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IN THE SUPREME COURT OF MISSOURI

Case No. SC99488

CEDAR COUNTY COMMISSION, COOPER COUNTY PUBLIC HEALTH CENTER, FRIENDS OF RESPONSIBLE AGRICULTURE, SUSAN WILLIAMS, FRED WILLIAMS, JEFFERSON JONES, WANDA CASSELL

Appellants,

v.

GOVERNOR MICHAEL PARSON; RICHARD ROCHA, CHAIR, MISSOURI AIR CONSERVATION COMMISSION; ASHLEY McCARTY, CHAIR, MISSOURI CLEAN WATER COMMISSION; PAULA F. NICKELSON, ACTING DIRECTOR, MISSOURI DEPARTMENT OF HEALTH & SENIOR SERVICES,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Nineteenth Judicial Circuit
The Honorable Daniel R. Green, Circuit Judge

BRIEF OF MISSOURI PORK PRODUCERS ASSOCIATION, MISSOURI CATTLEMEN'S ASSOCIATION, MISSOURI FARM BUREAU FEDERATION, MISSOURI CORN GROWERS ASSOCIATION, INC., MISSOURI SOYBEAN ASSOCIATION, MISSOURI EGG COUNCIL, INC., MFA INCORPORATED, MISSOURI AGRIBUSINESS ASSOCIATION, MISSOURI LIVESTOCK MARKETING ASSOCIATION, MISSOUIRI DAIRY, FCS FINANCIAL, ACA AND MISSOURI CHAMBER OF COMMERCE AND INDUSTRY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Robert J. Brundage, MBE #33791
Brundage Environmental and Ag Law LCC
410 Madison St, Jefferson City, MO 65101
Telephone: (573) 606-6177
robert@brundagelawfirm.com

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INTEREST OF AMICI CURIAE

These *Amici Curiae* are interested in this appeal because they support their individual interests in Missouri agriculture and support the growth and viability of Missouri's agricultural economy. In this appeal, these Amici express their support for Missouri's livestock industry including pork, cattle, poultry and eggs. The livestock industry is dependent upon corn and soybean-based livestock feed, and in turn, the corn and soybean growers and Missouri's farmers are dependent on the livestock industry as a critical consumer of their commodities.

The Missouri Pork Producers Association represents Missouri's Pork Industry through promotion, education, research, and public policy. We strive to ensure that our producer members and allied industry partners have the freedom to operate while enhancing their opportunities for success.

The Missouri Cattlemen's Association is the oldest and largest association in Missouri dedicated solely to advancing Missouri's beef cattle industry. Formed in 1911, the association has over 5,000 producer families as members.

The Missouri Farm Bureau Federation serves over 143,000 member families across the state of Missouri. Missouri Farm Bureau Federation's network of volunteer leaders actively advocate for policies that advance opportunities for Missouri farmers and ranchers. We support the state law prohibiting county health regulations that impose standards on agriculture that are stricter than state standards. To that end, we urge the Court to provide clarity on this issue for the benefit of Missouri's farmers and ranchers.

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The Missouri Corn Growers Association, Inc. was formed in 1978 to advance policies that will help protect the rights of members, build new markets for corn, and increase opportunities through partnerships within agriculture and beyond.

The Missouri Soybean Association works to increase profitability of Missouri soybean farmers and protect their freedom to operate through legislative advocacy, public policy initiatives and education. Our membership is made up of soybean farmers, many managing diversified operations including livestock, and are small business owners working hard to produce not only food and fuel, but jobs and tax revenues enjoyed by all state and local taxing jurisdictions.

The Missouri Egg Council, Inc. represents approximately eight million laying hens in the state that have an appetite for Missouri corn and soybeans. Our layers have production barns in five counties, and we contract with specialists in local counties to raise pullets to egg-laying age.

MFA Incorporated is a Midwest-based regional farm supply and marketing cooperative serving more than 45,000 farmer/owners. Through its network of retail locations and affiliated cooperatives in Missouri and adjacent states, MFA provides value-added products, services and expertise to row-crop, livestock and specialty farms.

Missouri Agribusiness Association (MO-AG) represents agricultural retailers, manufacturers and processors of pesticides, fertilizer feed, seed, and grain. All MO-AG members, from feed mills to grain elevators to ag retailers, benefits from the success of our customers (the farmers and ranchers across the state) and the increased economic activity across all sectors of agriculture. MO-AG supports the use of the latest science so

that our farm animals are raised in healthy environments and our water and air remain clean. We also support consistent rules and regulations across all counties of the state so that opportunities exist for all to be involved in agriculture and stay on the family farm anywhere in the state of Missouri.

FCS Financial offers credit and financially related services to the agricultural industry in the State of Missouri, including the livestock industry. FCS Financial is a member association of the Farm Credit System, which was created by an Act of Congress with a mission to support rural communities and agriculture with reliable, consistent credit and financial services, today and tomorrow. FCS Financial is a cooperative with voting stockholders and a board of directors comprised of the borrowers it serves. This ensures a customer-first approach that helps Missouri agricultural producers, including livestock producers, feed the world, strengthen Missouri's rural economy and provide jobs that support rural communities.

The Missouri Livestock Marketing Association represents Missouri's livestock markets in the state. Livestock markets, or sale barns, are vital to the success of family farmers and ranchers providing opportunities to producers to market their livestock in a competitive way.

Missouri Dairy is the single voice for Missouri's 425 grade A dairy farmer producers. Our focus is producer and consumer education and legislative representation for those farmers in Jefferson City and Washington DC.

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The Missouri Chamber of Commerce and Industry is the largest business association in Missouri. Together with the Missouri Chamber Federation, the Missouri Chamber represents more than 75,000 employers.

All of these *Amici* support a fair and balanced regulatory environment. Prior to the enactment of Senate Bill 391 in 2019, § 192.300, RSMo. frustrated opportunities to expand the livestock industry in counties that enacted so-called "county health ordinances." These ordinances created an inconsistent, patchwork of county regulation layered on top of Missouri Department of Natural Resources' environmental regulations.

These *Amici* supported the enactment of Senate Bill 391 (2019) and House Bill 271 (2021) which allowed counties to continue to regulate livestock operations but only if their county regulations were consistent with and no more stringent than state law. No one better than these *Amici* know the impact of county health ordinances that stifled the responsible growth of the livestock industry. No one better than these *Amici* know the purpose for and responsible application of the plain meaning of the Right-to-Farm Constitutional Amendment at issue in this appeal.

These *Amici* will help explain the plain meaning and impact of these two pieces of critical legislation designed to create a fair and uniform regulatory environment for Missouri's agricultural industry.

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POINTS RELIED ON

I. The Circuit Court correctly ruled that the amendments to § 192.300.1 do not conflict with the Right to Farm Amendment (response to Point I).

Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 946 S.W.2d 234, 238 (Mo. banc 1997)

State v. Shanklin, 534 S.W.3d 240, 242 (Mo. banc 2017)

Schweich v. Nixon, 408 S.W.3d 769, 778 (Mo. 2013)

MO. CONST. art. I, § 35

Senate Bill 391 (2019)

House Bill 271 (2021)

§ 192.300, RSMo.

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II. The Circuit Court correctly ruled that § 192.300.1(2) applies to the Public Health Center's Regulation 6 because it is inconsistent with, in addition to, different from, and more stringent than state law (response to Point III).

Borron v. Farrenkopf, 5 S.W.3d 618, 620 (Mo. App. W.D. 1999)

Friends of Responsible Agriculture v. Zimmerman, 51 S.W.3d 64, 79 (Mo. App. W.D. 2001)

Berner v. Montour Twp. Zoning Hearing Bd., 217 A.3d 238, 242 (Pa. 2019)

Senate Bill 391 (2019)

House Bill 271 (2021)

§ 192.300, RSMo.

§ 640.760, RSMo.

10 CSR 10-6.010

10 CSR 10-6.060

10 CSR 10-6.165

10 CSR 10-6.170

10 CSR 20-8.300

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ARGUMENT

I. The Circuit Court correctly ruled that the amendments to § 192.300.1 do not conflict with the Right to Farm Amendment (response to Point I).

Appellants suggest that Senate Bill 391 ("SB 391") and House Bill 271 ("HB 271") are unconstitutional because they conflict with the Right-to-Farm Amendment, Article I, § 35 of the Missouri Constitution. Appellants argue that the Right-to-Farm Amendment locked in and preserved counties' authority to regulate agriculture under § 192.300, RSMo. as codified on the date of passage of the Right-to-Farm Amendment. This argument ignores other Constitutional authority and the plain meaning of the Right-to-Farm Amendment.

Missouri's Constitutional Right-to-Farm amendment states:

> That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

MO. CONST. art. I, § 35.

State Respondents' brief adequately and thoroughly explains why § 192.300 is not an authorized power conferred by Article VI but instead arises out of Article IV. But even if Article VI conferred the power to enact § 192.300, RSMo., Appellants' argument fails.

The only provision in Article VI identified by the Respondent as relevant to its position is Article VI, § 7, which establishes the county court. App. brief at 16. Article VI, § 7 directs county commissions to "manage all county business as prescribed by law", i.e., laws enacted by the General Assembly. Counties "have no inherent powers but are

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confined to those expressly delegated by the sovereign and to those powers necessarily implied in the authority to carry out the delegated powers.") *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County,* 946 S.W.2d 234, 238 (Mo. banc 1997).

Articles IV and VI of the Missouri Constitution grant the General Assembly the power to give, but also to restrict counties' enabling authority. In this case, the General Assembly enacted SB 391 and HB 271 to further restricted counties' powers over "agricultural operations." See § 192.300.1(2), RSMo.

The General Assembly's authority to continually grant, expand, contract or rescind counties' statutory authority is consistent with the Constitutional Right-to-Farm Amendment. The Amendment says the right-to-farm is "subject to duly authorized powers, **if any**, conferred by article VI of the Constitution of Missouri." MO. CONST. art. I, § 35. (Emphasis added.) The words "if any" imply a county may not have any powers. The words "if any" also implies counties' powers are not fixed in time but rather subject to constant change dependent on the General Assembly legislative enactments expanding or contracting counties' "duly authorized powers." MO. CONST. art. I, § 35. In this instance, the General Assembly exercised its Constitutional powers to redefine and further restrict counties' powers to regulate agricultural operations.

Finally, Appellant argues that Missouri voters believed that if they voted for the Right-to-Farm Constitutional Amendment, it would forever bar the General Assembly from restricting authority granted by § 192.300, RSMo. Appellants argue "at the time Missouri voters went to the polls in 2014 to consider the Right-to-Farm Amendment, it

must be presumed the voters were aware of §192.300 which contained no limiting language prohibiting County health ordinances. . . . .” App. brief at 17.

“When construing a constitutional amendment, the fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment.” *State v. Shanklin*, 534 S.W.3d 240, 242 (Mo. banc 2017) (internal quotation omitted). Appellants suggest that “the clear intent of the voters had to be for County commissions and county health boards to continue to have such existing authority.” App. brief at 18. If this were true, the drafters of the Right-to-Farm Amendment would not have included the words “if any”. The words “if any” inform the voter that § 192.300, as it existed in 2014, is not and would not be enshrined into state law. By including the words “if any” in the Amendment, reasonable voters would not have an expectation that counties would forever have all authority that existed on passage of the Amendment. To adopt Appellants’ suggestion the voters thought county powers would live in perpetuity would render the words “if any” as having no meaning.

The voters’ intent logically follows the plain meaning of the amendment’s text. The “common sense of the People” would understand “if any” means counties either do not currently have any authority or may not have any authority in the future. The words “if any” put Missouri voters on notice that those “duly authorized powers” defined by statute can be restricted by future enactments of law. One could say the voters’ intent was to specifically allow the General Assembly to further limit counties’ rights at any time.

It is noteworthy that the Right-to-Farm Amendment makes no reference to § 192.300. Most voters would likely have no knowledge of the existence of § 192.300

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much less any intent that this statute would be forever enshrined in state law despite reading the "if any" words in the Amendment.

One more observation on the words "if any." The Court may take judicial notice of the legislative actions that resulted in the inclusion of the words "in any" in the final bill. *Schweich v. Nixon*, 408 S.W.3d 769, 778 (Mo. 2013) (quoting in footnote 11 *Sperry Corp. v. State Tax Comm'n*, 695 S.W.2d 464, 469 (Mo. banc 1985) (internal citations omitted). The Senate Substitute for House Committee Substitute for House Joint Resolution Nos. 11 & 7 Joint Resolution (2013) read as follows:

> Section 35. That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state. No state law shall be enacted which abridges the right of farmers and ranchers to engage in agricultural production and ranching practices, unless enacted by the General Assembly. **Nothing in this section shall be interpreted to abrogate the authority of political subdivisions to exercise powers vested therein by the laws of the state of Missouri**.

https://www.house.mo.gov/billtracking/bills131/hlrbillspdf/0132S.03F.pdf (emphasis added). Note the absence of the words "if any" in the last sentence. Compare the Senate Substitute to the Truly Agreed and Finally Passed Conference Committee Substitute for Senate Substitute for House Committee Substitute for House Joint Resolution Nos. 11 & 7 Joint Resolution (2013):

> Section 35. That agriculture which provides food, energy, health benefits, and 2 security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, **if any**, conferred by article VI of the Constitution of Missouri.

https://www.house.mo.gov/billtracking/bills131/hlrbillspdf/0132H.05T.pdf (emphasis added). The words "if any" were not included in the introduced legislation or even in the Senate Substitute. Rather these words were included in the final joint resolution with a specific purpose in mind. The Generally Assembly, with constructive knowledge of all state laws, added the words "if any" to emphasize that they retain their powers to grant or restrict county authorities in the future. Any reasonable voter would read it the same way.

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II. The Circuit Court correctly ruled that § 192.300.1(2) applies to the Public Health Center's Regulation 6 because it is inconsistent with, in addition to, different from, and more stringent than state law (response to Point III).

A. Backdrop before enactment of Senate Bill 391 in House Bill 271

Before the enactment of SB 391 in 2019, § 192.300 RSMo. allowed a patchwork of county-based regulation of agricultural operations. These so-called "county health ordinances" primary purpose was to target concentrated animal feeding operations or CAFOs.

"It is a cardinal rule of statutory interpretation that the legislature is presumed to know the existing law when enacting a new piece of legislation." *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 567 (Mo. banc 2012) (internal quotation omitted). Before the enactment of SB 391 and then HB 271, the General Assembly was aware of two appellate cases that it sought to render moot by legislative action. They were:

- *Borron v. Farrenkopf*, 5 S.W.3d 618, 620 (Mo. App. W.D. 1999) (hereafter referred to as the "*Borron*" case), and
- *Friends of Responsible Agriculture v. Zimmerman*, 51 S.W.3d 64, 79 (Mo. App. W.D. 2001) (hereafter referred to as the "*FARMER*" case).

Both of these cases are cited extensively by Appellant. But what Appellant fails to acknowledge, these two cases are no longer precedential and have been rendered moot by SB 391 and HB 271 as explained below.

B. *Borron* case is no longer precedential

When the Court of Appeals, Western District decided the *Borron* case in 1999, § 192.300 provided that county ordinances and regulations shall "not be in conflict" with

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any rules of the departments of health, and social services. App. Apdx. A-071. In *Borron*, the court held that Linn County's CAFO regulation did not "conflict with any rules or regulations authorized and made by the department of health in accordance with this chapter or by the department of social services under chapter 198 RSMo." A – 071. The *Borron* court held that Linn County ordinance "merely requires CAFOs to comply with additional regulations" that were "prohibitory" in nature. *Id*. at 623. But in 2019, SB 391 added another layer of restrictions on county health ordinances on top of the shall "not be in conflict" with any rules of the departments of health and social services language.

Senate Bill 391 restricted the scope of county health ordinances. Section 192.300.1(2), as amended by SB 391 (2019), provides in pertinent part:

> 1. The county commissions and the county health center boards of the several counties may make and promulgate orders, ordinances, rules or regulations, respectively as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county, but any orders, ordinances, rules or regulations shall not: . . .
>
> (2) Impose standards or requirements on an agricultural operation and its appurtenances, as such term is defined in section 537.295, that are **inconsistent with or more stringent than** any provision of this chapter or chapters 260, 640, 643, and 644, or any rule or regulation promulgated under such chapters.

§ 192.300.1(2), RSMo. (emphasis added).

In *Borron*, the Court of Appeals separately analyzed another section under Chapter 640 and found that "the County's regulations here were not in conflict with the state law, but only added **more stringent** regulations." *Borron* at 624 (emphasis added). To address and moot the *Borron* decision, Senate Bill 391 prohibited "more stringent" ordinances

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and regulations, the same term the Court of Appeals used to characterize the Linn County ordinance.

After the enactment of HB 271, § 192.300.1(2) further prevents any ordinance or regulation that is "inconsistent with, **in addition to, different from**, or more stringent than any provision of this chapter or chapters 260, 640, 643, and 644, or any rule or regulation promulgated under such chapters," leaving no doubt the *Borron* case is no longer applicable. (emphasis added to words added by HB 271).

C. *FARMER* case is no longer precedential

Appellants' brief suggests *Friends of Responsible Agriculture v. Zimmerman*, 51 S.W.3d 64, 79 (Mo. App. W.D. 2001) ("*FARMER*") imposes an "affirmative regulation" requirement. Senate Bill 391 made it is crystal clear there is no "affirmation regulation" requirement applicable to health ordinances, thus rendering moot the *FARMER* case.

The *FARMER* case interpreted the Missouri Air Conservation Law's ("MACL") requirement that Missouri Air Conservation Commission ("MACC") regulations shall not "shall not be any stricter than those required under the provisions of the federal Clean Air Act." § 643.055.1, RSMo. The *FARMER* court said that the MACC "is prohibited from adopting rules or regulations . . . that are either stricter than federal law or enforceable sooner." *Id*. In other words, there must be an existing federal regulation or an "**affirmative regulation** under the Clean Air Act" to prevent the MACC from adopting a stricter than federal regulation. (emphasis added). SB 391 and HB 271's amendments to § 192.300 moot *FARMER's* "affirmative regulation" requirement.

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Appellant incorrectly suggests that for Cooper County Public Health Center Regulation 2019-6 ("Regulation 6") to be "inconsistent with, in addition to, different from, or more stringent than" from any statutory provision within the enumerated MDNR chapters or regulations promulgated thereunder, there must be a state law or regulation that "affirmatively" address subject matter addressed by Regulation 6. App. brief at 23. Without authority, Appellants state that "unless there is an affirmative state statute or state rule or regulation against which to compare Regulation 6 to determine whether it is more stringent, in addition, different, or inconsistent, Regulation 6 cannot be preempted under the SB 391 or HB 271 amendments to § 192.300.1." App. brief at 27. Appellant claims that Cooper County's Regulation 6 "cannot, under the *FARMER* analysis, be inconsistent with a more stringent than **nonexistent** statutory provisions, rules or regulations." App. brief at 27 (Emphasis added.). Appellant completely ignores the plain meaning of SB 391's requirement that county regulation may not be "inconsistent with" MDNR regulations.

Whether a county regulation is "inconsistent with" a MDNR regulation is not dependent upon there being an "affirmative" or existing MDNR regulation. As amended by SB 391, § 192.300.1(2), RSMo. limits a county's authority to only adopt ordinances or regulations that mirror or duplicate MDNR regulations. Any change or "addition" of a new or "different" regulatory provision is by definition "inconsistent with" MDNR regulations.

The General Assembly left no doubt there does not need to be an existing or "affirmative" state regulation to prevent a county from enacting a more stringent

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regulation. This assertion ignores SB 391's limitation on "inconsistent" regulations. The legislature effectively put up guard rails that require counties to enact regulations that are "consistent" with state regulations that shall not differ from state regulations unless they are less stringent.

D. The Supreme Court of Pennsylvania applied "inconsistent with" in a similar statute to strike down a local ordinance regulating agricultural operations.

A 2019 Pennsylvania Supreme Court decision provides guidance on the meaning of "inconsistent with and more stringent than" state law. The Pennsylvania statute at issue, which closely resembles Missouri's § 192.300.1(2), allowed local governments to adopt regulations only if they "are consistent with and no more stringent than" state statutory requirements. *Berner v. Montour Twp. Zoning Hearing Bd.*, 217 A.3d 238, 242 (Pa. 2019). The Pennsylvania Supreme Court held that a local CAFO regulation was "inconsistent with the state law requirements because it imposes obligations that are **in addition to** those included in the Act and its regulations." *Id*. at 250 (emphasis added). The court determined that a local government could not impose requirements on the smallest CAFO classification that had been expressly exempted by the states because it was not "consistent with" state law was considered to be a regulation "in addition to" state law and is thus prohibited. *Id.* at 250.

In an effort to distinguish Pennsylvania's *Berner* case from the Missouri *FARMER* case, Appellants' brief mischaracterizes Pennsylvania Supreme Court's *Berner* opinion. Appellant asserts that the Missouri General Assembly did not intend to preempt the entire field of agricultural regulation but the Pennsylvania General Assembly intended to

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"occupy the whole field of regulation regarding nutrient management . . . to the exclusion of all location regulations." App. brief at 30. Appellant omitted that part of the *Berner* opinion where the Pennsylvania Supreme Court commented that when:

> [t]aken together, the provisions of Section 519 of the Act do not evidence an intent on behalf of the Legislature to preclude all local regulation in the field of nutrient management. Instead, viewed in its entirety, Section 519 of the Act reveals the Legislature's intent to prohibit local regulation of nutrient management only to the extent that it is more stringent than, inconsistent with, or in conflict with the Act or its regulations.

Id. at 153. The Pennsylvania Supreme Court believes that any local regulation that is "more stringent than" state law is "inconsistent with" and "in conflict" with state law and is therefore void.

In conclusion, SB 391 prohibition on county regulations that are "inconsistent" with MDNR regulations applies to county regulations covering subject matter not covered or regulated by state law. To drive this point home, the General Assembly enacted HB 271 that reflects the Pennsylvania Supreme Court's holding that any local regulation that is "inconsistent" with state law is by definition "in addition to" and different than state law and is therefore prohibited.

E. <u>The General Assembly amended § 192.300 in House Bill 271 in light of Appellants' position taken in their Motions for Summary Judgment in this case and a recent circuit court decision.</u>

The General Assembly is presumed to know about this court challenge to SB 391. On October 20, 2020, when the case was before the Circuit Court of Cole County, Appellants field a motion for summary judgment. In this motion, Appellants were making the argument that Cooper County's Regulation 6 was not

more strict than "nonexistent" state regulations and therefore was not "inconsistent" with state regulations. See Legal File Appeal Document Number 109 Page 24. Appellants made this argument despite SB 391's probation on "inconsistent" regulations. In an effort to clarify SB 391's limitations on inconsistent local ordinances, the General Assembly passed HB 271 by incorporating the Pennsylvania Supreme Court's interpretation that a local CAFO is "**inconsistent** with the state law requirements because it imposes obligations that are **in addition to** those included in the Act and its regulations." *Berner,* 217 A.3d at 250 (emphasis added). HB 271 incorporated the words "in addition to" and "different from" to leave no doubt of the meaning of "inconsistent."

F. State Air Law Regulatory Framework

At issue in this appeal is whether the Cooper County Public Heath Center's Regulation 6 violates § 192.300, RSMo. Section 192.300.1(2), RSMo. prohibits counties and county health boards from imposing

> standards or requirements on an agricultural operation . . . that are inconsistent with, in addition to, different from, or more stringent than any provision of this chapter or chapters 260, 640, 643, and 644, or any rule or regulation promulgated under such chapters.

Chapter 643 is referred to as the Missouri Air Conservation Law ("MACL"). § 643.010, RSMo. The Missouri Air Conservation Commission ("MACC") promulgates regulations to implement the MACL. § 643.040, RSMo. The MACC is authorized to promulgate regulations establishing "maximum quantities of air contaminants that may be emitted from any air contaminant source." § 643.050.1(1)(b), RSMo.

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The MACC regulations established "Ambient Air Quality Standards" ("AAQS") for six criteria pollutants established in the federal Clean Air Act (carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution a/k/a particulate matter or PM) plus two more AAQS for sulfur dioxide plus hydrogen sulfide. 10 CSR 10-6.010. AAQS are established "to protect the public health and welfare." *Id*. The AAQS apply to "ambient air" which is defined as "That portion of the atmosphere, external to buildings, to which the general public has access." 10 CSR 10-6.020(2)(A)44. The public has access at the property line of an air contaminant source.

The Missouri Air Conservation Law requires the issuance of construction permit and air operating permits to control the emission of air contaminates. §§ 643.075 and 643.078, RSMo. Air construction permits impose emission limitations on air contaminant sources to prevent "interfere[nce] with the attainment of or maintenance of N[ational] AAQS and the air quality standards established in 10 CSR 10-6.010." 10 CSR 10-6.060(5)(D)1.

Regulation 6 provides that "[o]dorous emissions shall not be emitted or caused to be emitted from the property lines of any" CAFO containing specified levels of hydrogen sulfide, ammonia, PM2.5, and PM10. First and foremost, Regulation 6 did not adopt a MACC regulation(s) verbatim. Appellant repeatedly asserts that Regulation 6 regulates differently than the MACL and MACC regulations because corresponding state regulations are "nonexistent." App. brief at 27. Since Regulation 6 did not adopt MACC regulation verbatim, Regulation 6 is therefore "inconsistent with, in addition to, [and]

different from" the MACL and the MACC regulations. As such, Regulation 6 violates § 192.300, RSMo. and is therefore void.

Appellants attempt to characterize Regulation 6's performance standards as "emissions limitations" as opposed to an AAQS. The Public Health Center has not imposed true emissions limitations since Regulation 6's standard applies to emissions "from the property lines" rather than from emission points like boilers, machines, or stacks. Thus, contrary to Appellants' characterization, Regulation 6 is more consistent with an ambient air standard than with emissions limitations. Appellants' efforts to try to distinguish Regulation 6's odor emission standards at the property line helps prove the point that Regulation 6 is clearly "inconsistent with," "different from" and "in addition to" the state air regulations in violation of § 192.300.

Appellant asserts the MACC "ambient air standards" promulgated 10 CSR 10-6.010 are not "emission limitations." Appellant asserts that the standards and limitations on odorous emissions at the property line are "emission limitations" and therefore cannot preempt Regulation 6. App. brief at 32. Regardless of whether Regulation 6 is an ambient air standard or an emission limitation, Regulation 6 regulates ammonia emissions. Ammonia is a compound not regulated by the MACL and MACC regulations.

Ammonia is not one of the eight regulated air contaminants under the MACC regulations. 10 CSR 10-6.010. Therefore, it is "inconsistent" with Missouri's list of regulated air contaminants, it regulates an air contaminant that is "different than" the Missouri list of contaminants and is "in addition to" the list of contaminants regulated by the MACC regulations. Therefore, Regulation 6 may not regulate ammonia.

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Regulation 6 says "odorous emissions shall not be emitted . . . from the property lines of any . . . concentrated animal feeding operation." Regulation 6 establishes so-called "performance standards" that defines not-to-exceed air contaminant concentrations at the property line. MACC's AAQS are not-to-exceed standards but set averages that must not be exceeded over a period of time. Therefore, these standards or "are inconsistent with, in addition to, different from, or more stringent than" than the MACC law and regulations and is therefore unlawful.

Regulation 6's performance standard for PM2.5 and PM10 are 24-hour average concentrations exceeding 35 and 150 micrograms per cubic meter, respectively. The State's ambient air quality standards are similar but there are differences. Regulation 6 does not average the concentrations over three years like the state does in 10 CSR 10-6.010. Because Regulation 6's PM2.5 and PM10 standards do not include a mean averaged over years element, they are inconsistent with, in addition to, different from, and more stringent than a regulation promulgated under Chapter 643.

By its terms, Regulation 6 regulates "odorous emissions" by imposing standards or limits on four different odorous air contaminants (hydrogen sulfide, ammonia, particulate matter (PM) 2.5 and PM-10). The MACL regulates odor in a different manner. The MACC regulations regulates odor from industrial sources and Class IA CAFOs. 10 CSR 10-6.165. The MACC regulations do not regulate individual constituents of odor like Regulation 6 does. Instead, the MACC odor regulation 10 CSR 10-6.165 regulates odor no matter what chemical compound causes the odor. The MACC regulations prohibit odor from being detected at the property line if it can be detected after being diluted

seven times with an instrument called a scentometer. 10 CSR 10-6.165(3). Since Regulation 6 regulates odor differently than the MACC regulations, these standards or "are inconsistent with, in addition to, different from, or more stringent than" than the MACC law and regulations and therefore violates § 192.300, RSMo.

The MACC regulations exempt fugitive particulate matter emissions from agricultural operations. 10 CSR 10-6.170(1)(B). But Regulation 6 regulates PM2.5 and PM10 which are constituents of particulate matter. Therefore, Regulation 6's regulation of fugitive particulate matter emissions from CAFOs that are considered an agricultural operation. Consequently, Regulation 6 is inconsistent with and more stringent than the MACC's regulations and is therefore void.

G. Regulation 6's "Water Quality" regulation violates § 192.300

Regulation 6 prohibits construction of "subsurface manure containment structures" at Class I or II concentrated animal feeding operation if the "U.S. Department of Agriculture, Natural Resources Conservation Service has designated the characteristics of the soils at the location of the structure as 'severe' based on the shrink-swell characteristics of such soils." Regulation 6 also imposes conditions on the construction of "subsurface manure containment structures" where the "U.S. Department of Agriculture, Natural Resources Conservation Service has designated the characteristics of the soils at the location of the structure as 'moderate' . . . based on the shrink-swell characteristics of such soils." Compare this to the MCWC regulations that only requires "[a] thorough site investigation shall be made to determine the physical characteristics and suitability of the

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soil and foundation of the fabricated storage structure." *See* 10 CSR 20-8.300(6)(A) (emphasis added).

Regulation 6 is more stringent than the MCWC regulations because it could prevent construction of a subsurface manure containment structures when the MCWC regulations would allow such a structure to be built so long as an engineer took soil characteristics into account. Consequently, Regulation 6 is inconsistent with, in addition to, different from, and more stringent than the MCWC regulations. Therefore, Regulation 6 violates § 192.300, RSMo. and is void.

MCWC regulation 10 CSR 20-8.300(4)(B)7 requires manure storage structures and confinement buildings maintain a minimum setback distance of 300 feet from nearest "sinkholes." Merriam-Webster's dictionary defines "karst" as "an irregular limestone region with sinkholes, underground streams, and caverns." *Merriam-Webster* online dictionary. Consequently, a sinkhole is a karst feature.

Regulation 6 prohibits a Class I or II concentrated animal feeding operation from constructing or operating any subsurface manure storage structure if the "geologic setting at the site, as determined by mapping done by the Missouri Geological Survey, is composed of karst formations." This requirement is "different from" and "inconsistent with" the MCWC's regulation that requires a setback from a sinkhole but not from other geological features that may be defined as karst. Moreover, Regulation 6 may prevent construction of a manure storage structure when the MCWC regulation may allow construction as long as it complies with the 300 foot sinkhole setback. Therefore,

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Regulation 6 is "is inconsistent with, in addition to, different from, or more stringent than" than the MCWC regulations and therefore violates § 192.300, RSMo.

Regulation 6 prohibits manure acquired through gift or contract from a Class I or II concentrated animal feeding operation from being "land-applied at any location if the geologic setting at the land application site, as determined by mapping prepared by the Missouri Geological Survey, is composed of karst formations." Manure from a Class I or II concentrated animal feeding operation that is sold or gifted to a neighbor is often referred to as exported manure – manure exported off site of a Class I CAFO.

First, the MCWL and MCWC regulations do not regulate Class II CAFOs except under very limited circumstances. 10 CSR 20-6.300(2)(C). Therefore, in this sense Regulation 6 is "inconsistent with, in addition to, different from, or more stringent than" than the MCWL and MCWC regulations and therefore violates § 192.300, RSMo. See also *Berner* at 217 A.3d 238 discussed above.

Furthermore, nothing in the MCWL and MCWC regulations prevents the application of exported manure. However, SB 391 includes a provision that requires land application of exported manure comport with various set back distances from geologic features, such as public drinking water lakes, wells, or intake structures. § 640.760, RSMo. Section 640.760 does not prohibit land application of exported manure on an agricultural field with "karst formations." Therefore, Regulation 6 is more stringent than the MCWL and MCWC regulations. In addition, Regulation 6 is also "inconsistent with, in addition to," and "different from" the MCWL and MCWC regulations in violation of § 192.300, RSMo. and is therefore void.

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CONCLUSION

Appellants' attempts to argue Regulation 6 is not "inconsistent with, in addition to, different from, or more stringent than state law" are based solely on two cases that have been rendered moot and effectively overruled by SB 391 and HB 271. The *Borron* case's reliance on shall "not be in conflict" language has been superseded by SB 391's limitation on "inconsistent with" and no "more stringent than" state law. HB 271's prohibition on local regulations that are "in addition to" and "different from" MDNR regulations further moots *Borron* case.

Appellants' reliance on the *FARMER* case suggesting there must be an "affirmative regulation" for a county regulation to be "stricter than" state regulation has also rendered moot by SB 391 and HB 271.

The Pennsylvania *Berner* case gives meaning to SB 391's prohibition on county regulations that are "inconsistent" with state regulations. In *Berner*, the Pennsylvania Supreme Court interpreted the word "consistent" to mean that there cannot be county regulations "in addition to" state regulations. This interpretation means Appellants cannot enact local regulations that are not already in state regulations. Simply put, counties are limited to enacting local regulations or ordinances that mirror or copy MDNR regulations, or adopting local regulations or ordinances that are less stringent than MDNR regulations.

Finally, Regulation 6's air and water regulations are, in some instances, "more stringent than" state regulations, and other Regulation 6 provisions are simply "inconsistent with" state law because they are "in addition to" state regulations and

"different than" state regulations in violation of SB 391 and HB 271's amendments to § 192.300.

Based on the foregoing, Amici request this Court affirm the circuit court's Judgment granting state Respondents' motion for summary judgment and denying Relators'/Appellants' third amended motion for summary judgment.

Brundage Environmental and Ag Law LLC

By Robert J. Brundage

Robert J. Brundage #33791
410 Madison St, Jefferson City, MO 65101
Phone: (573) 606-6177
Facsimile: (573) 303-0183
robert@brundagelawfirm.com

ATTORNEY FOR AMICI CURIAE
Missouri Pork Producers Association
Missouri Cattlemen's Association
Missouri Farm Bureau Federation
Missouri Egg Council, Inc.
Missouri Corn Growers Association, Inc.
Missouri Soybean Association
MFA Incorporated
Missouri Agribusiness Association
FCS Financial, ACA
Missouri Livestock Marketing Association
Missouri Dairy
Missouri Chamber of Commerce and Industry

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned certifies that the foregoing was filed electronically on this 10th day of May 2022, with the Clerk of Court to be served by operation of the Court's electronic filing system on all attorneys of record.

The undersigned further certifies that to the best of his knowledge and belief, Amicis' Brief includes the information required by Rules 55.03 and 84.06(b), and contains 6,466 words (exclusive of cover, certificate, signature block and appendix, if any).

Brundage Environmental and Ag Law LLC

By Robert J. Brundage