STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 8198
RURAL EMPOWERMENT ASSOCIATION FOR COMMUNITY HELP, NORTH CAROLINA ENVIRONMENTAL JUSTICE NETWORK, WATERKEEPER ALLIANCE & WINYAH RIVERS ALLIANCE, Plaintiffs, v. STATE OF NORTH CAROLINA, TIMOTHY K. MOORE, in his official capacity at Speaker of the North Carolina House of Representatives; PHILIP E. BERGER, in his official capacity as the President Pro Tempore of the North Carolina Senate, Defendants, N.C. FARM BUREAU FEDERATION, INC Defendant-Intervenor	**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs, and in support of their Motion for Summary Judgment, show the Court:

I. SUMMARY OF ARGUMENT

The constitutional infirmities of North Carolina House Bill 467 ("HB 467") and Section 10 of Senate Bill 711 ("SB 711") (codified at North Carolina General Statutes §§ 106-701 & 106-702)(hereinafter collectively "the Farm Act amendments"), lie in their improper

purpose and their unreasonable deprivation of fundamental property rights without any good faith, appropriate, or direct connection to the government's interest in protecting the public health, safety and welfare. HB 467 and SB 711 upend nuisance law and fundamental constitutional rights to benefit a particular industry, giving it license to disregard harms it causes to neighbors by ensuring that its operations will almost never be subject to nuisance liability, but if they are, that such liability will be severely limited.

Both statutes were passed in reaction to and designed to interfere with ongoing nuisance litigation against the country's largest hog production corporation; tellingly, they apply only to nuisance claims filed against agricultural and forestry operations—these laws affect no other potential nuisance litigant, plaintiff or defendant. HB 467, adopted in 2017, eliminates all compensatory damages for nuisance except for diminution of property value; SB 711, adopted in 2018, (1) requires that plaintiffs live within one-half mile of the source of the nuisance, (2) demands that nuisance cases be filed within one year of the start of the offending operation, (3) extends the Farm Act's exemptions from nuisance to negligently or improperly operated facilities, and (4) requires evidence of civil or criminal enforcement against operations as a condition precedent to an award of punitive damages. *See* Session Law 2017-11 (HB 467, attached and incorporated hereto, as Attachment 1); Session Law 2018-113 (SB 711, attached and incorporated hereto as Attachment 2)

The most egregious aspect of HB 467's and SB 711's changes to the Farm Act is that they immunize those defendants who, because of the intensity and geographical scope of their operations, have the most severe impacts on neighbors; small, traditional farmers

are far less likely to negatively impact nearby residents than large-scale, industrial animal operations are. In the view of the bills' drafters, this is a feature, not a bug: the legislation was drafted for the specific purpose of undermining ongoing litigation not against small family farmers but against the country's largest hog production corporation.

Plaintiffs do not dispute that the North Carolina General Assembly has broad power to pass laws, nor that the courts generally defer to the Legislature when subjecting those laws to constitutional scrutiny. However, the General Assembly's power is not limitless: the North Carolina Constitution establishes clear legislative limits in Article I (detailing the fundamental rights reserved to the people) and in Article II (specifying limits on the Legislature's authority). Plaintiffs bring this facial challenge under N.C. Const. Art. I §§ 19 and 25 and Art. II § 24 because, as a matter of law, the General Assembly exceeded those limits when it passed HB 467 and SB 711.

As discussed below, the legislative record establishes—and Defendant Intervenors admit—that the Farm Act amendments were "enacted in response to litigation in the United States District Court for the Eastern District of North Carolina" against Smithfield Hog Production Division. North Carolina Farm Bureau Federation, Inc.'s Answer and Affirmative Defenses at 10 ¶ 69; s*ee also* Session Law 2018-113 (Attachment 2). While the General Assembly has broad authority to make laws, it is constitutionally prohibited from passing a "local, private or special" law relating to abatement of nuisances. N.C. Const. Art. II § 24(1)(a). The undisputed fact that the Farm Act amendments were passed in direct response to the nuisance suits and jury verdicts against Smithfield (and to prevent

any similar suits in the future) demonstrates that they are "special" or "private," as opposed to "general," laws.

Similarly, while the General Assembly may pass "general" laws affecting the common law nuisance remedy, it is constitutionally prohibited by N.C. Const. Art. I § 19 from exceeding the scope of its police power and unreasonably depriving North Carolinians of their fundamental property rights.

Finally, by eliminating all but diminution damages available to a successful plaintiff in a nuisance action against an agricultural or forestry operation, HB 467 violates N.C. Const. Art. I § 25's guarantee of the right to have a jury determine compensatory damages in private nuisance actions.

II. STATEMENT OF FACTS

A. Background

North Carolina is home to over 2000 industrial hog operations (IHOs), collectively housing around 9 million hogs.[1] These IHOs operate by confining the animals are into large containment buildings; each facility typically has between two and ten such buildings. The animals live their entire lives inside the buildings, standing on slotted floors through which their feces, urine, and other waste fall to collect in a storage pit underneath the building. The waste from the containment facility are periodically flushed into nearby open, football field-sized pits which the industry calls "lagoons." The hogs typically produce between 4,500 to 15,000 gallons of hog feces and urine per building each

[1] *See* "List of Permitted Animal Facilities 4-1-2020," available at https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/animal-feeding-operation-permits/animal-facility-map.

day.[2] To discard the waste created through hog production and prevent the lagoons from overflowing, liquid sewage is regularly sprayed on surrounding fields, typically through a center pivot irrigation system that sprays liquified waste into the air. When the liquid hog waste is sprayed onto the application fields, the spray can also run off onto neighboring properties or into surrounding surface waters traveling throughout the state.[3] *See* Ex. 1 ¶ 8; Ex. 2; Ex. 5; Ex. 6; Ex. 25.

B. Nuisance Litigation

In 2013, around 500 residents (nearly all of whom are African American) living near industrial hog operations noticed their intent to file suit against Smithfield's pork producer subsidiary, Murphy-Brown, LLC, for nuisance created by its operations.[4] Those plaintiffs included lifelong residents of properties neighboring IHOs. Some of the plaintiffs can trace back their family's ownership of their current properties over a century or more, and some of the plaintiffs are members of Plaintiffs REACH and NCEJN.

The plaintiffs recognized the complete control the corporation maintains over every aspect of hog production through its contracts, and so their claims were brought against Smithfield and *not* against the individual local growers. The plaintiffs sought damages for the "anger, embarrassment, discomfort, annoyance, inconvenience, decreased quality of life, deprivation of opportunity to continue to develop properties,"

[2] Ryke Longest, *History of Conflicts Between Swine Farmers and Neighbors in North Carolina: The Response of the Law to Conflict, Workshop on Agricultural Air Quality*, at 382 (June 5, 2006).
[3] The state Department of Environmental Quality (DEQ) has noted that IHOs' land applications are direct conveyances for runoff of the highly nutrient-laden water to surface waters. Final Neuse River Basinwide Water Quality Plan, Ch. 17 (2009), available at http://portal.ncdenr.org/web/wq/ps/bpu/basin/neuse/2009.
[4] *See* Request for Prelitigation Mediation of Farm Nuisance Dispute, Exhibit B, *Blanks v. Smithfield Foods, Inc.,* No. 13-R-685 (N.C. Super. Ct. July 3, 2013).

and "physical and mental discomfort and reasonable fear of disease and adverse health effects" caused by the horrible odors, flies, buzzards, truck traffic, and other impacts flowing from the operations.[5]

The adverse impacts from the IHOs about which plaintiffs' complained were supported by a broad range of public health and epidemiological research studies. These studies show, among other impacts, that the lagoon and sprayfield system can create air pollution [6] and spread aerosolized waste up onto property up to three miles away; [7] that runoff damages the environment, fish, wildlife, and in turn residents' recreational and subsistence fishing traditions;[8] that these operations are a source of stench and noxious gases, including hydrogen sulfide ammonia; bioaerosols including endotoxins, bacteria, yeasts, molds and other respiratory irritants;[9] that residents living near industrial hog operations suffer adverse health impacts including acute blood pressure, wheezing, asthma, headaches, muscle aches, burning eyes, stress, anxiety, anemia and interrupted

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[5] Cordon M. Smart, *The "Right to Commit Nuisance" in North Carolina: A Historical Analysis of the Right-to-Farm Act,* 94 N.C. L. REV. 2097, 2101-02 (2016).

[6] *See,* Michelle B. Nowlin, Conference on Agriculture and Food Systems: September 28, 2012: *Sustainable Production of Swine: Putting Lipstick on a Pig?*, 37 Vt. L. Rev. 1079, 1085, *see also* note 2, *supra.*

[7] *See, e.g.,* Steve Wing and Jill Johnston*, Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics and American Indians* (Oct. 19, 2015)(citing Todd Cole and Steve Wing, *Concentrated swine feeding operations and public health: A review of occupational and community health effects*, 108 Environmental Health Perspectives 685-699 (2000) and S. Schiffman, J. Bennett and J. Raymer, *Quantification of odors and odorants from swine operations in North Carolina*, 108 Agricultural and Forest Meteorology 213-240 (2001). Dr. Wing served as an expert witness in the nuisance cases. *See,* Erica Hellerstein, *"How Smelly Is Too Smelly? What We Learned from the First Two Days of the Murphy-Brown Hog Nuisance Trial"*, IndyWeek, Apr. 12, 2018, *https://indyweek.com/news/archives/smelly-smelly-learned-first-two-days-murphy-brown-hog-nuisance-trial./*

[8] *See* Michael A. Mallin & Lawrence B. Cahoon, *Industrialized Animal Production—A Major Source of Nutrient and Microbial Pollution to Aquatic Ecosystems*, 24 Population & Env't 369, 371 (2003).

[9] *See* Wing et al *supra* note. 7.

sleep; [10] and are also at high risk of exposure to antibiotic-resistant bacteria.[11] Ex. 7. More recently, the North Carolina Medical Journal published research further documenting the increased risk of serious health conditions suffered by residents in North Carolina.[12] This research highlighted that North Carolina is unique among hog producing states because of its concentration of IHOs in the southeastern portion of the state. The population density in that area and the high average number of hogs per operation result in exposing greater numbers of nearby residents and communities to the adverse health impacts of IHOs.[13]

Within weeks of the nuisance plaintiffs filing the prelitigation notice, the General Assembly amended North Carolina's Right to Farm Act ("RTFA") to further limit the ability to sue agricultural operations for nuisance.[14] The RTFA (and common law) already provided operations with a defense where the plaintiff "came to the nuisance," i.e.,

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[10] Steve Wing, Rachel Avery Horton and Kathryn M. Rose, *Air Pollution from Industrial Swine Operations and Blood Pressure of Neighboring Residents*, 121 Environmental Health Perspectives 92 (2013); *see also,* Steve Wing, Rachel Avery Horton, Stephen W. Marshall, Kendall Thu, Mansoureh Tajik, Leah Schinasi and Susan S. Schiffman, *Air Pollution and Odor in Communities Near Industrial Swine Operations*, 116 Environmental Health Perspectives 1362 (2008).

[11] *See* Stephanie Souchery, *MRSA Infection Found in Communities Near Hog Farms,* North Carolina Health News Network, Sept. 25, 2013, https://www.northcarolinahealthnews.org/2013/09/25/mrsa-infection-found-in-nc-communities-near-pig-farms/; Jessica L Rinsky, Maya Nadimpalli, Steve Wing, Devon Hall, Dothula Baron, Lance B Price, Jesper Larsen, Marc Stegger, Jill Stewart, Christopher D Heaney, *Livestock-associated methicillin and multidrug resistant Staphylococcus aureus is present among industrial, not antibiotic-free livestock operation workers in North Carolina,* July 2013, https://pubmed.ncbi.nlm.nih.gov/23844044/

[12] Julia Kravchenko, Sung Han Rhew, Igor Akushevich, Pankaj Agarwal and H. Kim Lyerly, *Mortality and Health Outcomes in North Carolina Communities Located in Close Proximity to Hog Concentrated Animal Feeding Operations, https://www.ncmedicaljournal.com/content/79/5/278.full.* The study compared communities with the highest concentration of hog operations to those without such operations (but similar in all other respects) and found there were 30% more deaths among patients with kidney disease, 50% more deaths among patients with anemia, and 130% more deaths among patients with a blood bacterial infection in communities near concentrated hog operations. These communities also experience greater risk of infant mortality and lower birth weights

[13] *Id.*

[14] Smart, *supra*, note 5.

acquired or moved to the property after the nuisance began. The 2013 amendments established that a change in ownership or size, or in the type of operation or product, was not a "fundamental change" that could subject a pre-existing farm to liability, thereby extending the "coming to the nuisance" affirmative defense to agricultural operations that transitioned to industrial hog operations without regard to whether or not they predated a nuisance plaintiff.[15]

In 2014, the nuisance suits were moved to federal district court in Raleigh. When it became clear in 2015 that the cases would go to trial, Smithfield's lawyers sought to limit the damages that could be recovered. But the court allowed the plaintiffs to proceed to have all their claims for damages heard— including damages for annoyance and reasonable fear of disease and adverse health effects.[16] Beginning in 2017, after the federal court ruled that the nuisance damages claims against Smithfield could proceed to trial, and continuing through the multiple jury verdicts against the company in 2018, Smithfield lobbyists and state legislators who have received substantial financial contributions from the corporation[17] responded by seeking to immunize Smithfield from nuisance liability through HB 467 and SB 711.

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[15] *Id.*

[16] *In re: NC Swine Farm Nuisance Litigation*, No. 5:15-CV-13-BR, Order Denying Motion to Dismiss 1 (Jun 24, 2015). In December 2016, plaintiffs stipulated that they were not seeking damages for loss to property value or rental value. See Ex. 21, p. 30.

[17] *See* https://indyweek.com/news/archives/n.c.-senate-overrides-cooper-s-hb-467-veto-hog-farm-protection-bill-law/; http://www.ncpolicywatch.com/2016/09/21/the-political-machine-behind-the-conflict-between-nc-farm-families-and-the-waterkeeper-alliance/.

As the plaintiffs in the nuisance suits that prompted HB 467 and SB 711 have so far successfully proven,[18] the odors, flies and other vermin, truck traffic and pollution from IHOs directly interfere with residents' (including those living more than a half mile from the offending operation) use and enjoyment of their property and force them to make difficult adjustments to their everyday lives. Neighbors typically keep their doors and windows closed, even investing in additional seals and coverings to keep out the outside air. They often are unable to spend time out of doors on their property or use their outdoor property for gardening or recreational purposes because of the stench and other pollution from the nearby operations. Ex. 2 ¶¶ 4-9 ("Although serving a meal as part of a community meeting is a deep tradition, oftentimes the stench from the hog and poultry facilities make it impossible to eat or even cook outside."); Ex. 6 ¶ 8 ("I cannot have or enjoy cookouts on my property, or even sit out on my porch and enjoy clean air, because of the stench and the flies."); Ex. 5 ¶ 5; Ex. 1 ¶ 8; Ex. 8; Ex. 9; Ex. 25; Ex. 26. Neighbors also cannot use their homes to engage in business or entertain visitors or guests. Ex. 2; Ex. 6. Residents have also abandoned wells for bottled water or paid to hook up to county water because of contamination from the industrial agricultural operations. Ex. 2.

B. Plaintiffs' Mission and Advocacy

All of the Plaintiff organizations are dedicated to environmental justice and the protection of the environment, and all have been directly harmed by the frustration of their missions and diversion of resources caused by the Defendants' actions in adopting

[18] *See, e.g.*, http://www.ncpolicywatch.com/2020/02/03/a-federal-appeals-court-judges-remarkable-speech-is-the-latest-surprise-in-ncs-hog-nuisance-lawsuits/; https://www.wral.com/another-verdict-against-smithfield-but-with-low-awards/18060146/.

HB 467 and SB 711. In addition, these organizations have members whose constitutional rights have been directly harmed by these legislative changes. Exs. 1, 3, 5, 7.

Rural Empowerment Association for Community Help ("REACH") is a membership-based organization in Warsaw, North Carolina whose mission is to address social, economic, and environmental inequities in Duplin, Sampson, Pender and Bladen Counties and protect its members' health and welfare. REACH has been a member of the North Carolina Environmental Justice Network (NCEJN) since 2004. The organization provides resources and support to members and area residents who are directly impacted by the pollution and other adverse effects of industrial hog and poultry operations. REACH has partnered in peer-reviewed scientific research related to IHOs' public health and environmental impacts.[19] REACH's other programmatic activities include instruction on environmental awareness, sustainable agriculture, small business development and homeownership, among other topics. Ex. 1.

Many REACH members are directly affected by the impacts of industrial agricultural operations, including air and water pollution, noxious odors, truck traffic, flies and buzzards, and swine waste that makes its way onto their property and into their homes. *Id.*, Ex. 2 During the legislature's consideration of HB 467 and SB 711, REACH organized and provided transportation to and from Raleigh for affected community members to attend legislative committee meetings and give public comments; held regular community meetings; engaged the media to raise awareness of community concerns; and worked to educate the public and get elected officials to hear and address

[19] See https://www.researchgate.net/scientific-contributions/2021190496-Devon-Hall.

its concerns and those of its members. REACH has continued that advocacy and education since the passage of these bills and has been forced to divert resources away from its core mission and planned organizing, advocacy, research, and education activities in order to try to continue to hold this industry accountable for its adverse impacts on the community. Exs. 1, 25, 26.

NCEJN is a non-profit, grassroots, African American-led coalition of community organizations, individuals and their supporters. NCEJN members include low income people of color as well as community organizations working to address issues of climate, environmental, racial, and social injustice across the state. Its mission is to ensure that environmental public policy is based on mutual respect and justice for all peoples, free from discrimination or bias. NCEJN has worked for more than a decade to combat environmental racism by encouraging meaningful regulation and monitoring of industrial agricultural operations in North Carolina, including collaborating with epidemiologists on research related to those operations' health effects on neighboring communities.[20] Ex 5.

NCEJN's members include African American residents of eastern North Carolina who live near and directly suffer from adverse health and environmental impacts from IHOs in their communities, including air and water pollution, noxious odors, truck traffic, flies and buzzards, and the spraying of waste onto their property and their homes. *Id*. Many NCEJN members whose right to bring a nuisance claim was eliminated when House Bill 467 and Senate Bill 711 became law fear retaliation from Smithfield, the Pork

[20] See https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2007.110486.

Council and/or their neighbors who work for IHOs if they were named as individual plaintiffs in this lawsuit. These members have been directly injured by the passage of these laws. *Id.*

NCEJN as an organization has also been harmed by this legislation. While the legislature was considering these bills, NCEJN staff travelled to Raleigh to attend committee meetings, gave public comments, drafted blog posts, spoke with media, held community meetings, and engaged the public and elected officials to raise awareness of the impacts of this legislation and to highlight how their passage would unconstitutionally discriminate against residents and deprive them of their constitutional rights. The organization also mobilized residents from eastern North Carolina to travel to Raleigh to testify in legislative meetings about the community impacts of HB 467 and SB 711. *Id*. ¶¶ 6-7, Exs. 8, 9, 25, 26. NCEJN also used time at its meetings and during the annual NCEJN Summit to discuss the impacts of HB 467 and SB 711 on its members. Both before and since the passage of HB 467 and SB 7u, NCEJN has been force to divert its valuable and limited resources away from its core mission and planned organizing, advocacy, research, and education activities in order to investigate, respond to, mitigate, and address the concerns of its members resulting from the State's elimination of their nuisance remedy against IHOs. Ex. 5.

The mission of Waterkeeper Alliance (WKA) is to hold polluters accountable in order to preserve and protect natural waterways and watersheds. Ex. 3. WKA consists of 176 U.S. member organizations, including 43 Waterkeeper organizations and affiliated organizations in 44 countries on 6 continents. *Id*. In North Carolina, there are currently 16

WKA affiliates. WKA and its member organizations cumulatively have tens of thousands of individual dues-paying and voting members that live, work and recreate on waterways and in watersheds across the United States. *Id*. HB 467 and SB 711 directly harm these individual members, many of whom have lost the right to bring a nuisance action against neighboring IHOs as a result of these bills. Even if some members may still be able to bring an action, they will not do so because the restrictions imposed by the Farm Act amendments make it harder to find legal representation from the private bar, and their legal costs would likely exceed the amount of damages they are now able to recover. *Id.*

WKA has also been directly harmed as an organization by the consideration and passage of this legislation. WKA has been compelled to invest significant time and resources to protect the use and enjoyment of affiliate members' private property against pollution from industrial animal agriculture, which included travel to Raleigh to attend and testify committee meetings as well as engaging the public and elected officials to raise awareness of the impacts of this legislation *Id.,* Ex. 26. WKA has pursued nuisance remedies for the loss of use and enjoyment of property, because they are the most effective legal means to hold industrial animal agricultural polluters accountable and deter the industry from continuing its harmful practices. HB 467 and SB 711 frustrate WKA's mission and force it to divert its resources away from its core mission and planned monitoring, advocacy, research, and education activities in order to find other ways to hold industrial animal agricultural polluters accountable for their pollution, to protect and preserve North Carolina's waterways, and to get the industry to change the practices which cause the harms that the legal remedy for nuisance is uniquely designed to address.

WKA now must continue to engage in education efforts to inform members in North Carolina about their loss of rights due to the passage of HB 467 and SB 711. Ex. 3.

Winyah Rivers Alliance ("WRA") has been a licensed member of WKA since 2002. WRA watches over the watersheds in the Lower PeeDee Basin, a drainage area of 11,700 square miles. Collectively this is referred to as the greater Winyah Bay watershed because all rivers ultimately discharge into Winyah Bay at Georgetown, South Carolina. Winyah Bay is the third largest estuary on the Eastern Seaboard. WRA's mission is to protect and improve the water quality of the Lower PeeDee River Basin through education, advocacy, and action. WRA currently has approximately 500 members, many of whom live, work, recreate on, and obtain their drinking water from waterways and in watersheds in North Carolina. WRA includes members who live on and/or own property impacted by pollution from industrial animal operations. Ex. 4. WRA meets with landowners to discuss the impacts of industrial animal agriculture and to learn more about nuisance conditions and property rights; conducts educational programming focused on the impacts of industrial animal agriculture; reports and provides video and photographic evidence of suspected permit and regulatory violations to DEQ and/or its subdivisions; collects surface water quality samples to assess the degree of those impacts, and pays for the analysis of such samples at state-certified labs. *Id.*

The consideration and passage of HB 467 and SB 711 directly harmed WRA by frustrating its mission and forcing it to divert resources away from its core activities—including issues related to the impacts and recovery efforts following devastating hurricanes in the region-- in order to find other ways to hold industrial animal operations

accountable for their pollution, to protect and preserve North Carolina's waterways, and to get the industry to change the practices which cause the harms that the legal remedy for nuisance is uniquely designed to address. WRA expended and continues to expend resources and time to combat the effects of these laws on the lower PeeDee basin and its watersheds, and to educate and advocate for its members. *Id*.

C. HB467

HB 467 added a new provision to the Right to Farm Act (N.C.G.S. § 106-702) entitled "Limitations on private nuisance actions against agricultural and forestry operations." Session Law 2017-11 (Attachment 1). HB 467 limits the damages available to a plaintiff in a nuisance case against an agricultural or forestry operation to only "the reduction in the fair market value of the plaintiff's property caused by the nuisance" or "the diminution of the fair rental value of the plaintiff's property caused by the nuisance." *Id.* HB 467 thereby eliminated the ability of plaintiffs alleging nuisance from agricultural and forestry operations to recover the broad range of traditional common law damages available to all other nuisance plaintiffs, including damages for loss of use and enjoyment, adverse impacts on mental or physical health, emotional distress, and inconvenience, discomfort or annoyance. HB 467 further limited recovery of the remaining allowable damages for diminution of value for any successor in interest to the impacted property, even against a different defendant:

> If any plaintiff or plaintiff's successor in interest brings a subsequent private nuisance action against any agricultural or forestry operation, the combined recovery from all such actions shall not exceed the fair market value of his or her property. This limitation applies regardless of whether the subsequent action or actions were brought against a different defendant than the preceding action or actions.

Id. Lastly, as introduced, HB 467 expressly applied to pending litigation.[21]

During the House Judiciary Committee III debate on HB 467, the bill's co-sponsor Rep. Davis explained that "it all" (referring to HB 467) was necessary because of rulings made by Judge Britt in the pending nuisance litigation against Smithfield, and "that was really the genesis" for the legislation. Ex. 20. at 16-17. Rep. Davis claimed that HB 467 was necessary because Judge Britt said he could not rule on the issue of damages because there "isn't any" North Carolina law to give him "guidance on how to move forward in this type of litigation." *Id.* at 17. That claim is contradicted by the plain language of Judge Britt's decision:

> Allowing a plaintiff to recover such damages comports with the general rule in North Carolina "that a tortfeasor 'is responsible for all damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong, under the facts as they exist at the time the same is committed and which can be ascertained with a reasonable degree of certainty.'" It is also consistent with the Restatement (Second) of Torts § 929(1)(c) (Am. Law Inst. 1979), another provision of which the North Carolina Court of Appeals has adopted regarding diminution in value and restoration damages awarded as a result of nuisance, among other claims.

In re NC Swine Farm Nuisance Litig., No. 5:15-CV-00013-BR, 2017 WL 5178038, at *9. When asked why the bill's restrictions on damages were limited to nuisance claims, Rep. Davis responded "that's because that's what the plaintiffs are using as their legal period to recover damages. They're not bringing anything else. . . . they're not pursuing any type of other legal claim." Ex. 20 at 15. He later reiterated that the bill was specifically about the

[21] https://webservices.ncleg.gov/ViewBillDocument/2017/1904/0/DRH40266-TQ-19 ("Section 2.(a)This act is effective when it becomes law and applies to actions filed, arising, or pending on or after that date.").

pending claims against Smithfield, stating "this is just relating to the nuisance of temporary or permanent nuisance legal theory." *Id.* at 18-19. In seeking to amend HB 467 to ensure that it would not apply to pending litigation, Rep. Reives noted that the bill's sponsors "are actually aiming one particular case." *Id.* at 23.

HB 467 was debated on the floor of the House on April 10, 2017. Naeema Muhammed, Organizing Director of Plaintiff NCEJN, attended the session that day, as did other representatives of NCEJN. *See* Exs. 5, 8. Rep. Dixon, one of HB 467's primary sponsors, spoke directly to the bill's relationship to the pending litigation against Smithfield, complained about the lawyers representing the plaintiffs in the case, and discounted the plaintiffs' claims. Ex. 21, at 5-7. Rep. Davis reminded his colleagues that "this legislation deals with nuisance lawsuits," and that it was exclusively focused on the only type of claims and damages sought in the cases against Smithfield. *Id.* at 9-10. Rep. Davis repeatedly focused on the pending litigation ("what you have is 26 cases that are presently pending in federal court. . . . These 26 cases represent 541 plaintiffs"), and the court's refusal to dismiss the case ("there was motion to dismiss that was filed. . . . And what Judge Britt did is the genesis of why we are here tonight.") *Id.* at 10-11.

During the debate, several members expressed concern about limiting nuisance remedies to protect a particular defendant or entity. Rep. Blackwell referred to the bill as "a law specially designed to favor a single defendant at the expense of whatever the common law rights of those 500 and some plaintiffs are. . . . it is encouragement for well healed (sic) defendants or plaintiffs to decide they will bring all heavily disputed claims to

the legislature." Ex. 21 at 21. He went on to highlight the sponsor's admission that the bill is limited to nuisance claims because the plaintiffs suing Smithfield

> didn't make the other claims, so the Bill is only addressing the pending litigation, that's what it's for. That's about nuisance, that's where the defendant is worried about losing and so they're asking us to pull their chestnuts out of the fire.

*Id.*at 22. Rep. Speciale agreed:

> what's right is right and what's wrong is wrong and that doesn't change . . . based on who you're doing it for or why you're doing it. . . . If we're going to change the laws and limit compensatory damages. . . then we need to do it for everybody. . . . to sit here and single out for specific court case and try to determine the outcome is the wrong thing to do."

Id. at 23.

Rep. Blust echoed the concerns about the bill being designed to protect one entity. Noting that in the pending litigation, the plaintiffs had determined they would not seek damages for diminution in the value of their property,

> Then the very day or else it was the next day, the defendants - - the defendant's here asking us to take away all other damages that have been recognized by courts for these types of actions. I just don't think that's a good thing for us to do. . . . that we are involving ourselves as a legislature in picking a winner in a lawsuit.

Id., p. 30. Rep. Blust attempted to amend the bill to make it apply only to litigation commenced after the its effective date, noting that the legislature would be specifically interfering with the pending litigation against Smithfield and the precedent such an action would set. "I fear that we're going to go down this route and litigants throughout the state will be appealing to us after interlocutory orders that may affect pending litigation to come and change the law. . . . we're changing the law that's long been

recognized." *Id.* at 31. Rep. Blust then twice reminded his colleagues of the individual constitutional rights HB 467 would impact:

> And I would just say one other thing, is that somebody's private property rights, particularly their home, the enjoyment and use of that unobstructed is one of the foundations of our freedom. It's one of the core, its's one of the pillars of our freedoms and this—this is something the legislature should not do. . . .
>
> The citizen's use of their own home, nothing is more fundamental to liberty that you get the use of your home unimpeded by bad things that neighbors may do on their property. It's long been recognized, we ought not to tamper with it in this Bill today, particularly to pick the winner in a lawsuit currently before the courts.

Id. at 31, 52.

In opposing the amendment to make the bill applicable only to cases filed after its effective date, Rep. Davis reiterated the urgency for the legislature to specifically intervene in the pending litigation ("if you allow this amendment what's going to happen to the pending cases that are sitting there because Judge Britt cannot rule on it."). *Id.* at 41. Rep. Dixon emphasized that the bill was supported by "the North Carolina Farm Bureau, the North Carolina Pork Council . . . exactly like it is." *Id.* at 53. The amendment was adopted over their opposition, and then the HB 467 passed the House. *Id.* at 58.

HB 467 passed the Senate on April 26, 2017 with minor revisions, and the House concurred with that version on April 27. On May 5, Governor Cooper vetoed the bill. In his veto message, the Governor said

> [n]uisance laws can be used to protect property rights and make changes for good. . . . . Special protect for one industry opens the door to weakening our

nuisance laws in other areas which can allow real harm to homeowners, the environment, and everyday North Carolinians.

Ex. 22. The legislature voted to override the Governor's veto and HB 467 became law on May 11, 2017.

D. SB 711

On April 26, 2018, the jury in the first nuisance trial issued a $50.75 million verdict against Smithfield. Ex. 8.[22] SB 711, an omnibus agricultural bill titled "An Act to Make Various Changes to the Agricultural Laws" was filed just three weeks later, on May 16.[23] On June 5, 2018, the bill was amended to include the revisions to the Right to Farm Act that are at issue in this case.[24]

Senator Brent Jackson was the primary sponsor of SB 711. His district includes Duplin and Sampson Counties, which are home to the largest and most dense concentration of industrial hog operations in the state. Ex. 8. Speaking about the purpose of the legislation, Sen. Jackson made clear that it was in response to the recent verdict: "Our goal is to ensure that all farming operations are protected from frivolous lawsuits. Due to recent judicial rulings, it has become blatantly obvious that the legislature must take action to clarify our intentions and correct these misguided rulings." *Id.*

The portion of SB 711 that amended the Right to Farm Act contains a series of "whereas clauses" that make explicit that the legislation was based on the recent verdict and the remaining pending lawsuits against Smithfield. "Whereas, recently a federal trial

[22] The verdict was later reduced to $3.25 million under N.C.G.S. §1D-1 et seq, the state law capping punitive damages. *See* Ex. 8.
[23] https://www.ncleg.gov/Sessions/2017/Bills/Senate/PDF/S711v0.pdf
[24] https://www.ncleg.gov/Sessions/2017/Bills/Senate/PDF/S711v2.pdf

court incorrectly and narrowly interpreted the North Carolina Right to Farm Act . . ." Session Law 2018-113 (Attachment 2, at 1). The bill establishes a comprehensive prohibition on nuisance lawsuits against an agricultural or forestry operation unless: (1) the impacted property is within one half mile of the source or structure causing the nuisance; and (2) the operation is less than a year old or undergoes a "fundamental change," which does not include a change in the farms' ownership, size, technology, or product. If an operation undergoes a "fundamental change," any suit must be brought within a year of that fundamental change. *Id.* at 7. Importantly, SB 711 provides that the one year statute of limitations for filing a claim against an agricultural operation begins to run *not* from the inception of the nuisance, but rather from the date of establishment of the operation. *Id.* Therefore, an operation that begins to cause a nuisance 366 days from its opening is immune from suit under this provision.

SB 711 deletes N.C. Gen. Stat. § 106-701(a2), which excluded "negligent or improper" agricultural or forestry operations from the law's exemption from nuisance liability. *Id.* at 8. The legislation also eliminates the clause in N.C. Gen. Stat. § 106-701(d) which permitted a local government to regulate and abate nuisances created by forestry or agricultural operations "whenever a nuisance results from the negligent or improper operations" of those facilities. *Id.* Lastly, SB 711 imposes narrow and novel restrictions on punitive damages for nuisances caused by agricultural or forestry operations, limiting the availability of such damages to only those instances where the offending operation has been

> subject to a criminal conviction or a civil enforcement action taken by a State of federal environmental regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance within three years prior to the first act on which the nuisance action is based.

Id. at 9. As with HB 467, as introduced, these provisions would have applied to the pending nuisance litigation against Smithfield.[25]

The Senate Judiciary Committee debated the bill on June 6, 2018. Agriculture Commissioner Steve Troxler made clear that the bill was designed in response to the nuisance litigation, saying "These lawsuits that are happening can put all of us out of business." Ex. 9. Elsie Herring, a REACH member and NCEJN organizer whose property in Duplin County has been in her family for over a century, traveled to Raleigh to attend and testify at the hearing. *Id.,* Ex. 1 ¶12; Ex. 8; Ex. 9. Although questions about the constitutionality of the bill were raised by committee members and by former House Majority leader and speaker pro tempore Paul Stam, the bill was quickly passed out of committee and was debated on the floor of the Senate beginning on June 7. Ex. 8, 9.

The Senate debate further reflected that SB 711 was brought forward in direct response to the recent verdict and the additional pending nuisance lawsuits. Sen. Tucker stated that the bill was necessary because "fancy lawyers from out of state came in here and promised somebody money. . . . and that's all it is." Ex. 13, at 1:12. Sen. Jackson continued to stress the need to address the ongoing litigation against Smithfield. "The court systems don't seem to be able to . . . understand what we're putting in the general statutes. They don't seem to able to interpret the intent that what Right to Farm actually

[25] *Id.* ("Section 10(c) This section is effective when it becomes law.")

means." Ex. 14 at 14:40. Immediate legislative action was necessary, he said "because it is obvious that the court systems do not understand how to interpret a General Statute." *Id.* at 15:35. Sen. Jackson stressed the importance for the legislature to tell the industrial agricultural corporations "that we support them." *Id.* at 19:15.

Others speaking on the bill noted that SB 711 would tip the scales in favor of corporations against their neighbors, and that it was inappropriate to be legislating in response to ongoing litigation. Sen. McKissick said "Why would we want to deprive people of their day in court? We ought to have confidence in our judges and triers of fact to listen to the evidence and determine if that evidence is persuasive." Ex. 13 at 59:00. He also questioned "why would we create this carve-out, this unique carve-out when it comes to these agricultural when we are not carving it out for anything else when it comes to nuisance law?" *Id.* at 1:02.

SB 711 was debated again in the Senate on June 11. Sen. Jackson read the "whereas" clauses to the anti-nuisance provisions on the bill:

> Whereas, frivolous nuisance lawsuits threaten the very existence of farming in North Carolina; and
>
> Whereas, in response to the long-standing threat to agriculture, in 1979 the General Assembly enacted the State's first effort to statutorily protect the ability of farms and forestry operations to continue to operate as surrounding development encroached; and
>
> Whereas, following the 1979 enactment, at least three succeeding General Assemblies in 1992, 2013, and 2017 tried to perfect a statutory framework that broadly fosters a cooperative relationship between farms and forestry operations and their neighbors across North Carolina; and
>
> Whereas, recently a federal trial court incorrectly and narrowly interpreted the North Carolina Right to Farm Act in a way that contradicts the intent of the

> General Assembly and effectively renders the Act toothless in offering meaningful protection to long-established North Carolina farms and forestry operations; and
>
> Whereas, regrettably, the General Assembly is again forced to make plain its intent that existing farms and forestry operations in North Carolina that are operating in good faith be shielded from nuisance lawsuits filed long after the operations become established; Now, therefore…

Ex. 15, at 40:25; *see* Session Law 2018-113 (Attachment 2). Sen. Jackson repeated during the debate that these amendments were being brought forth "due to the recent court decisions," Ex. 15, at 42:52; and that the bill was necessary to deal with "these nuisance lawsuits." *Id*. at 55:56. The problem, he told the Senate, was "money grabbing . . . out-of-state lawyers. It's time we stand up to them." *Id*. at 59:29. SB 711 was necessary, he said, "due to the recent erroneous court rulings, where a judge turned a blind eye," *id.* at 1:02; and that because of that, the legislature needed to defend "these companies." *Id.* at 1:00:26

Other Senators also emphasized that SB 711 was a response to the nuisance verdict and designed to address the pending litigation. In defending the bill, Sen. Hise said "we've had a judge that says those smells and odors are nuisance." Ex. 16, at 11:10. He also accused those seeking to delay the bill for further discussion of trying to give residents more time to file lawsuits. *Id*. at 14:10. Defendant Berger said the bill was needed because "a court comes in and says . . . a farmer . . . can be slapped with a nuisance lawsuit." *Id.* at 20:26. He then specifically named the farm that was the subject of the recent nuisance verdict as the reason why the bill should be adopted. *Id.* at 21:15. SB 711 passed the Senate on June 11 and was sent to the House.

The House Agriculture Committee considered SB 711 on June 12.[26] Senator Jackson presented the bill and answered questions from the committee. When asked about the impacts of the bill on neighbors' ability to protect themselves from nuisance, Sen. Jackson explained that neighbors could still bring a nuisance suit, albeit under the limited circumstances described in the bill. He also made clear that the restrictions on nuisance in SB 711 were designed to address the ongoing Smithfield litigation. "The latest court ruling is one of the reasons I am so passionate about this," he said, elaborating that SB 711 was necessary because of "what this particular federal court judge did in his ruling on that first case." Ex. 24 at 8:27-42. But with SB 711, Sen. Jackson said, "we are addressing that." *Id.* at 9:56. Rep. Reives asked how this bill related to HB 467, which had been passed the previous year, noting that this was another bill impacting that same class of persons as the previous one, and that with the additional restrictions on SB 711, "I don't know that you've got a whole lot left." *Id.* at 22:45. In response, Sen. Jackson said "After this recent court ruling . . . the baby was thrown out with the bathwater, and we are correcting that today." *Id.* at 23:45. Rep. Harrison noted that a jury had made that decision, which was "not against the farmers, it was against a large agricultural entity. *Id.* at 38:52. Sen. Jackson replied that "we need to let it be known that we welcome Smithfield foods to stay here in North Carolina . . . . it is imperative, moving forward, that if we don't do something to let them know they are welcome here, that they will be leaving the state." *Id.* at 39:25.

REACH and NCEJN's Elsie Herring testified at the hearing about what she and her neighbors experience as a result of the hog operations, including smells, vermin, water

[26] https://www.ncleg.gov/BillLookup/2017/sb%20711

pollution, and waste drift from the spray fields. She asked why impacted neighbors and communities were not being given any consideration in these discussions, and urged the legislature to seek a solution that can help the community people as well as the farmers. Ex. 25 at 0:01-2:05.

Will Hendrick, Senior Attorney and Manager of Plaintiff WKA also testified at the hearing. He said that the bill would be "the third strike" against property rights taken by the legislature since the filing of the nuisance suits against Smithfield. Ex. 26 at 0:27-2:22. Violet Branch, a lifelong resident of Duplin County and member of REACH also adversely affected by a neighboring hog operation testified that she had been accused of trying to put the operation out of business. She explained that was not true: "They can have all the hogs they wanted to, but just keep the scent to themselves." *Id.* at 4:55. Ms. Branch also said she and her family had been there long before the hog operations started. *Id.* Larry Baldwin, Crystal Coast Waterkeeper and Advocacy Director of the White Oak - New Riverkeeper Alliance (both affiliate members of WKA) also testified at the hearing. He asked why the legislature could not find a solution to the impacts of these operations besides taking away the property rights of the people who live near them. *Id.* at 7:17-9:10.

Jessie Ladsen, a Duplin County Commissioner and REACH member, testified "as a person who lives within a mile of the stink." *Id.* at 12:05. She described the impacts on her family home and on her business. Another Duplin County resident and REACH member, Jimmy Wayman, also testified about the odors and the health impacts on his home and family. He said that they were not trying to put anyone out business, but just wanted the operations to be cleaned up. *Id.* at 15:23-16:39.

SB 711 passed through House committees in one day and debate was taken up on the floor of the House on June 13. That the bill was crafted in response to the nuisance litigation was a central focus of the House discussion of SB 711. Rep. Dixon said the bill was needed because "it's easy to go in a courtroom. It's easy to talk about the law." https://www.ncleg.gov/DocumentSites/HouseDocuments/2017-2018%20Session/Audio%20Archives/2018/06-13-2018.mp3, at 1:59. Other members echoed the need to address the Smithfield nuisance litigation, and rejected amendments seeking to temper the bill, asserting they would expand the possibility of nuisance lawsuits indefinitely, or open floodgates of litigation over the next few years. *Id.* at 2:08-2:16, 2:30. Rep. Dixon stated that the express goal was to limit these nuisance lawsuits. *Id.* at 2:31. And although he insisted that the bill had nothing to do with the current lawsuits, Rep. Dixon expressly identified the operation at issue in the nuisance case, claims made by Smithfield in the trial, and the award of punitive damages in that case as the justification for SB 711. *Id.* at 2:52.

In response, Rep. Blust asked why the defendants in the Smithfield cases should be treated differently before the law. *Id.* at 2:58. Rep. Blackwell similarly argued that "[w]e're going to close the door as effectively and as tightly as we can to anybody who might sue you in this favored group" and treat plaintiffs who do sue differently than those who sue any other defendant for nuisance. *Id.* at 3:19. Rep. Blackwell also noted that the General Assembly had preempted local land use regulations that may have helped address the causes of the nuisance. *Id.* at 3:20-3:21.

The House continuing to debate SB 711 on June 14. Representative Blust challenged the idea that the bill was not an attempt to defend Smithfield, stating that "The act itself says it was about that lawsuit. That verdict was entered on April 26 and then we're here by early June with supposedly a legislative fix."

https://www.ncleg.gov/DocumentSites/HouseDocuments/2017-2018%20Session/Audio%20Archives/2018/06-14-2018.mp3, at 2:00. He continued to warn against the legislature intervening to affect the outcome of these cases:

> Let me be frank and tell the truth, this bill is moving like this because we are taking sides in a dispute. Now, some have filed, some haven't filed, and we're saying to certain people . . . we're going to protect you, and to tell the truth too it *is* about one giant corporation.
>
> We are saying we in the legislature know better than the courts, we know better than the facts, we know better than the law. We're going to protect one litigant and we're gonna say to the other "you don't matter, you don't count" and it's because the one side has the ear of the powers that run this institution. That's why it's moving like this. . . .

Id. at 2:00-2:02.

Rep. Blust noted that the law already strongly favored agricultural interests, but because "our side loses," the legislature was going to make it even more difficult for residents impacted by nuisances from these facilities. *Id.* at 2:07. He also pointed out that the proposed one-year statute of limitations in the bill created an additional special exemption exclusively for the hog industry:

> You know they give one year. There's a one-year provision in here. All the hog lagoons were in place by 1997 so effectively the way this is written there's nobody that's going to bring one of these actions against only a hog producer. It doesn't protect the chicken farmer. It's not going to protect the dairy farmer.

Id. at 2:08. Rep. Richardson defended the legal process as the appropriate forum for resolving the controversy, noting that an impartial jury had looked at the facts and the evidence in the case, made a determination about "the callous indifference" of the company towards its neighbors, and "because of that, we've gone into hysteria." *Id.* at 1:55.

The House passed SB 711 on June 14, the Senate concurred the same day, and the bill was ratified on June 15 and sent to the Governor.

On June 25, 2018, Plaintiffs NCEJN, REACH, and WKA, along with many of their members, held a press conference at the General Assembly on SB 711 and its potential impacts on residents in eastern North Carolina, and spoke directly to their representatives. Exs. 1, 3, 5. Later that day, the bill's supporters also held a rally at the legislature and featured speeches from Lt. Governor Forest, Commissioner of Agriculture Steve Troxler, Defendants Berger and Moore, Rep. Dixon, and Sen. Jackson.[27] That same day, Governor Cooper vetoed SB 711. His veto message recognized that

> property rights are vital to people's homes. . . . North Carolina's nuisance laws can help allow generations of families to enjoy their homes and land without fear for their health and safety. . . . Our laws must balance the needs of business versus property rights. Giving one industry special treatment at the expense of its neighbors is unfair.[28]

The Senate voted to override the veto on June 26, and the House debated overriding the veto on June 27. During that debate, Rep. Richardson said that the bill would "severely limit due process" and was the most harmful proposal "to individual liberties and individual due process that I can imagine."

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[27] https://www.wral.com/group-rallies-in-support-of-agriculture-in-nc/17654403/, Catherine Clabby, "*Contrasting Narratives in the Hog Farm Bill Fight,"* North Carolina Health News, June 26, 2018, https://www.northcarolinahealthnews.org/2018/06/26/contrasting-narratives-in-hog-farm-bill-fight/

[28] https://webservices.ncleg.gov/ViewBillDocument/2017/7351/0/S711-BD-NBC-2506

https://www.ncleg.gov/DocumentSites/HouseDocuments/2017-2018%20Session/Audio%20Archives/2018/06-27-2018.mp3 at 20:30. Rep. Ager, "a small scale hog farmer in the mountains," also spoke against overriding the veto, and pointed out the very issue that was central to the plaintiffs' claims against Smithfield—that the multi-billion dollar hog giant should stop using the antiquated lagoon and sprayfield method of dumping hog waste and thereby stop harming neighbors and the environment:

> I rise to say this bill is generally good but I can't support section 10. There are better ways to manage hog waste than pumping it into a lagoon and spraying it on the land. Let's stop the lawsuits by modernizing waste management in NC. . . . I say that we need to be good neighbors in NC.

Id. at 22:25. Rep. Blust then noted the same point that forms the core of Plaintiffs' facial challenge: "Private property rights, especially of the homestead, are the most precious fundamental things we have that make us free. . . . Changing this law because of the exigencies of the moment is a fundamental crack in that bedrock private property rights." He also criticized the Legislature for changing the law because of "this one case, and these one series of cases, against a huge operation." *Id.* at 26:15-28:15.

The North Carolina legislature overrode the Governor's veto on June 27, 2018.

E. Actions Following Passage

In the wake of the passage of SB 711, juries returned nuisance verdicts against Smithfield in each of the next four trials that were held.[29] The Plaintiffs continued their advocacy around the impact of the changes to the Right to Farm Act, including outreach

[29] Barry Yeoman, *Here are the rural residents who sued the world's largest hog producer over waste and odors—and won,"* Food & Environment Reporting Network, De. 20, 2019, https://thefern.org/2019/12/rural-north-carolinians-won-multimillion-dollar-judgments-against-the-worlds-largest-hog-producer-will-those-cases-now-be-overturned/

to residents and public education efforts. *See* Exs, 1, 3, 4 and 5. In August 2018, NCEJN and REACH held a press conference and rally in Duplin County to challenge Smithfield and the NC Farm Families' divisive rhetoric pitting neighbors against the farmers working under contract with Smithfield -- all of whom share the same community. NCEJN's Naeema Muhammed said "We feel like Smithfield is pitting neighbors against neighbors when they talk about people who are in the nuisance lawsuits. Our community members just want to breathe clean air, drink clean water and not be made sick when they step outside."[30] REACH, NCEJN, and WKA also filed an amicus briefs at the Fourth Circuit in support of the plaintiffs in Smithfield's appeal of the first nuisance verdict.[31]

III. STANDARD OF REVIEW

To prevail on their Motion for Summary Judgment, Plaintiffs must establish that they are entitled to judgment as a matter of law. *See* N.C.G.S. § 1A-1, Rule 56(c) (2001). "The purpose of [Rule 56(c)] is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 578-579, 573 S.E.2d 118, 123 (2002)(citing *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001)). "The court's function at this juncture is to find factual issues, not to decide them." 356 N.C. at 579, 573 S.E.2d at 124 (citations omitted). *See also S&M Brands, Inc. v. Stein*, 2020 NCBC LEXIS 41, *1-2 (2020) ("The Court

[30] Joe Johnson, *Environmentalists call on neighbors, hog farmers to start a conversation,* The Herald-Sun, Aug. 4, 2018, https://www.heraldsun.com/latest-news/article216104270.html

[31] *Amicus Curiae* brief of NC EJN and REACH, Doc. 59-1 filed in *McKiver v. Murphy-Brown LLC*. 19-1019, Fourth Circuit Court of Appeals, May 6, 2019; also available at https://chambersccr.org/wp-content/uploads/2019/05/NCEJN-REACH-amicus-brief-filed.pdf; https://waterkeeper.org/wp-content/uploads/2019/05/File-Stamped-Motion-to-File-Amicus-Brief-with-Brief-Attached-and-AOC-Chandra.pdf

does not make findings of fact when ruling upon a motion for summary judgment. But to provide context for its ruling, the Court may state either those facts that it believes are not in material dispute or those facts on which a material dispute forecloses summary adjudication.") (citing *Ehmann v. Medflow, Inc.*, 2017 NCBC LEXIS 88, at *6 (N.C. Super. Ct. Sept. 26, 2017).

Plaintiffs must show the lack of any triable issue of material fact. *See, e.g., Dull v. Mutual of Omaha Ins. Co.*, 85 N.C. App. 310, 314, 354 S.E.2d 752, 754 (1987) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E. 2d 506 (1984)). "A genuine issue of material fact is of such a nature as to affect the outcome of the action," *Capital Outdoor, Inc. v. Tolson*, 159 N.C. App. 55, 58, 582 S.E.2d 717, 720 (2003)(quoting *Johnson v. Trustees of Durham Tech. Cmty. College*, 139 N.C. App. 676, 681, 535 S.E.2d 357, 361, *app. dismissed and disc. review denied*, 353 N.C. 265, 546 S.E.2d 101 (2000)); however, questions of fact which are immaterial to the legal issues are insufficient to defeat summary judgment. *Dull,* 85 N.C. App. at 314, 354 S.E.2d at 754. In addition, the non-movant[s] may not "rest upon the allegations of [their] pleading[s] to create an issue of fact, even though the evidence must be interpreted in a light favorable to the nonmovant." *Capital Outdoor, Inc. v. Tolson*, 159 N.C. App. at 58-59, 582 S.E.2d at 720 (quoting *Smiley's Plumbing Co., Inc. v. PFP One, Inc.*, 155 N.C. App. 754, 575 S.E.2d 66, 70, disc. review denied, 357 N.C. 166, 580 S.E.2d 698 (2003)).

The fact that this is a facial constitutional challenge does not change the traditional summary judgment standard described above. Plaintiffs must establish that the General Assembly exceeded the limits imposed by Article I §§ 19 and 25, and Article II

§ 24(1)(a) of the North Carolina Constitution when it adopted HB 467 and SB 711 by showing that there are no set of circumstances in which these laws are constitutional. *See, e.g.*, *Capital Outdoor, Inc. v. Tolson*, 159 N.C. App. 55, 62, 582 S.E.2d 717, 722 (2003)("In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground.")(quoting *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 571 S.E.2d 52 (2002)).

While courts owe deference to legislative acts, the same separation of powers doctrine also dictates an end to that deference where a legislative act clearly exceeds constitutionally defined limits.

> It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

City of Asheville v. State, 369 N.C. 80, 87, 794 S.E.2d 759, 766 (2016). "All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *Id*. "'If there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.'" *Id*. at 88, 794 S.E.2d at 766 (citing *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 690, 249 S.E.2d 402, 406 (1978)(quoting *Nicholson v. State Educ. Assistance Auth*., 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969)).

As shown below, Plaintiffs meet their burden to demonstrate the unconstitutionality of the Farm Act amendments and summary judgment should be granted.

IV. ARGUMENT

PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON EACH OF THEIR FACIAL CONSTITUTIONAL CLAIMS.

A. HB 467 and SB 711 are "private" or "special" laws, void under N.C. Const. Art. II § 24 (1)(a).

Plaintiffs prevail on their First Claim for Relief because HB 467 and SB 711 were created for the special benefit of an arbitrarily-determined small few (Smithfield and corporations like it) to the general detriment of an arbitrarily-determined many (those who live near Smithfield's and others' large-scale hog operations), and because they unreasonably classify similarly situated persons: those with nuisance claims against Smithfield and corporations like it and those with nuisance claims against *anyone else*.

Article II § 24 of the North Carolina Constitution provides: "The General Assembly shall not enact any local, private or special legislation" on fourteen "[p]rohibited subjects," including abatement of nuisance. It "is the fundamental law of the State and may not be ignored." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965). Since by their plain language the Farm Act amendments relate to abatement of nuisances, *see* N.C. Gen. Stat. §§ 106-701 ("Right to farm defense; nuisance actions") and 106-702 ("Limitations on private nuisance actions against agricultural and forestry operations"), Plaintiffs must prove only that HB 467 and SB 711 are local, private or special laws, as opposed to laws of general applicability. "If the Court finds them to be

local, private or special, then they are void by the express provisions of Article II, section [24(3)] of the Constitution."[32] *Id.* at 656, 142 S.E.2d 697, 702 (1965).

"Special laws are those made for individual cases, local laws are special as to place. A local act is one operating only in a limited territory or specified locality. A private law is one which is confined to particular individuals, associations or corporations." *McIntyre v. Clarkson*, 254 N.C. 510, 517, 119 S.E.2d 888, 893 (1961). A "special" law is one "imposing particular burdens or conferring special rights, privileges or immunities upon a portion of the people of the State without including therein and being applicable to all of the class throughout the State." *State v. Dixon*, 215 N.C. 161, 171, 1 S.E.2d 521, 526 (1937) (Barnhill, J., concurring). In sum, special laws are those made for "a special class or favored few." *State v. Kelly*, 186 N.C. 365, 379, 119 S.E. 755, 763 (1923) ("An exemption to a special class or favored few is not looked upon with favor and should never be allowed, unless clearly granted by the legislative branch of our government and not in conflict with any constitutional provision on the subject.").[33] In contrast, as the North Carolina Supreme Court noted in *City of Asheville*:

> A law is general 'if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law.' [ ] Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction

[32] N.C. Const. Art. II, § 24, Const. 1969 was formerly Art. II, § 29, Const. 1868, as amended. N.C. Const. Art. II, § 24(3) states: "Prohibited acts void. Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void."

[33] Restrictions on private laws, "those for the benefit or relief" of particular parties or entities, were a concern for the General Assembly as early as 1835, and long preceded its determination to address local legislation. *See* Joseph Ferrell, *Local Legislation in the North Carolina General Assembly,"* 45 N.C.L. Rev. 340, 1344-46 (1967).

> and operate the same on all parts of the [S]tate under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious.

369 N.C. at 91, 794 S.E.2d at 768 (citations omitted).

When legislation defines a class and then established exclusions from that class, the Art. 1 §. 24 inquiry is whether "a sound reason" justifies the exclusion or whether the legislative classification is "arbitrary and discriminatory," denying or granting privileges contrary to the Act's declared purpose. *See Dixon*, 215 N.C. at 172, 1 S.E.2d at 527. Applying that inquiry to the present case, as an initial matter, HB 467 and SB 711 establish exclusions from the class of all plaintiffs with nuisance claims. By their plain language, HB 467 and SB 711 fail to "apply to and operate uniformly on" all plaintiffs with nuisance claims; their application is limited to plaintiffs with nuisance claims against agricultural or forestry operations, and they impose further restrictions on that subclass of plaintiffs. *City of Asheville*, 369 N.C. at 91, 794 S.E.2d at 768. Given this disparate application, the Court must determine whether plaintiffs with nuisance claims against agricultural or forestry operations are reasonably, tangibly different from plaintiffs with nuisance claims against other types of defendants, and if so, whether that difference makes them less deserving of the full nuisance remedy that is available to all other North Carolinians. [34]

This determination lies at the core of the Court's "special" vs. "general" analysis. *See, e.g., McIntyre*, 254 N.C. at 518-519, 119 S.E.2d at 894 ("For a law to be general it is only

[34] Additionally, the "class of persons, places or things requiring legislation peculiar to itself in matters covered by the law" at issue in HB 467 and SB 711 could be defendants in all nuisance actions. Then the questions for the Court becomes: are agricultural or forestry operations reasonably, tangibly different from other nuisance defendants? What makes them more deserving of being shielded from nuisance actions than other defendants? Under either assessment of the class excluded by these bills, the analysis is the same, as is the outcome, because of the underlying unreasonableness of the distinctions these laws create.

required that the objects of its operation be reasonably classified. . . . when the persons or things subject to the law are not reasonably different from those excluded, the statute is local or special."). Those affected by the legislation must be "reasonably different from those excluded" and there must be "a logical basis for treating them in a different manner." *Id*. *See also City of Asheville* 369 N.C. at 91, 794 S.E. 2d at 768 (requiring examination of the classifications created by the challenged law to "determine whether the persons . . . subject to the legislation are reasonably different from those excluded.").

The primary test employed for more than a half-century to determine whether a law is "local, private or special" has been the "reasonable classification" test adopted by the North Carolina Supreme Court in *McIntyre*, 254 N.C. at 517-19, 525-26, 119 S.E.2d at 893-95, 898-99. In its most recent application of the test, the state Supreme Court made clear that the challenged legislation is subject to greater scrutiny than the rational basis standard, noting *all* of the following prongs must be satisfied:

1. the classification must be based upon substantial distinctions which make one class really different from another;
2. the classification adopted must be germane to the purpose of the law;
3. the classification must not be based upon existing circumstances only; *and*
4. to whatever class a law may apply, it must apply equally to each member thereof.

City of Asheville, 369 N.C. at 91, 794 S.E.2d at 768-769 (emphasis added) ("The reasonable classification test utilized to distinguish between general and local legislation is not equivalent to the rational basis test utilized in due process and equal protection cases.").

City of Asheville concerned Asheville's constitutional challenge to legislation that required it to transfer assets it used to operate a public water system to a newly created

metropolitan water and sewerage district.[35] The trial court concluded that the involuntary transfer was a "local law" relating to "health," "sanitation" and "non-navigable streams," in violation of Article II, § 24(1)(a) and (e), among other constitutional provisions. *City of Asheville v. State*, 243 N.C. App. 249, 253, 777 S.E.2d 92, 95 (2015). The Court of Appeals reversed the trial court's order, in part, and directed the trial court to enter summary judgment in favor of the State. *Id*.

On appeal, the North Carolina Supreme Court began its Article II § 24 inquiry by determining the law to be "local" as opposed to "general" using the reasonable classification test. 369 N.C. at 90, 794 S.E.2d at 768. Upon review of the legislative history, the court found it failed to satisfy the first and second prongs, placing significant weight on the trial court's finding that the involuntary transfer provisions "were specifically designed to apply to the City and to no other municipality in North Carolina." *Id.,* at 83, 794 S.E.2d at 764.

> The total absence of any justification for singling out the City's water system from other large municipally owned systems and the steps taken during the drafting process to ensure that the involuntary transfer provisions of the legislation did not apply to any municipality except the City demonstrate that the involuntary transfer provisions were never intended to apply to any municipal water system except that owned by the City. As a result, given the absence of any reasonable relationship between the stated justification underlying the legislation and the classification adopted by the General Assembly for the purpose of achieving its stated goal, the legislation is, without doubt, a local rather than a general law.

Id., at 94-95, 794 S.E.2d at 770-771.

[35] In addition to its claims under Art. II § 24, the City brought due process and equal protection claims, as well as claims for an unlawful taking and, in the alternative, taking without just compensation under Article I §§ 19 and 35. *See* 369 N.C. at 81, 83-84, 794 S.E.2d at 762, 764.

Notably, in determining the legislation's "stated purpose," the court looked not only at the legislation's explicit language and floor debate records, but also "the practical effect of the legislation." *Id.,* at 102, 794 S.E.2d at 775. *Cf. Williams v. BCBSNC*, 357 N.C. 170, 189, 581 S.E.2d 415, 429 (2003) (concluding that while "the record demonstrates that . . . the intent of the enabling legislation … is to prohibit discrimination in the workplace, the effect of these enactments is to govern the labor practices of [certain businesses] in Orange County"). The court concluded that because the legislation "works a change in the governance of the City's water system," it "impermissibly relates to health and sanitation in violation of Article II, Section 24(1)(a) of the North Carolina Constitution." 369 N.C. at 105, 794 S.E.2d at 777.

This following section applies the four-pronged reasonable classification test first to each of the classifications created by HB 467 and SB 711.

a. HB 467 and SB 711's classifications are not based upon substantial distinctions between the impacted classes

Both pieces of legislation fail to satisfy the first prong of the "reasonable classification" test because there is no substantive difference between plaintiffs with private nuisance claims against agricultural and forestry operations and those with claims against any other defendants. Specifically, as was proven in 2018 and 2019 to five juries in the pending nuisance litigation against Smithfield which prompted this legislation,[36] plaintiffs suffering nuisances caused by agricultural operations endure similar substantial annoyance, material physical discomfort, injury to their health, and interference with

[36] See *supra,* note 18.

their enjoyment of their property as plaintiffs with private nuisance claims against any other types of defendants. And as a matter of law, they must. *See, e.g.*, *Broadbent v. Allison*, 176 N.C. App. 359, 363, 626 S.E.2d 758, 762 (2006)("In order to establish a claim for nuisance, a plaintiff must show the existence of a substantial and unreasonable interference with the use and enjoyment of its property. In this context, our Supreme Court has interpreted substantial interference to mean a 'substantial annoyance, some material physical discomfort . . . or injury to [the plaintiff's] health or property.'") (quoting *Shadow Group v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 200, 579 S.E.2d 285, 287 (2003).

Specifically, with respect to HB 467's restrictions on North Carolinians' right to traditional compensatory damages for substantial and unreasonable interference with their use and enjoyment of their property, as a matter of law, there is no distinction between plaintiffs with private nuisance claims against agricultural and forestry operations and those with claims against any other type of defendant. Both groups of plaintiffs possess the fundamental right to use and enjoyment of their homes, free from unreasonable and substantial interference from neighboring uses. *See, e.g.*, *Broadbent* and *Shadow Group*, *supra*. In addition, because HB 467 creates a classification for the private benefit of a single corporation or industry, it fails to satisfy the first prong of the reasonable classification test, is a "private" and a "special" law, and therefore void under N.C. Const. Art. II § 24(1)(a).

Likewise, with respect to SB 711's restrictions, there is no distinction between residents with nuisance claims living near agricultural or forestry operations and

residents living near any other potential nuisance defendant that could justify the law's restrictions on the former. Both groups of plaintiffs have the same fundamental property rights, and they all have the same burden of proof in order to prevail on their common law nuisance claims. There is no distinction among them that could justify barring only them, as opposed to all nuisance plaintiffs, from the only legal remedy which fully protects all North Carolinians' fundamental property rights.

SB 711 also conditions the availability of punitive damages in a nuisance suit against agricultural or forestry defendants on the existence of "a criminal conviction or a civil enforcement action taken by a State or federal environmental regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance within the three years prior to the first act on which the nuisance action is based." Session Law 2018-113 (Attachment 2, p. 9). There is no substantial difference between agricultural and forestry operations and any other defendant in a private nuisance action that could justify insulating them from a punitive damages award based on some outside executive branch action.[37] "It is well-established that in nuisance claims, punitive damages may be allowed, or not, *as the jury see proper*," where there is "evidence ...that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases, the matter is within the sound discretion of the jury." *Cobb v. Atlantic C. L. R. Co.*, 175 N.C. 130, 132, 95 S.E. 92, 94

[37] Additionally, DEQ, the agency responsible for civil enforcement of these operation, rarely issues notices of violations to IHOs. *See,* Ex. 26.

(1918)(emphasis added); *Motsinger v. Sink*, 168 N.C. 548, 84 S.E. 847 (1915); *Hoffman v. R. R.*, 163 N.C. 171, 79 S.E. 307 (1915).

For plaintiffs with common law nuisance suits against any other type of defendant, the defendant's compliance with existing law or regulation does not "preclude such an award [of punitive damages] if the evidence shows willful misconduct, malice, fraud, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Oglethorpe Power Corp. v. Estate of Forrister*, 382 Ga. App. 693, 705, 774 S.E.2d 755, 765 (2015) (internal citations omitted). *Cf. Salmon v. Parke, Davis & Co.*, 520 F.2d 1359, 1362 (4th Cir. 1975) ("In North Carolina, as elsewhere, compliance with federal laws and regulations concerning a drug, though pertinent, does not in itself absolve a manufacturer of liability."); *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 583–84 (W.D. Okla. 1979), *aff'd in part, rev'd in part on other grounds*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) ("For the same reason that mere compliance with government regulations cannot necessarily be found consistent with the reasonable person standard, so too it cannot necessarily be found consistent with an attitude and conduct devoid of that state of mind for which an award of punitive damages is appropriate."); S*unburst Sch. Dist. No. 2 v. Texaco, Inc.*, 338 Mont. 259, 165 P.3d 1079 (2007) ("[G]overnmental agency regulations and orders afford neither an explanation nor an excuse for egregious conduct on the part of a defendant."); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981), *reh'g denied and opinion modified*, 670 F.2d 21 (5th Cir. 1982) ("Generally speaking, compliance with regulatory standards may be admissible on the issue of care but does not require a jury to find a defendant's

conduct reasonable."). By its restriction on punitive damages, SB 711 creates additional, unreasonable classifications bestowing burdens only plaintiffs impacted by agricultural and forestry nuisances, and special, private protections to agricultural and forestry operations that are not available to other defendants.[38] SB 711's blanket exemption from nuisance for negligently or improperly operated agricultural or forestry uses creates similarly unreasonable distinctions between classes of plaintiffs that are otherwise facing identical burdens on their property. Session Law 2018-113 (Attachment 2, p. 8).

b. The classifications in HB 467 and SB 711 are germane to its (improper) "private law" purpose.

The practical effect of these laws and legislative record regarding HB 467 and SB 711 make clear their purpose was to shield Smithfield and the hog industry from nuisance suits, the former by its elimination of all but diminution in market value damages for plaintiffs' property against agricultural and forestry nuisance defendants; the latter by effectively eliminating the nuisance remedy entirely for that same class of plaintiffs. These provisions are certainly germane to that "private law" purpose.[39] However, while the Farm Act amendments may arguably satisfy this second prong of the "reasonable classification," they fail to satisfy the first, third and fourth prongs. As a result, this legislation must be held void under N.C. Const. Art. I § 24(1)(a).

[38] Courts in other states that prohibit on "special" laws have applied a similar analysis. *See. e.g. Wright v. Cent. Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 329-330 347 N.E.2d 736, 743 (1976) (striking down statute limiting recovery in medical malpractice actions while not limiting recovery in other types of actions because the distinction between medical and non-medical actions was "arbitrary" and thus violated the state constitution's provision barring the special or local laws; Ill. Const. Art. IV § 13. *Id*. at; 347 N.E.2d at 743.

[39] Plaintiffs assert that the bestowing this private benefit was the actual purpose of the Farm Act Amendments, but do not conceded that this is a legitimate or constitutional purpose, and argue that such action is beyond the State's regulatory power, as discussed in Argument B., *infra)*.

c. HB 467 and SB 711's classifications—passed in response to pending nuisance suits against Smithfield-- were "based upon existing circumstances only."

Under *City of Asheville*, legislation is void where "the classification [is] based on existing circumstances only." 369 N.C. at 91, 794 S.E.2d at 768-769. The legislative record of both HB 467 and SB 711 and the whereas clauses of SB 711 establish that both pieces of legislation were precisely that—based specifically on the existing nuisance suits against Smithfield. *See supra,* pp. 15-30. The legislation's sponsors repeatedly made clear that they intended to "correct these misguided rulings." Ex. 8. The legislative record also makes clear that the specific classifications in each bill were tailored to the allegations and specific characteristics of the plaintiffs in those cases. During House discussions of SB 711, Representative John Blust raised the example of a hypothetical nuisance that was based at the center of a large farm so that no neighbors fell within the requisite half a mile (approximately ten city blocks) of the nuisance, correctly pointing out that such an operation would be completely shielded from all nuisance claims. Rep. Dixon responded by pointing out that not only is a half a mile "a long, long, long ways" but that the "existing nuisance suits are coming from plaintiffs three or four miles away." https://www.ncleg.gov/DocumentSites/HouseDocuments/2017-2018%20Session/Audio%20Archives/2018/06-13-2018.mp3, at 2:00.

Additionally, the legislative record is replete with express statements by the bills' sponsors and supporters that each was introduced to address the claims, damages, verdicts, the rulings by the trial court, and the alleged conduct of the attorneys for the plaintiffs in the Smithfield nuisance litigation. *See, supra*, pp. 15-30. Additionally, the

timing and specific classifications created by the bills further demonstrate that they were introduced and adopted based on existing circumstances only. HB 467 and SB 711 therefore both fail the third prong of the reasonable classification test.

d. HB 467 and SB 711 fail to apply equally to the class of plaintiffs with nuisance claims and also fail to apply equally to the subclass of plaintiffs harmed by nuisance from agricultural and forestry operations

Finally, both HB 467 and SB 711 violate the requirement that "to whatever class a law may apply, it must apply equally to each member thereof," *City of Asheville,* 369 N.C. at 91, 794 S.E.2d at 768-769, and neither bill as a matter of law can be justified by any substantial difference between the subclasses of plaintiffs they create. Additionally, while HB 467 arguably restricts the ability of all successful plaintiffs' suing an agricultural or forestry defendant to recover compensatory damages, SB 711's specific restrictions also fail to apply equally even on the subclass of neighbors harmed by large-scale, industrial agricultural operations.

Two of the subclasses created by SB 711 consist of the plaintiffs located within one-half mile of the source of the nuisance (who might be able to bring a suit), and every plaintiff living beyond half a mile (who is categorically excluded from ever bringing a nuisance suit). It is difficult to argue that these two subgroups of all plaintiffs with nuisance claims are substantially different from one another as matter of law, particularly given that the latter class includes plaintiffs who live just outside of the half-mile cutoff. In other words, a plaintiff located 2,640 feet from the source of a nuisance can bring a suit, but a plaintiff just over that limit, even at just 2,650 feet, cannot—even if the harm each is suffering is identical.

The half-mile limitation establishes as a matter of law that an agricultural or forestry operation cannot create any substantial interference with a neighbor's use and enjoyment of his property if that neighbor lives more than a half mile from the source of the nuisance—a presumption for which there was no evidence presented during the legislative debate on SB 711 and which was proven false in the suits that prompted the bill and also by the direct, lived experience of Plaintiffs' members. *See* Exs. 1, 2, 5, 6, 8, 9, 13-16, 20, 21, 24, 25, 26. In fact, Rep. Dixon, SB 711's sponsor in the House, spoke of the plaintiffs to whom juries awarded millions in compensatory and punitive damages as living three or four miles away from Smithfield operations as his motivation for this section of the bill. https://www.ncleg.gov/DocumentSites/HouseDocuments/2017-2018%20Session/Audio%20Archives/2018/06-13-2018.mp3, at 2:00. The fact that plaintiffs who live beyond half a mile from the source of the nuisance and prevailed on their claims against Smithfield establishes as a matter of law that there are no genuine differences between the two subclasses SB 711 creates.

Additionally, SB 711 creates a statute of limitations (suit must be filed within one year of the operation's establishment) that also fails to apply equally not just to all plaintiffs with nuisance claims, but also to the class of plaintiffs with nuisance claims against agricultural and forestry operations. First, for all other plaintiffs with nuisance claims against any defendant, the statute of limitations is three years. N.C. Gen. Stat. § 1-52; *James v. Clark*, 118 N.C. App. 178, 454 S.E.2d 826 (1995) (a cause of action for nuisance is governed by the same statute of limitations as a cause of action for trespass). SB 711's "within one year of establishment" statute of limitations bears no relation to when the

nuisance begins.[40] One could live in a neighborhood near a new, large swine slaughtering/processing facility which, because of permit, construction or other issues, does not actually begin slaughtering animals or processing meat for a year. Odors and other effects from the facility giving rise to a nuisance claim for those neighbors would not begin until after SB 711's statute of limitations had already run.

Secondly, SB 711's new statute of limitations also fails to apply equally to the sub-class of plaintiffs who suffer nuisance caused by the antiquated and harmful system of waste disposal utilized by the swine industry (and which was the basis of the Smithfield nuisance litigation). Swine operations in North Carolina housing more than 250 hogs at any given time are permitted by the State under the Swine General Permit, which allows disposal of hog waste via the "lagoon" and spray field system.[41] No swine operation of that size, constructed or commenced after 2007, may use the lagoon and spray field system, because the General Assembly permanently banned the use of this method of waste disposal due to its effects on neighbors and the environment. *See* Session Law 2007-253, enacted Aug. 31, 2007.[42] There are available alternative technologies for swine waste disposal which comply with the 2007 performance standards (required by N.C. Gen. Stat. § 143-215.10I) and which substantially eliminate this odor and pollution,[43] but since the

[40] Notably, the federal judge in the cases against Smithfield rejected a similar effort by the corporation's lawyers to bar the plaintiffs from recovery. *See In re NC Swine Farm Nuisance Litig*., No. 5:15-CV-00013-BR, 2017 WL 5178038, at *6 (E.D.N.C. Nov. 8, 2017).
[41] https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/animal-feeding-operation-permits/permits.
[42] https://www.ncleg.gov/Sessions/2007/Bills/Senate/ PDF/S1465v7.pdf.
[43] C.M. Williams, Animal & Poultry Waste Mgmt. Ctr., N.C. State Univ., Evaluation Of Generation 3 Treatment Technology For Swine Waste (2013), available at https://projects.ncsu.edu/cals/waste_mgt/smithfield_projects/CWMTF-Report.pdf.

statutory ban and the requirement that swine waste systems comply with those performance standards was imposed, no new swine operations have been constructed in North Carolina. Ex. 21, p. 30, Ex. 24, at 38:00. As was proven in all five of the twenty-six nuisance against Smithfield cases that have so far been tried, the lagoons and sprayfields cause most of the horrible odor and particulate matter air pollution that can travel more than one-half mile, causing substantial interference with surrounding neighbors' use and enjoyment of their homes. *See McKiver v. Murphy-Brown LLC*, No. 7:14-CV-180-BR, 2018 WL 10322917, at *1 (E.D.N.C. May 7, 2018); *McGowan v. Murphy-Brown, LLC*, No. 7:14-CV-00182-BR, 2018 WL 10322919, at *1 (E.D.N.C. Sept. 17, 2018); *Artis v. Murphy-Brown*, LLC, No. 7:14-CV-00237-BR, 2019 WL 1103406, at *1 (E.D.N.C. Mar. 8, 2019); and *Gillis v. Murphy-Brown*, LLC, 2019 U.S. Dist. LEXIS 19063. Because all of those operations were established at least before 2007, no neighbor suffering a recurrent or continuing nuisance from an industrial hog operation could ever meet the statute of limitations. Sen. Jackson admitted in the House Agricultural Committee meeting that this statute of limitations would not impact these existing swine operations for this very reason (and that no new ones had been constructed). Ex. 24 at 38:00.

On the other hand, poultry operations are generally not subject to any moratorium or permit governing waste disposal. *See* N.C. Gen. Stat. §§ 143-215.10B and 215.10C, 15A N.C. Admin. Code 02T .1303.[44] As a result, numerous new poultry operations have sprung

[44] N.C. Gen. Stat. § 143-215.10C only requires a permit for a dry litter poultry operation if a permit is required under federal law, and a permit is only required under federal law if there is intent to discharge or actual discharge from the waste. Absent the federal requirement, a permit is only required for an animal waste management system serving an "animal operation," and state law excludes dry litter poultry facilities from the definition of "animal operation." N.C. Gen. Stat. § 143-215.10B.

up across North Carolina in recent years, and their numbers continue to grow.[45] So unlike neighbors impacted by nuisance caused by swine operations, who will never be able to meet the one year statute of limitations, neighbors impacted by nuisance caused by large-scale poultry facilities have at least the potential to meet the filing deadline. Ex. 24 at 38:00. This unequal application across members of even the subclass of potential plaintiffs seeking the nuisance remedy against agricultural and forestry operations (and within the one-half mile) further demonstrates that SB 711 fails this prong of the reasonable classification test.

The North Carolina Supreme Court has held that legislation must meet all four prongs of the reasonable classification test to satisfy the constitutional restrictions of Art. II, Sec. 24. Neither HB 467 nor SB 711 meets all of these criteria, and therefore should be declared void.

B. HB 467 and SB 711 are facially unconstitutional under N.C. Const. Art. I § 19 because their unreasonable restrictions on the fundamental right to property exceed the permissible scope of the State's police power.

> The fundamental right to property is as old as our state . . . . "Property" encompasses *every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value*" and includes *not only the thing possessed but* . . . the right of the owner to the land; *the right to possess, use, enjoy and dispose of it*, and the corresponding right to exclude others from its use.

Kirby v. N.C. DOT, 368 N.C. 847, 853, 786 S.E.2d 919, 924 (2016) ("the Map Act" case) (internal citations and quotation marks omitted) (emphasis added). The fundamental

[45] https://www.wral.com/know-where-the-nearest-poultry-farm-is-neither-do-nc-regulators/18436022/

right to property, as described by Justice Newby above, is rooted in Article I § 19 of the North Carolina Constitution, which states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

There are multiple categories of legal claims and remedies relating to the protection of this fundamental right to property, including nuisance, trespass, and governmental takings (whether regulatory or by eminent domain). Each of these remedies protect different aspects of the fundamental right-- but only the private nuisance action addresses an invasion of the right that results in "material physical discomfort to the plaintiffs, or injury to their health or property." *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 617, 124 S.E.2d 809, 813-814 (1962)(distinguishing negligence, private nuisance *per se*, and private nuisance *per accidens* actions, noting that for liability to exist in either of the private nuisance actions, "there must be a substantial non-trespassory invasion of another's interest in the private use and enjoyment of property [which] affect[s] the health, comfort or property of those who live near [, causing] substantial annoyance, some material physical discomfort to the plaintiffs, or injury to their health or property"). Compare, *e.g.*, the Map Act case, 368 N.C. at 856, 786 S.E.2d at 926 (plaintiffs' inverse condemnation claim for a governmental taking by eminent domain did not require the same showing as a private nuisance claim, nor included damages for annoyance, discomfort, nor injury to health and property).

Our courts have long recognized the private nuisance cause of action to defend fundamental property rights:

> The precise limits of one's right to do as he pleases with his own property are difficult to define. *The use must be a reasonable one, and the right implies and is subject to a like right in every other person*. One cannot use his property so as to cause a physical invasion of another person's property, or unreasonably to deprive him of the lawful use and enjoyment of the same, or so as to create a nuisance to adjoining property owners . . . and any unreasonable . . . use which produces material injury or great annoyance to others, or unreasonably interferes with their lawful use and enjoyment of their property, is a nuisance which . . . will render him liable for the consequent damage.

Watts v. Pama Mfg. Co., 256 N.C. 611, 617, 124 S.E.2d 809, 814 (1962)(emphasis added)(internal citations omitted). SB 711 and HB 467 so severely restrict the nuisance remedy—and only for those affected by agricultural and forestry nuisances-- that they eliminate the sole means by which that subclass of North Carolinians can defend their fundamental right to use and enjoy their property free from unreasonable and substantial interference.

Plaintiffs allege that HB 467 and SB 711 violate the fundamental right to substantive due process guarantees under Art. I §19. Even though the right to private property is fundamental, there are permissible governmental restrictions on that right--e.g., zoning regulations and exercise of eminent domain--as long as the government legitimately exercises its police power to protect or further the public welfare. *See, e.g., Hope - a Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 693 S.E.2d 673 (2010); *Responsible Citizens in Opposition to Flood Plain Ordinance v. Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983); *A-S-P Associates v. Raleigh*, 298 N.C. 207, 214, 258 S.E.2d 444, 448-449

(1979). Legislative action may also impose procedural limitations on remedies affecting property, e.g. through statutes of limitations.[46]

However, all of those legislative actions must be exercised within the constitutional limits on the police power of the State, which require that it be exercised reasonably. For example, while the State may require plaintiff to bring a trespass, negligence or nuisance action within three years to protect the public interest of judicial efficiency and fairness in the timely resolution of property disputes, it could not reduce that period to three days, as that would unreasonably restrict the plaintiffs' property right.

In *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 450 S.E.2d 888 (1994), the court struck down a statute that gave presumptive ownership of abandoned railroad easements to the adjacent property owner and converted the rebuttable presumption of ownership into a conclusive one, unless a person/entity challenging the presumption brought an action to establish ownership within one year "of the date of enactment of this statute or the abandonment of such easement, whichever later occurs." 338 N.C. at 446, 450 S.E.2d at 890. The court of appeals held the statute violated the state constitution's due process clause because it failed to provide fee simple landowners with adequate notice, an opportunity to be heard, and just compensation. *Id*. at 447, 450 S.E.2d at 890.

[46] Even within this context, the court must apply some measure of heightened scrutiny to its review. "If the right is fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest." *Affordable Care v. N.C. State Bd. of Dental Examiners,* 153 N.C. App. 527, 535-536 (2002). Similarly, in considering the issue of reasonableness, the court in *City of Asheville* noted that the analysis was greater than rational basis. 369 N.C. at 91, 794 S.E.2d at 768-769

On appeal, the supreme court focused on how the one year statute of limitations deprived the plaintiff of their fundamental property rights, noting that "as early as 1877 . . . . The Court, under the United States Constitution and the law of the land clause of the North Carolina Constitution, rejected the argument that a statute of limitations could deprive persons of their vested property rights." *Id.* at 448, 450 S.E.2d at 890. The court then quoted *Trustees of the Univ. of North Carolina v. North Carolina R.R. Co.*, 76 N.C. 103, 107 (1877):

> We know of no case in which a legislative Act to transfer the property from A to B without his consent has ever been a constitutional exercise of the legislative power in any State in the Union.' (Citations omitted). . . . The Act under review, not only bars the [dividend holder] of his right of recovery, but takes from him his property, transfers it to another and enables that other to recover and own it. The [dividend holder] not only loses his property, but by the magic of this Act and without consideration received, it is vested absolutely in another. . .

Id. The court went on to note that the statute at issue had the same effect: that it barred recovery by the operation of a new statute of limitations, that the new presumption deprived the owner of property rights and vested them in another person, and further failed to provide adequate notice or just compensation (violating procedural as well as substantive due process rights). *Id*. at 448, 450 S.E.2d at 891.

Plaintiffs' facial substantive due process challenge requires the court to determine as a matter of law whether the Farm Act amendments are a reasonable exercise of the State's police power. North Carolina precedents establish that the court's "reasonableness" determination has two parts, with the second part having two prongs. *A-S-P Associates v. Raleigh*, 298 N.C. at 214, 258 S.E.2d at 448-449. The court must first ask "whether the object of the legislation is within the scope of the police power;" and second,

"considering all the surrounding circumstances and particular facts of the case, is the means by which the governmental entity has chosen to regulate reasonable?" *Id*. (citations omitted). This second inquiry is two-pronged, and asks: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good; and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree? *Id.*

In *State v. Vestal,* 281 N.C. 517, 522, 189 S.E.2d 152, 157 (1972), the North Carolina Supreme Court struck down an ordinance requiring the owner of a junkyard to build a fence around the property. The court reviewed the city's stated purpose for the law: that it would enhance public safety by ensuring that these properties would not block the view of drivers on adjoining roads. Despite satisfying the legitimate purpose part of the test, the court found that there was no reasonable basis to conclude that requiring the plaintiff to fence his property would improve public safety, and invalidated the ordinance because it failed the "means" part of the test:

> While a reasonable restriction upon the use which a landowner may make of his property may be imposed under the police power in the interest of public safety, there must be a reasonable basis for supposing that the restriction imposed will promote such safety, otherwise the restriction is a deprivation of property without due process of law.

Id. at 522, 189 S.E. 2d at 157.

In applying the "means" prong in assessing whether the State's Certificate of Need ("CON") statute was unconstitutional, the court of appeals in *Hope - a Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 693 S.E.2d 673 (2010) highlighted that the statute itself contained specific findings and "detailed explanations as to how the requirement of

a CON based on need determinations promotes the public welfare." The court then upheld the statute as a legitimate exercise of the police powers because the legislation sufficiently described the relation between the purposes of the law and its impact on individual property rights.

The statute at issue in the Map Act case allowed the state Department of Transportation (DOT) to record highway corridor maps identifying future areas for state highway construction, and restricted property owners' use or development of land located within these corridors indefinitely. It included *ad valorem* tax discounts for these properties and also contained a detailed administrative process that owners could pursue to seek relief from the statutory restrictions. There was no limitation on how long a property could be subject to the restrictions or any requirement that the highway ever be built. Landowners subject to the Map Act sued, alleging the statute was a taking without just compensation. The DOT argued that the Map Act was a valid exercise of the police power to regulate land use in the public interest, claiming that the Act promoted the general welfare of the public by "facilitating orderly and predictable development," minimizing impacts of future relocations, and reducing costs to the State. *Kirby,* at 852, 786 S.E.2d at 924.

The North Carolina Supreme Court disagreed, declaring that to

> [j]ustify[] the exercise of governmental power in this way would allow the State to hinder property rights indefinitely for a project that may never be built. Though the reduction in acquisition costs for highway development properties is a laudable public policy, economic savings are a far cry from the protections from injury contemplated under the police power. The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. Furthermore, the provisions of the Map Act that allow landowners

> relief from the statutory scheme are inadequate to safeguard their constitutionally protected property rights.

Id. at 855, 786 S.E.2d at 925 (internal citations omitted).

Writing for the court, Justice Newby framed the "ends/means" test under Article I § 19 as an either/or determination: if the State exceeded its police powers, then it has unlawfully deprived owners of their property rights. 368 N.C. at 854, 786 S.E.2d at 924. In making that determination, Justice Newby stated that "police power regulations must be enacted in good faith and [have] appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." *Id*. (internal citations omitted). Because it found that the Map Act failed to satisfy the first prong of the "ends/means" test, the court never even reached the 2-part second prong.

Here, like in the Map Act case, the State cannot meet the first prong to show that "the object of the legislation is within the scope of the police power." HB 467 was enacted to provide a private benefit, which is not within the State's police power. With respect to its actual purpose, the legislation's title, "An Act to Clarify the Remedies Available in Private Nuisance Actions Against Agricultural and Forestry Operations," is misleading. The legislation does not "clarify" existing law; it drastically changes and restricts the common law remedy only for private nuisance plaintiffs suing large-scale agricultural or forestry operations. Session Law 2017-11 (Attachment 1). The legislative record suggests that the term "clarify" relates to HB 467's sponsors' belief that the federal judge presiding in the pending nuisance suits against Smithfield had expressed that there was insufficient statutory guidance on the issue of damages. Ex. 20., at 17. That belief cannot be substantiated. S*ee supra,* p. 16.

The record does establish that HB 467's purpose is to insulate agricultural and forestry operations (specifically, Smithfield) from liability for traditional compensatory damages— including damages for personal discomfort, inconvenience, annoyance, loss of enjoyment, injury to health, and mental distress-- which all other private nuisance defendants are subject to. As the Supreme Court did in *Williams* and *City of Asheville*, the Court should consider the plain language of the legislation, the legislative record, and the law's practical effect to determine its purpose-- all of which establish that the purpose of this provision (which was drafted to apply to pending lawsuits) was to shield Smithfield from the claims brought against it by more than 500 North Carolinians who had specifically waived only compensatory damages measured by the reduction in fair market value of their homes caused by the stench, flies and other aspects of Smithfield's industrial hog operations. *See supra*, pp. 15-20; ; Ex. 20, at 15.

HB 467 also provides that if a "successor in interest" to a property owner who previously brought a successful private nuisance action "brings a subsequent private nuisance action" against that same "agricultural or forestry operation"--even if it is for a different harm--"the combined recovery from all such actions shall not exceed the fair market value of [the] property." Session Law 2017-11 (Attachment 1). "This limitation applies regardless of whether the subsequent action or actions were brought against a different defendant than the preceding action or actions." *Id*. This provision ensures that, in total, over its entire operation, an agricultural or forestry operation causing a nuisance will never be liable for more than the property value of its neighbors' property, regardless of how many, what sorts, or the severity of the nuisances it creates, how long those

nuisances persist, of if they are caused by a different defendant. No other class of plaintiffs with nuisance claims are burdened with this restriction on their fundamental rights as property owners; nor is any other class of defendants provided with this immunity from liability. This further demonstrates that HB 467 was enacted for a purpose outside of the State's police power --to shield one particular company from nuisance liability-- and thereby violates Art. I, Sec. 19.

SB 711 suffers from the same constitutional infirmity, in that its purpose is beyond the legitimate scope of the police power. SB 711's stated purpose is found in its five "whereas" clauses, the first of which states that "frivolous nuisance lawsuits threaten the very existence of farming in North Carolina [.]" Session Law 2013-133 (Attachment 2). However, none of SB 711's restrictions actually relate to frivolous lawsuits; moreover, there already exist substantial legal protections against frivolous lawsuits.[47] Despite SB 711's stated purpose however, the "practical effect of the legislation" demonstrates that its specific restrictions are designed to create a private benefit and are not germane to preventing frivolous lawsuits.

SB 711's next "whereas" clause references the 1979 Farm Act's "effort to statutorily protect the ability of farms and forestry operations to continue to operate as surrounding development encroached." *Id.* However, that purpose is accomplished by the common

[47] *See, e.g.*, Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 858–59 (codified as amended at N.C. Gen. Stat. § 106-701 (2015))(extending the "coming to the nuisance" affirmative defense that already existed at common law to operations regardless of whether they preceded adjoining residents); N.C. Gen. Stat. § 7A-38.3(d)(2015)(requiring a plaintiff to file a request for prelitigation mediation before bringing an agricultural nuisance suit); N.C. Gen. Stat. § 1A-1, Rule 11 (providing for sanctions against a party and/or party's attorney for filing a frivolous claim).

law "coming to the nuisance" defense recognized for all nuisance defendants, and which (within weeks of plaintiffs noticing claims against Smithfield) the General Assembly codified and drastically expanded to immunize agricultural and forestry operations regardless of whether they preceded adjoining residents. *See* Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 858–59 (codified as amended at N.C. Gen. Stat. § 106-701 (2015). Furthermore, none of SB 711's specific restrictions address or relate to "encroaching development."

SB 711's fourth "whereas" clause reveals the legislation's true purpose, referencing the nuisance suits against Smithfield which prompted SB 711's sponsors to introduce the bill. This clause criticizes the "federal trial court" in those cases for "incorrectly and narrowly interpret[ing] the North Carolina Right to Farm Act in a way that contradicts the intent of the General Assembly and effectively renders the Act toothless in offering meaningful protection to long-established North Carolina farms and forestry operations." Session Law 2018-113 (Attachment 2). However, the plaintiffs in those cases carried their burden of proof to establish not only compensatory damages for the impacts to their health and well-being caused by pollution from the defendant hog operations, but also for punitive damages. "Meaningful protection" for operations that cause substantial and unreasonable interference with neighbors' use and enjoyment of their property—regardless of whether those operations have been found out of compliance with regulatory standards-- cannot justify total elimination of the only legal remedy neighbors possess to protect their fundamental private property rights.

SB 711's final "whereas" clause states that that the "General Assembly is again forced to make plain its intent that existing farms and forestry operations in North Carolina that are operating in good faith be shielded from nuisance suits filed long after the operations become established[.]" Whether a defendant is acting in "good faith" is, as a matter of law, completely irrelevant to the determination of whether its actions cause substantial and unreasonable interference with plaintiffs' fundamental right to use and enjoy their property.[48] Similarly, the length of time that a defendant has been "established" has no bearing on whether its actions cause harm to its neighbors; what matters is whether suit is filed within the nuisance claim's generally applicable three years statute of limitations. *See. e.g., Aydlett v. Carolina By-Products Co.*, 215 N.C. 700, 702, 2 S.E.2d 881, 882 (1939)(distinguishing "continuing or recurrent" from "permanent" nuisance). Similarly, the fact that these industrial operations have been permitted has no determinative significance with regard to nuisance liability. *See, e.g. King v. Ward*, 207 N.C. 782, 178 S.E. 577 (1935) (while a legitimate business may not be a nuisance *per se,* the defendant may still be liable for nuisance caused by the negligent and unreasonable operation and maintenance of that business that produces the nuisance.); *Clinic & Hospital v. McConnell*, 236 S.W. 2d 384 (Mo. 1951) (whether the use of property to carry on a lawful business, creating noise and causing vibrations, amounts to a nuisance depends upon the facts and circumstances of each particular case); 39 Am.

[48] Moreover, while insisting it as seeking to protect "good faith" operations following state regulations, SB 711 extended its exemption from nuisance to negligent or improperly operated facilities. *See* Attachment 2.

Jur., Nuisances, ss. 48 and 52, pp. 333 and 335 (noise and vibrations emanating from the operation of a lawful enterprise may constitute a nuisance in fact).

Both HB 467 and SB 711 fail to meet the first prong of the due process reasonableness test. Despite the substantial record on this question, even if the court were to conclude that HB 467 and SB 711 somehow met the "ends" prong and were enacted for a legitimate purpose, the bills are still an unconstitutional deprivation of due process because of their unreasonable "means." For all of the reasons discussed in detail above, the restrictions in HB 467 and SB 711 exceed the legitimate scope of the police power, because they are not reasonably necessary to promote the accomplishment of a public good and unreasonably interfere with residents' right to use and enjoy their property. To meet the parameters of the due process clause, police power legislation must "accomplish a public good," "avoid excessive limitations of property interests," and "effect[] little interference" with individual property rights. *Goodman Toyota, Inc. v. Raleigh*, 63 N.C. App. 660, 664, 306 S.E.2d 192, 195 (1983). HB 467 and SB 711 fail on all counts.

Unlike the Map Act case, in the present case, there is no direct public interest served by HB 467 and SB 711, nor are these laws' drastic restrictions on the fundamental property rights of North Carolinians living near agricultural and forestry operations "designed to prevent injury or protect the health, safety, and welfare of the public." 368 N.C. at 855, 786 S.E.2d at 925. These laws are indisputably designed instead to immunize large-scale hog operations from liability for nuisance. It is also important to note that, prior to these amendments, there already existed multiple state laws and rules that

address both frivolous lawsuits and nuisance claims filed by property owners who moved to the area after the defendant operation had commenced.[49] Furthermore, the burden of proof a plaintiff bears in order to prove nuisance and damages before a jury is substantial.

Notably, in the Map Act case (like the present case, also a facial challenge), the court found that despite the "laudable public policy" undergirding the legislation, the General Assembly had overstepped its police powers. Justice Newby's admonition that "economic savings are a far cry from the protections from injury contemplated under the police power" signals that there is no set of facts under which the Farm Act amendments, designed to pass economic savings to a *private* corporation or single industry, can survive scrutiny under Art. I § 19's "ends/means" test. *Id*.

C. HB 467 is facially unconstitutional under N.C. Const. Art. I § 25 because it violates the right to trial by jury

Article I § 25 of the North Carolina Constitution provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." This right extends to all causes of action that "respect[ed] property" and "existed at common law or was procedure by statute at the time the Constitution was adopted." *State v. Morris*, 103 N.C. App. 246, 247, 405 S.E.2d 351, 352 (1991); *Huyck Corp. v. C.C. Mangum, Inc.*, 309 N.C. 788, 792, 309 S.E.2d 183, 186 (1983). A case "respects property" if it concerns "any right in the property or in its use." *Belk's Dep't Store v. Guilford Cty.*, 222 N.C. 441, 447, 23 S.E.2d 897, 902 (1943).

[49] *Id.*

As the common law recognized the claim of private nuisance, and because private nuisance claims concern a property interest, such claims are protected by section N.C. Const. Art. I § 25. *Cf. State ex rel. Bowman v. Malloy*, 264 N.C. 396, 398, 141 S.E.2d 796, 797 (1965) (party charged with public nuisance cannot be deprived of right to jury trial); *Sinclair v. Croom*, 217 N.C. 526, 8 S.E.2d 834, 836 (1940) (jury trial required for "allegedly innocent owner whose property has been used without his knowledge or assent in the creation or maintenance of a nuisance"). Moreover, the right to trial by jury extends not only to defendants but to plaintiffs as well. *See Dockery v. Hocutt*, 357 N.C. 210, 217, 581 S.E.2d 431, 436 (2003) ("Under the North Carolina Constitution, *a party* has a right to a jury trial in 'all controversies at law respecting property.'" (emphasis added)). Most significantly for this case, these claims are also covered by Art. I § 25 because "compensatory damages . . . represent a type of property interest vesting in plaintiffs." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004).

The "right of trial by jury" has long included the right to a jury determination not only on liability but on assessment of damages. *See, e.g.*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) ("The right to a jury trial includes the right to have a jury determine the amount of statutory damages . . . It has long been recognized that 'by the law the jury are judges of the damages.'" (quoting *Lord Townshend v. Hughs*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677)). North Carolina courts have also recognized this fact. *See, Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d 357 (1958) (analyzing whether there was a deprivation of a "constitutional right to have a jury assess the

damages."). HB 467 violates the constitutional right to have a jury assess damages by artificially limiting nuisance damages solely to diminution of value.

Other states have also recognized that the right to have a jury determine damages is inseparable from the right to a jury trial, and stuck down similar limitations on the ability to recover compensatory damages. In *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633 (Mo. 2012), the Missouri Supreme Court held unconstitutional a cap on damages as applied to medical malpractice as an infringement on the right to jury trials. In reaching its conclusion, the court relied on the fact that the state's law "has recognized that one of the jury's primary functions is to determine the plaintiff's damages, " and that "the assessment of damages is one of the factual findings assigned to the jury rather than to a judge, any limit on damages that restricts the jury's fact-finding role violates the constitutional right by jury." *Id.; see also, Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 646, 771 P.2d 711, 716 (1989) (striking down cap on compensatory damages as violation of right to jury trial because "the jury's fact-finding function include[s] the determination of damages"). *Cf. Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 557, 644 N.E.2d 397, 401 (1994) (striking down an Ohio law giving the court the right to determine punitive damages as unconstitutional, because "the assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury.").

While our state supreme court upheld a cap on *punitive* damages in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004), that case cannot be interpreted to hold that *all* limitations on damages are constitutionally permissible. *Rhyne* explicitly distinguished its holding on the question of punitive damages from other cases on compensatory

damages, a distinction central to its holding. *Id*. at 176, 594 S.E.2d at 12 (noting distinction between "compensatory damages, which represent a type of property interest vesting in plaintiffs, and punitive damages, which do not . . . ."). Moreover, *Rhyne* in fact supports the notion that caps on compensatory, as opposed to punitive, damages are unconstitutional. Analyzing its previous decision in *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), the *Rhyne* court explained that "[t]he Court noted, in *dicta*, that had the act [challenged in *Osborn*] restricted the recovery of actual or compensatory damages, it would have been unconstitutional." 358 N.C. at 185, 594 S.E.2d at 18.

HB 467 also unconstitutionally deprives successors in interest of any meaningful jury award where a previous owner has already recovered some or all of the diminution in value of the real estate. *See* Session Law 2017-11 (Attachment 1). These successors in interest are entitled to a trial by jury for two independent reasons. First, they wish to file claims for private nuisance, which necessarily relates to real property. Second, these persons have a property right to recover compensatory damages. 358 N.C. at 176, 594 S.E.2d at 12 (2004)

HB 467 deprives successors in interest of their right to trial by jury by creating a single pool of compensatory damages for all owners of a given parcel of real estate, eliminating the entire purpose of seeking legal redress and taking from them the value of those damages. Because deprivation of any amount of compensatory damages is a deprivation of the right to a jury trial, HB 467's damages "pool" violates Article I § 25. *See, e.g.*, *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1135, 442 P.3d 509, 514 (2019) ("Giving the jury a practically meaningless opportunity to assess damages simply pays lip service to the

form of the jury but robs it of its function." (internal quotation marks omitted)); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 164 (Ala. 1991) ("Because the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes less than an advisory status."); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088–89 (Fla. 1987) ("A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right."); *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988) (adopting reasoning in *Smith*, 507 So.2d at 1088-89).

The constitutional flaw of HB 467 is that it imagines that rights flow with property rather than inhere in individuals. As a matter of law, the fact that prior owners of the real estate have recovered compensatory damages is irrelevant, as rights are held by persons, not property. *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) ("The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are *individual and personal rights*." (emphasis added)). Because HB 467 deprives *individuals* of their right to a jury trial for the recovery of compensatory damages, it violates Art. I § 25.

HB 467 was expressly designed to deprive plaintiffs and those like them of the right to a jury trial for the compensatory damages that were at issue in the pending nuisance litigation. Ex. 20, at 15. It prioritizes the financial well-being of monied industries over the constitutional rights of ordinary North Carolinians by eliminating

recoverable damages against those industries and no others. HB 467 thereby unfairly deprives Plaintiffs and their members of their right to trial by, and should be declared unconstitutional.

V. CONCLUSION

There are no genuine issues of material fact regarding Plaintiffs' claims that HB 467 and SB 711 are facially unconstitutional, and Plaintiffs have demonstrated that they are entitled to judgment as matter of law. The motion for summary judgment should be granted.

Respectfully submitted, this the 26th day of August, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies that, upon agreement by all counsel to electronic service, the foregoing Brief in Support of Plaintiffs' Motion for Summary Judgment has been served on all parties at the following email addresses:

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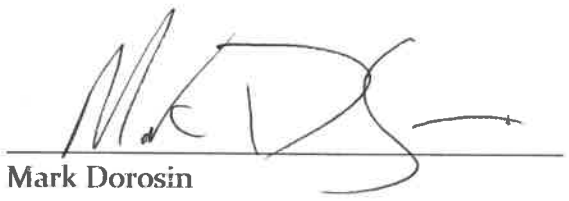
This the 26th day of August, 2020.



Mark Dorosin

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-11
HOUSE BILL 467

AN ACT TO CLARIFY THE REMEDIES AVAILABLE IN PRIVATE NUISANCE ACTIONS AGAINST AGRICULTURAL AND FORESTRY OPERATIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 57 of Chapter 106 of the General Statutes is amended by adding a new section to read:

"**§ 106-702. Limitations on private nuisance actions against agricultural and forestry operations.**

(a) The compensatory damages that may be awarded to a plaintiff for a private nuisance action where the alleged nuisance emanated from an agricultural or forestry operation shall be as follows:

(1) If the nuisance is a permanent nuisance, compensatory damages shall be measured by the reduction in the fair market value of the plaintiff's property caused by the nuisance, but not to exceed the fair market value of the property.

(2) If the nuisance is a temporary nuisance, compensatory damages shall be limited to the diminution of the fair rental value of the plaintiff's property caused by the nuisance.

(b) If any plaintiff or plaintiff's successor in interest brings a subsequent private nuisance action against any agricultural or forestry operation, the combined recovery from all such actions shall not exceed the fair market value of his or her property. This limitation applies regardless of whether the subsequent action or actions were brought against a different defendant than the preceding action or actions.

(c) This Article shall apply to any private nuisance claim brought against any party based on that party's contractual or business relationship with an agricultural or forestry operation.

(d) This Article does not apply to any cause of action brought against an agricultural or forestry operation for negligence, trespass, personal injury, strict liability, or other cause of action for tort liability other than nuisance, nor does this Article prohibit or limit any request for injunctive relief or punitive damages that are otherwise available."

SECTION 2.(a) This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date.

SECTION 2.(b) If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part declared to be unconstitutional or invalid.

In the General Assembly read three times and ratified this the 27th day of April, 2017.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

VETO Roy Cooper
Governor

Became law notwithstanding the objections of the Governor at 4:32 p.m. this 11th day of May, 2017.

s/ Sarah Lang
Senate Principal Clerk

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2018-113
SENATE BILL 711

AN ACT TO MAKE VARIOUS CHANGES TO THE AGRICULTURAL LAWS.

Whereas, frivolous nuisance lawsuits threaten the very existence of farming in North Carolina; and

Whereas, in response to the long-standing threat to agriculture, in 1979 the General Assembly enacted the State's first effort to statutorily protect the ability of farms and forestry operations to continue to operate as surrounding development encroached; and

Whereas, following the 1979 enactment, at least three succeeding General Assemblies in 1992, 2013, and 2017 tried to perfect a statutory framework that broadly fosters a cooperative relationship between farms and forestry operations and their neighbors across North Carolina; and

Whereas, recently a federal trial court incorrectly and narrowly interpreted the North Carolina Right to Farm Act in a way that contradicts the intent of the General Assembly and effectively renders the Act toothless in offering meaningful protection to long-established North Carolina farms and forestry operations; and

Whereas, regrettably, the General Assembly is again forced to make plain its intent that existing farms and forestry operations in North Carolina that are operating in good faith be shielded from nuisance lawsuits filed long after the operations become established; Now, therefore,

The General Assembly of North Carolina enacts:

FRUIT AND VEGETABLE HANDLERS REGISTRATION ACT

SECTION 1.(a) Article 44 of Chapter 106 of the General Statutes is repealed.

SECTION 1.(b) Chapter 106 of the General Statutes is amended by adding a new Article to read:

"Article 44A.

"Fruit and Vegetable Handlers Registration Act.

"**§ 106-501.1. Definitions.**

The following definitions shall apply when used under this Article:

(1) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.

(2) "Consignment" means any transfer of fruits and vegetables by a seller to the custody of another person who acts as the agent for the seller for the purpose of selling such fruits and vegetables.

(3) "Department" means the Department of Agriculture and Consumer Services.

(4) "Farmer" means any person who produces fruits or vegetables or both.

(5) "Handler" means any person in the business of buying, receiving, selling, exchanging, negotiating, processing for resale, or soliciting the sale, resale, exchange, or transfer of any fruits and vegetables purchased from a North Carolina farmer, received on consignment from a North Carolina farmer, or received to be handled on net return basis from a North Carolina farmer.

(6) "Net return basis" means a purchase for sale of fruits and vegetables from a farmer or shipper at an unfixed or unstated price at the time the fruits and vegetables are shipped from the point of origin, and it shall include all purchases made "at the market price," "at net worth," and on similar terms, which indicate that the buyer is the final arbiter of the price to be paid.

(7) "Processing" means any act or operation that freezes, dehydrates, cans, or otherwise changes the physical form or characteristic of fruits and vegetables.

"**§ 106-501.2. Registration required.**

(a) Prior to conducting business in North Carolina, a handler shall register with the Department, free of cost, by providing to the Department the following information:

(1) The handler's name.

(2) The handler's principal place of business.

(3) The type of fruits and vegetables handled by the handler.

(4) The annual volume, in dollar amount, of fruits and vegetables handled by the handler in North Carolina.

(b) A handler shall update the Department within 60 calendar days of any change in information required under subdivision (a)(1), (a)(2), or (a)(3) of this section.

(c) A handler shall update the Department of the annual volume required under subdivision (a)(4) of this section by February 1st of each year.

(d) Information collected under this Article shall be held confidential by the Department and not subject to public records disclosure.

"**§ 106-501.3. Exemptions to registration.**

This Article shall not apply to:

(1) A farmer or group of farmers in the sale of fruits and vegetables produced by the farmer or group of farmers.

(2) A handler who pays at the time of purchase with United States cash currency or a cash equivalent, such as a money order, cashier's check, wire transfer, electronic funds transfer, or PIN-based debit transaction, or a credit card.

(3) A restaurant.

(4) A retailer that sells fruits and vegetables to end-use consumers through retail establishments or food stands operated by the company, its affiliates, or subsidiaries.

"**§ 106-501.4. Authority of the Board of Agriculture.**

The Board of Agriculture may adopt rules to implement this Article.

"**§ 106-501.5. Civil penalties.**

(a) The Commissioner may assess a civil penalty of not more than one hundred dollars ($100.00) per violation against any person or business entity who violates a provision of this Article or any rule adopted thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation. The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Civil penalties for failure to register or provide updated information under this Article shall only be issued after a 15-calendar-day notice has been provided to the handler and the handler fails to remedy the deficiency within the 15 days.

"**§ 106-501.6. Injunctions.**

In addition to the remedies provided in this Article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to any court of competent jurisdiction, and such court shall have jurisdiction upon hearing and for cause shown to grant, for a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this Article or any rule promulgated thereunder. Such injunction shall be issued without bond."

SECTION 1.(c) This section becomes effective January 1, 2019, and applies to handlers conducting business in the State on or after that date.

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES CONFIDENTIALITY CHANGE

SECTION 2. G.S. 106-24.1 reads as rewritten:

"§ 106-24.1. Confidentiality of information collected and published.

All information published by the Department of Agriculture and Consumer Services pursuant to this Part shall be classified so as to prevent the identification of information received from individual farm operators. All information generated by any federal agency received pursuant to this ~~Part~~ Chapter that is confidential under federal law shall be held confidential by the Department and its ~~employees.~~employees, unless confidentiality is waived by the federal agency. All information collected by the Department from farm owners or animal owners, including, but not limited to, certificates of veterinary inspection, animal medical records, laboratory reports received or generated from samples submitted for analysis, or other records that may be used to identify a person or private business entity subject to regulation by the Department shall not be disclosed without the permission of the owner unless the State Veterinarian determines that disclosure is necessary to prevent the spread of an animal disease or to protect the public health, or the disclosure is necessary in the implementation of these animal health programs."

EXEMPT GOT TO BE NC AGRICULTURE MERCHANDISE FROM UMSTEAD ACT

SECTION 3. G.S. 66-58 reads as rewritten:

"§ 66-58. Sale of merchandise or services by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of the unit, department or agency, or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to provide transportation services, or to contract with any person, firm or corporation for the operation or rendering of the businesses or services on behalf of the unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

...

(13b) The Department of Agriculture and Consumer Services with regard to its lessees at farmers' markets operated by the Department.

(13c) The Western North Carolina Agricultural Center.

(13d) Agricultural centers or livestock facilities operated by the Department of Agriculture and Consumer Services.

(13e) The Department of Agriculture and Consumer Services with regard to its Got to Be NC Agriculture promotion.

...."

ALLOW DISTRIBUTION OF VERIFIED PROPAGULES BY INDUSTRIAL HEMP COMMISSION

SECTION 4. G.S. 106-568.51 reads as rewritten:

"§ 106-568.51. Definitions.

The following definitions apply in this Article:

~~(1) Certified seed. – Industrial hemp seed that has been certified as having a delta-9 tetrahydrocannabinol concentration less than that adopted by federal law in the Controlled Substances Act, 21 U.S.C. § 801 et seq.~~

(2) Commercial use. – The use of industrial hemp as a raw ingredient in the production of hemp products.

(3) Commission. – The North Carolina Industrial Hemp Commission created by this Article.

(4) Department. – The North Carolina Department of Agriculture.

(5) Grower. – Any person licensed to grow industrial hemp by the Commission pursuant to this Article.

(6) Hemp products. – All products made from industrial hemp, including, but not limited to, cloth, cordage, fiber, food, fuel, paint, paper, particleboard, plastics, seed, seed meal and seed oil for consumption, and ~~certified seed~~verified propagules for cultivation if the seeds originate from industrial hemp varieties.

(7) Industrial hemp. – All parts and varieties of the plant Cannabis sativa (L.), cultivated or possessed by a grower licensed by the Commission, whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis.

(7a) Industrial hemp research program. – The research program established pursuant to G.S. 106-568.53(1).

(7b) State land grant university. – North Carolina State University and North Carolina A&T State University.

(8) Tetrahydrocannabinol or THC. – The natural or synthetic equivalents of the substances contained in the plant, or in the resinous extractives of, cannabis, or any synthetic substances, compounds, salts, or derivatives of the plant or chemicals and their isomers with similar chemical structure and pharmacological activity.

(9) Verified propagule. – A seed or clone from an industrial hemp plant from which THC concentration samples have been tested by a qualified laboratory and confirmed as having a delta-9 tetrahydrocannabinol concentration less than that adopted by federal law in the Controlled Substances Act, 21 U.S.C. § 801, et seq."

TECHNICAL CORRECTIONS TO FORESTRY STATUTES

SECTION 5.(a) G.S. 106-980(b) reads as rewritten:

"(b) Three or more persons, who associate themselves by an agreement in writing for the purpose, may become a private limited dividend corporation to finance and carry out projects for the protection and development of forests and for such other related purposes as the ~~Secretary~~ Commissioner shall approve, subject to all the duties, restrictions and liabilities, and possessing all the rights, powers, and privileges, of corporations organized under the general corporation laws of the State of North Carolina, except where such provisions are in conflict with this Article."

SECTION 5.(b) G.S. 106-981 reads as rewritten:

"§ 106-981. Manner of organizing.

A corporation formed under this Article shall be organized and incorporated in the manner provided for organization of corporations under the general corporation laws of the State of North Carolina, except where such provisions are in conflict with this Article. The certificate of organization of any such corporation shall contain a statement that it is organized under the

provisions of this Article and that it consents to be and shall be at all times subject to the rules and supervision of the ~~Secretary,~~Commissioner, and shall set forth as or among its purposes the protection and development of forests and the purchase, acquisition, sale, conveyance and other dealing in the same and the products therefrom, subject to the rules from time to time imposed by the ~~Secretary.~~Commissioner."

SECTION 5.(c) G.S. 106-982 reads as rewritten:

"§ 106-982. Directors.

There shall not be less than three directors, one of whom shall always be a person designated by the ~~Secretary,~~Commissioner, which one need not be a stockholder."

SECTION 5.(d) G.S. 106-1003 reads as rewritten:

"§ 106-1003. Deposit of receipts with State treasury.

All moneys paid to the ~~Secretary~~ Commissioner for services rendered under the provisions of this Article shall be deposited into the State treasury to the credit of the Department."

SECTION 5.(e) G.S. 106-1012(2) reads as rewritten:

"(2) "Approved practices" mean those silvicultural practices approved by the ~~Secretary~~ Commissioner for the purpose of commercially growing timber through the establishment of forest stands, of insuring the proper regeneration of forest stands to commercial production levels following the harvest of mature timber, or of insuring maximum growth potential of forest stands to commercial production levels. Such practices shall include those required to accomplish site preparation, natural and artificial forestation, noncommercial removal of residual stands for silvicultural purposes, cultivation of established young growth of desirable trees for silvicultural purposes, and improvement of immature forest stands for silvicultural purposes. In each case, approved practices will be determined by the needs of the individual forest stand. These practices shall include existing practices and such practices as are developed in the future to insure both maximum forest productivity and environmental protection."

DIRECT DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES TO ADDRESS MISLABELING OF PLANT-BASED PRODUCTS AS "MILK"

SECTION 6.(a) It is declared to be the policy of the State of North Carolina that it is necessary to take steps to assure the continued viability of dairy farming and to assure consumers of an adequate, local supply of pure and wholesome milk. The dairy industry is an essential agricultural activity and dairy farms, and associated suppliers, marketers, processors, and retailers, are an integral component of the region's economy. The North Carolina General Assembly finds that the United States Food and Drug Administration has not provided consistent guidance to the Department of Agriculture and Consumer Services, dairy farms, associated suppliers, marketers, processors, retailers, and consumers as to the application of the established standard of identity of milk as defined in 21 C.F.R. § 131.110. The North Carolina General Assembly seeks to be a national leader in the preservation of the dairy industry while balancing the need to maintain interstate commerce.

SECTION 6.(b) The following definitions apply to this section:

(1) "Department" means the Department of Agriculture and Consumer Services.

(2) "FDA" means the United States Food and Drug Administration.

(3) "Milk" means the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy hooved mammals. Hooved mammals include, but are not limited to, the members of the Order Cetartiodactyla, such as: Family Bovidae (cattle, water buffalo, sheep, goats, yaks, etc.), Family Camelidae (llamas, alpacas, camels, etc.), Family Cervidae (deer, reindeer, moose, etc.), and Family Equidae (horses, donkeys, etc.).

SECTION 6.(c) In accordance with the established standard of identity for milk defined in 21 C.F.R. § 131.110 and the Pasteurized Milk Ordinance, the Department shall immediately develop an enforcement plan to enforce FDA's standard of identity for milk as adopted in the North Carolina Administrative Code to prohibit the sale of plant-based products mislabeled as milk.

SECTION 6.(d) No later than 90 days after the effective date of this subsection, the Department shall begin to implement its enforcement plan, which shall include, but is not limited to, notification of the Department's intent to embargo all mislabeled products offered for sale in this State. All plant-based products displayed for sale in this State shall be labeled in accordance with FDA's standard of identity for milk and the Pasteurized Milk Ordinance no later than six months after the effective date of this section.

SECTION 6.(e) Subsection (d) of this section is effective upon the enactment into law of a mandatory labeling requirement to prohibit the sale of plant-based products mislabeled as milk that is consistent with this section by any 11 of the group of states composed of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. The remainder of this section is effective when it becomes law.

SECTION 6.(f) Nothing in this section shall be construed to limit the Department's authority to enforce its laws and regulations.

SET QUORUM FOR AGRICULTURE AND FORESTRY AWARENESS STUDY COMMISSION

SECTION 7. G.S. 120-150 reads as rewritten:

"§ 120-150. Creation; appointment of members.

There is created an Agriculture and Forestry Awareness Study Commission. Members of the Commission shall be citizens of North Carolina who are interested in the vitality of the agriculture and forestry sectors of the State's economy. Members shall be as follows:

(1) Three appointed by the Governor.
(2) Three appointed by the President Pro Tempore of the Senate.
(3) Three appointed by the Speaker of the House.
(4) The chairs of the House Agriculture Committee.
(5) The chairs of the Senate Committee on Agriculture, Environment, and Natural Resources.
(6) The Commissioner of Agriculture or the Commissioner's designee.
(7) A member of the Board of Agriculture designated by the chair of the Board of Agriculture.
(8) The President of the North Carolina Farm Bureau Federation, Inc., or the President's designee.
(9) The President of the North Carolina State Grange or the President's designee.
(10) The Secretary of Environmental Quality or the Secretary's designee.
(11) The President of the North Carolina Forestry Association, Inc., or the President's designee.

Members shall be appointed for two-year terms beginning October 1 of each odd-numbered year. The Chairs of the House Agriculture Committee and the Chairs of the Senate Committee on Agriculture, Environment, and Natural Resources shall serve as cochairs. The President Pro Tempore of the Senate and the Speaker of the House of Representatives may each appoint an additional member of the Senate and House, respectively, to serve as cochair. If appointed, these cochairs shall be voting members of the Commission. A quorum of the Commission is nine members."

AGRICULTURE AND FORESTRY AWARENESS STUDY COMMISSION STUDIES

SECTION 8.(a) The Agriculture and Forestry Awareness Study Commission shall study all of the following matters:

(1) Requiring the holders of unused rights-of-way and utility easements to offer the easements to the underlying property owners for fair market value.

(2) The advisability of excluding property enrolled in present use value taxation from rural fire protection district and county service district taxes.

SECTION 8.(b) The Agriculture and Forestry Awareness Study Commission shall complete the studies required by subsection (a) of this section and report its findings and recommendations, including any legislative proposals, to the General Assembly by January 1, 2019.

MANDATORY RECORD NOTICE OF PROXIMITY TO FARMLANDS

SECTION 9. G.S. 106-741 reads as rewritten:

"§ 106-741. Record notice of proximity to farmlands.

(a) ~~Any county that has a computerized land records system may require that such~~All counties shall require that land records include some form of notice reasonably calculated to alert a person researching the title of a particular tract that such tract is located within one-half mile of a poultry, swine, or dairy qualifying farm or within 600 feet of any other qualifying farm or within one-half mile of a voluntary agricultural district.

(b) In no event shall the county or any of its officers, employees, or agents be held liable in damages for any misfeasance, malfeasance, or nonfeasance occurring in good faith in connection with the duties or obligations imposed by any ordinance adopted under subsection (a).

(c) In no event shall any cause of action arise out of the failure of a person researching the title of a particular tract to report to any person the proximity of the tract to a qualifying farm or voluntary agricultural district as defined in this Article.

(d) In no event shall any cause of action arise out of the failure of a person licensed under Chapters 93A or 93E of the General Statutes for failure to report to any person the proximity of a tract to a qualifying farm or voluntary agricultural district as defined in this Article."

AMEND NORTH CAROLINA RIGHT TO FARM LAW

SECTION 10.(a) G.S. 106-701 reads as rewritten:

"§ 106-701. ~~When agricultural and forestry operation, etc., not constituted nuisance by changed conditions in or about the locality outside of the operation.~~Right to farm defense; nuisance actions.

(a) ~~No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year, when such operation was not a nuisance at the time the operation began.~~No nuisance action may be filed against an agricultural or forestry operation unless all of the following apply:

(1) The plaintiff is a legal possessor of the real property affected by the conditions alleged to be a nuisance.

(2) The real property affected by the conditions alleged to be a nuisance is located within one half-mile of the source of the activity or structure alleged to be a nuisance.

(3) The action is filed within one year of the establishment of the agricultural or forestry operation or within one year of the operation undergoing a fundamental change.

(a1) ~~The provisions of subsection (a) of this section shall not apply when the plaintiff demonstrates that the agricultural or forestry operation has undergone a fundamental change. A~~

For the purposes of subsection (a) of this section, a fundamental change to the operation does not include any of the following:

(1) A change in ownership or size.

(2) An interruption of farming for a period of no more than three years.

(3) Participation in a government-sponsored agricultural program.

(4) Employment of new technology.

(5) A change in the type of agricultural or forestry product produced.

~~(a2) The provisions of subsection (a) of this section shall not apply whenever a nuisance results from the negligent or improper operation of any agricultural or forestry operation or its appurtenances.~~

(b) For the purposes of this Article, "agricultural operation" includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.

(b1) For the purposes of this Article, "forestry operation" shall mean those activities involved in the growing, managing, and harvesting of trees.

(c) The provisions of subsection (a) shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by him on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation.

(d) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural or forestry operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstance set forth in this section are and shall be null and ~~void; provided, however, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural or forestry operation or any of its appurtenances. Provided further,~~void. Provided, however, that the provisions shall not apply whenever a nuisance results from an agricultural or forestry operation located within the corporate limits of any city at the time of enactment hereof.

(e) This section shall not be construed to invalidate any contracts heretofore made but insofar as contracts are concerned, it is only applicable to contracts and agreements to be made in the future.

(f) In a nuisance action against an agricultural or forestry operation, the court shall award costs and expenses, including reasonable attorneys' fees, to:

(1) The agricultural or forestry operation when the court finds the operation was not a nuisance and the nuisance action was frivolous or malicious; or

(2) The plaintiff when the court finds the agricultural or forestry operation was a nuisance and the operation asserted an affirmative defense in the nuisance action that was frivolous and malicious."

SECTION 10.(b) G.S. 106-702 reads as rewritten:

"**§ 106-702. Limitations on private nuisance actions against agricultural and forestry operations.**

(a) The compensatory damages that may be awarded to a plaintiff for a private nuisance action where the alleged nuisance emanated from an agricultural or forestry operation shall be as follows:

(1) If the nuisance is a permanent nuisance, compensatory damages shall be measured by the reduction in the fair market value of the plaintiff's property caused by the nuisance, but not to exceed the fair market value of the property.

(2) If the nuisance is a temporary nuisance, compensatory damages shall be limited to the diminution of the fair rental value of the plaintiff's property caused by the nuisance.

(a1) A plaintiff may not recover punitive damages for a private nuisance action where the alleged nuisance emanated from an agricultural or forestry operation that has not been subject to a criminal conviction or a civil enforcement action taken by a State or federal environmental regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance within the three years prior to the first act on which the nuisance action is based.

(b) If any plaintiff or plaintiff's successor in interest brings a subsequent private nuisance action against any agricultural or forestry operation, the combined recovery from all such actions shall not exceed the fair market value of his or her property. This limitation applies regardless of whether the subsequent action or actions were brought against a different defendant than the preceding action or actions.

(c) This Article shall apply to any private nuisance claim brought against any party based on that party's contractual or business relationship with an agricultural or forestry operation.

(d) This Article does not apply to any cause of action brought against an agricultural or forestry operation for negligence, trespass, personal injury, strict liability, or other cause of action for tort liability other than nuisance, nor does this Article prohibit or limit any request for injunctive relief ~~or punitive damages that are~~that is otherwise available."

SECTION 10.(c) This section is effective when it becomes law and applies to causes of action commenced on or after that date.

AMEND SOIL AND WATER CONSERVATION DISTRICT SUPERVISOR CONTINUING EDUCATION REQUIREMENTS

SECTION 12. G.S. 139-7.2 reads as rewritten:

"§ 139-7.2. Training of elective and appointive district supervisors.

(a) All district supervisors, whether elected or appointed, shall complete a minimum of six clock hours of training ~~annually.~~per term of service.

(b) The training shall include soil, water, and natural resources conservation and the duties and responsibilities of district supervisors.

(c) The training may be provided by the School of Government at the University of North Carolina at Chapel Hill, or other qualified sources as approved by the Soil and Water.

PROVIDE UNIFORMITY TO ASSESSMENT OF FARM MACHINERY

SECTION 14.(a) G.S. 105-317.1 reads as rewritten:

"§ 105-317.1. Appraisal of personal property; elements to be considered.

(a) Appraisal Elements. – Whenever any personal property is appraised it shall be the duty of the persons making appraisals to consider the following as to each item (or lot of similar items):

(1) The replacement cost of the property;
(2) The sale price of similar property;
(3) The age of the property;
(4) The physical condition of the property;
(5) The productivity of the property;
(6) The remaining life of the property;
(7) The effect of obsolescence on the property;
(8) The economic utility of the property, that is, its usability and adaptability for industrial, commercial, or other purposes; and
(9) Any other factor that may affect the value of the property.

(b) Business Property. – In determining the true value of taxable tangible personal property held and used in connection with the mercantile, manufacturing, producing, processing, or other business enterprise of any taxpayer, the persons making the appraisal shall consider any information as reflected by the taxpayer's records and as reported by the taxpayer to the North Carolina Department of Revenue and to the Internal Revenue Service for income tax purposes,

taking into account the accuracy of the taxpayer's records, the taxpayer's method of accounting, and the level of trade at which the taxpayer does business.

(b1) Farm Equipment. – In determining the true value of taxable farm equipment, the person making the appraisal may use any of the appraisal methods listed in subsection (a) of this section and must consider relevant taxpayer information as required under subsection (b) of this section. The Department must publish a depreciation schedule for farm equipment to assist counties that use the cost approach to appraise this equipment. The Department must make the schedule available electronically on its Web site. A county that uses a cost approach method to appraise this equipment must use the depreciation schedule published pursuant to this subsection.

(c) Appeal Process. – A taxpayer who owns personal property taxable in the county may appeal the value, situs, or taxability of the property within 30 days after the date of the initial notice of value. If the assessor does not give separate written notice of the value to the taxpayer at the taxpayer's last known address, then the tax bill serves as notice of the value of the personal property. The notice must contain a statement that the taxpayer may appeal the value, situs, or taxability of the property within 30 days after the date of the notice. Upon receipt of a timely appeal, the assessor must arrange a conference with the taxpayer to afford the taxpayer the opportunity to present any evidence or argument regarding the value, situs, or taxability of the property. Within 30 days after the conference, the assessor must give written notice to the taxpayer of the assessor's final decision. Written notice of the decision is not required if the taxpayer signs an agreement accepting the value, situs, or taxability of the property. If an agreement is not reached, the taxpayer has 30 days from the date of the notice of the assessor's final decision to request review of that decision by the board of equalization and review or, if that board is not in session, by the board of county commissioners. Unless the request for review is given at the conference, it must be made in writing to the assessor. Upon receipt of a timely request for review, the provisions of G.S. 105-322 or G.S. 105-325, as appropriate, must be followed."

SECTION 14.(b) This section is effective for taxes imposed for taxable years beginning on or after July 1, 2019.

CLARIFY CEMETERY PROPERTY TAX EXEMPTION

SECTION 15. G.S. 105-278.2(a) reads as rewritten:

"(a) Real property set apart for burial purposes shall be exempted from taxation unless it is owned and held for purposes of (i) sale or rental or (ii) sale of burial rights therein. No application is required under G.S. 105-282.1 for property exempt under this subsection. A county cannot deny the exemption provided under this subsection to a taxpayer that lacks a survey or plat detailing the exempt property."

LAW ENFORCEMENT MUTUAL AID AND VETERINARIAN COMITY FOR WORLD EQUESTRIAN GAMES

SECTION 15.1.(a) Article 10 of Chapter 153A of the General Statutes is amended by adding a new section to read:

"**§ 153A-212.5. Mutual aid assistance by out-of-state law enforcement officers for international equestrian event.**

(a) Any law enforcement agency may request and enter into intergovernmental law enforcement mutual aid agreements with out-of-state law enforcement agencies or out-of-state law enforcement officers to aid in enforcing the laws of North Carolina within the jurisdiction of the requesting law enforcement agency for maintaining security and safety for an international equestrian event.

(b) Any intergovernmental law enforcement mutual aid agreement entered into under this section shall be in writing and may be comprised of any of the following:

(1) Allowing out-of-state law enforcement officers to work temporarily with officers of the requesting law enforcement agency, including in an undercover capacity.

(2) Furnishing, lending, or exchanging supplies, equipment, facilities, personnel, and services as may be needed.

(3) Reciprocal law enforcement mutual aid and assistance between law enforcement agencies.

(c) Any intergovernmental law enforcement mutual aid agreement entered into under this section shall address all of the following:

(1) Standards of conduct for the out-of-state law enforcement officers, including the requesting law enforcement agencies' policies regarding the use of force.

(2) Training requirements, as prescribed by the requesting law enforcement agency.

(3) Reimbursement of costs and expenses for supplies, equipment, facilities, personnel, services, and similar items if furnished, lent, or exchanged as part of the intergovernmental law enforcement mutual aid agreement.

(4) Protocols for processing claims made against or by the out-of-state law enforcement officer.

(5) Approval of the governing body, if the law enforcement agency is a sheriff or municipal police force.

(d) While working with the requesting law enforcement agency under the authority of this section, an out-of-state law enforcement officer shall have the same jurisdiction, powers, rights, privileges, and immunities, including those relating to the defense of civil actions and payment of judgments, as the officers of the requesting law enforcement agency. While on duty with the requesting law enforcement agency, the out-of-state law enforcement officer shall be subject to the lawful operational commands of the requesting law enforcement agency.

(e) Notwithstanding the provisions of Chapter 17C and Chapter 17E of the General Statutes, out-of-state law enforcement officers certified and sworn in the officers' home jurisdiction and subject to the provisions of an intergovernmental law enforcement mutual aid agreement under this section shall be deemed to have met the certification requirements of this State for the purposes of being sworn as a law enforcement officer with the requesting law enforcement agency.

(f) Notwithstanding the provisions of G.S. 128-1 and G.S. 128-1.1(c1), out-of-state law enforcement officers shall be authorized to hold dual offices when one of the appointive offices held is that of a out-of-state law enforcement officer and the other appointive office is that of a law enforcement officer for a law enforcement agency authorized to enter into an intergovernmental law enforcement mutual aid agreement under this section.

(g) This section in no way reduces the jurisdiction or authority of State law enforcement officers.

(h) As used in this section, the following definitions apply:

(1) Law enforcement agency. – Any of the following:

a. The Highway Patrol, as established by Article 4 of Chapter 20 of the General Statutes.

b. A sheriff serving a county sharing a border with another state and which county is the site of an equestrian event with worldwide participants.

c. A municipal police department for a municipality located, in whole or part, in a county sharing a border with another state and which municipality is the site of an equestrian event with worldwide participants.

(2) Out-of-state law enforcement agency. – An employer which is a governmental agency outside of this State that meets all of the following criteria:

a. Is assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the home jurisdiction or serving civil processes.

b. Has employees who possess the power of arrest by virtue of an oath administered under the authority of the home jurisdiction.

(3) Out-of-state law enforcement officer. – A full-time paid employee of a governmental employer who meets all of the following criteria:

a. Is actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the officer's home jurisdiction or serving civil processes.

b. Possesses the power of arrest by virtue of an oath administered under the authority of the home jurisdiction.

c. Is in good standing and has no pending civil, criminal, or departmental action that would disqualify the officer if the officer were certified by this State."

SECTION 15.1.(b) Article 11 of Chapter 90 of the General Statutes is amended by adding a new section to read:

"**§ 90-187.3A. Comity for out-of-state veterinarians and international veterinarians for international equestrian event.**

(a) Any nonresident veterinarian validly licensed in another state, territory, or district of the United States or a foreign country may submit to the Board an application for a licensure to practice veterinary medicine in this State.

(b) The Board shall issue, without written examination, a license to practice veterinary medicine in this State to a nonresident veterinarian validly licensed in another state, territory, or district of the United States or a foreign country who submits an application for licensure. The Board shall not charge the fee authorized in G.S. 90-186(6)e. for the issuance of a license under this section."

SECTION 15.1.(c) This section is effective when it becomes law and expires October 1, 2018.

ALLOW THE DISPENSING OF RAW MILK AND RAW MILK PRODUCTS TO INDEPENDENT OR PARTIAL OWNERS OF LACTATING ANIMALS FOR PERSONAL USE OR CONSUMPTION

SECTION 15.2.(a) G.S. 106-266.35 reads as rewritten:

"**§ 106-266.35. Sale or dispensing of milk.**

(a) Except as provided in subsection (d) of this section:

(1) Only milk that is Grade "A" pasteurized milk may be sold or dispensed directly to consumers for human consumption.

(2) Raw milk and raw milk products shall be sold or dispensed only to a permitted milk hauler or to a processing facility at which the processing of milk is permitted, graded, or regulated by a local, State, or federal agency.

(b) The Board of Agriculture may adopt rules to provide exceptions for dispensing raw milk and raw milk products for nonhuman consumption. Any raw milk or raw milk product dispensed as animal feed shall include on its label the statement "NOT FOR HUMAN CONSUMPTION" in letters at least one-half inch in height. Any raw milk or raw milk product dispensed as animal feed shall also include on its label the statement "IT IS NOT LEGAL TO SELL RAW MILK FOR HUMAN CONSUMPTION IN NORTH CAROLINA." ~~"Sale"~~This

labeling requirement does not apply to raw milk or raw milk products dispensed for personal use or consumption to the independent or partial owner of a cow, goat, or other lactating animal.

(c) As used in this section, the term "sale" or "sold" ~~shall mean~~means any transaction that involves the transfer or dispensing of milk and milk products or the right to acquire milk and milk products through barter or contractual arrangement or in exchange for any other form of ~~compensation including, but not limited to, the sale of shares or interest in a cow, goat, or other lactating animal or herd.~~compensation. The term "sale" or "sold" does not include the transfer or dispensing of raw milk or raw milk products to, or the right to acquire raw milk or raw milk products by, the independent or partial owner of a cow, goat, or other lactating animal.

(d) Nothing in this section shall prohibit the dispensing of raw milk or raw milk products for personal use or consumption to, or the acquisition of raw milk or raw milk products for personal use or consumption by, an independent or partial owner of a cow, goat, or other lactating animal."

SECTION 15.2.(b) This section becomes effective October 1, 2018.

SEVERABILITY CLAUSE AND EFFECTIVE DATE

SECTION 16.(a) If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and, to this end, the provisions of this act are declared to be severable.

SECTION 16.(b) Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 15th day of June, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

VETO Roy Cooper
Governor

Became law notwithstanding the objections of the Governor at 11:13 a.m. this 27th day of June, 2018.

s/ James White
House Principal Clerk