

TOWARDS JUSTICE

DEFENDING THE DIGNITY OF WORK

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TO: Michael Primo, Director of Operations, Division of Labor Standards and Statistics, Colorado Department of Labor and Employment

FROM: Towards Justice

DATE: September 28, 2021

RE: SB87 Pre-Rulemaking Comments on Overtime for Agricultural Workers

VIA EMAIL: michael.primo@state.co.us

Towards Justice, a Colorado-based nonprofit legal organization that advocates for and collaborates with workers and workers' organizations to build worker power and advance economic justice, submits these comments in anticipation of the proposed rules providing meaningful overtime and maximum hours protections for agricultural employees pursuant to SB87. Specifically, we encourage the Colorado Department of Labor and Employment (CDLE) to incorporate agricultural workers into the basic overtime protections enjoyed by other Colorado workers. That is, effective January 31, 2022, agricultural employees should be paid time and one-half of the regular rate of pay for any work in excess of: (1) forty hours per workweek, (2) twelve hours per workday, or (3) twelve consecutive hours without regard to the starting and ending time of the workday (excluding duty free meal periods), whichever calculation results in the greater payment of wages.

There is no valid justification for continuing to deny overtime rights to this vulnerable workforce. Instead, continued exclusion perpetuates a racist system that exploits minority workers. That racist system was codified into federal law through a series of unconscionable race-based compromises during the New Deal. The Fair Labor Standards Act of 1938 was written to specifically carve out Black field workers to win the support of Southern Democrats who represented farmers who relied on cheap Black labor.¹ States, including Colorado, followed suit by modeling labor laws from federal standards, thereby perpetuating systemic injustice.

Given such systemic racism and the legislature's directive in SB87, CDLE cannot assume that excluding agricultural workers from overtime is appropriate, but instead must require a

¹ See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 4, 31 & 155-56 (1st ed. 2017) (the exclusion of farmworkers was motivated by racism and capitulation to the commitment to white supremacy); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 *Ohio St. L.J.* 95, 96 n.1 (2011); see also U.S. Dep't. of Labor, Wage and Hour Division, Fact Sheet #12 <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs12.pdf> (even after 7 and a half decades, the federal Fair Labor Standards Act still does not guarantee overtime rights to our country's agricultural workers).

substantial showing of non-racist reasons for disparate treatment. That is, the racist history of the exclusion of farmworkers from overtime puts a burden on opponents of overtime rights to prove why agriculture should be treated differently. But as explained below, the post hoc justifications for excluding agricultural workers from overtime protections are insufficient to justify allowing the racism of the Jim Crow era to perpetuate inequality in Colorado today.²

No industry should feel entitled to proactively put all market burdens on the backs of workers, leaving an entire industry of workers trapped in poverty for generations. This is particularly true where, as here, those workers hail from historically marginalized groups. While the demographics of agricultural labor has changed (today, 83% of farmworkers are Latinx),³ the deep-rooted institutional racism has remained and serves to elevate the idea that it is unnecessary to protect people of color.

Currently, these workers are subjected to extraordinarily dangerous workplaces. And working overtime increases the risk of workplace injury. Meanwhile, working overtime hours in any industry has deleterious health effects. To protect the health and safety of agricultural workers, Colorado should take steps to disincentivize overtime work, thereby reducing the risk of worker injury as well as physical and mental health consequences of long hours. These rights would also be a first step in raising agricultural worker incomes, which are so low now as to create ongoing and extraordinary health risks for both workers and their families.

Dangerous, low pay agricultural work currently attracts some of our state's most vulnerable workers. And that is no accident. The history of systemic racism that excluded workers from overtime rights decades ago has also excluded agricultural workers from other protections, including the right to bargain collectively. Today, financial insecurity and a broken immigration system both routinely chill agricultural worker complaints. And the government has not stepped in to enforce workplace rights in the agricultural industry, where violations run rampant.⁴ Meanwhile, aggressive industry consolidation in both agricultural input and processing markets have further undermined worker power in the past few decades. Such consolidation may require government action, but it should come in the form of antitrust enforcement, not laws that push unbearable macro-economic burdens onto the backs of our state's most vulnerable workers.

² See *State v. Jefferson*, 192 Wn.2d 226, 243, 429 P.3d 467 (2018) (examining procedure for peremptory jury challenges) (quoting *State v. Saintcalle*, 178 Wn.2d 34, 35-36, 309 P.3d 326 (2013)) (“Allowing explicitly racist decisions of the past to embed themselves in the structure of our laws without examination ignores the fact that most racism operating today is institutional and “unintentional.”).

³ JBS International, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers Research Report No. 13 (January 2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.

⁴ Sam Bloch, 70 Percent of Farm Labor Investigations End In Violations, *The Counter*, (Dec. 2020), <https://thecounter.org/seventy-percent-farm-labor-investigations-violations/> (agriculture sees wage and hour violations at three times the rate of other industries); Oxfam America, *Like Machines in the Fields: Workers Without Rights in American Agriculture* (Mar. 2004), <https://s3.amazonaws.com/oxfam-us/www/static/media/files/like-machines-in-the-fields.pdf> (In 1990, violations of the OSHA Field Sanitation Standard were found in 69% of all federal field investigations involving agricultural Employers).

The state must consider these unique challenges to agricultural workers' ability to demand treatment equal to that enjoyed by other employees in our state. It must not only ensure that this rulemaking process takes extraordinary measures to overcome worker economic and political disenfranchisement but also demand a substantial substantive showing before diverging from the presumption that agricultural workers are entitled to the same overtime rights enjoyed by other Colorado employees.

It is time for Colorado to join with other states in correcting our racist history by extending to farmworkers the same overtime protections extended to other workers in Colorado. Setting some other hours threshold for overtime in the agricultural sector, as some states have done, would be an unjustifiable continuation of entrenched systemic racism. Any threshold higher than 40 hours per week and 12 hours per day would also fail to meaningfully impact wage rates or working hours in Colorado's agricultural sector, where farm workers only work an average of 44.2 hours per week.⁵ Quite simply, the meaningful overtime rights called for by the statute requires implementation of overtime pay after 40 hours per week and 12 hours per day.

1. THE INEQUITY AND RACIST ORIGINS OF THE EXCLUSION OF AGRICULTURAL EMPLOYEES FROM OVERTIME AND MAXIMUM HOURS PROTECTIONS AVAILABLE TO OTHER EMPLOYEES

a. The Racist Origins of Agricultural Exceptionalism

The Fair Labor Standards Act (FLSA) of 1938 created overtime protections for most workers in the United States. But the FLSA, like other worker protections created during the New Deal, excluded agricultural workers. The exclusion of farmworkers from New Deal legislation was designed to maintain white supremacy in the South. Racism and white supremacy were the dominant themes in the South during the 1930s as evidenced by state and local laws that mandated segregation and the wholesale exclusion of Black citizens from the political process.⁶ Thus, to pass any New Deal legislation, the Roosevelt administration had to appease Southern interests in Congress, which in turn required legislation that codified white supremacy. Southern congressmen "fervently believed in the necessity of maintaining the traditional caste and class structure," causing President Roosevelt to recognize "he would lose the support of these Southerners if his administration made any direct attempt to reform traditional racial and class patterns."⁷

The states that mandated racial segregation controlled 35 percent of the seats in the Senate and a disproportionate number of seats in the house due to apportionment that counted Black people

⁵ Colorado Center on Law and Policy, Rulemaking Pursuant to SB 21-081: Agricultural Rights and Responsibilities, Letter to Michael Primo (Sept. 7, 2021), <https://drive.google.com/file/d/1SQ9qERIQvy12dGmhEv2ONYR5M6ufZdSm/view>.

⁶ See Congressional record, House Committee on Ways and Means, 74th Cong. Feb 4, 1935 (describing disenfranchisement of black citizens in South).

⁷ Farmworker Justice Amicus Brief, Supreme Court of the State of Washington, Case No. 96267-7, September 20, 2019 (quoting Raymond Wolters, *Negroes and The Great Depression: The Problem of Economic Recovery*, 15 (Greenwood, 1970).

who could not vote. Coupled with the seniority of these lawmakers and the Senate's supermajority rules, most notably the filibuster, "the South possessed a structural veto over all New Deal and Fair Deal legislation."⁸ Meanwhile, Northern Democrats were willing to concede the agricultural exemptions from this legislation because most of their constituents worked in manufacturing industries. Under this political framework, progress could occur "so long as the New Deal did not disturb southern agricultural, industrial, or racial patterns."⁹

The National Labor Relations Act¹⁰ was the first crucial piece of labor legislation that was structured to carve out Black workers in the South. Passed in 1935, the NLRA protects "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer."¹¹ As the Supreme Court has long recognized, this was "a fundamental right."¹²

Nevertheless, in 1935 the bloc of Southern Democrats proved powerful enough to ensure this landmark legislation excluded agricultural workers from the definition of "employee."¹³ Not surprisingly, this was to ensure agricultural workers in the South, who were overwhelmingly black, were left without legal recourse. As a result, Congress's exclusion of agricultural workers meant the fundamental right of collective action did not apply to the largely black agricultural workforce and employers were free to commit what would be considered "unfair labor practices" such as interrogating workers about their communications with each other, surveilling worker communication, and discipline and discharging workers for attempting to improve the terms and conditions of their employment. To this day, agricultural workers lack protection under the NLRA.¹⁴

In fighting against a similar agricultural worker exclusion in the Social Security Act of 1935, the National Association for the Advancement of Colored People aptly noted that the exclusion of agricultural and domestic workers from labor protections would impact approximately 3.5 million or 60 percent of all Black workers.¹⁵ In the House, Representative Marcantonio of New York argued against the exclusion partially because it would facilitate the expansion of the

⁸ Sean Farhang and Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *Studies in American Political Development* 1, 1 (Spring 2005).

⁹ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 *TEX. L. REV.* 1335, 1351-52 (1987) (Linder does note that the NLRA constitutes the one possible exception to this rationale based on the opposition of the farm-owning class to organized labor resulting from memories of the Industrial Workers of the World ("IWW"). However, most historians recognize the agricultural worker exclusion as a continuous practice of racism throughout the New Deal era); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 27 *Ohio St. L.J.* 95, 96 & n.1 (2011).

¹⁰ Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. § 141 *et seq.*

¹¹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

¹² *Id.*

¹³ 29 U.S.C. § 152(3); Perea *supra* note 9 (The definition of employee also excludes domestic workers based on the same forces of institutional racism).

¹⁴ 29 U.S.C. §§ 157-159; National Labor Relations Board, *About NLRB: Jurisdictional Standards*, <https://www.nlr.gov/about-nlr/b-rights-we-protect/the-law/jurisdictional-standards>.

¹⁵ See Congressional record, House Subcommittee of the Committee on Labor, 74th Cong. Feb 4, 1935 ("Practically 85 percent of the Negroes in the South are agricultural workers."); Linder, *supra* note 9 at 1335.

“plantation system” in places like Arkansas that amounted to a “continuance of virtual slavery.”¹⁶ Unfortunately, continuing and expanding that plantation system remained the central motivation of Southern Democratic legislators from agricultural states throughout the New Deal Era.¹⁷ The agricultural and domestic worker exclusions from the NLRA and Social Security Act ensured the plantation system reliant on denying economic citizenship to the worker could continue to dominate U.S. agriculture.

This exclusion of Black workers continued in the passage of the Fair Labor Standards Act in 1938.¹⁸ By then, their exclusion was all but a foregone conclusion. As scholars have long established:

[T]he South’s misgivings about social change derived in considerable measure from the fact that almost any kind of change might challenge the bi-racial system. Wage and hour laws were resisted because they might mean equal wages for Negroes and whites.¹⁹

“By the time the FLSA was drafted, the exclusion of farm workers from New Deal economic legislation had become such a fixed component of New Deal politics that the drafters no longer considered the issue.”²⁰ This position of dominance enabled Southern Democrats to reveal their true intentions behind separating agricultural and industrial labor rights.

The legislative history of FLSA further illuminates the racist reasons held by Southern Democrats pushing for the exclusion of agricultural workers. Representative James Mark Wilcox of Florida explained “the problem of our Negro labor” was of great importance to the South, that “[t]here has always been a difference in the wage scale of white and colored labor,” and warned the federal government “cannot put the Negro and the white man on the same basis and get away with it.”²¹ Representative Edward Cox of Georgia bemoaned the support for the FLSA generated by Black political organizations “because it will... render easier the elimination and disappearance of racial and social distinctions.”²² Senator “Cotton Ed” Smith of South Carolina called the FLSA “unconscionable” because it sought “to overcome the splendid gifts of God to the South,” meaning the availability of cheap labor based on the racist oppression of Black people.²³ The collection of Southern Democrats responsible for the agricultural and domestic

¹⁶ Congressional record, House Subcommittee of the Committee on Labor, 74th Cong. Feb 4, 1935.

¹⁷ See Congressional record, House Subcommittee of the Committee on Labor, 74th Cong. Feb 4, 1935.

¹⁸ See generally Linder *supra* note 9.

¹⁹ Farmworker Justice Amicus Brief, Supreme Court of the State of Washington, Case No. 96267-7, Sept. 20, 2019 (quoting David Potter & Don E. Rehrenbacher & Carl N. Degler, *The South and the Concurrent Majority*, 70 (La. State Univ., 1972)).

²⁰ Linder *supra* note 9 at 1353.

²¹ Sean Farhang and Ira Katznelson, *supra* note 8, at 13 (quoting Congressional Record, 75th Cong., 2nd sess., 1937, 82:1404); see also Congressional record, 75th Cong., December 13, 1937; 1350-1450

²² *Id.* (quoting Congressional Record, 75th Cong., 2nd sess., 1937, 82:442 (appendix)).

²³ Congressional Record, Cox Statement, 75th Cong., December 14, 1937.

worker exclusions were not seeking to protect small family farms, only the racial hegemony created by federal law and enforced by White supremacist violence.²⁴

But lawmakers were not satisfied with a run-of-the-mill exclusion of Black workers from labor protections. Instead, the coalition of Southern legislators “aggressively expanded the scope of the agricultural exemption and elaborated its reach in detail.”²⁵ The definition of agriculture provided in the FLSA includes: farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities..., the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.²⁶ Unlike the NLRA, which failed to clearly define the scope of “agriculture,” the FLSA ensured that every possible Black person working in agriculture would be excluded from the potential equalizing force of guaranteed wages.²⁷

b. Colorado Imported Racist Compromises in the New Deal

Like most states around the country, Colorado adopted labor standards based on the FLSA. Even Colorado’s 2019 revision of state minimum wage and overtime rules specifically relied on the FLSA definition of “agricultural jobs” when continuing to exclude those workers from most wage and hour protections.²⁸ In this way, policymakers, even those operating in good faith, entrenched racist law and, as a result, our state has yet to extend overtime rights to agricultural workers.²⁹

c. Historic Racism Continues to Disempower Black and Brown Workers in Colorado

Due to the racialization of agricultural work in the United States—first with slavery, then with the importation of foreign nationals on a temporary basis—agricultural worker exceptionalism has disproportionately impacted People of Color. Today, 83% of the nation’s farmworkers are

²⁴ Linder, *supra* note 9, at 1375 (In 1935, when the agricultural worker exception first entered U.S. labor law, “only one in seven farms employed any hired labor; fewer than one percent employed four or more workers; and less than one-quarter of one percent employed eight or more workers.” These small family farms that did not hire outside labor would have been exempted from FLSA coverage regardless, so the real beneficiaries of the agricultural worker exclusions were the larger farms of the South and Southwest seeking to replicate plantation agriculture.)

²⁵ Sean Farhang and Ira Katznelson, *supra* note 8 at 13.

²⁶ 29 U.S.C. § 203(f).

²⁷ Fred Whitney, Agricultural Workers Under National Labor Relations Law, Inst. of Lab. & Indus. Rel. Bull. 4 (U. of Ill., Urbana-Champaign, Ill.) Series A, Vol. 2, Special (Mar. 1948), http://www.archive.org/stream/agriculturalwork02witn/agriculturalwork02witn_djvu.txt.

²⁸ Colorado Department of Labor and Employment, Division of Labor Standards and Statistics, Notice of Public Hearing Concerning Colorado Overtime & Minimum Pay Standards Order (COMPS Order) #36, 7 CCR 1103-1, (Nov. 2019), <https://www.sos.state.co.us/CCR/Upload/NoticeOfRulemaking/AddInfoAttach2019-00687.pdf>.

²⁹ S.O. Rodman, et. al., Agricultural Exceptionalism at the State Level: Characterization of Wage and Hour Laws for U.S. farmworkers, *Journal of Agriculture, Food Systems, and Community Development*, 6(2), 89–110 (2016), <http://dx.doi.org/10.5304/jafscd.2016.062.013>.

Hispanic, according to the U.S. Department of Labor’s National Agricultural Workers Survey. At least 65% - 73% of people who labor in Colorado’s food system are Black, Indigenous, or People of Color (with at least 82% of this group identifying as Latinx).³⁰ These are the people who are systematically denied basic workplace protections afforded to other Colorado workers, which perpetuates the wage gap between races as well as intergenerational poverty.

d. Maintaining the Status Quo is No Argument for Perpetuating Systemic Racism

Given the unsavory history of denying overtime rights to agricultural workers, the state must require a specific non-racial reason for continuing to treat agricultural workers worse than other workers in our state. But there are no good arguments for continuing to exclude agricultural workers from overtime rights. The post hoc rationalizations for the racist exclusion that have developed over the years all fail to meaningfully distinguish agricultural work from other types of work in a way that could justify placing such extraordinary burdens on workers. Maintaining the status quo is no argument for perpetuating a system based on historic racism that continues to have a disparate impact on Black and Brown people today.

The Opposition often claims that agriculture is unique in its seasonality, dependence on the weather, or need to tend animals. Not so. Agriculture is not different in ways that justify the exploitation of its workforce. Many important sectors of the Colorado economy are seasonal and weather-variable (e.g., tourism and outdoor recreation); many are essential, low margin, and require safeguarding other living beings (e.g., healthcare, child care, transportation). Yet, none of these other industries are exempted from basic wage and labor protections.

The Opposition argues that the unpredictable schedules in agriculture make the industry different from others in which workers enjoy overtime rights.³¹ But the number of industries in which workers have unpredictable schedules is too long to list. If Colorado were to exclude anyone with an unpredictable schedule from overtime rights it would gut the protection entirely.

The Opposition also claims poverty, saying they just can’t afford to pay overtime. But the numbers suggest that the modest increase in operating expenses associated with overtime rights in the agricultural sector would be manageable, and in line with other cost fluctuations that regularly occur in the marketplace. The Colorado Center on Law and Policy estimates that providing overtime to agricultural workers after 40 hours per week and 12 hours per day “would increase farms’ aggregate 2019 operating expenses by approximately 0.8 percent. This cost represents approximately 0.6% of all income earned by farms in 2019.”³² This is consistent with

³⁰ Project Protect Food Systems, Why Colorado Must Protect Farm Workers FAQ, <https://drive.google.com/file/d/1dbXNQa-oafh83e9DvvDPDIU7d8bwVGp4/view>

³¹ Saja Hindi, There’s a Push to Give Colorado’s Agricultural Workers More Protections and Better Pay. The Industry Isn’t Having It, The Denver Post (Apr. 25, 2021), <https://www.denverpost.com/2021/04/25/agriculture-workers-overtime-unionization-colorado-legislature/> (“industry groups, ranchers and farmers say the \$41 billion Colorado rural agriculture industry isn’t like other professions with 9-5 schedules”).

³² Colorado Center on Law and Policy, *supra* note 5.

research from other states.³³ This increase in farm operating expenses is unlikely to substantially impact the competitiveness of Colorado farmers relative to operations in other states,³⁴ particularly where the average Colorado farmworker earns less per hour (\$13.21) than the national average (\$14.62).³⁵

Also, a portion of any additional labor costs would be offset by the benefits employers enjoy upon offering overtime pay.³⁶ Studies show that better pay would make workers easier to attract and easier to retain, a very significant challenge for farm owners, particularly at a time of increasing restrictions on immigration. In fact, agricultural workers overtime rights could give Colorado farmers a competitive advantage at a time when attracting workers to farm work is challenging all across the country.³⁷ Lower turnover means lower training costs and more experienced workers.³⁸ In fact, one study indicates that “it is reasonable to assume that about one-fifth of the labor cost increase associated with the expansion of overtime protections could be offset by lower turnover among farmworkers.”³⁹ By the same token, higher pay and less extreme overtime hours lead to increases in productivity—more gets done per hour worked.⁴⁰

Finally, the Opposition leans back on traditional racist arguments, saying that “many of the workers are happy with their wages because of how much more money they’re making here than they could be in their home countries.”⁴¹ But such logic would allow creation of an underpaid underclass of foreign workers in our state. That is not only repugnant and unamerican on its face, it also would undercut the wages of American workers competing for the same jobs. This argument would also undermine the purpose of our state’s wage and hour protections, which demands that Colorado’s workers be “protected from conditions of labor that have a pernicious effect on their health and morals”.⁴² Put simply, the argument is deeply discriminatory and

³³ Jeannette Wicks-Lim, Estimates of the Potential Costs and Benefits of Extending Overtime Pay Eligibility to All Farmworkers in Massachusetts, Political Economy Research Institute, University of Mass. Amherst (June 4, 2020), <https://peri.umass.edu/economists/jeannette-wicks-lim/item/1300-estimates-of-the-potential-costs-and-benefits-of-extending-overtime-pay-eligibility-to-all-farmworkers-in-massachusetts>.

³⁴ Colorado Center on Law and Policy, *supra* note 5.

³⁵ Daniel Costa, The Farmworker Wage Gap Continued in 2020, Economic Policy Institute, Working Economics Blog (Jul. 20, 2021), <https://www.epi.org/blog/the-farmworker-wage-gap-continued-in-2020-farmworkers-and-h-2a-workers-earned-very-low-wages-during-the-pandemic-even-compared-with-other-low-wage-workers/>.

³⁶ Fiscal Policy Institute, Farm Workers’ Overtime Pay is Affordable and Long Overdue (May 2019), <https://fiscalpolicy.org/wp-content/uploads/2019/05/Support-the-Farm-Worker-Fair-Labor-Practices-Act.pdf>.

³⁷ *Id.*

³⁸ Wicks-Lim, *supra* note 33 (“The large body of research on the economic impact of minimum wage hikes has demonstrated that increases in the pay rates of low-wage workers has the beneficial, cost-saving effect of lowering worker turnover rates.”)

³⁹ *Id.*

⁴⁰ See generally John Pencavel, The Productivity of Working Hours, 125 Economic Journal 589 (2014), at 2052–2076, <https://onlinelibrary.wiley.com/doi/full/10.1111/ecoj.12166> (“employees at work for a long time may experience fatigue or stress that not only reduces his or her productivity but also increases the probability of errors, accidents, and sickness that impose costs on the employer.”); see also Lonnie Golden, The Effects of Working Time on Productivity and Firm Performance, Research Synthesis Paper, International Labor Organization (ILO) Conditions of Work and Employment Series 33 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149325.

⁴¹ Hindi, *supra* note 31.

⁴² CRS §8-6-101 (“The welfare of the state of Colorado demands that workers be protected from conditions of labor that have a pernicious effect on their health and morals, and it is therefore declared, in the exercise of the police and

should have no place in the laws of a place that respects the dignity of work and eschews the race to the bottom.

The only area where there may be a rational reason to exempt a small subset of agricultural workers from 40/12 overtime rights, is for range workers during periods when they work out on the open range. Standard overtime rules should apply to range workers whenever they are not working on the range, but during periods when they are actively engaged in the range production of livestock on the open range, a thoughtful exception could make sense. Project Protect Food Systems will describe a modest approach to overtime in this context, which although it may understate hourly pay and therefore hourly overtime, provides a framework for overtime rights while workers are on the open range.⁴³ Ranchers could benefit from this exception by submitting a certification for each workweek in which the exception applies, when the worker is exclusively working out on the open range. For every workweek in which no certification has been made, range workers should be covered by regular overtime rules.

e. Colorado Must Meet Systemic Injustice with a Systemic Fix

Agricultural workers were not haphazardly excluded from random labor protections. There was – and continues to be - a wholesale agenda to exclude agricultural workers from all meaningful social welfare and labor programs. The natural and intended consequence of these exclusions is a structural problem that needs a structural solution. A key part of that solution is extending overtime rights to Colorado’s agricultural workers. Those rights must be the same as the overtime rights enjoyed by other Colorado workers to meaningfully rectify systemic racism.

2. THE FUNDAMENTAL RIGHT OF ALL EMPLOYEES TO OVERTIME AND MAXIMUM HOURS STANDARDS THAT PROTECT THE HEALTH AND WELFARE OF EMPLOYEES

Agricultural workers, like all other workers, deserve safe and healthy work environments and overtime is a fundamental right that protects the health and safety of employees. Wage standards were designed to raise substandard wages and to increase the costs of forcing workers to work excessive hours, thereby deterring employers from requiring overwork. Minimum wage and overtime laws protect workers from “from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.”⁴⁴

Colorado recognizes that overtime protections are key to workplace health and safety. In fact, the State expanded overtime protections to construction workers in 2020 for the specific reason that the construction industry was particularly arduous and hazardous for workers.⁴⁵ Although the

sovereign power of the state of Colorado, that inadequate wages and unsanitary conditions of labor exert such pernicious effect.”).

⁴³ Project Protect Comment Forthcoming

⁴⁴ Remarks of Senator John F. Kennedy in the Senate, Washington, D.C. (Aug. 10, 1960),

<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/united-states-senate-labor-standards-amendments-19600810>.

⁴⁵ CDLE Notice of Public Hearing, *supra* note 28.

agency recognized that same argument applies to agriculture – the most hazardous industry in the country⁴⁶ – it failed to extend overtime rights to farm workers. It must do so now.

a. Physical & Mental Health

Agricultural workers labor in the most dangerous industry in the country,⁴⁷ with 573 fatalities, or an equivalent of 23.1 deaths per 100,000 workers.⁴⁸ Agriculture, forestry, fishing, and hunting (AFFH) workers die from work injuries at a rate six times higher than the rate for workers overall.⁴⁹ Meanwhile, the range and gravity of worker industries in the sector is substantial:

[W]orkers on dairy farms and in hog growing operations are at risk of being injured by charging or kicking animals and by contact with heavy machinery, workers who handle livestock and poultry are at increased risk of zoonotic diseases, and those who tend and harvest crops often suffer heat-related illness, pesticide poisoning, and chronic back and shoulder injuries from bending, reaching, and lifting. Workers employed in seafood, poultry, pork, and beef slaughtering and packaging suffer from lacerations and amputations, infections and exposure to antibiotic-resistant pathogens, and musculoskeletal disorders caused by intense repetitive work.⁵⁰

Farmworkers are also at high risk for work-related lung diseases, noise-induced hearing loss, skin diseases, and certain cancers associated with chemical use and prolonged sun exposure.⁵¹

Long hours mean more strain on farmworkers' bodies from the physically demanding nature of the work⁵² and more musculoskeletal and other health problems.⁵³ Even absent the unique hazards of agricultural work, “[a] growing body of evidence suggests that long working hours

⁴⁶ Centers for Disease Control and Prevention, The National Institute for Occupational Safety and Health (NIOSH), Agricultural Safety (2020), <https://www.cdc.gov/niosh/topics/aginjury/default.html>.

⁴⁷ Occupational Safety and Health Administration, Fact Sheet (2005), https://assets-global.website-files.com/5d710ad86986a61c7247fe82/5dc880935f39e0c8d2955a5e_FarmFacts.pdf.

⁴⁸ The National Education Center for Agricultural Safety, National Farm Safety and Health Week 2021 (Sept. 2021), <https://www.necasag.org/nationalfarmsafetyandhealthweek/>.

⁴⁹ Bureau of Labor Stat., U.S. Dep't of Labor, Graphics for Economic News Releases, Number and Rate of Fatal Work Injuries, By Industry, <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm> (The fatal injury rate for workers overall was 3.5 per 100,000 full-time, equivalent workers. The rate for warehousing and transportation was 15.1 per 100,000 full-time, equivalent workers. The rate for construction was 9.5 per 100,000 full-time, equivalent workers.).

⁵⁰ APHA Policy Statement 20177: Improving Working Conditions for U.S. Farmworkers and Food Production Workers (Nov. 2017), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/improving-working-conditions>.

⁵¹ See U.S. Department of Labor, Occupational Health and Safety Administration, Agricultural Operations, <https://www.osha.gov/agricultural-operations>.

⁵² Claire C. Caruso et al., U.S. Dep't of Health & Human Serv., Overtime and Extended Work Shifts: Recent Findings on Illness, Injuries, and Health Behaviors 21 (2004), <https://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf>.

⁵³ *Id.*

adversely affect the health and wellbeing of workers.”⁵⁴ Long working hours negatively affect the “risks of cardiovascular diseases; chronic fatigue, stress; depressive state, anxiety, sleep quality, all-cause mortality, alcohol use and smoking; and self-perceived health, mental health status, hypertension, and health behaviours.”⁵⁵

Other studies confirmed that excessive work hours increase the risk of “hypertension, cardiovascular disease, fatigue, stress, depression, musculoskeletal disorders, chronic infections, diabetes, [and] general health complaints[.]”⁵⁶ Working long hours also substantially increases the risk of stroke,⁵⁷ as well as the likelihood of smoking, excessive drinking, and weight gain.⁵⁸ “[P]eople who routinely put in more than 11-hour days more than double their chances of major depression, compared to employees who typically work about eight hours a day[.]”⁵⁹

Even when working long hours doesn’t cause clinical health problems, it reduces workers’ ability to exercise and cook healthy food. It also prevents people from spending time with their loved ones, leading to isolation and the breakdown of meaningful relationships. All these consequences dramatically impact the health of Colorado’s agricultural workers.

In addition to the general health consequences of long hours, the risk of workplace injury also increases with overtime work.⁶⁰ The CDC found that “overtime was associated with poorer perceived general health, increased injury rates, more illnesses, or increased mortality in 16 of 22 studies,” including an exponential increase in the risk of accidents during long shifts, so that the

⁵⁴ A E Dembe, J B Erickson, R G Delbos, & S M Banks, *The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States* (Mar. 2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1741083/pdf/v062p00588.pdf>.

⁵⁵ Kapo Wong, Alan H. S. Chan, and S. C. Ngan, *The Effect of Long Working Hours and Overtime on Occupational Health: A Meta-Analysis of Evidence from 1998 to 2018*, *Int J Environ Res Public Health* (Jun. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6617405/>.

⁵⁶ Dembe, *supra* note 54; *see also* Marc Fadel, MD, et al., *Association Between Reported Long Working Hours and History of Stroke in the CONSTANCES Cohort*, *American Heart Association* (May 6, 2019) <https://www.ahajournals.org/doi/pdf/10.1161/STROKEAHA.119.025454>; Marianna Virtanen et al., *Overtime Work as a Predictor of Major Depressive Episode: A 5-Year Follow-Up of the Whitehall II Study*, *PLoS ONE* 7(1): e30719 (Jan. 25, 2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3266289/> (“[P]eople who routinely put in more than 11-hour days more than double their chances of major depression, compared to employees who typically work about eight hours a day.”); Allard E. Dembe et al., *Association Between Long Work Hours and Chronic Disease Risks over a 32 Year Period*, *American College of Occupational and Environmental Medicine* (2016), https://www.researchgate.net/publication/266785031_Association_between_Long_Work_Hours_and_Chronic_Disease_Risks_over_a_32_Year_Period.

⁵⁷ Eric Todisco, *Working Long Hours Increases the Risk of Having a Stroke, New Study Says*, *People* (June 27, 2019), <https://people.com/health/long-work-hours-increase-risk-of-stroke/>.

⁵⁸ Annie Spratt, *Go Home on Time! Working Long Hours Increases Your Chance of Having a Stroke*, *The Conversation* (June 27, 2019), <https://theconversation.com/go-home-on-time-working-long-hours-increases-your-chance-of-having-a-stroke-119388>.

⁵⁹ Cari Nierenberg, *Too Much Overtime May Raise Depression Risk*, *WebMD* (January 25, 2012), <https://www.webmd.com/depression/news/20120124/too-much-overtime-may-raise-depression-risk>.

⁶⁰ Dembe, *supra* note 54; *see also* U.S. Dep’t of Labor, *Occupational Safety and Health Administration, Long Work Hours, Extended or Irregular Shifts, and Worker Fatigue*, <https://www.osha.gov/worker-fatigue> (“Research indicates that working 12 hours per day is associated with a 37% increased risk of injury. In a 2005 study reporting on a survey of 2737 medical residents, every extended shift scheduled in a month increased by 16.2 % monthly risk of a motor vehicle crash during their commute home from work.”)

risk of accident in the twelfth hour was more than double the risk during the first eight.⁶¹ Another study found that overtime hours increase the injury hazard rate by 61%.⁶² “Working at least 12 hours per day was associated with a 37% increased hazard rate and working at least 60 hours per week was associated with a 23% increased hazard rate.”⁶³ This increased risk in our state’s most dangerous industry dramatically undermines the health and welfare of agricultural workers.

Agricultural workers suffer these extraordinary risks of injury and death on the job while remaining among the poorest workers in our state. A key social determinant of health is income, and that is precisely what our farm workers lack. Despite long hours of demanding work, farm workers are twice as likely to remain in poverty than other workers.⁶⁴ Over 40% of Colorado farmworkers lived at or near poverty in 2019.⁶⁵ An average Colorado farmworker earn less than the average at \$13.21 per hour,⁶⁶ and farmworkers nationwide “earned just under 60% of what comparable workers outside of agriculture made in 2020.”⁶⁷ A report for the U.S. Department of Labor found that farm workers’ “mean and median personal incomes the previous year were in the range of \$17,500 to \$19,999.”⁶⁸ The same report found that workers’ “mean and median total family incomes the previous year were in the range of \$20,000 to \$24,999.”⁶⁹

These averages do not include H-2A workers, who generally earn less than other farm workers.⁷⁰ Also, the 14% of agricultural workers employed directly by farm labor contractors rather than growers⁷¹ earn even lower wages and are even less likely to receive workers compensation, health insurance, or any other benefit. Farm labor contractors “use a variety of ways to cheat workers out of part of their wages (a common scheme is to pocket the workers’ wage deductions for Social Security or taxes),” charge for food, rent, transportation and tools at inflated prices, “and in the most extreme cases, subject them to debt peonage (e.g., forcing illegal immigrants to work off smuggling debts).”⁷²

This economic stress has broad ramifications for individuals and families, who struggle to access medical care, food, housing, and other necessities. “Income to a large degree determines the level of health care, shelter, nutrition, and transportation to which one has access. The ability to meet these basic needs has myriad effects on mental and physical health.”⁷³ Our state’s agricultural

⁶¹ Caruso, *supra* note 52.

⁶² Dembe, *supra* note 54.

⁶³ *Id.*

⁶⁴ Colorado Center on Law and Policy, *supra* note 5.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Costa, *supra* note 35.

⁶⁸ JBS, *supra* note 3.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Bloch, *supra* note 4.

⁷² Oxfam America, Like Machines in the Fields: Workers without Rights in American Agriculture (Mar. 2004), <https://s3.amazonaws.com/oxfam-us/www/static/media/files/like-machines-in-the-fields.pdf>.

⁷³ S.O. Rodman, et. al., Agricultural exceptionalism at the state level: Characterization of wage and hour laws for U.S. farmworkers, *Journal of Agriculture, Food Systems, and Community Development*, 6(2), 89–110 (2016), <http://dx.doi.org/10.5304/jafscd.2016.062.013>.

workers are in a desperate situation, unable to heat their homes, clothe their children, or even put food on the table. “Despite their responsibility for the nation’s food supply, farmworkers suffer from food insecurity at disproportionately high rates as compared to the rest of the U.S.”⁷⁴

The effects of poverty on Colorado children are particularly concerning. Nationally, 55% of farmworkers have children⁷⁵ and “33 percent of farmworkers in 2015-2016 were found to have family incomes below the poverty threshold.”⁷⁶ But the federal poverty threshold is far below the actual amount of money a family needs to survive in Colorado. A living wage for an adult supporting just one child in Greeley, Colorado, the county seat of one of Colorado’s top ten agricultural counties,⁷⁷ was \$31.53 per hour. If both parents were wage earners supporting the child, each parent would only need to make \$17.26 per hour to earn a living wage in Greeley.⁷⁸ Therefore, even with the help of a wage-earning partner, the average hourly farmworker wage of \$13.21 per hour is insufficient to provide a living wage for a family with just one child. When combined with the fact that many farmworkers work fewer than 52 weeks per year, the situation is even more bleak. Simply put, current farmworker wages in Colorado are insufficient to allow workers to maintain even a decent standard of living.

Therefore, growing up in an agricultural family in Colorado often means that children grow up in poverty. Such poverty has long-term consequences for kids’ participation in our society into adulthood. “These ever-poor children are less successful than their never-poor counterparts in their educational achievement and employment, and they are more likely to have a nonmarital teenage birth and some involvement with the criminal justice system. Children who spend half their childhood living in poverty fall even further behind.”⁷⁹ Parents’ uncompensated overtime hours not only leave children impoverished but can also leave them flopping from different childcare arrangements, lacking in meaningful relationships, unsupervised at a young age, and without assistance in cooking healthy food. One Project Protect Promotora explained that “I have a few families who have told me that they cannot afford buying medicine for their kids when they get sick.”⁸⁰ Luis Murillo shared the story of a Southern Colorado family unable to properly heat their mobile home.⁸¹ While the parents were working, the kids turned on various space heaters, causing an electrical fire that killed their 13-year-old daughter.⁸²

⁷⁴ *Id.*

⁷⁵ JBS, *supra* note 3.

⁷⁶ *Id.*

⁷⁷ Colorado Department of Agriculture, 2019 Glimpse of Colorado Agriculture Map, <https://ag.colorado.gov/sites/ag/files/documents/2019%20Glimpse%20of%20CO%20Agriculture%20Map.pdf>.

⁷⁸ MIT Living Wage Calculator, <https://livingwage.mit.edu/metros/24540>.

⁷⁹ Caroline Ratcliffe, Child Poverty and Adult Success, Urban Institute (Sept. 2015), <https://www.urban.org/sites/default/files/publication/65766/2000369-Child-Poverty-and-Adult-Success.pdf>

⁸⁰ Project Protect Food Systems, Stories from the Field (January 2021)(, <https://drive.google.com/file/d/1dbXNQa-oafh83e9DvvDPDIU7d8bwV/Gp4/view>.

⁸¹ Faith Miller, Agricultural Workers Would be Able to Form Unions, Earn Minimum Wage Under Colorado Bill, Colorado Newsline (Mar. 19, 2021), <https://coloradonewsline.com/2021/03/19/agricultural-workers-would-be-able-to-form-unions-earn-minimum-wage-under-colorado-bill/>.

⁸² *Id.*

The alternative to leaving children alone while parents work long hours is to bring them to work. “Children who live with their farmworker parents often work alongside them in the fields because childcare is expensive, and because their families are poor and depend on the children’s incomes for their survival.”⁸³ The farmworker youth high school dropout rate is 45%. As one child put it, “If we don’t work, we don’t eat. That’s why we don’t go to school.”⁸⁴

Finally, in a society that traditionally places caretaking demands on women, the normalization of extended work hours disproportionately disadvantages women. Agricultural workers have little option but to miss important family events to put in overtime at work for no overtime pay. This leads to pay inequity, and further propagates barriers women face in the workplace.⁸⁵ The risk of depression from long working hours is also higher for women, who disproportionately bear the burden of childcare and other unpaid domestic labor.⁸⁶ These challenges are substantial for the 28% of the agricultural workforce that is female.⁸⁷ Maria “Cuca” Carmona, of Pasadena, California, explained:

“Farm work is hard. After working in the fields, you come home exhausted. As a woman, when you get home, you don’t lay down and rest or turn on the television or drink a beer like the men do. You have to keep cleaning, sweeping, washing dishes, and cooking. Sometimes you have to keep on working until late at night. Then, you hardly have time to sleep before you have to wake up in the morning and do it all over again—making lunch for everyone, preparing things for the family, and going back to work. That’s the experience that thousands of farmworker women live through every day.”⁸⁸

Although overtime pay is unlikely to dramatically increase agricultural workers’ overall income (CCLP estimates that overtime rights after 40 hours in a week could increase more than 40% of Colorado farm workers’ take-home pay by up to 16.7%⁸⁹), it would be “an important improvement in living standards for some of the lowest-paid and hardest-working workers in the state.”⁹⁰ By setting basic labor standards that disincentivize overtime work, the state could

⁸³ Oxfam, *supra* note 72.

⁸⁴ *Id.*

⁸⁵ Maryam Navaie-Waliser, et. al., When the Caregiver Needs Care: The Plight of Vulnerable Caregivers, *Am J Public Health*, (Mar. 2002) 92(3): 409–413, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447090/>.

⁸⁶ Understanding Society, Working Long Hours is Linked to Depression in Women (Feb. 26, 2019), <https://www.understandingsociety.ac.uk/2019/02/26/working-long-hours-is-linked-to-depression-in-women> (women working 55+ hours per week more likely to be depressed); *see also* Mahée Gilbert-Ouimet et al., Adverse effect of long work hours on incident diabetes in 7065 Ontario workers followed for 12 years (Jul. 2, 2018), <https://pubmed.ncbi.nlm.nih.gov/30002856/> (longer hours increases diabetes risk for women).

⁸⁷ National Farm Worker Ministry, Women in Agriculture (Jul. 2018), <http://nfwm.org/farm-workers/farm-worker-issues/womens-issues/>.

⁸⁸ Oxfam, *supra* note 72.

⁸⁹ Colorado Center on Law and Policy, *supra* note 5.

⁹⁰ Fiscal Policy Institute, *supra* note 36.

reduce workplace injuries in the agricultural sector, slightly improve wages, and dramatically improve worker and family well-being. Failure to set maximum or standard working hours threatens the health of workers given “the negative health effects of long working hours.”⁹¹ Colorado should use this regulatory opportunity to provide agricultural workers with overtime rights sufficient to protect health and welfare.⁹² To do that, we must provide overtime compensation after 40 hours in a week and after 12 hours in a day.

3. THE UNIQUE DIFFICULTIES AGRICULTURAL EMPLOYEES HAVE OBTAINING WORKPLACE CONDITIONS EQUAL TO THOSE PROVIDED TO OTHER EMPLOYEES

It has been more than 80 years since agricultural workers were denied overtime rights in the FLSA. In that time, structural disempowerment has made it impossible for agricultural workers to obtain conditions of employment equal to those provided to other employees.⁹³ Agricultural workers have not only been excluded from minimum wage and overtime protections, but also from health and safety standards, collective bargaining rights, and workers compensation insurance.⁹⁴ In these circumstances, where worker bargaining power is insufficient to obtain workplace conditions equal to those provided to other employees, the state must intervene. But that intervention should be limited to leveling up and providing these disenfranchised workers with equal rights. The state cannot, without substantial justification, depart from equal treatment under the law.

Systemic disempowerment has created an industry populated with vulnerable workers who are constrained in their ability to advocate for workplace rights, making it impossible for agricultural workers to access equal treatment in the marketplace. Agricultural workers are uniquely vulnerable. Most are foreign born (7 in 10 crop workers were born in Mexico (69%), with an additional 7% born in other countries not including the United States) and have limited English language skills.⁹⁵ Most crop workers also lack education, with an average level of formal education of 8th grade and 19% of Spanish-speaking crop workers unable to read well in Spanish.⁹⁶ Given decades of systemic worker disempowerment, these are the only workers willing to accept the extraordinary risks and meagre pay associated with agricultural work in the United States today.

⁹¹ Int J Environ Res Public Health Business, *supra* note 55.

⁹² Raising Farmworker wages would be good for Colorado’s farming communities. When Low-wage workers earn more money, they spend more money in local stores and pay sales taxes to local municipalities. This could boost local business in rural communities throughout our state. They are also able to meet their basic needs without resorting to government assistance, as some farmworkers have had to do in the past. *See generally* Fiscal Policy Institute, *supra* note 36; JBS, *supra* note 3.

⁹³ *See generally* APHA Policy Statement, *supra* note 50.

⁹⁴ *Id.*

⁹⁵ JBS, *supra* note 3 (77% speak Spanish as dominant language and only 29% report speaking English well. And 30% reporting that they don’t speak any English at all. And 41% report they can’t read English at all.).

⁹⁶ *Id.* (Note that this report covers crop workers, not including H-2A workers and not including workers engaged with livestock like dairy workers or meat processing workers).

This vulnerable workforce is subject to staggering abuse. Sexual assault and other workplace violence,⁹⁷ trafficking,⁹⁸ wage and hour abuses,⁹⁹ child labor,¹⁰⁰ pesticide exposure,¹⁰¹ and inability to access medical care,¹⁰² are just a few. With financial pressures, immigration concerns, lack of information, lack of time and transportation, and challenges accessing counsel, victims rarely complain.¹⁰³

Where systemic disempowerment has chilled complaints even in the most horrific circumstances, it is hard to imagine that agricultural workers will take time off to advocate for overtime rights. That is, unless their employer has required or encouraged them to engage. In circumstances where worker power has been systemically undermined for decades and workers live in fear of and reliance on their employers, the CDLE must be skeptical of forces that push individual workers to oppose to overtime rights. The CDLE must also take extraordinary measures to engage and educate workers if their input will benefit the policy-making process.

Systemic disempowerment in Colorado's agricultural industry is perpetuated by a combination of low pay, broken immigration laws, underenforcement of workplace rights, limitations on concerted activity, and concentrated industry power. We discuss each of these factors in turn:

⁹⁷ Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment* (May 15, 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and> (“sexual violence and sexual harassment experienced by farmworkers is common enough that some farmworker women see these abuses as an unavoidable condition of agricultural work”).

⁹⁸ Trafficking Victims Protection Act, 22 USCS § 7101(b)(1) (“Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.”); *see also* Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States, Urban Institute (Oct. 2014) https://www.urban.org/research/publication/understanding-organization-operation-and-victimization-process-labor-trafficking-united-states/view/full_report (the most common venues for labor trafficking in the United States “were agriculture, hospitality, domestic service in private residences, construction, and restaurants”).

⁹⁹ U.S. Dep’t of Labor, *Low Wage, High Violation Industries*, <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries> (finding that tens of thousands of agricultural workers have been denied their earned wages -- in direct violation of applicable laws -- over the past two decades. Nationally, employers illegally withheld \$65 million in earned wages from 150,000 employees between 2001 and 2019.); Rebecca Smith, et. al., *Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB*, National Employment Law Project and National Immigration Law Center, <http://stage.nelp.org/wp-content/uploads/2015/03/wlghoff040303.pdf> (A survey in 2000 found that “100% of all poultry processing plants were non-compliant with federal wage and hour laws. Another “DOL survey in agriculture focused on cucumbers, lettuce, and onions revealed that compliance in these commodities was [also] unacceptably low.”).

¹⁰⁰ National Center for Farmworker Health, *Child Labor Fact Sheet* (2018), http://www.ncfh.org/uploads/3/8/6/8/38685499/childlaborfactsheet_final_2018.pdf; Human Rights Watch, *Fingers to the Bone: United States Failure to Protect Child Farmworkers* (Jun. 2020), <https://www.hrw.org/report/2000/06/02/fingers-bone/united-states-failure-protect-child-farmworkers>; *See generally* 29 U.S.C. Ch. 8 Fair Labor Standards Act, <https://uscode.house.gov/view.xhtml?path=/prelim@title29/chapter8&edition=prelim> (fails to provide same protections against child labor for agricultural workers that it provides to child laborers in other industries).

¹⁰¹ National Farmworker Ministry, *supra* note 87; *see also* Oxfam *supra* note 72 (An estimated 300,000 farmworkers suffer pesticide poisonings each year).

¹⁰² Oxfam, *supra* note 72 (95% of all farmworkers have no health insurance for non-work-related injuries or illnesses).

¹⁰³ *See e.g.*, National Public Radio, *Sexual Assault and Farmworkers* (Nov. 5, 2017), <https://www.npr.org/2017/11/05/562188700/sexual-assault-and-farmworkers>.

a. Low Pay Perpetuates Structural Disempowerment

No one teetering so close to the edge of financial ruin can risk employment repercussions if they advocate for working conditions equal to those enjoyed by other Colorado employees. “[T]hat is just not acceptable, especially when that last paycheck means your rent, your grocery bill or clothes or needs that your children have.”¹⁰⁴ Workers fear retaliation in the form of reduced hours, losing a job, or being blacklisted from multiple jobs in the area. Others fear losing their homes, especially the 16% of farmworkers who live in employer-provided housing.¹⁰⁵ Still others fear retaliation against family members who also work in the fields.¹⁰⁶ Put simply, with wages so low, most workers cannot run any risk of missing a paycheck or even a day of work to defend or advance their rights.

b. Our Broken Immigration System Undermines Worker Power

Only 40% of the farm workforce are U.S. citizens and legal immigrants with full rights and agency in the labor market.¹⁰⁷ The remaining workers have looming immigration concerns that chill reporting of even the most extraordinary abuses. In this context, it is very challenging for workers to advocate for equal treatment.

It is an open secret that more than half of agricultural workers are undocumented.¹⁰⁸ These workers often fear retaliation, like reports to immigration authorities, that could risk immigration consequences up to and including deportation. These fears reduce the likelihood that workers will challenge wage theft or raise concerns about unsafe working conditions, unlawful restrictions on their liberty, sexual harassment, assault, or other forms of unfair and illegal treatment.¹⁰⁹ Even if they were willing to complain, “[u]nauthorized workers often struggle to find legal representation, since federally funded legal services organizations are prohibited (with some exceptions) from representing unauthorized immigrants.”¹¹⁰ Deportation or other immigration consequences can be even more daunting for farmworkers who have lived in the United States for a long time or who have a mixed status family: with some documented and some undocumented members. In that case, deportation could mean leaving your children behind.¹¹¹

¹⁰⁴ *Id.*

¹⁰⁵ JBS, *supra* note 3.

¹⁰⁶ Human Rights Watch, *supra* note 97.

¹⁰⁷ Costa, *supra* note 35.

¹⁰⁸ Miriam Jordan, Farmworkers, Mostly Undocumented, Become ‘Essential’ During Pandemic, *The New York Times* (Apr. 10, 2020), <https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farmworkers-agriculture.html> (“About half of all crop hands in the United States, more than one million, are undocumented immigrants, according to the Agriculture Department. Growers and labor contractors estimate that the share is closer to 75 percent.”); *See also* APHA Policy Statement *supra* note 50; *see also* U.S. Dep’t of Agriculture, Economic Research Service, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#recent>.

¹⁰⁹ Costa, *supra* note 35.

¹¹⁰ Human Rights Watch, *supra* note 97.

¹¹¹ *Id.* (“In 2007-2009, 55 percent of foreign born-workers reported having been in the US for at least 10 years; 29 percent reported having been in the US for more than 20 years. In 1992-1994, only three percent of all farmworkers

Agricultural producers also rely on workers on non-immigrant H-2A visas, which represent about 10% of the agricultural workforce.¹¹² These visas bind a worker to a single employer, rendering her unable to shop around for higher wages or better benefits, including overtime pay.¹¹³ “Guest workers’ forced tie to a single employer leaves them reluctant to challenge illegal or unfair employer practices.”¹¹⁴ H-2A “workers are reticent to report abuses, as the balance of power tips sharply in favor of their employers, who can terminate noncompliant workers and have them deported at any time.”¹¹⁵

c. Historic Underenforcement of Worker Protections Undermines Agricultural Worker Power

Government has not picked up the slack to protect this vulnerable workforce. Quite the opposite; workplace safety, wage and hour, and other “worker protection laws have historically been under-enforced due to lack of public funds, competing agency enforcement priorities, and the disproportionate power and influence of employers.”¹¹⁶ Of the more than 100 safety and health regulations adopted by OSHA, only six address hazards specific to agriculture.¹¹⁷ Indeed, a court order was necessary to encourage OSHA to create standards for drinking water and toilet facilities in 1987, no standards protect agricultural workers from the musculoskeletal injuries that are rampant in the industry, and the Environmental Protection Agency’s authority over pesticides has pre-empted OSHA’s work in that area without taking steps to protect workers from exposure.¹¹⁸ “Despite the fact that agriculture is second only to mining as the most hazardous occupation, a recent federal study found that OSHA devoted less than 3 percent of its inspections to agriculture.”¹¹⁹ Since 2010, only 0.625% of OSHA workplace safety inspections in Colorado were for the agricultural industry.”¹²⁰

The Department of Labor (DOL), which is charged with enforcing child labor laws as well as the wage and hour provisions of the FLSA, has limited capacity to investigate employers. In 1998, DOL cited only 104 cases of child labor violations in agriculture, while experts estimate that there are approximately “one million violations related to child labor in U.S. agriculture each year.”¹²¹ Meanwhile, the reduced the number of wage and hour investigators in recent years, with fewer investigators in 2019 than the agency had fifty years ago, has impacted the

were in mixed status families, but by 2007-2009, that number had increased to 12 percent.”); *see also* National Farmworker Ministry, *supra* note 87.

¹¹² Costa, *supra* note 35.

¹¹³ APHA Policy Statement, *supra* note 50.

¹¹⁴ Farmworker Justice, No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers, <https://www.farmworkerjustice.org/resource/no-way-to-treat-a-guest-why-the-h-2a-agricultural-visa-program-fails-u-s-and-foreign-workers/>.

¹¹⁵ Dell’Orto, Federica and Judith Wood, Agricultural Workers Rights in Today’s America: A Parallel to Modern Slavery, 67-OCT Fed. Law. 34 (Sept./Oct. 2020).

¹¹⁶ Project Protect Food Systems, Why Colorado Must Protect Its Agricultural Workers, <https://drive.google.com/file/d/1dbXNQa-oafh83e9DvvDPDIU7d8bwVGp4/view>

¹¹⁷ APHA Policy Statement, *supra* note 50.

¹¹⁸ Oxfam, *supra* note 72.

¹¹⁹ Human Rights Watch, *supra* note 100.

¹²⁰ Project Protect Food Systems, *supra* note 116.

¹²¹ Human Rights Watch, *supra* note 100.

department’s ability to investigate wage theft.¹²² Although the “vast majority (over 70%) of federal labor standards investigations of farms conducted by the Wage and Hour Division (WHD) of the U.S. Department of Labor detect violations ... there is a very low probability—1.1%—that any farm employer will be investigated by WHD in any given year.”¹²³ Former WHD Director David Weil reflected that beyond increasing the number of investigators or investigations, we need “a broader, more comprehensive approach of trying to change the factors that lead to such pervasive noncompliance” in the agricultural industry.¹²⁴

d. Longstanding Limitations on Concerted Activity Reduce Agricultural Worker Power

Agricultural workers also have had unique difficulties obtaining workplace conditions equal to those provided to other employees because they have traditionally not been covered by important labor protections enjoyed by most other workers. In addition to being carved out of federal pay standards, agricultural workers were, and remain, excluded from the protections of the National Labor Relations Act, which guarantees other workers the right to form and join unions and the right to organize for improved working conditions.¹²⁵ This is so despite the fact that The United Nations Universal Declaration of Human Rights maintains that “everyone has the right to form and to join trade unions for the protection of his interests.”¹²⁶ Although SB87 in Colorado, and a few other recent state laws, give farmworkers the right to engage in collective action in a handful of states, decades of denying them that right have eroded their bargaining power and entrenched poor working conditions.

e. Monopsony in the Agricultural Industry Consolidates Employer Power

As President Biden recently said, “[i]t is long past time that we put all of America’s farmworkers on an equal footing with the rest of our national workforce when it comes to their basic rights.” But that is difficult in a time when agricultural markets are some of the most highly concentrated in the United States.¹²⁷

The markets for beef, pork, and poultry, grain, seeds, and pesticides are dominated by four firms. Three firms dominate the biotechnology industry. One or at best two firms control large farm equipment manufacturing. And a small number of firms are

¹²² Daniel Costa, Philip Martin, and Zachariah Rutledge, Federal Labor Standards Enforcement in Agriculture, Economic Policy Institute (Dec. 2020), <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/>.

¹²³ *Id.*

¹²⁴ Steve Davies, Farmworker Advocates Seek More Enforcement of Labor Laws, Agripulse (Mar. 2021), <https://www.agri-pulse.com/articles/15570-farmworker-advocates-seek-more-enforcement-of-labor-laws>.

¹²⁵ 29 U.S.C. §§ 151-169; *see also* National Labor Relations Board, Employee Rights, <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employee-rights>.

¹²⁶ Universal Declaration of Human Rights, Art. 23(4), <https://www.un.org/sites/un2.un.org/files/udhr.pdf>.

¹²⁷ Hiba Hafiz, Competitive Edge: Big Ag’s monopsony problem: How market dominance harms U.S. workers and consumers, Washington Center for Equitable Growth (Feb. 2021), <https://equitablegrowth.org/competitive-edge-big-ags-monopsony-problem-how-market-dominance-harms-u-s-workers-and-consumers/>.

increasingly dominating agricultural data and information markets.¹²⁸

These firms have consolidated power rapidly over the past few decades. The Center for American Progress found that between 1986 and 2008, “the four-firm share of animal slaughter nationwide increased from 55 percent to 79 percent for cattle, from 33 percent to 65 percent for hogs, and from 34 percent to 57 percent for poultry.”¹²⁹ As the firms processing raw agricultural goods consolidate, so do the firms that provide farm inputs like seed and farm equipment.¹³⁰ Such market consolidation from above and below squeezes farmers and suppresses worker pay. Suppressing worker pay is sometimes accomplished through mere consolidation, but “[c]urrent litigation against the poultry, pork, and meat cartels estimates that hundreds of thousands of workers suffer poverty wages from wage-fixing conspiracies.”¹³¹ Although market consolidation creates financial challenges for small farmers as well, those challenges cannot be addressed by sliding the burden down the chain to our state’s most vulnerable workers. Instead, farmers and ranchers “must resist the politics of division and recognize that they have common cause with [] workers, even though they may look different, pray different, or speak a different language.”¹³²

The extraordinary consolidation in agricultural markets is yet another factor that undermines worker power and creates unique difficulties for agricultural employee efforts to obtain workplace conditions equal to those provided to other employees. These factors are pervasive and have prevented agricultural workers from defending and advancing their rights for decades. Colorado now has an opportunity to upset the long history of systemic racism and injustice that has rendered agricultural work some of the most dangerous and lowest paid in our nation.

4. CONCLUSION AND CALL TO ACTION

Providing overtime rights to Colorado’s agricultural workers is just one step in dismantling the abusive structures that undermine agricultural worker power. Absent substantial justification, the long history of systemic disempowerment of agricultural workers requires the state to grant those workers overtime rights equals to those enjoyed by other employees. Meanwhile, the rule-making process for designing overtime rights in our state also must reflect the extraordinary barriers agricultural workers face to engaging with the policy process.

We call on the State of Colorado to set the same overtime protections for agricultural workers that are enjoyed by other Colorado workers, thereby taking a meaningful step in our state’s battle to address systemic racism. We hope the benefits of overtime pay will not stop at the workers’

¹²⁸ *Id.*

¹²⁹ Caius Z. Willingham and Andy Green, A Fair Deal for Farmers, Center for American Progress (May 2019), <https://www.americanprogress.org/issues/economy/reports/2019/05/07/469385/fair-deal-farmers/>; see also James M. MacDonald, Robert A. Hoppe, and Doris Newton, Three Decades of Consolidation in U.S. Agriculture, U.S.D.A., (Mar. 2018), https://www.ers.usda.gov/webdocs/publications/88057/eib189_summary.pdf?v=0.

¹³⁰ Willingham, *supra* note 129.

¹³¹ Hafiz, *supra* note 127.

¹³² Ted Ganoways, Beyond Big Meat, The New Republic (Aug. 2020)

<https://newrepublic.com/article/158679/beyond-big-meat-coronavirus-pandemic-meatpacking-monopoly>.

paycheck but will inspire workers to demand equitable treatment after decades of oppression.¹³³ Although industry groups are concerned about new mandates, maintaining the status quo is no argument for perpetuating a racist system that continues to have a disparate impact on Black and Brown people today.

¹³³ Fiscal Policy Institute, *supra* note 36 (“Workers also report that the absence of overtime pay has led to other exploitative labor practices—in other words, exclusion from one labor protection paves the way for labor abuse.”).