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IN THE SUPREME COURT OF IOWA

Jerry Dovico, et al., Plaintiffs-Appellees, v. **Valley View Swine, LLC, et al.,** Defendants-Appellants.	**Supreme Court No. 16-1006** Wapello County Case No. LALA105144 – Division A

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

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

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ARGUMENT

This Court Should Find Iowa Code Section 657.11 Constitutional Both on Its Face and As Applied, Because Plaintiffs Fail to Rebut the Presumption that Iowa Code Section 657.11(2) is a Lawful and Permissible Exercise of Legislative Powers to Protect Animal Agriculture in the State of Iowa

A. Protecting and Preserving Animal Agriculture in Iowa is a Legitimate Government Interest and Proper Legislative Function

Plaintiffs recognize the Iowa Legislature has the ability, pursuant to its police power, to pass regulations impacting property rights, and that "courts accord legislatures a highly deferential standard of review." *See* Plaintiffs' Brief at 23; *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995). Plaintiffs further concede "the interests of the public generally, as distinguished from those of a particular class, require such interference" and that "the means are reasonably necessary for the accomplishment of purpose." *Id.* The Court's inquiry should end there.

The purpose of Iowa Code section 657.11 is articulated in its preamble:

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

> assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural operations.

Iowa Code § 657.11(1). The statute accomplishes its purpose of protecting farmers by barring recovery of special damages—damages for loss of use and enjoyment—in nuisance actions against an animal feeding operation unless specified cause of action elements and proof requirements are met.

The District Court's holding that Iowa Code section 657.11 is unconstitutional as applied to Plaintiffs was premised on its conclusion that the statute violates the Inalienable Rights Clause of Article I, section 1 of the Iowa Constitution. Ruling on Pretrial Motions ("Ruling"), App. 1904. The Iowa Supreme Court has long recognized that the test applicable to inalienable rights challenges is "virtually identical to the rational-basis due process test or equal protection tests under the Federal Constitution." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015) (citing *Vilas v. Iowa State Bd. of Assessment & Review*, 223 Iowa 604, 612 (1937); *McGuire v. Chi., Burlington & Quincy R.R.*, 131 Iowa 340, 348–49 (1906)).

Accordingly, courts apply a deferential standard, evaluating only whether there is "a reasonable fit between the government interest and the means used to advance that interest." *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002)). Under this level of limited scrutiny, the legislature need not employ

the best means of achieving a legitimate state interest, but only rationally advance a reasonable and identifiable governmental objective. *Hensler v. City of Davenport*, 790 N.W.2d 569, 584 (Iowa 2010). When the statute in question "bears 'a definite, rational relationship to a legitimate purpose,' it must be allowed to stand." *King v. State*, 818 N.W.2d 1, 23 (Iowa 2012).

Relying on a misunderstanding of *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004) which has been perpetuated by the lower courts, Plaintiffs contend only that Iowa Code section 657.11 fails because it is "unduly oppressive." Plaintiffs' argument, which seeks nothing more than a result-oriented outcome beneficial to them, regardless of the facts of their case and the deferential standard of review that applies, should be rejected. To do otherwise disregards the power and acts of the General Assembly as a co-equal branch of government.

i. The legislature, in its role as policymaker, may alter a common law cause of action

Plaintiffs argue, in effect, that the legislature cannot alter the common-law of nuisance. However, Plaintiffs' argument is undermined by the very case law it relies upon. Plaintiffs cite *Gravert v. Nebergall*, and correspondingly *Lawton v. Steele*, for the proposition that Iowa Code section 657.11 is an "unduly oppressive" exercise of the legislature's police power.

See Plaintiffs' Brief at 23. *Gravert* and *Lawton* stand for precisely the opposite proposition.

Lawton, which formed the basis for the *Gravert* Court's opinion, affirmed the constitutionality of a legislative act allowing governmental seizure and destruction of fishing devices found to be in violation of any statutes or laws for the protection of fish. 152 U.S. 133, 135 (1894). The act further provided, in derogation of the common law, that "no action for damages shall lie or be maintained against any person for or on account of any such seizure or destruction." *Id.*

The Supreme Court's holding that the statute was constitutional confirms both that the legislature has the power to modify a cause of action, and the power to limit common law remedies. Over protests which echo the argument made by Plaintiffs here—that the statute "strips" them of the ability to redress their injuries—the Supreme Court held the act did not deprive individuals of a legal remedy, as they were free to replevy nets or institute action for their value. *Id.* at 142; Plaintiffs' Brief at 33.

In *Gravert*, this Court reviewed a challenge to a fence-viewing statute the district court held unconstitutional as applied to the plaintiffs. 539 N.W.2d at 186. The *Gravert* Court confirmed that "[l]aws enacted by the

exercise of a state's police power are presumed to be constitutional provided there is some reasonable relation to the public welfare." *Id.*

The court's analysis shed light on the second prong of *Lawson*, prohibiting statutes that are "unduly oppressive to individuals." *Id.* at 188. The court observed, "[a] law does not become unconstitutional because it works a hardship." *Id.* Indeed, "the fact that one must make substantial expenditures does not raise constitutional barriers." *Id.* The court concluded that "[w]hatever unfairness the Graverts see in the fence law is of political, not constitutional, dimensions. It is for the legislature and not for the courts to pass upon the policy, wisdom, advisability, or justice of a statute." *Id.*

In its analysis, the *Gravert* Court observed several benefits of the statute, including:

> (1) freedom from unwanted intrusion by a neighbor's livestock; (2) freedom from trespassing neighbors and increase in privacy; (3) elimination of "devil's lanes," unoccupied spaces between separate fences constructed by hostile neighbors; (4) diminution of lawsuits arising out of damage caused by straying cows; (5) discouragement of litigation by clearly marking the boundaries of rural lands; (6) increase in value of all land by fostering the continued validity of agriculture.

Id. The majority of these benefits were not specific to the Graverts, but inure to the public generally.

Gravert does not stand for the proposition, as Plaintiffs claim, that an individual must receive a "particular benefit" for a statute to be

constitutional. It is only by way of "example" that the court observed the Graverts derived individual benefit from the fence because it protected their crops from defendants' miniature horses. *Id.* Nowhere in the case does the court form any particularized test, save for the rational basis standard of review. *Id.* at 186.

While the Graverts formed their own personal judgment that the cost of complying with the fence statute outweighed the benefit to them personally, that "particularized" judgment was irrelevant to the court's conclusion, for good reason. If the validity of a statute depends upon an individualized subjective burden as opposed to objective analysis, no statutory regulation will ever be safe from challenge. The rational basis test thereby would be rendered meaningless.

A requirement that each law passed bestow a specific benefit upon every individual is further inconsistent with codified presumptions of constitutional validity, pursuant to which "public interest is favored over any private interest." Iowa Code § 4.4.

Plaintiffs' misreading of the *Gacke* decision follows a theme perpetuated by the trial courts. This Court can and should correct any such misconceptions now by (a) answering the facial challenge question not addressed in *Gacke* with a declaration that Iowa Code section 657.11 is a

reasonable and proper exercise of legislative power constitutional on its face, and (b) finding the statute is constitutional as applied to the facts of this case.

ii. *Gacke v. Pork Xtra, L.L.C.* does not establish a test for constitutionality

Despite recognizing the deferential standard of review articulated in *Lawton* and *Gravert*, Plaintiffs urge this Court to fashion a three-prong test to evaluate the "burden" imposed by Iowa Code section 657.11 by replacing legislative goals and measurements with court-created standards designed to dictate a result for them. Plaintiffs' proffered test extends the *Gacke* decision well beyond the limited facts and holding of that case.

Plaintiffs allege they should only be required to "maintain identity" with three factors: (1) that as plaintiffs they "receive no particular benefit from the nuisance immunity[1] granted to their neighbors other than that inuring to the public in general;" (2) they are positioned to suffer significant hardship; and (3) they "lived on and invested in their property long before

[1] Defendants dispute Plaintiffs' characterization of the statute as granting "immunity" to animal agricultural operations. The statute operates to limit recovery of special damages against animal agricultural producers to cases where the producer acted negligently by failing to follow applicable regulations or consistently failing to abide by industry-standard management practices. *See* Iowa Code § 657.11(2). It does not prohibit compensation for alleged diminution in property value. *Gacke*, 684 N.W.2d at 175.

[the animal feeding operation] constructed its confinement facilities." *See* Plaintiffs' Brief at 24 (quoting *Gacke*, 684 N.W.2d at 178).

While the *Gacke* Court did observe those facts, it did not develop those facts as a litmus test against which the nuisance cases of future plaintiffs would be measured. To the contrary, the *Gacke* Court observed only that those considerations were "relevant." *Gacke*, 684 N.W.2d at 178–79. Importantly, the court observed that the case before it "has some important distinguishing characteristics," and expressed "no opinion as to whether the statute might be constitutionally applied under other circumstances." *Id.*

If adopted, the "identity" factors Plaintiffs claim should control will create a problematic and unwarranted framework for future animal agriculture lawsuits. Despite relying on the statutory definition of nuisance, Plaintiffs propose a test that is essentially a restatement of the elements of common law nuisance. *See* Plaintiffs' Brief at 20 fn. 9. Plaintiffs at once appear to acknowledge the legislature's power to modify a common law cause of action and in the same breath deny the legislature's ability to do so. In effect, they allege the judiciary can legislate change to the common law while the General Assembly cannot.

The "identity" test Plaintiffs advocate promotes subjective and vague factors, each of which is dependent on the unique factual situation of the litigant. This test would impose a daunting evidentiary burden on the district courts. This standard has proven unworkable—in every case since *Gacke*, Iowa Code section 657.11 has been held unconstitutional as applied and the plaintiffs allowed to proceed to trial, even where a plaintiff's claims are frivolous. *Compare* Ruling on Pretrial Motions, App. 1738 (holding Iowa Code section 657.11 unconstitutional as applied to Plaintiffs David Bowen, Bonita Miller, and Rod Miller and allowing Plaintiffs' claims to proceed to trial) *with* Order on Post-Verdict Motions and Judgment Entry, App. 1886 (holding Plaintiffs David Bowen, Bonita Miller, and Rod Miller's claims frivolous and imposing costs pursuant to Iowa Code section 657.11(5)).

Plaintiffs' Amicus Brief proposes equally unworkable and unwise alternatives. Without any basis in law or fact,[2] Plaintiffs' Amicus Curiae suggests adoption of a "rule of common courtesy" requiring "construction of

[2] Defendants object to Iowa Association for Justice's citation to various newspaper op-eds and unverified websites as established fact. One such op-ed was authored by Dallas County Farmers and Neighbors, an anti-animal agriculture group directly connected with current and formerly pending nuisance suits. The District Court expressed concern with the accuracy and proliferation of these publications following the trial in Division C. *See* April 13, 2016 Tr., App. 2476; Ex. List to April 13, 2016 Hearing and Exs. 1–2, App. 1891–95.

new livestock facilities be located by the owner's homes, rather than by the neighbor's home," which it claims would abrogate the need for Iowa Code section 657.11. *See* Iowa Association for Justice's Amicus Curiae Brief at 6.

Plaintiffs' Amicus Curiae overlooks the fact that Jeff Adam, a member of Valley View Swine, lives at Site 1. Ex. E to Plaintiffs' MSJ, Tr. of J. Adam Depo., p. 25:13–15, App. 952. Shawn Adam, another member of Valley View Swine, and Brandon Warren, the barn manager for both sites, live near Site 2. Ex. to Valley View MSJ, Tr. of B. Warren Depo., p. 80:10–12, App. 793. Both live less than half the distance from any Plaintiff to Site 1 and 2. *See* Figure 1 *infra* (depicting the Adam and Warren residences in the lower left corner).

It also bears noting that the Chance and Honomichl Plaintiffs here were initially named Plaintiffs in the Warren suit, where they sued Warren Family Pork and Mr. Warren individually. *See* Amended Petition and Jury Demand, App. 64. Mr. Warren testified at trial that his family has raised livestock at their home property for four generations. Mr. Warren and his son both live directly adjacent to the animal feeding operations at issue in the suit.

Plaintiffs' Amicus Curiae wholly ignores these facts and fails to observe the applicable standard of review in this matter. For those reasons,

this Court should reject Plaintiffs' proposed rule and hold Iowa Code section 657.11 constitutional as a reasonable means to achieve a legitimate government interest in protecting and preserving animal agriculture in Iowa.

A far better approach to those presented by Plaintiffs' "identity" test or the common courtesy platitude suggested by Plaintiffs' Amicus Curiae is already present in Iowa Code section 657.11. As currently framed, the statute requires a district court considering a nuisance claim to evaluate only whether a plaintiff can establish an exception to the statute under the negligence standard of subsection 657.11(2). That test is well defined, capable of proof through understandable and workable evidentiary presentations, and one for which rational basis has been demonstrated.

iii. Iowa Code section 657.11 is not unduly burdensome upon Plaintiffs

Despite Plaintiffs' assertion that as a group they "clearly maintain identity with the three factual *Gacke* elements," Plaintiffs do not uniformly meet the standards they propose. For example, Plaintiffs do not all predate the establishment of the animal feeding operations at issue. Plaintiff Karen Frescoln does not even live at the property for which she has sued—her claim is based on an ownership interest in a property on which her daughter has resided since 2013. Ex. I to Plaintiffs' MSJ, Tr. of K. Frescoln Depo., p. 7:12–15, App. 1037. Her daughter is not a party to this lawsuit. Ms. Frescoln

actually lives at a residence in Libertyville, Iowa, nearly 10 miles from the town of Batavia. *Id.*

Other Plaintiffs did not live on their properties "long before" Sites 1 and 2 were constructed. *See* Plaintiffs' Brief at 24–25. The Honomichls moved to their current property in 2005. *See* Statement of Undisputed Material Facts, Plaintiffs' MSJ, ¶¶ 20, 24, 28, 32 App. 840–41. The Chances moved to their property in 2000. *Id.* Both the Honomichls and the Chances moved from cities to experience "country life." Id. ¶¶ 8, 12, 16, App. 838–39. Despite their stated desire to live in the country, no Plaintiffs are farmers, or involved in agriculture in any way.

Nor do Plaintiffs live a uniform distance from the animal feeding operation. Plaintiffs' Brief incorrectly states that all Plaintiffs live within 2 miles of the animal feeding operation. However, Exhibit 17 to JBS's Motion for Summary Judgment establishes that all Plaintiffs except for the Honomichls in fact live *at least* 2 miles from one of the Sites. *See* Ex. 17 to Cargill Pork MSJ, App. 575. Plaintiff Michael Merrill[3] lives in the town of

[3] Plaintiff Michael Merrill was a party to this matter at the time the District Court heard argument on Plaintiffs' claims. Mr. Merrill dismissed his claim with prejudice on June 7, 2016. Voluntary Dismissal of Plaintiff Michael Merrill, App. 1901. Defendants' Motion for Costs and Expenses as to Mr. Merrill's frivolous claim is currently pending before the District Court. Order Regarding Stay of Proceedings, App. 2010.

Batavia, as many as 2.36 miles from Site 1 and 3.69 miles from Site 2. *Id.* Plaintiff Karen Frescoln's home in Libertyville is nearly 10 miles from the town of Batavia and the animal feeding operation at issue. Ex. I to Plaintiffs' MSJ, Tr. of K. Frescoln Depo., p. 7:12–15, App. 1037.

Defendants dispute that Plaintiffs require a "direct or particular benefit from the facility" for the statute to be deemed constitutional, but nonetheless respond that Plaintiffs do in fact receive benefit.

First, as described in detail below, the legislatively established setback distances grant Plaintiffs property rights which vastly exceed the scope of their individual parcels. Second, Defendants' opening brief references the expert report of Dr. Dermot Hayes, which describes in detail the unique benefits conferred on individuals within Wapello County as a result of the expansion of animal agriculture. *See* Ex. 14 to Cargill Pork MSJ, App. 552. Those include the creation of jobs locally, and funding to public works, schools, and services through taxes. *Id.*

iv. Iowa Code section 657.11 does not immunize animal feeding operations from suit

While the General Assembly structured Iowa Code section 657.11 to avoid detailed factual examinations without a plaintiff first establishing negligence, the legislation was not designed to and does not deprive plaintiffs of a remedy. Contrary to Plaintiffs' claim, Iowa Code section

657.11 does not "strip neighbors of animal feeding operations . . . of the ability to redress their injuries." The courts are well settled on this point. *See Gacke*, 684 N.W.2d at 175 ("The Takings Clause does not prohibit the legislature from granting animal feeding operations immunity from liability for any other damages traditionally allowed under a nuisance theory of recovery.").

A useful analogy can be drawn to tort reform in other areas, where the legislature has modified a cause of action or imposed a gatekeeping requirement. For example, a plaintiff in a medical malpractice case cannot sue a physician without first acquiring an expert in that field to establish that a physician violated the medical standard of care. *See* Iowa Code § 668.11. That statute has been upheld as constitutional. *See Thomas v. Fellow*, 456 N.W.2d 170, 172–73 (Iowa 1990).

Iowa Code section 657.11(2) imposes a similar proof prerequisite in an animal agriculture nuisance lawsuit by demanding a violation of industry standards be established before a plaintiff may recover special damages. *See* Iowa Code § 657.11(2)(a) (requiring proof of an injury to person or damage to property proximately caused by "[t]he failure to comply with a federal statute or regulation or state statute or rule which applies to the animal feeding operation"); Iowa Code § 657.11(2)(b) (requiring proof of an injury

to person or damage to property proximately caused by both (1) unreasonable and substantial interference with use and enjoyment of life or property and (2) failure "to use existing prudent generally accepted management practices reasonable for the operation."). In this way, the legislature has balanced its stated interest in protecting and preserving animal agricultural production operations and punishing "bad actors" as referenced by Plaintiffs' Amicus Curiae. *See* Iowa Association for Justice's Amicus Curiae at 6.

B. Iowa Code Section 657.11 is Facially Constitutional and Constitutional as Applied

The District Court frames its conclusion of unconstitutionality as an "as applied" determination. However, as observed in Defendants' opening brief, the District Court failed to evaluate the factual situation of each Plaintiff. Defendants dispute Plaintiffs' assertion that the District Court incorporated Plaintiffs' subjective statements regarding alleged interference with their use and enjoyment of property into its ruling. *See* Plaintiffs' Brief at 28.

The text of the District Court's Ruling is clear—it neither makes findings of facts, nor accepts as true Plaintiffs' self-interested claims.[4] *See* Ruling, App. 1904. Rather, the District Court endorsed a facial challenge to the statute, resulting in a judicial declaration that the Iowa Legislature is powerless to reform substantive elements of the animal agriculture nuisance cause of action. It made Iowa Code section 657.11(2) unconstitutional in all circumstances irrespective of the facts presented by a particular plaintiff.

Plaintiffs also urge this Court to determine the facial constitutionality of the statute, alleging it is "clearly unconstitutional on its face." *See* Plaintiffs' Brief at 15. Irrespective of whether the facial challenge originated with Plaintiffs or the Court, the burden to demonstrate the statute is facially unconstitutional rests on Plaintiffs. This requires Plaintiffs to rebut the presumption that every statute is constitutional.

To overcome this presumption a challenger must "refute every reasonable basis upon which the statute could be found constitutional." *Seering*, 701 N.W.2d at 661. Stated differently, Plaintiffs bear the burden of demonstrating that "no conceivable set of circumstances exist under which

[4] The constitutionality of a statue should not turn upon a witness's subjective perceptions. If, for example, non-plaintiff neighbors testify in this case that the facilities cause no nuisance (as they will if this matter is tried) or if they fail to so testify, the constitutional analysis should be unaffected.

the statute would be valid." *Hernandez-Lopez*, 639 N.W.2d at 237 (citing *U.S. v. Salerno*, 481 U.S. 739, 746 (1987)).

Plaintiffs claim Iowa Code section 657.11 is facially unconstitutional because persons with nuisance claims *universally* receive no particular benefit beyond that to the public at large, sustain significant hardship, and have resided on and made "legitimate and valuable expenditures" on their property before the animal operation started. *See* Plaintiffs' Brief at 31. Not only is Plaintiffs' claim without merit, it is not true as applied even to the bellwether Plaintiffs implicated in this case.

Though Plaintiffs have each submitted self-serving testimony that they experience odor which interferes with the use and enjoyment of their property, a subjective, self-interested statement does not constitute fact.[5]

[5] Plaintiffs' subjective testimony is subject to a "normal person" standard, whereby the alleged nuisance "must be such as would cause physical discomfort or injury to a person of ordinary sensibilities." *Helmcamp v. Clark Ready Mix Co.*, 314 N.W.2d 126, 130 (Iowa 1974). Exhibit 17 to JBS's Motion for Summary Judgment depicts Plaintiffs' residences as well as neighboring households not parties to this suit. App. 575. The number of households who do not allege nuisance conditions is staggering. This alone casts doubt on Plaintiffs' claims that their perceptions are "normal" and true. The record also contains numerous discrepancies and contradictions in Plaintiffs' testimonies. *Compare* Ex. I to Plaintiffs' MSJ, Tr. of D. Chance Depo. Vol. II, pp. 65:3–20, App. 991 (in which Plaintiff Deb Chance claims she smells odor "well over 75 percent of the time") *with* Ex. A to Defendants' Brief in Support of their Motion for Judgment and Costs and Expenses, Including Attorney's Fees, as to Plaintiff Michael Merrill, pp.

Indeed, the District Court previously held the claims of plaintiffs who presented no evidence aside from their own testimony to substantiate their claims, were frivolous. Order on Post-Verdict Motions and Judgment Entry, App. 1886.

Simply put, Plaintiffs' claim that all potential plaintiffs are universally burdened is without merit. It does not require a leap of the imagination to envision a potential plaintiff residing some distance from the animal feeding operation at issue to whom the statute could be lawfully and fairly applied. At a certain distance, a plaintiff's claims become meritless. As described in Defendants' opening brief, that distance has been legislatively determined to be the setback distance imposed upon animal feeding operations.

i. The regulatory scheme enacted contemporaneously with Iowa Code section 657.11 constitutes a legislative balancing of interests which benefits Plaintiffs

The Iowa Court of Appeals' recent decision in *McIlrath v. Prestage Farms*, No. 15-1599, 2016 WL 6902328, at *3 (Iowa Ct. App. Nov. 23, 2016) and its dismissive treatment of the impact of setback distances for animal feeding operations is indicative of the confusion and oversight *Gacke* has sown. *McIlrath* mechanically applied *Gacke* to find that Iowa Code

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103–07, App. 1931–35 (in which Plaintiff Michael Merrill admits smelling no odor in 2013—the year he filed suit—and noticing odor less than a dozen times in subsequent years).

section 657.11(2) is unconstitutional because "the factual situation in this case was substantially similar to that presented in *Gacke*."[6]

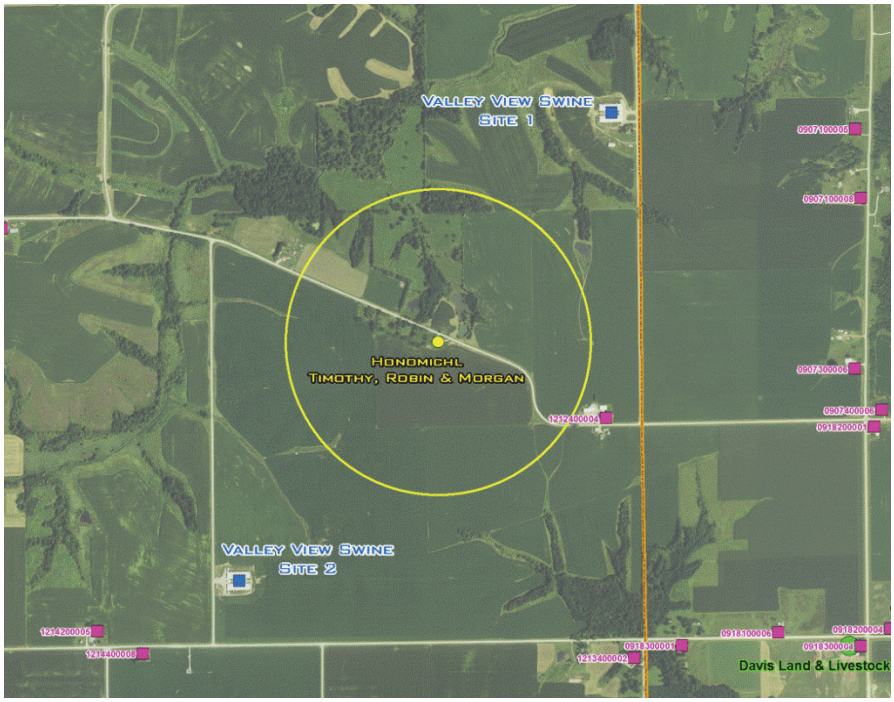
In two minimal paragraphs that disregarded the applicable standard of review as well as the deference properly accorded legislative enactments, the court reached the conclusion that McIlrath did not benefit from the operation of the statute, ignoring the impact of increased setback distances because "they were not one of the factors cited by the Supreme Court in discussing the constitutionality of section 657.11(2)." *Id.* To ignore the applicable setback distance is to ignore a direct benefit bestowed upon property owners by exercise of the legislature's police power.

As discussed in the Amicus Curiae Brief of the Iowa Pork Producers Association and Iowa Farm Bureau Federation, setback distances were introduced in the same legislative bill as Iowa Code section 657.11: House File 519, 1995 Iowa Acts Chapter 195. *See* Amicus Curiae Brief of the Iowa Pork Producers Association and Iowa Farm Bureau Federation at 14–15. Those setback distances have been expanded twice since their enactment to a

[6] The factual situation applicable to McIlrath is dissimilar to that of the Gackes. The Gackes lived approximately 1,300 feet from the animal feeding operation at issue. In contrast, McIlrath lives 2,220 feet from the animal feeding operation—nearly twice the distance of the Gackes and in excess of the minimum applicable setback distance of 1,875 feet. *See Gacke*, 684 N.W.2d at 171; *McIlrath*, 2016 WL 6902328, at *1; Iowa Admin. Code Ch. 65.

current minimum distance of 1,875 feet for an animal feeding operation the size of that at issue in this case. *See* Iowa Admin. Code Ch. 65. Those setback distances confirm the ability of the legislature to alter the scope of individual property rights and demonstrate one direct benefit bestowed upon neighboring property owners.

Statutory setback distances are applicable to any owner of a residence, business, church, school, and/or public use area existing at the time an applicant submits an application for a construction permit for an animal feeding operation. Iowa Admin. Code § 567-65.11(1). Plaintiffs, by the mere fact of property ownership, are granted a 1,875 foot radius surrounding their home within which they can prevent construction of an animal feeding operation, therefore influencing both the property and professional rights of their neighbors. The figure below illustrates the scope of influence the setback distance imposes upon the Honomichl household:



Despite owning only a small parcel of land, the Honomichls have the ability to prevent construction of an animal feeding operation on 253.55 acres of land owned mostly by their neighbors.[7] Conversely, if a farmer elects to build an animal feeding operation outside those 253.55 acres in compliance with the regulatory scheme, the legislature has conclusively decided that the farmer should be in turn protected from nuisance suits, unless a plaintiff can establish an exception under Iowa Code section 657.11(2). This fair balancing of interests conducted by the legislature is

[7] As may be seen, the Honomichl's actual setback from both Site 1 and Site 2 is nearly double the statutory setback. The Honomichl home is approximately 2/3 of a mile from the nearest facility.

evident when the legislative scheme is viewed as a whole—not in isolation as Plaintiffs urge.

The specific factual situation of the plaintiffs in *Gacke*, on which subsequent courts have placed so much emphasis, is rendered impossible today as a result of the heightened regulatory scheme and increased setback distances the General Assembly has decided serve the public interest and appropriately balance the rights of landowners with the public good of promoting and preserving animal agriculture. Those distances, and the entirety of the regulatory scheme incorporated in the statute by reference, make the individual balancing performed by the *Gacke* Court unnecessary.

The legislature already struck that balance when it concluded that animal agricultural operations located within clearly defined setback distances, operating in accordance with Iowa law, shall not be found to be a public or private nuisance. Iowa Code § 657.11(2).

CONCLUSION

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

RENEWED REQUEST FOR ORAL ARGUMENT

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

DATED: January 24, 2017

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF FILING

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

ATTORNEY'S COST CERTIFICATE

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

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

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

1. The type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because, according to the word count software used to prepare this Brief, it contains 4,890 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1); and

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

/s/ Jacob D. Bylund

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