

IN THE
INDIANA COURT OF APPEALS

Case No. 18A-PL-00645

MARTIN RICHARD HIMSEL, JANET HIMSEL,)	
ROBERT LANNON, and SUSAN LANNON,)	
)
Appellant-Plaintiffs,)	Appeal from
)
	Hendricks Superior Court #4
)
vs.)	Case No: 32D04-1510-PL-150
SAMUEL T. HIMSEL, CORY M. HIMSEL,)	
CLINTON S. HIMSEL, 4/9 LIVESTOCK LLC,)	The Honorable Mark A. Smith,
and)	Judge
CO-ALLIANCE, INC.,)	
Appellee-Defendants)	

AMICUS BRIEF IN SUPPORT OF REHEARING ON BEHALF OF THE INDIANA FARMERS UNION, FAMILY FARM ACTION, PUBLIC JUSTICE, AND FOOD & WATER WATCH

David C. Van Gilder
Van Gilder & Trzynka, P.C.
436 E Wayne St.
Fort Wayne, IN 46802
(260) 424-8132
Fax: (260) 969-5361
dvangilder@vgtlaw.com

David S. Muraskin
Jessica L. Culpepper
Public Justice, P.C
1620 L Street, N.W., Suite 630
Washington, D.C. 20036
dmuraskin@publicjustice.net

Tarah Heinzen
FOOD & WATER WATCH
1600 P Street NW, Suite 300
Washington, DC 20036
(202) 683-2457
theinzen@fwwatch.org

ATTORNEYS FOR AMICI

Table of Contents

I. STATEMENT OF INTEREST OF AMICUS CURIAE	7
II. SUMMARY OF ARGUMENT	8
III. ARGUMENT	10
A. Industrial Hog Farming Is a Recent Creation That Presents Extreme Risks.	10
<i>i. CAFOs are recent creations.</i>	10
<i>ii. CAFOs contaminate the surrounding air, land, and water in ways traditional farms could not.</i>	12
<i>iii. Recent Studies Establish CAFOs Threaten Human Health.</i>	15
B. Industrial Agricultural Operations Undermine Rural Communities By Giving Control to Corporations, Not Farmers.	17
IV. CONCLUSION.	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Assateague Coastkeeper v. Alan & Kristin Hudson Farm</i> , 727 F. Supp. 2d 433 (D. Md. 2010).....	20
<i>State ex rel. Graham v. Nash Johnson & Sons’ Farms, Inc.</i> , 138 S.E.2d 773 (1964)	20
<i>Himsel v. Himsel</i> , No. 18A-PL-645, 2019 WL 1758411 (Ind. Ct. App. Apr. 22, 2019)	8, 9, 17
<i>Overgaard v. Rock County Bd. Of Comm’rs</i> , 2002 WL 31924522 (D. Minn. Dec. 30, 2002).....	20
<i>Tyson Foods, Inc. v. Stevens</i> , 783 So. 2d 804 (Ala. 2000).....	20
Statutes	
Ind. Code § 32-30-6-9.....	8
Other Authorities	
A.W. Jongbloed & N.P. Lenis, <i>Environmental Concerns About Animal Manures</i> , 76 J. Animal Sci. 2641 (1998)	13
Alan R. Hirsch, <i>Hydrogen sulfide exposure without loss of consciousness: chronic effects in four cases</i> , 18 Toxicology & Indus. Health 51 (2002)	16
Anna Balas et al., <i>A Look At Concentrated Animal Feeding Operations in North Carolina: The Problems with Animal Waste and a Framework to Solve Them</i> , Duke Univ. Bass Connections Animal Waste Mgmt. 3 (Fall 2016).....	14
Bahman Eghball et al., <i>Phosphorus Movement and Adsorption in a Soil Receiving Long-Term Manure and Fertilizer Application</i> , 25 J. Env’tl. Quality 1339 (1996).....	13
Christopher Leonard, <i>The Meat Racket: The Secret Takeover of America’s Food Business</i> (1st ed. 2014)	20
Craig Watts, <i>Under Contract: Farmers and the Fine Print, a brutally honest look at contract poultry</i> , Farm Aid Blog (Jan. 18, 2017)	19

Amicus Brief of Indiana Farmers Union, Family Farm Action,
Public Justice, and Food & Water Watch in Support of Rehearing

Dick Heederik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, 115 *Envtl. Health Persp.* 298 (2007)12

Donald Carr, *Manure From Unregulated Factory Farms Fuels Lake Erie’s Toxic Algae Blooms*, *AgMag* (Apr. 9, 2019)15

Enzo R. Campagnolo et al., *Antimicrobial residues in animal waste and water resources proximal to large-scale swine and poultry feeding operations*, 299 *Sci. Total Env’t* 89 (2002)15

F. Liu et al., *Phosphorus Recovery in Surface Runoff from Swine Lagoon Effluent by Overland Flow*, 26 *J. Envtl. Quality* 995 (1997).....13

Hearing on “H.R. _____, *Farm Regulatory Certainty Act*,” *Before the Subcomm. on Env. of the House Comm. of Energy and Com.*, 115th Cong. 54 (2017) (statement of Lynn Utesch, Founder, Kewaunee Citizens Advocating Responsible Environmental Stewardship)13

Jeffrey J. Reimer, *Vertical Integration in the Pork Industry*, 88 *Amer. J. Agric. Econ.* 234 (2006).....18

JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 *Envtl. Health Perspectives* 309 (2007).....15

Kendall M. Thu, *Public Health Concerns for Neighbors of Large-Scale Swine Production Operations*, 8 *J. Agric. Safety & Health* 175 (2002)15

Lawrence B. Cahoon et al., *Nitrogen and Phosphorus Imports to the Cape Fear and Neuse River Basins to Support Intensive Livestock Production*, 33 *Envtl. Sci. & Tech.* 410 (1999).....13

M.E. Anderson & M.D. Sobsey, *Detection and occurrence of antimicrobially resistant E. coli in groundwater on or near swine farms in eastern North Carolina*, 54 *Water Sci. & Tech.* 211 (2006)14

M. Tajik et al., *Impact of Odor from Industrial Hog Operations on Daily Living Activities*, 18 *New Solutions* 193 (2008)16

Margaret Carrel et al., *Residential proximity to large numbers of swine in feeding operations is associated with increased risk of methicillin-resistant Staphylococcus aureus colonization at time of hospital admission in rural Iowa veterans*, 35 *Infection Control and Hospital Epidemiology* 190 (2014).....14

Maria C. Mirabelli et al., *Asthma Symptoms Among Adolescents Who Attend Public Schools That Are Located Near Confined Swine Feeding Operations*, 118 *Pediatrics* e66 (2006)16

Amicus Brief of Indiana Farmers Union, Family Farm Action,
Public Justice, and Food & Water Watch in Support of Rehearing

Michael F. Thompson, *Major Livestock and Poultry Operations Across Indiana: A Census of CFOs and CAFOs*, InContext vol. 9 (Mar. 2008)11

Michelle B. Nowlin, *Sustainable Production of Swine: Putting Lipstick on a Pig?*, 37 Vt. L. Rev. 1079 (2013).....11

N. C. Swine Odor Task Force, *Options for Managing Odor*, N.C. Agric. Res. Serv. (1995).....14

Niman Ranch Blog, *Niman Ranch Talks About Antibiotic-Free Pork on the Dr. Oz Show*, (Feb. 6, 2018).....13

Philip Wayne Westerman et al., *Swine Manure and Lagoon Effluent Applied to a Temperate Forage Mixture: II. Rainfall Runoff and Soil Chemical Properties*, 16 J. Env'tl. Quality 106 (1987).....13

R. Brent Ross & Peter J. Barry, *Contract Hog Production: A Case Study of Financial Arrangements*, J. of ASFMRA, 17-22 (2005)19

Rachel C. Avery et al., *Odor from Industrial Hog Operations and Mucosal Immune Function in Neighbors*, 59 Archives Env'tl. Health 101 (2004).....16

Shawn G. Gibbs et al., *Isolation of Antibiotic-Resistant Bacteria from the Air Plume Downwind of a Swine Confined or Concentrated Animal Feeding Operation*, 114 Env'tl. Health Persp. 1032 (2006)12

Smithfield Foods, *2013 Integrated Report* (2013).....18

Smithfield Foods, *2015 Sustainability & Financial Report* (2015).....18

Stacy Sneeringer, *Does Animal Feeding Operation Pollution Hurt Public Health? A National Longitudinal Study of Health Externalities Identified by Geographic Shifts in Livestock Production*, 91 Am. J. Agric. Econ. 124 (2009).....16

Tom Philpott, *Fumes from Iowa Hog-Manure Pit Kill Father and Son*, Mother Jones (July 30, 2015)12

U.S. EPA, *Profile of the Agricultural Livestock Production Industry* (2000).....14

USDA Grain Inspection, Packers & Stockyards Admin., *Assessment of the Cattle, Hog and Poultry Industries*, (July 2004)18

USDA Nat'l Agric. Stat. Serv., *Census of Agriculture: 2017 Census Volume 1, Chapter 1: U.S. National Level Data, "Table 23: Hogs and Pigs – Inventory by Type of Producer: 2017"* (2017).....17

U.S. Small Bus. Admin. Off. of Inspector General, *Evaluation Report: Evaluation of SBA 7(a) Loans Made to Poultry Farmers*, Report No. 18-13 (Mar. 6, 2018).....18, 19

Amicus Brief of Indiana Farmers Union, Family Farm Action,
Public Justice, and Food & Water Watch in Support of Rehearing

William D. McBride & Nigel Key, *U.S. Hog Production from 1992-2009:
Technology, Restructuring, and Productivity Growth*, U.S. Dep't of Agric.
Econ. Res. Serv. Rep. No. 158 (Oct. 2013)10, 11, 13, 17

Yelena Ogneva-Himmelberger et al., *CALPUFF and CAFOs: Air Pollution
Modeling and Environmental Justice Analysis in the North Carolina Hog
Industry*, 4 Int. J. Geo-Info. 150 (2015).....16

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Indiana Farmers Union (“IFU”) works to protect and enhance the economic well-being of family farmers. IFU, which currently has approximately 1,000 members, is a voice for farmers who are committed to conserving our state’s natural bounty, whether they are long established or beginning their agricultural journey. IFU advocates for the sustainable production of food, fiber, fuel, and feed. It is committed to representing the interests of Indiana farmers on issues such as quality of life in rural communities, sustainability, competitive markets, monopolies and consolidation, conservation, and the environment. Therefore, IFU is deeply troubled by laws, including the decision of the Court of Appeals, which protect unsustainable (and unsafe) factory farms, and advance the interests of agribusiness over rural communities.

Family Farm Action (“FFA”) is a coalition of family farmers and advocates seeking to protect farming and rural communities from multinational agribusiness monopolies through which powerful corporations increasingly exert control over agriculture, extract wealth from farming communities, and turn farmers into cogs. These monopolies shut down mechanisms for farmers to bring their goods to market independent of the major companies, and then force them to farm on the companies’ terms. FFA promotes polling, research, candidates, and legislation that will reverse this trend. As a result, FFA is very concerned by decisions like that of the Indiana Court of Appeals, which provide another means for industrial agricultural to exploit family farmers and rural America.

Public Justice’s Food Project is the only legal project in the country solely dedicated to reforming industrial animal agriculture into a system that is regenerative, just, humane, and enables independent farmers to thrive. Therefore, Public Justice has a strong interest in the

ability to hold industrial operations, like Appellees-Defendants', accountable for the harms they cause to rural communities, people, and the planet.

Food & Water Watch ("FWW") is a national non-profit organization that champions healthy food and clean water for all by standing up to corporations that put profits before people. Factory farming is a priority issue for FWW and its more than one million members and supporters. FWW is engaged in numerous campaigns to hold the factory farming industry accountable for its adverse impacts on rural communities and the environment. FWW has more than 14,000 members and supporters in Indiana.

II. SUMMARY OF ARGUMENT

The panel decision in *Himsel v. Himsel*, No. 18A-PL-645, 2019 WL 1758411 (Ind. Ct. App. Apr. 22, 2019), turns Indiana's "Right to Farm Act," Ind. Code § 32-30-6-9, on its head, making it a tool to harm rural communities and undermine family farmers. Indeed, the decision rests on two fundamentally false premises that will enable agribusiness to exploit and weaken Indiana's farming communities, an unjust result that should be reconsidered by this Court.

First, the panel decision allows Defendants' massive factory farm, built in 2013, to take advantage of the Right to Farm Act because it concludes, as a matter of law, "[t]he operation would not have been a nuisance at the time the agricultural ... operation began on that locality" in 1941—a statutory prerequisite to invoking the Right to Farm defense, Ind. Code § 32-30-6-9(d)(2). The panel contends that because the new factory farm is sited in a "longstanding agricultural community," which has raised "livestock" for generations, then "[n]one of the Plaintiffs can now be heard to complain" that Defendants' industrial operation—housing up to 8,000 hogs at a time—moved next door. *Himsel*, 2019 WL 1758411, at *6. This conclusion fails

to understand traditional family farms are wholly unlike the industrial animal production factories Defendants operate.

Defendants' operation would never have been anticipated when Plaintiffs moved to their agricultural community nearly 100 years ago and has recently been established to harm neighbors' health, livelihood, and property values. "Concentrated Animal Feeding Operations" ("CAFOs"), like Defendants', are a creation of the last few decades. In that span, animal agriculture has largely transformed from diversified, pasture-based farms, to specialized endeavors, where the entire "farm" is a series of buildings designed to contain—for their whole lives—more animals and waste than the land can sustain.

As CAFOs proliferated, researchers began to analyze their effects. In recent years they confirmed CAFOs have extreme impacts, including making nearby residents ill, harming their quality of life, and degrading the value of their investments in their community—just like the Defendants' CAFO has done to Plaintiffs, the Himsels and Lannons, in this case. To hold that residents would not have regarded Defendants' CAFO as a nuisance in the 1940s, when such an industrialized hog factory would have been unimaginable, defies common sense. It is particularly illogical because it is only with these recent studies that communities have been able to connect their injuries to factory farming, substantiating that CAFOs like Defendants' are nuisances.

Second, the panel insists its expansive interpretation of the Right to Farm Act is the only way to protect communities' "rural character." *Himself*, 2019 WL 1758411, at *6. It suggests that if the Himsels and Lannons can proceed with their litigation the "senses" of "nonagricultural land" operators would dictate farming practice. *Id.* at *5 (internal quotation marks omitted). In actuality, however, factory farms and their impacts are a product of corporate greed—not necessity, or farmers' judgment. CAFOs, including Defendants', are not designed or managed by

farmers, but by vertically-integrated companies that own the hogs and control the practices. These companies dictate how contract “growers” (the former farmers) behave, mandating operations that diminish, rather than preserve, rural communities and true, independent farmers. By immunizing industrial facilities from liability, the panel decision further tilts the scales in favor of such corporations, eroding Indiana’s “rural character.” The decision allows one, harmful system to externalize its costs, prevents existing rural communities from recovering for their injuries, and wrongly picks winners and losers—picking the wrong winners and losers.

III. ARGUMENT

A. Industrial Hog Farming Is a Recent Creation That Presents Extreme Risks.

Defendants’ 8,000 head hog facility represents a new way to raise hogs that threatens agricultural communities in ways no one would have anticipated or accepted, particularly in the 1940s.

i. CAFOs are recent creations.

As the United States Department of Agriculture (“USDA”) explains, the hog industry was “[o]nce dominated by many small operations that practiced both crop and hog farming[.]”¹ The farmers fed the hogs with feed grown “onsite and then sold their hogs at local markets.”²

The CAFO model has taken over hog production in the last twenty-five years, with the development of “specialized labor” focused exclusively on confined animal production, and new pharmaceuticals and housing models that allow the animals to survive the confinement.³

¹ William D. McBride & Nigel Key, *U.S. Hog Production from 1992-2009: Technology, Restructuring, and Productivity Growth*, U.S. Dep’t of Agric. Econ. Res. Serv. Rep. No. 158, (Oct. 2013), at 1.

² *Id.* at 5.

³ *Id.*

Between 1992 and 2009, “[t]he average hog farm grew from 945 head of hogs sold or removed under contract ... to 8,389 head[.]”⁴

Indiana is no exception. “[T]he trend in [] permits is clearly away from small diverse farms toward the creation of large pig operations.”⁵ Between 2004 and 2006 alone, the number of hogs maintained in Indiana confinement facilities (rather than on pasture) increased approximately five-fold.⁶ USDA, which measures these trends by region, explained that between 1998 and 2004, “Heartland [hog] farms doubled in size” and, from 2004 to 2009, their growth rate was “much faster” than that of other regions.⁷

Given the number of animals the industrial-sized hog factories raise, even limited outdoor access for the hogs is not viable. With present-day CAFOs, “[t]ypically, the animals spend the duration of their lives in” a “long metal building[.]”⁸ The sole focus is “to facilitate rapid growth and shorten the time from birth to slaughter,” through limiting movement, increasing consumption, and “the regular application of antibiotics to suppress disease and accelerate growth.”⁹

The fact that in the 1940s when the land where the CAFO now sits may have raised “livestock” misses the point: in recent years, traditional farms have been replaced by factory confinement facilities, upending any notion of what kind of livestock “farm” could conceivably appear in a rural community.

⁴ *Id.* at iii.

⁵ Michael F. Thompson, *Major Livestock and Poultry Operations Across Indiana: A Census of CFOs and CAFOs*, InContext vol. 9, Mar. 2008, at 2.

⁶ *Id.* at 4.

⁷ McBride & Key, *supra*, at 30.

⁸ Michelle B. Nowlin, *Sustainable Production of Swine: Putting Lipstick on a Pig?*, 37 Vt. L. Rev. 1079, 1084 (2013).

⁹ *Id.*

- ii. *CAFOs contaminate the surrounding air, land, and water in ways traditional farms could not.*

The CAFO model brings with it toxic conditions that simply did not (and would not) exist with animals raised on traditional, diversified farms. Indeed, through polluting the air, land, and water, CAFOs contaminate their communities, not just their own property, harming others' livelihoods, as well as day-to-day enjoyment of their surroundings.

The gases produced by CAFOs' massive amounts of manure are so noxious numerous workers have died.¹⁰ As a result, CAFOs employ "giant fans" to ventilate the pollution away from the animals and workers,¹¹ which pushes the mix—containing ammonia, hydrogen sulfide, particulates, and carbon dioxide—into the surrounding countryside.¹² This is consistent with the evidence presented by the Himsels and Lannons' expert, who found unhealthy levels of ammonia on their properties from the Defendants' CAFO. Appellants' Br. 14-15.

Moreover, because hog CAFOs use preventive antibiotics to keep illnesses from spreading through their close quarters, they also generate and emit multidrug-antibiotic-resistant bacteria. Multiple types of antibiotic resistances can be found surrounding a hog CAFO.¹³ In

¹⁰ See Tom Philpott, *Fumes from Iowa Hog-Manure Pit Kill Father and Son*, Mother Jones (July 30, 2015), <https://www.motherjones.com/food/2015/07/hog-cafo-fumes-deadly/>.

¹¹ *Id.*

¹² Dick Heederik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, 115 *Envtl. Health Persp.* 298 (2007).

¹³ See Shawn G. Gibbs et al., *Isolation of Antibiotic-Resistant Bacteria from the Air Plume Downwind of a Swine Confined or Concentrated Animal Feeding Operation*, 114 *Envtl. Health Persp.* 1032, 1036 (2006).

contrast, such pollutants are rarely associated with traditional, pasture-based hog farming,¹⁴ and, in fact, make pasture-based farming more difficult because of the risks from exposure.¹⁵

Further, as USDA recognizes, raising more animals indoors results in “an increasing volume of manure [production]” with “less cropland per animal.”¹⁶ This creates a waste disposal problem not present with pasture production, where animals naturally incorporate their manure into the land. “When too much manure is applied to crop[land], there is a greater chance that manure nutrients (nitrogen, phosphorus, and potassium) and pathogens will flow into ground and surface water. These [] contaminants can harm aquatic life and degrade drinking water.”¹⁷ Indeed, numerous studies have found that even when waste from hog CAFOs is intended to function as a fertilizer, because of the volume of waste being applied, the chemicals in the manure are not absorbed by crops, but flow into surrounding water supplies, frequently at dangerous levels.¹⁸

¹⁴ See, e.g., *Niman Ranch Talks About Antibiotic-Free Pork on the Dr. Oz Show*, The Niman Ranch Blog (Feb. 6, 2018), <https://www.nimanranch.com/niman-ranch-talks-about-antibiotic-free-pork-on-the-dr-oz-show/>.

¹⁵ See, e.g., *Hearing on “H.R. ___, Farm Regulatory Certainty Act,” Before the Subcomm. on Env. of the House Comm. of Energy and Com.*, 115th Cong. (2017) 54 (statement of Lynn Utesch, Founder, Kewaunee Citizens Advocating Responsible Environmental Stewardship) (discussing how CAFO land application contaminated farmers’ well water with cryptosporidium, causing calf deaths at downstream farms).

¹⁶ McBride & Key, *supra*, at 35.

¹⁷ *Id.* at 36.

¹⁸ See Lawrence B. Cahoon et al., *Nitrogen and Phosphorus Imports to the Cape Fear and Neuse River Basins to Support Intensive Livestock Production*, 33 *Envtl. Sci. & Tech.* 410 (1999); see also A.W. Jongbloed & N.P. Lenis, *Environmental Concerns About Animal Manures*, 76 *J. Animal Sci.* 2641 (1998); F. Liu et al., *Phosphorus Recovery in Surface Runoff from Swine Lagoon Effluent by Overland Flow*, 26 *J. Env’tl. Quality* 995 (1997); Bahman Eghball et al., *Phosphorus Movement and Adsorption in a Soil Receiving Long-Term Manure and Fertilizer Application*, 25 *J. Env’tl. Quality* 1339 (1996); Philip Wayne Westerman et al., *Swine Manure and Lagoon Effluent Applied to a Temperate Forage Mixture: II. Rainfall Runoff and Soil Chemical Properties*, 16 *J. Env’tl. Quality* 106 (1987).

What is more, because animals do not deposit the manure as they forage, factory farms must maintain large quantities of manure prior to its disposal. “The floor of the swine building is made of concrete with slats, allowing the urine and feces excreted by the hogs to fall into an underground storage pit below the barn. The hog waste is collected and stored through different systems, including below-floor slurry storage (deep pit), underground slurry storage, anaerobic lagoons, and oxidation pits.¹⁹ Depending on the design of the CAFO, the waste either remains in the pit for months before it is scraped, out or is flushed out with water throughout the day.²⁰ No matter how the waste is stored, additional contaminants and bacteria are released during volatilization from decomposing waste.²¹ Research in Iowa found the risk of contracting methicillin-resistant *Staphylococcus aureus* (“MRSA”) was nearly triple for those who lived within a mile of confinements of 2,500 hogs or more.²² Consistent with this research, antibiotic resistant *E. coli* have been found near hog manure storage facilities and application fields.²³

Of particular concern to rural communities and independent farmers, research also establishes CAFOs diminish the productivity of the surrounding land. The seepage and spills

¹⁹U.S. EPA, *Profile of the Agricultural Livestock Production Industry* at 49 (2000), <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=50000EBO.TXT>.

²⁰ Anna Balas et al., *A Look At Concentrated Animal Feeding Operations in North Carolina: The Problems with Animal Waste and a Framework to Solve Them*, Duke Univ. Bass Connections Animal Waste Mgmt. 3 (Fall 2016), https://sustainability.duke.edu/sites/default/files/cafos_nc_paper.pdf.

²¹ See, e.g., North Carolina Swine Odor Task Force, *Options for Managing Odor*, N.C. Agric. Res. Serv.(1995), available at <http://www.mtcnet.net/~jdhogg/ozone/odor/swineodr.html>.

²² See Margaret Carrel et al., *Residential proximity to large numbers of swine in feeding operations is associated with increased risk of methicillin-resistant *Staphylococcus aureus* colonization at time of hospital admission in rural Iowa veterans*, 35 *Infection Control and Hospital Epidemiology* 190 (2014).

²³ See, e.g., M.E. Anderson & M.D. Sobsey, *Detection and occurrence of antimicrobially resistant *E. coli* in groundwater on or near swine farms in eastern North Carolina*, 54 *Water Sci. & Tech.* 211 (2006).

from liquid manure storage and land disposal can lead to antimicrobial residues²⁴ and toxic algae blooms,²⁵ rendering harmful or unusable the water sources on which other farms rely. Again, none of this is true with diversified farms, which only raise the number of animals they can feed from the crops they grow, preventing the need for antibiotics, limiting the quantities of manure, and ensuring what manure they produce is truly functioning as a fertilizer, rather than running off unused.

iii. Recent Studies Establish CAFOs Threaten Human Health.

Starting in the late 1990s, scientists began examining the public health consequences of living near factory farms and their pollutants, confirming CAFOs endanger people in addition to the environment. The first controlled study, published in 1997, determined that neighbors within two miles of a 4,000 hog facility “reported significantly higher rates” of coughing, sputum production, breath shortness, chest tightness, wheezing, nausea, weakness, dizziness, headaches, plugged ears, runny nose, scratchy throat, and burning eyes.²⁶ These symptoms were similar to what has been seen among workers who are in the facilities day-to-day.²⁷ These findings are also consistent with the adverse health symptoms suffered by the Himsels and Lannons. Appellants’ Br. 14-15.

²⁴ See, e.g., Enzo R. Campagnolo et al., *Antimicrobial residues in animal waste and water resources proximal to large-scale swine and poultry feeding operations*, 299 *Sci. Total Env't* 89 (2002).

²⁵ See e.g., Donald Carr, *Manure From Unregulated Factory Farms Fuels Lake Erie’s Toxic Algae Blooms*, *AgMag* (Apr. 9, 2019), <https://www.ewg.org/agmag/2019/03/manure-unregulated-factory-farms-fuels-lake-erie-s-toxic-algae-blooms>; JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 *Envtl. Health Perspectives* 309 (2007).

²⁶ Kendall M. Thu, *Public Health Concerns for Neighbors of Large-Scale Swine Production Operations*, 8 *J. Agric. Safety & Health* 175, 179 (2002) (summarizing author’s earlier study).

²⁷ See *id.*

In the 2000s, research determined neighbors of hog CAFOs suffered from reduced immune function,²⁸ “air-based pollution in the proximity” of factory farms, including hog facilities, and increased rates of infant mortality.²⁹ Studies also establish hydrogen sulfide, which is generated by the massive amounts of waste CAFOs store, produces neurological deficits, even at low levels.³⁰

More recently, a study determined that children attending rural schools within three miles of hog CAFOs suffer significantly increased rates of asthma symptoms, comparable to those seen among individuals exposed to second-hand smoke.³¹ Downwind homes have also been shown to have ammonia levels three times the average, exceeding established acceptable risk levels.³² Of course, all of these effects from hog CAFOs not only reduce the lifespan of rural residents, but directly limit surrounding farmers’ productivity by interfering with their ability to work outside.³³

* * *

The science is undeniable. To hold that Defendants’ industrial-scale hog facility is protected by the Right to Farm Act because in the 1940s people in the area raised livestock is

²⁸ See, e.g., Rachel C. Avery et al., *Odor from Industrial Hog Operations and Mucosal Immune Function in Neighbors*, 59 Archives Envtl. Health 101 (2004).

²⁹ Stacy Sneeringer, *Does Animal Feeding Operation Pollution Hurt Public Health? A National Longitudinal Study of Health Externalities Identified by Geographic Shifts in Livestock Production*, 91 Am. J. Agric. Econ. 124 (2009).

³⁰ See, e.g., Alan R. Hirsch, *Hydrogen sulfide exposure without loss of consciousness: chronic effects in four cases*, 18 Toxicology & Indus. Health 51 (2002).

³¹ See Maria C. Mirabelli et al., *Asthma Symptoms Among Adolescents Who Attend Public Schools That Are Located Near Confined Swine Feeding Operations*, 118 Pediatrics e66, e72 (2006).

³² See Yelena Ogneva-Himmelberger et al., *CALPUFF and CAFOs: Air Pollution Modeling and Environmental Justice Analysis in the North Carolina Hog Industry*, 4 Int. J. Geo-Info. 150 (2015).

³³ See, e.g., M. Tajik et al., *Impact of Odor from Industrial Hog Operations on Daily Living Activities*, 18 New Solutions 193 (2008).

akin to saying the Himsels and Lannons must accept the presence of a nuclear reactor because when they moved to the area someone generated energy with a windmill. There is absolutely no basis to believe that in 1941 a neighbor would not have regarded 8,000 confined hogs and their waste as a nuisance. Quite the contrary, given what we now know, 1940s farmers should and would fear a CAFO next door, as it would strip them of their use and enjoyment of their land, just as CAFOs do today.

**B. Industrial Agricultural Operations Undermine Rural Communities By
Giving Control to Corporations, Not Farmers.**

A particularly cruel irony of the panel decision is its suggestion that by preventing the Himsels and Lannons from proceeding, it effectuates the Right to Farm Act’s goal of “reduc[ing] the loss to the state of its agricultural resources.” *Himself*, 2019 WL 1758411, at *10 (quotation marks omitted). Hardly. The vertically-integrated industrial agriculture system that produces CAFOs prevents farmers from directing their practices, and it is this loss of independence and autonomy that results in the loss of “agricultural resources” in rural communities.

USDA explains that with the rise of CAFOs, “U.S. hog farms declined in number by more than 70 percent over the past two decades while hog inventories remained stable.”³⁴ “Full integration,” in which vertically-consolidated companies (“integrators”) own and control not just the slaughterhouses, processing plants, and inputs for the farm, but also the actual farms now accounts for 23 percent of domestic hog production.³⁵

³⁴ McBride & Key, *supra*, at iii.

³⁵ See USDA Nat’l Agric. Stat. Serv., *Census of Agriculture: 2017 Census Volume 1, Chapter 1: U.S. National Level Data*, “Table 23: Hogs and Pigs – Inventory by Type of Producer: 2017” (2017), available at https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0020_0023.pdf.

Moreover, the “four-firm [c]oncentration” in the hog sector, or the percentage of hogs slaughtered by the top four companies, doubled from 32 percent to 64 percent in less than twenty years, from 1985 to 2004.³⁶ The increase in industry consolidation means dwindling options for independent hog farmers trying to get their hogs to market.

Making matters worse, integrators achieve cost savings by siting their contract facilities near their slaughterhouses.³⁷ This means an individual integrator tends to dominate a geographic area—often providing it anticompetitive-monopsony power. This further reduces independent farmers’ ability to negotiate access to market or prices for their animals.

The people under contract to grow hogs for the integrators are no longer farmers. The contract grower owns the land, houses, and the waste the animals produce, but the integrator maintains ownership of the hogs throughout their lives.³⁸ As a result, the company is able to impose a laundry list of requirements on its “growers,” dictating how the animals are fed, and medicated, how the animal containment facilities are ventilated, and how waste and dead bodies are stored and disposed of.³⁹ That is exactly the situation in this case. Appellants’ Br. 10-11.

³⁶ USDA Grain Inspection, Packers & Stockyards Admin., *Assessment of the Cattle, Hog and Poultry Industries*, (July 2004), at 10.

³⁷ See, e.g., *2015 Sustainability & Financial Report*, Smithfield Foods, 66 (2015), <https://www.smithfieldfoods.com/pdf/past-reports/smithfield-2015-integrated-report.pdf>.

³⁸ See, e.g., Jeffrey J. Reimer, *Vertical Integration in the Pork Industry*, 88 *Amer. J. Agric. Econ.* 234, 240 (2006).

³⁹ See, e.g., *See Evaluation Report: Evaluation of SBA 7(a) Loans Made to Poultry Farmers*, SBA Off. Insp. Gen., Rep. No. 18-13 (2018), available at <https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13.pdf>; *2013 Integrated Report*, Smithfield Foods, 17 (2013), http://admin.csrwire.com/system/report_pdfs/1332/original/smithfield-integrated-report2013_11_.pdf.

Nonetheless, growers have to finance the houses to meet the company’s specifications.⁴⁰ Houses can cost hundreds of thousands of dollars. This debt further places the grower at the integrator’s mercy and forces them to follow corporate standard operating procedures, even if it is not how they would exercise their own judgment as farmers.⁴¹ Contract growers have stated, in fact, the requirements demanded by integrators are *not* how they would choose to raise animals.⁴²

A federal agency recently concluded the integrator-grower relationship involves such comprehensive control by the integrator that growers must be characterized as employees rather than independent businesses. In 2018, the Small Business Administration’s (“SBA”) Office of Inspector General reviewed the agency’s “7(a) Loans” to poultry farmers, the agency’s primary small business loan program, guaranteeing billions of dollars in loans for independent businesses.⁴³ SBA’s Inspector General found poultry companies “exercised ... comprehensive control over the growers ... through a series of contractual restrictions, management agreements, oversight inspections, and market controls.”⁴⁴ Therefore, poultry growers had essentially no ability to “operate their business independent of integrator mandates.”⁴⁵ Accordingly, poultry growers did not meet SBA’s loan eligibility requirements because they were not independent operators.⁴⁶ It is unsurprising Defendants’ operation here was shown to be subject to similar

⁴⁰ See, e.g., R. Brent Ross & Peter J. Barry, *Contract Hog Production: A Case Study of Financial Arrangements*, J. of ASFMRA, 17-22 (2005).

⁴¹ See *id.*

⁴² See Craig Watts, *Under Contract: Farmers and the Fine Print, a brutally honest look at contract poultry*, Farm Aid Blog (Jan. 18, 2017), <https://www.farmaid.org/issues/industrial-agriculture/under-contract-farmers-fine-print-honest-look-contract-poultry/>.

⁴³ See *Eval. Rep.*, *supra*.

⁴⁴ *Id.* at Exec. Summ.

⁴⁵ *Id.*

⁴⁶ See *id.*

corporate control, Appellants' Br. 10-11. The development of hog CAFOs has been referred to as the "chickenization" of the hog industry.⁴⁷

Elsewhere, the law has already incorporated the fact that integrators turn farmers into laborers who work for corporate executives. The North Carolina Supreme Court explained, "the owners of the houses furnish the water, fuel, electricity, and labor necessary to raise the birds. [The integrator] provides the chicks, feed, medication, litter, and feed bins." *State ex rel. Graham v. Nash Johnson & Sons' Farms, Inc.*, 138 S.E.2d 773, 774 (1964). The company's other "employees regularly supervise all grow-out operations, including the labor of the owners of the houses." *Id.* at 776. "The farmer's compensation" is not based on his efficiency, but the integrators' rules, and "[a]fter each flock is marketed, [the integrator] decides whether to entrust the farmer with another." *Id.* at 774. Therefore, growers must be regarded as employees, not independent contractors. *See id.*

Numerous courts have also concluded integrators should be liable for the torts of contract operations because integrators bring about the harm. *See, e.g., Overgaard v. Rock County Bd. Of Comm'rs*, 2002 WL 31924522, at *3 (D. Minn. Dec. 30, 2002); *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804, 809 (Ala. 2000); *see also Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442-43 (D. Md. 2010).

In sum, in insulating Defendants' CAFO from liability for the harm it is causing, the panel has not protected Indiana's "agricultural resources," but hastened their demise. If CAFOs can proliferate without concern for their effects on others, the concentration that has already reduced the number of farms and farmers will drive more independents from the market. The "farmers" who are left will not be able to farm consistent with the values of their community,

⁴⁷ Christopher Leonard, *The Meat Racket: The Secret Takeover of America's Food Business* 167-169 (1st ed. 2014).

because they will be subject to the complete control of a corporation beholden only to its shareholders. Contrary to what the panel believed its decision was supporting, this does not protect Indiana's "rural character."

IV. CONCLUSION.

For the foregoing reasons, the panel decision should be vacated and reheard.

May 22, 2019

Respectfully Submitted,

/s/ David C. Van Gilder
David C. Van Gilder
Van Gilder & Trzynka, P.C.
436 E. Wayne St.
Fort Wayne, IN 46802
(260) 424-8132
Fax: (260) 969-5361
dvangilder@vgtlaw.com

David S. Muraskin
Jessica L. Culpepper
Public Justice, P.C
1620 L Street, N.W., Suite 630
Washington, D.C. 20036
(202) 861-5245
dmuraskin@publicjustice.net

Tarah Heinzen
FOOD & WATER WATCH
1600 P Street NW, Suite 300
Washington, DC 20036
(202) 683-2457
theinzen@fwwatch.org

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 4200 words not counting the items excluded under Rule 44(C) as determined by the Microsoft Word program I used for this brief.

May 22, 2019

/s/ David C. Van Gilder
David C. Van Gilder
Van Gilder & Trzynka, P.C.
436 E Wayne St.
Fort Wayne, IN 46802
(260) 424-8132
Fax: (260) 969-5361
dvangilder@vgtlaw.com

Amicus Brief of Indiana Farmers Union, Family Farm Action,
Public Justice, and Food & Water Watch in Support of Rehearing

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Amicus Brief was delivered this 22nd day of May, 2019, to the following persons, via the Court's E-Filing System:

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

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

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

Kim E. Ferraro (#27102-64)
Hoosier Environmental Council
541 S. Lake St.
Gary, Indiana 46403
Phone: 219/464-0104
Email: kferraro@hecweb.org

Nicholas C. Huang, Attorney
HARRISON & MOBERLY, LLP
10 West Market Street, Suite 700
Indianapolis, Indiana 46204

Martha R. Lehman
Smith Amundsen, LLC
Capital Center, South Tower
201 North Illinois Street, Suite 1400
Indianapolis, Indiana 46204

Todd J. Janzen
Brianna J. Schroeder
Janzen Agricultural Law, LLC
8425 Keystone Crossing, Suite 111
Indianapolis, Indiana 46240

Daniel P. McNerny
Andrew M. McNeil
Bose McKinney & Evans, LLP
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204

Gregory E. Steuerwald
Graham T. Youngs
Steuerwald, Hannon & Witham, LLP
106 North Washington Street
P.O. Box 503
Danville, Indiana 46122

Warren Mathies,
1044 N. Eskew Road
Boonville, IN. 47601
812-897-5100

/s/ David C. Van Gilder
David C. Van Gilder