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IN THE
INDIANA COURT OF APPEALS

CASE NO. 18A-PL-645

MARTIN RICHARD HIMSEL, JANET L. HIMSEL, ROBERT J. LANNON and SUSAN M. LANNON Appellants (Plaintiffs Below), v. SAMUEL T. HIMSEL, CORY M. HIMSEL, CLINTON S. HIMSEL, 4/9 LIVESTOCK, LLC and CO-ALLIANCE, LLP. Appellees (Defendants Below).	Appeal from the Hendricks Superior Court, Room No. 4 Trial Court Cause No. 32D04-1510-PL-000150 The Honorable Mark A. Smith

INDIANA AGRICULTURAL LAW FOUNDATION, INC. AND INDIANA PORK PRODUCERS ASSOCIATION, INC.'S AMICUS BRIEF

Todd J. Janzen, Atty. No. 23615-49
Brianna J. Schroeder, Atty. No. 28772-64
Janzen Agricultural Law LLC
8425 Keystone Crossing, Suite 111
Indianapolis, Indiana 46240
317-855-9920
Janzen@aglaw.us
Schroeder@aglaw.us

Counsel for Indiana Agricultural Law Foundation, Inc.

Daniel P. McInerny, Atty. No. 10337-71
Andrew M. McNeil, Atty. No. 19140-49
Bose McKinney & Evans LLP
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204
317-684-5000
dmcinerny@boselaw.com
amcneil@boselaw.com

Counsel for Indiana Pork Producers Association, Inc.

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I. Statement of Interest of the Amici Curiae.

Indiana Agricultural Law Foundation, Inc. ("IALF") is a 501(c)(3) charitable organization established by the Indiana Farm Bureau, Inc. to promote better understanding of legal issues facing the agricultural community. The IALF engages in research and education to further the understanding of agricultural legal issues for the agricultural community, the judiciary, and the general public. Indiana Pork Producers Association, Inc. ("IPPA") is a nonprofit trade organization that represents and supports the 3,000 pork producers throughout Indiana. IPPA provides producers with the resources they need to be profitable and effective in the areas of animal care, the environment, food safety, and health.

The IALF sought and was granted leave to appear before the trial court. (App. XII, p. 74.) The IALF and IPPA (jointly "Amici Curiae") have a specific interest in supporting the established precedent of Indiana's Right to Farm Act, Indiana Code § 32-30-6-9 ("RTFA"), and in ensuring that the RTFA continues to provide the broad protection to farmers that Indiana's Legislature intended. This Court's interpretation of the RTFA will affect the decisions of countless Hoosier farmers regarding whether to spend time and money developing, sustaining, and improving their agricultural operations. The Amici Curiae support those farmers in all aspects of their agricultural pursuits.

II. Summary of Argument.

Our Legislature intended the RTFA to be a tool for farmers to preserve, protect, and develop agricultural land uses across the state. The Act allows farmers to produce food and agricultural products for a growing global population. This Court should affirm the trial court's decision so the RTFA remains a viable defense for Indiana farmers against lawsuits based on nonagricultural land uses near Indiana's farms.

The RTFA does not require farmers to prove that their modern farm would not have been a nuisance when agricultural operations began on a specific site. Instead, the RTFA preserves farmland by giving limited protection to farmers against nuisance lawsuits if an agricultural operation would not have been a nuisance at the time agricultural operations started on the site. The RTFA's statutory language, the legislative intent behind it, Indiana case law, and cases from other jurisdictions support this conclusion and support applying the RTFA at the summary judgment stage.

The RTFA is constitutional. It does not violate the open courts provision of the Indiana Constitution because it does not bar access to courts for an established right and remedy. Instead, the RTFA imposes acceptable conditions and limitations on plaintiffs' nuisance claims. Likewise, the RTFA does not violate the takings clause of the Indiana or federal Constitution. A panel of this Court already considered and rejected a similar takings challenge to the RTFA in *Lindsey v. DeGroot Dairy LLC*, 898 N.E.2d 1251 (Ind. Ct. App. 2009). Nothing in this case requires the Court to revisit that decision.

Finally, the RTFA does not violate the equal privileges and immunities clause of the Indiana Constitution. The RTFA satisfies both prongs of the privileges and immunities test established in *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). First, the RTFA addresses two inherent characteristics in agricultural operations, namely, agricultural operations produce food and Indiana regulates farmers and agricultural land uses more rigidly than other non-agricultural uses. Both of these characteristics serve as independent justifications for any disparate treatment afforded agricultural operations under the RTFA. Second, the limited protections afforded by the RTFA are equally available to any agricultural operation that meets the Act's requirements. The RTFA does not pick winners and losers amongst agricultural operations. The RTFA does not violate any state or federal constitutional provision.

The trial court's decision should be upheld.

III. Argument.

A. The RTFA does not require defendants to prove the modern agricultural use would not have been a nuisance in an earlier era.

The RTFA is an exclusionary rule. It says that certain agricultural operations cannot, as a matter of law, be classified as nuisances if the RTFA's requirements are satisfied. Under the RTFA, an agricultural operation is not a nuisance if it has been in operation continuously on the locality for more than one year, there is "no significant change in the type of operation," and the "operation would not have been a nuisance at the time the agricultural…operation began on that locality." IND. CODE § 32-30-6-9(d)(1)-(2).

Plaintiffs argue section (d)(2) requires a farmer to prove that a modern pig farm would not have been a nuisance when a specific site began agricultural use (App. Br. 26), which often extends back decades (if not centuries). This interpretation is at odds with the language and purpose of the RTFA. Read consistent with the statutory language and the purpose of the RTFA, section (d)(2) protects the current agricultural operation if the original "agricultural operation" (crops, livestock, poultry, timber, etc.) would not have been a nuisance when it began on the site. IND. CODE § 32-30-6-9(d)(2).

1. The language of the RTFA does not support Plaintiffs' argument.

Plaintiffs' hyper-restrictive focus on transporting the current agricultural operation back to the period of original agricultural use is not supported by the statutory language. Notably, the RTFA's definition of an "agricultural operation" includes any facility used for the production of crops or livestock, among other things. IND. CODE § 32-30-6-1. Thus, when considering whether an agricultural operation would have been a nuisance at the time the operation began at the location in question, the

RTFA is concerned with the agricultural operation generally, not the specific, current agricultural operation.

The Southern District of Indiana already has rejected an argument similar to Plaintiffs' argument regarding what constitutes a "significant change" in an agricultural operation. *See Dalzell v. Country View Family Farms, LLC*, No. 1:09-cv-1567-WTL-MJD, 2012 U.S. Dist. LEXIS 130773, at *7 (S.D. Ind. Sep. 13, 2012). The RTFA is not a defense if there is a "significant change in the type of operation," but the RTFA explains that "a conversion from one type of agricultural operation to another type of agricultural operation" does not qualify as a "significant change." *Id.* (citing IND. CODE § 32-30-6-9(d)(1)). The district court rejected an argument that the change from crops to livestock constituted a significant change and consequently removed the farm from the RTFA's protection because it found "no support in the language of the Act." *Id.* Instead, the RTFA provides that the conversion of an agricultural operation from one type of operation to another does not qualify as a "significant change." IND. CODE § 32-30-6-9(d)(1)(A). The court concluded this provision would have no meaning under the plaintiffs' interpretation of the RTFA, because each time the farm changed (*e.g.*, from crops to livestock), the existing "agricultural operation" would cease to exist and a new one would start. *Dalzell*, 2012 U.S. Dist. LEXIS 130773, at *7-8, 12.

The Seventh Circuit affirmed the district court's conclusion, holding that a change in the type of operation did not break the continuous operation requirement of the RTFA. *Dalzell v. Country View Family Farms, LLC*, 517 F. App'x 518, 519 (7th Cir. 2013). The Dalzells argued a hog farm was not the same continuous "agricultural

operation" as its crop-based predecessor. *Id.* In rejecting that argument, the Seventh Circuit explained that subsection 9(d) of the RTFA spoke of "the agricultural operation," not "'the *current* agricultural operation' or anything similar." *Id.* (emphasis original). The court concluded that because the RTFA expressly states that a change in the type of agricultural operation is not a significant change to break the continuity of the operation, the Dalzells failed to overcome the protections of the RTFA. *Id.*

Here, Plaintiffs' argument is like the argument rejected in *Dalzell*. Specifically, Plaintiffs argue a farmer must show that the specific agricultural operation at issue "'would not have been a nuisance' when continuous agricultural operations on the site first began." (App. Br. at 26.) This argument fails for the same reason the Dalzells' argument failed, namely, Plaintiffs read evidentiary requirements into the statute that are not there. Subsection (d)(2) requires that the "operation" would not have been a nuisance at the time when the agricultural operation began on the property. This is the same phrasing as the "significant change" provision addressed by the federal courts in *Dalzell*. It doesn't say that the "current operation" would have been a nuisance at the moment when agricultural operations started. Consequently, it must be interpreted consistently to conclude that the nuisance question is evaluated based on the original agricultural operation at the time that operation commenced.

It is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Dalzell*, 2012 U.S. Dist. LEXIS 130773, *12; *Salmon v. City of Bloomington*, 761 N.E.2d 440, 447 (Ind. Ct. App. 2002) ("statutory provisions covering the same general subject matter are *in pari*

materia and should be construed together to produce a harmonious statutory scheme."). "When the legislature again uses the phrases 'the agricultural operation' and 'the operation' in subsection (d)(2), they cannot then be read to refer to the agricultural operation as it existed after a conversion from one type of agricultural operation to another when it so clearly does not have that meaning earlier in the same section." *Dalzell*, 2012 U.S. Dist. LEXIS 130773, *12. In the same way, the question of whether or not the "operation" would "have been a nuisance at the time the agricultural . . . operation began on that locality" must be considered from the perspective of when the continuous agricultural operation first began. To adopt any other reading of this section would eliminate the protections the Legislature afforded Indiana farms.

Simply put, the text of the RTFA does not require a farm to demonstrate that in its modern form, it "would not have been a nuisance" when farming began in that area. *See Id.;* IND. CODE § 32-30-6-9(d)(2). This conclusion dispenses with the balance of Plaintiffs' summary judgment argument that the defendants failed to negate questions of fact about the precise origin of the agricultural operation on the defendants' farm. (App. Br. at 19, 30-31.) Plaintiffs' summary judgment argument unfolds in four steps: (1) Indiana's standard is more restrictive than the federal standard; (2) the farmer must present affirmative evidence from decades (or more) ago to prove a negative, namely, that the original agricultural operation was not a nuisance; (3) due to the passage of time, a farmer can't satisfy the Indiana summary judgment standard with admissible evidence; and (4) Plaintiffs win by default because the farmer can't rely on the protections afforded by the RTFA. (*Id.*) Plaintiffs' position rests on a standard that

doesn't exist under the law—showing that the current 8,000 hog farm would or would not have been a nuisance decades ago. Rightly understood, the RTFA's focus is directed at whether the there is evidence suggesting that the original agricultural operation on the property would have been a nuisance decades ago. Here, there is no evidence upon which to exclude the Defendants' farm from the RTFA's protection. In other words, the design of the RTFA allows and encourages the evolution of agricultural operations by protecting agricultural operations that meet its requirements. Plaintiffs' approach does the opposite, setting up an evidentiary barrier that doesn't exist and charting a course for agricultural extinction based on the passage of time. Plaintiffs' argument undermines the letter, spirit, and purpose of the RTFA.

2. Agriculture is in Indiana's roots—it is impossible for farmers to show their specific modern operation "would not have been a nuisance" when agriculture "began in that locality."

To require farmers to present evidence that their specific modern farming operation would not have been a nuisance when agriculture "began on the locality" is to impose a colossal burden on farmers. This would encourage unreliable, speculative evidence. By at least the early 1800s, Indiana was home to organized agricultural operations, including livestock. *See* Harlow Lindley, INDIANA AS SEEN BY EARLY TRAVELERS: A COLLECTION OF REPRINTS FROM BOOKS OF TRAVEL, LETTERS, AND DIARIES PRIOR TO 1830, 216-218, 230 (Indiana Historical Collections 1916) (In 1819, "[t]he country is admirably fitted for rearing cattle and swine…"). In 1910, 92.3% of Indiana land[1] was used as farmland. USDA, CENSUS OF AGRICULTURE (1925), available at

[1] In 2012, 63.8% of Indiana land was used for farming. USDA, CENSUS OF AGRICULTURE (2012).

http://usda.mannlib.cornell.edu/usda/AgCensusImages/1925/01/11/1555/Table-02.pdf.

The Legislature recognized this heritage when it declared "it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products." IND. CODE § 32-30-6-9(b). The statute recognizes that agriculture requires continual development and "improvement"—a real estate term that includes buildings and structures. Agriculture is always changing. There are no witnesses alive from the time when agricultural operations began around the state. To require such specific evidence is to effectively negate any RTFA defense for most of the state. This is not the purpose of the statute.

Instead, the RTFA requires that a farmer show that the original "agricultural operation"—whether it was crops, livestock, poultry, or timber—would not have been a nuisance when agriculture began on that site. IND. CODE §§ 32-30-6-1; 32-30-6-9(d)(2). So, was farming a nuisance in rural Indiana 200 years ago? Of course not. Plaintiffs may not like the law, but our Legislature made the decision to establish the RTFA to protect agriculture.[2] Plaintiffs' remedy is to lobby for change—not to twist the statutory language around or to ignore established case law.

3. The RTFA was intended to be applied early in litigation.

[2] In January 2014, Plaintiffs' counsel provided testimony to the Legislature consisting of many of these same arguments about the RTFA. The General Assembly chose not to amend the RTFA as proposed by Plaintiffs' counsel. (App. X, pp. 185-187.)

The RTFA is designed to relieve Indiana farmers from the costly and uncertain burden of protracted litigation; it is intended to limit the circumstances under which an agricultural operation can be hauled into court or classified as a nuisance. Even so, Plaintiffs advocate for a full-blown trial on the RTFA issues that the trial court resolved, appropriately, on summary judgment. (App. Br. at 21-33.)

Any statute intended to curb litigation abuse—such as objecting to agricultural operations in an agricultural area—must be applied early in litigation to make the statute effective. This is evident from the unambiguous legislative intent included in the Act and from our courts' history of applying the RTFA at the summary judgment stage.

The Act's explicit purpose is:

> ... to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.…It is the purpose of this section to reduce the loss to the state of its agricultural resources *by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.*

IND. CODE § 32-30-6-9(b) (emphasis added). The purpose statement outlines some of the problems the Act is meant to address: "when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits." *Id.* As the trial court in *Parker* explained:

> In view of the clearly stated policy and purpose…the Act is applicable when non-agricultural land uses such as non-farming residences extend into agricultural areas, whether as a result of 'non-farmers' moving into the area or, as in the present case, when 'erstwhile farmers' now utilize the land as a non-farming residence after ceasing farm operations. In either case, the non-agricultural land uses (non-farming residences) now extend into agricultural areas.

Parker v. Obert's Legacy Dairy, Cause No. 26D01-1106-PL-14, p. 5 (Gibson Sup. Ct. Aug. 27, 2012) (App. XII, p. 70.) As a result of such suits, "agricultural operations are sometimes forced to cease operations and many persons may be discouraged from making investments in farm improvements." IND. CODE § 32-30-6-9(b). The non-farmers who want to live in rural areas but do not want to live near modern agriculture are one of the concerns specifically addressed in the RTFA.

Right-to-farm laws encourage farmers "to continue devoting their land to agricultural purposes. The 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." *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 289 (Winter 1984). Right-to-farm laws also protect investments in farmland for agricultural production. Nuisance complaints objecting to noises, odors, dust, chemical use, and slow-moving machinery make farming more difficult and less financially stable. *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U.L. REV. 1694, 1697 (1998).

Nuisance lawsuits are expensive to defend. To allow such a case to proceed to trial—when no evidence of operational negligence or other facts prevent application of the RTFA on summary judgment—causes farmers to incur significant legal fees and face the uncertain risks of trial, which defeats the RTFA's explicit purpose. The farm at issue here is a textbook example. It is located in a traditionally agricultural area on land that has been agricultural as long as anyone can remember. Cory and Clint Himsel are third-generation farmers in Hendricks County and they own the 4/9 hog farm with

their father, Sam. The farm modernized and evolved to stay in business and then was sued by a neighbor for non-agricultural property impacts allegedly caused by the farm. If the Defendants are forced to proceed to trial on this record, other farmers must evaluate whether to stop raising livestock, whether they should modernize and run the risk of expensive nuisance lawsuits, and whether they should remain less productive due to litigation concerns. The Legislature adopted the RTFA so farmers did not have to make these choices.

4. Indiana courts apply the RTFA before trial.

The legislative purpose of the RTFA is served by allowing farms to use the RTFA as a summary judgment remedy. To limit the RTFA to a trial defense renders it meaningless, since the purpose is to limit lawsuits against well-run farms existing in long-established agricultural locations.

Three relatively recent cases demonstrate how courts implement the legislative purpose by applying the RTFA at the summary judgment stage. *See* IND. CODE § 32-30-6-9(a), (d). In *Lindsey*, 898 N.E.2d 1251; *Parker v. Obert's Legacy Dairy LLC*, 988 N.E.2d 319 (Ind. Ct. App. 2013); and *Dalzell*, 2012 U.S. Dist. LEXIS 13077, Indiana trial courts analyzed plaintiffs' nuisance claims against agricultural operations. Each court determined the statutory conditions were met and applied the RTFA to defeat the plaintiffs' nuisance claim at the summary judgment stage. Each decision was upheld on appeal. *See id.*

The Legislature provided an exception to the RTFA exclusionary application—when a nuisance is caused by the farm's negligent operation, the plaintiff may proceed

to trial on that issue, provided the nuisance is caused by the negligent operation. In the absence of a triable issue over a negligent operation—such as in this case—a trial court should resolve the RTFA's application on summary judgment, or the intent of the Legislature to minimize the burden on Indiana's agricultural operations is thwarted. *See Lindsey*, 898 N.E.2d at 1251.

5. Cases from other jurisdictions apply the RTFA before trial.

Other states have applied their RTFA at the summary judgment stage. For example, in *Vicwood Meridian P'ship v. Skagit Sand*, 98 P.3d 1277, 1279 (Wash. Ct. App. 2004), a Washington trial court granted summary judgment for a mushroom farm under that state's RTFA. The appellate court affirmed the summary judgment and recounted the purpose of Washington's RTFA, which was to protect established agricultural activities from nuisance lawsuits. *Id.* at 1280. Based in part on the importance of the legislative intent, the appellate court upheld the trial court's summary judgment order in favor of the defendant mushroom farmer.

Likewise, the trial court in *Horne v. Haladay*, 728 A.2d 954 (Pa. Sup. Ct. 1999) granted summary judgment for a poultry farm based on Pennsylvania's RTFA, and the appellate court affirmed. The appellate court rejected the plaintiffs' argument that Pennsylvania's RTFA did not apply since their residences predated the poultry farm in question. The legislature's express purpose in passing Pennsylvania's RTFA was "to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products." *Id.* at 956 (citing 3 Pa. C.S.A. §§ 951, 954). The purpose statement made it clear Pennsylvania's RTFA protected the defendants' right to "develop" their poultry operation. *Id.* at 957.

The appellate court ruled that Pennsylvania's RTFA applied at the summary judgment stage to protect the poultry operation.

In *Rancho Viejo v. Tres Amigos Viejos*, 100 Cal. App. 4th 550 (Cal. Ct. App. 2002), the plaintiff sued an avocado farmer for trespass, claiming the farmer's irrigation water damaged plaintiff's property. The avocado farmer moved for summary judgment, claiming the plaintiff artfully pleaded trespass instead of nuisance in an attempt to avoid application of California's RTFA. Plaintiff contended issues of fact precluded summary judgment. The court noted that "[b]y its plain language, [California's RTFA] was intended to immunize farmers from nuisance liability for 'any practices performed by a farmer or on a farm incident to . . . farming operations,' as long as the other conditions of the statute are met." *Id.* at 560. The court relied on the legislative record, which contained the following explanation of California's RTFA:

> Suits against agricultural operations for dust, wind machine or tractor noise, livestock or poultry smells and other things commonly associated with the operation of an agricultural enterprise are becoming more prevalent as urban development reaches out to meet agricultural areas. [The bill] will stop this dangerous cycle by allowing agriculture to operate without undue pressure from urbanization. Keeping agricultural land in agricultural use is the goal.

Id. The court held there were no material issues of fact related to the farmer's irrigation practices and affirmed summary judgment in favor of the avocado farmer. *Id.* at 570-71.

While these states have different right to farm laws than Indiana, the policy is the same. The goal is to protect farmland for agricultural development. If plaintiffs can force agricultural operations to defend themselves all the way through trial—without any evidence of negligent operations—those farms would be forced out of operation

nearly as quickly as if they were legally enjoined from farming. The RTFA prevents this outcome.

B. Constitutional Claims.

1. The RTFA keeps courts open for plaintiffs with legitimate nuisance claims.

Article 1, Section 12 of the Indiana Constitution provides that "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. ART. I § 12. This "Open Courts Clause" does not create new legal rights, as Plaintiffs would have this Court believe. Rather, it "guarantees access to the courts to redress injuries *to the extent the substantive law recognizes an actionable wrong*." *Smith v. Ind. Dep't of Corr.*, 883 N.E.2d 802, 807 (Ind. 2008) (emphasis added). The Open Courts Clause does not permit us to close the courtroom doors "[w]hen Indiana Law affords a remedy." *Escamilla v. Shiel Sexton Co.*, 73 N.E.3d 663, 667 (Ind. 2017). The RTFA does not violate the Open Courts Clause.

The Open Courts Clause means that if a right and remedy exists, the legislature may not bar access to the Courts to enforce that right or remedy. For example, undocumented immigrants are entitled to the same court access to file a tort claim as a U.S. citizen. *See Escamilla*, 73 N.E.3d 663 (immigration status does not bar courtroom doors for existing right or remedy). Patients are entitled to court access to file medical malpractice claims against doctors. *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) (statute of limitations could not expire before patient could have possibly learned about injury). The right to open courts assumes a right and remedy already exist. But, the legislature can impose conditions and limitations upon those existing rights and remedies. *Id.*

Our Supreme Court recently explained: "[t]he legislature has wide latitude in defining the existence and scope of a cause of action and in prescribing the available remedy." *KS&E Sports v. Runnels*, 72 N.E.3d 892, 906 (Ind. 2017). "If the law provides no remedy, [Article 1,] Section 12 does not require that there be one." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 979 (Ind. 2000). The Open Courts Clause does not prevent the legislature from modifying or restricting common law rights and remedies. *Smith*, 883 N.E.2d at 807. Nor does it prevent the legislature from imposing conditions on the pursuit of a claim in court. *Id.* There is no right under the Open Courts Clause to any particular cause of action. *Id.* at 810.

In *KS&E Sports*, our Supreme Court held a plaintiff was not denied access to open courts when the legislature afforded him a limited cause of action and limited recoveries. The plaintiff there was still able to seek equitable relief on a public nuisance claim for a gun store recklessly selling weapons, even if he was prohibited from a damages lawsuit against the gun store. 72 N.E.3d at 905-06. Such a statutory system does not mean plaintiff is denied court access and does not violate the Open Courts Clause. *Id.* The legislature's policy decision to bar damages suits against firearms sellers is within its broad discretion. 72 N.E.3d at 906.

The primary case upon which Plaintiffs rely, *Martin,* does not support their view of the RTFA. In *Martin*, the court held that the occurrence-based medical malpractice statute of limitations was unconstitutional as applied, since it would have run before the plaintiff could have discovered she had sustained an injury as a result of malpractice. 711 N.E.2d at 1283. It would have required her to file a claim before the

claim existed. The court recognized that legislation which restricts a right does not violate the Open Courts Clause as long as it is a rational means to achieve a legitimate legislative goal. *Id*.

The RTFA does not bar access to the courts. The plaintiff in *Martin* was denied access to the courts because she never had any viable method to bring a malpractice claim. The existing right and remedy were completely denied to her because of the statute of limitations. A plaintiff's tort rights are not completely denied under the RTFA—but there are reasonable conditions and limitations applied in furtherance of legislative intent. Plaintiffs may bring a nuisance suit if farmers' negligent operations are the cause of a nuisance. Plaintiffs may bring a nuisance suit if farmers have a statutory "significant change" in operations, or if the other factors in the RTFA are not satisfied. Just like any other tort claim, plaintiffs only have a claim if they can prove the elements of the cause of action and avoid any affirmative defenses (like the RTFA). These limitations are lawful. The RTFA does not violate the Open Courts Clause.

Other jurisdictions have considered whether a right to farm act violates federal due process considerations. Courts in Minnesota and New York have ruled the statutes are constitutional under the Due Process Clause of the U.S. Constitution. *See Overgaard v. Rock County Bd. of Com'rs*, 2003 U.S. Dist. LEXIS 13001 (D. Minn. July 25, 2003); *Pure Air and Water Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786 (N.Y. Sup. Ct. 3d Dep't 1998). A recent decision from the Missouri Supreme Court is instructive. Plaintiffs filed suit against a new hog farm, alleging the farm caused odors, pathogens, hazardous substances, flies, and manure to "escape" onto their properties. *Labrayere v. Bohr Farms,*

LLC, 458 S.W.3d 319, 326-27 (Mo. 2015). The trial court entered summary judgment in favor of the farm, relying on Missouri's RTFA, which only allowed the recovery of documented medical costs or diminution of rental value. *Id.* (citing Mo. Stat. § 537.296(2)(2)). On appeal, plaintiffs alleged the right to farm act violated the open courts provision found in the Missouri Constitution because the act denied them access to court. *Id.* at 333. The Missouri Supreme Court held the plaintiffs did not establish they were barred from accessing the court to pursue a *recognized* cause of action, so their open courts challenge failed. *Id.*

Indiana's RTFA, like Missouri's, allows certain causes of action and restricts others. Plaintiffs here have failed to show that they are somehow barred from pursuing a recognized cause of action, so the Open Courts Clause is not at issue.

2. *Lindsey* rejected the Plaintiffs' argument that the RTFA is a "taking."

The RTFA does not violate the taking clause of the Indiana or U.S. Constitution. Plaintiffs urge this Court to decide that the RTFA constitutes an unconstitutional taking without just compensation. But Plaintiffs ignore this Court's decision explicitly holding that the RTFA is not a taking. *See Lindsey*, 898 N.E.2d 1251. The Plaintiffs know about *Lindsey*. It was briefed below. Indiana farmers (and trial courts) have relied upon *Lindsey* since 2009.

In *Lindsey*, the plaintiffs alleged the RTFA was unconstitutional, arguing it amounted to an unconstitutional taking of their property without just compensation because it essentially gave the farmer an easement over their property. *Id.* at 1257. The plaintiffs in *Lindsey* relied on Iowa case law, which held the right to maintain a nuisance

amounted to a government-created easement. *See Gacke v. Pork Xtra, LLC.*, 684 N.W.2d 168 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

In 1998, the Iowa court ruled the nuisance immunity provision in its RTFA created an easement in the affected property because the immunity allowed the farmers to do acts on their own land which, were it not for the easement, would have constituted a nuisance. *Bormann*, 584 N.W.2d at 321. The court held the Iowa legislature had exceeded its authority in violation of the federal and state constitutions. *Id.* In 2004, the Iowa Supreme Court declared Iowa's RTFA unconstitutional as applied in another case. *Gacke*, 684 N.W.2d 168. In *Gacke*, the court noted that the right to use property had long been recognized as an inalienable right, but subject to reasonable exercise of police powers by the state. *Id* at 176. The court decided Iowa's RTFA served a valid public purpose, but as applied in that case, it was unduly oppressive. *Id.* at 179. The court's holding was expressly limited to its facts. *Id.*

Presented with the same argument posed by the plaintiffs in the Iowa cases (and posed again now by the Plaintiffs), this Court refused to follow the "seemingly unique" Iowa holdings. *Lindsey*, 898 N.E.2d at 1258-59. This Court reviewed the Iowa decisions, but noted that courts in Idaho and Texas had held the RTFA defenses in their respective states were not unconstitutional takings. *Id.* (citing *Moon v. North Idaho Farmers Ass'n*, 96 P.3d 637 (Idaho 2004) (immunity from nuisance suit under Idaho RTFA not an unconstitutional taking; *Barrera v. Hondo Creek Cattle Co*., 132 S.W.3d 544 (Tex. Ct. App. 2004) (Texas RTFA not unconstitutional as applied)). *See also Overgaard v. Rock County Bd. of Com'rs*, 2003 U.S. Dist. LEXIS 13001, 21-22 (D. Minn. 2003) (holding *Bormann* did

not apply to Minnesota RTFA). After considering the legislative intent of Indiana's RTFA and the ways in which these other states had approached the taking question, this Court expressly rejected the plaintiffs' invitation to adopt Iowa's holding that the right to maintain an agricultural operation as mentioned in the RTFA creates an easement on plaintiffs' property. *Lindsey*, 898 N.E.2d at 1259. Thus, the Court ruled there was no unconstitutional taking and the RTFA was constitutional. *Id.*[3]

Rather than disclosing *Lindsey* in their section on unconstitutional takings (App. Br. 52-58), Plaintiffs invite this Court to perform the *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) analysis and hold that a private farm is a government-authorized nuisance. *Lindsey* says otherwise and is fatal to Plaintiffs' argument.

Presumably for this reason Plaintiffs ignore this Court's decision in *Lindsey* and present their case in terms of federal case law. But state and federal takings clauses are textually indistinguishable and are to be analyzed identically. *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 211 (Ind. 2009). Under a state or federal standard, governmental actions are takings only if the governmental action deprives an owner of all or substantially all economic or productive use of his or her property. *Id.* (*citing Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005)).

This Court heard the *Lindsey* case in 2009, and therefore was informed by *Lingle*, *Penn Central*, and *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570 (Ind. 2007), where our Supreme Court coordinated state takings case law with the federal standard in *Lingle*

[3] On May 9, 2017 Judge Smith granted Defendants' TR 12(B)(6) motion to dismiss Plaintiffs' inverse condemnation claim, in which Plaintiffs argued the RTFA constituted a taking without just compensation. (App. VIII, p. 177.)

and *Penn Central.* In *Lindsey*, this Court considered whether a dairy farm was a nuisance under both state *and* federal constitutions. 898 N.E.2d at 1258. This Court harmonized state and federal takings law under both the state and federal constitutions and determined the dairy farm was not a "taking." The Court's ruling in the present case therefore should be consistent with *Lindsey*.

3. The RTFA does not violate the equal privileges or immunities clause in the Indiana Constitution.

Article I, Section 23 of the Indiana Constitution provides: "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." IND. CONST. ART. I § 23. In *Collins v. Day*, our Supreme Court considered Section 23 and explained:

> [Section 23] imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

644 N.E.2d 72, 80 (Ind. 1994). There is no burden on the Defendants to demonstrate the law is constitutional. *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 239 (Ind. 2003). Rather, the burden is entirely upon Plaintiffs to overcome the presumption of constitutionality and to establish a constitutional violation. *Id.* The statute "stands before this Court clothed with the presumption of constitutionality until clearly overcome by a contrary showing." *Whistle Stop Inn v Indianapolis*, 51 N.E.3d 195, 199 (Ind. 2016). Plaintiffs here failed to meet their "heavy burden." *Id.* at 203-04.

As a threshold matter, the Indiana RTFA does not make farmers or agricultural operations "immune" to nuisance lawsuits. Farmers whose negligent operations cause a nuisance are subject to lawsuits from an affected party. The RTFA does not give him immunity. The Legislature may create conditions and limitations to causes of action. *See KS&E Sports*, 72 N.E.3d at 906.

The first prong of *Collins* requires that the alleged disparate treatment must be reasonably related to an inherent characteristic differentiating the classes. 644 N.E.2d at 80. This does not mean that any statute which provides specific requirements or treatment to a group based on what they do or who they are would be illegal. We have laws that limit lawsuits against people who break car windows to protect dogs in hot cars, people offering emergency medical care (Good Samaritan laws), medical professionals (medical malpractice claim limits), and people who report child abuse. Likewise, the RTFA is a law which puts limitations or conditions on an existing cause of action based on who farmers are and what they do. There are multiple inherent characteristics which differentiate agricultural operations.

First, our Legislature identified an inherent characteristic which distinguishes agricultural operations: they produce food. *See* Ind. Code § 32-30-6-9(b). This, alone, is enough to satisfy the first *Collins* prong. The RTFA is intended to "conserve, protect, and encourage the development and improvement of its agricultural land for the production of food[.]" *Id.* The statute is designed to stimulate new technology, innovative farming methods, and increased efficiencies. *Id.* This includes new livestock

systems, genetically modified crops, and other pioneering scientific approaches to improve food output to feed a hungry world.

Hog farms are fewer but larger than they used to be. USDA, *Overview of the United States Hog Industry*, http://usda.mannlib.cornell.edu/usda/current/hogview/hogview-10-29-2015.pdf. As our population goes up, so does our need for quality protein sources. In the United States in 1907, roughly 32.8 million hogs were butchered. USDA, CENSUS OF AGRICULTURE, National Statistics for Hogs, https://quickstats.nass.usda.gov/results/D137063F-E35A-32C3-9919-CB2865784714?pivot=short_desc. In 2017, over 120 million hogs were raised for meat consumption. *Id.* The RTFA encourages Indiana farmers to meet this growing demand. More pigs are needed, but there are fewer hog farms today than there used to be. According to the United States Census, there were over 22,000 hog farms in Indiana in 1978. In 2012, there were only 2,757. USDA, CENSUS OF AGRICULTURE (1978-2012). In Hendricks County, there were 249 hog farms in 1978, and only 44 in 2012. *Id.* The RTFA is the Legislature's effort to limit further loss of productive agricultural land to nonagricultural uses. Agricultural operations which produce grains, meat, dairy products, eggs, vegetables, fruits, and nuts are inherently different than businesses or people who do not produce food. We treat agricultural operations differently because we are concerned with the loss of farmland to nonagricultural uses.

A second, independent inherent difference is that agricultural operations are regulated differently than other operations or businesses. In *Whistle Stop*, the Supreme

Court held Indianapolis could treat bars and casinos differently by imposing different smoking ordinances on them in part because the state already regulated the entities differently by requiring casinos to comply with extensive licensing regulations and air standards. 51 N.E.3d at 200-02. Regulation may be a reason to treat classes differently. *Id.*

Here, the General Assembly chose to treat differently two classes which already possessed distinguishing inherent attributes that require different legislation with respect to members of the class. *See Whistle Stop*, 51 N.E.3d at 201. Agricultural operations are regulated by the state government in ways which other individuals or businesses are not. *See e.g.*, Ind. Code §§ 13-18-10 (confined feeding); 15-18 (dairy products); 15-19 (livestock); 327 IAC 19 (confined feeding). These sections generally regulate a farm's operations to protect the environment and control manure. At its base, Plaintiffs' lawsuit is about manure. Thus, the regulations are an inherent characteristic which is reasonably related to the differing treatment. This, on its own, also is sufficient for the RTFA to satisfy the first prong of *Collins*.

The second *Collins* prong requires any preferential treatment to be equally available to all similarly situated persons. 644 N.E.2d at 80. The alleged preferential treatment here—partial protection from nuisance lawsuits in specific situations—does not violate the second prong. All similarly situated persons (agricultural operations facing nuisance lawsuits for non-negligent farming) are treated the same. As in *Whistle Stop*, the different classes are significantly different. Agricultural operations provide distinctly different goods to the public and are regulated differently by the state

government. Livestock operations must comply with the burdensome requirements of Indiana Code § 13-18-10 and 327 IAC 19. These regulations apply to the Defendants, but not the Plaintiffs. Under this analysis, the treatment is available to similarly situated persons. The *Collins* second prong is not violated. *See Whistle Stop*, 51 N.E.3d at 203. Thus, the RTFA does not violate the Equal Privileges and Immunities provision of the Indiana Constitution.

Plaintiffs also claim it is not fair that a plaintiff could have pursued a nuisance claim when he also was a farmer but not after he has retired and is no longer a "farmer." (App. Br. at 61.) Plaintiffs' argument is based on what they call the "holding" of *Stickdorn v. Zook*, 957 N.E.2d 1014, 1024 n.5 (Ind. Ct. App. 2011), but *Stickdorn* was actually a case about the statute of limitations, not the RTFA. *Id.* RTFA cases decided after *Stickdorn* show that what determines whether the RTFA applies has nothing to do with the occupation of the plaintiff, but rather whether the *injury* is agricultural. Thus, the RTFA did not apply to a claim that a swine virus introduced at one farm caused a nuisance at another swine farm. *See TDM Farms v. Wilhoite Family Farm*, 969 N.E.2d 97, 110 (Ind. Ct. App. 2012). On the other hand, the RTFA did apply when manure smells allegedly caused a nuisance to a residence located on a farmstead. *Parker*, Gibson Sup. Ct. at 5. (App. XII, p. 70), *aff'd on appeal*. What matters is whether the injury is agricultural, not whether the plaintiff claims his occupation is "farmer." Nothing in *TDM Farms* or *Parker* supports the Plaintiffs' novel argument that the RTFA discriminates based upon a plaintiff's occupation.

The Legislature believed its intent behind the RTFA was important enough to include in the actual statute. This Court should defer to that clear legislative intent.

IV. Conclusion.

Our Legislature has identified the preservation and development of agricultural land for the production of food as a crucial public goal. Thus, the Court reads the RTFA with that intention in mind. The Court considers the constitutional challenges in light of the clear legislative intent. The RTFA is an important tool in our state to preserve existing agricultural land and to encourage development on that land to produce food. This Court should affirm the trial court's ruling.

Respectfully submitted,

/s/ Brianna J. Schroeder
Janzen Agricultural Law, LLC
Counsel for Indiana Agricultural Law Foundation, Inc.

/s/ Andrew M. McNeil
Bose McKinney & Evans LLP
Counsel for Indiana Pork Producers Association, Inc.

V. Word Count Certificate.

I verify that this brief contains no more than 7,000 words. I verify that this brief contains exactly 6,897 words, excluding the items listed in Indiana Rule of Appellate Procedure 44(C).

/s/ Brianna J. Schroeder
Janzen Agricultural Law, LLC
Counsel for Indiana Agricultural Law Foundation, Inc.

VI. Certificate of Service.

I certify that on August 17, 2018, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on August 17, 2018, the foregoing document was served upon the following counsel via the IEFS:

Kim E. Ferraro
Samuel Henderson
Hoosier Environmental Council
541 S. Lake St.
Gary IN 46403

Kyle A. Lansberry
Brandon W. Ehrie
Lewis Wagner, LLP
501 Indiana Avenue, Suite 200
Indianapolis IN 46202-6150

Christopher J. Braun
Jonathan P. Emenhiser
Justin A. Allen
Plews, Shadley, Racher & Braun LLP
1346 North Delaware Street
Indianapolis IN 46202

Aaron Craft
Patricia C. McMath
Office of Indiana Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis IN 46204-2770

/s/ Brianna J. Schroeder
Janzen Agricultural Law, LLC
Counsel for Indiana Agricultural Law Foundation, Inc.