IN THE IOWA SUPREME COURT

NO. 16-1006

MORGAN HONOMICHL, ROBIN HONOMICHL, TIMOTHY HONOMICHL, DEB CHANCE, JASON CHANCE, KARA CHANCE, KAREN JO FRESCOLN, AND Q.H.

Plaintiffs/ Appellees,

vs.

VALLEY VIEW SWINE, LLC and JBS LIVE PORK, LLC,

Defendants/Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
HONORABLE JUDGE ANNETTE SCIESZINSKI
WAPELLO CO. NO. LALA105144—DIVISION A

PLAINTIFFS/APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Plaintiffs-Appellees Morgan Honomichl, Robin Honomichl, Timothy Honomichl, Deb Chance, Jason Chance, Kara Chance, Karen Jo Frescoln and Q.H. agree the Iowa Supreme Court should retain this case. It presents a substantial constitutional question as to the validity of Iowa Code section 657.11(2), the determination of which involves fundamental and urgent issues of broad public importance concerning the treatment of numerous pending animal agriculture nuisance cases in Iowa. *See* Iowa. R. App. P. 6.1101(2)(a), (d) (criteria for retention).

STATEMENT OF THE CASE

Plaintiffs dispute the Statement of the Case from Defendants-Appellants Valley View Swine, LLC ("Valley View") and JBS Live Pork, LLC ("JBS"), successor in interest to Cargill Pork, LLC ("Cargill Pork") to the extent it includes arguments and subjective statements that go beyond the procedural posture of the case. Plaintiffs disagree with Defendants' characterization of: Iowa Code section 657.11(2); the district court's June 8, 2016, Ruling on Pretrial Motions ("Ruling"); and the ramifications of the Ruling. Plaintiffs dispute that the district court's Ruling excluded factual analysis. (*Compare to* Defs. Brief at 7). These disagreements are developed

further in the argument section below. Plaintiffs do not otherwise dispute Defendants' recital of the procedural posture of the case, i.e., the pleadings and Ruling that led up to this interlocutory appeal.

The parties additionally engaged in significant motion practice, particularly regarding proposed expert witnesses. Specifically, as relates to this appeal, the district court granted Plaintiffs' motion to exclude the testimony of Dr. Dermot Hayes. (App. 1907). In their brief, Defendants rely on Dr. Hayes' report as the foundation for arguing the legislature's valid interest in protecting Iowa agricultural producers. (Defs. Brief at 34). The district court barred introduction of expert opinion testimony by Dr. Hayes for exactly that purpose as more prejudicial than probative.[1] However, the district court did acknowledge considering Dr. Hayes' opinions in finding section 657.11(2) unconstitutional. (App. 1907).

[1] "The expert opinions of Dr. Dermot Hayes, as proposed for evidentiary use by JBS Live Pork, LLC to establish the economic impact and consequent reasonableness of the Iowa pork industry as underpinnings of Iowa Code section 657.11 (2), is not legally relevant to issues to be decided by the jury fact-finder. Even if trial relevance were to be demonstrated, the probative value of the evidence is substantially outweighed by the risk of jury confusion of the issues, a threat of unfair prejudicial impact on the plaintiffs' nuisance claims, and an implicit invitation for jurors to inject their own economic interests into their adjudicative function." (App. 1907).

STATEMENT OF FACTS

Plaintiffs add to and clarify Defendants' Statement of Facts as follows. Facts and shorthand designations previously set forth in the Statement of the Case are incorporated here. Again, Plaintiffs dispute Defendants' recitation to the extent they include arguments and subjective statements that go beyond the objective facts of the case.

Defendant JBS is an integrator, supplier and owner of hogs that it places in confined animal feeding operations (hereinafter "CAFOs") operated by finishers who grow the hogs to market weight. Defendant Valley View Swine is a finisher that owns the CAFOs at issue in Wapello County, Iowa. The two CAFOs are known as Valley View Site 1 and Valley View Site 2; they became operational in August 2013 and September 2013, respectively. (App. 952).[2]

From the commencement of their operations, Defendants have not employed any measures or technologies to prevent odors except pit additives and fan shields. (App. 956). Defendants have not considered, and do not intend to consider, using any other technologies to reduce odors. (App. 957-58; 1552-54). Numerous and well-documented technologies and best

[2] Unless otherwise noted, the exhibits referenced herein are attached to Pls. MSJ Facts.

management practices exist that could be utilized at Defendants' facilities to reduce, minimize, or prevent malodors and flies. (App. 963). Numerous and well-documented technologies and best management practices**,** including, but not limited to, biofilters and electrostatic precipitation devices, could be utilized at Defendants' facilities. (App. 974-75). Defendants have failed to identify alternative odor sources they believe are the cause of any alleged injuries by Plaintiffs. (App. 953; 1056-57; 1062-63; 1066; 1557).

The facilities Valley View Swine owns are valued at approximately $2.5 million; its contracts with Cargill Pork (now JBS) entitle it to a yearly fee of $3.3334 for each of the 9,920 pig spaces, split evenly between the two facilities. (App. 723-724). The yearly payments exceed $396,000. (App. 724). Valley View contracts with Brandon Warren to manage the operation of facilities. (*Id.*). It is undisputed that Valley View owners Nick Adam, Jeff Adam and Shawn Adam spend very little time at the facilities and do not play significant roles in their operation. (App. 725). At a meeting where members of the community asked the Adams family to consider siting the CAFOs elsewhere, Shawn Adam announced that Valley View would build and site their CAFOs as planned, regardless of their neighbors' opinions.

As Defendants note, the district court implemented a bellwether procedure and divided the case into three divisions. This interlocutory appeal only concerns Dovico Division A, which includes Plaintiffs Deb Chance, Jason Chance, Kara Chance, Karen Jo Frescoln, Robin Honomichl, Timothy Honomichl, Morgan Honomichl, and Q.H.

In support of their motion for partial summary judgment on Defendants' affirmative defenses, the Plaintiffs submitted a statement of undisputed facts. (App. 837). All deposition transcripts for the Plaintiffs were attached thereto as Exhibit I. (App. 838). Plaintiffs' statement of undisputed facts individually detailed with supporting transcript citations that: (1) each of them resided on their property before the CAFOs were built; (2) each lives within a mile of at least one of the two Valley View sites; (3) Defendants' hog operations have substantially impaired the plaintiffs' use and enjoyment of the same; and (4) none have materially benefitted from Defendants' operations. (App. 838-42). Plaintiffs detailed these same facts in responding to Cargill Pork's statement of facts supporting its own summary judgment motion. (App. 1281-86). In arguing section 657.11 (2) was unconstitutional, Plaintiffs further illustrated how the CAFOs

significantly interfere with their use and enjoyment of their property using specific examples from the deposition transcripts. (App. 824-26).

In denying Defendants' request to dismiss Plaintiffs' claims on the basis of immunity in section 657.11(2) (and granting Plaintiffs' motion that the defenses in section 657.11(2) were unconstitutional and therefore unavailable), the district court issued summary rulings. (App. 1904; 1910). The court did so "[i]n an exercise of judicial economy" due to the fast-approaching trial; accordingly, the court explicitly incorporated by reference "the parties' excellent, conscientious legal briefing" in their motions for summary judgment. (App. 1904).

The specific factual details the district court incorporated in declaring section 657.11(2) unconstitutional as applied include each Plaintiffs' testimony as to the following:

- **The Chance Family:** Deb, Jason and daughter Kara have lived on their property since 2000. The property is located no further than 0.7 miles from Valley View Site 1 and no further than 2 miles from Valley View Site 2. (App. 838-40).

- **The Honomichl Family**: Tim, Robin and their children, (Morgan, Q.H. and their non-party youngest child) have lived on their property since 2005. The property is located no further than 1 mile from each of the facilities. (App. 840-41).

- **Karen Jo Frescoln**: She lived on her property from 1979 to 2013.[3] The property is located no further than one half mile from each of the facilities. (App. 841-2).

As examples of the CAFOs' significant interference with their use and enjoyment of their property, the Plaintiffs testified the noxious odors prevented them from planning and hosting events, barbequing, hanging clothes outside, opening windows, sitting on the porch, walking on trails or riding ATVs; the stench has also caused physical symptoms such as burning in throat and eyes, diarrhea, lethargy and nausea, as well as anxiety, depression, and embarrassment. (App. 824-26).

Additional facts are identified in the argument as necessary.

SUMMARY OF THE ARGUMENT

This lawsuit is part of a larger universe of nuisance claims filed by multiple Iowa citizens against their neighbors, the CAFO integrators, owners, and finishers, containing tens of thousands of hogs.[4] The current

[3] Frescoln still owns the farm property; her daughter, son-in-law and grandchildren now reside in her former house, but she is on the property daily as their full-time childcare provider. (App. 1175-76). Her husband, Robert Frescoln, is not a party to this lawsuit due to early onset Alzheimer's. (App. 1179).

[4] The following is an updated list of ongoing cases in Iowa district courts with the same plaintiffs' counsel and substantively the same claims:

plaintiffs' universe comprises five suits in nuisance filed by over fifty Iowa citizens. These plaintiffs lived in their communities and their homes before defendants built the neighboring CAFOs. The plaintiffs are primarily members of established rural communities and neighborhoods. Many of these ordinary citizens advocated with their neighbors, county board of supervisors, and the CAFO integrators, operators, and owners to influence admission and location of CAFOs in their communities. These citizens organized and attended meetings with CAFO developers and their county board of supervisors to voice their concerns and advocate for neighborly respect. In all of the cases filed, citizens became plaintiffs after the CAFOs were built despite their concerns.

Factual commonalities between the filed cases are so common as to be universal. Once the developers built the CAFOs and the integrators filled them with hogs, their neighbors universally experienced intense, intermittent

CAPTION	CASE NUMBER	COUNTY
Bergthold v. Pro Ag Investors, LLC et al.	LALA018794	Louisa
Ahrens et al. v. Prestage Farms of Iowa, LLC	CVEQ027257	Poweshiek
Dovico et al. v. Valley View Swine, LLC et al.	LALA105144	Wapello
City of Mount Union et al. v. Pro Ag Investors, LLC et al.	LALA011873	Henry
Lappe et al. v. Pro Ag Investors, LLC et al.	LALA004642	Des Moines

odors that could permeate their homes at any time of day or night, nothing like normal animal livestock odors common and unremarked upon in rural communities. The unpredictability of the odors exerted its own form of control over all plaintiffs' activities, particularly going outside. This is a pervasive, all-encompassing situation that detrimentally interferes with Iowa citizens' use and enjoyment of their own homes and properties.

Following almost twenty years of precedent, this Court should find Iowa Code section 657.11 unconstitutional. In its June 8, 2016, Ruling on Pretrial Motions in *Dovico v. Valley View*, the district court properly held that the statutory grant of immunity in Iowa Code section 657.11(2) is unconstitutional as applied. But for Iowa courts declaring right to farm laws unconstitutional, CAFO neighbors would have no right to recourse even under the limited avenue of nuisance law.[5] Only these ancient common law

[5] The Iowa Legislature enacted section 93A.11 as the first right to farm statute in 1982. The language in section 93A.11 became section 176B.11 in 1987. Iowa Code chapter 176B became Iowa Code section 352 in 1993. *Weinhold v. Wolff*, 555 N.W.2d 454, 457 (Iowa 1996). After this Court declared section 352.11 unconstitutional in *Bormann v. Bd. of Sup'rs In & For Kossuth Cty*., 584 N.W.2d 309 (Iowa 1998), the legislature enacted section 657.11 in 1995.

rights stand to protect citizens. Almost all the CAFO operators in concert with their integrators site these facilities in rural areas with far fewer resources and community members than larger metropolitan areas. Nuisance suits are the only recourse for these rural citizens and their way of life.

In finding section 657.11(b) unconstitutional as applied, the Iowa Supreme Court in *Gacke* did not address whether it was severable from the rest of the statute or give the lower courts a framework for the constitutional application of the rest of the statute. *Gacke v. Pork Xtra, L.L.C.,* 684 N.W.2d 168 (Iowa 2004). The lower courts and all parties involved in nuisance claims involving section 657.11(b) immunity look to this Court for clarity as to the constitutionality of the statute as a whole.

ISSUE I: THE DISTRICT COURT CORRECTLY FOUND IOWA CODE SECTION 657.11(2) UNCONSTITUTIONAL AND DENIED SUMMARY JUDGMENT TO DEFENDANTS.

Preservation of Error

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002) (internal citation omitted). This includes constitutional questions. "[C]ourts will not ordinarily initiate an inquiry regarding constitutional

issues." *Peel v. Burk*, 197 N.W.2d 617, 619 (Iowa 1972) (internal citation omitted). While following this general rule, other jurisdictions recognize that an appellate court can raise the question of facial constitutionality *sua sponte* where a statute is "clearly unconstitutional on its face." *Prejean v. Barousse*, 90 So.3d 477, 479 (La. Ct. App. 2012) (internal citation omitted). This is because "[a] statute which is unconstitutional on its face cannot be constitutionally enforced." *Id.* (citing *Gulf States Theatres of La., Inc. v. Richardson*, 287 So.2d 480, 487 (La. 1974)).

There is no question Defendants preserved error on the district court's finding section 657.11(2) is unconstitutional as applied. However, the Ruling does not decide facial constitutionality.[6] (*See generally* App. 1904-11). While not addressing this absence head-on, Defendants would seem to be arguing facial unconstitutionality is properly before the Court. They claim the district court found the statute unconstitutional "as applied" in name only; in other words, they argue, the effect of the Ruling was akin to a finding of facial unconstitutionality. (*See, e.g.,* Defs. Brief at 19, 40). Of

[6] Counsel for Plaintiffs did argue section 657.11 was unconstitutional both on its face and as applied at a combined hearing before the district court on pretrial motions in both Divisions A and C of this case and *Winburn, et al. v. Hoksbergen, et al.*, Case No. LALA 002187 in the Iowa district court for Poweshiek County. (App. 2182).

course, Plaintiffs strongly dispute Defendants' characterization of the as applied finding because the district court incorporated factual analysis as detailed below in Part A. Plaintiffs also strongly dispute that their suit "plainly engages" in the "subterfuge" of a "facial attack masquerading as 'as applied' challenges." (Defs. Brief at 42). Thus, even though Plaintiffs would welcome a determination of the statute's facial constitutionality, Plaintiffs cannot in good faith argue this issue before the Court in reliance upon a traditional standard of issue preservation.

Instead, Plaintiffs urge this Court to follow other jurisdictions in determining it can address facial constitutionality *sua sponte* because, as laid out fully in part B, section 657.11 is clearly unconstitutional on its face. In the wake of *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), no defendants have successfully asserted the immunity granted in section 657.11(2) because district courts have universally found it unconstitutional as applied. Litigants and the lower courts need a determination from this Court on the facial constitutionality of section 657.11 as a whole.

For example, district courts are in the unenviable position of interpreting other subparts of section 657.11 despite finding subpart 2 unconstitutional in accordance with *Gacke*. This produces results that are

confusing at best. In Division B (the *Pauls* case), the district court found the grant of immunity unconstitutional as applied but later awarded Defendant JBS' motion for costs under section 657.11(5) against certain Division B Plaintiffs.[7] (App. 1749-58; 1887-89). The district court in *Pauls* imposed sanctions despite the parties' agreement that subsection 5 should only be available if a defendant successfully raises a defense under subsection 2. At the April 13, 2016, hearing on JBS' motion, counsel for JBS stated unequivocally it was not entitled to fees and costs unless the court reversed its previous finding subsection 2 was unconstitutional as applied:

> THE COURT: Do you believe that's the only way that the Court can grant your relief under sub 5?
>
> MR. BYLUND: Yes, Your Honor.
>
> THE COURT: So you're waiving opportunity for section 5 to be applied if the Court's unwilling to change its constitutionality ruling?
>
> MR. BYLUND: Yes, Your Honor. I believe when you look at the text of the statute itself, it says, "If a Court determines that a claim is frivolous, a person who brings the claim as part of a losing cause of action against a person who may raise a defense under this section." So

[7] The district court has yet to rule on Defendants' motion for fees and costs under section 657.11(5) against former Plaintiff Michael Merrill, and therefore, Plaintiffs have no decision to appeal the constitutionality of this section in Division A. (Defs. Brief at 37).

> the way the statute is written, we had to be able to raise the defense under the section in order to be able to recover fees under subsection 5, and because of the Court's ruling under subsection 2, we can't raise the defense. And, therefore, unless the Court reverses course on that subsection 2 ruling, we don't think we have an independent ability to recover attorney's fees under sub 5.

(App. 2485). The confusion resulting from courts enforcing the teeth of 657.11 even after finding the immunity shield unconstitutional is further illustrated by Defendants' claim that, "The district court's ruling [awarding subpart 5 fees and costs against certain *Pauls* plaintiffs] stands tantamount to a finding that plaintiffs have a constitutional right to bring frivolous claims against animal feeding operations." (Defs. Brief at 18). Such conflicting results cannot produce reasonable outcomes for any party.

Accordingly, Plaintiffs address the facial constitutionality of section 657.11 below and respectfully request a determination from this Court as to the same.

Standard of Review

This Court reviews questions as to the constitutionality of a statute de novo. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004) (analyzing constitutionality of Iowa Code section 657.11(2)). The Court

starts with a presumption the statute is constitutional. *Id.* (citing *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995)). The parties challenging the statute "bear the burden to rebut this presumption by establishing the unreasonableness of the statutory provision." *Gacke*, 684 N.W.2d at 177 (citing *Kempf v. City of Iowa City*, 402 N.W.2d 393, 399 (Iowa 1987); *Steinberg-Baum & Co. v. Countryman*, 77 N.W.2d 15, 20 (Iowa 1956)). "Although this court must examine the reasonableness of the challenged legislative action, we do not concern ourselves with the wisdom of the policy decisions underlying the statute." *Id.* (citing *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739, 742 (Iowa 1969)).

Argument

First, the district court properly found Iowa Code section 657.11(2) unconstitutional under the analysis this Court established in *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004). Second, section 657.11(2) is facially unconstitutional under Iowa's Inalienable Rights Clause because it unduly oppresses an individual's right to use and enjoy property by denying her right to recover for an injury to the same. Iowa Const. art. I, § 1. Striking the statute on its face would create a clear framework for nuisance litigation instead of the current inconsistent statutory application, accomplish the same

legal result, and create much-needed certainty for all parties and the lower courts.

Finally, should this Court find Iowa Code section 657.11(2) constitutional, Defendants are not entitled to summary judgment on remand. The district court specifically denied Defendants' request for summary dismissal of Plaintiffs' claims under the exception to immunity in section 657.11(2)(b), because it found "[m]aterial facts are in good-faith dispute" on such claims. (App. 1906). As Defendants have not challenged this determination on appeal, should this Court find section 657.11(2) constitutional, it must remand for a determination regarding the exception.

A. The District Court Correctly Found Section 657.11(2) Unconstitutional as Applied.

This Court should affirm the district court finding that the legislative grant of immunity for CAFOs in section 657.11(2) is unconstitutional as applied to Plaintiffs.[8] Section 657.11(2) unreasonably operates to deprive

[8] Iowa Code § 657.11(2) states:

> 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

Plaintiffs of a remedy for injuries arising out of their property rights, as their residency long predates the CAFOs, they receive no benefit from the CAFOs, and their proximity to the CAFOs has resulted in the loss of use and enjoyment of their properties, in accordance with the *Gacke* factors.

The *Gacke* court held that the statutory limitation of property owners' right to use and enjoy their property was an unreasonable exercise of the state's police power as applied to the circumstances of those property owners, and consequently violated the Inalienable Rights Clause, article I, section 1 of the Iowa Constitution. *Gacke*, 684 N.W.2d at 179. This decision

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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.

protected the rights of CAFO neighbors to recover for the adverse effects of a nuisance[9] resulting in loss of use and enjoyment of property.

1. The right to use and enjoy property is protected subject to reasonable exercise of the police power.

The Iowa Constitution commences with an assurance of protection for each person of their natural right to acquire, possess, and enjoy property, known as the Inalienable Rights Clause:

> All men and women are, by nature, free and equal, and have certain inalienable rights--among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Iowa Const. art. I, § 1. Property consists not only of the physical land, but also "the rights of use and enjoyment." *Gacke*, 684 N.W.2d at 177 (Iowa 2004) (quoting *Liddick v. City of Council Bluffs*, 5 N.W.2d 361, 374 (1942)). The Plaintiffs' right to possess their property comprises certain essential attributes, including their right to use and enjoy it. *Id.* (citing *State v.*

[9] Iowa Code section 657.1.1 defines nuisance as:

> Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance.

Osborne, 154 N.W. 294, 301 (1915)). Interference with use and enjoyment of property is tantamount to a deprivation of that property pursuant to article 1, section 1 of the Iowa Constitution. *Id.*

This Court already found section 657.11(2) falls within the state's police power because the legislature's desire to promote animal agriculture is in the general public interest, and the statutory immunity is reasonably related to this objective. *Gacke*, 684 N.W.2d at 177 (citing Iowa Code § 657.11(1) (statement of purpose)). By the nature of their claims and position, Plaintiffs are compelled to dispute that the police power[10] properly includes

[10] The United States Supreme Court described police power as follows:

> The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and

protecting large-scale agricultural interests that have themselves been commonly characterized as a public nuisance or risk. The United States Supreme Court defined the traditional parameters of the police power as follows:

> To justify the state 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 individuals.

Gravert v. Nebergall, 539 N.W.2d 184, 186 (Iowa 1995) (quoting *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). However, Plaintiffs respectfully acknowledge that "courts accord legislatures a highly deferential standard of review, although of course the legislature must stay within certain parameters when exercising the state's police power." *Id.* (quoting *State v. Hartog*, 440 N.W.2d 852, 857 (Iowa 1989).

Accordingly, as in *Gacke*, the focus here is whether the legislature's chosen means were "reasonably necessary" and not "unduly oppressive." *Gacke*, 684 N.W.2d at 177.

> habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold.

Lawton v. Steele, 152 U.S. 133, 136 (1894).

2. Section 657.11(2) is not a reasonable exercise of police power because it is unduly oppressive.

Section 657.11(2) is unconstitutional pursuant to the *Gacke* analysis, as it is "unduly oppressive and, therefore, not a reasonable exercise of the state's police power" as applied to individuals, including Plaintiffs. *See Gacke*, 684 N.W.2d at 179. The *Gacke* court based this conclusion on three factors. *Id.* at 178. Section 657.11(2) is unreasonable when plaintiffs "receive no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general," plaintiffs suffer significant hardship, and plaintiffs "lived on and invested in their property long before Pork Xtra constructed its confinement facilities." *Id.* at 178-179. In its substantive due process analysis, the *Gacke* court also emphasized that 657.11(2) effectively abrogated any right to recovery in nuisance. *Id*. at 179.

Plaintiffs here clearly maintain identity with the three factual *Gacke* elements, as properly considered by the district court in its summary rulings incorporating the parties' briefing. (App. 1904; 1910). First, and most importantly, Plaintiffs predate the establishment of the CAFOs at issue in this action, Valley View Site 1 and Site 2. Defendants populated the two Valley View Sites to fill the 9,920 pig spaces, split evenly between the two facilities, in August and September 2013. (App. 251-52; 837). None of the

Plaintiffs before this Court moved to a nuisance, as they all owned or resided at the properties at issue long before Defendants populated Valley View Site 1 and Site 2. (App. 838-42).

Next, Plaintiffs do not receive a benefit from Defendants' operations beyond the benefit to the public in general. (App. 839-42). Defendants have not and cannot provide any evidence to suggest that Plaintiffs receive any direct or particular benefit from the facility. *See McIlrath v. Prestage Farms of Iowa, L.L.C.,* No. 15-1599, 2016 WL 6902328 at *3 (Iowa Nov. 23, 2016) (holding similarly).

Finally, all Plaintiffs continue to suffer significant hardship due to the almost 10,000 hogs at Valley View Site 1 and Site 2, and have testified to significant interference with their use and enjoyment of their property. Examples of the claims made by Plaintiffs include:

Deb Chance Deposition, Volume II:

QUESTION: How often do you feel that -- maybe if we could talk in percentage terms, if that's okay, what percent of the time do you have odors at your property which interfere with your use and enjoyment?

ANSWER: Well over 50 percent.

QUESTION: Would you say it's around 75, or more, or less?

ANSWER: I'll answer it this way. We cannot plan and cannot have events at our house. So it is well over 75 percent now because there's no way of knowing if that's going to be the day that we have the worst smell, or if it's going to be light smell. It's intermittent. So there's no way of knowing. So planning a whole event, spending the money to put it together and then having people over and not being able to be outside is worth -- worthless. So we do not plan events at our house.

(App. 991).

Jason Chance Deposition:

QUESTION: Can you please tell me how Valley View 1 and Valley View 2 have interfered with your life, your quality of life?

ANSWER: With this horrible stench and hog smell coming off Valley View 1 and Valley View 2, I have not and we have not been able to enjoy our property like we did for the first 13 years we lived there. Last 2 years have been horrible.

Simple things; you can't sit on the porch and enjoy it. You can't walk on the trails. You can't ride the ATVs. There's been mental distress. There's been anxiety, depression. Our family has had deteriorating relationships. I can't have friends and family over. It's embarrassing.

I wanted to come back to Iowa to raise our daughter, and we did because I felt it was important to come back to Iowa and to be in southeast Iowa, and we were able to do that. The first 13 years was fine. The last 2 or approximately

years it's just been horrible. You can't do anything. Your throat is burning. Your eyes are burning.

My daughter had dreams of getting her education, which she was able to accomplish that. Another dream that was destroyed was that she wanted to build a house on the south side of the pond. She had plans, she had been planning this since she was a younger kid. She wanted to stay in the area. There no reason to build that house9 there stink all the time. It isn't going to be worth anything.

It's no way to live at all. It's just horrible.

(App. 824-25).

Kara Chance Deposition:

ANSWER: Well, Number 1, I think we cannot use our property. It smells so incredibly awful. I have headaches all the time. I've never had them in my entire life. My eyes burn when I smell that hog smell. My nose is inflamed. My throat gets irritated. I can't breathe. Sometimes I feel lethargic. The smell makes me nauseous and ill. I have diarrhea to the point where it's liquid. I've never had that in my entire life.

We can't do anything on other property. We can't barbecue anymore. We can't hang clothes on the line. We can't even open our windows.

(App. 825).

Tim Honomichl Deposition:

QUESTION: How else has the hog smell affected the use of your property?

ANSWER: As outdoors, or anything?

QUESTION: Anything.

ANSWER: We no longer have our swimming pool outside. We no longer have our clothesline outside. We no longer have our basketball hoop outside. The boys no longer -- I would say never play outside, but that has -- became a factor. They don't -- they are not outside as much.

(App. 825-26).

Karen Jo Frescoln Deposition:

QUESTION: How often do you smell odor at the property?

ANSWER: Almost daily smell something but -- go ahead.

QUESTION: What does the odor smell like?

ANSWER: Decaying animal almost. Poop from a child's diaper type odor. Sometimes it can knock it just curls your toes, gags you, and it hangs in the air like a fog. Not every day, but enough, enough that it changes plans that you've made to be outside.

(App. 826).

Given the foregoing, and the entirety of the undisputed facts in the case at bar, Plaintiffs have met their burden to show section 657.11(2) is unconstitutional as applied to them. The district court explicitly incorporated the Plaintiffs' factual arguments in their briefing when it invalidated the

grant of immunity as applied to them. Application of section 657.11(2) immunity is unduly oppressive to the Plaintiffs in this case and as such is an unreasonable exercise of police power and unconstitutional as applied to them. This Court has consistently held that a nuisance created by a CAFO is permanent when the owners and operators do not intend to close the facility in the foreseeable future. *Gacke*, 684 N.W.2d at 177 (citing *Weinhold v. Wolff*, 555 N.W.2d 454, 463 (Iowa 1996)). When a CAFO nuisance is found to be permanent and an abatement order impractical, this Court correspondingly deems plaintiffs entitled to all past, present, and future damages. *Id.*(citations omitted). Given the legal and factual identity of Plaintiffs' claims with those in *Gacke*, the same principles should apply to determination of damages, allowing Plaintiffs to recover all past, present, and future damages requested upon proof of their nuisance claims.

B. Iowa Code Section 657.11(2) Is Unconstitutional on Its Face.

Incorporating the foregoing, clearly there is no question injury for interference with use and enjoyment of property is well-established in Iowa. *See, e.g.*, Iowa Code § 657.1 (defining nuisance); *Bormann v. Board of Sup'rs In & For Kossuth County*, 584 N.W.2d 309, 315 (Iowa 1998) (principal property rights are use and enjoyment of the same) (citing *Liddick*

v. Council Bluffs, 5 N.W.2d 361, 374 (Iowa 1942); *Weinhold v. Wolff*, 555 N.W.2d 454, 458-59 (Iowa 1996) ("[p]arties must use their own property in such a manner that they will not unreasonably interfere with or disturb their neighbor's reasonable use and enjoyment of the neighbor's property" (internal citation omitted)). So-called "special damages" are available in common law nuisance claims to compensate for "[t]he annoyance, discomfort, and loss of full enjoyment of the property." *Weinhold*, 555 N.W.2d at 466.

Following the Inalienable Rights Clause analysis set out in part A under *Gacke*, section 657.11(2) is also facially unconstitutional. Again, the primary question is whether the state's exercise of police power is reasonable. The reasonable exercise of police power depends on whether

> . . . 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 individuals.

Id. (quoting *Gravert*, 539 N.W.2d at 186).[11]

[11] In their amicus curiae brief, Iowa Pork Producers Association ("IPPA") and Iowa Farm Bureau Federation ("IFBF") argue that the constitutionality of section 657.11(2) does not turn on whether it's "a reasonable exercise of police power, but rather the test is whether a rational legislator could conclude that the statute will accomplish a legitimate goal," i.e., a rational

To recap, the *Gacke* court found the statute used unreasonable means and was unduly oppressive in large part because the plaintiffs received no particular benefit beyond that to the public at large and because they sustained significant hardship by virtue of residing on their property and making "legitimate and valuable expenditures" in it before the animal operation started. *Gacke,* 684 N.W.2d at 178-79 (internal citations omitted). These same factors are essentially universal to plaintiffs with nuisance claims against animal feeding operations. Moreover, the statute was not a reasonable means to address the rare instance where one of these factors is absent. A case-by-case factual analysis is unnecessary, and the statute should be invalidated on its face.

First, the Iowa Court of Appeals recently found a plaintiff did not personally benefit from the statute absent owning an "animal feeding

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basis test. (*See* Amicus Brief at 11 (citing *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 340 (Iowa 2015); *see also* Defs. Brief at 32-33 (likewise arguing for rational basis review)). However, the Iowa Court of Appeals in *McIlrath*, decided only last month, employed the same standard as in *Gacke*, clearly indicating that the test has not changed. *See generally McIlrath v. Prestage Farms of Iowa, L.L.C.*, No. 15-1599, 2016 WL 6902328 at *2-3 (Iowa Nov. 23, 2016).

operation" herself.[12] *See McIlrath v. Prestage Farms of Iowa, L.L.C.*, No. 15-1599, 2016 WL 6902328 at *3 (Iowa Nov. 23, 2016). To the extent the legislature is concerned with the extremely unlikely scenario of one owner of an animal feeding operation suing another for nuisance, it could craft a much narrower and more reasonable immunity statute prohibiting intra-industry claims. Second, Iowa common law already shields defendants from liability to someone who moves to the nuisance, and therefore all plaintiffs with true nuisance claims would have priority of location anyway. *See*

[12] Implausibly, IPPA and IFBF claim section 657.11(2) actually benefits plaintiffs in nuisance actions by protecting them as neighboring property owners beyond the public interest. (*See* Amicus Brief at 13-14). As proof, they point to the nuisance defense exceptions that allow claims where (a) the nuisance results from a failure to abide by state or federal statute or regulation or (b) the livestock operation unreasonably and for substantial periods of time interferes with the plaintiff's comfortable use and enjoyment of their life or property and the operation fails to use existing generally accepted management practices. (*Id.* at 14). Far from protecting plaintiffs, these exceptions set a new bar plaintiffs must clear to even bring a common law nuisance claim in the first place. And the exceptions actually reverse common law that inured to plaintiffs' benefit. At common law, "carrying on a lawful business in accordance with accepted standards" is insufficient to avoid nuisance liability. *See Weinhold*, 555 N.W.2d at 461 (further stating "[a] lawful business, properly conducted, may still constitute a nuisance if [the business] interferes with another's use of his own property") (citing *Valasek v. Baer*, 401 N.W.2d 33, 35 (Iowa 1987)). Moreover, respecting the exception in (b) concerning management practices, the *Gacke* court already found it akin to the negligence exception to immunity that did not save section 352.11(1)(a) from invalidation in *Bormann* under a takings analysis. *See Gacke*, 684 N.W.2d at 173.

Weinhold v. Wolff, 555 N.W.2d 454, 459-60 (1996) (citations omitted). To the extent the legislature wanted to protect animal feeding operations from defense costs for unfounded nuisance suits, again, the legislature could have taken the more reasonable approach of codifying this common law principle.

The *Gacke* court was also concerned with the statute's effect of denying injured persons any right of recovery. *Gacke*, 684 N.W.2d at 179. The grant of immunity unjustly strips neighbors of animal feeding operations—who would otherwise have common law nuisance claims—of the ability to redress their injuries. Like the predecessor right-to-farm law invalidated in *Bormann*, section 657.11(2) is unconstitutional on its face:

> When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.

Bormann, 584 N.W.2d at 322.[13] Significantly, the presence of the *Gacke* factors (i.e., no personal benefit, significant hardship shown by investments

[13] The *Gacke* court also invalidated section 657.11(2) to the extent it violated article 1, section 18 of the Iowa Constitution by creating an uncompensated easement in the plaintiffs' property. *Gacke*, 684 N.W.2d at 173-74 (citing *Bormann*, 584 N.W.2d at 315)). Plaintiffs here have chosen not to avail themselves of the remedy for the taking that occurs by operation of the statutory immunity, namely the diminution in value of the property burdened

and priority of location, and remedy stripping) led the *Gacke* court to conclude the statute did not serve the traditional purpose of police power anyway.

> Property owners like the Gackes bear the brunt of the undesirable impact of this statute without any corresponding benefit. Moreover, their right to use and enjoy their property is significantly impaired by a business operated as a nuisance, yet they have no remedy. Unlike a property owner who comes to a nuisance, these landowners lived on and invested in their property long before Pork Xtra constructed its confinement facilities. **Under these circumstances, the police power is not used for its traditional purpose of insuring that individual citizens use their property "with due regard to the personal and property rights and privileges of others."** *May's Drug Stores*, 242 Iowa at 329, 45 N.W.2d at 250-51. Instead, one property owner—the producer—is given the right to use his property without due regard for the personal and property rights of his neighbor. We conclude that section 657.11(2) as applied to the Gackes is unduly oppressive and, therefore, not a reasonable exercise of the state's police power. Accordingly, the statutory immunity violates article I, section 1 of the Iowa Constitution and may not be relied upon as a defense in this case. We express no opinion as to whether the statute might be constitutionally applied under other circumstances.

Gacke, 684 N.W.2d at 179 (emphasis added). Finding the statute unconstitutional on its face would only require the Court to take a small step

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by the animal feeding operation, measured by the fair market value of the real estate immediately before and after imposition of the easement. *Id.* at 174-75. Accordingly, Plaintiffs here focus on the facial unconstitutionality of section 657.11(2) under the Inalienable Rights clause.

down the path it paved in *Gacke*, which the court of appeals clearly followed in *McIlrath*. *See McIlrath*, 2016 WL 6902328 at *3.

Moreover, in practice, declaring section 657.11(2) facially unconstitutional does not deprive the Defendants or other CAFO owners of any rights or protections. The *Gacke* holding essentially invalidated the legislature's attempt to grant immunity because district courts have universally relied on it to find the statute unconstitutional as-applied since then. Striking the statute on its face would clarify the process, accomplish the same legal result, and create much-needed certainty for all parties and the lower courts.

The changes in regulatory framework for animal feeding operations since *Gacke* (i.e., setback distances and concrete use requirements) do not alter the constitutional analysis, as the *McIlrath* court made clear. *Compare* Amicus Brief at 14-16 and Defs. Brief at 31-32 to *McIlrath*, 2016 WL 6902328 at *3 (rejecting a similar argument from defendants in that case because set-back requirements were not one of the factors the Iowa Supreme Court relied on in *Gacke*). Likewise, IPPA and IFBF's argument that the public now has a greater ability to participate in the permitting process than

it did in *Gacke* (brief at 16-18) fails to show that the factors for constitutional analysis have changed.

C. Even If Iowa Code § 657.11(2) Is Constitutional, Defendants Are Not Entitled to Summary Judgment on Remand.

Should this Court find Iowa Code section 657.11(2) constitutional, Defendants are nevertheless unentitled to their requested relief, i.e., reversal and remand for entry of summary judgment on their behalf. (*See* Defs. Brief at 45). A fact finder still must determine whether the statutory exception to immunity in section 657.11(2)(b) applies. The district court denied Defendants' request for summary dismissal of Plaintiffs' claims under the exception to immunity in section 657.11(2)(b) because it found "[m]aterial facts are in good-faith dispute" on such claims and "adjudication of facts under this exception necessarily implicates reasonable inferences that may be drawn from both direct and circumstantial evidence and that may involve both disputed facts as well as undisputed facts." (App. 1906). Defendants have not challenged this determination on appeal.

To be clear, Plaintiffs' position is the exceptions to immunity are only at issue if the grant of immunity is constitutional in the first place. *See, e.g.*, *McIlrath*, 2016 WL 6902328, at *1 (district court intended to submit special jury verdict form on exceptions to immunity so that there would be a jury

determination in the event section 657.11(2) was found constitutional as applied). To that end, Plaintiffs recognize the potential confusion ensuing from the district court first finding the statutory immunity in section 657.11(2) unconstitutional as applied, and then granting Defendants summary dismissal of Plaintiffs' claims brought under the other exception to immunity in section 657.11(2)(a). (*See* App. 1906). The district court did so because it found no factual dispute "that [D]efendants are in compliance with federal and state statutes and regulations pertaining to CAFO ownership and operation." This factual finding has not been contested on appeal. Under the district court's determination that section 657.11(2) is unconstitutional as applied, Plaintiffs' claim to an exception in section 657.11(2)(a) is moot anyway.

CONCLUSION

This Court should affirm the district court's Ruling to the extent it found section 657.11(2) unconstitutional as applied and remand for entry of an amended Ruling clarifying that this section is unconstitutional. Costs of appeal should be taxed to Defendants-Appellants Valley View and JBS.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees respectfully request to be heard orally upon the submission of this appeal.

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CERTIFICATE OF FILING

The undersigned hereby certifies that I, or someone acting on my behalf, filed the foregoing Plaintiffs-Appellees' Final Brief via the Iowa Judicial Branch EDMS system on January 24, 2017.

/s/ Jennifer H. De Kock

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of January, 2017, a copy of the foregoing Plaintiffs-Appellees' Final Brief was served via the Iowa Judicial Branch EDMS system to the attorneys listed below:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This final brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this final brief contains 8832 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This final brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this final brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

Dated: January 24, 2017

/s/ Jennifer H. De Kock