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Linda Myhre Enlow  
Thurston County Clerk

1  EXPEDITE  
2  No Hearing Set  
3  Hearing is Set:  
4       Date: 1/19/2021  
5       Time: 1:30 pm  
6 Hon. Chris Lanese

7  
8                                   **STATE OF WASHINGTON**  
9                                   **THURSTON COUNTY SUPERIOR COURT**

10 DEPARTMENT OF LABOR AND  
11 INDUSTRIES OF THE STATE OF  
12 WASHINGTON

13                                   Plaintiff,

14                                   v.

15 FOWLER NAT D. AND MARY M.  
16 DBA FARM BOY DRIVE IN

17                                   Defendant.

NO. 20-2-02460-34

REPLY TO RESPONSE TO  
PRELIMINARY INJUNCTION AND  
MOTION TO DISMISS

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1  
2 **I. INTRODUCTION**

3 The Department of Labor & Industries seeks injunctive relief to protect employees  
4 from the potentially deadly harm of exposure to the COVID-19 virus. Farm Boy raises  
5 constitutional issues but all lack merit because the courts recognize that the state may act in a  
6 pandemic to protect its workers, their families, and the public at large, and Farm Boy’s factual  
7 arguments impermissibly re-argue the merits of WAC 296-800-14035.

8 **II. FACTS**

9 **A. COVID-19 Is a Highly Contagious Virus, Which Can Cause Serious Illness or  
10 Death**

11 COVID-19 presents a serious public health emergency in Washington State and  
12 throughout the country. Streuli Decl. Ex. A at 1; Lindquist Decl. 3. A highly virulent virus  
13 causes COVID-19, and COVID-19 is a serious workplace hazard that creates a substantial risk  
14 of illness and death. Soiza Decl. 3; *see* Lindquist Decl. Ex. B; Lindquist Decl. 2. The virus can  
15 cause respiratory symptoms, high fever, nausea, fatigue, and neurological symptoms. Lindquist  
16 Decl. 2. Complications leading to death may include respiratory failure, acute respiratory  
17 distress syndrome, sepsis and septic shock, thromboembolism, and multiorgan failure,  
18 including injury of the heart, liver, or kidneys. Lindquist Decl. 2.

19 The World Health Organization has classified COVID-19 as a worldwide pandemic  
20 and COVID-19 continues to spread throughout the state. Lindquist Decl. 2, 5. COVID-19  
21 spreads when an infected person speaks, coughs, or sneezes or when a person touches a  
22 contaminated surface or object and then touches their own mouth, nose, or eyes. Lindquist  
23 Decl. 4. The primary route of infection is through respiratory droplets transferred from one  
24 person to another in close proximity for a period of time. Lindquist Decl. 4. Being within six  
25 feet of another person for 15 minutes in a day is considered a “close contact” with a significant  
26 potential for transmission of the disease. Lindquist Decl. 4.

1 Aerosol transmission risks are increased when interactions occur indoors, when  
2 ventilation is limited, and when more people are brought together. Lindquist Decl. 5.  
3 Significantly, COVID-19 can be transmitted by an infected human, whether or not that person  
4 is symptomatic. Restaurants present high-risk hazards and are powerful contributors to the  
5 spread of COVID-19. Soiza Decl. 8. The CDC notes heightened transmission in restaurants.  
6 Lindquist Decl. Ex. E; *see also* Lindquist Decl. 3, 5-7.

7 The primary control of the COVID-19 virus is to avoid contact with others and  
8 maintain a safe distance when interaction is required. Lindquist Decl. 5. Limitations on  
9 activities in the community are adopted to reduce to the number of contacts between people,  
10 particularly when individuals may have multiple contacts in enclosed environments. Lindquist  
11 Decl. 5. Although vaccines have now been approved, it will be months before the vaccines are  
12 widely enough available to impact transmission of the virus. *See* Lindquist Decl. 5.

13 **B. The Governor Issued Proclamations to Protect Washingtonians From COVID-19**

14 Responding to the health crisis and acting under his emergency-proclamation authority  
15 under RCW 43.06.220, the Governor has issued a series of emergency proclamations following  
16 the best scientific and medical analysis available. Streuli Decl. 2-6. On November 15, 2020,  
17 the Governor issued Proclamation 20-25.8, which modified the provisions of the prior  
18 proclamations and provided among other things that restaurants and bars are closed for “indoor  
19 dine-in service.” Soiza Decl. 3. This proclamation stemmed from the alarming rise in COVID-  
20 19 cases from the latter part of October through the first two weeks of November. Streuli Decl.  
21 5. Later proclamations continued to prohibit the business activity of restaurant indoor dine-in  
22 service. Streuli Decl. Ex. H. at 3.

23 On January 11, 2021, the Governor issued Proclamation 20-25.12. Proclamation 20-  
24 25.12 put in place the “Healthy Washington: Roadmap to Recovery,” which establishes the  
25 beginning of a new COVID-19 recovery plan for Washington State. Under this plan, the State  
26 is divided into eight geographic regions, based on available health care services. There are two

1 phases in the Roadmap to Recovery and each region begins in Phase 1. As it relates to this  
2 matter, indoor dining at restaurants and bars is prohibited during Phase 1. Regions can move  
3 into Phase 2 by meeting certain benchmarks that the Roadmap describes. During Phase 2  
4 indoor dining will be limited to 25 percent of capacity. Hall Decl. Ex. 3. To date, none of the  
5 regions identified in the Roadmap to Recovery have progressed to Phase 2.

### 6 **C. Temporary Restraining Order**

7 On December 15, 2020, this Court granted a temporary restraining order prohibiting  
8 indoor dining services at Farm Boy. This is because by offering indoor dine in services, Farm  
9 Boy violated the Governor’s COVID-19 proclamations and WAC 296-800-14035, which  
10 provides that “[w]here a business activity is prohibited by an emergency proclamation an  
11 employer shall not allow employees to perform work.” Farm Boy ignored the TRO, and on  
12 December 29, 2020, this Court entered an order finding the restaurant in contempt. Because  
13 Farm Boy continues to provide indoor dine-in services, the Department has moved for a  
14 second order of contempt and preliminary injunction.

## 15 **III. ARGUMENT**

16 A party seeking injunctive relief must show that (1) the party has a clear legal or  
17 equitable right, (2) that the party has a well-grounded fear of immediate invasion of that right,  
18 and (3) the acts complained of are either leading to or will result in actual and substantial  
19 injury to the party. *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 96 Wn 2d 785, 792, 638 P.2d  
20 1213 (1982). The Department proves each in turn.

### 21 **A. The Department Has a Clear Legal and Equitable Right**

#### 22 **1. The Department has statutory and regulatory authority to act**

23 There is a clear legal and equitable right to temporary injunctive relief to enforce WAC  
24 296-800-14035. Farm Boy only generally asserts that the Department does not have the  
25 statutory and regulatory authority to act. Resp. 5. It provides no authority to support this  
26 assertion, simply claiming instead that the Department does not provide authority. Resp. 5. But

1 RCW 49.17.040 gives the Department the authority to enact safety and health regulations;  
2 49.17.060 gives the Department the right to enforce them. Farm Boy has not filed a rules  
3 challenge against WAC 296-800-14035, and cannot raise in these proceedings an argument  
4 that the Department’s rule is invalid. *See Kettle Range Conservation Grp. v. Dept of Nat. Res.*,  
5 120 Wn. App. 434, 458, 85 P.3d 894 (2003) (party must bring “a petition for declaratory  
6 judgment in Thurston County Superior Court” to challenge a rule’s adequacy). Rules have the  
7 force and effect of law. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256  
8 (2002)

9 **2. Any right to hold employment is not implicated here because there is no**  
10 **unreasonable governmental interference**

11 Contrary to Farm Boy’s argument, the “right to hold specific private employment” does  
12 not allow it to obtain relief. Resp. 2. The temporary limitation of indoor dining services during  
13 a global pandemic does not infringe the right to pursue a profession or calling three reasons.

14 First, there is no showing factual or otherwise that prohibiting indoor dining denies a  
15 right to employment. The rule does not restrict take out, preparation of food, the ability to enter  
16 the restaurant; the only restriction is on eating inside the restaurant. Nor have they presented  
17 evidence about any attempt to rely on take out only.

18 Second, the courts have emphasized that “cases recognizing [the right to pursue a  
19 profession] all deal with a complete prohibition of the right to engage in a calling, not [a] sort  
20 of brief interruption.” *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 997 (9th Cir. 2007),  
21 *aff’d*, 553 U.S. 591 (2008) (quotations omitted); *Dittman v. California*, 191 F.3d 1020, 1029  
22 (9th Cir. 1999); *see also Franceschi v. Yee*, 887 F.3d 927, 938 (9th Cir. 2018) (affirming  
23 dismissal of substantive due process claim where state regulation did not “operate as a  
24 complete prohibition on” plaintiff’s right to engage in chosen profession).

25 The challenged application of the Department’s rule amounts, at most, to a temporary  
26 “interruption” of Farm Boy’s business, not a “complete prohibition.” *See Engquist*, 478 F.3d

1 985; *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 66 (9th Cir. 1994)  
2 (temporary ban on amusement game did not unduly interfere with game manufacturers’ and  
3 operators’ right to pursue profession); *see also Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir.  
4 2009) (temporary suspension of doctor from medical reimbursement program did not implicate  
5 liberty interest in pursuing occupation). Here, there is only an interruption to the provisions of  
6 indoor dining and that is only for a temporary time, as when Thurston County moves to Phase  
7 2 indoor dining will be allowed at 25 percent capacity. Hall Decl. Ex. 3, 4. At present, Farm  
8 Boy is allowed to serve food through take out and have outdoor dining.

9 Third, even if temporary public health restrictions on Farm Boy’s business implicated  
10 its liberty interest, the restrictions were constitutional. The right to pursue a calling is not  
11 fundamental. *Country Classic Dairies, Inc. v. State of Mont., Dep’t of Commerce Milk Control*  
12 *Bureau*, 847 F.2d 593, 596 (9th Cir. 1988) (citing *New Orleans v. Dukes*, 427 U.S. 297, 303-  
13 05, 96 S. Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam)); *Marilley v. Bonham*, 844 F.3d 841,  
14 854 (9th Cir. 2016) (en banc).<sup>1</sup> To successfully challenge the Department’s application of its  
15 rule on this basis, Farm Boy must show that “the challenged law [is not] rationally related to a  
16 legitimate state interest.” *Yim v. City of Seattle*, 194 Wn.2d 682, 689, 451 P.3d 694 (2019), as  
17 amended (Jan. 9, 2020). The U.S. District Court for the Eastern District of Washington  
18 recently rejected a similar claim under the purported due process “right to pursue [a] common  
19 calling,” concluding that the Governor’s Proclamations had a reasonable relation to the  
20 ongoing crisis. *Slidewaters LLC v. Wash. Dep’t of Labor & Indus.*, No. 2:20-cv-0210-TOR,  
21 2020 WL 3130295, at \*4 (E.D. Wash. June 12, 2020).<sup>2</sup>

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22 <sup>1</sup> Farm Boy cites *Plumber Steamfitters* for the proposition that there is a fundamental right to private  
23 employment. But application of the principle is limited. *Plumbers Steamfitters Union Local 598 v. Wash. Pub.*  
24 *Power Supply Sys.*, 44 Wn. App. 906, 915, 724 P.2d 1030 (1986). *Plumbers Steamfitters* cited *Greene v. McElroy*,  
25 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959), and noted the principle of the right to hold private  
26 employment was limited to the facts in *Greene* of the employment discharge situation where there is a stigma  
imposed or discharge on grounds that a worker’s integrity is called into question. *Id.*

<sup>2</sup> The *Slidewaters* decision also upheld the Department’s authority to enact WAC 296-800-14035. *See*  
*Slidewaters* at \*4.

1 And the Supreme Court has recognized that “[s]temming the spread of COVID–19 is  
2 unquestionably a compelling interest.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct.  
3 63, 67 (2020). It stated that “Members of this Court are not public health experts, and we  
4 should respect the judgment of those with special expertise and responsibility in this area.” *Id.*  
5 at 68.<sup>3</sup>

6 Even if there is an applicable fundamental right under *Plumber Steamfitters* to private  
7 employment, the right is not without restriction; it only applies to prevent unreasonable  
8 governmental interference. 44 Wn. App. at 906; *Duranceau v. City of Tacoma*, 27 Wn. App.  
9 777, 780, 620 P.3d 533 (1980). Workplace safety regulation is not unreasonable governmental  
10 interference with employment. Farm Boy’s argument would mean that all WISHA regulations  
11 could be set aside as to private employment, but such a result contradicts authority. Both the  
12 Constitution and the Legislature recognize the importance of protecting workers from  
13 workplace hazards. *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 475 P.3d 164, 171 (Wash.  
14 2020); *Afoa v. Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800 (2013); RCW 49.17.010,  
15 .060. Indeed, the Washington State Constitution itself mandates protection of workers. *Bayley*  
16 *Constr. v. Washington State Dep’t of Labor & Indus.*, 10 Wn App. 2d 768, 781, 450 P.3d 647  
17 (2019), *review denied*, 195 Wn.2d 1004 (2020). Art. II, § 35. “Article II, section 35 mandates

18  
19 <sup>3</sup> In an emergency such as the COVID-19 pandemic, the state’s interests in protecting its  
20 residents’ health and safety are at their apex, tipping the constitutional scale heavily in its favor.  
21 Thus, during the COVID-19 pandemic, federal courts have applied a more deferential framework  
22 in adjudicating constitutional claims arising out of state and local governments’ public health  
23 orders. Derived from *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905), the standard allows the  
24 state to “implement emergency measures that curtail constitutional rights so long as the measures  
25 have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all  
26 question, a plain, palpable invasion of rights secured by the fundamental law.’ ” *In re Abbott*, 954  
F.3d 772, 784-85 (5th Cir. 2020) (quoting *Jacobson*, 197 U.S. at 31). “Courts presented with  
emergency challenges to governor-issued orders temporarily restricting activities to curb the spread  
of COVID-19 have consistently applied *Jacobson v. Massachusetts* to evaluate those challenges.”  
*Carmichael v. Ige*, No. CV 20-00273 JAO-WRP, 2020 WL 3630738, at \*5 (D. Haw. July 2, 2020)  
(collecting cases). Thus, the need to protect citizens from COVID-19 allows regulations, despite  
Farm Boy’s constitutional claims. See *Big Tyme Investments, LLC v. Rust*, \_\_\_ F.3d \_\_\_, 2021 WL  
118628, \*6-\*8 (5th Cir. 2021) (restrictions on bars satisfied *Jacobson*).



1 legislative action about workplace safety and constitutes a fundamental right of Washington  
2 workers to health and safety protection.” *Martinez-Cuevas*, 475 P.3d at 171. The provision  
3 “requires the legislature to pass appropriate laws for the protection of workers.” *Id.* These  
4 principles hold particularly true when the safety regulation at issue was enacted to protect  
5 employees against a global pandemic.

6 Consistent with this constitutional provision, the Department has adopted COVID-19  
7 restrictions because of the dangers of the virus. *See also* RCW 49.17.050 (rulemaking authority  
8 for airborne particles). Farm Boy has presented no authority that the Department does not have  
9 the constitutional and statutory ability to make judgments about what constitutes a threat to  
10 safety under the Washington Industrial Safety and Health Act, RCW ch. 49.17.

11 **3. There is no equal protection violation because Farm Boy’s assumption**  
12 **about the classes is incorrect**

13 To sustain an equal protection claim there must be different classifications affected by  
14 the law. *See Am. Legion Post #149 v. Dep’t of Health*, 164 Wn.2d 570, 609, 192 P.3d 306  
15 (2008). A classification passes rational basis review “so long as it bears a rational relation to  
16 some legitimate end.” *Id.* Farm Boy argues that there is an equal protection violation premised  
17 on an assertion that “there is indoor dining and consumption of food at local hospitals  
18 cafeterias, local airport, bus and train depot cafeterias and food vending, and indoor  
19 consumption of food at deli counters of local large supermarkets and retailers such as Walmart  
20 and Target.” Resp. 6; Resp. 9.<sup>4</sup>

21 But the distinction Farm Boy describes does not exist. Under the Governor’s  
22 Proclamation indoor dining is prohibited, and it does not matter if it is indoor seating at Costco,  
23 Walmart, or Target. Hall Decl. Ex. 3, 4. As the Department’s declaration states, the  
24 Department enforces its rule to indoor dining. Blackwood Decl. 3-4. According to Department  
25 expert Criag Blackwoodp, “Phase 1 continued the restriction that restaurants and bars from

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26 <sup>4</sup> Farm Boy provides no declarations or other evidentiary support for its assertions regarding dining at other facilities.

1 offering indoor dining services. I understand this restriction to apply all restaurants and food  
2 courts. This includes food courts within locations such as Costco, Target, or Walmart.  
3 Additionally, airports are prohibited from allowing dining within VIP lounges or restaurants  
4 and hospital cafeterias are prohibited from offering indoor dining to guests.” Blackwood Decl.  
5 3. Farm Boy has cited no evidence that other businesses are open for indoor dining. And  
6 contrary to its assertion at Resp. 8, there is no evidence of heftier fines to businesses like Farm  
7 Boy. If there were Farm Boy could appeal the citation before the Board of Industrial Insurance  
8 Appeals. RCW 49.17.140.

9 **4. Farm Boy’s remaining constitutional arguments are also without merit**

10 Farm Boy also argues that it has property right to produce and sell its products. Resp. 4  
11 This argument ignores the fact that Farm Boy has been free to provide drive-through and  
12 takeout food services since the November proclamation was issued. Farm Boy has not  
13 plausibly alleged that the Department’s rule impinges on any protected property interests. And  
14 if there were a valid takings argument, the damages are only monetary. That relief cannot be  
15 provided here. *See Robinson v. City of Seattle*, 119 Wn.2d 34, 49, 830 P.2d 318 (1992),  
16 *abrogated on other grounds by Yim v*, 194 Wn.2d 682.

17 Finally, Farm Boy lists other claims: contract, liberty, due process,<sup>5</sup> just compensation,  
18 privileges and immunities, peaceable assembly, and petition. Resp. 2. With no argument, this  
19 Court need not consider them. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

20 **B. The Department Has a Well-Founded Fear of Immediate Invasion of Its Clear  
21 Legal and Equitable Rights**

22 The Department has a well-grounded fear of immediate invasion of its clear legal and  
23 equitable rights to enforce regulations adopted under the Washington Industrial Safety and  
24 Health Act. *See Tyler Pipe*, 96 Wn 2d at 792. Farm Boy does not dispute this element. By  
25 being open for indoor dining with employees, Farm Boy violates WAC 296-800-14035. Thus,

26 <sup>5</sup> Farm Boy has received notice and the opportunity to heard for this preliminary injunction, and does not assert otherwise.

1 the Department’s right to protect workers from dangerous conditions is being invaded.

2 **C. By Staying Open, Farm Boy Is Creating a Significant Risk of Substantial Injury**  
3 **or Death**

4 Farm Boy’s actions are either leading to or will result in actual and substantial injury to  
5 the Department in its role of protecting workers statewide. *See Tyler Pipe*, 96 Wn 2d at 792.  
6 COVID-19 is caused by a highly contagious virus, and can cause serious illness or death. The  
7 rapidly increasing number COVID cases in our State threatens the health of workers at Farm  
8 Boy and in the workforce, and threatens to overwhelm our state’s hospital and medical  
9 systems. Lindquist Decl. 8.

10 Plainly, there is the probability of substantial bodily harm or death resulting from  
11 COVID-19. Even for less severe cases, the virus can cause respiratory symptoms, high fever,  
12 nausea, fatigue, and neurological symptoms. Lindquist Decl. 2. But there is also the possibility  
13 of death as complications leading to death may include respiratory failure, acute respiratory  
14 distress syndrome, sepsis and septic shock, thromboembolism, and multi-organ failure,  
15 including injury of the heart, liver, and/or kidneys. Lindquist Decl. 2. As former Assistant  
16 Director Soiza—the top workplace safety expert in the state—reports, “irreparable injury will  
17 occur if Farm Boy Drive In does not cease in-door dining operations . . . Contracting the  
18 disease will be irreparable if the condition becomes symptomatic with serious health  
19 consequences and potential death.” Soiza Decl. 11. Farm Boy’s actions in continuing to  
20 provide indoor dining services threaten workers because the primary control of the COVID-19  
21 virus is to avoid contact with others and maintain a safe distance when interaction is required.  
22 Lindquist Decl. 5.

23 Farm Boy disputes that there is a substantial probability of harm. Resp. 5. It also argues  
24 that the mortality risk is similar to the flu. Resp. 4. It cites and attaches a document from the  
25 CDC but that article makes no mention of the flu, let alone any assertion that mortality risk is  
26 similar to the flu. Farm Boy argues that restaurants constitute just 1.4 percent of COVID-19

1 transmission in New York. Resp. 4. Yet Farm Boy fails to account for the restrictions on  
2 indoor dine-in service during this time. Lower transmission rates during the time period  
3 actually demonstrate the efficacy of restrictions on indoor dine-in service. Finally, Farm Boy  
4 contends that overall death rates are low. Resp. 4. Farm Boy fails to provide the Ioannidis  
5 study it claims shows lower fatality rates. Farm Boy provides no expert testimony or  
6 declaration to dispute the Department's compelling scientific evidence showing the threat of  
7 death or serious bodily injury to employees exposed to the COVID-19 virus.

8 **IV. CONCLUSION**

9 This Court should issue a preliminary injunction requiring Farm Boy to comply with  
10 the Governor's Proclamations and WAC 296-800-14035.

11 DATED this 15<sup>th</sup> day of January 2021.

12 ROBERT W. FERGUSON  
13 Attorney General

14 

15 MICHAEL HALL, WSBA No. 19871  
16 Assistant Attorney General