime protections is appropriate. SB87 shifts that presumption. Instead, under state law, CDLE must start from a presumption of equal treatment, and depart from that presumption only after providing reasons that are consistent with the Agency's statutorily-mandated considerations.

6. By denying agricultural workers overtime standards enjoyed by most workers, the rule unconstitutionally grants special treatment to agricultural employers and results in discrimination against agricultural workers, who are overwhelmingly Latinx.

7. Plaintiffs seek a declaratory judgment that denying agricultural workers overtime standards enjoyed by other workers violates Colorado's Administrative Procedures Act and the Colorado State Constitution. In support, Plaintiffs hereby state and allege:

JURISDICTION AND VENUE

8. This Court has jurisdiction over this suit for review of final agency action pursuant to the Colorado Administrative Procedure Act, C.R.S. § 24-4-106.

9. This Court has jurisdiction for declaratory relief under the Uniform Declaratory Judgments Law, C.R.S. § 13- 51-101, and C.R.C.P. 57.

10. Venue is proper pursuant to C.R.S. § 24-4-106.

PARTIES

11. Plaintiff Colorado Jobs with Justice is a formal coalition of labor, community, faith, and student and youth organizations that come together to advance workers' rights and social justice. Colorado Jobs with Justice's members include current agricultural workers who live and work in Colorado. Its members also include organizations who work with and on behalf of agricultural workers in Colorado.

12. Colorado Jobs with Justice seeks to improve the working conditions and wages paid to its individual members and protect its members' interest in ensuring the CDLE complies with its statutory mandate to protect all workers, including agricultural workers, and operating in accordance with the Colorado Administrative Procedure Act.

13. Plaintiff Patricia Vital Rangel resides in Commerce City, Colorado. Until recently, Ms. Vital Rangel worked as a farm worker harvesting vegetables in the northeastern region of Colorado. Ms. Vital Rangel would actively seek employment in the agricultural industry if such jobs were available at the wages and working conditions that were not adversely affected by the disparate overtime protections for agricultural workers implemented by CDLE on January 1, 2022.

14. Defendant Jared S. Polis is the Governor of the State of Colorado and is required by the Colorado Constitution to ensure that all laws of the state are faithfully executed.[4]

15. Defendant CDLE is a state agency responsible for the execution of C.R.S. § 8-1-101, et seq.

16. Defendant Joseph Barela is the Director of the CDLE and is responsible for all the functions of CDLE, including compliance with C.R.S. § 8-1-101, et seq.

17. Defendant Division of Labor Standards and Statistics is the department of CDLE that administers laws and regulations governing payment of wages and minimum wage in Colorado and promulgates the Wage Order.

18. Defendant Scott Moss is the Director of CDLE's Division of Labor Standards and Statistics. The Director is responsible for the administration of laws and regulations by the Division.

FACTUAL ALLEGATIONS

Nature of agricultural labor in Colorado

19. Colorado's agricultural industry produces an array of crops and commodities from peaches, cherries and sweet corn, to lettuce, onions, potatoes to beef, lamb, chicken and pork. Colorado's agricultural workers cultivate and harvest these fruits, vegetables and grains and raise and tend to livestock throughout the state.

20. The vast majority of agricultural workers, whether they are year-round, seasonal or migrant workers, including those brought to the U.S. on H-2A temporary agricultural work visas, are Spanish-speaking, most born in Mexico.

21. Agricultural workers labor in one of the most hazardous industries in the country. According to 2019 data from the U.S. Bureau of Labor Statistics, agriculture remains the most dangerous industry with 573 fatalities, equivalent of 23.1 deaths per 100,000 workers.[5]

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[4] COLO. CONST. ART. IV § 2.

[5] U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries Summary, 2020 https://www.bls.gov/news.release/pdf/cfoi.pdf

22. Agricultural workers face more than double the poverty rate of all Coloradoans.

23. According to the 2019 5-Year American Community Survey (ACS), 14.5 percent of agricultural workers experienced poverty in 2019 compared to 6.3 percent for all employed Coloradoans. [6]

24. Median earnings of agricultural workers in Colorado are just $25,030 – less than half the $56,111 average for all workers.[7]

The exclusion of agricultural workers from labor standards

25. Unlike most other Colorado employers, the agricultural industry has long been excluded from the overtime requirement in Colorado's Minimum Wage Orders.

26. The exemption of agricultural workers from Colorado overtime protections is based on an FLSA exemption crafted during the Jim Crow era, when most farm workers who fell under its reach were Black, Southern and had virtually no political power.

27. The FLSA provided minimum wage and overtime protections for workers across the nation.

28. In order to appease the Southern Democrats and obtain their support for the FLSA and other New Deal legislation, President Franklin D. Roosevelt agreed to a carve-out in these laws for agricultural workers, who at the time were predominantly Black.

29. This compromise resulted in the exemption of agricultural workers from both the minimum wage and overtime protections of the FLSA. Thus, and by design, most Black workers in the South were excluded from the protective reach of the original FLSA.

30. Like most states, many of Colorado's wage laws are rooted largely in the FLSA.

31. In fact, the current wage order explicitly relies on the FLSA definition of agricultural workers.[8]

32. The structural disempowerment of agricultural workers has made it impossible for agricultural workers to obtain conditions of employment equal to those provided to other employees.

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[6] Colorado Center for Law and Policy, Comments on Rulemaking Pursuant to SB21-087 (Sept. 7, 2021) referencing CCLP analysis of 2019 5-Year ACS microdata download from IPUMS USA, University of Minnesota, www.ipums.org

[7] *Id.*

[8] *See* COMPS Order #38, Rule 1.5(C).

33. For example, some agricultural workers continued to be excluded from minimum wage protections. It was not until the passage of SB87 were all Colorado agricultural workers entitled to minimum wage protections, with the exception of range workers engaged in the range production of livestock.

34. Agricultural workers have also long been excluded from fundamental health and safety standards, collective bargaining rights, and workers compensation insurance.

35. This vulnerable workforce is also subject to staggering abuse, including sexual assault and other workplace violence, trafficking, wage and hour abuses, child labor, pesticide exposure, and inability to access health care.

36. Combined with financial pressures, immigration concerns, lack of time and transportation, this systemic disempowerment has chilled complaints even in the most horrific circumstances and has made it impossible for them to exercise their voice to obtain equal treatment to other workers.

37. These pervasive exclusions and double standards disproportionately impact people of color.

38. At least 82% of Colorado's agricultural workers identify as Latinx.[9]

Senate Bill 21-087

39. SB87 revised numerous labor conditions pertaining to agricultural workers, including the prohibition of retaliation and interference with visitors at employer-provided housing, granting the right to organize and engage in collective bargaining, and removal of the minimum wage exemption, the establishment of health and safety protections in high temperatures.

40. SB87 also sought to eliminate the exclusion of agricultural workers from overtime wage standards provided to other Colorado workers.

41. The Colorado legislature charged the Colorado Department of Labor and Employment, Division of Labor Standards and Statistics to propose, solicit public comment on, and then adopt new rules for overtime standards in agriculture.

42. In promulgating the rules, the legislature directed the Division to consider: (1) the inequity and racist origins of the exclusion of agricultural employees from overtime and maximum hours protections available to other employees; (2) the fundamental right of all employees to overtime and maximum hours standards that protect the health and welfare of

[9] Project Protect Food Systems, Why Colorado Must Protect Farmworkers FAQ, available at https://drive.google.com/file/d/1dbXNQa-oafh83e9DvvDPDIU7d8bwVGp4/view

employees; and (3) the unique difficulties agricultural employees have obtaining workplace conditions equal to those provided to other employees.

43. Other than the factors set forth above, the legislature did not set forth any additional factors for the Division to consider in promulgating the overtime rules.

44. The statutory mandate demonstrates the legislature's intent to create an equitable overtime pay standard for agricultural workers and to rid the state of exclusions of agricultural workers that are racially motivated and discriminatory.

45. The Division was specifically required to promulgate the overtime rules for agricultural workers based on a presumption of equal treatment and to depart from that presumptions only if justified by reasons that are not rooted in the "racist origins of the exclusion of agricultural workers" from overtime protections and that take account of the other statutorily-mandated considerations codified in state law.

46. During rulemaking, however, the comments the Division received in support of creating a second-tier overtime standard for agricultural workers were based in the historical and discriminatory exclusion of agricultural workers.

47. The written comments and oral testimony provided during rulemaking included a significant amount of evidence as to the current and historical working conditions of Colorado's agricultural workers such as access to pay, water, breaks and shade.

48. The record created during rulemaking also contains scientific data and findings demonstrating the detrimental impact working in the fields and performing other types of strenuous labor has on the health of those who work in agriculture.

The Division's rule is divorced from the statutory mandates it was required to consider

49. Instead of creating rules that specifically addressed the factors set forth by the legislature, the Division created a complex scheme that continues to deny meaningful overtime pay to most agricultural workers in Colorado.

50. The Division's overtime standards for agricultural workers also set forth a phase-in structure with numerous exceptions that effectively provide overtime benefits to very few agricultural workers after working 56 hours per week.

51. Specifically, the Division issued the following:

2.3.2 Overtime and Maximum Hours Protections.

(A) Agricultural employees of agricultural employers are exempt from both the 40- hour weekly and the 12-hour daily overtime pay requirements in Rule 4.1.1, provided that such employees receive the following.

(1) Weekly overtime pay, at one and one-half times their regular rate of pay, after 60 hours worked per workweek from November 1, 2022, through December 31, 2023, and thereafter as follows, and as listed in the summary table below:

(a) at a highly seasonal agricultural employer (defined in Rule 2.3.2(C)), (i) after 56 hours worked per workweek during any up to 22-workweek period, or any two or three periods of at least four workweeks each totaling up to 22 weeks, that the employer designates as its peak labor period(s), and (ii) otherwise after 48 hours worked per week; and

(b) at an agricultural employer that is not highly seasonal, (i) after 54 hours worked per workweek in 2024, and (ii) after 48 hours worked per workweek as of January 1, 2025; except

(c) at a small agricultural employer (defined in Rule 2.3.2(B) below), whether or not highly seasonal, after 56 hours worked per workweek in 2024, then whichever of (a) or (b) applies as of January 1, 2025.

(2) Beginning November 1, 2022:

(a) in lieu of 12-hour daily overtime pay under Rule 4.1.1, 30 minutes for the third Rule 5.2 paid rest period (rather than 10 minutes or any other duration under 30 minutes otherwise applicable to that rest period) — except that if the employer had no reason to believe an employee would exceed 12 hours until the twelfth hour worked, then the additional break time may be provided on the employee's next workday; and

(b) for a workday with more than 15 hours of work, or for more than 15 consecutive hours of work (as provided by Rule 4.1.5) without regard to the start and end time of the workday, an additional lump-sum payment equal to one hour of the Colorado minimum wage, as specified for the applicable year in the PAY CALC Order.

(B) "Small agricultural employer" means an agricultural employer that:

(1) employed fewer than four employees on average over the three prior calendar years (or as many complete prior calendar years as they have been in operation); and

(2) had average adjusted gross income, over the three prior complete taxable years preceding 2024 (the year that small agricultural employers have a different overtime standard), of no more than $1,000,000. Employers in operation fewer than three complete taxable years shall use as many complete taxable years as they have been in operation; employers not yet in operation for any complete taxable years shall be considered below the threshold.

(C) “Highly seasonal agricultural employer” means an agricultural employer that, in any up to 22-workweek period (or any two or three periods, of at least four workweeks each, totaling up to 22 weeks) in the prior calendar year, had at least twice as many employees as the rest of the year, and provides the following to those it would pay weekly overtime after 56 rather than 48 hours in peak weeks.

(1) An initial disclosure, at least annually,

(a) that weekly overtime pay will be after 56 rather than 48 hours for up to 22 peak weeks,

(b) whether those peak weeks will be divided into one, two, or three periods (of four weeks or more), and

(c) a good-faith estimate of the months in which the peak weeks will occur.

The initial disclosure must be provided to employees at least 30 days in advance of the first expected peak week (or upon hiring for those start work fewer than 30 days in advance), except for those employed under, and in compliance with federal requirements for, temporary work visas, no later than the date of the worker’s visa application, contemporaneous with required federal pre-employment written disclosures to visa workers ordinarily due by the date of the worker’s visa application.

(2) Written notice, at least annually, of which weeks will be the peak weeks, no later than the seventh day before the first peak week (or upon hiring for those starting work after the seventh day). The employer may change which are the peak weeks after that notice if:

(a) it provides at least one week’s written notice of any week being added or removed as a peak week;

(b) the initial disclosure was the employer’s good-faith, reasonable expectation of which weeks would be the peak weeks; and

(c) the changes are based on circumstances not foreseeable at the time of the initial disclosure (for example, a late frost).

(3) All required notices and disclosures related to peak weeks in English and any language that is the first language spoken by at least five percent of the employer’s workforce at any point during the year.

(D) An agricultural employee is exempt from all overtime pay requirements in the COMPS Order if (by blood, adoption, or marriage) they are the child, sibling, spouse, parent, aunt, uncle, nephew, niece, first cousin, grandchild, or grandparent of a family owner of an employer. For this exemption, a “family owner” is an individual with an ownership interest in an agricultural

employer that is either (a) a majority interest or (b) an at least 10% interest that combines with those of other family members of that owner (of any type of relative listed in the prior sentence) to form a majority interest. If a family owner is also an "employee" of the agricultural employer, they also are exempt from all overtime pay requirements in the COMPS Order.

(E) How many employees an agricultural employer has, for purposes of the above definitions of "small agricultural employer" in (B), and "highly seasonal agricultural employer" in (C), shall be determined as follows.

> (1) Employees shall be counted at the worksite for which the definition is being assessed, and shall count proportionally as follows, based on their average hours worked in all weeks in the preceding year with at least one hour worked:
>
> > (a) 35 hours per week or more, 1.0;
> >
> > (b) between 15 and 35 hours per week, 0.5; and
> >
> > (c) under 15 hours per week, 0.
>
> (2) Employers need not rely on prior staffing levels to qualify for the "small agricultural" or "highly seasonal" employee thresholds if they (a) have been in operation for less than one calendar year, or (b) did not qualify based on their prior staffing levels, but have a good-faith, objectively reasonable belief that they will qualify for the present year. If their belief that they will qualify for the threshold proves incorrect, they must pay affected employees back pay for any additional overtime owed, plus 5%, by 30 days from the date the employer has notice that it will not qualify for the threshold for the year, or (if they lacked notice until the end of the year) by 30 days from the end of that calendar year.

(F) The Rule 2.3.2 exemption does not apply if an employer draws at least 50% of its annual dollar volume of business from sales to the consuming public (rather than for resale) of any services, commodities, articles, goods, wares, or merchandise; prior Orders for decades have covered any such employer, in any industry. E.g., Order #35, Rule 2(A) (covering any employer "that sells or offers for sale, any service, commodity, article, good, … wares, or merchandise to the consuming public" and draws "50% or more of its annual dollar volume … from such sales," rather than from sales to other businesses "for resale").

52. The overtime standard for most of Colorado's other employees is clearcut: "Employees shall be paid time and one-half of the regular rate of pay for any work in excess of any of the following, except as provided in exemptions or variances in Rule 2: (A) 40 hours per workweek; (B) 12 hours per workday; or (C) 12 consecutive hours without regard to the start and end time of the workday."[10]

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[10] *See* Comps Order 38, Rule 4.1.

53. Notably, the 22 peak weeks carve out for "highly-seasonal employers" effectively results in an additional large percentage of Colorado agricultural workers not receiving overtime premiums until they work more than 56 hours per week.

54. This 22-week carveout goes much further than the other "peak periods" designated by the Department for several other industries in Colorado, with no justification provided.

55. The carveout also fails to address its necessity at all, particularly when compared to other highly seasonal operations such as retail and outdoor recreation.

56. The agricultural worker overtime standards are admittedly based on the position that providing any overtime requirements "will be a major adjustment for Colorado agricultural employers – who, even when 100% compliant with all labor standards, have never had to pay extra for overtime."[11]

57. The Division fails, however, to note the fact that the only reason agricultural employers have never had to pay extra for overtime is because of "inequity and racist origins of the exclusion of agricultural employees from overtime" and the difficulties agricultural workers have had accessing equal treatment to other workers.[12]

58. The Division also fails to comply with SB-87's mandate of considering "the fundamental right of all employees to overtime standards . . . that protect the health and welfare of employees."[13]

59. And while the Division acknowledged that "even with many employers engaged in best practices," agriculture "is among the industries with the highest work fatalities rates" and beyond fatalities, "ranks among the most hazardous industries,"[14]it issued a rule that materially sets lesser overtime requirements for agricultural employees in direct conflict with its statutory mandate.

60. Extended duration of outdoor work is a primary risk factor for farmworker health.[15] As it is, agricultural workers are at high risk for fatalities and injuries, work-related lung diseases, noise-induced hearing loss, skin diseases, and certain cancers associated with chemical use and prolonged sun exposure.[16]

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[11] Statement of Basis, Purpose, Authority, & Findings, at 6.
[12] C.R.S. § 8-6-120.
[13] C.R.S. § 8-6-120.
[14] (Statement of Basis, Purpose, Authority, & Findings, at 6 (citing the National Institute for Occupational Safety and Health, Workplace Safety & Health Topics: Agricultural Safety)).
[15] *Safety and Health Topics: Agricultural Operations,* available at https://www.osha.gov/dsg/topics/agriculturaloperations/.
[16] *Id.*

61. The Division also failed to consider the unique difficulties agricultural workers have obtaining workplace conditions equal to those provided to other employees. To the contrary, the Division issued its overtime rule based on the difficulties agricultural *employers* will have in implementing overtime standards.

62. Indeed, aside from mentioning the factors and acknowledging they exist, it appears the Division based its rule on the unsubstantiated economic anecdotes provided by opponents to equitable overtime standards for agricultural workers. This analysis turns the Division's statutory directive on its head.

COUNT I: VIOLATION OF THE COLORADO ADMINISTRATIVE PROCEDURE ACT, 24-4-101, ET SEQ – RULE IN EXCESS OF STATUTORY AUTHORITY

63. Plaintiffs incorporate by reference the allegations contained in all preceding paragraphs as if set forth fully herein.

64. The Colorado Administrative Procedure Act requires that this Court "shall hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, purposes, or limitations."[17]

65. Wage Order 38 is a rule under the Colorado APA.[18]

66. Wage Order 38 constitutes a final agency action.

67. For the reasons stated above, CDLE's actions in promulgating Wage Order 38, effective January 1, 2022, violated C.R.S. § 24-4-101, et seq., and C.R.S. § 8-1-101, et seq., because the rule is entirely disconnected from the factors the legislature explicitly required the Agency to consider.

68. The final rule, therefore, was issued in excess of statutory authority and is therefore invalid.

COUNT II: VIOLATION OF THE COLORADO ADMINISTRATIVE PROCEDURE ACT, 24-4-101, ET SEQ – ARBITRARY AND CAPRICIOUS

69. Plaintiffs incorporate by reference the allegations contained in all preceding paragraphs as if set forth fully herein.

70. The Colorado Administrative Procedure Act requires that this Court "shall hold unlawful and set aside" agency action that is "arbitrary or capricious."[19]

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[17] C.R.S. § 24-4-106(7)(b).
[18] C.R.S. § 24-4-102(15).
[19] C.R.S. § 24-4-106(7)(b).

71. Wage Order 38 is arbitrary and capricious because while it purports to have considered the statutorily mandated factors, the standards fail to address any of the factors and are divorced from the clear intent of the SB87.

72. Given the legislature's directive in SB87, it is arbitrary and capricious to assume, as the Division did, that excluding agricultural workers from overtime is appropriate, but instead it must require a substantial showing of non-racist reasons for disparate treatment. That is, the racist history of the exclusion of agricultural workers from overtime puts a burden to prove why agriculture should be treated differently.

73. The rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and is, therefore, invalid.

COUNT III: COLO. CONST. ART. II, SECTION 3 AND SECTION 25

74. Plaintiffs incorporate by reference the allegations contained in all preceding paragraphs as if set forth fully herein.

75. Colo. Const. Art. II, Sec. 3 and Colo. Const. Art. II, Sec. 25 provides that no individual may be denied equal protection of the law based on a suspect classification and that all individuals within the state are guaranteed the equal protection of the law.

76. Defendants discriminated against Plaintiffs, targeted them, and denied them the equal protection of the laws by creating a matric of exclusion under the COMPS 38 Order.

77. COMPS 38 and its enforcement discriminates against agricultural workers.

78. The exclusion of agricultural workers from the overtime standards enjoyed by other Colorado workers deprives agricultural workers of the fundamental right to the equal protection of the laws under Colo. Const. Art. II, Sec. 3 and Colo. Const. Art. II, Sec. 25.

PRAYER FOR RELIEF

79. The Plaintiffs respectfully request that this Court:

a. Enter an order in favor of Plaintiffs, finding the CDLE's COMPS Order #38, as it pertains to the overtime standard for agricultural workers, is void as contrary to law and arbitrary and capricious in violation of the Colorado Administrative Procedures Act; and

b. Enter an order in favor of Plaintiffs, requiring CDLE to promptly begin a new rulemaking that accords with the requirements of C.R.S. § 8-1-101, et seq., and C.R.S. § 24-4-101, et seq.

c. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled.

Dated: February 7, 2022 Respectfully submitted,

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