IN THE
INDIANA SUPREME COURT

No. _____

Court of Appeals Cause No. 18A-PL-00645

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

APPELLANTS' PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

A. Is the Indiana Court of Appeals' interpretation of Indiana's Right to Farm Act, Ind. Code § 32-30-6-9 ("RTFA"), contrary to its plain language and intended scope?

B. Did the Indiana Court of Appeals fail to follow Indiana's summary judgment standard?

C. Is the Indiana Court of Appeals' RTFA interpretation unconstitutional as applied to the facts of this case?

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APPELLANTS' PETITION TO TRANSFER

I. BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER[1]

This lawsuit arose from the decision of Appellees ("CAFO Operators") to build and operate an 8,000 hog concentrated animal feeding operation ("CAFO") upwind and closer to the Appellees' ("Himsels and Lannons") homes than the livestock industry's standards and practices dictate, and knowing that doing so would cause the very harm it is causing to the Himsels and Lannons. (App. VI:161-168). The CAFO Operators were not concerned about the CAFO's impacts to neighbors because they believed Indiana's RTFA would protect them from *all* tort

[1] Pursuant to Indiana Appellate Rule 57(G)(3), the Himsels and Lannons incorporate the extensive background of proceedings before the trial court as set forth in Appellants' Brief at pp. 8-17 and 20-21.

liability as long as they complied with regulatory requirements. (App.VIII:44-49, 62, 90, 109) The Court of Appeals agreed with that view. *Himsel v. Himsel*, 122 N.E.3d 935, 944-945, 950 (Ind. Ct. App. 2019), *rehearing denied* by *Himsel v. Himsel,* 2019 Ind. App. LEXIS 314 (Ind. Ct. App., July 12, 2019) (Judge Tavitas dissenting).

The CAFO Operators' regulatory compliance aside,[2] air testing at the Himsels and Lannons' homes found elevated levels of ammonia and volatile fatty acids from the CAFO. (App. VI:181-189) Scientific evidence and testimony of a Ph.D. in biochemistry and environmental toxicology from John Hopkins University, confirmed that these noxious emissions are "physical" chemical compounds (App. VI: 174-195) and the cause of the Himsels and Lannons' complaints of burning noses, throats and eyes, vomiting and gagging, experiencing the "smell of death," and other conditions they never endured prior to the CAFO. (App. V:124-125, 144; VI:79, 86, 88, 96; VII:140, 152, 170-171, 174-175; VIII:11) The Court of Appeals acknowledged that the Himsels and Lannons have suffered substantial property value losses—49.5% and 60%, respectively—as a result of the CAFO (VI:109-124), and that their "property rights are clearly affected." *Id.* at 948. Even so, the court held that the RTFA bars any remedy for those losses. *Id.* at 945-946, 950.

The Himsels and Lannons petitioned for rehearing asking the Appeals Court to reconsider its expansive reading of the RTFA. Several public interest organizations, and a group of law professors submitted *amici curiae* briefs in support. The CAFO Operators and their *amici* filed opposition briefs. The Court of Appeals denied rehearing, with Judge Tavitas dissenting. *Himsel,* 2019 Ind. App. LEXIS 314.

II. ARGUMENT

A. The Court of Appeals has so significantly departed from accepted law and practice, and

[2] Applicable environmental regulations do not limit CAFO air emissions. (App. VII:54-55)

has sanctioned such a departure by the trial court as to warrant the exercise of Supreme Court jurisdiction.

The RTFA provides agricultural operations with an affirmative defense to nuisance liability only when certain conditions are met; namely, that the nuisance is not negligently caused, and the nuisance-causing form of the operation would not have been a nuisance had it existed when the operation began. Ind. Code § 32-30-6-9(a) and (d)(2). (*See also* Appellants' Br. at 21-26). And, because the RTFA is a statute in derogation of the common law, its terms are to be strictly construed against the party seeking its protection. *Smith v. Dunn Hosp. Grp. Manager, Inc.*, 61 N.E.3d 1271, 1274 (Ind. Ct. App. 2016).

The Court of Appeals abandoned this established rule of statutory construction to conclude that the RTFA provides sweeping immunity not only for nuisance, but negligence and trespass as well. As discussed below, the court's ruling has no foundation in the RTFA's plain language, is contrary to fundamental principles of tort and administrative law, fails to hold the CAFO Operators to their summary judgment burden, and is unconstitutional. Accordingly, this Court should accept transfer.

1. The RTFA Does Not Immunize Agricultural Operations From Negligence and Trespass Liability

The Appeals Court affirmed summary judgment on the Himsels and Lannons' negligence and trespass claims concluding that holding otherwise would "create an end run around the protections of the RTFA." *Himsel,* 122 N.E.3d at 945, 950. However, it is the court's ruling that fails to give effect to the RTFA's intent: to "limit[] the circumstances under which agricultural operations may be deemed to be a nuisance." Ind. Code § 32-30-6-9(b).

Claims for nuisance, negligence and trespass are distinct causes of action, and analyzed separately even when they arise from the same facts. *See, e.g., KB Home Indiana Inc. v.*

Rockville TBD Corp., 928 N.E.2d 297, 304-309 (Ind. Ct. App. 2010). Nuisance law protects the right to reasonably use property without interference. *Indiana Motorcycle Ass'n v. Hudson*, 399 N.E.2d 775, 778 (Ind. Ct. App. 1980). Trespass protects the right to exclusively possess property. *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999). Both trespass and nuisance may be deliberate, negligent, or an unintended byproduct of an intentional act. *See e.g. Bonewitz v. Parker*, 912 N.E.2d 378, 380, 384 (Ind. Ct. App. 2009); *Hawke v. Maus*, 226 N.E.2d 713, 717 (Ind. Ct. App. 1967). In contrast, liability in negligence depends not on the kind of harm caused, but whether reasonable care was used. *Harradon v. Schlamadinger*, 913 N.E.2d 297, 300 (Ind. Ct. App. 2009).

When interpreting a statute, a court is to be "mindful of both what it 'does say' and what it 'does not say.'" *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016). The RTFA has nothing to say about "limiting the circumstances" under which an agricultural operation can be held liable for negligence or trespass. Instead, the RTFA states that its protections do not apply to nuisances that are negligently caused. Ind. Code § 32-30-6-9(a). Furthermore, the Court of Appeals' policy justification is out of place when there is no ambiguity in the law itself. *Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016); *Miller v. Town Bd. of Sellersburg*, 88 N.E.3d 217, 218 (Ind. Ct. App. 2017).

The Appeals Court relied on a Texas case holding that Texas' RTFA bars trespass claims. *Himsel,* 122 N.E.3d at 945. But Texas' unique RTFA has no negligence exception like Indiana's and has provisions that protect agricultural operations from all civil liability in some circumstances. *See* Tex. Agric. Code Ann. § 251.006(a). Moreover, a nuisance in Texas is defined to include a physical invasion of property and, therefore, includes trespass. *Ehler v. LVDVD, L.C.*, 319 S.W.3d 817, 823 (Tex. App. 2010). Conversely, Indiana defines nuisance as

an interference with "the comfortable enjoyment of life or property" and, therefore, does not include trespass. Ind. Code § 32-30-6-6.

Indiana's RTFA was amended in 2005. *See* Ind. P.L. 23-2005. At that time, it had been a decade since the court in *Lever Bros. Co. v. Langdoc* held that evidence of invasion by noxious materials could give rise to actions in nuisance, negligence, and trespass. 655 N.E.2d 577, 583 (Ind. Ct. App. 1995). Yet the Legislature still limited the RTFA's application to nuisance. Had it intended for the RTFA to bar tort claims beyond nuisance, it would have had to do so explicitly. *Smith,* 61 N.E.3d at 1274 ("when the legislature enacts a statute in derogation of common law, [courts] presume [it] is aware of the common law, and does not intend to make any changes beyond what is declared in express terms or by unmistakable implication"). The Court of Appeals' decision breaks with this well-established law.

2. The RTFA Does Not Require a Plaintiff to Exhaust Administrative Remedies[3]

The Appeals Court held that the Himsels and Lannons' "nuisance claim fails as a matter of law" under the RTFA, in part, because they failed to appeal the CAFO's zoning and regulatory approvals. *Himsel*, 122 N.E.3d at 944. Nowhere in the plain text of the RTFA is there a requirement to exhaust administrative remedies. Moreover, the Court's ruling breaks with established Indiana law.

a. Courts decide tort claims, not administrative agencies

[3] The CAFO Operators accuse the Himsels and Lannons of creating a "strawman argument" on this issue and claim they "never argued that the Plaintiffs' tort claims are barred by the doctrine of administrative exhaustion." (Resp. Br. to Rehearing Pet. at 19, FN 8). Yet, the CAFO Operators asserted an affirmative defense and counter-sued the Himsels and Lannons for "frivolously" pursuing tort claims without exhausting administrative remedies. (App. IX:37-44) By renouncing their own counterclaim, the CAFO Operators appear to understand just how untenable their argument and Court of Appeals' ruling is.

"[A] plaintiff raising a common law negligence claim need not exhaust administrative remedies." *S.E. Ind. Nat. Gas Co. v. Ingram,* 617 N.E.2d 943, 949 (Ind. Ct. App. 1993). The reason: courts decide tort claims, not administrative agencies. *Id.* at 950. As such, "questions of duty, breach of duty, causation and injury have traditionally fallen within the competence of the judiciary and its fact-finding jury" and "[d]eference is not granted [to an] agency's legal conclusion . . . because regardless of the facts and law found by the agency, neither the jury nor the court will be bound by the [agency's] determinations." *Id.* Without a doubt, the CAFO's zoning and IDEM approvals decided issues of zoning and environmental law only. They did not adjudicate any aspect of the Himsels and Lannons' tort claims.

And, contrary to the Court of Appeals' conclusion that pursuing administrative appeals would have provided the Himsels and Lannons with "ample due process," *Himsel*, 122 N.E.3d at 944, such appeals cannot provide an award of damages and are, therefore, "no remedy at all for a common law tort." *S. E. Ind. Nat. Gas Co. v. Ingram,* 617 N.E. 2d at 950. Thus, the court's ruling allows a county and state agency to decide this case, thereby impairing "the very substance of [the] right to jury trial protected by the Indiana Constitution." *Id.* at 951.

b. The RTFA does not provide a per se defense to negligence based on regulatory compliance

Similar to its unfounded exhaustion rule, the Appeals Court held that the CAFO Operators' compliance with regulations demonstrates that the CAFO is not negligently operated, which would otherwise remove the RTFA's protection. *Himsel,*122 N.E.3d at 944-945. The problem with this conclusion is that it requires a showing that the RTFA limits the scope of an agricultural operator's duty of care to regulatory compliance, and no such showing has been or could be made.

Specifically, "[d]uties which may be the basis of a negligence action may arise by statute or by operation of law." *S. E. Ind. Nat. Gas,* 617 N.E.2d at 951. In Indiana, those who want to operate CAFOs have a statutory duty to comply with applicable regulations. But they also have a common law duty to use due care. *Id.* at 953 ("the law imposes but one common law duty and that duty is to use due care [which] . . . is the same for all relations, without regard to the facts of the case").

Whether due care is exercised is distinct from whether statutory requirements are met. *S. E. Ind. Nat. Gas Co. v. Ingram*, 617 N.E.2d at 950 ("the test of reasonable care aris[es] from common law" and is "a wholly distinct standard dependent largely upon the circumstances of the case and upon what a jury may decide a reasonably prudent person would have done under the circumstances.") This distinction is why Indiana courts recognize that compliance with regulation does not preclude tort liability. *See e.g., Bonewitz v. Parker*, 912 N.E.2d 378, 382 (Ind. App. 2009), *trans. denied.*

As discussed above, had the legislature intended for the RTFA to limit the scope of an agricultural operator's duty in tort, it would have had to do so explicitly. *Smith,* 61 N.E.3d at 1274. Yet nothing in the RTFA's plain text says anything about limiting the scope of an agricultural operator's duty to regulatory compliance. The Court of Appeals' interpretation otherwise, caused it to disregard the Himsels and Lannons' evidence that supports each element of their negligence claim, including negligent operation under the RTFA. (Appellants' Br. at 32-39)

3. <u>If the Decision to Change the Type of an Agricultural Operation is Unreasonable, it is "Negligent Operation" under the RTFA</u>

The Appeals Court concluded that building and siting a CAFO cannot be "negligent operation" under the RTFA. *Himsel,* 122 N.E.3d at 945. This interpretation ignores the

"substantial change" provision of the RTFA which states that converting from one type of agricultural operation to another type is not a "significant change" in the operation that would remove the RTFA's protection. Ind. Code § 32-30-6-9(d)(1). Put another way, the decision to switch from growing crops to producing 8,000 hogs in a CAFO is an "operational" decision, just as a decision to switch from growing corn to soybeans would be. If that decision is negligent—unreasonable under the circumstances—it is "negligent operation." To hold otherwise writes the "significant change" provision out of the statute.[4] (Appellants' Br. at 32-33)

Such a reading also eliminates any duty for agricultural operators to exercise reasonable care. (Appellants' Br. at 35-38). And, since there are no regulatory limits on air emissions, or the size or scale of CAFOs, the Court's interpretation allows 80,000-head hog skyscrapers with surrounding lakes of hog waste to be built on any farm field in Indiana, because no matter how extreme, unreasonable, or harmful, no such decision would ever be considered "negligent operation."

4. The Appeals Court Disregarded Indiana's Summary Judgment Standard

Indiana's summary judgment standard is aimed at protecting a party's day in court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014); *Simon Prop. Grp., L.P. v. Acton Enterprises, Inc.*, 827 N.E.2d 1235, 1239–40 (Ind. Ct. App. 2005) (summary judgment is disfavored "lethal weapon"). Unlike federal practice, "Indiana imposes a more onerous burden: to affirmatively negate an opponent's claim." *Hughley*, 15 N.E.3d. at 1003. Under this standard, the bar is set deliberately low for the non-movant: any sworn testimony may suffice to create a genuine issue of material fact. *Id.* at 1004. This Appeals Court failed to apply this standard.

[4] And, if the decision to switch from crops to CAFO is not part of the ongoing operation, then the RTFA would not protect the CAFO.

a. The Court ignored evidence of trespass

The Appeals Court rejected the Himsels and Lannons' trespass claim as "purportedly based on the unlawful physical intrusion of the CAFO's noxious emissions" and allegations that those emissions "are chemical compounds that result in a physical, space-filling invasion into their homes." *Himsel,* 122 N.E.3d at 945. (emphasis added). But the Himsels and Lannons did more "allege" a physical invasion, they provided credible evidence of that fact. (App. VI:160-168, 181-189; *see also* Appellants' Br. at 39-42).

In Indiana, a trespass can take the form of invasion by noxious materials. *Lever Brothers*, 655 N.E.2d at 582. While the invasion must be physical, if the evidence conflicts as to whether the invasion is physical, the question is one for the jury. To illustrate, in *Indiana Michigan Power*, the court upheld the denial of summary judgment on trespass by electromagnetic field because "the legal and the scientific communities [were] currently divided over the precise nature of EMF and its ability to create a trespass." 717 N.E.2d at 228. There is no reason for a different result here.

The CAFO Operators did not designate evidence indicating that their CAFO's noxious emissions are not physical, even acknowledging that their argument is contrary to the "modern understanding of science." (Appellees' Br. 33-34) It is also contrary to law. *See e.g., Stickdorn v. Zook,* 957 N.E.2d 1014, 1022 (Ind. Ct. App. 2011) (invasion of noxious odors from confinement dairy sufficient to support trespass). Indeed, the CAFO Operators do not identify any material distinction between the CAFO's emissions and the invisible, intangible virus in *TDM Farms v. Wilhoite Family Farm, LLC*, 969 N.E.2d 97, 109 (Ind. Ct. App. 2012)—which was sufficient to support trespass—other than to say the virus caused "illness to pigs." (Appellees' Resp. Br. to

Rehearing Pet. at 14) The CAFO's emissions are causing illness to people. One trusts that trespass law protects people as well as pigs.

b. The Court ignored evidence of negligence

The Appeals Court similarly rejected the Himsels and Lannons' distinct negligence claim as a "repackaged" nuisance claim. *Himsel,* 122 N.E.3d at 950. Yet, the Himsels and Lannons presented expert testimony on the applicable standard of care, specific breaches of that standard, and of the harm that was foreseeably and proximately caused by those breaches. (App. VI:161-168; Appellants' Br. at 33-38) This evidence at minimum creates genuine fact issues on each element of negligence. Yet the Appeals Court ignored it contrary to Indiana's summary judgment standard. *Harradon*, 913 N.E.2d at 300 (summary judgment is rarely appropriate in negligence cases because they are fact sensitive and governed by the objective reasonable person standard—"one best applied by a jury after hearing all of the evidence").

5. The RTFA Does Not Protect an Agricultural Operation if it Would Have Been a Nuisance During its First Year of Operation

Under the RTFA, an agricultural operation "does not become a nuisance ... by any changed conditions in the vicinity of the locality after the agricultural ... operation ... has been in operation continuously on the locality for more than one (1) year if . . . there is no significant change in the type of operation" (which does not include changing from crops to CAFO), 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). To illustrate, in *Dalzell v. Country View Family Farms, LLC*, 517 F. App'x 518 (7th Cir. 2013), the plaintiff argued that the RTFA did not immunize a 2,800 hog CAFO because it began its first year of operation in 2007, after the plaintiff had already moved to the area. *Id.* at 518. Rejecting that argument, the court explained, "the land [where the CAFO sits] appears to have been in agricultural use since 1956, long before plaintiffs

bought their parcels, if not earlier [and] . . . [p]laintiffs do not contend that the [the CAFO] would have been a nuisance in the 1950s." *Id.* at 519. (*See also* Appellants' Br. at 26-31)

Contrary to *Dalzell*, the Appeals Court held that "requiring a defendant farmer to establish that his or her particular CAFO (rather than hog farming or CAFOs generally) would not have been a nuisance when the agricultural operation began on the locality would eviscerate the protections of the RTFA." *Himsel*, 122 N.E.3d at 944. There are several problems with this. First, such policy concerns are out of place when a statute is clear. *Miller*, 88 N.E.3d at 218. Second, the CAFO Operators have the burden on summary judgment to negate the Himsels and Lannons' claims, and prove their RTFA affirmative defense. Yet, they did not designate evidence that would allow the Appeals Court to determine as a *matter of law* that even "hog farming or CAFOs generally", much less their 8,000 hog CAFO, would not have been a nuisance when the operation ostensibly began in the 1940s. (App. III:72)

Even so, the Appeals Court found that because "a number of farmers in the area own[] or hav[e] owned livestock [including] Richard Himsel, prior to retiring from farming," means that the CAFO would not have been a nuisance had it existed in the 1940s. *Himsel,* 122 N.E.3d at 944. But that finding ignores evidence establishing that CAFOs are dramatically different from traditional livestock farms in terms of both their industrial nature and impact to public health, the environment, and neighbors' use and enjoyment of life and property. (App. VI:161-168) The Court's finding also ignores the Himsels and Lannons' testimony that none of the vastly smaller livestock farms that the Himsels and other local farmers operated ever created untenable living conditions like the CAFO does. (App. V:112-113, 118-119, 134, 147; VII:191-192, VIII:10, 152) In any event, whether the CAFO's emissions are comparable to anything produced by past livestock farms in the area is a question of fact precluding summary judgment.

In addition, the evidence clearly establishes that in 1926—long *before* 1941 when continuous operations purportedly began at the CAFO site, Richard Himsel's parents built the Himsel home where Richard Himsel grew up and has lived most of his life. (App. V:119; VIII:152-153) Accordingly, the Himsels' residential use was there first. And had the CAFO been built in the 1940s, it would have been a nuisance to Richard Himsel and his family, then living in the Himsel home, just as it is now.

B. The Court of Appeals' Interpretation of the RTFA is Unconstitutional as Applied

Long ago, this Court recognized that:

> A business should bear its own costs, burdens, and expenses of operation, and these should be distributed by means of the price of the resulting product and not shifted, particularly, to small neighboring property owners for them to bear alone. We can understand no sensible or reasonable principle of law for shifting such expense or loss to persons who are not involved in such business ventures for profit. Industrial development is to be encouraged, not at the expense of private individuals without their consent, but by the price of the resulting product in the industry itself. If there is a public interest in such development, the only equitable and just way to distribute such expense or cost would be through the equitable use of public funds.

Enos Coal Mining Co. v. Schuchart, 243 Ind. 692, 697-98, 188 N.E.2d 406, 408 (1963). The Court of Appeals's abandoned this equitable principle in ruling that the RTFA is constitutional even though it compels the Himsels and Lannons to bear the unique and disproportionate burdens of the CAFO Operators' economic activity for the ostensible public good of pork production. If allowed to stand, the court's unjust ruling renders the RTFA unconstitutional as applied.

1. The Court of Appeals' Construction of the RTFA Violates the Open Courts Clause in Article I, Section 12 of the Indiana Constitution ("Section 12")

The Appeals Court held that the RTFA does not violate Section 12 because it merely "modifie[s] the substantive law of nuisance by eliminating a nuisance cause of action against agricultural operations" under certain circumstances. *Himsel,* 122 N.E.3d at 946. As an initial matter, the RTFA does not eliminate a nuisance cause of action, it provides an affirmative defense to one. And, while the RTFA's limited nuisance immunity does not violate Section 12, the Court of Appeals' expansive reading of the RTFA does. (*See* Appellants' Br. at 51-52)

Decades before the RTFA was enacted, the Himsels and Lannons purchased their homes and obtained the "bundle" of legal rights afforded them as fee simple title holders in real estate including: the right of exclusion (the violation of which is a trespass); the right of use and enjoyment (the violation of which is a nuisance); and the right of disposition (a violation is an unreasonable restraint on alienation). *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); *State v. Dunn*, 888 N.E.2d 858, 862 (Ind. Ct. App. 2008). By the Appellate Court's reading, the RTFA allows the CAFO Operators to infringe on these long-vested rights, while barring any remedy—that reading violates Section 12. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 978 (Ind. 2000) ("[t]he Legislature is entirely at liberty to create new rights or abolish old ones *as long as no vested right is disturbed.")* (emphasis added).

The court's conclusion that "the facts underlying [the Himsels and Lannons'] nuisance claim occurred well after the RTFA went into effect and barred such a claim" is not only incorrect, it misses the point. The Himsels and Lannons have a valid nuisance claim under Indiana's nuisance statute (Ind. Code § 32-30-6-6) and a valid trespass claim. By its plain terms, the RTFA does not bar either claim. The Court of Appeals' interpretation that it does, denies the Himsels and Lannons access to otherwise available remedies to vindicate their vested property rights. While the Appeals Court is correct that the Himsels and Lannons "have no vested or

property right in any rule of common law", *Himsel,* 122 N.E.3d at 946, they do have a "vested or property right" in their vested property rights, and the right to pursue available remedies to vindicate those rights.

2. The Court of Appeals' Construction of the RTFA Violates the Takings Clauses of the U.S. and Indiana Constitutions

The U.S. Supreme Court has articulated a three-factor test for determining whether a regulation effects a taking: (1) the economic impact of the regulation, (2) the extent of the plaintiff's reasonable investment-backed expectations, and (3) the character of the government action. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). Applying this test, the Court of Appeals held that the RTFA did not effect a taking because the Himsels and Lannons "have alleged no distinct, investment-backed expectations that have been frustrated by the CAFO", and "the RTFA has [not] permitted a physical invasion of their property." *Himsel*, 122 N.E.3d at 947-48. The designated evidence plainly demonstrates otherwise. (Appellants' Br. at 52-58) The RTFA effects a taking under the court's construction.

III. CONCLUSION

For all the foregoing reasons, the Court of Appeals departed from established law in affirming summary judgment under the RTFA, and this Court should grant transfer.

Respectfully submitted,

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Petition to Transfer of Appellants Martin Richard Himsel, Janet Himsel, Robert Lannon and Susan Lannon

WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F), I verify that this Appellants' Petition for Rehearing contains no more than 4,200 words, excluding items listed in Appellate Rule 44(C).

/s/ Kim E. Ferraro
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Petition for Rehearing was delivered this 12th day of August, 2019, to the following persons, via the Court's E-Filing System:

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