

IN THE SUPREME COURT OF IOWA

Jerry Dovico, et al.,

Plaintiffs-Appellees,

v.

Valley View Swine, LLC, et al.,

Defendants-Appellants.

Supreme Court No. 16-1006

Wapello County Case No.
LALA105144 – Division A

Appeal from the Iowa District Court in and for Wapello County
The Honorable Annette J. Scieszinski, Judge

**Defendants-Appellants Valley View Swine, LLC and
JBS Live Pork, LLC's Final Brief and
Request for Oral Argument**

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. This Court Should Reverse the District Court Because Its Summary Judgment Ruling Failed to Uphold the Enactment and Enforcement of Iowa Code Section 657.11(2) As Constitutionally Permissible Exercises of Legislative Powers Lawfully Used By The General Assembly To Control How Agricultural Nuisance Cases Are Litigated in Iowa and To Define the Damages Available Against Farmers and Producers in Lawsuits Such As This One

Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978)

New York Cent. R.R. v. White, 243 U.S. 188 (1917)

Ducharme v. Merrill–Nat’l Labs., 574 F.2d 1307 (5th Cir. 1978)

Eddings ex rel. Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369 (11th Cir. 1988)

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City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008)

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State v. Osborne, 171 Iowa 678 (1915)
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Stewart v. Bd. of Supervisors, 30 Iowa 9 (1870)
Vilas v. Iowa State Bd. of Assessment & Review, 223 Iowa 604 (1937)

Iowa Const. art. I, § 1
Iowa Const. art. III, § 1
Iowa Const. art. V, § 7
Iowa Const. art. XII, § 1
Iowa Code § 4.4
Iowa Code § 352.11(1)(a)
Iowa Code Ch. 459
Iowa Code § 459.202

Iowa Code § 459.306

Iowa Code § 657.11(1)

Iowa Code § 657.11(2)

Iowa Code § 668.3

Iowa Admin. Code Ch. 65

Iowa Admin. Code § 567-65.11(1)

Iowa R. App. P. 6.104(1)(b)(2)

Iowa R. App. P. 6.104(1)(d)

Iowa R. App. P. 6.904(3)(m)

ROUTING STATEMENT

The Iowa Supreme Court should retain this interlocutory appeal because it presents a substantial constitutional question as to the validity of a statute, in this case Iowa Code section 657.11(2). Iowa R. App. P. 6.1101(2)(a).

In addition to dictating the outcome in this case, this Court's resolution regarding the constitutionality of Iowa Code section 657.11(2) under comparable circumstances will provide controlling authority affecting similarly situated animal agriculture nuisance cases involving hundreds of plaintiffs represented by the same counsel currently pending in Iowa. Therefore, this appeal also presents a fundamental and urgent issue of broad public importance meriting prompt and ultimate determination by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(d).

Further, in granting interlocutory appeal pursuant to Iowa Rule of Appellate Procedure 6.104, this Court inherently agreed that the issue raised affects substantial rights and the final outcome of this lawsuit, and determination of that issue prior to trial on the merits will better serve the interests of justice. Iowa R. App. P. 6.104(1)(d).

Accordingly, the Iowa Supreme Court should retain and decide this matter pursuant to Iowa Rule of App. P. 6.1101(2).

STATEMENT OF THE CASE

This lawsuit involves agricultural nuisance claims initiated by Plaintiffs to challenge animal feeding operations on an Iowa farm, the very type of claim that the Iowa General Assembly restricted in litigation reform measures adopted beginning in 1995 through enactment of Iowa Code section 657.11(2). That subsection, by its title, covers “Animal Feeding Operations” in Iowa. The statute protects farmers by, among other things, barring recovery of special damages—damages for loss of use and enjoyment—in nuisance actions against an animal feeding operation unless specified cause of action elements and proof requirements are established by the plaintiff.

While this Court deemed section 657.11(2) unconstitutional as applied to a limited context which predates today’s comprehensive regulatory scheme, the District Court relied on that decision to declare in effect that the procedural and substantive provisions of the statute can never shield farm operations as the General Assembly intended when it exercised its police power to protect the general good.

Defendants JBS Live Pork, LLC (“JBS”), successor in interest to Cargill Pork, LLC (“Cargill Pork”), and Valley View Swine, LLC (“Valley View Swine”), collectively “Defendants,” appeal the Iowa District Court for

Wapello County's holding that Iowa Code section 657.11(2) is unconstitutional.

Defendants timely moved for summary judgment on Plaintiffs' nuisance claims on the basis of section 657.11(2) on October 6, 2015. Defendant Cargill Pork, LLC's Motion for Summary Judgment ("Cargill Pork MSJ"), App. 233; Defendants Valley View Swine, LLC, Nick Adam, Jeffery Adam, and Shawn Adam's Motion for Summary Judgment ("Valley View Swine MSJ"), App. 714. Plaintiffs also moved for partial summary judgment on October 6, 2015, seeking to strike certain statutory affirmative defenses through their request for a declaratory ruling holding Iowa Code section 657.11(2) unconstitutional as applied to them. Plaintiffs' Motion for Partial Summary Judgment as to Affirmative Defenses of Defendants, App. 817.

In October and November 2015, the parties filed resistances and replies relating to the cross motions for summary judgment. App. 1075–1737. On November 24, 2015, the District Court heard argument on Plaintiffs' and Defendants' motions. App. 2012. It held a second hearing for argument on those motions on December 15, 2015. App. 2275.

On June 8, 2016, the District Court issued its Ruling on Pretrial Motions, denying Defendants' motions for dismissal of Plaintiffs' claims on

the basis of Iowa Code section 657.11(2) and granting Plaintiffs’ motion to strike section 657.11(2) from Defendants’ affirmative defenses. Ruling on Pretrial Motions (“Ruling”), App. 1904. The District Court held the immunity provided by the General Assembly in Iowa Code section 657.11 was unconstitutional as applied to Plaintiffs because it violated the inalienable rights clause of Article I, Section 1 of the Iowa Constitution. *Id.*

While framed as an “as applied” determination, the District Court did not evaluate facts specific to any Plaintiff. *Id.* Thus, although labeled an “as applied” challenge, the ruling effectively endorsed a facial challenge to the statute and implemented a judicial declaration that the Iowa Legislature is powerless to reform substantive elements of the animal agriculture nuisance cause of action, making Iowa Code section 657.11(2) unconstitutional in all circumstances irrespective of the facts presented by a particular plaintiff.

Defendants filed their Application for Interlocutory Appeal on June 13, 2016, which this Court granted on July 15, 2016. This Court stayed further District Court proceedings pending outcome of this interlocutory appeal. *Id.*

The Statement of Facts that follows provides further context for those relevant events.

STATEMENT OF FACTS

This appeal presents a single issue regarding the constitutionality of Iowa Code section 657.11(2) over the spectrum of facts that any particular plaintiff may present. The Court's resolution of this issue is controlling as to this case and similarly situated nuisance suits currently pending on Iowa District Court dockets involving hundreds of plaintiffs and numerous animal agricultural producers.

The animal feeding operation at issue in this case is located in Wapello County, Iowa, and owned by Valley View Swine. It consists of two sites, Site 1 and Site 2. Exs. 2, 3 to Cargill Pork MSJ, App. 286, 322. In early 2013, Nick Adam and his sons, Jeffrey and Shawn, as members of Valley View Swine, entered into discussions with Cargill Pork to develop a hog feeding operation as part of the family interest in growing its farm. Ex. 39 to Cargill Pork MSJ, pp. 10:14–11:3, App. 706.

Cargill Pork was a wholly-owned subsidiary of Cargill Meat Solutions Corporation. Ex. 8 to Cargill Pork MSJ, ¶ 4, App. 408. On October 30, 2015, ownership in Cargill Pork was transferred to Swift Pork Company and Cargill Pork became JBS Live Pork, LLC. Notice of Name Change and Motion to Change Case Caption, App. 1617. Cargill Pork, now JBS, is authorized to enter into contracts with Iowa swine producers for the care and

feeding of swine owned by JBS pursuant to a Consent Decree filed in the United States District Court for the Southern District of Iowa on January 19, 2006.¹ Ex. 9 to Cargill Pork MSJ, App. 411. JBS also operates a processing plant in Ottumwa, Iowa, which processes swine owned by JBS and other producers for consumer use. Ex. 8 to Cargill Pork MSJ, ¶ 12, App. 408. The plant supports approximately 4,847 jobs, most of which are in close proximity to Ottumwa. Ex. 14 to Cargill Pork MSJ, p. 5, App. 556.

Construction on Site 1 and Site 2 began in April 2013. On April 15, 2013, the Iowa Department of Natural Resources (“Iowa DNR”) issued a Construction Permit for Site 1 in accordance with Iowa DNR rules and regulations. Ex. 4 to Cargill Pork MSJ, App. 394. On April 19, 2013, the Iowa DNR issued a Construction Permit for Site 2 in accordance with Iowa DNR rules and regulations. Ex. 6 to Cargill Pork MSJ, App. 401. Those rules and regulations constitute a comprehensive, extensive body of law governing the construction and operation of animal feeding operations in Iowa. The construction permit includes specific conditions that must be met by the applicant in order to ensure proper waste management and protection of soil and waterways, including design requirements for manure

¹ A Private Letter Agreement executed May 21, 2015, extended the Consent Decree for an additional ten-year term. Ex. 9 to Cargill MSJ, App. 411.

management structures and an approved manure management plan. *See* Exs. 4, 6 to Cargill Pork MSJ, App. 394, 401; Iowa Admin. Code Ch. 65; Iowa Code § 459.306. The construction must also maintain minimum separation distances from existing residences established by the Iowa Legislature. Iowa Code § 459.202.

In 2013, the applicable minimum required separation distance for an operation the size of Site 1 and Site 2 was 0.36 miles, or 1,875 feet. Iowa Admin. Code Ch. 65; Ex. 41 to Cargill Pork MSJ, App. 713. The closest Plaintiff to Site 1 is located 0.67 miles or 3,527 feet from Site 1, and the most distant Plaintiff is as many as 2.36 miles, or 12,461 feet from Site 1. Ex. 17 to Cargill Pork MSJ, App. 575. The closest Plaintiff to Site 2 is located 0.72 miles or 3,802 feet from Site 2, and the most distant Plaintiff is as far as 3.69 miles, or 19,483 feet from Site 2. *Id.* Thus, as a matter of undisputed fact, Plaintiffs reside far outside the minimum separation distances for Sites 1 and 2 as set by the Iowa Legislature.

On August 1, 2013, Valley View Swine and Cargill Pork entered into hog feeding agreements for Site 1 and Site 2. *See* Exs. 2, 3 to Cargill Pork MSJ, App. 286, 322. Pursuant to the Agreements, Valley View Swine must “comply with all local, state, and federal laws, regulations, permits, and orders that pertain to this Agreement in any way.” *Id.* Valley View Swine

must also maintain the animal feeding operation to Cargill Pork's standards and allow Cargill Pork to conduct periodic audits. *Id.* Cargill Pork provides growers a Wean-to-Finish Manual detailing management practices and procedures. Ex. 12 to Cargill Pork MSJ, App. 434.

On August 13, 2013, the Iowa DNR issued Authorization to use Site 1, finding the barn was constructed in compliance with DNR regulations and expressly authorizing its use. Ex. 5 to Cargill Pork MSJ, App. 399. On August 14, 2013, the Iowa DNR issued Authorization to use Site 2, finding the barn was constructed in compliance with DNR regulations and expressly authorizing its use. Ex. 7 to Cargill Pork MSJ, App. 406. Site 1 became operational in August 2013, and Site 2 became operational in September 2013. Exs. 5, 7 to Cargill Pork MSJ, App. 399, 406.

Since the Valley View Swine animal feeding operation became operational, the Iowa DNR has not issued any notices of violation or other citations. Ex. 8 to Cargill Pork MSJ, ¶ 35, App. 410. Regular audits of the Valley View Swine animal feeding operation have never identified any violation of applicable laws or regulations. *Id.* ¶ 32, App. 410; Exs. 10, 11 to Cargill Pork MSJ, App. 425, 430. The Valley View Swine animal feeding operation has never been found by the Iowa DNR to be in violation of any applicable statute or regulation. Ex. 8 to Cargill Pork MSJ, ¶ 32, App. 410.

On November 22, 2013, a mere three months from the time Site 1 became operational and only two months from the time Site 2 became operational, Plaintiffs filed suit in the Iowa District Court in and for Wapello County. Petition and Jury Demand, Wapello County Case No.

LALA105087. Plaintiffs' initial Petition included 70 individual Plaintiffs and asserted claims for temporary nuisance and negligence against Valley View Swine, Nick Adam, Jeffrey Adam, Shawn Adam (collectively "the Adam Defendants"), Tri-L Farms, Inc., Larry Hickenbottom, Josh Hickenbottom, Richard Warren, and Cargill Pork. *Id.* Plaintiffs failed to fulfill the mediation requirement of Iowa Code section 657.10 prior to filing their Petition, and on January 2, 2014, dismissed the case. Notice of Voluntary Dismissal Without Prejudice, Wapello County Case No. LALA105087.

On April 2, 2014, Plaintiffs re-filed the suit in Wapello County naming 69 Plaintiffs and again asserting claims of temporary nuisance and negligence against Valley View Swine, the Adam Defendants, Tri-L Farms, Inc., Larry Hickenbottom, Josh Hickenbottom, Richard Warren, and Cargill Pork. Petition and Jury Demand, App. 4. On September 2, 2014, the District Court ordered the case severed into divisions based upon Plaintiffs' allegations against three diverse defendant groups. Order on Motions and

Directing Proceedings, App. 39. Division A included Plaintiffs' claims against Valley View Swine, the Adam Defendants, and Cargill Pork; Division B included Plaintiffs' claims against Tri-L Farms, Inc. and the Hickenbottoms; and Division C included Plaintiffs' claims against Richard Warren and Cargill Pork. *Id.* The Divisions were joined for the purposes of discovery. *Id.*

On September 30, 2014, Plaintiffs filed an Amended Petition and Jury Demand in Division A on behalf of 69 Plaintiffs, asserting claims of temporary nuisance, permanent nuisance, and negligence against Valley View Swine, the Adam Defendants, and Cargill Pork. First Amended Petition and Jury Demand, App. 43. In their Answers to the Amended Petition, Cargill Pork and Valley View Swine raised Iowa Code section 657.11(2) as an affirmative defense, asserting the statute barred Plaintiffs' claims. Defendant Cargill Pork, LLC's Answer and Defenses to Plaintiffs' Amended Petition, App. 82; Answer, Affirmative Defenses and Jury Demand of Defendants Valley View Swine, LLC, Nick Adam, Jeffrey Adam and Shawn Adam, App. 104.

On October 29, 2014, the District Court implemented a bellwether procedure by which Plaintiffs and Defendants would each select two plaintiff households, with separate bellwether trials to proceed in Divisions

A, B, and C. Order Regarding Discovery and Scheduling, App. 132. Deb Chance, Jason Chance, Kara Chance, Karen-Jo Frescoln, Robin Honomichl, Timothy Honomichl, Morgan Honomichl, Q.H., C.H., and Michael Merrill were selected as the Division A bellwether plaintiffs.

The cases filed under Wapello County Case No. LALA105144 have dramatically changed composition since they were initially filed. On November 3, 2014, Plaintiffs dismissed Division B in its entirety. Notice of Voluntary Dismissal, App. 136.

Since November 2013, Plaintiffs have filed four iterations of their Petition in Division A and dismissed bellwether plaintiffs C.H. and Michael Merrill.² *See* Petition and Jury Demand, Wapello County Case No. LALA105087; Petition and Jury Demand, App. 4; Amended Petition and Jury Demand, App. 43; Second Amended Petition and Jury Demand, App.

² Plaintiff Michael Merrill was dismissed on June 7, 2016, two months before trial was set to begin. On June 10, 2016, Defendants filed a Motion for Judgment and Costs and Expenses, Including Attorneys' Fees, requesting the District Court award all costs and expenses incurred by Defendants in defense of Mr. Miller's frivolous claims, including attorneys' fees, pursuant to Iowa Code section 657.11(5). App. 1913. Defendants also sought costs under Iowa Code Chapter 625.1 and sanctions pursuant to Iowa Rule of Civil Procedure 1.413(1). *Id.* Defendants' Motion has been stayed by the District Court pending resolution of this appeal. Order Regarding Stay of Proceedings, App. 2010.

161; Plaintiffs' Notice of Voluntary Dismissal Without Prejudice of C.H., App. 230; Voluntary Dismissal of Plaintiff Michael Merrill, App. 1901.

Division C Plaintiffs filed six Petitions prior to trial, eliminating 26 Plaintiffs during the course of litigation—including one bellwether plaintiff—and adding one bellwether plaintiff. *See* Petition and Jury Demand, Wapello County Case No. LALA105087; Petition and Jury Demand, App. 4; Amended Petition and Jury Demand, App. 64; Second Amended Petition and Jury Demand, App. 139; Third Amended Petition and Jury Demand, App. 187; Fourth Amended Petition and Jury Demand, App. 206.

This trend has continued in other Iowa District Court nuisance suits against JBS by plaintiffs represented by the same counsel. For example:

- On May 16, 2014, counsel for Plaintiffs filed Case No. LALA002187 in Poweshiek County, asserting temporary negligence and nuisance claims on behalf of 15 plaintiffs against Doug Hoksbergen, PSL, Inc., and Cargill Pork. *See* Petition and Jury Demand. The case proceeded through discovery, but was dismissed on March 30, 2016, only 62 days before trial. *See* Notice of Voluntary Dismissal.
- On July 21, 2015, counsel for Plaintiffs filed Adair County Case No. LACV005896 on behalf of 14 plaintiffs, naming Cargill Pork as a defendant. *See* First Amended Petition and Jury Demand. That matter was severed into Divisions A and B (representing Adair County plaintiffs and Union County plaintiffs, respectively), expanded to 25 plaintiffs, and dismissed on August 30, 2016 after a year of litigation. *See* Voluntary Dismissals of Plaintiffs' Claims Without Prejudice.

- On December 2, 2015, counsel for Plaintiffs filed Davis County Case Nos. LALA012580, LALA012581, and LALA012582 on behalf of 56 plaintiffs against JBS. *See* Petition and Jury Demands. Those cases were consolidated under Case No. LALA012582 and reduced to 16 plaintiffs. On November 2, 2016, Plaintiffs dismissed the case without prejudice as to refiling. *See* Plaintiffs’ Voluntary Dismissal Without Prejudice.
- Counsel for Plaintiffs has filed, amended, and ultimately dismissed similar nuisance suits against other producers in Des Moines, Henry, Linn, Louisa, and Poweshiek Counties.³

Following dismissal of Wapello County Case No. LALA105144 – Division B, Divisions A, C, and Poweshiek County Case No. LALA002187 were consolidated for purposes of discovery and related deadlines, with Division C to be tried first, beginning February 1, 2016. Order for Trial and

³ The additional below listed cases involving substantively the same claims and the same plaintiffs’ counsel have been filed in Iowa District Courts:

Caption	Case Number	County	Status
<i>Lappe et al. v. Pro Ag Investors, LLC et al.</i>	LALA004642	Des Moines	Pending
<i>City of Mount Union et al. v. Pro Ag Investors et al.</i>	LALA011873	Henry	Pending
<i>Davis et al. v. Maschhoff Pork, LLC et al.</i>	LACV084348	Linn	Dismissed
<i>Bergthold v. Pro Ag Investors, LLC et al.</i>	LALA018794	Louisa	Pending
<i>Wilkerson et al. v. Pro Ag Investors, LLC et al.</i>	LALA018795	Louisa	Dismissed
<i>Wilson et al. v. Pro Ag Investors, LLC et al.</i>	LALA018795	Louisa	Pending
<i>Ahrens et al. v. Prestage Farms of Iowa, LLC</i>	CVEQ027257	Poweshiek	Pending

Pretrial Directions, App. 226. Poweshiek County Case No. LALA002187 was to follow beginning May 31, 2016, with trial in this matter, Division A, set to begin August 15, 2016. *Id.*

On October 6, 2015, Defendants filed motions for summary judgment in each case, arguing Iowa Code section 657.11(2) is a valid and enforceable statute that bars Plaintiffs' claims. Cargill Pork MSJ, App. 233; Valley View Swine MSJ, App. 714. Also on October 6, 2015, Plaintiffs filed a Motion for Partial Summary Judgment, seeking to strike Defendants' affirmative defense under section 657.11(2) and requesting a declaratory ruling holding section 657.11's statutory immunity unconstitutional as applied to Plaintiffs. Plaintiffs' Motion for Partial Summary Judgment as to Affirmative Defenses of Defendants, App. 817. The District Court held hearings on Plaintiffs' and Defendants' submissions on November 14, 2015 and December 15, 2015. *See* Nov. 14, 2015 Tr., App. 2012; Dec. 15, 2015 Tr., App. 2275.

On January 9, 2016, the District Court ruled Iowa Code section 657.11(2) was unconstitutional as applied to all Division C bellwether plaintiffs. Ruling on Pretrial Motions, App. 1738. In February 2016, a Wapello County jury heard and decided Division C. After 16 days of trial, the jury returned defense verdicts, finding no nuisance on the properties of each of the nine Plaintiffs.

Following trial, JBS filed a Motion for Costs and Expenses, asserting the claims of Plaintiffs David Bowen, Bonita Miller, and Rod Miller were frivolous within the meaning of Iowa Code section 657.11(5) and seeking statutory recovery for all costs and expenses, including attorney fees, incurred in defending those claims. *See* JBS Live Pork, LLC's Motion for Costs and Expenses, App. 1746. The District Court held that as a matter of law, JBS raised a defense under Iowa Code section 657.11 and recovery under subsection (5) was therefore available to JBS. Order on Post-Verdict Motions and Judgment Entry, App. 1886.

The District Court found Mr. Bowen, Ms. Miller, and Mr. Miller's claims frivolous within the meaning of the statute, and held each plaintiff liable for his or her portion of costs incurred by JBS in defense of their claims. *Id.* at 3; Order on Motion for Reconsideration and Order on Motion to Enlarge and Amend, App. 1896. The District Court's ruling stands tantamount to a finding that plaintiffs have a constitutional right to bring frivolous claims against animal feeding operations.

On June 8, 2016, the District Court ruled on the pending dispositive motions in this matter. Ruling, App. 1904. Despite the District Court's consideration of the enlarged record, including the defense verdict in Division C and the Court's finding that three Division C plaintiffs' claims

were frivolous, the District Court issued a summary ruling denying JBS and Valley View Swine’s motions for summary judgment. The Ruling held Iowa Code section 657.11(2) is unconstitutional as applied to the bellwether plaintiffs and violates Article I, Section 1 of the Iowa Constitution. *Id.*

The District Court’s Ruling includes no findings of fact which support its conclusion. *Id.* Instead, the District Court stated only that:

There are no material facts in good-faith dispute that demonstrate that the plaintiffs suffer a disqualification from remedy under a premise that they, as individuals, benefit from the immunity statute greater than those in the general public who benefit from the immunity protection of Iowa Code Section 657.11(2).

Id. In so ruling, the District Court made no factual assessment of the circumstances presented by each Plaintiff—for example whether his or her property fell without or outside of the minimum separation distances set by the Iowa Code and approved for Sites 1 and 2 by the Iowa DNR—effectively endorsing a facial challenge to the statute and declaring the Iowa Legislature is powerless to reform substantive elements of the animal agriculture nuisance cause of action.

On June 13, 2016, Defendants submitted an Application for Interlocutory Review to the Iowa Supreme Court, timely perfecting appeal of the District Court’s Ruling. Iowa R. App. P. 6.104(1)(b)(2). On July 15,

2016, the Iowa Supreme Court granted Defendants' Application and stayed District Court proceedings.

On appeal, Defendants challenge the District Court's interlocutory ruling denying summary judgment and holding Iowa Code section 657.11(2) unconstitutional, seeking reversal and remand for entry of judgment in favor of Defendants on the basis of section 657.11's protections.

ARGUMENT

This Court Should Reverse the District Court Because Its Summary Judgment Ruling Failed to Uphold the Enactment and Enforcement of Iowa Code Section 657.11(2) As Constitutionally Permissible Exercises of Legislative Powers Lawfully Used By The General Assembly To Control How Agricultural Nuisance Cases Are Litigated in Iowa and To Define the Damages Available Against Farmers and Producers in Lawsuits Such As This One

A. Error Preservation and Standard of Review

This case is before the Court on a timely and appropriate grant of interlocutory appeal. Defendants correctly preserved the issue of the constitutionality of Iowa Code section 657.11(2) for appellate review. Defendants timely moved for summary judgment on Plaintiffs' nuisance claims.

In their filings, as well as at hearings on November 24, 2015, and December 15, 2015, Defendants presented the arguments raised here. *See* Cargill Pork MSJ, App. 233; Valley View Swine MSJ, App. 714; Nov. 24, 2015 Tr., App. 2012; Dec. 15, 2015 Tr., App. 2275. Furthermore, Defendants applied for interlocutory review of the District Court's Ruling within the statutorily prescribed time limitation, and review was granted by this Court. Iowa R. App. P. 6.104(1)(b)(2).

The Court reviews the challenges to the constitutionality of a statute *de novo*. *State v. Groves*, 742 N.W.2d 90, 92 (Iowa 2007). Courts presume

the constitutionality of statutes and the challenger bears the burden to prove unconstitutionality beyond a reasonable doubt. *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005). The challenger must “refute every reasonable basis upon which the statute could be found to be constitutional.” *Id.* Therefore, if the statute is capable of being construed in more than one manner, one of which is constitutional, the Court must adopt that construction. *Id.*

Iowa Code section 4.4 imposes similar “presumption of validity” rules, stating:

In enacting a statute, it is presumed that:

1. Compliance with the Constitutions of the state and of the United States is intended.
2. The entire statute is intended to be effective.
3. A just and reasonable result is intended.
4. A result feasible of execution is intended.
5. Public interest is favored over any private interest.

Finally, “in construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said.” Iowa R. App. P. 6.904(3)(m).

B. The Iowa Constitution Empowers the Legislature to Limit Causes of Action and Restrict Recoverable Remedies

The issue before this Court concerns the constitutionality of Iowa Code section 657.11, which protects the right to farm in Iowa through

animal feeding operations by limiting economic damages available in public or private nuisance suits unless certain statutory conditions are met.

Here, the District Court extended *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), which rested on a limited finding that the statute was unconstitutional as applied to plaintiffs who predated today's rigorous agricultural regulations, to Plaintiffs without making any findings. In doing so, it eviscerated the protections provided by Iowa Code section 657.11 and the public policy behind them, which the General Assembly extensively outlined in Iowa Code section 657.11(1).

To resolve the issue presented here concerning the constitutionality of Iowa Code section 657.11(1), the Court should revisit the very foundation of Iowa's government and the powers bestowed upon Iowa's co-equal branches by the state's formative documents.

Notably, Iowa's Constitution grants the legislature the power to create and define causes of action. *State v. Cronkhite*, 613 N.W.2d 664, 668–69 (Iowa 2000). The Constitution also defines those rights of citizens which may be restricted as necessary for orderly operation of our society and promotion of Iowa's agrarian way. It is precisely this balancing of interests the Iowa Legislature undertook in lawfully enacting Iowa Code section 657.11(2), and that balancing is exclusively the province of the legislature.

i. The legislature creates and defines causes of action

In establishing the co-equal and independent Judicial, Legislative, and Executive branches, the Constitution effects a complete separation of the powers of each. Iowa Const. art. III, § 1. The primary power of the General Assembly is to pass all laws necessary to carry the Constitution into effect. *Id.* art. XII, § 1. That power is exclusive to the legislature—it may not be assumed by any other branch of government, nor may it be delegated to the people of the state. *See Santo v. State*, 2 Iowa 165, 203 (1855) (“The General Assembly cannot legally submit to the people, the proposition whether an act should become law or not; and the people have no power, in their primary or individual capacity, to make laws.”); *Knorr v. Beardsley*, 38 N.W.2d 236, 245 (Iowa 1949) (“The people then, have vested the legislative authority inherent in them, in the general assembly.”) (quoting *Stewart v. Bd. of Supervisors*, 30 Iowa 9, 18 (1870)).

The General Assembly’s power to create law encompasses the authority to create and define an offense, and to specify the recovery or punishment. *Cronkhite*, 613 N.W.2d at 668–69. The General Assembly in the exercise of its authority may also retain, repeal, or amend statutes, or enact new ones. *Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1975); *In Interest of C.S.*, 516 N.W.2d 851, 859 (Iowa 1994). Moreover, the

legislature is responsible for policy decisions which “involve the weighing of the merits of social, political and economic factors” *Goodman v. City of Le Claire*, 587 N.W.2d 232, 236 (Iowa 1998).

Elected lawmakers repeat this weighing *ad infinitum*, to keep pace with an evolving society. To that end, a “person has no property, no vested interest, in any rule of common law.” *Johnson v. Am. Leather Specialties Corp.*, 578 F. Supp. 2d 1154, 1174 (N.D. Iowa 2008) (holding the Iowa Legislature “clearly had the constitutional authority to enact the type of tort reform scheme at issue in Iowa Code § 613.18 even if its enactment served to deprive the Johnsons of some previously held causes of action under the common law”) (quoting *Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 88 (1978); *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917) (“No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”); *Eddings ex rel. Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1374 (11th Cir.1988) (holding plaintiffs lacked vested interest in former interpretation of state law); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (“No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.”); *Ducharme v. Merrill–Nat’l Labs.*, 574

F.2d 1307, 1309 (5th Cir. 1978) (“[A] plaintiff has no vested right in any tort claim for damages under state law.”)).

Indeed, the General Assembly’s power is so broad, the Constitution is its only anchor. *Knorr*, 38 N.W.2d at 245 (quoting *Campbell v. Jackman Bros.*, 118 N.W.755, 761 (Iowa 1908)). “Except when the Constitution has imposed limits upon the legislative power, it must be considered practically absolute.” *See id.* at 844 (quoting *McGuire v. Chicago, B. & Q. R. Co.*, 108 N.W. 902, 907 (Iowa 1906)); *Stewart*, 30 Iowa at 18 (“[T]he legislative power of the general assembly is supreme . . . it is bounded only by the limitations *written* in the constitution.”) (emphasis in original).

ii. The courts grant deference to the legislature’s policy determinations

In contrast to the legislature’s role as the state’s law and policymaker, the judiciary “shall be conservators of peace throughout the state.” Iowa Const. art. V, § 7. “[C]ourts do not sit to revise or review legislative action.” *McGuire*, 108 N.W. at 907. It is not a court’s “province to pass upon the policy, wisdom, advisability or justice of a statute.” *Steinberg-Baum & Co. v. Countryman*, 77 N.W.2d 15, 18 (Iowa 1956); *see also Stewart*, 30 Iowa at 16 (“There may be, there always will be, questions, not only as to the expediency but the justice of laws. But questions of public policy and State necessity are not meant to be assigned to the domain of the courts.”).

Accordingly, a court has “no authority to annul an act of the legislature unless it is found to be in clear, palpable and direct conflict with the written constitution.” *Stewart*, 30 Iowa at 18. A court’s exercise of that authority “is considered of the most delicate and responsible nature, and is not to be resorted to unless the case be clear, decisive and unavoidable.” *Santo*, 2 Iowa at 165.

These limits extend to a court’s inquiry into whether the legislature constitutionally exercised its police power. A court’s analysis begins with the presumption the statute is constitutional, and the court must hold the challenger to high burden to rebut the presumption. *Gacke*, 684 N.W.2d at 177. When the legislature’s police power is at issue, courts apply a “highly deferential standard of review” in evaluating the reasonableness of a statute:

To justify the statute in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individual benefit.

Id. (citing *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995)).

C. The Legislature’s Extensive Police Power Extends to Regulation of Property and Professional Rights

Article I of the Iowa Constitution, Iowa’s Bill of Rights, describes the common law rights of Iowa citizens. *May’s Drug Stores, Inc. v. Tax*

Comm'n, 242 Iowa 319, 329 (1950). While not “a mere glittering generality without substance or meaning,” the protection of the Inalienable Rights Clause falls well short of being absolute. *State v. Osborne*, 171 Iowa 678, 693 (1915); *May’s Drug Stores*, 242 Iowa at 329.

i. The legislature may reasonably restrict property rights

The first enumerated right is that of persons to acquire, possess, and protect property. Iowa Const. art. I, § 1. The property rights preserved by the Inalienable Rights clause “are subject to the higher and greater right known as the public welfare.” *May’s Drug Stores*, 242 Iowa at 329; *Santo*, 2 Iowa at 184 (“When the public good demands it, all are required to surrender certain natural rights, for the benefit of the whole people.”).

In this regard, police power “is an incident of title to private property, and it is no objection to its reasonable exercise that private property is impaired in value or otherwise adversely affected.” *May’s Drug Stores*, 242 Iowa at 329 (“The above constitutional provision gives no right to own property as such, free from regulation.”). It is through the exercise of its police power that the legislature has the authority to “say what laws shall be enacted for the ‘*benefit, security, and protection of themselves, and for the public good.*’” When private interest comes in conflict with the public good,

private interest must yield, especially when that *private interest comes in conflict with the law.*” *Santo*, 2 Iowa at 184–85 (emphasis in original).

“That a law may be severe, drastic or work hardship does not render it unconstitutional.” *Countryman*, 77 N.W.2d at 20. Nor does the fact that a legislative enactment may reduce the value of an individual’s property make the regulation unconstitutional on its face. *May’s Drug Stores*, 242 Iowa at 329.

In *Gravert v. Nebergall*, the Iowa Supreme Court confronted a constitutional challenge to a fence-viewing statute enacted pursuant to the legislature’s police power. 539 N.W.2d at 185. The court upheld the statute as constitutional, finding the statute was a benefit to the public generally and was not unduly oppressive to individuals. *Id.* at 187–88. The court’s decision neither rested upon the challengers’ claim that the statute required to expend substantial sums of money, nor upon their claim that they derived no benefit from the fence. *Id.* at 188. The court concluded, “Whatever unfairness the Graverts see in the fence law is of political, not constitutional, dimensions. It is for the legislature and not for the courts to pass upon the policy, wisdom, advisability, or justice of a statute. *Id.* (citing *Hines v. Illinois Cent. Gulf R.R.*, 330 N.W.2d 284, 289 (Iowa 1983)). Thus, while not without

importance or weight, the inalienable right to acquire, possess, and protect property is not inviolable.

ii. The legislature may reasonably restrict professional rights

The legislature's police power extends to imposition of reasonable regulations on *all* inalienable rights. For example, Iowa citizens have the "inalienable right to follow any legitimate trade, occupation, or business which he sees fit." *State v. Harrington*, 296 N.W. 221, 223 (Iowa 1941). Nonetheless, "[t]his right to pursue any trade or calling is subordinate to the right of the state to limit such freedom of action by statutory regulation where the public health, safety, or welfare of society may require." *Id.*

Iowa is a leading agricultural state, with a significant sector of the economy engaged in crop or animal farming activities, including hog production. In 2015, the pork and hog industries in Iowa were predicted to contribute more than \$1.1 billion in value added to the state's economy. Ex. 14 to Cargill Pork MSJ, p. 3, App. 554.

The inalienable rights clause does not give Iowa farmers the ability to practice their trade without reasonable regulation imposed by the legislature any more than it gives their neighbors the rights to recover for lawful farming activity. For example, in accordance with its constitutionally granted police power, the legislature has enacted sweeping regulations upon

the hog industry. *See, e.g.*, Iowa Admin. Code Ch. 65; Iowa Code § 459.306. These include required minimum separation distances for construction of or addition to a confined animal feeding operation structure. Iowa Code § 459.202.

In enacting Iowa’s Animal Agriculture Compliance Act, the legislature balanced the public interest in “protect[ing] neighbors from potentially offensive odors and air emissions” with a farmer’s “inalienable” right to pursue an occupation of his choosing and use his property as he sees fit. *See* Iowa Code Ch. 459. The resulting required minimum separation distances apply to a residence that exists at the time an applicant submits an application for a construction permit to the department or at the time a manure management plan or construction design statement is filed with the department. Iowa Admin. Code § 567-65.11(1). The setback regulations allow neighbors to enforce a “no-build” zone around their property—a right which extends beyond an individual’s own property and encroaches upon his neighbor’s right to use and enjoy his property.

“Change, change, change, is the order of legislation.” *Sanders v. State*, 2 Iowa 230, 276 (1855). The legislature has regularly revisited the setback distances, which have dramatically increased over time. Prior to January 1, 1999, the setback distance ranged from 750 feet to 1,500 feet, depending

upon the size of the facility. *See* Iowa Code Ch. 65; Ex. 41 to Cargill MSJ, App. 713. For buildings constructed after January 1, 1999, but prior to March 1, 2003, the setback distances were extended to 1,000 feet to 1,875 feet. *Id.* For buildings constructed on or after March 1, 2003, the setback distances were again expanded to 1,250 to 2,375 feet. *Id.* The setback distances are merely one part of a complex regulatory scheme governing construction and operation of animal feeding operations in Iowa.

D. Iowa Code Section 657.11 Permissibly Alters the Statutory and Common Law Animal Agriculture Nuisance Action to Eliminate Recovery of Special Damages

In accordance with its constitutionally granted power to create law and shape policy, the Iowa Legislature enacted a regulatory scheme for animal feeding operations with special safeguards to modify the general law of nuisance set forth in Iowa Code Chapter 657. Post-*Gacke*, the Iowa Supreme Court, in examining the scope of the inalienable rights clause, has held that the “reasonable regulation” formulation is “virtually identical to the rational-basis due process test⁴ or equal protection tests under the

⁴ In equating the “reasonable regulation” formula with rational basis review pursuant to substantive due process analysis, the *Jacobsma* Court recognized that the rights implicated by Article I, Section 1 of the Iowa Constitution are not fundamental rights. *Jacobsma*, 862 N.W.2d at 352 (“Where liberty or property rights are allegedly infringed by a statute or ordinance, our inalienable rights cases have held that, even if the plaintiff’s asserted interest

Federal Constitution. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015) (citing *Vilas v. Iowa State Bd. of Assessment & Review*, 223 Iowa 604, 612 (1937) (noting Article I, Section 1 and Article I, Section 6 of the Iowa Constitution “contain practically the same guarantees found in the ‘due process clause’ and ‘equal protection of the law’ clause of the Fourteenth Amendment”)).

Rational basis review requires the court consider whether there is “a reasonable fit between the government interest and the means utilized to advance that interest.” *Id.* (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002)). Under this level of scrutiny, the legislature need not employ the best means of achieving a legitimate state interest, but only rationally advance a reasonable and identifiable governmental objective. *Hensler v. City of Davenport*, 790 N.W.2d 569, 584 (Iowa 2010). Rational-basis review is deferential to legislative judgment. *Id.*

In its wisdom as a policymaker, the Iowa Legislature determined that the interests of the public generally are affected by the success and survival of the animal agricultural industry in Iowa—an industry which has been

is within the scope of the inalienable rights clause, the rights guaranteed by the provision are subject to reasonable regulation by the state in the exercise of its police power.”). Indeed, the court has held that no fundamental right exists to choose where and under what conditions one lives. *State v. Groves*, 742 N.W.2d 90, 93 (Iowa 2007) (citing *Seering*, 701 N.W.2d at 662–63).

threatened by the proliferation of frivolous nuisance lawsuits. In order to preserve that industry, the legislature, pursuant to its constitutionally granted power to create law and to regulate even the inalienable rights of citizens, enacted Iowa Code section 657.11, modifying the common law nuisance cause of action to balance the interests of producers and others.

i. Iowa Code section 657.11 reflects a proper legislative balancing of interests pursuant to the General Assembly's authority and role as law and policymaker for the State of Iowa

Iowa Code section 657.11's preamble clearly sets forth the implicated government interest:

The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.

Iowa Code § 657.11(1). As described in the report of Dr. Dermot Hayes, Professor of Economics and Finance at Iowa State University, the pork and hog industries in Iowa were predicted to contribute more than \$1.1 billion in value added to the state's economy in 2015. Ex. 14 to Cargill Pork MSJ, App. 552. This amounts to \$372 for every person in the state. *Id.* A total of

13,305 jobs were created by the pork industry, with an additional 21,917 jobs created by downstream manufacturing and 31,500 jobs in services supported by the income and property taxes paid by the pork and hog industries. *Id.* Statistics show that operation of Valley View Swine, together with the JBS Ottumwa processing plant and the Hedrick feed mill, benefits Wapello and other nearby counties to an even higher degree, creating jobs locally and funding public works and services through taxes. *Id.*

These benefits have been eroded by the large volume of nuisance suits filed by Plaintiffs' counsel. As described above, there have been as many as 15 individual suits pending at one time in 9 Iowa counties, involving hundreds of plaintiffs. Plaintiffs have pursued both integrators, like JBS, and individual farmers like Valley View Swine, imposing a significant burden on the industry at the macro and micro levels. Further, Plaintiffs' counsel has pursued a practice of filing suit with large numbers of plaintiffs, litigating the case until shortly before trial, and then dismissing.

In an editorial published in *The Fairfield Ledger* shortly after trial of Case No. LALA105144 – Division C in Wapello County, Jefferson County Farmers and Neighbors (“JFAN”), a local activist organization associated with Plaintiffs, described the intended impact of nuisance suits:

This trial was the first of many CAFO lawsuits now in litigation with the Speer, Middleton and Sykes legal team throughout

Southeast Iowa. CAFO nuisance cases pose a significant commitment of time, money, public inquiry and uncertainty for CAFO owners. It's believed the Warren family and Cargill/JBS incurred monumental legal fees in the hundreds of thousands of dollars over a taxing 2–3 year litigation period.

* * *

In JFAN's opinion, these lawsuits aren't going away. There will be wins and losses, but anytime a CAFO nuisance case goes to court, it serves as a significant deterrent, and the pork industry groans.

Anyone considering a CAFO should think long and hard about the ramifications of building a confinement against their neighbors' wishes.

See Court Ex. 1 to April 13, 2016 Hearing, App. 1894. As articulated in JFAN's op/ed piece, also published in nearly 30 other publications state-wide, Plaintiffs' objective is to affect the pork industry generally, and interfere with animal agricultural producers such as the Defendants even though they are lawfully pursuing their trade. *See* Court Ex. 2 to April 13, 2016 Hearing, App. 1895.

In addition to consuming the resources of integrators and producers, these suits impose a significant burden on Iowa District Courts. This matter has been on the docket for the Iowa District Court for Wapello County for nearly three full years, and has involved significant motion practice. Plaintiffs have re-cast their petition four times since filing and have dismissed two bellwether plaintiffs prior to trial. *See* Petition and Jury

Demand, Wapello County Case No. LALA105087; Petition and Jury Demand, App. 4; Amended Petition and Jury Demand, App. 43; Second Amended Petition and Jury Demand, App. 161; Plaintiffs' Notice of Voluntary Dismissal Without Prejudice of C.H., App. 230; Voluntary Dismissal of Plaintiff Michael Merrill, App. 1901.

This significant consumption of judicial resources is particularly troubling where the claims of plaintiffs are frivolous and the General Assembly already took actions to reform and curb this type of broadside attack on an important segment of Iowa's farming economy. In Division C, the District Court determined the claims of three of the nine Plaintiffs were frivolous, resulting in a cost of \$101,447.33 to JBS to defend the claims. Order on Motion for Reconsideration and Order on Motion to Enlarge and Amend, App. 1896. JBS's Motion for Costs and Expenses relating to dismissed Division A Plaintiff Michael Merrill is currently pending before the District Court.

The Iowa General Assembly long-ago weighed these considerations of social welfare and science and declared its intent to protect the animal agricultural industry in the State of Iowa through enactment of Iowa Code 657.11. Its wisdom and policy choices merit deference and affirmance as reasonable governmental objectives. *See e.g., City of Davenport v. Seymour,*

755 N.W.2d 533, 544 (Iowa 2008) (“Any determination on the merits of the policy arguments is not for the court, but the political organs of government influenced by an informed electorate.”).

ii. The General Assembly lawfully determined that plaintiffs in nuisance cases such as this may not recover special damages

In order to achieve the legitimate governmental objective set forth in Iowa Code section 657.11(1), the legislature reasonably restricted the damages recoverable in a nuisance action against an animal agricultural producer. As described above, the legislature exclusively holds the power to create, amend, or eliminate causes of action, as well as define remedies available pursuant to those causes of action.⁵ *Cronkhite*, 613 N.W.2d at 668–69; *Bechtel*, 225 N.W.2d at 332; *In Interest of C.S.*, 516 N.W.2d at 859. The legislature is within its power to eliminate recovery of special damages from the nuisance cause of action. *See Gacke*, 684 N.W.2d at 175 (“The Takings Clause does not prohibit the legislature from granting animal feeding operations immunity from liability for any other damages traditionally allowed under a nuisance theory of recovery.”).

⁵ For example, Iowa’s comparative fault system—by which a plaintiff found over 50 percent at fault is barred from recovery—is a creation of the legislature which operates to limit or bar damages, modifying common law causes of action. *See* Iowa Code § 668.3.

Thus, the General Assembly stands fully empowered to protect animal agricultural producers, and more generally, the citizens of Iowa who depend upon the animal agricultural industry and to exercise its constitutionally-granted authority to alter the nuisance cause of action to limit recovery of special damages. It did just that when it adopted Iowa Code section 657.11(2), which imposes proof and damage limits to an animal agriculture nuisance cause of action. The statute expressly provides:

An animal feeding operation, as defined in section 459.102, shall not be found to be a public or private nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action. However, this section shall not apply if the person bringing the action proves that an injury to the person or damage to the person's property is proximately caused by either of the following:

- a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.
- b. Both of the following:
 - (1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property.
 - (2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.

Iowa Code § 657.11(2).

The District Court's holding that Iowa Code section 657.11(2) "unduly burdens plaintiffs by denying them access to a lawful remedy for their alleged injuries to the person and/or to property occasioned in use of their real-estate interests" is erroneous at least insofar as it makes a blanket ruling that all plaintiffs can attack the statute on its face or as applied to them even though no specific facts underlie the facial challenge. Ruling, App. 1904.

First, this Court has examined the constitutionality of section 657.11 within the framework of the Takings Clause and held it constitutional. In *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998), the Court invalidated the statutory immunity of Iowa Code section 352.11(1)(a) "only insofar as it prevents property owners subjected to a nuisance from recovering damages for the diminution in value of their property." *Gacke*, 684 N.W.2d at 175. Applying this principle to Iowa Code section 657.11(2), the statute operates to eliminate recovery of special damages as against animal agricultural producers except when the producer acts negligently by failing to follow applicable regulations or consistently failing to abide by industry-standard management practices. It does not prohibit suit seeking compensation for alleged diminution in property value.

Here, Plaintiffs limited the compensatory damages sought for nuisance and negligence to “special damages” for alleged loss of use and enjoyment of their respective properties. *See* Second Amended Petition and Jury Demand pp. 11, 15, App. 176, 180 (“Plaintiffs pray for . . . damages . . . to compensate Plaintiffs for the interference in their right to the use and quiet enjoyment of their properties; for all special damages available to them at law”).

Plaintiffs disavowed any claim for any other type of compensatory damages, including damages for diminution in property or rental value. Each admitted that he or she did not seek damages for loss of property or rental value. *See* Exs. No. 21, 23, 26, 28, 30, 32, 34, 36, 38 to Cargill Pork MSJ, ¶¶ 9–14, App. 606–07, 617–18, 632–33, 643–44, 654–55, 665–66, 676–77, 688–89, 700–01. Each Plaintiff stated:

Plaintiff is claiming a private nuisance and damages for the loss of quiet, peaceful, and comfortable use and enjoyment of property which, under Iowa law, includes personal inconvenience, annoyance, and discomfort caused by a nuisance.

See id. ¶¶ 1–5, App. 603–06, 614–17, 629–32, 640–43, 651–54, 662–65, 673–76, 685–88, 697–700. Plaintiffs thus limited their claims to special damages—recoveries that could only be predicated on loss of use and enjoyment—and thereby sought remedies not available as a result of the

legislature's lawful elimination under section 657.11(2) of special damages for nuisance.

E. The District Court Erred Because Iowa Code Section 657.11 is Both Facially Constitutional and Constitutional as Applied

This Court's inquiry should begin and end with a finding that the legislature, in enacting Iowa Code section 657.11, imposed a reasonable restriction pursuant to its constitutionally granted police power that stands fully lawful as applied to Plaintiffs. Such a finding establishes the constitutionality of section 657.11, just as it precludes facial attacks masquerading as "as applied" challenges. Plaintiffs' suit plainly engages in such subterfuge.

The Ruling purports to follow in the footsteps of the *Gacke* Court in holding the statute unconstitutional "as applied" to Plaintiffs. Ruling, App. 1904. However, unlike *Gacke*, the Ruling is devoid of facts and analysis necessary to establish an "as applied" challenge sufficient to overcome the presumption of validity afforded to section 657.11 and all statutes enacted by the General Assembly.

In *Gacke*, the court considered the specific factual situation of the plaintiffs. Geographic proximity provided a critical component of the *Gacke* "as applied" holding, yet the foundation facts there present a situation

rendered impossible today as a result of the heightened regulatory scheme and increased setback distances. Those distances, and the regulatory scheme incorporated in the statute by reference, make the individual balancing performed by the *Gacke* Court unnecessary. Indeed, the balance has been struck by the legislature, which concluded that animal agricultural operations located within clearly defined setback distances, operating in accordance with Iowa law, shall not be found to be a public or private nuisance. Iowa Code § 657.11(2).

The Ruling is not alone in misreading or overextending the limited holding in *Gacke* that was specific to the statute as applied to the facts of that lawsuit and the regulatory scheme existing at the time. In every case since *Gacke* was decided, district courts have held section 657.11 unconstitutional “as applied,” despite the Iowa Supreme Court’s cautionary statement in *Gacke* that the five members participating in the case (four of whom are no longer on the Court) “express[ed] no opinion as to whether the statute might be constitutionally applied under other circumstances.” Ruling, App. 1904; *Gacke*, 684 N.W.2d at 179.

Thus, this case presents this Court with the opportunity and ability to resolve any uncertainty remaining after the *Gacke* decision that Iowa Code section 657.11 can constitutionally be applied to the facts of a given case to

defeat a plaintiff's claim as a matter of law.⁶ More importantly, because the facts here, most notably as to minimum separation distance compliance, definitively establish that section 657.11's immunity can be applied consistent with the inalienable rights clause, this Court should confirm the presumption of validity attached to Iowa Code section 657.11, recognize that its grant of immunities are well within the policy and legal purview of the General Assembly as Iowa's co-equal, independent legislative branch, and apply the statute to defeat Plaintiffs' nuisance cause of action as a matter of law under the facts of record.

⁶ The Iowa Pork Producers Association and Iowa Farm Bureau Federation have filed an *Amicus Curiae* brief in support of JBS and Valley View Swine, which further describes the comprehensive regulatory scheme applicable to animal feeding operations and urges this Court to find Iowa Code section 657.11 constitutional both on its face and as applied.

CONCLUSION

For the reasons stated in this Brief, the District Court's Ruling universally barring application and enforcement of Iowa Code section 657.11(2) as enacted and intended by the General Assembly should be reversed and the case remanded for entry of judgment for Defendants on their motions for summary judgment.

REQUEST FOR ORAL ARGUMENT

Defendants-Appellants JBS Live Pork, LLC and Valley View Swine, LLC request the opportunity for oral argument on their appeal.

DATED: January 24, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that in compliance with Iowa Rule of Appellate Procedure 6.701, the foregoing **Defendants-Appellants Valley View Swine, LLC and JBS Live Pork, LLC's Final Brief and Request for Oral Argument** was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on January 24, 2017:

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CERTIFICATE OF FILING

The undersigned hereby certifies that on the 24th day of January, 2017 **Defendants-Appellants Valley View Swine, LLC and JBS Live Pork, LLC's Final Brief and Request for Oral Argument** was filed with the Clerk of the Supreme Court via EDMS, in accordance with Iowa Rule of Appellate Procedure 6.701(2).

ATTORNEY'S COST CERTIFICATE

The undersigned certifies the actual cost of reproducing the necessary copies of the preceding **Defendants-Appellants Valley View Swine, LLC and JBS Live Pork, LLC's Final Brief and Request for Oral Argument** was \$0.00 and that amount has been actually paid by the attorneys for the Defendants-Appellants.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION AND TYPEFACE AND TYPE-STYLE
REQUIREMENTS**

The undersigned certifies this 24th day of January, 2017 that this Brief complies with:

1. The type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because, according to the word count software used to prepare this Brief, it contains 9,072 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1); and

2. The typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 SP2 word processing software in 14-point Times New Roman font.

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