

No. 19-1019

**In the United States Court of Appeals  
for the Fourth Circuit**

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JOYCE MCKIVER, ET AL.

*Plaintiffs-Appellees,*

*v.*

MURPHY-BROWN, LLC,

*Defendant-Appellant.*

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On Appeal from the United States District Court for the Eastern  
District of North Carolina, No. 7:14-cv-00180

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**BRIEF OF THE AMERICAN FARM BUREAU FEDERATION,  
NATIONAL PORK PRODUCERS COUNCIL, NORTH CAROLINA  
FARM BUREAU FEDERATION, AND NORTH CAROLINA PORK  
COUNCIL AS *AMICI CURIAE* SUPPORTING APPELLANT AND  
REVERSAL**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 19-1019 Caption: Joyce McKiver, et al., v. Murphy-Brown, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

AMERICAN FARM BUREAU FEDERATION  
(name of party/amicus)

who is amicus curiae, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
  
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: Timothy S. Bishop

Date: March 5, 2019

Counsel for: AMERICAN FARM BUREAU FEDER

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I certify that on March 5, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Caption: Joyce McKiver, et al., v. Murphy-Brown, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

NATIONAL PORK PRODUCERS COUNCIL

(name of party/amicus)

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Counsel for: NATIONAL PORK PRODUCERS CO

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Caption: Joyce McKiver, et al., v. Murphy-Brown, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

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Counsel for: NORTH CAROLINA FARM BUREAU

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Caption: Joyce McKiver, et al., v. Murphy-Brown, LLC

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Counsel for: NORTH CAROLINA PORK COUNCI

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## INTEREST OF THE *AMICI*<sup>1</sup>

The American Farm Bureau Federation is a voluntary general farm organization established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 States and Puerto Rico, representing nearly six million member families. Its mission is to enhance and strengthen the lives of rural Americans and to build strong and prosperous agricultural communities throughout the Nation.

The North Carolina Farm Bureau Federation is the State's largest general farm organization, representing approximately 35,000 farm families in every county of North Carolina. NCFBF's volunteer-farmer members raise livestock and poultry and produce myriad crops throughout the State, including tobacco, sweet potatoes, melons, cotton, soybeans, corn, and wheat. Established in 1936, NCFBF primarily advocates for its members before Congress, the North Carolina General Assembly, and federal and state regulatory agencies. The North Carolina Farm Bureau Federation proudly stands as the State's "voice of agriculture."

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<sup>1</sup> Pursuant to Rule 29(a)(4)(E), counsel for *amici* affirm that no party to this appeal, party's counsel, or other third party authored this brief in whole or in part or contributed financially to its preparation. This brief is filed pursuant to Rule 29(a)(2); all parties consent to its filing.

The National Pork Producers Council is a 501(c)(5) nonprofit agricultural organization representing forty-two affiliated state associations, including the North Carolina Pork Council, serving as the global voice of the U.S. pork industry. The National Pork Producers Council works to ensure that the U.S. pork industry remains a consistent and responsible supplier of high-quality pork to domestic and international markets. Through public policy outreach, the organization fights for reasonable legislation and regulations, develops revenue and market opportunities, and protects the livelihood of America's 60,000 pork producers.

The North Carolina Pork Council is a nonprofit North Carolina corporation established in 1962. The organization is a 501(c)(5) trade association with the mission to promote and educate to ensure a socially responsible and profitable North Carolina pork industry. The North Carolina Pork Council engages in public policy and advocacy efforts as well as research, producer education, promotion, and consumer information programs and services. The majority of the Board of Directors is elected by the full membership of the association. In addition to members directly engaged in the pork industry, the Board of Directors has members representing allied industry and meat processors, state officers, representatives of NC State University, NC State University College of



Veterinary Medicine, and the NC Department of Agriculture. No single member of the North Carolina Pork Council funds or controls its activities.

*Amici* have already participated in this Court in this litigation, as *amici* supporting defendant's successful mandamus challenge to a gag order imposed by the district court. See Am. Br. of AFBF and NCFBF, *In re Murphy-Brown, LLC*, No. 18-1762 (4th Cir., filed Aug. 6, 2018); Am. Br. of the NCPC and NPPC, *id.* (filed Aug. 7, 2018). Like that gag order, the judgment below is "defective in multiple respects." *In re Murphy-Brown, LLC*, 907 F.3d 788, 792 (4th Cir. 2018). And as with the gag order, the judgment harms not only the defendant, but also *amici* and their members. Indeed, it is no exaggeration to say that the entire United States livestock sector is threatened by the proceedings below, which have unleashed hundreds of millions of dollars in punitive damages verdicts based on widely accepted farming practices carried out in conformity with state law.

*Amici* are keenly interested in this case because massive damages awards based on normal farming activity that complies with applicable regulations pose an existential threat to the livelihoods of farmers and the food security of our Nation. And the structure of the suit—targeting a processor for activities of a contracted grower who operates the farm and

manages its manure—raises questions about the viability of a commonplace and efficient commercial relationship.

The threat these novel suits pose to the livestock sector—from small growers and farmers to meat processors, and all whose businesses serve them—goes beyond the pork industry. Already, activist groups have suggested that the same nuisance theories can be used against North Carolina’s poultry industry. *E.g.*, Environmental Working Group, *New Investigation: Recent Explosion of Poultry Factory Farms in N.C. Piles Manure from 515.3M Chickens Onto Waste From 9.7M Hogs* (Feb. 13, 2019), <https://tinyurl.com/y6cfjqjw>. Both industries are enormous contributors to the North Carolina economy and make the State the second largest exporter in the Nation of pork and poultry. See North Carolina State University, *Economic Contribution of North Carolina Agriculture and Agribusiness* 20 (Oct. 2015), [https://www.ces.ncsu.edu/wp-content/uploads/2017/01/NC-Agriculture-Economic-Pocket-Guide\\_NC-State-CALS.pdf?fwd=no](https://www.ces.ncsu.edu/wp-content/uploads/2017/01/NC-Agriculture-Economic-Pocket-Guide_NC-State-CALS.pdf?fwd=no) (“*Economic Contribution*”). The pork industry alone supports more than 50,000 jobs for North Carolinians.

Nor is the threat limited to North Carolina. As North Carolina Agriculture Commissioner Steve Troxler explained, “there is not a farm in this country that is going to be safe” from plaintiffs’ nuisance theories. John Hart, *Nuisance Suits Now Threaten All Farmers* (Aug. 6, 2018),

<https://www.farmprogress.com/hog/nuisance-lawsuits-now-threaten-all-farmers>. Nor are growers and processors the only victims. Enormous judgments against the producers of our food drive up costs and undermine one of our Nation's greatest strengths—its abundant supply of domestically-grown, affordable, and high-quality food, and the food security that comes with it. The only winners from this litigation are plaintiffs and their entrepreneurial lawyers, who walk away with windfall damages and enormous fees unrelated to any plausible measure of harm. The losers are rural communities that stand to shed dollars, jobs, and economic and social stability, and consumers who lose the benefits of reliable and efficient methods of agricultural production.

In fact, that appears to *amici* to be the goal of litigation like this. Lawsuits aimed at agriculture are often funded and engineered by outside interests who know little of rural communities or the agricultural way of life but are politically and socially opposed to farmers and their businesses. Plaintiffs' closing argument attacked modern agriculture while promoting visions of small 75-hog, multi-crop farms as the ideal. ECF 296 at 13. Around the country, litigation threats and uneconomic environmental standards are part of a war on farmers with no less ambitious a goal than ending modern methods of agricultural production.

The case on appeal is among the highest-impact and highest-profile agricultural cases being litigated anywhere in the country. The stakes are high, including enormous economic and social damage inflicted on rural communities and the toll taken personally by farm families. *Amici's* experience with pork production and the production of agricultural commodities more generally, in North Carolina and nationwide, will assist this Court in its consideration of this case—the first of dozens before the same district court that together threaten an inconceivable level of harm.

## ARGUMENT

### **A. Huge Punitive Damages Awards Based On Efficient, Highly Regulated Farm Activities Would Cause Untold Harm To The Agricultural Economy**

*Amici* address below specific legal errors that invalidate the district court's judgment. But we first draw this Court's attention to the enormous harm that would be done by allowing runaway punitive damages awards to rural residents who express surprise that a neighboring farm—which has operated for decades—sometimes causes noise and odors. Imposing quasi-criminal punishment on Murphy-Brown for creating a nuisance when its contract grower has operated its farm in compliance with state regulation is not only extremely unfair, but also highly destructive of our Nation's rural, agriculture-dependent economy. The Court should not ignore these practical consequences when it considers the erroneous legal

interpretations and evidentiary rulings below. As with the previously reversed gag order, “[t]he mischief of the trial court’s action should be apparent.” *In re Murphy-Brown, LLC*, 907 F.3d 788, 794 (4th Cir. 2018).

Begin with verdicts to date. The jury in this case awarded ten plaintiffs more than *\$50 million* in compensatory and punitive damages. ECF 267. A second trial produced an award of over *\$25 million* to two plaintiffs. A third resulted in the jury awarding more than *\$473 million* to half a dozen plaintiffs. And as this Court understands, “the Master Case Docket includes more than 20 lawsuits and more than 500 plaintiffs.” *Id.* at 792. Even after reductions to comply with North Carolina limits on punitive damages, repeated verdicts of this measure are crippling; no business could withstand an ongoing assault of this kind. And small farm operations—which could as easily be targeted using plaintiffs’ legal theories as the processors who contract with them—would be wiped out with a single verdict. Importantly, plaintiffs’ legal theories do not target rogue operators who flout environmental laws. They challenge operators who comply with the law and carry out ordinary farming practices. It is no exaggeration to say that a plaintiff win in these lawsuits would subject the everyday activities of all farmers to punitive damages.

The broader consequences are foreseeable. Large damages awards threaten not only individual agricultural operations and the livelihoods of

the families that run them but also the entire North Carolina farm economy—indeed the health of the State’s economy in general. Hog farming, while “predictably [a] messy business, [is] one with central economic importance to the state of North Carolina.” *Murphy-Brown*, 907 F.3d at 792. North Carolina is home to some nine million hogs on nearly 2,300 hog farms. Anne Blythe, *Jury awards more than \$25 million to Duplin County couple in hog-farm case*, News & Observer (June 29, 2018), [perma.cc/73LS-4RKK](https://perma.cc/73LS-4RKK). Those farms provide 46,000 full-time jobs for North Carolina workers and result directly in \$11 billion in economic productivity for the State. Greg Barnes, *Suits against Smithfield could leave hog industry in doubt*, Fayetteville Observer (June 16, 2018), [perma.cc/2VRU-P6T5](https://perma.cc/2VRU-P6T5). See generally *Economic Contribution*, *supra*.

This economic activity is focused in the eastern part of the State which, lacking the commercial and industrial base of other parts of North Carolina and with few urban centers, is especially dependent on hog farming. Hog farming developed in that part of the State to replace dwindling tobacco production, and it thrived there because the area is close to farms that produce corn and soybean feed crops and close to processing plants. Sampson and Duplin counties are especially hog-

dependent, producing fully 40 per cent of all pigs and hogs raised in the State. See <https://www.ncpork.org/truth-hog-farms-eastern-north-carolina>.

There is no question that these nuisance suits are a dire threat to hog farming in the State, and to the economic benefits and farm jobs that go with it. As Smithfield's CEO has stated, "If we keep losing these suits, it is going to be very difficult to continue to do business in North Carolina," leaving eastern North Carolina's economic future gravely in doubt. Greg Barnes, *supra*, [perma.cc/2VRU-P6T5](https://perma.cc/2VRU-P6T5); see Charlotte Smith, *OPINION: Hog trial misleading; living high on the hog isn't for everyone*, Bladen Online (July 14, 2018), [perma.cc/NFC4-4CNG](https://perma.cc/NFC4-4CNG) (lamenting "the detriment the lawsuits are having on our farmers and the potential [effect] it could have on the way of life as we know it").

But that is not all. It is not just hog farms and processors that are imperiled. Other businesses, for example restaurants and catering businesses that depend on a local supply of fresh pork, are also jeopardized. See Mike McHugh, *Elected officials say "enough is enough" with hog farm lawsuits*, Star News Online (July 10, 2018), [perma.cc/Y64Y-LM68](https://perma.cc/Y64Y-LM68) (owner of North Carolina barbecue catering business stating that, if the lawsuits run hog farmers out of eastern North Carolina, "he'd be through"). And if 50,000 workers lost their jobs, the broader local economy that serves them also would crater.

In fact, these suits have adverse implications for all types of livestock operations everywhere. Similar nuisance actions could be filed against other kinds of livestock farming operations in North Carolina. Indeed, the State's poultry industry already is in activists' sights. See Environmental Working Group, *supra*, <https://tinyurl.com/y6cfjqjw>. And the same is true all across the country. There are about 3.2 million farmers in the United States. U.S. Dep't of Agric., *Farm Demographics—U.S. Farmers by Gender, Age, Race, Ethnicity, and More* (May 2014), [perma.cc/5KEB-BETW](https://perma.cc/5KEB-BETW). They employ an additional 1.5 million agricultural workers. Bureau of Labor Statistics, *Employment by major industry sector* (Oct. 24, 2017), [perma.cc/DK8Q-VZQC](https://perma.cc/DK8Q-VZQC). Those farmers and their employees are raising nearly 90 million cattle, more than 66 million pigs and hogs, and more than 1.85 billion chickens across the United States. U.S. Dep't of Agric., *2012 Census of Agriculture: United States Summary and State Data*, 19, 22, 25 (May 2014), [perma.cc/NPF7-KVSB](https://perma.cc/NPF7-KVSB). Those livestock have a total value of sales that exceed \$182 billion annually (*ibid.*), playing a critical role in the Nation's economy.

Modern agricultural practices, including those used by hog growers and processors, are also key to putting affordable food on the Nation's tables. The United States is one of the most food secure countries in the world, with among the very highest rankings world-wide for food



affordability, quality, safety, and availability. See *Global Food Security Index* (Oct. 2018), <https://foodsecurityindex.eiu.com/Downloads>. Nuisance suits that add to the cost of producing food, or even shut down production, threaten that security, which harms the most needy residents of the State. See <http://worldpopulationreview.com/states/north-carolina-population> (Nov. 30, 2018) (poverty rate in North Carolina is 16 per cent).

These nuisance suits are fundamentally at odds with the agricultural way of life and the economic and social benefits it brings. The potential practical and economic consequences of successful nuisance suits like the underlying case here are beyond measure. It is with that background in mind that this Court should consider whether nuisance suits and punitive damages awards are a permissible method for regulating lawful agricultural practices that are consistent with all prevailing regulations—and thus whether the standards for agricultural practices should be set prospectively by legislators and regulators or retroactively by jurors.

#### **B. The Liability And Damages Awards Are Barred By North Carolina Right-To-Farm Laws**

The question posed by *amici* at the end of the last section has squarely been answered by the North Carolina legislature. The State's Right-to-Farm Act, N.C.G.S. § 106-701 ("RTFA"), broadly protects farmers

from nuisance claims that would otherwise threaten farm viability and limits damages in those lawsuits that it does not bar.

**1. The right-to-farm laws show that the legislature meant to protect farmers from actions like this**

The North Carolina General Assembly decided decades ago to “limi[t] the circumstances under which an agricultural ... operation may be deemed to be a nuisance,” in order to encourage investment in agriculture and ensure farms can continue to operate. N.C.G.S. § 106-700. At the time this suit began, the RTFA provided that an agricultural operation “shall [not] be or become a nuisance ... by any changed conditions in or about the locality outside of the operation” once the farm has operated for one year, “when such operation was not a nuisance at the time the operation began.” *Id.*, § 106-701(a). That protection does not apply only if “the plaintiff demonstrates that the [farm] operation has undergone a fundamental change” (*id.*, § 106-701(a1)), or “a nuisance results from the negligent or improper operation of [the farm].” *Id.*, § 106-701(a2). Here, plaintiffs never had to prove the conditions for either exclusion, because the district court granted summary judgment to plaintiffs on Murphy-Brown’s RTFA defense. Order, ECF 476.

The policy goals of the RTFA strongly warn against expansive application of nuisance law like that permitted here. And the trial court’s

refusal to allow Murphy-Brown to raise the RTFA as a defense marks a substantial departure from the legislature's intent. Properly understood, the pre-2018 version of the RTFA should have barred this suit.

The district court rejected Murphy-Brown's RTFA defense to liability on the ground that plaintiffs had produced "evidence that they or their relatives have lived on the affected properties prior to" Kinlaw Farms beginning operations in 1995. ECF 476, at 9. But that is not the test. The RTFA's protection is triggered by "*any* changed conditions in or about the locality" of the farm, which is not the same issue as whether particular plaintiffs (or their relatives) moved to the area after farm operations began. Murphy-Brown pointed to ample evidence that there were "changed conditions" around Kinlaw Farms. Since 1995, farm land in the area has changed to residential use, with new homes built and land values rising, and farming on that land has ceased. See, *e.g.*, ECF 343, at 18-20. That evidence should at least have been enough to survive summary judgment and to raise a fact issue for the jury about whether "changed conditions" in the locality had triggered the nuisance suit (as suggested by the fact that the farm had operated for twenty years before the suit was filed).

In granting plaintiffs summary judgment on the RTFA defense, the district court relied on *Mayes v. Tabor*, 334 S.E.2d 489 (N.C. Ct. App. 1985). ECF 476, at 10. But in *Mayes* there had *not* been a change in the

character of the surrounding area. There, the summer camp adjacent to the defendant farm had been in use for 60 years. Accordingly, the RTFA did not protect the farm. Here, by contrast, there *was* evidence of changed conditions in the area surrounding the Kinlaw farm.

In using the broad phrase “any changed conditions in or about the locality” of the farm the legislature could not have meant for courts to focus solely on whether plaintiffs or their families began to use their properties prior to the establishment of the farm at issue. But that is what the district court did here. The district’s court error undermines the policy rationale that supports the RTFA by allowing plaintiffs—who lived next to Billy Kinlaw’s farm for 20 years *without complaint*—to launch an all-out legal assault on North Carolina’s farm families.

## **2. The 2017 Right-To-Farm Act amendments require reversal of the judgment**

The district court’s RTFA ruling is so far removed from what the State legislature intended in its right-to-farm laws that the General Assembly reacted quickly to correct the error. It amended the law twice, in 2017 and 2018—by supermajority votes, no less, thereby overriding gubernatorial vetoes—to change the requirements for nuisance liability and limit the damages available to nuisance plaintiffs. In doing so, the General Assembly explained that the district court *in this case* had

“incorrectly and narrowly interpreted” the RTFA so as to “contradic[t] the intent of the General Assembly” and “rende[r] the Act toothless.” Sess. Law 2018-113 (preamble).

As most relevant here, the 2017 law limited plaintiffs’ damages for nuisance claims against agricultural operations to “the reduction in the fair market value of the plaintiff’s property caused by the nuisance, but not to exceed the fair market value of the property.” Sess. Law 2017-11, § 1(a)(1), codified at N.C.G.S. § 106-702(a)(1). Plaintiffs here did not seek damages for “any loss of property value.” See ECF 250, at 4 (stipulation). Plaintiffs asked the jury to award damages only for plaintiffs’ loss of use and enjoyment of their property, along with punitive damages. *E.g.*, ECF 296, at 62.

Against this backdrop, Murphy-Brown argues that the 2017 statutory limitation on damages applies to this case retroactively, which would wipe out both the compensatory and punitive damages awarded below.<sup>2</sup> Although a different understanding may have been presumed

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<sup>2</sup> N.C.G.S. § 1D-15(a) specifies that “[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages,” so striking down under the 2017 RTFA the only compensatory damages the jury awarded would also invalidate the punitive award. That result would also be consistent with the General Assembly’s intent when it further amended the RTFA in 2018 to provide that, in the future, no punitive damages may be awarded in nuisance actions against agricultural

during legislative debates, a careful reading of *Ray v. N.C. Dep't of Transportation*, 727 S.E.2d 675 (N.C. 2012), compels the conclusion that the 2017 amendment applies retroactively to this case.

The General Assembly provided that Section 106-702(a)(1) “is effective when it becomes law and applies to causes of action commenced or brought on or after that date.” Sess. Law 2017-11, § 2(a). But, as Murphy-Brown contends, although that language might on its face seem conclusive, under established North Carolina caselaw it is not controlling. That is because *Ray* holds that the question whether a law applies prospectively or retroactively is one for judicial determination applying well-established standards. 727 S.E.2d at 682.

In *Ray*, the North Carolina Supreme Court considered a situation in which prior statutory and common law had been thought by the lower courts to point to one application of the public duty doctrine, but a statute enacted after the suit was commenced contradicted that view of the doctrine. The statute, the Supreme Court held, was a “clarifying amendment” that “gives further insight into the way in which the

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defendants unless the nuisance resulted from operations that have been “subject to a criminal conviction or a civil enforcement action” by State or federal authorities “pursuant to a notice of violation” (Sess. Law 2017-11, § 10(b), codified at N.C.G.S. § 106-702(a1)—a condition that is not satisfied here.

legislature intended the law to apply from its original enactment.” *Id.* at 681. And “in addition to applying to all cases brought after their effective dates, *such amendments apply to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment.*” *Ibid.* (emphasis added). Furthermore, “[t]he General Assembly’s inclusion of an effective date in the session law” is not determinative, but is overridden if the court determines that the statute clarifies prior law. *Id.* at 682; see also *ibid.* (“when the amendment is determined to be clarifying by this Court, the effective date does not supersede the law that governs how clarifying amendments control”). The court in *Ray* cited numerous North Carolina decisions applying these principles. *Id.* at 681-682.

Murphy-Brown’s retroactivity argument also finds support in the legislative record. Consider the title to Session Law 2017-11, which reads: “An Act to *clarify* the remedies available in private nuisance actions against agricultural ... operations.” The Act’s sponsors too explained that it was necessitated because existing law was not clear on what damages are available for agricultural nuisances. *E.g.*, Hearing on HB 467 (Apr. 10, 2017), JA2272:19-20 (Rep. Dixon: “This bill is simply trying to clarify the existing law”). The North Carolina Supreme Court has said that it is precisely in the circumstances here, where “the statute initially ‘fails

expressly to address a particular point”—the pre-2017 RTFA did not specify the measure of damages—“but addresses it after the amendment”—as the 2017 law addressed the damages available—that “the amendment is more likely to be clarifying than altering.” *Ray*, 727 S.E.2d at 682.

As Murphy-Brown observes, the parallels between this case and *Ray* cannot be overlooked. In *Ray*, “the General Assembly enacted a measure allowing negligence claims against the State, but did not include a provision specifying whether and how the public duty doctrine was to apply.” 727 S.E.2d at 683. In the absence of a statutory provision, courts applied the common law of the public duty doctrine. “The General Assembly reacted, speaking on a topic that it had not previously addressed and stating that ... the doctrine is to be a limited one.” *Ibid.* The Supreme Court held that in those circumstances—and regardless of what the legislative amendment said about its effective date—the amendment was clarifying and thus applied to the case before it.

Again, after careful review, Murphy-Brown is correct—*Ray* controls the result here. The pre-2017 RTFA said nothing about the measure of nuisance damages. The district court (incorrectly) interpreted the common law to fill that gap. And, noting that error, the General Assembly quickly reacted by specifying the available remedies in a manner consistent with



the RTFA's purpose to protect farmers from nuisance lawsuits. Under *Ray* that amendment must be applied to this case. And applied here, it requires reversal.

**C. Because Kinlaw Farms Conducted Its Operations In Compliance With North Carolina's Comprehensive Regulatory Regime, Punitive Damages Are Improper**

Hog farms are subject to substantial, detailed regulation in North Carolina. They require a permit, must have an approved animal waste system management plan, and are subject to inspection and enforcement by the State. That regulatory structure authorized Kinlaw Farms' use of the lagoon and sprayfield system, restricted when and how Kinlaw Farms could apply animal waste to land, and required Kinlaw Farms to undertake best management practices to minimize odor. *The State never cited Kinlaw Farms for any violation or deficiency in its compliance with its permit or the regulations.* When a farm conducts its operations in compliance with a comprehensive regulatory regime such as North Carolina's, no punitive damages may be awarded.

The General Assembly has found that "animal operations provide significant economic and other benefits to the State" and that the growth of animal operations in the State "has increased the importance of good animal waste management practices." N.C.G.S. § 143-215.10A. Because it was "critical that the State balance growth with prudent environmental

standards,” the legislature established a permitting program for animal waste management systems. *Ibid.* In fact, the North Carolina Department of Environmental Quality has explained that the State “has the strongest permit program for concentrated animal feeding operations in the country and is one of the only states that requires annual inspections of every facility.” N.C. Dep’t of Env’tl Quality, *AFO Program Summary*, <https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/animal-feeding-operation-permits/afo-program-summary>. The Animal Feeding Operations Program has regulated animal operations in North Carolina for over 25 years. *Ibid.*

Under North Carolina law, any person operating an “animal waste management system for an animal operation” is required to obtain a permit. N.C.G.S. § 143-215.10C. An “animal operation” is defined, in part, to be any “agricultural feedlot activity involving 250 or more swine”; an “animal waste management system” is a “combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste.” *Id.* § 10B.

Although the State has prohibited the issuance of permits to operate new animal waste management systems that employ the lagoon and sprayfield method, *id.* § 10I(b), it has grandfathered systems already in use. Sess. Law 2007-523, § 1(b) (“An animal waste management system

that serves a swine farm for which a permit was issued prior to 1 September 2007 and that does not meet the requirements of G.S. 143-215.10I ... may continue to operate under, and shall operate in compliance with, that permit”).

Those grandfathered operations remain subject to extensive state regulation. A hog farm’s permit application must include an animal waste system management plan written by a technical specialist who certifies compliance with state regulations. N.C.G.S. § 143-215.10C(d); 2 N.C. Admin. Code 59E.0103(a); see N.C.G.S. § 143-215.10B; 2 N.C. Admin. Code 59E.0102(5) (requiring certification to qualify as a “technical specialist”). Permit renewal or modification requires further State evaluation of the plan.

A farm’s waste management plan “defines the fields to which the waste is applied, the crops to be grown and other details of the operation.” *AFO Program Summary, supra*. It must contain a “checklist of potential odor sources and a choice of site-specific, cost-effective remedial best management practices to minimize those sources,” and a similar checklist and plan for potential insect sources. N.C.G.S. §§ 143-215.10C(e)(1), (2). The Soil and Water Conservation Commission approves those best management practices that it deems “acceptable as part of an approved animal waste management plan.” 2 N.C. Admin. Code 59E.0104(a).

A farm's waste management plan is incorporated into its permit. See Swine Waste Management System General Permit, § I(3). The permit requires a farm's application of animal waste to fertilize crop land to be in accordance with its waste management plan, but "[i]n no case [to] exceed the agronomic rate of the nutrient" (*id.*, § II(4)), *i.e.*, the amount of waste "that can be used productively by the crops planted" (*AFO Program Summary, supra*), as established by State regulation. General Permit § VII; see 2 N.C. Admin. Code 59E.0104(d).

The permit governs how soon waste applied to tilled bare soil must be incorporated into the soil (which reduces odor) (General Permit § II(7)), and how frequently a land application site is inspected to ensure that the fertilizer is applied in accordance with the waste management plan. *Id.*, § II(17). The permit also imposes conditions on when waste may be applied, prohibiting application "in wind conditions that might reasonably be expected to cause the mist to ... cross property lines or field boundaries" (*id.*, § II(19)), and specifies that it may not be applied when strong storms or flooding are anticipated. *Id.*, §§ II(21), (22).

The Division of Water Resources inspects the farm's waste management operations at least once a year. N.C.G.S. § 143.215.10F(a). Among the aims of the inspection is to determine "whether the system is in compliance with its animal waste management plan" and other permit

conditions. *Ibid.* Technical specialists conduct operations reviews and are available to assist the farmer in complying with the permit. N.C.G.S. § 143-215.10D(b).

In sum, North Carolina comprehensively regulates hog farm operations such as Kinlaw Farms. Regulations required Kinlaw Farms to obtain a permit to conduct its operations, and that permit required that Kinlaw Farms have a certified waste management plan. That plan required Kinlaw Farms to follow approved, best practices in odor abatement and specified when and how Kinlaw Farms could apply animal waste to fertilize crop land. One goal of that regulatory scheme is specifically “to prevent odorous emissions from the facility from causing or contributing to objectionable odors beyond the facility’s boundary.” 15A N.C. Admin. Code 02D.1806(e). Kinlaw Farms’ compliance with the permit, management plan, and other regulatory obligations was subject to inspection and enforcement by the State. In this heavily regulated environment, the State never cited Kinlaw Farm for violation of any of its obligations.

A farm like Kinlaw Farms that is in compliance with this regulatory regime should not be subject to punitive damages. See Donald van der Vaart, *Hog farmers comply with rules but still get sued* (Feb. 2, 2019), <https://www.newsobserver.com/opinion/article225380320.html>. The Sup-

reme Court has explained that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996). When a heavily regulated business is in compliance with the state regulatory regime, it does not have fair notice that its compliant conduct could subject it to punitive damages for nuisance.

This is especially true under North Carolina’s “extremely high standard” for punitive damages. *Finch v. BASF Catalysts LLC*, No. 1:16-cv-1077, 2018 WL 3941978, at \*6 (M.D.N.C. Aug. 18, 2018). Punitive damages may be awarded “to punish a defendant for egregiously *wrongful* acts.” N.C.G.S. § 1D-1 (emphasis added). *But acts that comply with a comprehensive regulatory regime cannot be “egregiously wrongful.”*

Punitive damages are available only if one of three aggravating factors is present: “fraud, malice, or willful or wanton conduct.” N.C.G.S. § 1D-15(a). “Willful or wanton conduct” is “the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.” *Id.* § 1D-5(7). It “means more than gross

negligence.” *Ibid.* A plaintiff must prove the existence of an aggravating factor by clear and convincing evidence. *Id.* § 1D-15(b).

Courts have often held that compliance with a regulatory regime “does tend to show that there is no clear and convincing evidence of ‘willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences.” *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993); see, e.g., *Little v. Ford Motor Co.*, No. 1:16-cv-00931-ELR, 2017 WL 6994586, at \*17 (N.D. Ga. Dec. 21, 2017) (“Punitive damages are generally inappropriate where a defendant complied with industry-wide practices, the state of the art, or federal regulations”); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 (D. Md. 1993) (where defendant “proved that it complied with federal regulations,” it did not act with malice and punitive damages were inappropriate). Indeed, leading commentators have concluded that “[i]n most contexts ... compliance with a statutory standard should bar liability for punitive damages.” Prosser & Keeton on Torts § 36 at 233 n.41 (5th ed. 1984) (emphasis added).

The Georgia Supreme Court explained that “[t]his is especially true in the case of a commercial enterprise the operation of which is accompanied by a certain amount of unpleasant but unavoidable effects or byproducts.” *Stone Man*, 435 S.E.2d at 206. Where a regulated business

complies with “county, state, and federal regulations,” punitive damages “are, as a general rule, improper.” *Ibid.* As the D.C. Circuit put the matter, a business “may not be condemned as a wanton wrongdoer for conforming to the standards set and the practices approved by the agency charged with the duty of regulating it.” *Nader v. Allegheny Airlines, Inc.*, 626 F.2d 1031, 1035 (D.C. Cir. 1980).

But that is what happened here. As described above, the general permit authorized Billy Kinlaw to use the lagoon and sprayfield system of animal waste management. Kinlaw’s permit incorporated the farm’s certified animal waste management plan, which had been written by a certified technical specialist and approved by the State’s Department of Environmental Quality. The permit and plan require a hog farm to undertake odor control practices and allow the farm to apply waste to the land under certain specified conditions and in specified amounts. A farm’s practices that comply with this regulatory regime are therefore authorized by the State and cannot be deemed willful and wanton sufficient to justify an award of punitive damages under North Carolina law. See *Nader*, 626 F.2d at 1035; *Stone Man*, 435 S.E.2d at 206. The issue of punitive damages should never have been put to the jury, and the instructions allowing the jury to find willful and wanton conduct should never have been given.



To be sure, some courts have held that regulatory compliance is not sufficient to defeat punitive damages if the plaintiff provides “other evidence showing culpable behavior.” *Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 844 (N.D. Ga. 1996); see *Little*, 2017 WL 6994586, at \*17. But even if that is the case, regulatorily approved conduct like that at issue here cannot qualify as the sort of “conscious and intentional disregard of and indifference to the rights and safety of others” that might satisfy that requirement. N.C.G.S. § 1D-5(7). As a matter of law, a hog farm cannot act with conscious and intentional disregard to the rights of others by engaging in farming and odor control practices specifically authorized by North Carolina law. Furthermore, the hog farm would have to know, or be in a position where it should have known, that its conduct “is reasonably likely to result in injury, damage, or other harm.” *Ibid.* Again, however, a North Carolina hog farm that conducts its operations in compliance with its permit is engaging in conduct that the State has determined is permissible and therefore *not* likely to cause injury to others. A punitive damages award cannot be squared with North Carolina law in these circumstances.

Further, an award of punitive damages resulting from odor emanating from a hog farm is inconsistent with the State’s avowed public policy of permitting existing hog farms to use the lagoon and sprayfield

system. In North Carolina, “[p]unitive damages are awarded on grounds of public policy.” *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 6 (2004). Where the award of punitive damages would run counter to public policy, they may not be awarded. Here, in carefully calibrating the manner in which hog farms may operate, North Carolina has declared a public policy permitting the operation of hog farms and their use of existing lagoon and sprayfield systems, subject to permit requirements and other regulations. To impose punitive damages for the very conduct that the General Assembly has authorized would violate North Carolina’s public policy. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981).

To conclude, Kinlaw Farms complied with the comprehensive regulatory regime North Carolina has imposed on hog farm operations. To find that Kinlaw Farms’ conduct could then be the basis for a punitive damages award runs directly counter to the requirement that a party have notice that its conduct may subject it to punitive damages, violates the statutory requirement that punitive damages be awarded only in cases of egregiously wrongful conduct, and violates North Carolina public policy.

**D. Trial Rulings Leave Agricultural Communities Doubtful That They Can Get A Fair Hearing**

Finally, *amici* urge this Court to weigh the overall fairness of the trial, which does not give the appearance of having been conducted on a

level playing field. Two trial rulings are of particular concern to *amici* because they suggest that when farming activities clash with residential and other interests, NIMBY sensitivities win out.

One element of unfairness to the defendants is the location of the trial. The case was tried in the Western Division of the Eastern District, where the jury pool draws from the urbanized Raleigh area, rather than in the Southern Division where the case was filed. The defendant requested trial in the Southern Division, where a jury would have been more likely to have experience with the norms of rural life.

The court could perhaps have eased the unfairness of a Raleigh jury deciding a dispute between farm and residential interests by having the jury visit the relevant sites. But it refused to do so. ECF 198. *Amici* may be excused for thinking that a jury selected from an urban area (in a case that could easily have been tried in farm country) should at least get to experience the agricultural context of the suit they are deciding.

*Amici* are equally concerned about the district court's treatment of odor experts, which to the agricultural community appears distinctly one-sided. In a case about alleged odor in which a jury site visit was denied, the odor experts were of critical importance. Yet the court allowed (without conducting a *Daubert* hearing) testimony from an "expert" who claimed to measure odor from the presence of fecal bacteria markers, while also

excluding a defense expert's testimony about her site-specific odor study that relied on a peer-reviewed methodology. If farmers are to be tried for normal farming activities, based on allegations of odor, basic fairness requires that proffered odor experts be strictly tested according to *Daubert* principles applied in an even-handed manner. That appears not to have happened here.

Remarkably, Judge Britt told the jury during his charge that he did not "want [them] to make a hog sty out of that room back there." ECF 296 at 163. In doing so, he played to stereotypes and cast the defendant in a negative light, reinforcing the perception throughout agricultural communities that the court is biased against their interests.

### **CONCLUSION**

The judgment of the district court should be reversed.

Dated: March 5, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rules 32(a)(7)(B) and 29(a)(5) because it contains 6500 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is typeset using Century Schoolbook in a size of 14 points or larger.

Dated: March 5, 2019

/s/ Timothy S. Bishop

**CERTIFICATE OF SERVICE**

I certify that that on March 5, 2019, the foregoing brief was served via the Court's CM/ECF system upon all counsel of record.

Dated: March 5, 2019

/s/ Timothy S. Bishop