IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

CEDAR COUNTY COMMISSION, ET AL.,	)	
RELATORS,	)	
v.	)	Case No. 19AC-CC00373
GOVERNOR MICHAEL PARSON, ET AL.,	)	
RESPONDENTS	)	

RELATORS' REPLY SUGGESTIONS IN SUPPORT OF
RELATORS' SECOND AMENDED MOTION FOR SUMMARY JUDGMENT

COME NOW Relators, by and through counsel, in accordance with Supreme Court Rule 74.04(c)(3), and for their Reply Suggestions in Support of Relators' Second Amended Motion for Summary Judgment state:

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Supreme Court Rule 74.04, "'a trial court may enter summary judgment where a moving party has demonstrated that there is no genuine issue of material fact and is entitled to judgment as a matter of law.'" *State ex rel. Nixon v. McIntyre*, 234 S.W.3d 474, 476 (Mo. App. W.D. 2007); *Brown v. Morgan County*, 212 S.W.3d 200, 202 (Mo. App. W.D. 2007). To be entitled to summary judgment, the movant must show that: (1) there is no genuine dispute as to the material facts on which the movant is relying for summary judgment; and (2) based on those undisputed facts, the movant is entitled to judgment as a matter of law. Supreme Court Rule 74.04; *Allen v. Midwest Institute of Body Work*, 197 S.W.3d 615, 621 (Mo. App. W.D. 2006). Facts set

forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993).

DISCUSSION

I. Relators have Standing to bring the claims asserted in Counts I, II, III, and IV in the Second Amended Petition.

A. Standing.

> "For a party to have standing to challenge the constitutionality of a statute, he must demonstrate that he is adversely affected by the statute in question" to ensure "there is a sufficient controversy between the parties [so] that the case will be adequately presented to the court." *W.R. Grace & Co. v. Hughlett*, 729 S.W.2d 203, 206 (Mo. banc 1987) (internal quotations omitted) (alteration in original). Standing further requires a petitioner to demonstrate a personal stake in the outcome of the litigation, meaning "a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief. *Schweich v. Nixon*, 408 S.W.3d 769, 775 (Mo. banc 2013).

Mo. Coalition for the Environment v. State, 579 S.W.3d 924, 926 (Mo. banc 2019)

There is a real, substantial, presently existing controversy regarding the constitutionality of Senate Bill 391 and its effect on County Ordinance 05162016 and Regulation 2019-6. The dispute is real and gives rise to specific relief after legal rights and liabilities are determined. The legal issues are ripe for judicial resolution. Further, Relators-Cedar County Commission and Cooper County Public Health Center have standing to assert claims seeking a judicial declaration of their rights and liabilities under § 192.300, as amended by Senate Bill 391, and County Ordinance 05162016 and

Regulation 209-6, respectively. *See Tietjens v. City of St. Louis*, 222 S.W.2d 70, 72 (Mo. 1949) and *City of St. Louis v. Milentz*, 887 S.W.2d 709, 711 (Mo. App. E.D. 1994).

B. Admissions by State Respondents.

Significantly, the State Respondents admit the following material facts that establish the Relators' standing:

- Relator-Cedar County Commission is the duly elected governing body for Cedar County, Missouri, and enacted Cedar County Ordinance 05102016 on May 11, 2016. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 1*;

- Relator-Cooper County Public Health Center is the duly established public health center for Cooper County, Missouri, and enacted Cooper County Public Health Center Regulation 6 on August 13, 2019. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 2*;

- Relators-Susan Williams and Fred Williams are Missouri taxpayers, own and operate farms and occupy private residences located near the site of the proposed Tipton East CAFO, the water source for drinking water and animal watering at their property are wells located in the shallow aquifer, and they are concerned about air and water pollution originating from the Tipton East CAFO adversely affecting and harming their health, their family's health, their drinking water supply, their agricultural water supply, and their property values. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶¶ 5, 6, 50, and 51;*

- Relator-Wanda Cassell is a Missouri taxpayer, farmer, business owner, property owner and resident of Cedar County, Missouri; she owns and operates the Stockton Hills Water Company, Inc., which draws water from a 600' well near Stockton Lake to supply drinking water to five (5) area subdivisions comprising a total of 169 families; she owns and operates the Cassell Real Estate Company, and has sold real estate in Cedar County for over 35 years; because of the critical importance of good, high-quality water to the residents of Cedar County, she is concerned about the adverse effects that current and future confined animal operations in Cedar County have on the regional water supply; and she is concerned about the adverse effects that would occur to property values and real estate sales if the Cedar County health ordinance is eliminated and additional confined animal operations are built throughout Cedar County. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts,* ¶¶ *7 and 52;*

- Relator Jefferson Jones is a farmer, rancher, property owner, and resident of Callaway County, Missouri, and is a Missouri taxpayer. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts,* ¶ *4;*

- Relator Friends of Responsible Agriculture, Inc. ("FORAG"), is a Missouri nonprofit corporation in good standing, has its principal place of business in Callaway County, Missouri. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts,* ¶ *3;* and

- Senate Bill 391 provides for the direct expenditure of public funds derived from taxation to implement its provisions, including § 21.900, RSMo requiring activities to be performed by the Joint Committee on Agriculture; § 640.715, RSMo requiring activities to be performed by the Department of Natural Resources; and § 640.745, RSMo imposing fees on permitted facilities and the associated costs to collect such fees. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 53.*

C. Cedar County Commission has Standing.

Relator-Cedar County Commission is adversely affected by Senate Bill 391 and has a legally protectable interest in maintaining County Ordinance 05162016 because the amendments to § 192.300 purport to strip away its legal authority to enact ordinances protect public health in Cedar County. In his deposition, Marlon Collins, the Cedar County Presiding Commissioner, testified "We wanted to know whether it was constitutional or not to take our authority away or health ordinances relating to agriculture, and whether it is retroactive or not going back to ordinances that are already established." *Deposition of Marlon Collins, p. 8, lines 13 - 18.*

D. Cooper County Public Health Center has Standing.

Relator-Cooper County Public Health Center is adversely affected by Senate Bill 391 and has a legally protectable interest in maintaining Regulation 2019-6 because the amendments to § 192.300 purport to strip away its legal authority to enforce and implement regulations to protect public health in Cooper County. Also, the legal issues regarding Regulation 2019-6 are ripe because. As admitted by the State Respondents, the

Department of Natural Resources issued a CAFO permit to PVC Management II, LLC to construct and operate a CAFO in Cooper County. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 40.* In this regard, over 30% of the soils in Cooper County have "severe" limitations for subsurface construction. *Deposition Transcript of Dean Jones, page 92, lines 19 - 21* ("30.4 percent of the county land area is comprised of soils having a severe limitation associated with shrink-swell"). Further, Melanie Hutton, Nurse Administrator of the Cooper County Public Health Center, testified how Senate Bill 391 adversely affects the Cooper County Public Health Center,

> Prior to 391 you could have a health regulation that was equal to or stronger than the State. Often the State has bare minimum paper tiger sort of regulations. So a health department could be equal to or stronger to the State and not less. . . .
>
> So when it comes to pollutants and emissions from contracted growers and producers, there are, based upon research, issues that are coming with as CAFOs increase. And it prohibits our ability to protect water and air and those citizens. And not -- it doesn't just prevent the Board; it allows for vulnerability and exposures to the citizens of the State of Missouri, but specifically Cooper County and visitors. It takes away the authority in deference to a special interest group.

Deposition of Melanie Hutton, pages 100, line 9, - page 101, line 9.

E. Susan Williams, Fred Williams, and Wanda Cassell have Standing.

Relators-Susan Williams, Fred Williams, and Wanda Cassell are adversely affected by Senate Bill 391 and have legally protectable interests in maintaining Regulation 2019-6 and Ordinance 05162016, respectively, because they are concerned about the effects on their health, water supplies, and property values if the protections

afforded by their respective County ordinance and regulation were preempted by Senate Bill 391, and because, as taxpayers, the direct expenditure of public funds derived from taxation is required to implement several provisions in Senate Bill 391. Further, they have each alleged vested rights in the respective health ordinance and regulation by alleging special damages unique to themselves (the Williams' close proximity to a CAFO affected by Regulation 2019-6 and Ms. Cassell's operation of a water system serving 160 families) that are separate and apart from damages incurred by the general public. *See Lee v. Osage Ridge Winery*, 727 S.W.2d 218, 221 (Mo. App. E.D. 1987) ("Plaintiffs, in both Counts I and II, have alleged that their property is 'in such close proximity' to Osage's land that it is 'immediately and adversely affected' by Osage's use of its property in violation of the zoning ordinance. . . . As a matter of pleading, this was sufficient to state a claim for relief as to special damages"). Moreover, they have each protected legal interests under Article I, § 13 of the Missouri Constitution that are adversely affected by any retrospective application of Senate Bill 391 to preempt Cedar County Ordinance 05162016 and Cooper County Public health Center Regulation 2019-6. *See Affidavit of Susan Williams; Affidavit of Fred Williams; Affidavit of Wanda Cassell; Deposition of Susan Williams, page 74, line 4 - page 76, line 25*; *Deposition of Fred Williams, page 34, line 3 - page 39, line 24*; and *Deposition of Wanda Cassell, page 23, line 21 - page 24, line 4; page 34, lines 13 - 23; page 35, lines 3 - 6; page 35, line 13 - page 36, line 5*.

F. Jefferson Jones and FORAG have Standing.

Relators-Jefferson Jones and Friends of Responsible Agriculture ("FORAG") have legally protectable interests that their County Commission properly interpret § 192.300

and are adversely affected by Senate Bill 391 because the Callaway County Commission cited Senate Bill 391 as the reason why it could not even consider a health ordinance to protect public health in Callaway County. In this regard, Mr. Jones testified, ". . . we asked our county commissioners to protect the public health of our communities and our county. And they said because of Senate Bill 391 they would not entertain the idea of any health ordinance whatsoever." *Deposition of Jefferson Jones, page 29, lines 7 - 11.* In addition, Mr. Jones testified regarding the e-mail communication received from the Callaway County Presiding Commissioner citing Senate Bill 391 as the reason it could not consider a health ordinance. *Deposition of Jefferson Jones, page 85, line 13 - page 86, line 6; Exhibit 4, attached to First Amended Petition*. Further, Mr. Jones and Friends of Responsible Agriculture, as taxpayers, are adversely affected by the direct expenditure of public funds derived from taxation is required to implement several provisions in Senate Bill 391. *See Deposition of Jefferson Jones, page 29, lines 11 - 13 ("And FoRAG has paid sales taxes and I know that Senate Bill 391 is being pushed with tax money"); page 92, line 21 - page 93, line 1.*

Accordingly, based on the foregoing, all Relators and Intervener have standing to assert their claims.

II. The amendments to § 192.300 made by Senate Bill 391 are in conflict with the Right-to-Farm Amendment, Article I, § 35 of the Missouri Constitution.

Count I of Relators' Second Amended Petition and Count I of Intervenor-Relator's Petition seek a declaratory judgment that the amendment made to § 192.300.1, RSMo by

Senate Bill 391 is unconstitutional because it is in conflict with the intent of the voters when they adopted Article I, § 35 of the Missouri Constitution.

On November 4, 2014, Missouri voters enacted Article I, § 35 of the Missouri Constitution (the "Right-to-Farm Amendment"). Article I, § 35 states,

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

Contrary to assertion of the State Respondents in ¶ 5 of their Cross-Motion for Summary Judgment, the Missouri Supreme Court has expressly held that Article VI of the Missouri Constitution allows for local regulation of agriculture. *Shoemyer v. Kander*, 464 S.W.3d 171, 175 (Mo. banc 2015) ("While it [agriculture] is subject to local government regulation under article VI, the availability of the right is not dependent on local governments passing an appropriation or other condition precedent"). Further, § 640.710.1, RSMo confers broad authority to the Department of Natural Resources to adopt rules specifically dealing with the "establishment, permitting, design, construction, operation and management of any class I [CAFO] facility," However, § 640.710.5 expressly provides "Nothing in this section shall be construed as restricting local controls." Thus, when read *in para materia*, Article VI and § 640.710.1 allow for local control over CAFOs, which would include county health ordinances and regulations enacted under § 192.300.

Moreover, it is well-established that when considering voter-approved measures, courts presume the voters are aware of existing laws. *Hill v. Mo. Dep't of Conservation*, 550 S.W.3d 463, 469 (Mo. banc 2018) ("This Court must presume the voters were aware of and accounted for this common use when they adopted article IV, section 40(a)"); and *State ex Inf. McKittrick v. Cameron*, 117 S.W.2d 1078, 1082 (Mo. 1938) ("Of course, every voter is presumed to know the law").

In this context, at the time the voters approved the Right-to-Farm Amendment in 2014, county commissions and county health centers had legal authority under § 192.300 to enact health ordinances and regulations affecting agriculture. In fact, different forms of such legal authority have existed for over 70 years:

- In 1946, the General Assembly enacted House Bill 830, which first provided authority to county courts to "make and promulgate such rules, regulations or ordinances as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county . . . ." LAWS OF MISSOURI (1945), pp. 974-975;

- In 1973, the General Assembly enacted House Bill 627, which amended § 192.300, RSMo, to provide that county courts of class one counties that did not have a charter form of government have authority to "make and promulgate such rules, regulations or ordinances as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county . . . ." LAWS OF MISSOURI (1973), p. 317;

- In 1987, the General Assembly enacted Senate Bill 397, which amended § 192.300, RSMo, to provide that county commissions and county health centers of all counties have authority to "make and promulgate orders and ordinances or rules and regulations, respectively, as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county . . . ." LAWS OF MISSOURI (1987), p. 596; and

- In 1989, the General Assembly enacted Senate Bill 68, which amended § 192.300, RSMo, to provide that county commissions and county health centers in all counties have statutory authority to "make and promulgate orders, ordinances, rules or regulations, respectively, as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county . . . ." LAWS OF MISSOURI (1989), pp. 596-597.

Thus, at the time Missouri voters went to the polls in 2014 to consider the Right-to-Farm Amendment, it must be presumed the voters were aware of § 192.300 and that there was absolutely no limiting language in that statute prohibiting county health ordinances and health regulations from affecting agriculture. In fact, the only limitation on the authority of a county commission or a county health board contained in § 192.300 provided that a health ordinance or regulation "shall not be in conflict with any rules or regulations authorized and made by the department of health and senior services in accordance with this chapter or by the department of social services under chapter 198. . . ."

Concerning the interpretation of the final clause in the text of the right-to-Farm Amendment ("subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri"),

> . . . "[i]n determining the meaning of a constitutional provision the court must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted." *Boone County Court v. State*, 631 S.W.2d 321, 324 (Mo. banc 1982). This common understanding of language reflects the common sense of the People, as every word employed in the constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. *State ex inf. Dalton v. Dearing*, 364 Mo. 475, 263 S.W.2d 381, 385 (1954) *quoting* 1 Story, Constitution, sec. 451. This ordinary and usual meaning normally appears in the dictionary. *Zahner v. City of Perryville*, 813 S.W.2d 855, 858 (Mo. banc 1991).

Akin v. Missouri Gaming Commission, 956 S.W.2d 261, 263 (Mo. banc 1997).

Significantly, the verb used in the phrase "conferred by article VI of the Constitution of Missouri" in the Right-to-Farm Amendment is in the present tense. In 2014, when Missouri voters considered this constitutional amendment, the only "authorized powers" relating to county health ordinances and health regulations which were "conferred by article VI" were the powers set forth in § 192.300. *Shoemyer v. Kander*, 464 S.W.3d at 175. Because it is presumed Missouri voters were aware that county governments possessed legal authority to adopt health ordinances and health regulations affecting agriculture, the clear intent of the voters had to be for county

commissions and county health boards to continue to have such existing authority to adopt and enforce such health ordinances and health regulations.

As a result, the amendment to § 192.300 made by Senate Bill 391 is in conflict with Article I, § 35 because it restricts the legal authority of county commissions and county health boards by restricting the scope of health ordinances and health regulations in ways not intended by the voters in 2014. While the General Assembly certainly has the power to amend a statute, it does not have the power to amend a statute in such a way as to be in conflict with a provision in the Constitution.

In *Akin v. Missouri Gaming Commission*, *supra*, the Missouri Supreme Court considered a case where the People adopted a constitutional amendment allowing gambling to occur on the Missouri and Mississippi Rivers. Later, the Missouri Gaming Commission and several gaming companies asserted that a statute enacted by the General Assembly setting forth an expanded definition of the terms "Missouri River" and "Mississippi River" to include land that was upland from the actual waterway allowed gaming to occur in land areas that were not physically on the Missouri or Mississippi Rivers. In rejecting the State's position, the Supreme Court "ascribe[d] to the words the meaning which the people understood them to have when the provision was adopted," and stated, "By approving the 1994 constitutional amendment, the People intended that games of chance be conducted on facilities that are solely over and in contact with the surface of the Mississippi and Missouri Rivers."

Significantly, the State Respondents offer no material facts to negate Relators' claim in Count I. Further, the State Relators offer no caselaw to dispute the Supreme

Court's prior holdings that Missouri voters are presumed to know existing laws and that agriculture is subject to local government control under Article VI of the Missouri Constitution.

In the present case, it is clear the People intended that agriculture continue to be "subject to duly authorized powers . . . as conferred by article VI." Mo. Const. Article I, § 35. Because the only "duly authorized powers" were those conferred to county commissions and county health boards in § 192.300, the intent of the People was to continue to allow for county commissions and county health boards to adopt and enforce health ordinances and health regulations as set forth in that statute. Accordingly, the amendment to § 192.300 made by Senate Bill 391 is in conflict Article I, § 35, and as a result, the amendment to § 192.300 is unconstitutional.

III. Senate Bill 391 operates prospectively and does not invalidate Cedar County Ordinance 05162016 or Cooper County Public Health Center Regulation 2019-6 because there is no language evidencing a clear legislative intent to operate retrospectively.

Significantly, the State Respondents fail to show any language in Senate Bill 391 that evidences a legislative intent for Senate Bill 391 to operate retrospectively or to preempt local health regulations affecting agricultural facilities. As a result, Senate Bill 391 only operates prospectively and does not invalidate either Cedar County Ordinance 05162016 or Cooper County Public Health Center Regulation 2019-6.

Contrary to the assertion by the State Respondents in ¶¶ 13 and 17 in their Cross-Motion for Summary Judgment,

> As a general rule, statutes operate prospectively. *St. Louis County v. University City*, 491 S.W.2d 497, 499 (Mo. banc 1973). This rule controls

> unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication. *Id*.

Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 34 (Mo. banc 1982).

> If the presumption normally favoring prospective operation is overcome, the inquiry focuses on whether the statute falls within the proscription against retrospective laws. This constitutional ban against retrospective laws applies only when the statute takes away or impairs any existing vested right. *Lincoln Credit Co. v. Peach*, *supra*, at 34-35; *Barbieri v. Morris*, 315 S.W.2d 711, 714 (Mo. 1958); *Clark v. Kansas City, St. Louis & Co. R. Co*., 219 Mo. 524, 118 S.W. 40 (1909); *Hope Mutual Ins. Co. v. Flynn*, 38 Mo. 483, 484 (1866).

Department of Social Services v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 (Mo. banc 1985).

There is absolutely no language used in Senate Bill 391 that clearly reflects any legislative intent that Senate Bill 391 operates retrospectively or that the amendment to § 192.300 applies retroactively to invalidate previously enacted county health ordinances and health regulations. In fact, there are no words anywhere in Senate Bill 391 that show any legislative intent that any provision in Senate Bill 391 operates retrospectively.

Further, assuming, *arguendo,* there is language in Senate Bill 391 reflecting legislative intent that it apply retrospectively, because § 640.710.5 <u>expressly and specifically</u> allows for local control over CAFOs, to the extent of any conflict between the general language in § 192.300, as amended by Senate Bill 391 - which does not even mention or refer to CAFOs - and the very specific language in § 640.710.5 that allows for local control over CAFOs, then § 640.710.5 controls. *See Mo. Chamber Commerce & Indus. v. Mo. Ethics Comm'n,* 581 S.W.3d 89, 92 (Mo. App. W.D.2019) (“where one

statute deals with [a] subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general statute").

In their brief, State Respondents cite several cases and state, "The General Assembly also can restrict county authority. When the state expressly prohibits county governments from acting, 'their acts are void.'" *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 15*. Apparently, the State Respondents assert that County Ordinance 05162016 and Regulation 2019-6 are in conflict with Senate Bill 391, so therefore these local controls on CAFOs are invalidated regardless of whether there is any preemptive or retroactive language in Senate Bill 391. However, the State Respondents' premise is flawed - there is no conflict involving County Ordinance 05162016 and Regulation 2019-6 because § 640.710.5 <u>expressly and specifically</u> provides for local controls over CAFOs.

While the State Respondents cite *Borron v. Farrenkopf*, 5 S.W.3d 618 (Mo. App. W.D. 1999) as support for their position that Senate Bill 391 operates retroactively to preempt any preexisting county health ordinances or regulations relating to agriculture, their argument is flawed because the Court of Appeals actually upheld the validity of the challenged Linn County health ordinance based on § 640.710.5.

> Finally, Missouri state law did not occupy the area which Respondents were attempting to regulate. Missouri had not created a comprehensive scheme on this particular area of the law, leaving no room for local control. While the Borrons may claim that section 640.700 *et seq*. occupies the area of CAFO regulation, the General Assembly's inclusion of the language, "nothing in this section shall be construed as restricting local controls" makes it obvious that the legislature wished to leave room for local action.

Borron v. Farrenkopf, 5 S.W.3d at 625.[1]

Accordingly, the amendment to § 192.300 made by Senate Bill 391 does not operate retroactively or retrospectively to invalidate or preempt Ordinance 05162016 or Regulation 2019-6.

IV. The air quality requirements in § 1 and the water quality requirements in § 2 of Regulation 2019-6 address subject matter not covered by Senate Bill 391 and are not preempted.

In § 1, Regulation 2019-6 imposes performance standards, or "emission limitations," for emissions of hydrogen sulfide, ammonia, and particulate matter from the property lines of Class I and II CAFOs located in Cooper County. In this context, the term "emission limitation" means a specific regulatory requirement imposed on a specific facility and its emissions:

> A regulatory requirement, permit condition, or consent agreement which limits the quantity, rate, or concentration of emissions on a continuous basis, including any requirement which limits the level of opacity, prescribes equipment, sets fuel specifications, or prescribes operation or maintenance procedures for an installation to assure continuous emission reduction.

10 CSR 10-6.020(2)(E).22.

In § 2, Regulation 6 prohibits the construction and operation of subsurface manure containment structures at any location in Cooper County where the U.S. Department of

[1] Cedar County Ordinance 05102016 is modeled on the Linn County CAFO ordinance.

Agriculture, Natural Resource Conservation Service has classified the soils as having "severe" characteristics based on the "shrink-swell" potential for such soils. Further, § 2 of Regulation 6 prohibits the construction and operation of subsurface manure containment structures and the land application of CAFO animal wastes at locations in Cooper County that have been identified based on mapping dome by the Missouri Geological Survey has having karst features.

A. Section 1 of Regulation 2019-6 is not preempted.

The State Respondents fail to cite or provide any material facts that show Chapters 192, 260, 640, 643, and 644 or any State rules that impose "emission limitations" on ammonia, hydrogen sulfide, or particulate emissions from a CAFO's property lines. The State Respondents do assert "… DNR has standards applicable to emissions of hydrogen sulfide, ammonia, PM2.5, and PM10." *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, pp. 27 - 28*. However, a cursory review of the two rules cited - 10 CSR 10-6.010 and 10 CSR 10-6.165 - shows that neither of the rules address or impose any "emission limitations" and any specific emission sources

While the State Respondents attempt to equate "emission limitations" with the "ambient air quality standards" set forth in 10 CSR 10-6.010, such a comparison is apples-to-oranges. *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, pp. 31 - 34.* In this regard, an "ambient air quality standard" is a general standard that is applicable throughout the entire State. More importantly, there is not any provision in 10 CSR 10-

6.010 that "limits the quantity, rate, or concentration of emissions on a continuous basis, including any requirement which limits the level of opacity, prescribes equipment, sets fuel specifications, or prescribes operation or maintenance procedures for an installation to assure continuous emission reduction." Thus, an "ambient air quality standard" is not an "emission limitation."[2]

The State Respondents cite *Worth County Friends of Agric. v. Worth County,* 688 N.W.2d 257 (Iowa 2004) to support its position that county regulation is preempted by State law. *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 28.* However, the State Respondents fail to state that the underlying basis of that decision was the existence of a state statute that specifically preempted county regulation over agriculture. *Worth County*, 688 N.W.2d at 262 ("Our legislature has enacted a statute that places limitations on ordinances adopted by a county").

Also, the State Respondents assert, "Regulation 6's air quality performance standards for ammonia and hydrogen sulfide are outside the Public Health Center's regulatory authority and are void *ab initio*." *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 26.* However, the State Respondents fail to cite to any material facts to

[2] The Clean Air Act requires EPA to set National Ambient Air Quality Standards (NAAQS) for six specified air pollutant that may be present in outdoor air. NAAQS are currently set for carbon monoxide, lead, ground-level ozone, nitrogen dioxide, particulate matter, and sulfur dioxide. These pollutants are found all over the U.S. *See https://www.epa.gov/criteria-air-pollutants.*

support this conclusion. More importantly, the testimony of Dr. Patrick Smith confirms that regulating emissions of ammonia, hydrogen sulfide, and particulate matter serve to prevent the spread of infectious, contagious, communicable or dangerous diseases.

Q. What would be an example of a communicable disease caused by ammonia?

A. Well, if it -- a problem with the person's sinuses and they had a -- they were a carrier of measles, mumps or chickenpox. Then when they were with their daycare center, then their extra running, that came from the rhinitis, the inflammation of the -- of that chemical, could expose all of the people to their runny nose or their tissues or -- or -- or bathroom doorknobs, you name it.

Q. The asthma or sinus, itself, would not be communicable, right?

A. No.

Q. You are saying just if somebody has something separate and apart, that --

A. We all have -- we all have bacteria in our bodies, whatever percentage, it's a huge percentage that would surprise people. And so they are natural and normal and people are carriers. And so the carrier state can become communicable, if it's let loose and exposed to other people. And then it can get in the air and -- and -- and -- usually, it's particulate but if you can see -- have you ever seen a picture of a sneeze? It's 15,000 particles. They don't all go into a tissue or the elbow.

Q. And does ammonia cause any dangerous diseases?

A.. It depends on the person that inhaled and what happened to that person.

. . .

Q. . . . How will Regulation 6 prevent the entrance of those issues?

A. If there is a distance away, that you would have marked reduction of exposure, then that would prevent the organism or intense amount of chemical that would be harmful from affecting a person. So it's not -- it's a -- it's not a concrete wall but it is a fence that would certainly, in certain cases, prevent. So you're looking at 95 percent rule or whatever percent that you want. Nothing is 100 percent but it would be a valuable deterrent.

Deposition of Dr. Patrick Smith, page 74, line 3 - page 75, line 7; page 76, line 22 - page 77, line 7.

B. Section 2 of Regulation 2019-6 is not preempted.

Concerning the protection of water quality, the State Respondents fail to cite or provide any material facts that show Chapters 192, 260, 640, 643, and 644 or any State rules contain any provisions that impose criteria for the construction and operation of subsurface manure containment structures or the land application of CAFO animal wastes at locations with soils classified with "severe" shrink-swell potential or with karst features.

The State Respondents state,

> The State's design standards for CAFOs provide a regulatory standard for subsurface containment structures. 10 CSR 20-8.300(6); Exhibit 3. According to this standard, before a subsurface containment structure is constructed, "[a] thorough site investigation shall be made to determine the physical characteristics and suitability of the soil and foundation for the fabricated storage structure." 10 CSR 20-8.300(6)(A). DNR "applies these design standards to all tanks and pits at CAFOs, including concrete subsurface structures."

Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 36.

However, a plain reading of 10 CSR 20-8.300(6)(A) shows the rule is completely silent with respect to what happens if the results of such an evaluation determine that the

soils or geology at the proposed site are determined to have either significant limitations on the construction of subsurface concrete structures or have karst features. All that the rule requires is that an evaluation occur.

As a result, Regulation 2019-6 is not inconsistent with 10 CSR 20-8.300(6)(A) because Regulation 2019-6 provides for the same evaluation of soils and geology at a proposed CAFO site. Further, Regulation 2019-6 is not more stringent that 10 CSR 20-8.300(6)(A) because the rule does not provide for any consequence of any kind based on the determinations in the soils and geology evaluation. In other words, because 10 CSR 20-8.300(6)(A) is silent on the issue of what happens if the soils and geology evaluation shows unsuitable site conditions, Regulation 2019-6 is expressly authorized by § 640.710.5 to fill the void.

The State Respondents also state, "The design of a CAFO subsurface containment structure must be watertight so as to avoid leaks to groundwater. 10 CSR 20-8.300(6)(G) . . ." *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 37.* This statement and its reliance in 10 CSR 20-8.300(6)(G) are red herrings because Regulation 2019-6 does not address or impose any <u>design</u> requirements for CAFOs. The State Respondents fail to cite to any provisions in Regulation 2019-6 that are allegedly inconsistent with or more stringent that the design requirement in 10 CSR 20-8.300(6)(G).

In addition, the State Respondents assert "In addition to the investigation and design requirements, all manure storage structures are subject to setback distance requirements. 10 CSR 20-8.300(3)(B)." *Opposition to Relators' Motion for Summary*

Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 37. However, this statement and its reliance on 10 CSR 20-8.300(6)(B) are also red herrings because nothing in Regulation 2019-6 addresses any setback distance requirements.

Further, the State Respondents state, "'Geologists with the Missouri Geological Survey perform geohydrologic evaluations for all earthen basis at proposed CAFOs' and may be requested by the DNR Water Protection Program to conduct a geohydrologic evaluation of other waste holding facilities. Exhibit 4, ¶ 9.a." *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 38.* However, the State Respondents fail to cite any material facts to support this statement. Moreover, the cited sentence from Mr. Jackson's affidavit is limited to "geohydrologic evaluations for all earthen basi[n]s at proposed CAFOs." Also, Regulation 2019-6 does not contain any provisions relating to "earthen basins." Further, Mr. Jackson's affidavit does not refute the professional opinions of John Bognar, R.G relating to Regulation 2019-6:

> . . . As previously discussed, MGS has identified several areas in Cooper County, Missouri that have karst features. Further, because the requirements in Regulation 6 serve to impose limitations on the potential introduction of CAFO animal wastes from either underground manure containment structures or land application fields into a subsurface karst environment, it is my professional opinion these requirements in Regulation 6 are reasonable and are protective of groundwater and the regional drinking water supply for area residents on well water.

Affidavit of John Bognar, R.G., ¶ 18.C.

Finally, the State Respondents state, "The State's nutrient management requirements provide additional regulatory standards for land application. 10 CSR 20-6.300 Exhibit 2, ¶ 8.Q." *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 42.* However, the State Respondents fail to cite any material facts to support this statement. Moreover, Regulation 2019-6 does not contain or impose any requirements relating to the preparation or content of nutrient management plans, and the State Respondents fail to cite to any provision in Regulation 2019-6 that is allegedly inconsistent with or more stringent than any provision in 10 CSR 20-6.300 or DNR's Nutrient management Technical Standard.

In *Friends of Agriculture v. Zimmerman*, 51 S.W.3d 64 (Mo. App. W.D. 2001), the Court of Appeals considered a challenge to three rules adopted by the Missouri Air Conservation Commission based on whether these rules were prohibited by § 643.055, RSMo, which prohibited State rules that were stricter than corresponding Federal requirements. In upholding the validity of the challenged rules, the Court held unless there was some affirmative regulation of the subject matter of the rule, the rule could not be "stricter than" nonexistent requirements.

> In other words, where there is affirmative regulation under the Clean Air Act, Congress has directly spoken as to the specific topic of that particular regulation, and § 643.055.1 is triggered. For example, in *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, the Commission had promulgated a regulation concerning asbestos abatement projects, while the EPA had adopted regulations which imposed requirements on asbestos abatement in demolition projects. Our Supreme Court reiterated that § 643.055 .1 prohibits regulations containing provisions stricter than their federal counterparts and remanded for a

> determination as to what portions of the Commission's regulations were stricter than the federal requirements. Here, however, there is no federal counterpart, and there are no standards or guidelines required for conformity with the Clean Air Act.

Id., 51 S.W.3d at 79.

Like the challenged rules in the *FARMER* case, the subject matter addressed in §§ 1 and 2 in Regulation 2019-6 is not subject to any affirmative State statutes in Chapters 192, 198, 260, 640, 643, or 644, or any affirmative State rules promulgated under those chapters. As a result, the emission limitations in § 1 and the soils and geology criteria in § 2 of Regulation 2019-6 cannot, under the *FARMER* analysis, be inconsistent with or more stringent than nonexistent statutes, rules or regulations. In other words, unless there is a State statute or State rule to which to compare Regulation 2019-6, it is impossible to conclude that Regulation 6 is inconsistent with or more stringent than such nonexistent standards.

The State Respondents cite *Berner v. Montour Twp. Zoning Hearing Bd.*, 217 A.3d 238 (Pa. 2019) in an attempt to show that the foregoing DNR rules somehow preempt Regulation 2019-6. *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 38.* ("Faced with a statute containing similar preemption language and an attempt to build a concrete manure storage facility at a small CAFO, the Supreme Court of Pennsylvania recently concluded that a local ordinance was preempted that required proof of no adverse impact to adjacent properties"). However, the State Respondents take this decision completely out of its proper context and significantly ignore the fact that the

Pennsylvania law contained a specific preemption provision. *See Berner*, 217 A.3d at 242 ("With respect to preemption, Section 519 of the Act sets forth the preemptive effect the Act, its regulations, and its guidelines have on local regulation of nutrient management").

The State Respondents also cite *Goodell v. Humboldt County*, 575 N.W.2d 486 (Iowa 1998) asserting that the Iowa Supreme Court invalidated a "county ordinance preempted that 'prohibit[ed] the application of livestock manure on land that drains into an agricultural drainage well or sinkhole in a manner that results in contamination of groundwater' because Iowa DNR had been given exclusive authority to regulate disposal of CAFO waste." *Opposition to Relators' Motion for Summary Judgment and Suggestions in Support of the State's Cross-Motion for Summary Judgment, p. 41*. However, the State Respondents conveniently ignore the court's summary conclusion: "Although the legislature has extensively regulated livestock feeding operations, it has not expressed a desire to prohibit local regulation that does not conflict with state statutes or rules. Therefore, we find no preemption of local authority in the area of animal feeding operations." *Goodell*, 575 N.W.2d at 507. As a result, because § 640.710.5 expressly allows for local controls over CAFOs, Regulation 2019-6 is not preempted.

Accordingly, because there are no State statutes or promulgated State rules that Regulation 2019-6 is inconsistent with or more stringent than, the Court should declare that Regulation 2019-6 is not inconsistent with or more stringent that any provisions in Chapters 192, 198, 260, 640, 643, or 644, or any rules or regulations promulgated

thereunder, and therefore, is not preempted by the Senate Bill 391 amendments to § 192.300, RSMo.

V. The agricultural exemption in § 192.300.2 is unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, §§ 2 and 10 of the Missouri Constitution because it impermissibly infringes the fundamental rights of the individual Relators and Intervener in their personal health and safety and in expecting their local county officials to take reasonable actions to guard and protect their health from significant sources of COVID-19 exposure.

It is clear that Wanda Cassell, Susan Williams, Jefferson Jones, and Fred Williams have fundamental rights and protectable liberty interests in their personal health and safety in expecting their elected officials to take reasonable actions to guard and protect their health, particularly in light of the COVID-19 pandemic. Significantly, the State Respondents fail to cite any caselaw holding that an individual does not have a protected fundamental right in his or her personal health and safety or a fundamental right to expect their elected officials to take reasonable and appropriate actions to guard and protect their health and safety.

Rather, as Chief Justice Roberts recently wrote in a case concerning COVID-19,[3]

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific

[3] The underlying case challenged the Governor of California's Executive Order designed to limit the spread of COVID–19 by placing temporary numerical restrictions on public gatherings "to address this extraordinary health emergency." Concerning COVID-19, the Court stated, "At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, slip op. at 1 (U.S. May 29, 2020).

> uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528, 545 (1985).

South Bay United Pentecostal Church v. Newsom, No. 19A1044, slip op. at 2 (U.S. May 29, 2020).

With regard to facts alleged in Count IV, the State Respondents admit:

- On March 7, 2020, the first case of novel coronavirus was reported in the State of Missouri. The virus has been named "SARS-CoV-2" and the disease it causes has been named "coronavirus disease 2019" (abbreviated "COVID-19"). *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 54*;

- Relators' Exhibit 44, Table 1 reflects laboratory-confirmed COVID-19 cases among workers in at least seven meat and poultry facilities in Missouri in April and May 2020. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 55*;

- The U. S. Centers for Disease Control and Prevention has stated, "COVID-19 outbreaks among meat and poultry processing facility workers can rapidly affect large numbers of persons" and "Distinctive factors that increase meat and poultry processing workers' risk for exposure to SARS-CoV-2, the virus that causes COVID-19, include prolonged close workplace contact with coworkers (within 6 feet for ≥15 minutes) for long time periods (8–12 hour shifts), shared work spaces, shared transportation to and from the workplace, congregate housing, and frequent community contact with fellow

workers. Many of these factors might also contribute to ongoing community transmission." *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 56*;

- "COVID-19 is a novel severe acute respiratory illness that is spread through close contact between persons and respiratory transmissions and is highly contagious" and "there have been numerous confirmed and presumptive positive cases of COVID-19 in this state, and COVID- I 9 continues to pose a serious health risk for the citizens and visitors of the State of Missouri." *Executive Order 20-12 dated June 11, 2020, Relators' Exhibit 46*;

- As of August 5, 2020, cases of COVID-19 have been reported in Cedar County and Cooper County. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 60*; and

- Neither Respondent-MCWC, MACC, nor DHSS have promulgated any State regulations designed to protect the public from exposure to COVID-19 by imposing health-based requirements or standards on persons employed in agricultural operations, including meat processing plants, grower facilities, and concentrated animal feeding operations. *State Respondents' Responses to Relators' Statement of Uncontroverted Material Facts, ¶ 63.*

Based on these admissions, it cannot be disputed that workers at agricultural facilities present increased risks of COVID-19 exposure and community spread into the local nearby communities. Moreover, it cannot be disputed that none of the State

Respondents have enacted any State regulations imposing any COVID-19 health-based requirements applicable to these agricultural facilities.

In order to address the significant failure of State Respondents to protect public health from the risks of COVID-19 exposure and community spread from these agricultural facilities, the Cedar County Commission and the Cooper County Public Health Center are on the record that they would consider imposing appropriate health-based regulations on these agricultural facilities, but will not do so because of the uncertainty regarding Senate Bill 391. *Affidavits of Marlon Collins, Robert Foster, Don Boultinghouse, and Patty Dick, Relators Exhibits 48 - 51*. In addition, the Callaway County Commission has previously stated it will not enact any health ordinance affecting agricultural facilities because of Senate Bill 391. *Relators' Exhibit 5.*

As alleged in Counts I, II, and III, Relators and Intervenor assert that county commissions and county health agencies have legal authority to enact health ordinances and regulations affecting agricultural facilities, which would include health-based COVID-19 ordinances and regulations. Relators' and Intervener's legal position that the Cedar County Commission and the Cooper County Public Health Center have such authority is supported by very recent admissions made by Respondent-Governor Parson.

In this regard, on October 9, 2020, Governor Parson participated in the 2020 Missouri Gubernatorial Forum that was held in Columbia, Missouri.[4] Early in the debate, a panelist asked all the debate participants a question concerning local control:

[4] A true and accurate video of the 2020 Missouri Gubernatorial Debate is posted online at: *https://www.c-span.org/video/?476809-1/missouri-gubernatorial-debate. Affidavits of*

"We have seen different hotspots around the State. When it comes to COVID-19, how much direction should the State exert over local control on topics such as Stay-at-Home Orders, Mask Ordinances, and COVID liability protection?"

In response, Governor Parson stated,

To answer the question, you know, as I think you want to do a balanced approach is what we have done from the beginning. We want the local officials to have input. No one person should try to be making mandates for the entire State of Missouri. It is a very diverse State, whether you have the urban areas or whether you have the rural areas. We should support the local levels, the school systems, the counties, the health care. When we got the CARES Act in the State of Missouri, we had that money out the door in 10 days to get local levels to help with testing, to help with contact tracing, to make sure our schools could start back up as we move forward on that. Again, it is a partnership. It is a partnership with the State and local communities. But, people at home should have a say in the rules and regulations that are placed on them, and should have representation for that. And we stated that balanced approach from the beginning. (emphasis added).

Marlon Collins, Robert Foster, Don Boultinghouse, and Patty Dick, Relators Exhibits 52 - 55, attached hereto and incorporated herein. These exhibits will also be incorporated as support for Additional Uncontroverted Material Facts in Relators' upcoming response in opposition to the State's Motion for Summary Judgment.

Based on Governor Parson's admissions, it cannot be disputed that "people at home," including Wanda Cassell, Susan Williams, Fred Williams, and Jefferson Jones, have protectable fundamental rights that are impermissibly infringed if "the local levels, … the counties, the health care," which includes the Cedar County Commission and the Cooper County Public Health Center, are hamstrung and prohibited from enacting any health-based COVID-19 ordinances and regulations applicable to agricultural facilities, which are documented to present increased risks of worker exposure and community spread of COVID-19. In other words, Respondent-Parson's admissions concede the point that local county commissions and county health agencies have legal authority to address COVID-19 concerns in their counties, which would include addressing COVID-19 risks at agricultural facilities. Otherwise, Governor Parson's "balanced approach" in deferring to local county officials is meaningless, and the public is placed at unnecessary risk from COVID-19.

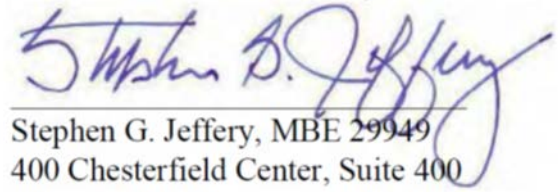
Based on the foregoing, the individual Relators' and Intervener's fundamental rights are impermissibly infringed because Senate Bill 391 arbitrarily allows the Cedar County Commission and the Cooper County Public Health Center to guard and protect their health and safety from exposure and community spread of COVID-19, except from exposure and community spread of COVID-19 at and from agricultural facilities, which are documented as some of the most significant sources for COVID-19 outbreaks. Thus, Senate Bill 391 operates in a discriminatory fashion by allowing for local health regulations to protect the populace from some sources of COVID-19, but not from the most likely significant source of COVID-19.

Moreover, the adverse effect of prohibiting such local regulation is exacerbated because none of the State Respondents are imposing any COVID-19 health-based standards and requirements on anyone; instead Respondents-Parson and DHSS have shifted all such responsibility to local county officials under the State's "balanced approach." Furthermore, there is no compelling state interest or any rational basis to justify this arbitrary restriction which the State Respondents assert prohibits local county officials and county health agencies from guarding and protecting the health and safety of their county residents from the most significant sources of COVID-19, and the State Respondents fail to provide any excuse or justification for such arbitrary restrictions.

CONCLUSION

Based on the foregoing and because there are no genuine disputed material facts, Relators pray the Court grant their Motion for Summary Judgment on Counts I, II, III, and IV in the Second Amended Petition and Counts I and II in Intervenor-Relators' Petition, award Relators their reasonable attorneys' fees and expenses, and award such further relief the Court deems appropriate.

JEFFERY LAW GROUP, LLC



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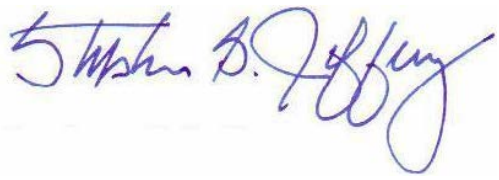
Certificate of Service

I certify that a true copy of the foregoing was served on all counsel of record via the Court's e-filing system on this 30th day of October 2020.



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