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DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO City and County Building 1437 Bannock Street Denver, CO 80202	
Plaintiff: COLORADO LIVESTOCK ASSOCIATION, a Colorado nonprofit corporation, v. **Defendants:** STATE OF COLORADO; JARED POLIS, in his official capacity as Governor of Colorado; 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, *and* **Defendant-Intervenors**: COLORADO LEGAL SERVICES, INC., a Colorado nonprofit corporation; and JANE DOE.	Δ COURT USE ONLY Δ
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REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

On behalf of its agribusiness members, Plaintiff Colorado Livestock Association demands a sweeping declaration and injunction invalidating, on takings clause grounds, a law that provides vulnerable, isolated agricultural workers reasonable access to basic services. *See* Colo. Rev. Stat. § 8-13.5-202(1)(b). But this challenge fails because the Livestock Association fails to identify a *single* member who has been injured and has a ripe claim for compensation. The declaration of the Association's CEO does not show otherwise, and the Association cannot evade dismissal by contending that a declaratory remedy dispenses with the requirement of an injury-in-fact. The Livestock Association has not offered any case in which an association of unidentified property owners was found to have standing or a ripe claim to pursue facial equitable relief against a statute under the Colorado or federal Takings Clauses. Thus, this Court lacks jurisdiction.

I. The Livestock Association Has Failed to Establish Associational Standing[1]

Colorado's standing doctrine is liberal, but it is not boundless. *Ainscough v. Owens*, 90 P.3d 851, 855–56 (Colo. 2004). The Livestock Association has failed to demonstrate that at least one of its members has standing because it has provided no evidence that Colo. Rev. Stat. § 8-13.5-202(1)(b) has caused or will cause any of its members economic harm — the only kind of harm cognizable in a takings challenge. Where, as here, an association fails to provide concrete allegations that a challenged law has resulted in a specific, compensable deprivation of any member's property, the association lacks standing. And a plea for declaratory relief cannot create a takings injury where none exists.

A. *The Livestock Association Fails to Allege that Any Identifiable Member Has Suffered Concrete Economic Loss*

The Livestock Association fails to show that Colo. Rev. Stat. § 8-13.5-202(1)(b) has caused any economic harm to anyone. The Association claims injury-in-fact "need not consist of a direct, pecuniary loss." Pl.'s Opp'n 4 (citation omitted). That is true when talking about injuries-in-fact generally. But it ignores that in the *takings* context the injury-in-fact *is* a pecuniary loss for which the government has failed to pay just compensation. *See* Def.-Intervs.' Mot. for J. on the Pleadings 5–6; *Am. Fam. Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 370 P.3d 319, 325 (Colo. App. 2015) (standing for takings claim where "property owners had suffered injuries-in-fact (property damage and economic loss)"); *Fowler Irrevocable Tr. 1992-1 v. City of Boulder*, 17 P.3d 797, 802 (Colo. 2001). The Association's authority, *Aurora Urban*

[1] The Association wrongly asserts Defendant-Intervenors do not contest the third prong of associational standing (the necessary participation of an association's members), Pl.'s Opp'n 5 n.3. Defendant-Intervenors do so by explicitly adopting and incorporating the Government Defendants' arguments on that point. *See* Def.-Intervs.' Mot. for J. on the Pleadings 2 n.1.

Renewal Auth. v. Kaiser, 507 P.3d 1033, 1039–40 (Colo. App. 2022), *cert. granted*, No. 22SC92, 2022 WL 5219671 (Colo. Oct. 4, 2022), is not a takings case and does not say otherwise.

In addition to failing to show that § 8-13.5-202(1)(b) causes any economic harm, the Livestock Association also fails to demonstrate that any identifiable member suffered such an injury. The Association wrongly dismisses as "irrelevant" Defendant-Intervenors' authority, Pl.'s Opp'n 11–12, noting that in *TABOR Foundation v. Colorado Department of Health Care Policy & Financing*, 487 P.3d 1277, 1283 (Colo. App. 2020), the association's members failed to establish the nexus requirement of taxpayer standing; and *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) interprets federal law. These distinctions are themselves irrelevant. As Defendant-Intervenors noted, *see* Def.-Intervs.' Mot. for J. on the Pleadings 4–5, and the Association ignores, Colorado's test for associational standing comes from federal jurisprudence. *Summers* and *TABOR*'s requirement that an association plead an identifiable member applies.

Nor does the declaration of the Livestock Association's CEO fill the gaps. Mr. Riley does not aver that any of the Livestock Association's members' workers has been visited by a key service provider pursuant to Colo. Rev. Stat. § 8-13.5-202(1)(b), rather than under the provision preventing employers from interfering with their workers' "reasonable access to visitors at the agricultural worker's employer-provided housing," Colo. Rev. Stat. § 8-13.5-202(1)(a), or some other unchallenged law. He simply states, through two levels of hearsay, that since the law's enactment Livestock Association members have called him "to complain about individuals entering their property and their businesses and contending to be providing services to those

employed on the premises." Riley Decl. ¶¶ 5–6. Even if admissible,[2] these statements would not show, as the Livestock Association contends, that "unwelcome individuals *have already* used *the KSP Provision*," *i.e.*, Colo. Rev. Stat. § 8-13.5-202(1)(b), "to access agricultural employers' property." Pl.'s Opp'n 10–11 (latter emphasis added). To reach that conclusion requires not an inference, as the Livestock Association claims, Pl.'s Opp'n 4, 11 n.7, but raw speculation. *See Weld Cnty. Colo. Bd. of Cnty. Comm'rs v. Ryan*, 536 P.3d 1254, 1259 (Colo. 2023) (holding "supposed harm" that "flows from speculation" about third-parties' actions "insufficient to confer standing" (citation omitted)). Mr. Riley's declaration fails to substantiate that any member has experienced an entry under the challenged statute or otherwise suffered pecuniary harm, so it does nothing to demonstrate the Livestock Association's standing.

Finally, merely claiming that the challenged statute effects a "*per se* taking" of the right to exclude does not alone establish a property owner's pecuniary injury. To say so, as the Livestock Association seems to do, Pl.'s Opp'n 5, conflates the merits (whether a law effects a taking under *Cedar Point*) with standing (whether a property owner has an injury-in-fact). A law giving Bigfoot a license to enter private property might constitute a taking, but no owner would

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[2] The Livestock Association's members' statements to Mr. Riley are hearsay since it offers them for their truth: to show that "[i]ndividuals *have* entered the private properties of Plaintiff's members." Pl.'s Opp'n 11 (citing Riley Decl. ¶¶ 5–6). The Association does not argue any exception applies to *this* level of hearsay, so these statements are necessarily not the kind of "competent evidence" that might establish standing. *State Bd. for Cmty. Colls. & Occupational Educ. v. Olson*, 687 P.2d 429, 434–35 (Colo. 1984). The purported entrants' statements are also hearsay; they are not "verbal acts," which are statements "of an operative fact that gives rise to legal consequences," not offered for their truth. *People v. Dominguez*, 454 P.3d 364, 369 (Colo. App. 2019) (cleaned up). The Association offers the purported entrants' statement that they are providing services to those employed on a property for its truth: to show that key service providers "*have already* used the KSP Provision to access agricultural employers' property." Pl.'s Opp'n 10–11.

be *injured* by it. That Bigfoot's entry is less likely than a key service provider's is irrelevant, because the mere possibility that one of the Livestock Association's members has faced or will face entry by an unwanted visitor pursuant to Colo. Rev. Stat. § 8-13.5-202(1)(b) does not satisfy the Association's burdens to identify such a member and substantiate such a possibility.

B. *The Livestock Association Has No Right to Declaratory Relief*

The Livestock Association boldly claims that "every agricultural employer in Colorado has standing to bring this declaratory relief action." Pl.'s Opp'n 5. The Association contends it has standing to seek a declaratory remedy because the declaratory remedy creates standing. This argument is hopelessly circular. The Livestock Association cannot conjure an injury-in-fact by claiming its members are entitled to an advisory declaration on the constitutionality of Colo. Rev. Stat. § 8-13.5-202(1)(b), absent any allegation of the economic injury a takings challenge requires.[3] A request for declaratory relief is not a get-out-of-standing-free card.

The Livestock Association's own authority makes this clear. "[I]n the declaratory judgment context," establishing injury-in-fact requires a plaintiff to demonstrate "an existing legal controversy that can be effectively resolved by a declaratory judgment, and not a mere possibility of a future legal dispute." *Aurora Urb. Renewal Auth.*, 507 P.3d at 1039 (cleaned up). True, the point of a declaratory judgment may be to resolve a controversy at an earlier stage —

[3] As the Government Defendants stated: "The mere existence of a statutory procedure for declaratory judgment actions does not allow CLA to pursue a declaratory judgment here." *See* Gov't Defs.' Reply Supp. Mot. for J. on the Pleadings 3. Indeed, the Government Defendants already refuted the Livestock Association's arguments on its claim for relief under the Colorado Uniform Declaratory Judgments Law (CUDJL), *see id.* at 2–6, yet the Livestock Association simply restates its arguments without making any effort to respond to the Government Defendants' points and authorities. Defendant-Intervenors incorporate by reference the Government Defendants' essentially unrebutted responses to the Livestock Association's declaratory judgment arguments here.

but a plaintiff still must establish that such a present, real-world controversy exists. *Id.* Otherwise, "the court's judgment [would] devolve into an advisory opinion, which courts do not have jurisdiction to render." *Id.* at 1038; *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984) (though standing for declaratory judgment "somewhat relaxed," plaintiff "must still demonstrate that the challenged statute . . . will likely cause tangible detriment" to present or likely "conduct or activities"). The Association fails to meet this bar.

Attempting to manufacture a live controversy, the Association claims that without a declaration on Colo. Rev. Stat. § 8-13.5-202(1)(b), its members risk enforcement and fines. Pl.'s Opp'n 7. Again, the Livestock Association fails to substantiate such fears or show that the prospect of such enforcement has caused the kind of economic injury-in-fact required for a takings claim. But even if the Association presented a real-world controversy, a declaratory judgment and injunction would not be the Livestock Association's avenue for pre-enforcement review because, as the Government Defendants put it, "there is no reason CLA's members would need to violate the law in order to determine whether § 8-13.5-202(1)(b) is valid because they can raise their challenges in inverse condemnation proceedings." Gov't. Defs.' Mot. for J. on the Pleadings 5; *see also Auraria Businessmen v. Denver Urban Renewal Auth.*, 517 P.2d 845, 847 (Colo. 1974) ("Constitutional objections to the eminent domain proceedings should be raised in those proceedings and be determined by the court *in limine* and not by way of a collateral injunction proceeding."). And in such a proceeding, if a court found the law caused a taking, the remedy would be compensation, not a license to violate § 8-13.5-202(1)(b).

Moreover, the Livestock Association's arguments self-sabotage any contention that inverse condemnation would be an inadequate legal remedy. In this case, the requested

declaratory relief is equitable, as the only other relief the Livestock Association seeks or could seek is injunctive, not monetary, in nature.[4] *See Stuart v. N. Shore Water & Sanitation Dist.*, 211 P.3d 59, 61–62 (Colo. App. 2009) (whether declaratory relief is equitable or legal depends on the kind of suit that would have been brought if declaratory relief were unavailable). Because the relief sought is equitable, the Livestock Association must show a lack of adequate legal remedies. But the Association states, over and over, that upon its enactment Colo. Rev. Stat. § 8-13.5-202(1)(b) effected a *per se* taking of agricultural employers' right to exclude, without the need for any further government action or additional facts. *See, e.g.*, Pl.'s Opp'n 12–14. By emphasizing the one-time, *fait accompli* nature of the asserted taking, the Livestock Association effectively concedes that this case bears no resemblance to one like *PhRMA v. Williams*, 64 F.4th 932 (8th Cir. 2023), involving an ongoing series of takings for which a one-time damages action was found inadequate. *See* Pl.'s Opp'n to Gov't Defs.' Mot. for J. on the Pleadings 9–11. Thus whichever theory of the purported taking the Association advances, this suit must be dismissed.

[4] The Livestock Association focuses solely on its right to declaratory relief, fleeing its demand for an injunction prohibiting the enforcement of Colo. Rev. Stat. § 8-13.5-202(1)(b). But its complaint speaks for itself — the Association seeks to block the enforcement of the law, not just to obtain an (advisory) opinion on whether it constitutes a taking. Compl. 1 (titled "COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF"), 10 (Prayer for Relief ¶ 5); *id.* ¶¶ 11, 29–33, 54–55, 58–61. And as the Association's authority demonstrates, to establish standing to seek injunctive relief against the enforcement of a regulatory regime, a plaintiff must "show[] that the action complained of has caused or has threatened to cause imminent injury to an interest protected by law." *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., Inc*, 830 P.2d 1045, 1054 (Colo. 1992). The Association does not mention and cannot meet this requirement.

II. The Livestock Association Fails to Establish a Ripe Takings Clause Claim

"[I]n takings cases," courts adhere to the Supreme Court's "admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (cleaned up). The Livestock Association offers no coherent response. It simply reiterates its view that the mere enactment of a statute that an organization claims causes a *per se* taking ripens a challenge the organization can litigate on behalf of unspecified members whom it has not shown suffer any economic harm. No authority supports that position. Ripeness for takings claims requires specifically identified property and compensable loss, neither of which the Livestock Association alleges here. *G & A Land, LLC v. City of Brighton*, 233 P.3d 701, 711–12 (Colo. App. 2010).[5]

A. *The Mere Enactment of Colo. Rev. Stat. § 8-13.5-202(1)(b) Does Not Create a Ripe Controversy*

Knick provides no support for the Livestock Association's assertion of ripeness. There, the Supreme Court found that a taking gives rise to a federal Takings Clause claim for compensation as soon as property is taken. *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178–79 (2019). But Rose Mary Knick's claim was ripe because a cemetery ordinance took *her property*. After passage of the ordinance, a Township officer located grave markers on her property "and notified her that she was violating the ordinance by failing to open the cemetery to the public

[5] The Livestock Association also asserts that its claims are ripe because the State "threatens substantial liabilities against any agricultural employer who asserts the right to exclude" and because Colo. Rev. Stat. § 8-13.5-202(1)(b) "*is* being used to access Plaintiff's members' property." Pl.'s Opp'n 12. Neither assertion is valid, for the reasons explained above: the Livestock Association has not, in fact, established that key service providers are using the challenged provision to access members' property (*see supra* at 3–4); and there is no reason Association's members would need to violate the law in order to determine whether § 8-13.5-202(1)(b) is valid (*see supra* at 6). Thus neither demonstrates ripeness.

during the day." *Id.* at 2168. *Knick* illustrates the kinds of facts necessary to ripen a takings claim; it does not stand for the proposition that the mere existence of a law someone believes effects a *per se* taking creates a ripe claim for any and all theoretically affected property owners.

Nor does *Cedar Point* support ripeness here. The Livestock Association has no response to the many factual and procedural differences Defendant-Intervenors highlighted which illustrate why the claims in *Cedar Point* were ripe and the Livestock Association's are not. *See* Def.-Intervs.' Mot. for J. on the Pleadings 10–12. Instead, the Association again conflates the merits — its insistence that Colo. Rev. Stat. § 8-13.5-202(1)(b) effects a *per se* taking under *Cedar Point* — with ripeness. Pl.'s Opp'n 13–14. But its legal theory cannot relieve it of the burden of alleging facts demonstrating a present, live controversy.

Ripeness is not relaxed for takings clause claims. If anything, the opposite is true, as *Pennell* shows. The Livestock Association's claim that *Pennell* and its reasoning are inapplicable where "no future governmental action is necessary for the taking to occur" is wrong. Pl.'s Opp'n 14. The landlords in *Pennell* characterized the challenged provision exactly as the Livestock Association frames the challenged law here — as effecting an immediate deprivation of a property right. 485 U.S. at 4, 6 (landlords sought declaration that tenant hardship provisions "are 'facially unconstitutional and therefore . . . illegal and void,'" and claimed "real property owned by appellants is 'subject to the terms of' the Ordinance" (ellipsis in original)). Moreover, it was not the need for "future governmental action" that made the takings claim unripe in *Pennell*, Pl.'s Opp'n 14, but, as here, the lack of "a sufficiently concrete factual setting for [its] adjudication." 485 U.S. at 10*; see also Auto. Importers of Am., Inc. v. Minnesota*, 681 F. Supp. 1374, 1381 (D. Minn. 1988) (citing *Pennell* to dismiss plaintiffs' "premature" takings claim where "[t]he

consequences of the [challenged] law need[ed] to be shown by specific facts"). Such facts being similarly absent here, the Livestock Association fails to demonstrate ripeness.

B. *Fact-Specific Questions about the Qualified Right to Exclude and the Circumstances in Which Key Service Providers May Meet Workers Illustrate the Lack of Ripeness*

Defendant-Intervenors explained that, particularly given Colorado property law and uncertainty about how and where visits by key service providers might occur, additional facts would be necessary to ripen a claim that Colo. Rev. Stat. § 8-13.5-202(1)(b) effects a taking of a Livestock Association member's right to exclude. Def.-Intervs.' Mot. for J. on the Pleadings 12–13. The Association misconstrues this argument and Defendant-Intervenors' authority to characterize them as nonsensical. Pl.'s Opp'n 16–18. But Defendant-Intervenors are not claiming that no Colorado property owner ever has a right to exclude — only that concrete facts are necessary to give rise to a justiciable controversy.

For example, where a key service provider reaches an agricultural employer's workers may not be on the employer's property at all, particularly for range workers and sheep herders. CLS Decl. Supp. Mot. to Interv. ¶¶ 14, 18. That matters because the Livestock Association's members do not have a right to exclude key service providers who visit workers on public, leased lands. Def.-Intervs.' Mot. for J. on the Pleadings 13–14; *Robinson v. Legro*, 325 P.3d 1053, 1058 & n.9 (Colo. 2014) (noting the prevalence of livestock grazing on federal lands and that "ranchers rarely, if ever, have" a right to "lawfully exclude others from . . . federally owned lands").[6] Similarly, Livestock Association members do not have (and do not claim) a right to

[6] *See also id.* at 1059 (Hobbs, J., concurring) ("A grazing permit confers a revocable, non-exclusive license to access the federal lands for a limited purpose" and differs from a leasehold estate because it does not "entitl[e] permit holders to exclude others").

exclude key service providers who visit with workers on the employer's property at the workers' employer-provided housing pursuant to Colo. Rev. Stat. § 8-13.5-202(1)(a) instead of (b). In other words, whether and how key service provider visits intersect with an employer's right to exclude is dependent on facts the Livestock Association did not plead. That absence shows the Association's claim is unripe.

CONCLUSION

Because the Court lacks jurisdiction over the Livestock Association's claims and the deficiencies are not curable, the complaint should be dismissed with prejudice.

January 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on January 12, 2024, the undersigned duly served the Reply in Support of Motion for Judgment on the Pleadings upon all counsel of record who have entered their appearances on behalf of the parties to Case No. 2023CV495 via the Colorado Courts e-Filing System.

/s/ *Kelsey Eberly*
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