

SC93816

IN THE SUPREME COURT OF MISSOURI

LINDA S. LABRAYERE, *et al.*,

Appellants,

vs.

BOHR FARMS, LLC, *et al.*,

Respondents.

Appeal from the Circuit Court of Boone County, Missouri
Honorable Jodie Asel
Case No. 11BA-CV04755

**BRIEF AMICI CURIAE OF
NATIONAL PORK PRODUCERS COUNCIL
AND MISSOURI FARMERS CARE**

Eugene E. Mathews III (Va. Bar 36384)
Pro Hac Vice pending
Tennille J. Checkovich (Va. Bar 68028)
Pro Hac Vice pending
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
Tel: 804-775-1000; Fax: 804-775-1061
mmathews@mcguirewoods.com
tcheckovich@mcguirewoods.com

Jean Paul Bradshaw II (31800)
Kurt U. Schaefer (45829)
Chad E. Blomberg (59784)
LATHROP & GAGE LLP
2345 Grand Boulevard, Suite 2200
Kansas City, Missouri 64108
Tel: 816-292-2000; Fax: 816-292-2001
jpbradshaw@lathropgage.com
kschaefer@lathropgage.com
cblomberg@lathropgage.com

ATTORNEYS FOR AMICI CURIAE NATIONAL PORK PRODUCERS COUNCIL
and MISSOURI FARMERS CARE

TABLE OF CONTENTS

STATEMENT OF INTEREST..... 1

ARGUMENT..... 2

I. Introduction 2

II. Background on the Pork Industry, Missouri Agriculture, and Bohr Farms 3

III. Policy Determinations Belong in the General Assembly 6

IV. Section 537.296 Helps Keep Missouri Competitive with Neighboring Agricultural States 9

 A. Missouri’s prior “right to farm” law was relatively weak in comparison to other states. 10

 B. Arkansas 12

 C. Illinois 13

 D. Iowa 13

 E. Kansas 14

 F. Kentucky..... 15

 G. Nebraska 16

 H. Oklahoma..... 16

 I. Summary: Enactment of Section 537. 296 allowed Missouri to remain competitive with neighboring states..... 17

V. Section 537.296 Is Constitutional..... 19

 A. Section 537.296 does not enact an unconstitutional taking. 19

 B. Section 537.296 is not a special law..... 23

 1. Section 537.296 is not facially special. 24

 2. The modifications to the nuisance cause of action enacted by the legislature in section 537.296 are rationally related to legitimate state interests. 28

VI. The Plain Language of Section 537.296 Shows That It Protects All
Farmers, Not Just Corporate Farms or Hog CAFOs 30

VII. In Addition to Section 537.296, Regulations Are Available to Balance
the Rights of Competing Land Uses..... 31

VIII. Section 537.296 Helps Restore Balance to Missouri’s Nuisance Laws..... 33

CONCLUSION..... 35

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barrera v. Hondo Creek Cattle Co.</i> , 132 S.W.3d 544 (Tex. App. Corpus Christi 2004)	20
<i>Bormann v. Bd. of Supervisors</i> , 584 N.W.2d 309 (Iowa 1998)	14, 22
<i>Budding v. SSM Healthcare Sys.</i> , 19 S.W.3d 678 (Mo. 2000).....	7, 8
<i>Christensen v. Yolo Cnty. Bd. of Supervisors</i> , 995 F.2d 161 (9th Cir. 1993).....	29
<i>Christiansen v. Clarke</i> , 147 F.3d 655 (8th Cir. 1998).....	29
<i>City of St. Louis v. State</i> , 382 S.W.3d 905 (Mo. 2012).....	<i>passim</i>
<i>Cline v. Franklin Pork, Inc.</i> 361 N.W.2d 566 (Neb. 1985).....	16
<i>Clinic & Hosp., Inc. v. McConnell</i> , 236 S.W.2d 384 (Mo. Ct. App. 1951).....	34, 35
<i>Cook v. DeSoto Fuels, Inc.</i> , 169 S.W.3d 94 (Mo. Ct. App. 2005).....	17
<i>Dalarna Farms v. Access Energy Coop.</i> , 792 N.W.2d 656 (Iowa 2010)	23
<i>Davis v. J.C. Nichols Co.</i> , 714 S.W.2d 679 (Mo. Ct. App. 1986).....	34
<i>Edmunds v. Alpha Kappa Lambda Fraternity, Inc.</i> , 87 S.W.3d 21 (Mo. Ct. App. 2002).....	33
<i>Finlay v. Finlay</i> , 856 P.2d 183 (Kan. App. 1993)	14

Frank v. Env'tl. Sanitation Mgmt., Inc.,
687 S.W.2d 876 (Mo. 1985)..... 11, 33

Fuchs v. Curran Carbonizing & Eng'g Co.,
279 S.W.2d 211 (Mo. Ct. App. 1955)..... 34

Gacke v. Pork Xtra, LLC,
684 N.W.2d 168 (Iowa 2004) 14, 23

Glossip v. Mo. DOT & Highway Patrol Empls. Ret. Sys.,
411 S.W.3d 796 (Mo. 2013)..... 24, 25, 27, 28

Greene v. Spinning,
48 S.W.2d 51 (Mo. Ct. App. 1931)..... 34

Grommet v. St. Louis Cnty.,
680 S.W.2d 246 (Mo. Ct. App. 1984)..... 33

Guralnick v. Sup. Ct. of N.J.,
747 F. Supp. 1109 (D.N.J. 1990) 29

Jefferson Cnty. Fire Prot. Dists. Ass'n v. Blunt,
205 S.W.3d 866 (Mo. 2006)..... 26

Kan. City Premier Apts., Inc. v. Mo. Real Estate Comm'n,
344 S.W.3d 160 (Mo. 2011)..... 24, 25, 27

Lee v. Rolla Speedway, Inc.,
494 S.W.2d 349 (Mo. 1973)..... 34

Lindsey v. DeGroot,
898 N.E.2d 1251 (Ind. Ct. App. 2009)..... 20

Metropolitan S. R. Co. v. Walsh,
94 S.W. 860 (Mo. 1906)..... 21

Moon v. N. Idaho Farmers Ass'n,
140 Idaho 536 (2004) 20

Nash v. Campbell Cnty. Fiscal Court,
345 S.W.3d 811 (Ky. 2011) 15

Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC,
361 S.W.3d 364 (Mo. 2012)..... 27, 30

Racine v. Glendale Shooting Club, Inc.,
755 S.W.2d 369 (Mo. Ct. App. 1988)..... 33, 34

In re Rahn’s Estate,
291 S.W. 120 (Mo. 1926)..... 8

Reagan v. Cnty. of St. Louis,
211 S.W.3d 104 (Mo. Ct. App. 2006)..... 21

State ex rel. Seabaugh v. Dolan,
398 S.W.3d 472 (Mo. 2013)..... 21

Shore v. Maple Lane Farms, LLC,
No. E2011-00158-COA-R3CV, 2012 WL 1245606 (Tenn. Ct. App.
Apr. 11, 2012), *rev’d on unrelated grounds*, 411 S.W.3d 405 (Tenn.
2013)..... 10

St. Charles Cnty. v. St. Charles Sign & Elec., Inc.,
237 S.W.3d 272 (Mo. Ct. App. 2007)..... 20

State v. Clarke,
54 Mo. 17 (1873)..... 9

United States v. 38.60 Acres of Land,
625 F.2d 196 (8th Cir. 1980)..... 21, 22

United States v. L.E. Cooke Co.,
991 F.2d 336 (6th Cir. 1993)..... 21, 23

State ex rel. Webster v. Lehndorff Geneva, Inc.,
744 S.W.2d 801 (Mo. 1988)..... 28

Statutes

2 Okla. Stat. § 10-9, *et seq.*..... 17

2 Okla. Stat. § 20-1, *et seq.*..... 17

2 Okla. Stat. § 20-18 17

2 Okla. Stat. § 20-40, *et seq.*..... 17

50 Okla. Stat. § 1.1B..... 16

Ark. Code Ann. § 2-4-10 12

Environmental Protection Act 16

Idaho Code § 22-4803A(6)..... 20

740 Ill. Comp. Stat. § 70/3..... 13

Iowa Code §§ 352.6, 352.7 13

Iowa Code §§ 352.11, 657.11 13

Iowa Code § 352.11.1(c) 14

Iowa Code § 657.11 (1995 version) 14

K.R.S. § 413.072(2)..... 15

K.S.A. § 2-3201, *et seq.*..... 14

K.S.A. § 47-1505 15

Neb. Rev. Stat. § 2-4401, *et seq.* 16

Neb. Rev. Stat. § 81-1506..... 16

Pennsylvania Right to Farm Act, 10 19

Right to Farm Laws 10

RSMo § 1.140 (2014) 28

RSMo § 516.100 17

RSMo § 523.039(1) (2014)..... 22

RSMo §§ 523.039(2), (3)..... 22

RSMo § 537.295 10, 11, 12

RSMo § 537.296 *passim*

RSMo §§ 537.296.2(1), (2)..... 22

RSMo §§ 537.296.2-.5..... 31

RSMo § 537.296.6(1) 29

Other Authorities

10 C.S.R. 20-6.300(3)(A)(3)..... 32

10 CSR 20-6.300 6

Missouri Constitution 23

Article 1 of the Missouri Constitution 21, 23

MO. CONST. Art. III Sec. 40 24

PENN ST. ENVTL. L. REV. 81, 86-87 (2001). Section 537.296 19

Rule 55.03 37

Rule 84.06(b) 37

United States Constitution 23

Validity, Construction, and Application of Right-to-Farm Acts, 8 A.L.R.
6th 465 (2005) 10

STATEMENT OF INTEREST

Amicus curiae National Pork Producers Council is a non-profit trade organization that represents forty-four affiliated state pork production associations, including the Missouri Pork Association. National Pork Producers Council conducts public policy outreach on behalf of its affiliated associations in order to enhance opportunities for the success of United States pork producers by establishing the American pork industry as a consistent and responsible supplier of high-quality pork to the domestic and world markets. It also supports reasonable legislation and regulations that protect the livelihoods of America's 67,000 pork producers, including the thousands of pork producers who live and work in Missouri.

Amicus curiae Missouri Farmers Care is a Missouri non-profit corporation with a mission of promoting the continued growth of Missouri agriculture and rural communities through coordinated communication, education and advocacy. Missouri Farmers Care is a joint effort of Missouri's farming community and agricultural associations to stand together for the men and women who provide the food and jobs on which our communities depend. Its members include (among others) the Missouri Pork Association, Missouri Soybean Association, Missouri Farm Bureau, Missouri Corn Growers, Missouri Cattlemen's Association, Missouri Dairy Association, Missouri Dairy Growth Council, Association of Missouri Electric Cooperatives, Missouri Sheep Producers, Missouri Pet Breeders Association, Missouri Veterinary Medical Association, Missouri Egg Council, and Missouri Association of Meat Processors.

ARGUMENT

I. Introduction

Appellants, a group of individuals who own or live on property near a typical modern Missouri hog farm, have raised numerous constitutional challenges to RSMo § 537.296, which was enacted in 2011. National Pork Producers Council and Missouri Farmers Care (collectively “Missouri Farmers”), as *amici curiae* and on behalf of their member farmers and agricultural communities, have an interest in this appeal to inform the Court about the important impact of this challenged legislation, which helps to strengthen a key sector of Missouri’s economy by protecting all of Missouri’s farms—not just so-called *corporate* pork production—from nuisance lawsuits. Unfortunately, under Missouri’s common law, damages for private nuisance have become unmoored from the fair market value of land, resulting in large jury verdicts for alleged loss of enjoyment of property that *exceed* the total value of the plaintiffs’ land. Missouri Farmers support section 537.296 because it corrects a flaw in Missouri law and makes the state economically competitive by affording farmers a level of protection against nuisance suits that is comparable to the protections other states have provided their farmers.

In addition, Missouri Farmers have an interest in informing the Court about the comprehensive regulations that already govern farming in Missouri. Missouri Farmers also have an interest in informing the Court of the extensive state regulations and county zoning ordinances that are in place and that undermine Appellants’ suggestions that rural citizens living in rural areas cannot petition appropriate

agencies to provide reasonable land use regulations or require permitting procedures for confined animal feeding operations (“CAFOs”). Finally, Missouri Farmers are in a position to offer additional, unique arguments and perspective on two issues pertaining to the constitutionality of section 537.296, which does not represent an uncompensated or unlawful taking and is not a “special law.”

II. Background on the Pork Industry, Missouri Agriculture, and Bohr Farms

The U.S. pork industry represents a significant value-added activity in the agriculture economy and the overall U.S. economy. Nationwide, more than 67,000 pork producers marketed more than 112.1 million hogs in 2013. Appendix at A4.¹ Overall, an estimated \$20.7 billion of personal income and \$34.5 billion of gross national product are supported by the U.S. hog industry, largely through the efforts of individual producers working together cooperatively to grow their business, provide stable, well-paying jobs, and improve the economies of the communities in which they live. Appendix at A5.² Economists Dan Otto and John Lawrence at Iowa State

¹ United States Department of Agriculture, National Agriculture Statistics Service, Livestock Slaughter Annual Summary (April 2014), *available at* <http://www.usda.gov/nass/PUBS/TODAYRPT/lSan0414.pdf> (last visited June 24, 2014).

² National Pork Producers Council, Written Submission to the Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, U.S. House of Representatives (April 19, 2007), *available at*

University estimate that the U.S. pork industry is directly responsible for the creation of 34,720 full-time equivalent jobs and generates 127,492 jobs for the rest of agriculture. *Id.* It is indirectly responsible for 110,665 jobs in the manufacturing sector, mostly in the packing industry, and 65,224 jobs in professional services such as veterinarians, real estate agents and bankers. *Id.* All told, the U.S. pork industry is responsible for 550,221 mostly rural jobs in the U.S. *Id.*

Likewise, agriculture is Missouri's top industry and critically important to the state's economy. The total value of agricultural products sold by Missouri farmers in 2012 was over \$9 billion. Missouri ranks in the top ten states nationally for sales of hogs, cattle, poultry, cotton, soybeans, and hay. Appendix at A11.³ According to the University of Missouri, the swine industry has an economic impact to the state of more than \$1.8 billion and provides in excess of 24,000 jobs; the cattle industry has an economic impact to the state of over \$3 billion; and the dairy industry has an

<http://www.nppc.org/2007/04/written-statement-of-the-national-pork-producers-council> (last visited June 24, 2014).

³ United States Department of Agriculture, National Agriculture Statistics Service, 2013 Missouri State Agriculture Overview, *available at* http://www.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=Missouri (last visited June 24, 2014).

economic impact of \$2.9 billion and provides over 4,400 jobs. Appendix at A15, A25, and A33.⁴

This appeal involves a nuisance lawsuit against Bohr Farms, LLC, owned by Chris and Della Bohr. The Bohrs are like many Missouri farmers and other small business owners who decide to form a corporation or limited liability company. This does not make their farm – to use the Appellants’ term – a “mega-farm” corporation. Rather, it makes it typical of other farms in Missouri and the overwhelming majority of hog farms nationwide. According to the USDA’s Census of Agriculture, in 2012, of the 3,099 farms that were incorporated in Missouri, over 90 percent (2,810) were family-owned. Appendix at A35.⁵

Further, the Bohr’s farm is permitted by the state of Missouri as a 4,800-head finishing facility. Under the rules of the Missouri Department of Natural Resources (“MDNR”), their farm is classified as a Class 1-C CAFO, which is both the smallest

⁴ University of Missouri Extension, Commercial Agriculture Program, Industry Audits for Beef, Dairy, and Swine, *available at* <http://agebb.missouri.edu/commag/resources/index.htm> (last visited June 24, 2014).

⁵ United States Department of Agriculture, 2012 Census of Agriculture, Table 67, *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Missouri/st29_1_067_067.pdf (last visited June 24, 2014).

class of CAFO regulated by the state and the most common. *See*, 10 CSR 20-6.300.

Bohr Farms has a production contract with Cargill Pork to raise hogs to market weight. This also is not unusual. According to a report by agricultural economists at the University of Missouri and Iowa State University, “[P]roduction contracts have become common in the pork industry,” and they expect this trend to continue.

Appendix at A37.⁶ That report also found that contract growers – like the Bohrs – were generally satisfied with this relationship; the growers believe that these contracts “gave them better access to capital, allowed for additional expansion, and reduced risk.” *Id.* at A38.

In short, there is nothing unusual about Bohr Farms. It is a typical modern Missouri hog farm. Appellants’ characterization of it, and of agriculture generally, is misleading and fails to recognize the advancements of modern farming. The statute before this Court offers protection to all Missouri farmers, not simply the “mega-corporations” Appellants seek to use as a stalking horse in their brief.

III. Policy Determinations Belong in the General Assembly

Appellants’ Brief is rife with hyperbolic jury arguments and anti-corporate rhetoric that attempt to disparage, on public policy grounds, the protections that

⁶ Ron Plain, John Lawrence, Glenn Grimes, *The Structure of the U.S. Pork Industry*, Pork Information Gateway “Fact Sheet” at 2-3, available at <http://www.pork.org/filelibrary/Factsheets/PIGFactsheets/NEWfactSheets/15-01-01g.pdf> (last visited June 24, 2014).

section 537.296 affords *all* of Missouri agriculture. In fact, the central theme of Appellants' argument is to portray section 537.296 as legislation that harms "rural dwellers," who are likened to prisoners being subjected to cruel and unusual punishment, in the interest of protecting "mega-farm" corporations, which are characterized as cruel entities engaged in "barbaric" practices. *See, e.g.* Appellants' Br. at 53, 57, 62, 67 70, 71-72, 74, 80, 81, 84, 94, 119, 120.⁷

However, such policy determinations fall within the province of the General Assembly. For example, in *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 682 (Mo. 2000), this Court addressed legislation which prohibited the application of strict liability in product defect claims against health care providers. While the parties in

⁷ Appellants use terms like "barbaric" to describe Respondents' farming practice, but ignore the quality, efficiency and health benefits that have been achieved through the use of CAFOs. For example, studies show that from 1945 to 2009, pork production *increased* while costs, animal mortalities, animal diseases and human illness from pork consumption all *decreased*. *See* Ron Plain, Beth Young, Marcia Shannon, John Lory and Joe Zulovich, *The Swine Industry: 1945 to 2009*, University of Missouri Extension, *available at* <http://swine.missouri.edu/econ/Passion%20for%20Pigs.pdf> (last visited June 24, 2014); Appendix at A43, A49-50, A52, A54-62. Thus, in attacking modern pork production, Appellants apparently desire a return to production methods that produced fewer hogs but generated more disease in both humans and animals.

Budding advocated both for and against the challenged statute on public policy grounds, this Court instructed that such arguments belong in another Jefferson City building, located across the street.

As the briefs of the parties point out, appealing public policy arguments can be made both for and against imposing strict liability where a health care provider transfers a defective product to a patient. *However, when the legislature has spoken on the subject, the courts must defer to its determinations of public policy.*

Id. at 682 (emphasis added).

Ironically, Appellants raise several “separation of powers” arguments, *see, e.g.*, Appellants’ Br. at 84-89, but overlook that it is precisely this separation which renders public policy arguments better suited for the General Assembly. “So it has been held by the appellate courts of our own state that ‘the very highest evidence of the public policy of any state is its statutory law,’ and, ‘if there is legislation on the subject, the public policy of the state must be derived from such legislation.’” *In re Rahn’s Estate*, 291 S.W. 120, 123 (Mo. 1926) (collecting cases). Accordingly, Missouri Farmers encourage this Court to apply its longstanding deference to public policy determinations made by the General Assembly.

Indeed, it is a venerable principle of Missouri law that public policy arguments, like those espoused by Appellants here, are improper and potentially “disrespectful” to the General Assembly. As this Court itself expressed more than 140 years ago,

[i]t is a naked assumption to say, that any matter allowed by the Legislature is against public policy. The best indication of public policy is to be found in the enactments of our Legislature. To say that such a law is of immoral tendency is disrespectful to the Legislature, who no doubt designed to promote morality, and it is altogether unwarranted to suppose that the object of the law or the ordinance is for any purpose but to promote the morals and health of the citizens.

State v. Clarke, 54 Mo. 17, 36 (1873).

Agriculture is an important industry to this state's economy, and many Missouri citizens rely on it for their jobs. The General Assembly in passing this legislation and the Governor in signing it into law recognized this importance and made the policy decision to afford farmers greater protection. This Court, in recognition of the separation of powers, should continue to respect and enforce the General Assembly's public policy decisions and reject Appellants' attacks on those decisions here.

IV. Section 537.296 Helps Keep Missouri Competitive with Neighboring Agricultural States

Appellants recognize that at least one purpose of section 537.296 was to "protect farming operations from unwarranted legal threats and help keep businesses in the state." Appellant's Br. at 68. Appellants also acknowledge concerns that some agricultural operations "in Missouri will leave" because of stronger nuisance protection laws in other states. *Id.* at 69. Yet, they overlook that section 537.296 was

needed to update Missouri law, which had remained relatively unchanged since 1990, when Missouri's "right to farm" law, RSMo § 537.295, was last amended.

Significantly, Missouri and its neighboring states have *all* recognized that legislative action is needed to protect farmers from nuisance lawsuits.

As of 2012, all fifty states have enacted some form of a "right to farm" protection against nuisance suits. *See Shore v. Maple Lane Farms, LLC*, No. E2011-00158-COA-R3CV, 2012 WL 1245606, at *10 & nn. 12 (Tenn. Ct. App. Apr. 11, 2012) (collecting statutes), *rev'd on unrelated grounds*, 411 S.W.3d 405 (Tenn. 2013); *see also* Harrison M. Pittman, Annotation, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R. 6th 465 (2005). As least one commentator has recognized that "[t]he impetus for this widespread policy choice is recognition of the fact that a serious effort must be made to prevent the destruction of America's agricultural base." Jaqueline P. Hand, *Right to Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 PITT. L. REV. 289, 289 (1984). As demonstrated below, Missouri has joined several states in enacting protections for farmers against harmful nuisance suits.

A. Missouri's prior "right to farm" law was relatively weak in comparison to other states.

Missouri enacted its first "right to farm" law in 1982. *See* RSMo § 537.295 (1986). Among other changes, the law was amended in 1990 to allow farmer-defendants to recover costs, expenses and attorney's fees incurred in defending against a frivolous claim. *See* RSMo § 537.295 (1994). Thus, more than 20 years

passed between the last amendment of Missouri's right to farm laws in 1990 and the enactment of section 537.296 in 2011.

Missouri's right to farm law provides that a farming operation is not a nuisance because of "changed conditions in the locality" so long as: (1) the farm has been in operation for more than one year; and (2) the farm was not a nuisance at the time it began operation. RSMo § 537.295. There are no Missouri appellate cases discussing the scope of the protection afforded to farmers by this statute. However, by its own terms, the statute's nuisance protection is weakened by several vague and undefined exceptions. For example, a farm loses its statutory protection when the nuisance arises from "negligent or improper" operation. *Id.* at 537.295.1.⁸ In addition, a farm that expands its operations will lose its nuisance protection if it: (1) "create[s] a substantially adverse effect upon the environment"; (2) creates a public health or safety hazard; or (3) causes a "measurably significant difference in environmental pressures upon existing and surrounding neighbors because of increased pollution." *Id.* The statute also creates special rules for livestock producers that expand operations, and requires them to meet University of Missouri Extension

⁸ There does not appear to be any way for a farmer operating in Missouri to discern the difference between a protected farm that is operated unreasonably (the core element for nuisance claims) and an unprotected farm that is negligently or improperly operated. See *Frank v. Env'tl. Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 880 (Mo. 1985) ("The crux of a nuisance case is unreasonable land use.").

recommendations for the removal of animal waste. *Id.* Thus, it is possible for a farmer to lose nuisance protection unless he complies with both state regulations and *recommendations* from the University of Missouri Extension.

In short, the statute's vague exceptions significantly undermine nuisance protection for Missouri farms. Comparing section 537.295 to the laws of neighboring states reveals that Missouri lost ground from 1990 (when its "right to farm" statute was last amended) in providing competitive protection to farmers. As such, the enactment of section 537.296 in 2011 was designed to keep Missouri agriculture competitive with farmers in other states.

B. Arkansas

Arkansas has specifically provided that its policy is to protect agriculture operations from nuisance suits. *See* Ark. Code Ann. § 2-4-10; *see also id.* at § 2-4-108 (instructing that Arkansas' protection of farms should be construed liberally). As part of this broad policy, Arkansas has provided nuisance protection that is in some instances much stronger than Missouri's previous right to farm law.

For example, Arkansas provides that "an agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production." *Id.* at § 2-4-107(b)(1). Arkansas also provides a rebuttable presumption that a farm is not a nuisance if it complies with state or federal permits. *Id.* at § 2-4-107(c)(2). Unlike Missouri law, which only permits a defendant farmer to recover attorney's fees for "frivolous" lawsuits, Arkansas law allows the

recovery of fees by a prevailing party. *Id.* § 2-4-107(d). Lastly, Arkansas prohibits local governments from enacting ordinances that deem an agricultural operation a nuisance or otherwise attempt to end-run state right to farm laws. *Id.* at § 2-4-105.

C. Illinois

Like Arkansas and Missouri, the Illinois “right to farm” statutes instruct that if a farm was not a nuisance at the time it began operating, and if it has operated for a period of one year, it cannot become a nuisance as a result of “any changed conditions in the surrounding area.” 740 Ill. Comp. Stat. § 70/3. However, the Illinois statute provides greater protection to farmers than both Arkansas and Missouri insofar as it permits only a prevailing *farmer-defendant* to recover reasonable expenses and attorney fees without also requiring a finding that a plaintiff’s lawsuit was frivolous. *Id.* at § 70/4.5. Like Arkansas, Illinois has announced that a state policy to support farmers and protect them from the harm caused by nuisance lawsuits. *Id.* at § 70/1.

D. Iowa

The Iowa Legislature has passed some of the strongest protections for agricultural operations in the region. Specifically, Iowa essentially granted broad immunity from nuisance liability for farming operations located in designated agricultural areas⁹ and animal feeding operations. Iowa Code §§ 352.11, 657.11. Unlike Missouri’s section 537.296, which provides substantial remedies for a plaintiff

⁹ An “agricultural area” is an area of a county consisting of more than 300 acres that is designated or zoned for farm operations. *See* Iowa Code §§ 352.6, 352.7.

in nuisance suit, Iowa may have gone too far by preventing “property owners subjected to a nuisance from recovering damages for the diminution in value of their property.” *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168, 172-74 (Iowa 2004); *see also Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 319-20 (Iowa 1998). Nevertheless, the acts of the Iowa Legislature demonstrate the significant efforts Missouri’s sister states have taken to protect their farmers from nuisance suits.¹⁰

Although *Bormann* and *Gacke* struck down the immunity provisions of Iowa’s right to farm laws, the opinions left untouched other key protections from nuisance suits for Iowa farmers. For example, Iowa requires pre-suit mediation, Iowa Code § 352.11.1(c), and permits a prevailing farm-defendant to recover his costs and fees for frivolous claims, *id.* at § 352.11.1(d).

E. Kansas

Like other states in the region, Kansas has enacted a “right to farm” statute, that generally protects pre-existing farming operations from nuisance suits by non-farming landowners that “come to the nuisance.” *See* K.S.A. § 2-3201, *et seq.* The law was enacted in response to the increased number of nuisance lawsuits as people, activities, suburbs and industry spread into traditionally agricultural areas. *See Finlay*

¹⁰ Iowa has a history of providing farmers significant protection against nuisance suits. *See* Iowa Code § 657.11 (1995 version) (creating a rebuttable presumption that a CAFO is not a nuisance if the CAFO has obtained a permit; the presumption must be rebutted with “clear and convincing evidence”).

v. Finlay, 856 P.2d 183, 187 (Kan. App. 1993). In addition, Kansas, like Iowa, provides a complete nuisance defense for licensed “feedlots” that are in compliance with certain farming standards. *See* K.S.A. § 47-1505.

F. Kentucky

Like other states in the region, Kentucky protects pre-existing agricultural operations from nuisance suits brought by those who “come to the nuisance.” Specifically, the statute protects farms from “changed conditions” in the locality, so long as the farm was in operation for more than a year, and was not a nuisance at the time it began operating. K.R.S. § 413.072(2). In addition, the statute generally permits a farm to retain its statutory protection despite changes in ownership, short-term cessation of operation, changes in crops, or changes in “methods of production due to the introduction and use of new and generally accepted technologies[.]” *Id.* at § 413.072(5).

Kentucky also prohibits local governments from enacting ordinances or zoning regulations that would declare a farm a nuisance or attempt to abate a farm nuisance. *Id.* at § 413.072(7). The Kentucky Supreme Court has supported the right to farm act, mentioning it in passing as a reflection of “the agricultural supremacy doctrine ... specifically prohibiting any city or country from adopting, and even void[ing], ordinances which would regulate farming through zoning or other regulations.” *Nash v. Campbell Cnty. Fiscal Court*, 345 S.W.3d 811, 817 (Ky. 2011).

G. Nebraska

Like other states in the region, Nebraska's "right to farm" laws protect pre-existing farm operations from nuisance claims caused by a change in surrounding land uses. Neb. Rev. Stat. § 2-4401, *et seq.*; *see also Cline v. Franklin Pork, Inc.* 361 N.W.2d 566, 572 (Neb. 1985). However, Nebraska has gone one step further and enacted specific nuisance protection for CAFOs. Neb. Rev. Stat. § 81-1506. As part of its Environmental Protection Act, Nebraska has declared that an "animal feeding operation" is not a nuisance if it uses "reasonable techniques ... to keep dust, noise, insects, and odor at a minimum," and complies with environmental regulations, local zoning regulations, and state and federal permitting requirements. *Id.* at § 81-1506(1)(b)(i)-(iii).

H. Oklahoma

Under Oklahoma's "right to farm" law, pre-existing farms ("established prior to nearby nonagricultural activities") are *presumed* not to be a nuisance if they are: (1) operated "consistent with good agricultural practices" and (2) do not have "a substantial adverse affect on the public health and safety." *See* 50 Okla. Stat. § 1.1B. A farm is also presumed to be a "good agricultural practice and not adversely affecting the public health and safety" if it complies with federal, state and local laws and regulations. *Id.*

Unlike Missouri, which has a ten-year statute of limitations for temporary nuisance,¹¹ Oklahoma farmers enjoy the benefit of a two-year statute of limitations. “No action for nuisance shall be brought against agricultural activities on [a farm that has] lawfully been in operation for two (2) years or more prior to the date of bringing the action.” *Id.* at § 1.1C. Moreover, Oklahoma, like Nebraska and Kansas, has enacted specific protection for CAFOs as part of an extensive regulatory scheme. *See* 2 Okla. Stat. § 10-9, *et seq.*; 2 Okla. Stat. § 20-1, *et seq.*; 2 Okla. Stat. § 20-40, *et seq.* Under these laws, it is *prima facie* evidence that a nuisance does *not* exist if a CAFO operates in compliance with applicable state rules, regulations, and zoning regulations. 2 Okla. Stat. § 20-18.

I. Summary: Enactment of Section 537. 296 allowed Missouri to remain competitive with neighboring states.

Missouri’s neighboring states have provided substantial, but varying degrees, of protection to their farmers against nuisance suits. The statutes of these neighboring states reflect a regional, if not nationwide, concern about the pressures that nuisance lawsuits are placing on American farmers. With no legislative changes to Missouri’s “right to farm” law since 1990, it was long overdue for Missouri—with one of the

¹¹ *See* RSMo § 516.100; *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 107 (Mo. Ct. App. 2005) (“a ten-year period of limitation applies to temporary nuisances”).

nation's largest agricultural economies¹²—to take steps through legislative action, and specifically section 537.296, to ensure that Missouri remains competitive in the agricultural industry.

The fear that farmers “in Missouri will leave” because of stronger nuisance protection laws in other states was a legitimate concern. *See* Appellants’ Br. at 69. For example, a study by the Commercial Agriculture Program at the University of Missouri found that, “[W]hile Missouri is in the top 10 in the country for swine production, a majority of feeder pigs are exported to other states for finishing production.” Ryan Milhollin, Ray Massey, *Economic Opportunity for Missouri with Swine Finishing Operations*, University of Missouri Extension (January 2013); Appendix at A88. In 2011, Missouri exported over 4 million hogs for finishing – primarily to the neighboring states of Iowa (87%) and Illinois (6%). *Id.* at A89-90. That study concluded that for every 100,000 pigs that remained in Missouri for finishing, 179 jobs would be provided for the construction of new facilities with an economic impact of over \$40 million, and there would be an annual impact of 110 jobs for production with an economic impact of almost \$9 million. *Id.* at A93. With

¹² In 2012, Missouri ranked 16th in the nation for market value of agricultural products sold (\$9.1 billion). Appendix at A11. In addition, pork production in Missouri in 2010 contributed approximately \$1.8 billion (including direct output, labor income, and value added) to the economy and generated approximately 24,000 jobs. Appendix at A15.

4 million hogs leaving the state currently, the possible impact is 40 times those numbers. “Finishing more pigs in Missouri would provide many new economic impacts to individual producers, the local community and the state’s economy.” *Id.* at A91. In fact, the farm that is the subject of this lawsuit is a new finishing farm, exactly the kind of new operation that Missouri needs.

Making Missouri more competitive with its neighboring states that are receiving these exported hogs provides a more level playing field. It creates real opportunities for new farmers to enter the business, helping to thwart the exodus of young people who see no opportunities in rural areas.

V. Section 537.296 Is Constitutional

While the constitutionality of section 537.296 has been firmly demonstrated by the arguments made by Respondents, Missouri Farmers are in a position to offer the Court some additional, unique arguments and perspective on two issues related to the constitutionality of the statute. First, as is demonstrated by decisions from courts both in Missouri and around the country, section 537.296 does not represent an uncompensated or unlawful taking. Second, section 537.296 is not a “special law.”

A. Section 537.296 does not enact an unconstitutional taking.

Every state in the country has enacted some sort of right to farm law in order to protect farmers from encroaching urbanism and frivolous nuisance litigation. *See* Thomas B. McNulty, *The Pennsylvanian Farmer Receives No Real Protection from the Pennsylvania Right to Farm Act*, 10 PENN ST. ENVTL. L. REV. 81, 86-87 (2001). Section 537.296 is intended to serve the same purpose: to right the ship on frivolous

nuisance actions and unrestrained damage awards and to protect Missouri's farmers from the effects of those lawsuits.

A common response to such statutes is for nuisance plaintiffs to argue (almost universally unsuccessfully) that the modifications to the nuisance cause of action enacted in such right to farm laws constitute unconstitutional takings of the plaintiffs' property. *See, e.g., Lindsey v. DeGroot*, 898 N.E.2d 1251, 1258-59 (Ind. Ct. App. 2009) (collecting and analyzing cases and finding no taking in right to farm act protecting farmers from nuisance claims); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 549 (Tex. App. Corpus Christi 2004) (same); *see also Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 544-45 (2004) (“[W]e hold that that the provision of Idaho Code § 22-4803A(6) granting immunity to the grass farmers does not represent an unconstitutional taking under either the state or federal constitution.”). Appellants do the same here, arguing that Section 537.296 constitutes a taking of “the right of use and enjoyment of property” for private use and/or for public use without just compensation, violating both the Missouri and federal Constitutions. (*See* Appellants' Brief at 44-58.)

Appellants' takings argument suffers from a number of flaws,¹³ but one is central: the proposition that either the Takings Clause of the Fifth Amendment or

¹³ For example: That section 537.296 constitutes a “regulatory taking”—it does not. *See St. Charles Cnty. v. St. Charles Sign & Elec., Inc.*, 237 S.W.3d 272 (Mo. Ct. App. 2007) (local ordinance changing definition of nuisance not a regulatory taking);

Section 26 of Article 1 of the Missouri Constitution entitles them to recover more in a nuisance action than the diminution in the value of their property.

When determining damage awards in takings cases, such as those for eminent domain or inverse condemnation, “[T]he object [] is to ascertain the general market value of property sought to be appropriated[.]” *Metropolitan S. R. Co. v. Walsh*, 94 S.W. 860, 863 (Mo. 1906); *see also United States v. 38.60 Acres of Land*, 625 F.2d 196, 198-99 (8th Cir. 1980) (“When land is taken by eminent domain, the landowner is entitled under the fifth amendment to the Constitution to be paid just compensation as measured by the fair market value of the property or interest taken as of the day of the taking.”). In other words, “[j]ust compensation for [taken] property is that amount of money necessary to put a landowner in as good a pecuniary position, but no better, as he would have been in if his property had not been taken.” *United States v. L.E.*

Reagan v. Cnty. of St. Louis, 211 S.W.3d 104, 110 (Mo. Ct. App. 2006) (no regulatory taking in change of zoning ordinance when land retained economic use, no physical invasion occurred, and change was made to promote legitimate governmental interests). That the taking here was for “private use”—it was not. *See State ex rel. Seabaugh v. Dolan*, 398 S.W.3d 472, 477-78 (Mo. 2013) (benefit of a private party by a taking does not mean that the taking was for private use; public use requirement is satisfied through increased jobs and tax revenue). Finally, that the state lacks a legitimate state interest for the protections of Section 537.296—it does not. *See Section V.B.2, infra.*

Cooke Co., 991 F.2d 336, 341 (6th Cir. 1993) (inverse condemnation case). In the event of a partial taking, a plaintiff is owed an amount equal to the fair market value of the part of the property taken (including diminution in value of the remainder property caused by the taken). *See 38.60 Acres*, 625 F.2d at 198-99. Missouri has, in fact, statutorily recognized this principle for purposes of condemnation cases. *See* RSMo § 523.039(1) (2014) (“[J]ust compensation for condemned property shall be . . . an amount equal to the fair market value of such property.”).¹⁴

Therefore, Section 537.296 cannot constitute a taking of Appellants’ property, because it allows them to recover from a farmer creating a nuisance exactly what they would be entitled to in a takings case: the fair market value of the property taken. *See* RSMo §§ 537.296.2(1), (2). The Iowa Supreme Court—probably the toughest court in the country in restricting right to farm laws¹⁵—has come to exactly this conclusion:

Because the recovery of diminution-in-value damages fully compensates the burdened property owners for the unlawful taking of an easement, the restrictions of the Takings Clause end

¹⁴ Missouri statutes do allow for greater recoveries in some circumstances in condemnation cases, *see* RSMo §§ 523.039(2), (3), but the baseline remains the fair market value of the property.

¹⁵ *See, e.g., Bormann*, 584 N.W.2d at 321-22 (finding statute giving farmers *complete* immunity from nuisance claims under certain circumstances to be unconstitutional).

at that point. The Takings Clause does not prohibit limitations on other damages recoverable under a nuisance theory.

Gacke, 684 N.W.2d at 175; see also *Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 663-64 (Iowa 2010) (“Put another way, if a nuisance resulting in an easement is established, *Gacke* requires that the plaintiff be compensated for the full value of the easement on his land to avoid an unconstitutional taking. [A plaintiff’s] recovery for other elements of damage, if any, caused by any nuisance [can be reduced pursuant to the statute].”).

Section 537.296 allows a plaintiff to recover the diminution in the value of his property in a permanent nuisance case and, in a temporary nuisance case, to recover the reduction in the fair rental value of his property. This is exactly what the Fifth Amendment to the United States Constitution and Section 26 of Article 1 of the Missouri Constitution require. Indeed, if the statute is meant to compensate nuisance plaintiffs for “takings” of their property, a provision for higher levels of compensation could itself be problematic. See *L.E. Cooke*, 991 F.2d at 341 (“[O]vercompensation is as unjust to the public as undercompensation is to the property owner[.]”).

Appellants’ arguments that Section 537.296 represents an uncompensated taking of their property are, therefore, without merit, and the statute should be upheld.

B. Section 537.296 is not a special law.

The Missouri Constitution prohibits the state legislature from enacting any local or special law. . . granting to any corporation, association or individual any special or exclusive right, privilege

or immunity. . . [or] where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

MO. CONST. Art. III Sec. 40. Put simply, a special law is one that “includes less than all who are similarly situated . . . but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.” *Glossip v. Mo. DOT & Highway Patrol Empls. Ret. Sys.*, 411 S.W.3d 796, 808 (Mo. 2013) (quotation omitted). A statute that is “facially special” is presumed to be unconstitutional and will not stand unless the party can demonstrate a “substantial justification” for the special treatment; otherwise, the statute is presumed to be constitutional and the review of any classifications found within the statute are subject only to the rational basis test. *See City of St. Louis v. State*, 382 S.W.3d 905, 915 (Mo. 2012).

1. Section 537.296 is not facially special.

The first question, then, is whether Section 537.296 is facially special. A facially special statute is one in which the statutory classifications are “closed,” *i.e.*, “based on some immutable characteristic.” *See Kan. City Premier Apts., Inc. v. Mo. Real Estate Comm’n*, 344 S.W.3d 160, 171 (Mo. 2011). By contrast, “[w]hen a law is based on open-ended characteristics, it is not facially special and is presumed to be constitutional.” *Glossip*, 511 S.W.3d at 808. Missouri courts have settled on a simple, easy-to-apply test to determine whether a statutory classification is open or

closed: Can a person or entity “move in and out of the class?” *See id.*; *see also City of St. Louis*, 382 S.W.3d at 915 (“[T]he test for whether a statute is special is not whether another falls within its parameters at a particular time but whether others may fall into the classification.”) (quotation omitted).

Following that analysis, the Missouri Supreme Court has determined that statutes regulating “real estate brokers . . . licensed attorneys or [] auctioneer[s]” are not special laws, because class membership is not based on an immutable characteristic. *See Kan. City Premier*, 344 S.W.3d at 171. Similarly, a statute granting survivor benefits to the spouses of highway patrol officers was not special:

This class is open-ended because persons may move in and out of the class in that highway patrol employees may marry and divorce and their spouses may predecease them.

Glossip, 411 S.W.3d at 808. Indeed, even if a law might apply to only a small number of entities at the time of its passage, the law is not special if the possibility exists that its reach might be extended at a future time:

Here, the City argues that section 320.097 is a special law because only the city of St. Louis both has a residency requirement for its firefighters and has a school district that is not fully accredited. ***

Section 320.097 applies to any city with a fire department with employees who have worked for that department for seven years if the only public school district in their geographic area of

employment has been unaccredited or provisionally accredited in the last five years. Any fire department could adopt a residency requirement, and any school district runs the risk of becoming unaccredited or provisionally accredited. . . . Because “others may fall into the classification,” the law is not special legislation.

City of St. Louis, 382 S.W.3d at 915. Thus, classifications are generally only considered closed when based on “characteristics [] such as historical facts, geography or constitutional status.” *Jefferson Cnty. Fire Prot. Dists. Ass’n v. Blunt*, 205 S.W.3d 866, 870 (Mo. 2006).

Contrary to Appellants’ arguments (*see* Appellants’ Brief at 99-102), none of the classifications in section 537.296 are closed, and, consequently, the statute is not facially special. Appellants argue that the statute’s restricted ambit to nuisances allegedly emanating from property primarily used for crop or animal production purposes (*i.e.*, farmers)

is a closed-ended classification because [the statute] classifies on the basis of who the tortfeasors are, not on some neutral or open-ended classification like the size of the county, etc.

(Appellants’ Brief at 100.) This analysis asks the wrong question. As set forth above, the difference between open and closed classifications is whether an entity could, in theory, become a member of the class, or whether the classification is so tightly drawn that only a single entity could possibly be covered. *See id.* In that way, farmers are no more a closed class than are lawyers, the spouses of highway patrol officers, or

counties that have residency restrictions for firefighters and unaccredited school districts. *See Glossip*, 411 S.W.3d at 808; *City of St. Louis*, 382 S.W.3d at 915; *Kan. City Premier*, 344 S.W.3d at 171.¹⁶ Appellants' arguments that the classifications based on property ownership are closed are equally unavailing, for the same reasons.¹⁷ (*See* Appellants' Brief at 101.)

¹⁶ It is worth noting that Appellants' argument that Section 537.296 gives farmers "a free pass" is incorrect on its face: the statute still makes farmers liable for the diminution in value of property caused by any nuisance that they may create, as well as proven medical damages, and any other sort of damage that is properly proved under the rubric of a cause of action other than nuisance.

¹⁷ Appellants also argue that the "damage classifications" in the statute are closed. (Appellants' Brief at 101.) It is not clear from Appellants' brief what they think the classification *is*, however—the damage classifications do not relate to groups of persons or other entities; they define the types of damages recoverable under a particular cause of action. Appellants provide no authority for the proposition that this sort of legislative action constitutes a "classification" for purposes of special law analysis. In any event, the damage classifications are not based on immutable characteristics of any individual or entity and are, therefore, open. *See Kan. City Premier*, 344 S.W.3d at 171; *Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 380-81 (Mo. 2012).

The classifications found in section 537.296 are open-ended and, therefore, the law is not facially closed. As a consequence, “the statute is presumptively constitutional and valid as long as the classification is reasonable.” *Glossip*, 411 S.W.3d at 808.

2. The modifications to the nuisance cause of action enacted by the legislature in section 537.296 are rationally related to legitimate state interests.

Under the rational basis test as used in the special law context, “the burden is on the party challenging the constitutionality of the statute to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose.” *City of St. Louis*, 382 S.W.3d at 915. Appellants cannot and do not meet this burden.

Indeed, Appellants’ only briefed argument regarding the supposed irrationality of the statute concerns Section 537.296.5, which limits the nuisance cause of action against farmers to individuals with an “ownership interest” in the property allegedly affected by a nuisance.¹⁸ (Appellants’ Brief at 103.)

As an initial matter, “[i]t is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce[.]” *State ex rel. Webster v. Lehdorff Geneva*,

¹⁸ Thus, even if this Court found that this classification fell afoul of the special laws provision, which it should not, the rest of the statute would still stand. *See* RSMo § 1.140 (2014) (“The provisions of every statute are severable.”).

Inc., 744 S.W.2d 801, 806 (Mo. 1988); *see also Christensen v. Yolo Cnty. Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (finding “preservation of agricultural uses of land” is a legitimate state interest). As discussed above, the agriculture industry contributes substantially to the Missouri economy in terms of jobs created, taxes paid, and exports produced. Balancing the health of this industry, as well as its thousands of employees and millions of customers, against the number of nuisance plaintiffs and potentially excessive awards collected by those plaintiffs, and, indeed, their attorneys, is a legitimate interest of the state.

Section 537.296.5 accomplishes this by paring down the number of nuisance plaintiffs and preventing duplicative awards for lost property value in nuisance: given that the property owner or possessor of an ownership interest can recover such value under the statute, there is no need to permit non-owners to do so. Permitting non-owner claimants to sue would simply add to already-clogged court dockets and would not provide plaintiffs with any additional recovery.¹⁹ *Cf. Christiansen v. Clarke*, 147 F.3d 655, 658 (8th Cir. 1998) (federal government had legitimate interest in reducing number of unnecessary lawsuits); *Guralnick v. Sup. Ct. of N.J.*, 747 F. Supp. 1109,

¹⁹ Note that non-owners can still recover for their damages through causes of action other than nuisance. RSMo § 537.296.6(1) (“Nothing in this section shall: Prohibit a person from recovering damages . . . on the basis of other causes of action[.]”).

1115 (D.N.J. 1990) (“[T]his court finds the maintenance of public confidence in the judicial system to be a legitimate state interest.”).

In short, section 537.296 furthers the legitimate state interests of maintaining the state’s agriculture industry, preserving agricultural uses of land, and preventing unnecessary and meritless nuisance suits from burdening the court system, the public fisc, and farmers. Appellants’ challenge to the statute on the basis that it violates Missouri’s prohibition on “special laws” is, therefore, without merit.²⁰

VI. The Plain Language of Section 537.296 Shows That It Protects All Farmers, Not Just Corporate Farms or Hog CAFOs

Appellants argue pervasively and *falsely* that section 537.296 advances “the interests *solely* of corporate farmers” and “provides an economic benefit *only* to mega-farm operations.” Appellants’ Brief at 56, 62 (emphases added); *see also id.* at 81 (“Only the large corporate farming operations benefit.”). Appellants also argue that section 537.296 is exceedingly narrow—protecting only “the corporate pork industry.” *Id.* at 82; *see also id.* at 99, n.34 (claiming that section 537.296 is “special legislation” intended to “benefit only” the “CAFO-oriented pork production” industry); *see also id.* at 100, 119. In comparison, they argue that section 537.296 provides no protection to, and in fact harms, “small family-owned farms.” *Id.* at 67;

²⁰ Appellant’s equal protection claims fail for the same reason. *See Estate of Overbey*, 361 S.W.3d at 380-381 (noting that special laws claim failed for same reasons as equal protection claim).

see also id. at 75 (“family farms are the ones most [negatively] impacted by the statute”).

A review of the plain language of section 537.296 disposes of Appellants’ exceedingly narrow view of the statute. In fact, the words “corporation,” “pork,” “industry” or “CAFO” are nowhere to be found. Instead, the protections against nuisance suits are afforded to *anyone* in Missouri whose land is “primarily used for crop or animal production.” RSMo §§ 537.296.2-.5. Thus, the statute provides protection to the thousands of Missouri farmers, regardless of their size, who grow, for example, soybeans or corn on their property, or who raise cattle, calves, hogs, chickens or turkeys there.²¹ In short, Appellants’ efforts to portray section 537.296 as protecting only “mega-farms” or CAFOs is baseless and conveniently ignores the plain and broad language of the statute.

VII. In Addition to Section 537.296, Regulations Are Available to Balance the Rights of Competing Land Uses

As part of their efforts to portray themselves as helpless victims facing “mega-farms” and corporations, Appellants argue that section 537.296 deprives rural Missourians of an adequate remedy to prevent or reduce alleged interferences with the use of enjoyment of property. For example, they argue that residents in

²¹ Based on its plain language, section 537.296 could provide nuisance protection to the 99,400 farms in Missouri that operate on 28.2 million acres of land. Appendix at A10.

unincorporated areas are unique in that they cannot avail themselves of the “virtue of zoning laws” available to city residents. *Id.* at 95. In a similar vein, Appellants argue that rural Missourians have “no city government to petition for redress[.]” *Id.* at 63. These arguments overlook the state and county regulations that specifically apply to CAFOs.

The MDNR has enacted a regulatory scheme for CAFOs that far exceeds the requirements of basic city “zoning ordinances.” For example, as part of its authority over CAFOs, MDNR has enacted regulations that: (1) limit the number of animals raised, 10 C.S.R. 20-6.300(3)(A)(3); (2) control the methods for the disposal of mortalities, *id.* at 20-6.300(3)(A)(5); and (3) require buffer distances of up to 3,000 feet between the CAFO and public buildings or neighboring residences, *id.* at 20-6.300(3)(B)(1).

In addition, MDNR regulations require CAFO operators to perform periodic (including daily) inspections of the property, *id.* at 20-6.300(3)(D), maintain extensive records of their activities and produce annual reports regarding their operations, *id.* at 20-6.300(3)(E)-(F). Before a CAFO is permitted, the operator must provide detailed information about its operation to state and county agencies, as well as adjoining properties with a certain geographical radius. *Id.* at 20-6.300(3)(C)(1)-(3). Neighbors are specifically provided an opportunity to submit comments to MDNR about the CAFO’s proposed operation. *Id.* at 20-6.300(3)(C)(5).

These regulations are just a few of the many requirements that Missouri imposes on operators of CAFOs. In fact, several Missouri counties have enacted

county health ordinances or zoning ordinances that impose additional requirements and fees on animal feeding operations beyond what is required by MDNR.²² In short, Appellants' suggestion that CAFOs are being operated without oversight or the "virtue" of regulations comparable to zoning rules available to city residents is false.

VIII. Section 537.296 Helps Restore Balance to Missouri's Nuisance Laws

Appellants' brief focuses on the alleged harm to several sentimental aspects of property ownership, *e.g.*, watching a "sunrise," enjoying "a hot cup of coffee," smelling "Sunday supper on the stove," or watching the "mist in trees." Appellants' Br. at 73, 102. However, Appellants ignore their neighbor's right to use and enjoy his property by, for example, growing crops or raising livestock to earn a living and support a family. Missouri courts are not unfamiliar with those who would rely on nuisance lawsuits as a method for impeding progress in their neighborhood. *See Grommet v. St. Louis Cnty.*, 680 S.W.2d 246, 253 (Mo. Ct. App. 1984) ("One suspects that respondents hope for a return to the halcyon days when their bucolic and idyllic neighborhood was uninterrupted by the [school's] activity.").

Nuisance law is supposed provide a careful *balancing* of competing property rights. *See, e.g., Frank*, 687 S.W.2d at 880; *Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369, 372 (Mo. Ct. App. 1988); *Edmunds v. Alpha Kappa Lambda*

²² *See* Missouri County and Township Restrictions on AFOs, published by the University of Missouri Extension, *available at* <http://nmplanner.missouri.edu/regulations/mocountyrules/>, last visited on June 24, 2014; Appendix at A97-99.

Fraternity, Inc., 87 S.W.3d 21, 29-30 (Mo. Ct. App. 2002). For example, Missouri courts hold that “the freedom of action on the part of one person ought *not to be curtailed more than is necessary* for the public welfare or the protection of the rights of some other person.” *Clinic & Hosp., Inc. v. McConnell*, 236 S.W.2d 384, 392 (Mo. Ct. App. 1951) (emphasis added).

In addition, nuisance law is supposed to weigh the “utility” of one landowner’s conduct against “the gravity of the harm” caused to another landowner. *Lee v. Rolla Speedway, Inc.*, 494 S.W.2d 349, 355 (Mo. 1973). In making these determinations, a court or jury should consider the zoning of the land in question, *Davis v. J.C. Nichols Co.*, 714 S.W.2d 679, 685 (Mo. Ct. App. 1986), as well as the “locality, character of neighborhood, nature of use, extent and frequency of injury, and the effect upon enjoyment of life, health, and property of those affected,” *Racine*, 755 S.W.2d at 372. Missouri nuisance cases also recognize that residents of an agricultural area cannot expect the same freedom from noise and pollution as those in a purely residential area. *See Clinic & Hosp.*, 236 S.W.2d at 391; *Fuchs v. Curran Carbonizing & Eng’g Co.*, 279 S.W.2d 211, 218 (Mo. Ct. App. 1955); *Greene v. Spinning*, 48 S.W.2d 51, 59 (Mo. Ct. App. 1931).

Here, Appellants claim to have suffered inference with highly subjective and sentimental aspects of property ownership. Missouri Farmers recognize the deeply personal feeling that can arise from one’s property. However, Missouri Farmers cannot join Appellants in championing multi-million-dollar jury verdicts against a farmer where the damages *exceed* the fair market value of the plaintiffs’ land. *See*

Appellants' Br. at 58. Instead of balancing competing rights, Missouri law has permitted plaintiffs to recover a *windfall* from *temporary* interferences at the expense of a neighboring farmer. Missouri law has permitted not only the recovery of the full fair market value of the property, but also amounts that *exceed* the value of the property, which can be recovered again and again in subsequent lawsuits. Such a one-sided "remedy" cannot be reconciled with nuisance law that is supposed to balance competing property rights and ensure that one landowner is not burdened any "more than is necessary" for the alleged inference sustained by another landowner. *See Clinic & Hosp., Inc.*, 236 S.W.2d at 392. Requiring a farmer to pay to his neighbor damages that exceed the value of the neighbor's property is hardly a careful balancing of competing interests. As a result, Missouri Farmers support section 537.296 as necessary to correct a flaw in Missouri nuisance law that has allowed temporary nuisance damage to become unmoored from a balancing of competing property rights.

CONCLUSION

For the reasons discussed above, *amici curiae* National Pork Producers Council and Missouri Farmers Care respectfully suggest to the Court that Appellants' constitutional challenges should be rejected.

Respectfully submitted,

LATHROP & GAGE LLP

By: /s/ Jean Paul Bradshaw II
Jean Paul Bradshaw II (31800)
Kurt U. Schaefer (45829)
Chad E. Blomberg (59784)
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108
Tel: (816) 292-2000
Fax: (816) 292-2001
jpbradshaw@lathropgage.com
kschaefer@lathropgage.com
cblomberg@lathropgage.com

Eugene E. Mathews III (Va. Bar
36384)

Pro Hac Vice pending

Tennille J. Checkovich (Va. Bar
68028)

Pro Hac Vice pending

MCGUIREWOODS LLP

One James Center

901 East Cary Street

Richmond, Virginia 23219

Tel: 804-775-1000

Fax: 804-775-1061

mmathews@mcguirewoods.com

tcheckovich@mcguirewoods.com

ATTORNEYS FOR AMICI
CURIAE NATIONAL PORK
PRODUCERS COUNCIL and
MISSOURI FARMERS CARE

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. The brief includes the information required by Rule 55.03;
2. The brief complies with the limitations contained in Rule 84.06(b);
3. According to the word count function of counsel's word processing software (Microsoft® Word), the brief, excluding those portions as defined by Rule 84.06(b) contains 9,413 words.

/s/ Jean Paul BradshawII
An Attorney for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned certifies that on June 26, 2014, a copy of the foregoing, together with the Certificate of Compliance, this Certificate of Service and the Appendix, was served via the Court's electronic filing system on the counsel of record below who have registered with Missouri's electronic filing system:

Charles F. Speer
Peter B. Bieri
Speer Law Firm, P.A.
104 W. Ninth Street, Suite 400
Kansas City, MO 64105
Telephone: (816) 472-3560
Telecopier: (816) 421-2150
cspeer@speerlawfirm.com
bbieri@speerlawfirm.com

Anthony L. DeWitt
Bartimus, Frickleton, Robertson & Goza, P.C.
715 Swifts Highway
Jefferson City, MO 65109
Telephone: (573) 659-4454
Telecopier: (573) 659-4460
aldewitt@sprintmail.com

Attorneys for Plaintiffs/ Appellants

/s/ Jean Paul Bradshaw II
An Attorney for Amici Curiae