UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-01537-NYW-GPG

TALBOTT'S MOUNTAIN GOLD LLLP, a Colorado limited liability limited partnership;
TALBOTT LAND AND PROPERTY LLLP, a Colorado limited liability limited partnership;
BLAINE D PRODUCE COMPANY LLC, a Colorado limited liability company;
BOX ELDER RANCH, LLC, a Colorado limited liability company;
BOX ELDER RANCH, INC., a Colorado corporation;
MARC ARNUSCH FARMS LLC, a Colorado limited liability company; and
MAUCH FARMS, INC., a Colorado corporation,

Plaintiffs,

v.

JOSEPH M. BARELA, in his official capacity as Executive Director of the Colorado Department of Labor and Employment; and
SCOTT MOSS, in his official capacity as Director of the Division of Labor Standards and Statistics, Colorado Department of Labor and Employment,

Defendants,

and

COLORADO LEGAL SERVICES; and JANE DOE,

Intervenor-Defendants.

INTERVENOR-DEFENDANTS' MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM IN SUPPORT

Pursuant to Rule 12, Intervenor-Defendants respectfully request the Court dismiss this action. In the alternative, they request the Court deny the preliminary injunction sought by Plaintiffs, Dkt. No. 13.

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I. INTRODUCTION

Claiming they are entitled to compensation for a taking, but without raising any other objection, Plaintiffs seek to enjoin a law crafted by Colorado's elected representatives to protect vulnerable agricultural workers' access to vital services like health care and education. Plaintiffs further contend they are entitled to emergency extraordinary relief to prevent that law from operating, despite sitting on their hands for more than a year after its enactment. That is not how the Takings Clause or equity operates.

Indeed, Plaintiffs' takings claims should be dismissed in their entirety. As the Supreme Court recently made clear in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), a claimant challenging a law for failing to provide just compensation (rather than alleging the taking was not for a public use) must show compensation cannot be obtained before a court can consider equitable relief. Plaintiffs cannot make that showing because Colorado law unquestionably authorizes just compensation.

To avoid *Knick*, Plaintiffs attempt to limit it to as-applied claims, but this distinction is unavailing for three independent reasons. First, the facial/as-applied distinction is irrelevant to *Knick*'s holding. Second, Plaintiffs are wrong on the facts; *Knick* concerned a facial challenge. Third, despite the labels they use, Plaintiffs actually allege as-applied claims.

Even were the Court to allow the case to proceed, Plaintiffs' requested relief does not match their allegations. In addition to requesting facial relief when Plaintiffs only allege as-applied claims, Plaintiffs attempt to leverage their claims for just compensation to challenge provisions they do not even suggest infringe their property rights, Colo. Rev. Stat. § 8-13.5-202(1)(c) and § 8-13.5-204. In fact, § 8-13.5-202(1)(c) merely requires the Colorado Department of Labor and

Employment ("CDLE" or "Department") to promulgate regulations, and Section 8-13.5-204 provides a private right of action. These are not takings. Plaintiffs also fail to demonstrate they raised their concerns (to the extent they exist) with the State before proceeding to court, as is required to challenge regulations.

Separately, if the claims are not dismissed, no preliminary injunction should issue. Plaintiffs are unlikely to succeed on the merits both because their right to exclude visitors from their land is not absolute under Colorado common law and because the challenged provisions do not constitute a taking within the meaning of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). Moreover, Plaintiffs will suffer no irreparable harm because they can seek compensation for any taking that has occurred. Finally, the balance of equities and public interest both tilt strongly against an injunction. The Agricultural Worker Bill of Rights provides important protections to a vulnerable and isolated population, and promotes public health and safety by ensuring that all Colorado workers, no matter where they work, can access basic services. That is why the Colorado legislature and Governor Polis enacted the law.

This Court should recognize this case for what it is: agribusinesses who disagree with the State's policy choices claiming the Takings Clause entitles them to act as a super legislature. While Plaintiffs may be entitled to compensation, they are not entitled to an election of remedies. An injunction is only available if compensation is not. Thus, the case should be dismissed in its entirety. At the least, it should be limited to an as-applied challenge, and the attacks on Colo. Rev. Stat. § 8-13.5-202(1)(c) and § 8-13.5-204 should be dismissed. Certainly, the Court should deny the requested preliminary injunction, both because no injunction is allowed, and because Plaintiffs fail to carry their particularly high burden to justify such disfavored relief.

II. BACKGROUND

A. Colorado's Agricultural Worker Bill of Rights and Its Regulations.

In June 2021, Colorado enacted the Agricultural Worker Bill of Rights ("the Bill"). As relevant here, the legislative history explains that Colorado's agricultural workers have been kept from obtaining medical care, legal services, and basic necessities like food and firewood. Dkt. No. 36, at 4, 13, 15. When service providers seek out workers, employers thwart their access, keeping providers from workers, or monitoring their conversations and intimidating the workers. *Id.* at 14.

As a result, the Bill addresses barriers to agricultural workers accessing "key service provider[s]," which the Bill defines to mean a "health care provider, a community health care worker, including a promotora; an education provider; an attorney; a legal advocate; a government official, including a consular representative; a member of the clergy and any other service provider to which a farmworker may need access." Colo. Rev. Stat. § 8-13.5-201(7).

The Bill prohibits employers from: (a) "interfer[ing] with an agricultural worker's reasonable access to visitors," such as key service providers, "at the agricultural worker's employer-provided housing" when the worker is present at the housing; (b) "interfer[ing] with an agricultural worker's reasonable access to key service providers at any location during any time," if the service provider is a health care provider, or any time the worker "is not performing compensable work" or is on a "paid or unpaid" break, for all other key service providers; and (c) violating other rules to be promulgated by the CDLE that will prevent "interfere[nce] with an agricultural worker's reasonable access to key service providers." *Id.* § 8-13.5-202(1)(a)-(c). The Bill further requires employers to ensure agricultural workers can reach providers offsite, through allowing or providing transportation at regular intervals. *Id.* § 8-13.5-202(1)(e)-(f).

The Bill provides a cause of action for "[a]n aggrieved agricultural worker, a whistleblower, or a key service provider" against an employer who violates the provisions. *Id.* § 8-13.5-204(1)(a). Alternatively, those same individuals can ask the CDLE to investigate and order remedies. *Id.* § 8-13.5-204(1)(b).

In January 2022, the CDLE issued the regulations required by § 8-13.5-202(1)(c). They went into effect on May 1, 2022. Those regulations detail the Department's interpretation of what constitutes "reasonable access to key service providers" and "interference" with that access. 7 C.C.R. § 1103-15(4.1). They explain that during breaks, an employer must facilitate phone and internet access with "as much privacy and quiet as possible," either by providing devices to workers or enabling the workers to reach phone or internet services offsite, assuming that is feasible. 7 C.C.R. § 1103-15(4.2.1(A)-(B)). If an employer cannot provide access to phone and internet services on- or off-site, then it "shall provide meaningful access to key service providers by alternate means, including at the worksite." *Id.* § 1103-15(4.2.1(C)). For agricultural workers whose workweek exceeds 40 hours, employers must also allow certain additional breaks so that the workers can access key service providers. *Id.* § 1103-15(4.2.2, 4.3). Finally, employers must provide workers with any mail and other communications sent to the employers on the workers' behalf. *Id.* § 1103-15(4.2.3). The regulations also confirm the Department is empowered to "investigate possible violations of these rules" and prohibit retaliation for a worker exercising their rights under the Bill. *Id.* § 1103-15(5.1).

B. Plaintiffs' Challenge.

Almost exactly a year after the Bill was signed into law, six months after the regulations were issued, and two months after they took effect, Plaintiffs filed their Complaint. Dkt. No. 1.

Plaintiffs requested that the Court declare and enjoin provisions of the Bill as "unconstitutional and, therefore, unenforceable" against all agricultural employers, or, at least, against Plaintiffs. *Id.* at 28 (Prayer for Relief). Specifically, they asked the Court to "prevent[] the application or enforcement" of three "Access Provisions," §§ 8-13.5-202(1)(b)-(c), 8-13.5-204. *Id.* ¶ 151. The Complaint states the provisions are unconstitutional solely because they "take private property without compensation." *Id.* ¶ 139. It contains no allegations that the purported takings were not for a "public use."

Moreover, the Complaint specifies it is only challenging the "Access Provisions" to the extent they undermine the "right to exclude" from "private agricultural property," such as "orchards, vineyards, and packing houses." *E.g.*, Dkt. No. 1 ¶¶ 39, 49 (Talbott Farms' "standing" allegations); *see also id.* ¶ 78 (Box Elder Ranch stating it is concerned with people accessing "cultivated acreage"); *id.* ¶ 86 (Marc Arnusch Farms stating it only "controls access to all of the land it cultivates"); *id.* ¶¶ 98, 109 (Mauch Farms contending it seeks to maintain "its right to exclude from its private, cultivated and irrigated fields"). The Complaint specifies Plaintiffs do not challenge the Bill's "Housing Provision" and "Transportation Provision," sections that ensure key service providers can reach agricultural workers in their employer-provided housing and that require employers to allow or facilitate offsite travel to access key service providers. *Id.* ¶¶ 125-26 (citing Colo. Rev. Stat. §§ 8-13.5.202(1)(a), (e)).

While § 8-13.5-202(1)(b) prevents unreasonable interference with service providers accessing "any location" and thereby allegedly provides access to the agricultural areas of concern to Plaintiffs, the Complaint is devoid of allegations explaining how the other challenged provisions impact Plaintiffs' concerns. Nowhere does the Complaint allege how § 8-13.5-202(1)(c)—which

requires CDLE to issue regulations—mandates access to agricultural areas. And the Complaint states it only challenges § 8-13.5-204—which creates a private right of action—to the extent it authorizes the State to sue to enforce the other two "Access Provisions." Dkt. No. 1 ¶¶ 11-12.

C. Plaintiffs' Motion For Preliminary Injunction.

Two months after filing their Complaint, Plaintiffs filed a Motion for Preliminary Injunction. Dkt. No. 13. Without specifying the terms of the relief it seeks, that motion requests a preliminary injunction against all of the "Access Provisions" challenged in Plaintiffs' Complaint because they "deprive[] agricultural employers of the right to exclude service providers from their privately controlled farm and ranch properties without just compensation." *Id.* at 34. Like the Complaint, the motion is scant as to how two of the provisions cause this alleged taking. The motion only mentions § 8-13.5-202(1)(c), which provides for the issuance of regulations, in the background section. *Id.* At 3-4. The same is true for § 8-13.5-204, which creates the private right of action, *id.* At 4, except Plaintiffs add one paragraph hypothesizing that if they requested "advance notice of key service provider access" there is "little doubt" Plaintiffs would be subject to suit under § 8-13.5-204. *Id.* at 7-8.

Regarding § 8-13.5-202(1)(b), which prohibits employers from interfering with reasonable access "at any location," consistent with the Complaint, the motion explains Plaintiffs do not object to the provision as written, because Plaintiffs do not object to providers accessing workers' housing or employers' obligation to enable transportation for workers to reach key service providers. Instead, the motion argues that in referring to "any location," § 8-13.5-202(1)(b) actually means something more limited—a prohibition on interfering with access to only those agricultural areas where Plaintiffs wish to deny access. Dkt. No. 13, at 15-16.

On this basis, Plaintiffs argue § 8-13.5-202(1)(b) is facially invalid, but only as applied to "*agricultural* employers" and only to the extent it prevents their ability to exclude key service providers from their agricultural land. Dkt. No. 13, at 14-16. Alternatively, the motion claims the provision is unenforceable "with respect to each of [Plaintiffs]," with the same caveats. *Id.* at 16.

III. APPLICABLE LEGAL STANDARDS

While Intervenor-Defendants did not have an opportunity to file a motion to dismiss before filing an Answer, *see* Fed. R. Civ. P. 24(c), whether this Court considers Intervenors' request to dismiss under Rule 12(b)(6), which typically applies to pre-Answer motions, or 12(c), which typically applies to post-Answer motions, it uses the "same standard of review." *Cont'l Credit Corp. v. Garcia*, No. 15-CV-1251-NYW, 2016 WL 614475, at *3 (D. Colo. Feb. 16, 2016) (Wang, J.). "To survive dismissal, 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A plaintiff may not rely on mere labels or conclusions in his pleadings, 'and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Regarding Plaintiffs' motion for a preliminary injunction, the injunction they seek "is considered an extraordinary remedy." *Archer v. Griswold*, No. 1:22CV02304NYWKLM, 2022 WL 16635397, at *4 (D. Colo. Nov. 2, 2022) (Wang, J.). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* (brackets in original). "An injunction can issue only if each factor is established." *Id.*

Moreover, here, Plaintiffs seek a disfavored injunction, as they seek to "change[] the status quo" measured from the point the litigation began (when the "Access Provisions" were in effect). *Id.* Thus, their request "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* Specifically, they "face[] a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-equities factors: [They] must make a strong showing that these tilt in [their] favor." *Id.*

IV. ARGUMENT

A. Plaintiffs Cannot Proceed Because They Failed to Seek Compensation or Allege It Is Unavailable.

Plaintiffs' requested relief, that the challenged provisions be declared, and enjoined as, "unenforceable," Dkt. No. 1, at 28 (Prayer for Relief), cannot be heard because Plaintiffs do not contend they will not be able to obtain just compensation. If, as here, a takings claimant does not challenge the "public use" of the taking, the Takings Clause only entitles them to compensation. Equitable relief is only available if compensation is not. *See* Dkt. No. 36, at 21-23 (State Defendants making similar argument to deny preliminary injunction). There is no dispute Colorado law authorizes just compensation. Colo. Const. Art. II, § 15; Colo. Rev. Stat. § 38-1-101 *et seq*. Therefore, Plaintiffs cannot ask this Court to prevent the "Access Provisions" from being enforced.

Plaintiffs contend only as-applied, not facial, claims need to address the unavailability of compensation. Dkt. No. 37, at 6-8 (citing *Knick*, 139 S. Ct. 2162). Incorrect. *Knick* made clear complaints about compensation never entitle a claimant to prevent a law's enforcement unless compensation is unavailable. *Id.* at 2176-77. This conclusion follows from the well-established principle that equitable remedies can only issue if there is no other adequate remedy. *Knick* also presented a facial challenge. Therefore, the Complaint must be dismissed.

1. Under the Takings Clause, the availability of compensation cuts off claims for equitable relief.

"It is important at the outset to distinguish two different types of Takings Clause challenges: challenges to the public-use requirement and challenges to the just-compensation requirement." *Wilkins v. Daniels*, 744 F.3d 409, 416-17 (6th Cir. 2014). The Takings Clause "provides that private property shall not 'be taken for public use, without just compensation.'" *Id.* at 416 (quoting U.S. Const. amend. V). Thus, if a party does not dispute the taking occurred for a public use, the clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," that the property owner be provided just compensation. *Id.* at 417 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005)). Put another way, if compensation is available, that is an adequate remedy.

As a result, until the Supreme Court decided *Knick*, the Tenth Circuit held takings claims could not be heard in federal court until a party sought compensation in state proceedings. *Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 (10th Cir. 2008) (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)); *see also Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1174 (10th Cir. 2011) (similar).

Knick changed the *forum* in which compensation could be sought. It explained "exhaustion of state remedies 'is *not* a prerequisite'" to pursue a takings claim under 42 U.S.C. § 1983. 139 S. Ct. at 2167. Therefore, § 1983 allows compensation-based takings claims "to proceed directly to federal court" even if state-court procedures for pursuing compensation are also available. *Id.* at 2171; *see also Anthony v. City & Cnty. of Denver,* No. 16-CV-01223-RM-NYW, 2020 WL 607066, at *2 (D. Colo. Feb. 7, 2020) (explaining *Knick* merely allows a takings claimant to pursue "a remedy in federal court").

However, *Knick* continued, that takings claimants are entitled to § 1983's "guarantee of a federal forum" in no way changes the limits on takings claims. 139 S. Ct. at 2171. It reiterated the long-held view that "later payment of compensation may remedy the constitutional violation that occurred at the time of the taking." *Id.* at 2172. Accordingly, *Knick* emphasized it is "consistent with our precedent" to hold "*equitable relief is not available* to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought." *Id.* at 2173 (brackets omitted) (emphasis added); *see also id.* at 2175 (affirming prior decisions that "concerned requests for injunctive relief" and held "the availability of subsequent compensation meant that such an *equitable remedy was not available*" (emphasis added)). Put another way, "[a]s long as an adequate provision for obtaining just compensation exists, *there is no basis to enjoin the government's action* effecting a taking." *Id.* at 2176 (emphasis added).

Knick described awards of equitable relief for just compensation claims as anachronisms. "The Framers meant to prohibit the Federal Government from taking property without paying for it" and "[u]ntil the 1870s" there was "no way at common law to obtain money damages for a permanent taking . . . only retrospective damages." *Knick*, 139 S. Ct. at 2176. Thus, an "injunction ejecting the government from the property" was the only method to provide the relief the clause required. *Id.* Today, there are "rights of action for damages" and therefore courts correctly "decline[] to grant injunctions because property owners ha[ve] an adequate remedy at law." *Id.*

For these reasons, *Knick* assured, "Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—*injunctive relief will be foreclosed*." *Id.* at 2179 (emphasis added). Once again, "So long as the property owner has some

way to obtain compensation after the fact, *governments need not fear that courts will enjoin* their activities," even though *Knick* has opened the federal forum and § 1983 to all just compensation claims. *Id.* at 2168 (emphasis added); *see also Laborers' Int'l Union of N. Am., Loc. 860 v. Neff*, 29 F.4th 325, 334 (6th Cir. 2022) (explaining following *Knick* that "to obtain an injunction" a just compensation claimant must show "no acceptable provision for obtaining just compensation exists" as equitable relief is only available where there is "no adequate remedy at law").

Plaintiffs contend *Knick* presented, and is limited to, an as-applied challenge, as parties must be allowed to bring facial challenges that do not merely seek compensation but attempt to enjoin laws. Dkt. No. 37, at 6-7. To the contrary, as explained above, if a taking claimant's concern is compensation, and that is available, compensation provides a remedy. Equitable relief is not warranted. Moreover, the plaintiff in *Knick* did in fact bring a "facial takings claim." *Knick v. Twp. of Scott*, 862 F.3d 310, 323 (3d Cir. 2017). The Supreme Court actually described the plaintiff's challenge in much more robust terms than what is at issue here, stating she claimed the entire ordinance at issue entitling "code enforcement officers to enter upon any property" was a taking. *Knick*, 139 S. Ct. at 2168. What distinguished her claim from other sorts of takings where injunctive relief is available, was that she did not challenge the underlying basis of the law, but rather that the state had not paid for its taking. *Knick*, 862 F.3d at 326.

The few cases Plaintiffs cite where injunctions were allowed predate *Knick*. Dkt. No. 37, at 7-8. Moreover, with the exception of an out-of-circuit district court case, the Tenth Circuit considered and rejected them in *Alto Eldorado Partnership*, which held pre-*Knick* that just compensation litigants cannot facially attack the "validity" of a law if compensation is available, and they must seek that compensation in state court. 634 F.3d at 1175. *Alto Eldorado* distinguished

the case law on which Plaintiffs rely as not raising the issue of "whether compensation was available" and thus not addressing whether an injunction is appropriate where compensation can be obtained. 634 F.3d at 1175 (discussing Plaintiffs' authority *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) and *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 340 n.23, 346 & n.25 (2005)).[1]

2. Plaintiffs' requested relief is unavailable.

With this background, Plaintiffs cannot proceed. They seek to declare the challenged provisions unenforceable and enjoin their application, Dkt. No. 1, at 28, but nowhere allege that the purported takings did not effectuate a public use. Nor could they. The legislative history demonstrates the "Access Provisions" are meant to ensure workers' health and prevent employers' illegal conduct. Dkt. No. 36, at 4, 11-15.

Rather than mounting a public-use challenge, Plaintiffs are solely challenging the "Access Provisions" on the basis that they did not provide just compensation. But Plaintiffs neither request compensation nor allege it is unavailable. To the extent Plaintiffs complain the Bill did not provide for "just compensation" and intend to leverage this to argue compensation could not be sought, *see* Dkt. No. 1 ¶ 17, that is not the test. The question is not whether the law allegedly accomplishing a taking also provides compensation, but whether the "government[] provides just compensation remedies." *Knick*, 139 S. Ct. at 2176. For instance, *Knick* explained that under federal law the Tucker Act waives immunity and establishes a mechanism for just compensation for alleged

[1] *Alto Eldorado* alone should result in the dismissal of Plaintiffs' Complaint. While *Knick* overruled its requirement that just compensation claimants must first proceed to state court, *Knick* did nothing to undermine *Alto Eldorado*'s rule that just compensation claimants, even those claiming to seek facial relief, cannot attempt to enjoin a law if compensation is available.

takings accomplished under other statutes. *Id.* at 2179. Colorado provides for "just compensation." Colo. Const. Art. II, § 15; Colo. Stat. § 38-1-101 *et seq*.; *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993) (describing inverse condemnation procedure). That is more than sufficient.

Therefore, this action should not be allowed to proceed. Plaintiffs could have sought compensation, or sought a declaration from the Court that the Bill constitutes a taking for which they are entitled to compensation. Instead, they sought only an injunction and a judicial declaration that the law is "unenforceable," Dkt. No. 1, at 28 (Prayer for Relief). Because Plaintiffs chose to focus on their political objectives rather than seek the remedies to which they are entitled, their Complaint should be dismissed.

B. Plaintiffs Fail To State a Facial Challenge.

Plaintiffs' complaint also fails because, under Tenth Circuit law, their so-called facial challenges seek as-applied relief. Therefore, under Plaintiffs' (incorrect) reading of *Knick*—that it only pertains to as-applied claims—they cannot seek to declare unlawful and enjoin the challenged provisions. Dkt. No. 37, at 6-8. At the least, their purported facial claims must be dismissed.

The Tenth Circuit's seminal decision on facial challenges explains the so-called "no set of circumstances" test often associated with a facial challenge is not "a separate test applicable to facial challenges, but a description of the outcome of a facial challenge." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012). That is, a facial challenge contends the law "can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *Id.* at 1127.

While Plaintiffs are far from specific on the order they seek, they are clear they challenge the "Access Provisions" to the extent they mandate access to farmland and do not challenge them

to the extent they authorize access to employer-provided housing or require employer-provided transportation. *E.g.,* Dkt. No. 1 ¶¶ 40, 43, 78, 86, 88, 98, 109, 125-26.

Yet, § 8-13.5-202(1)(b) prohibits interfering with reasonable access at "any location," thereby encompassing areas over which Plaintiffs do not contend they have a right to exclude that is being taken. Section 8-13.5-202(1)(c) merely requires the issuance of regulations. These regulations in turn make no mention of requiring access to farmland, but require employers to provide some form of internet or phone access on- or off-site, *or* another form of "meaningful access" to key service providers, with the means of access to be chosen by the employer. 7 C.C.R. § 1103-15(4.1)-(4.2). Section 8-13.5-204 does not address interference with access anywhere, but provides a cause of action. Far from arguing the provisions can never be applied constitutionally, Plaintiffs only attack a fraction of *one* "Access Provision."

Seemingly recognizing this problem, Plaintiffs cite *United States v. Supreme Court of New Mexico*, 839 F.3d 888 (10th Cir. 2016), for the proposition that facial challenges can seek to limit the application of a law to a discrete subset of individuals. Therefore, they suggest that because Plaintiffs argue the "Access Provisions" should not be applied to "*agricultural* employers," their claim is facial. Dkt. No. 13, 13-14 (emphasis in original). This argument fails for two reasons.

First, it underscores the ways in which Plaintiffs' claims differ from traditional facial challenges. Plaintiffs are not only seeking to limit the provisions' application to a subset of employers *but also* solely attacking the provisions' applications on farmland. These are not challenges that seek to define the law's unconstitutional reach, but are conveniently structured to relieve Plaintiffs' concerns while ignoring those of anyone else. That is the very definition of an as-applied challenge. *See Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) ("A

paradigmatic as-applied attack, by contrast, challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance[.]").

Second, Plaintiffs misread *Supreme Court of New Mexico.* That case limits itself to the "analysis [that] should extend to a preemption" claim, failing to consider any of the intricacies of takings law. *Supreme Ct. of N.M.*, 839 F.3d at 916. In that context, it recognizes there can be claims that have "characteristics of both facial and as-applied challenges" and states in those circumstances "facial *standards* should be applied to the [plaintiff's] preemption" claims. *Id.* at 915, 916 (emphasis added). Nonetheless, it notes, "these dual [facial and as-applied] claims are qualitatively distinct from paradigmatic facial claims." *Id.* at 915 & n.13.

In this manner, Plaintiffs effectively concede their Complaint should be dismissed, as they state *Knick* requires as-applied claims to demonstrate compensation is unavailable before requesting equitable relief, and they only bring as-applied claims without alleging compensation is unavailable. *See* Dkt. No. 37, at 6-7. Moreover, their requests for facial relief should be dismissed for failing to bring a facial claim.[2]

[2] There is yet another reason to reject Plaintiffs' effort to evade *Knick* based on the distinction between facial and as-applied claims: The Supreme Court has questioned the distinction's merit. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Indeed, the distinction appears to have particularly little function in the takings context, where the clause itself separates "public use" and "just compensation" claims. *Brown v. Legal Found. Of Wash.*, 538 U.S. 216, 231-32 (2003). Given that the proper remedy for just compensation claims is the "pecuniary loss" resulting from the taking, not an order preventing the law's enforcement, *id.* at 240, it is difficult to conceptualize a just compensation claim that is truly "facial" under Tenth Circuit precedent.

C. Plaintiffs Fail To State a Claim Against § 8-13.5-202(1)(c) and § 8-13.5-204.

Assuming Plaintiffs can state a claim for equitable relief, their challenge should be narrowed to only Colo. Rev. Stat. § 8-13.5-202(1)(b) because Plaintiffs fail to state a claim against the other provisions. In fact, to allow the additional claims would raise jurisdictional concerns.

None of Plaintiffs' papers explain how § 8-13.5-202(1)(c) effectuates a taking. That is because they cannot. Section 8-13.5-202(1)(c) provides that CDLE "shall promulgate rules" that prevent interference with access to service providers, without specifying how those rules will accomplish that end. But even assuming Plaintiffs mean to challenge the regulations, they fail to explain how the regulations effectuate a taking. Plaintiffs merely allege that the regulations provide access, but fail to allege this implicates any of Plaintiffs' property rights. Dkt. No. 1 ¶ 30.

In their motion, Plaintiffs highlight that the regulations allow the Department to "investigate and order remedies" for violations of the "Access Provisions." Dkt. No. 13, at 4-5. However, while a cause of action can create a property interest, it does so in the people who can file suit using that cause of action: here agricultural workers, whistleblowers, and key service providers. *See M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1309 (10th Cir. 2018). A cause of action does not take property.

For these same reasons, Plaintiffs have failed to state a claim against § 8-13.5-204, which solely creates a cause of action. Moreover, that cause of action can only be invoked by "[a]n aggrieved agricultural worker, a whistleblower, or a key service provider." Colo. Rev. Stat. § 8-13.5-204(1). Thus, Plaintiffs lack standing to challenge § 8-13.5-204 where they fail to allege that anyone has used that provision to initiate legal action against them—and if a worker, whistleblower, or key service provider were to do so, that potential future action would not be a

taking, would not be traceable to the State Defendants' actions, and would not be redressable by an order from this Court prohibiting the State Defendants from acting. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (injury is traceable to the defendant, and redressable, if there is "a causal connection between the injury" and the *defendant's* conduct (emphasis added)).

D. Plaintiffs Cannot Challenge § 8-13.5-202(1)(c) Because They Failed to Allege Exhaustion of the Rulemaking Process.

Plaintiffs' claim against § 8-13.5-202(1)(c) must also be dismissed because it is actually an attack on regulations—the provision does nothing beyond require regulations to issue—and Plaintiffs make no allegations that their objections were presented to CDLE during the rulemaking process. In the Tenth Circuit, "Generally, a party challenging an agency regulation must have initially presented its concerns to the agency during the rulemaking process in order for a reviewing court to consider those concerns." *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1151 n.11 (10th Cir. 2016). This is because a court "may not substitute [its] judgment for that of the agency on matters where the agency has not had an opportunity to make a factual record or apply its expertise." *N.M. Environ. Imp. Div. v. Thomas*, 789 F.2d 825, 835 (10th Cir. 1986). The Tenth Circuit recognizes an exception to the requirement if the plaintiff can show the issue was "obvious" or "otherwise brought to the agency's attention." *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007). However, as Plaintiffs do not address the rulemaking proceedings at all, they certainly have not alleged these predicates. Moreover, given Plaintiffs' limited and indefinite allegations concerning § 8-13.5-202(1)(c), it appears unlikely Plaintiffs could show the Department considered their objections.

E. Plaintiffs Are Not Entitled to a Preliminary Injunction.

If this Court does not dismiss Plaintiffs' claims outright, it should, at a minimum, find that they cannot clear the high bar necessary to secure the "drastic relief" of a preliminary injunction. *United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989). In this case, the bar is even higher as to the first (likelihood of success) and third (balance of equities) factors because Plaintiffs seek to alter the status quo, requesting the court enjoin provisions that were already in effect when they filed suit. *See Awad v. Ziriax*, 670 F.3d 1111, 1125-26 (10th Cir. 2012). Because Plaintiffs have the burden of establishing all four of the preliminary injunction factors, *Archer*, 2022 WL 16635397, at *4, and cannot establish any of them, no injunction should issue.

1. Plaintiffs Are Unlikely to Succeed on the Merits Because They Do Not Have an Absolute Right to Exclude Visitors and the "Access Provisions" Do Not Effectuate a Taking.

Plaintiffs' allegations that allowing key service providers onto their land constitutes a taking are premised on the notion that, prior to the Bill's enactment, they had an absolute "right to exclude" everyone from their land. *U.S. v. Kausby*, 328 U.S. 256, 265 and n.10 (1946) ("an owner is entitled to the absolute and undisturbed possession of every part of his premises" (quotation omitted)); *see also Kaiser Aetna v. U.S.*, 444 U.S. 164, 180 (1974) (describing the right to exclude as a "fundamental element of the property right").

This premise is false. Plaintiffs never had an absolute right to exclude visitors, because of principles of Colorado property law, especially in rural areas. Moreover, the additional qualifications that the Bill places on that right do not constitute a taking for three reasons: because at least some agricultural workers covered by the Bill live on or near their worksite in employer-

provided housing; because the "Access Provisions" are reasonable regulatory conditions on business licenses; and because the "Access Provisions" protect important Constitutional rights of agricultural workers.

a) Colorado Property Law Does Not Grant Landowners an Absolute Right to Exclude, and This Is Particularly True in Rural Areas.

Under Colorado's common law of trespass, landowners like Plaintiffs do not have an absolute right to exclude visitors from their agricultural property, and thus their rights are not necessarily diminished by every statute authorizing entry. A trespass occurs when one physically intrudes upon the property of another "without the proper permission" of the property owner. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 933 (Colo. 1997). However, there are many situations when physical intrusions onto another's land are necessary, and in evaluating claims of trespass, Colorado courts look to both the reasonableness and the necessity of the intrusion. *Id.* at 928. *See also Wagner v. Fairlamb*, 379 P.2d 165, 167-69 (Colo. 1963) (finding "easement by way of necessity" based on "voluminous" evidentiary record showing a "practical inability to have access [to adjacent land] any other way"); *People v. Neckel*, 487 P.3d 1036, 1041-42 (Colo. App. 2019) (holding that "no trespassing" signs do not act "as a bar to any entry whatsoever," and that this qualification is true "in rural areas in particular").

Colorado grazing law reveals that the right to pursue a common-law trespass action is further limited when livestock are at issue. *See* Kate A. Burke, *Colorado's Fence Law: An Overview of Open Range and Fence Out Concepts*, *Colo. Law.*, March 2014, at 29, 30. Specifically, in *Williamson v. Fleming*, the Colorado Supreme Court held that the owner of cattle who turned them out on the public domain, or his own land, was not guilty of an actionable

trespass, although he knew that to reach water they must go upon the unenclosed land of a neighbor. *Williamson v. Fleming*, 178 P. 11, 12 (Colo. 1919). Thus, a trespass involving livestock requires more than mere knowledge that animals may stray onto another's property.

The qualified nature of the right to exclude under Colorado law, especially in rural areas, undermines Plaintiffs' claims on the merits. It demonstrates the mere fact that § 8-13.5-202(1)(b) prevents interference with reasonable access at "any location" is likely not enough for Plaintiffs to establish it effects a taking of their agricultural property. Rather they will need to show context-specific facts that may or may not reveal a taking, but certainly are not present in this challenge where Plaintiffs never allege any entry onto agricultural property has even occurred.

b) *Cedar Point* Does Not Apply When People Live on the Property at Issue.

Plaintiffs' takings claims are also unlikely to succeed because they analogize their situation to that of the employer in *Cedar Point*, ignoring the key distinction that none of the workers in *Cedar Point* lived at the worksite. 141 S. Ct. at 2069. Here, at least some of the Plaintiffs also provide housing to their workers. Plaintiffs seek to make their provision of housing a non-issue by disclaiming any challenge to the Bill's provision granting key service providers access to workers in employer-provided housing. *E.g.*, Dkt. No. 1 ¶ 125. But the fact that some workers protected by the Bill live in employer-provided housing cannot be so neatly elided.

In *Cedar Point*, the Supreme Court affirmed its earlier ruling in *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992) that government regulations affecting landowners that use their property for housing are not per se takings. 141 S. Ct. at 2072. Based on this affirmation of the continued applicability of Yee, many other courts have subsequently explained that *Cedar Point* is not applicable to housing regulations. *See, e.g.*, *BVCV High Point, LLC v. City of Prattville, Ala.*, NO.

2:21-CV-821-WKW, 2022 WL 3716592, at *7 (M.D. Ala. Aug. 29, 2022) (citing *Cedar Point* and holding that a zoning ordinance prohibiting construction of multifamily housing did not constitute a per se taking); *Southern California Rental Housing Ass'n v. Cnty. of San Diego*, 550 F. Supp.3d 853, 865-66 (S.D. Cal. 2021) (explaining that pandemic-related evictions moratoria are not takings and not subject to *Cedar Point*); *MDG-Rio V Limited v. City of Seguin, Tex.*, No. SA-18-CV-0882-JKP, 2021 WL 4267718, at *10-15 (W.D. Tex. Sept. 17, 2021) (finding no per se taking under *Cedar Point*, and denying plaintiff's motion for summary judgment on its takings claim, based on city's zoning decision that property could not be developed as manufactured home subdivision); *Bldg. & Realty Inst. of Westchester & Putnam Ctys., Inc. v. New York*, No. 19-CV-11285 (KMK), 2021 WL 4198332, at *22 (S.D.N.Y. Sept. 14, 2021) (explaining that tenant protection statutes are not takings and not subject to *Cedar Point*).

Despite Plaintiffs efforts to rewrite the law, the provisions they challenge as takings do impact service providers' ability to access workers in employer-provided housing, as well as other locations. Section 8-13.5-202(1)(b) prevents interference with reasonable access at "any location" when agricultural workers are not working and access to health care providers "at any location" even when agricultural workers are working. Moreover, for workers like herders who move with their flocks, there is simply no clear line of demarcation between home and workplace. Dkt. No. 38-2, Aguirre Decl. ¶ 5; Dkt. No. 38-1, Asher Decl. ¶ 28. Because that provision includes access to housing within its scope, and *Cedar Point* does not apply to government regulations of housing, Plaintiffs are unlikely to succeed on their *Cedar Point*-based takings claim.

c) The "Access Provisions" Are Regulatory Conditions on Agricultural Employers' Business Licenses.

As the State Defendants correctly explained in their opposition, Plaintiffs are unlikely to prevail because the challenged provisions are permissible health and safety regulations implemented under the state's police power, and confer benefits on employers in the form of a healthier and more productive workforce. Dkt. No. 36 at 10-16, 19-21.

Plaintiffs are also unlikely to prevail for another, related reason discussed in *Cedar Point*: the "Access Provisions" are regulatory conditions placed upon the benefit of being permitted to operate a business within the state, not a taking.[3] 141 S. Ct. at 2079.

Numerous courts have held that such conditions on business operations do not constitute a taking under *Cedar Point*. *See, e.g.*, *Skatemore, Inc. v. Whitmer*, No. 1:21-CV-66, 2021 WL 3930808 (W.D. Mich. Sep. 2, 2021), *aff'd*, 40 F.4th 727 (6th Cir. 2022) (holding that pandemic-related business regulations are not takings under *Cedar Point*); *Orlando Bar Grp., LLC v. DeSantis*, 339 So. 3d 487, 492 (Fla. Dist. Ct. App. 2022), *rev. denied*, No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022) (similar); *Hinkle Fam. Fun Ctr., LLC v. Grisham*, 586 F. Supp. 3d 1118, 1130 (D.N.M. 2022) (similar); *Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi*, 52 F.4th 974 (5th Cir. 2022) (similar); *Sheetz v. Cnty. of El Dorado*, 84 Cal. App. 5th 394 (2022) (holding that development impact fees as a condition for land-use permits are not

[3] Colorado has a number of licensing regulations that businesses must follow, including a number of agriculture-specific regulations. *See, e.g., Licensing and Examination Guide*, Colo. Dept. of Ag. (2015); Colo. Rev. Stat. § 12-16; Colo. Rev. Stat. § 18-9-2; Colo. Rev. Stat. § 35-4 *et seq.*; Colo. Rev. Stat. § 35-9 *et seq.*; Colo. Rev. Stat. § 35-21; Colo. Rev. Stat. § 35-23 *et seq.*; Colo. Rev. Stat. § 35-33; Colo. Rev. Stat. § 35-40 *et seq.*; Colo. Rev. Stat. § 35-46 *et seq.*; Colo. Rev. Stat. § 35-50 *et seq.*; Colo. Rev. Stat. § 35-60; Colo. Rev. Stat. § 35-70; *see generally, Checklist for New Businesses*, Colo. Sec. of State Jena Griswold (2022), https://www.sos.state.co.us/pubs/business/businessChecklist.html.

takings under *Cedar Point*). To maintain an active business license with the state, the owners of all businesses, from shirtwaist factories to meatpacking plants, must comply with certain regulations on their operations. The "Access Provisions" here are no different.[4]

d) The "Access Provisions" Protect Agricultural Workers' First Amendment Rights and Thus Do Not Constitute a Taking.

Finally, Plaintiffs are unlikely to prevail because the "Access Provisions" ensure First Amendment freedoms that undermine Plaintiffs' taking claim. The "Access Provisions" ensure workers can obtain information about their health, safety, and rights. The Tenth Circuit has previously ruled that "the First Amendment includes a fundamental right to receive information." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012). In *Doe*, the Court held that the First Amendment right to receive information included the freedom from interference with receiving that information, overturning a law prohibiting registered sex offenders from entering public libraries. *Id.* Further, the Tenth Circuit ruled in *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1234 n.10 (10th Cir. 2021), cert. denied, 142 S. Ct. 2647 (2022) that *Cedar Point* could not be used to exclude only people with certain viewpoints, such as pro-worker viewpoints.

Where a First Amendment right is at stake, *Cedar Point* and the Takings Clause are not the proper analysis. The Tenth Circuit's rulings show that agricultural workers have an established

[4] Moreover, the "Access Provisions" are not (or at least not solely) framed in terms of rights granted to service providers, unlike in *Cedar Point* where the statute specifically granted union organizers a right "to take access." Rather than create an easement for a specific group, as was the case in California, the Colorado statutes ensure that agricultural employers do not "interfere with" the reasonable right of workers to access vital health, safety, and welfare services. Colo. Rev. Stat. § 8-13.5-202(1)(b)-(d). That is, the California statute granted positive rights of access, whereas the Colorado statute is a negative right or protection for workers.

right to receive information; the statutory provisions that codify that right do not constitute a taking.

* * *

Plaintiffs have no absolute right to exclude others from their agricultural land under Colorado common law. And to the extent Plaintiffs wish to use *Cedar Point* as the yardstick for their takings claim, that ruling is limited to its facts, which differ from the facts here in numerous ways. In short, *Cedar Point* does not apply to the provisions Plaintiffs challenge, and so they are unlikely to succeed on the merits of their takings claim, especially under the heightened standard required for a preliminary injunction that would change the status quo.

2. Plaintiffs Are Unlikely to Suffer Irreparable Harm When Compensation Is Available for Any Taking.

Plaintiffs insist that the mere violation of a Constitutional right is all they need to show to establish they will suffer irreparable harm without a preliminary injunction. But this argument suffers from a fundamental flaw: even if Plaintiffs can establish a Constitutional violation, which they cannot for all the reasons described in the previous section, a claim that Plaintiffs suffered a taking without just compensation is, by its very nature, not an irreparable harm. It is just the opposite, a violation that requires reparation through compensation, and such compensation is available under Colorado law. Put another way, Plaintiffs have adequate remedies at law, and so an injunction would not be appropriate. The fact that Plaintiffs have chosen not to seek compensation because they would prefer that the law not be enforced does not create an irreparable injury or change the nature of this Court's equity powers.

Plaintiffs do pay lip service to other harms they assert they may suffer because of the "Access Provisions." But as the next section will discuss, these predicted harms are entirely speculative and can be avoided through safety measures provided in the statute.

3. The Balance of Equities Favors Intervenor-Defendants, Especially Under the Heightened Standard for an Injunction Altering the Status Quo.

To prevail on the balance of the equities, Plaintiffs must show "the threatened injury outweighs the harm the grant of the injunction will cause the opposing party." *Schrier v. Univ. of Colo.*, 427 F. 3d 1253, 1258 (10th Cir. 2005). This showing is heightened here because Plaintiffs seek a change to the status quo that existed when they filed suit. *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004). Yet, the record establishes the only true harm that would flow from a preliminary injunction would be to the workers the Bill seeks to protect, not Plaintiffs.

Plaintiffs point to no harms presently occurring beyond the alleged taking. Rather, in an attempt to add weight to their side of the balance-of-equities scale, Plaintiffs raise concerns of alleged future harms that will flow from "unfettered access" to their properties, namely that service providers entering their property "will likely, if not certainly" cause physical injury, introduction of disease and other biohazards and other damages. *E.g.*, Dkt. No. 13, at 27. But Plaintiffs conveniently ignore that § 8-13.5-202(1)(d) specifically empowers agricultural employers, such as Plaintiffs, to require visitors to follow the same protocols they have put in place for other third parties who may also enter the worksite; protocols that are designed to "manage biohazards and other risks of contamination, to promote food safety, and to reduce the risk of injuries to or from livestock on farms and ranches except on the open range." Colo. Rev. Stat. § 8-13.5-202(1)(d).

Notably, CDLE Interpretive Notice & Formal Opinion #12B, which addresses the service provider "Access Provisions," reiterates the safeguards in place for employer property, ensuring that key service providers are limited to those who relate to worker health or safety and that the service providers are to "follow any worksite safety rules that other third parties must follow." INFO #12B: Agricultural Employee Rest Periods, Meal Periods, and Service Provider Access, Division of Labor Standards and Statistics, CDLE (last updated Oct. 11, 2022).[5] The notice further clarifies that "reasonable access" is not unrestricted access and does not include access that risks harm or that goes beyond access "genuinely needed for worker health or safety needs." *Id.*

As business owners and employers who run farms and ranches with varying acres of land on which they raise livestock and/or crops and utilize farm equipment and maintain structures such as packing houses or storage sheds, Plaintiffs presumably have such protocols or rules in place for others who enter their property in the regular course of business (i.e. audit inspectors, delivery/pick-up trucks, repair and service personnel).[6] Plaintiffs can require key service providers visiting workers to follow these same protocols or rules. Therefore, the additional harms Plaintiffs claim are "likely if not certain" to occur are simply bogymen conjured for this litigation, and in conjuring them, Plaintiffs ask the Court to ignore the text of the statute.

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[5] Available at https://cdle.colorado.gov/sites/cdle/files/%5BOct.%20%2722%20update%5D%20INFO%20%2312B_%20Agricultural%20Employee%20Rest%20Periods%2C%20Meal%20Periods%2C%20and%20Service%20Provider%20Access%20%282%29.pdf.

[6] In their declarations, Plaintiffs state how they control access to their property in regard to the general public and reference their need to maintain strict health and safety protocols. Plaintiffs' Complaint, Exhibit 1, Declaration of Bruce Talbott, ¶¶ 6, 7, 11, 12; Exhibit 2, Declaration of Blaine Diffendaffer, ¶¶ 5, 11, 12; Exhibit 3, Declaration of Audrey Rock, ¶ 10; Exhibit 4, Declaration of Marc Arnush, ¶ 4; and Exhibit 5, Declaration of Dale Mauch, ¶¶ 11, 12.

Unlike Plaintiffs, Intervenor-Defendant Jane Doe and other agricultural workers would face substantial harm if Plaintiffs' injunctive relief is granted. In fact, the decision to allow the "Access Provisions" to remain in effect pending the outcome of this case could be a matter of life and death. Agriculture is one of the most dangerous industries in terms of both fatal and non-fatal injuries.[7] Due to the nature and the conditions of their labor and the prolonged hours during which they work, agricultural workers are already 20 times more likely than other workers to die from heat stress.[8] Colorado agricultural workers having access to health-care providers at the worksite, whether or not they are working, is absolutely crucial.

If Plaintiffs' injunction is granted, Intervenor-Defendant Jane Doe and other similarly-situated agricultural workers would face additional harm as well. During the season, Jane Doe works long hours, every day of the week, including weekends. Motion to Intervene, Exhibit C, Declaration of Jane Doe ("Doe Decl."), Dkt. No. 38-3 ¶ 6. She does not live in employer-provided housing and thus her employer is not required to take her once a week to access basic necessities pursuant to Colo. Rev. Stat. § 8-13.5-202(1)(e). Doe Decl. ¶ 7. If Plaintiffs' relief is granted, Jane Doe would not be able to schedule visits with her medical providers, lawyers or children's teachers during her lunch or other breaks. As a result, her health would suffer, she would be unable to

[7] *See* U.S. Bureau of Labor Statistics, *Census of Fatal Occupational Injuries 2020* (December 16, 2021), https://www.bls.gov/news.release/pdf/cfoi.pdf, and U.S. Bureau of Labor Statistics, *Employer Reported Workplace Injuries and Illnesses 2021* (November 9, 2022), https://www.bls.gov/news.release/pdf/osh.pdf (last visited December 15, 2022). The Court may take judicial notice of the facts and data recounted in these official government documents, and other official documents described below, under Federal Rule of Evidence 201.

[8] *See* Centers for Disease Control, *Heat-related deaths among crop workers—United States, 1992-2006*, MMWR 57:649-53 (June 20, 2008).

resolve her legal matters, and she would lose the opportunity to participate in her children's education. Doe Decl. ¶¶ 9-12.

Intervenor-Defendant Colorado Legal Services ("CLS") would also face considerable harm if Plaintiffs' injunctive relief is granted. One such harm is the threat of physical injury the staff of the Migrant Farm Worker Division would face when conducting outreach to agricultural worker housing. For years, CLS has encountered agricultural employers who interfere with or outright prohibit access to their workers at a number of labor camps, claiming they have the right to deny and/or control their workers' access to visitors because the workers live on the employers' property. During some of these encounters, CLS outreach workers have been accused of trespassing, and threatened with arrest or acts of violence. *See* Motion to Intervene, Exhibit A, Declaration of Jonathan D. Asher ("Asher Decl."), Dkt. No. 38-1 ¶¶ 16-17. The implementation of Colo. Rev. Stat. § 8-13.5-202(1)(a) makes it clear that such interference by employers is unequivocally prohibited at employer-provided housing. This provision is crucial not only for worker access to services but for the safety of service providers like CLS.

Although Plaintiffs do not challenge the provision specifically protecting workers from interference with service provider access to employer-provided housing, the mere filing of this lawsuit has already had a chilling effect on the implementation and enforcement of Colo. Rev. Stat. § 8-13.5-202(1)(a). This past summer, Intervenor-Defendant CLS encountered agricultural employers who denied access to worker housing and complained about the new law, making reference to "legal challenges" and holding firm to the position of their right to deny anyone access to anywhere on their property. Asher Decl. ¶¶ 22-23.

Intervenor-Defendant CLS fears that the injunction, if granted, would be easily misconstrued as preventing all access to an agricultural employer's property, including labor camps owned or operated by agricultural employers, putting the CLS outreach workers at increased risk of violence while conducting outreach to worker housing. Asher Decl. ¶ 24. Intervenor-Defendant CLS faces the additional risk of expending substantial resources on proactive measures it would need to undertake to protect its staff (*i.e.*, educating agricultural employers) as well as time and expenses of litigating such disputes. Asher Decl. ¶ 27.

Given the safeguards and parameters of the "Access Provisions" and the ease with which Plaintiffs can ask service providers to follow the same safety practices utilized in the normal course of business for others who enter the property, Plaintiffs face minimal, if any, harm from allowing the provisions to remain in place pending the outcome of this action. Jane Doe and CLS, however, face the risk of direct harm, tipping the balance of the equities strongly in their favor.[9]

4. Denying the Preliminary Injunction Would Serve the Public Interest.

Finally, Plaintiffs must show that the injunction, if issued, will not adversely affect the public interest. *Archer,* 2022 WL 16635397, at *4. They cannot make this showing.

The public interests in need of protection in this case are not Plaintiffs' property rights. The public interest is to ensure workers have access to basic necessities—regardless of whether they work in the fields, a restaurant or an office building. The public interest is to protect and promote the health, safety and well-being of those who work hard to put food on our tables. The Colorado legislature has already made that determination in passing the Agricultural Worker Bill of Rights.

[9] If the Court believes that any of these factual questions require further development of evidence, Intervenor-Defendants request an evidentiary hearing.

Indeed, the challenged "Access Provisions" were supported by extensive legislative history demonstrating the vulnerability of Colorado's agricultural workers—including to labor abuses, sexual assault and violence, child labor, and human trafficking— and the need to ensure they could meet with service providers like CLS to know and protect their rights.

V. CONCLUSION

The Court should dismiss Plaintiffs' complaint in its entirety, or at a minimum, dismiss the facial claims for relief and the claims against Colo. Rev. Stat. § 8-13.5-202(1)(c) and § 8-13.5-204 for failure to state a claim. Even if no claims are dismissed at this time, Plaintiffs' request for a preliminary injunction should be denied.

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