No. 19-1019

IN THE

United States Court of Appeals for the Fourth Circuit

JOYCE MCKIVER, *et al.*,

Plaintiffs-Appellees,

v.

MURPHY-BROWN, LLC, d/b/a Smithfield Hog Production Division,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of North Carolina, No. 7:14-cv-180-BR
District Judge W. Earl Britt

BRIEF AMICUS CURIAE OF THE NORTH AMERICAN MEAT INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, GROCERY MANUFACTURERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL TURKEY FEDERATION, AND NATIONAL CHICKEN COUNCIL IN SUPPORT OF APPELLANT

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March 6, 2019

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The North American Meat Institute has no parent company and no publicly held company holds more than a ten percent interest in the Meat Institute.

The National Association of Manufacturers has no parent company and no publicly held company holds more than a ten percent interest in the NAM.

The Grocery Manufacturers Association has no parent company and no publicly held company holds more than a ten percent interest in the GMA.

The Chamber of Commerce of the United States of America has no parent company and no publicly held company holds more than a ten percent interest in the U.S. Chamber.

The National Turkey Federation has no parent company and no publicly held company holds more than a ten percent interest in the Federation.

The National Chicken Council has no parent company and no publicly held company holds more than a ten percent interest in the Council.

No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation within the meaning of Local Rule 26.1(b). This case does not arise out of a bankruptcy proceeding.

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STATEMENT OF INTEREST OF AMICI CURIAE

The North American Meat Institute, National Association of Manufacturers, Grocery Manufacturers Association, Chamber of Commerce of the United States of America, National Turkey Federation, and National Chicken Council respectfully submit this brief as *amici curiae*.[1]

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici* and their members and counsel contributed money intended to fund the brief's preparation or submission.

The North American Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products, and Meat Institute member companies account for more than 95 percent of United States' output of these products. The Meat Institute provides regulatory, scientific, legislative, public relations, and educational services to the meat and poultry packing and processing industry. The Meat Institute's advocacy includes amicus briefs in important cases.

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. As the voice of the manufacturing community, NAM is the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly files amicus briefs in appeals important to manufacturers, including the prior mandamus petition arising out of these cases, *In re Murphy-Brown, LLC*, 907 F.3d 788, 792 (4th Cir. 2018).

The Grocery Manufacturers Association is the country's largest food, beverage, and consumer-product association, representing companies that

participate in this $2.1 trillion industry. GMA member companies include internationally recognized brands, as well as local and neighborhood businesses. The GMA advocates for its member companies before courts, legislatures, and executive agencies. To that end, GMA regularly files *amicus* briefs in cases affecting its members' interests.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in courts throughout the country on issues of concern to the business community.

The National Turkey Federation is the national advocate for America's turkey farmers and producers, raising awareness for its members' products while strengthening their ability to profitably and safely deliver wholesome, high-quality and nutritious food to consumers worldwide.

The National Chicken Council is the national trade association representing the vertically integrated companies that produce and process more than 95 percent

of the chicken marketed in the United States. The Council's members' chickens are raised on farms across the country, including farms in North Carolina.

SUMMARY OF ARGUMENT

I. Industry—including hog and poultry production—is crucially important to North Carolina's economy. North Carolina is the second-largest hog producer and largest poultry producer in the United States. And North Carolina has a vibrant and diverse manufacturing sector. All of this industry played a crucial role in diversifying North Carolina away from its prior dependence on tobacco production.

But all industry—including pork and poultry production—generates waste. And that waste must be disposed of somehow. This case involves what the industry calls "lagoon-and-spray-field" systems, which gather, decompose, and spray waste on nearby crops and grass. Properly maintained, lagoon-and-spray-field systems are cost- and labor-effective ways to manage animal waste. But they come with risks, which is why the North Carolina legislature and the North Carolina Department of Environmental Quality have implemented comprehensive rules governing the systems' operation. Existing lagoon-and-spray-field systems can remain in service subject to state regulation and inspection. But new lagoon-and-spray-field systems cannot be built. That trade-off protects farmers' existing investments, but ensures different technologies in the future. North Carolina has

made similar regulatory choices in regulating and permitting emissions from other industries, demonstrating a careful balance between economic growth and environmental stewardship.

II. Firms that comply with North Carolina's comprehensive environmental regulations cannot be held liable in nuisance or subject to punitive damages. Nuisance actions like that instituted by Plaintiffs are governed by notoriously ill-defined standards, relying on judges' and juries' case-by-case intuitions. Environmental statutes and regulations replace those formless standards with clear ones, and a firm that complies cannot be a nuisance as a matter of law. After all, nuisance is governed by equitable maxims, and one of the leading equitable maxims is that equity follows the law. Equity accordingly does not allow nuisance liability to be imposed against a facility that follows the law.

And because there can be no nuisance liability, there can be no punitive damages. Punitive damages punish wrongful conduct and deter its repetition. But when a firm complies with environmental regulations, a court need not—indeed, should not—punish that company for operating in compliance with the jurisdiction's regulatory framework. The District Court's punitive-damages award is contrary to that principle. It punishes a hog farm for operating within its state-granted permit. And the risk is not limited to hog farming. *Any* industry in North Carolina is at risk for nuisance liability and punitive damages for conduct the

legislature and administrative agencies have blessed. The political branches, not the courts, are the proper venue for Plaintiffs' disagreement with North Carolina's environmental policies.

This Court should reverse.

ARGUMENT

I. NORTH CAROLINA HAS THOUGHTFULLY AND COMPREHENSIVELY ADDRESSED INDUSTRIAL DISCHARGES THROUGH STATUTE AND REGULATION, BALANCING ECONOMIC GROWTH WITH ENVIRONMENTAL STEWARDSHIP.

Meat production "is a predictably messy business, but one with central economic importance to the state of North Carolina." *In re Murphy-Brown, LLC*, 907 F.3d 788, 792 (4th Cir. 2018). North Carolina is the second-largest pork producer in the nation, marketing 4.1 *billion* pounds of pork in 2017. *State Rankings by Hogs and Pigs Inventory*, National Pork Board (June 14, 2018), https://tinyurl.com/y2hsjhyd. North Carolina also ranks first in poultry production, with 822.7 million broiler chickens and 31 million turkeys produced in 2015. Margaret Ross, *Poultry by the Numbers*, NC Cooperative Extension (Nov. 22, 2017), https://tinyurl.com/y2kge84y**.** All those animals add up to real revenue for North Carolina farmers: Pork cash receipts totaled over $2 billion and poultry cash receipts over $3.9 billion. *Id.*; *Hogs and Pigs Inventory*, *supra*.

Those receipts go back into the local economy. The North Carolina pork industry employs more than 46,000 people through the production, processing, and distribution chain, Tom Campbell, *Hog Economy Can't Be Ignored*, Rocky Mount Telegram (July 21, 2018), https://tinyurl.com/yxd827pa, and the North Carolina poultry industry creates over 126,933 jobs for North Carolinians, *Poultry Facts*, North Carolina Poultry Federation, http://www.ncpoultry.org/facts/facts.cfm. The pork and poultry industries have a combined economic impact estimated at $45.6 billion. *Id.*; *Get The Facts*, N.C. Farm Families, https://ncfarmfamilies.com/get-the-facts/.

North Carolina's leadership in hog and poultry farming is a direct result of the State's concerted efforts to diversify its agricultural output. For over 100 years, North Carolina's economy was dominated by tobacco farming and production. Donnie Charleston, *Feeding the Hog Industry in North Carolina: Agri-Industrial Restructuring in Hog Farming and Its Implications for the U.S. Periphery*, Sociation Today, Spring 2004, https://tinyurl.com/y4xehqme. But with tobacco on the decline, farmers had to look elsewhere. *See* Morris S. Thompson, *Diversification Now Reigns In County Where Tobacco Was King*, Wash. Post (Aug. 8, 1988), https://tinyurl.com/y5f9y4m9.

Many turned to pigs and poultry. Bill Cresenzo, *Farms in Flux: NC's Agricultural Landscape Changing With the Times*, Times-News (Sept. 10, 2016,

9:43 PM), https://tinyurl.com/y5t4um7w. And diversification worked. By 1996, "29 percent of [farm cash] receipts came from poultry products, 22 percent came from pork products, and only 13 percent came from tobacco." Bill Finger, *Making the Transition to a Mixed Economy*, North Carolina Insight, Dec. 1997, at 4, 5, https://tinyurl.com/yxd64dfe. That trend continues to this day. In 2017, 37 percent of farm cash receipts came from poultry products, 20 percent came from pork products, and only 6 percent came from tobacco. U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., and North Carolina Dep't of Agric. and Consumer Servs., *2018 North Carolina Agricultural Statistics* 15 (2018), https://tinyurl.com/y43kxu35.

North Carolina also has a vibrant manufacturing sector. North Carolina's 7,821 manufacturers account for 19 percent of the State's total output and employ over 10 percent of the State's workforce, with over 460,000 workers. Center for Mfg. Research, Nat'l Ass'n of Mfrs., *North Carolina Manufacturing Facts* (Oct. 2018), https://tinyurl.com/y6b7hccx. And North Carolina manufacturers represent a diverse range of sectors, including chemicals; food, beverage, and tobacco products; computer and electronic products; motor vehicles; and furniture and related products. *Id.*

2. All of that industry generates waste. *See* Michael Blanding, *Transforming Manufacturing Waste Into Profit*, Harvard Bus. School Working

Knowledge (Oct. 3, 2011), https://tinyurl.com/y5js2dvv ("Every manufacturing process leaves waste . . . ."). The question is what to do with it. Federal and state governments regulate industrial byproducts through a variety of laws, including the Clean Air Act (42 U.S.C. §§ 7401-7671q), Clean Water Act (33 U.S.C. §§ 1251-1388), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901-6992k), and state and local analogues and supplements. And in exercising their regulatory authority under these statutes, legislators and agencies balance economic growth and environmental stewardship.

Hog farming is no different. Pigs produce waste, and that waste must be disposed of. Most North Carolina hog farms use a traditional form of waste management known as "lagoon and spray field" systems. Animal and Poultry Waste Mgmt. Ctr., *A Few Words About Managing Waste*, N.C. State Univ., https://tinyurl.com/y6lexkw4. Farmers flush manure from hog houses to a lagoon, an earth basin where microbes break down the waste. *Id.* Lagoons tend to be open, so they can fill with liquid, especially during heavy rains. *Id.* Farmers therefore keep liquid in the lagoon at manageable levels by spraying the liquid on nearby fields, where crops or grass can use the nutrients as fertilizer. *Id.*

Many farmers prefer the lagoon-and-spray-field system "because it is simple, cost-effective, allows production of a large number of animals in one location, and is not labor intensive." Ashlyn Karan, Pigs, Profit, Planet: North

Carolina Farmers' Perspectives on Waste Lagoon Conversion 6 (Dec. 2011) (unpublished undergraduate honors thesis, Duke University), https://tinyurl.com/y24tv3m6. And, properly maintained, "lagoons have been shown to be an effective and economical method of treating waste" that has the beneficial side-effect of allowing farmers to "make[ ] use of the nutrients in the waste." *A Few Words About Managing Waste*, *supra*. But lagoon-and-spray-field systems come with risks, too. "If not managed properly, lagoons can be a source of odor," and "lagoons have broken and spilled their contents into nearby surface waters." *Id.*

The North Carolina legislature and regulators have accordingly taken steps to balance the benefits and risks of lagoon-and-spray-field systems. For starters, the North Carolina Department of Environmental Quality has issued general permits[2] requiring hog-waste lagoons to meet stringent performance standards, operation-and-maintenance requirements, and monitoring-and-reporting mandates. *See* North Carolina Envtl. Mgmt. Comm'n, Dep't of Env't and Natural Resources, *Swine Waste Management System General Permit* 1-11 (Mar. 7, 2014), https://tinyurl.com/y3d8ydtu; North Carolina Envtl. Mgmt. Comm'n, Dep't of Envtl. Quality, *Swine Waste Management System NPDES General Permit* 1-15

[2] A general permit "authorize[s] 'categories of activities' rather than individual projects." *Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 496 (4th Cir. 2005).

(Dec. 5, 2016), https://tinyurl.com/y2ebsdys. And the Department enforces its permits. North Carolina is "one of the only states that requires annual inspections of every facility." *AFO Program Summary*, North Carolina Dep't of Envtl. Quality, https://tinyurl.com/yxm65us6. In fact, farmers frequently complain that the State imposes *too many* requirements on the operation of their lagoon-and-spray-field systems. Pigs, Profit, Planet, *supra*, at 6 (reporting that farmers "felt the limitations of the lagoons" included "onerous regulations, especially water quality regulations").

North Carolina did not stop with strict regulations. The Legislature in 2007 imposed a permanent ban on swine farms that employ an anaerobic lagoon and spray field to primarily dispose of waste. N.C. Gen. Stat. § 143-215.10I(b). But the Legislature grandfathered in existing operations, in order to protect them from the sudden cost of changing their waste-disposal systems. The Legislature thus compromised, forbidding future lagoon-and-spray-field systems, but allowing current ones to operate under state supervision.

The Legislature also encouraged existing lagoon-and-spray-field systems to convert to newer technologies by offering grants that would offset the cost of closing and converting older lagoon-and-spray-fields. *See* N.C. Session Law 2007-523, § 2. But cost-effective systems are hard to come by. An independent, blue-ribbon panel commissioned by the North Carolina Attorney General, *see*

Agreement between Attorney General of North Carolina and Smithfield Foods, Inc., et al. (July 25, 2000), https://tinyurl.com/y6e358p4, concluded that newer technologies were not economically feasible, C.M. (Mike) Williams, N.C. State Univ., Waste Mgmt. Programs, *Evaluation of Generation 3 Treatment Technology for Swine Waste* 2-3 (Aug. 19, 2013), https://tinyurl.com/y2b9qsvm.

North Carolina's regulation of industry goes beyond hogs. The Department of Environmental Quality has also issued general permits governing waste from poultry and cattle farming that similarly require intensive performance standards, monitoring, reporting, and inspections.[3] More broadly, the Department of Environmental Quality and certain local environmental agencies administer both the Clean Air Act and Clean Water Act under Environmental Protection Agency-delegated authority and oversight. *See Clean Air Act Permitting in North Carolina*, U.S. Envtl. Protection Agency, https://tinyurl.com/y5subh7v; *History and Water Quality Overview*, North Carolina Dep't of Envtl. Quality, https://tinyurl.com/yxqwsgm5. All North Carolina industry is thus subject to

[3] *See* North Carolina Envtl. Mgmt. Comm'n, Dep't of Env't and Natural Resources, *Poultry Waste Management System General Permit* (March 2014), https://tinyurl.com/y32hb7ur; North Carolina Envtl. Mgmt. Comm'n, Dep't of Envtl. Quality, *Liquid Poultry Waste Management System NPDES General Permit* (Dec. 5, 2016), https://tinyurl.com/yxqpf4z9; North Carolina Envtl. Mgmt. Comm'n, Dep't of Env't and Natural Resources, *Cattle Waste Management System General Permit* (March 7, 2014), https://tinyurl.com/yxd3dkhv; North Carolina

comprehensive regulation that considers all stakeholders' concerns, environmental and economic.

II. NUISANCE LIABILITY AND PUNITIVE DAMAGES ARE INAPPROPRIATE WHEN A FIRM COMPLIES WITH ENVIRONMENTAL REGULATIONS.

1. Given North Carolina's comprehensive regulations, a firm cannot be liable in nuisance or subject to punitive damages when it complies with them. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately . . . ." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 86, at 616 (5th ed. 1984) (footnote omitted); *see also North Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010) (explaining that "public nuisance is an all-purpose tort that encompasses a truly eclectic range of activities"). Suits like Plaintiffs' therefore involve "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence" that judges and juries apply on a fact-intensive, case-by-case basis. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

That, in turn, creates tremendous uncertainty for regulated industries. One judge or jury might declare lagoon-and-spray-field systems or other industrial

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Envtl. Mgmt. Comm'n, Dep't of Envtl. Quality, *Cattle Waste Management System NPDES General Permit* (Dec. 5, 2016), https://tinyurl.com/y3t8ldh6.

operations not a nuisance; another judge or jury might disagree. That conflict "will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders." *Cooper*, 615 F.3d at 301. Firms would have little way to know in advance whether their investments—or even their livelihoods—might be wiped out in a private lawsuit.

Laws and regulations, by contrast, tend to have a wider aperture, be the product of more public input, and produce clearer rules. *See Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (explaining that "[t]he notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking"). Indeed, the very purpose of environmental statutes and regulations is to replace "an ill-defined omnibus tort of last resort," public nuisance, with "defined standards." *Cooper*, 615 F.3d at 302.

These clear legislative and administrative rules "promote judicial restraint and a [court's] readiness to leave the question to" the political branches, given "[t]he variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court and of interests not represented before it." Restatement (Second) of Torts § 821B cmt. f (1979). To be sure, a generalized permission like a building permit or zoning approval may not

categorically insulate a firm from nuisance liability. *See Kass v. Hedgpeth*, 38 S.E.2d 164, 165 (N.C. 1946). But "[i]t would be odd, to say the least, for specific state laws and regulations to expressly permit a [firm] to operate and then have a generic statute countermand those permissions on public nuisance grounds." *Cooper*, 615 F.3d at 309. It is thus a general principle of nuisance law that "conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability," even where the conduct "would be a nuisance at common law." Restatement (Second) of Torts § 821B cmt. f.

That is a principle North Carolina recognizes; its Supreme Court holds that "[t]he operation of a lawful enterprise is not a private nuisance *per se*." *Watts v. Pama Mfg. Co.*, 124 S.E.2d 809, 813 (N.C. 1962). And it is a principle that has particular bite in the environmental arena. "Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government," especially "where the conduct sought to be enjoined implicates the technically complex area of environmental law." *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981) (per curiam).

And the rule makes sense. Nuisance, after all, is guided by equitable maxims, *City of Milwaukee*, 451 U.S. at 317, and one of the premier maxims of equity is that "equity follows the law." *Seaboard Air Line R.R. Co. v. Atlantic Coast Line R.R. Co.*, 74 S.E.2d 430, 434 (N.C. 1953). Courts should not overturn

the policy decisions of the legislature and administrative agencies through nuisance liability. *See People v. Lim*, 118 P.2d 472, 476 (Cal. 1941) ("In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity."). And *federal* courts, for their part, should even be more wary. District courts sitting in diversity "rule upon state law as it presently exists"; they are "not to surmise or suggest its expansion." *Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989); *see also Seaboard Sur. Co. v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987) (per curiam) (plaintiff who files in federal court cannot seek "exten[sion]" of state law, but rather must "abide by federal determination as to the present state of [state] law").

The District Court broke from this rule by apparently accepting Plaintiffs' argument that lagoon-and-spray-field systems operated in accordance with North Carolina law can be nuisances *per se*. *See* JA9119 (arguing that Kinlaw Farm's operations, even if in accordance with "the rules of their permit," still caused a nuisance); JA9593 n.18 (arguing that Kinlaw Farm's lagoon-and-spray-field system "causes nuisance" even when operated in accordance with standard operating procedures); JA9653 (arguing that Murphy-Brown's willful conduct warranting punitive damages was its predecessor deploying a lagoon-and-spray-

field system at Kinlaw Farm). The North Carolina legislature has expressly found that "animal operations provide significant economic and other benefits to th[e] State," that must be "balance[d] . . . with prudent environmental safeguards." N.C. Gen. Stat. § 143-215.10A. But rather than shutter farms using lagoon-and-spray-field systems, the Legislature embarked on a "cooperative and coordinated approach to animal waste management among the agencies of the State with a primary emphasis on technical assistance to farmers." *Id.* North Carolina took the sound approach of allowing *existing* lagoon-and-spray-field systems—like Kinlaw Farm's here—to continue operation under State regulation and supervision while prohibiting *new* lagoon-and-spray-field systems from being built.

The District Court's judgment upsets that balance. The jury's nuisance award effectively requires that Kinlaw Farm—and its lagoon-and-spray-field system—shut down until any nuisance conditions can be abated. JA9206-07, 9322-23. And that is contrary to the North Carolina Legislature's view that existing, properly operated lagoon-and-spray-field systems should not be shuttered, even if Plaintiffs might prefer the systems not be used. In imposing liability for using a waste-management practice the North Carolina legislature expressly allowed, the District Court took North Carolina nuisance law too far.

Because Murphy-Brown cannot be liable in nuisance, it follows that Murphy-Brown cannot be liable for punitive damages. *See Shugar v. Guill*, 283

S.E.2d 507, 509 (N.C. 1981) (explaining that "[a] civil action may not be maintained solely for the purpose of collecting punitive damages but may only be awarded when a cause of action otherwise exists"). Punitive damages, after all, are intended "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1. That is, "North Carolina has consistently allowed punitive damages *solely* on the basis of its policy to punish intentional wrongdoing and to deter others from similar misbehavior." *Newton v. Standard Fire Ins. Co.*, 229 S.E.2d 297, 302 (N.C. 1976) (emphasis added).

But there is no need to deter any farmer from, or punish any farmer for, operating existing lagoon-and-spray-field systems in accordance with North Carolina law. The North Carolina legislature has made a conscious decision to allow existing lagoon-and-spray-field systems to operate under the supervision of the Department of Environmental Quality and its regulations. *See* N.C. Gen. Stat. § 143-215.10I(b). It is not lawful, and neither fair nor appropriate, to punish and deter farmers for doing what the North Carolina legislature and Department of Environmental Quality have permitted.

Plaintiffs—and the District Court—might want North Carolina to ban or more stringently regulate lagoon-and-spray-field systems. But "[t]he role of the Court is not to sit as a super legislature and second-guess the balance struck by the

elected officials." *Diaz v. Division of Social Servs.*, 628 S.E.2d 1, 5 (N.C. 2006) (citation omitted). North Carolina's political branches decided that the long-term health of its crucially important agribusiness sector counsels in favor of allowing existing lagoon-and-spray-field systems to remain in service. In the face of that determination, Plaintiffs' "remedy is with the legislature, not the courts." *Hart v. State*, 774 S.E.2d 281, 294 (N.C. 2015).

2. Plaintiffs' suit and the District Court's judgment imperil more than the meat industry. Under the precedent set by Plaintiffs' action, *any* disfavored manufacturer or industry could become the target for nuisance suits that substitute plaintiffs' and courts' policy preferences for those of the legislature and executive agencies.

For instance, some North Carolinians object to the expansion of the State's wood-pellet industry, which creates carbon-neutral alternative fuels for use in European power plants, replacing coal. *See* James Morrison, *Controversy Simmers Over NC Wood Pellet Plant*, North Carolina Public Radio (Oct. 3, 2017), https://tinyurl.com/ybjw92fr. Even though the Department of Environmental Quality has determined that the expanded pellet plants meet relevant air-quality guidelines, some local residents are not satisfied. *Id.* Before the decision below, the only path would be to challenge the air-quality decision or to lobby the Legislature. But with the decision below, a new opportunity emerges: Call the

expanded plants a nuisance and have a federal district court award a remedy that forces its closure.

Indeed, *any* of North Carolina's permittees could face the same threat as Murphy-Brown and Kinlaw Farm did below. North Carolina has issued general air-quality permits for cotton ginning, yarn-spinning plants, and concrete-batch plants, allowing these facilities to emit particulate matter into the air. *See* North Carolina Envtl. Mgmt. Comm'n, Dep't of Env't and Natural Resources, Div. of Air Quality, *Air Permit For Cotton Ginning*, https://tinyurl.com/y5qvwyek; North Carolina Envtl. Mgmt. Comm'n, Dep't of Env't and Natural Resources, Div. of Air Quality, *Air Permit for Yarn Spinning Mill*, https://tinyurl.com/y2qzlxo6; North Carolina Envtl. Mgmt. Comm'n, Dep't of Env't and Natural Resources, Div. of Air Quality, *General Air Permit for Concrete Batch Plants*, https://tinyurl.com/yy63mzno. Under the District Court's judgment, any resident who thinks themselves aggrieved by one of these facilities could claim that it is a nuisance and circumvent the State's detailed permitting process.

And, in fact, *any* permittee—even one who has received an individualized, tailored permit from the Department of Environmental Quality—is at risk. By definition, a permit allows otherwise unlawful discharges into the environment. *See Rapanos v. United States*, 547 U.S. 715, 723 (2006) (Clean Water Act prohibits discharges into the navigable waters of the United States except as

permitted by the Act); *Cooper*, 615 F.3d at 299-300 (Clean Air Act requires States to impose emission limits on sources and emitting sources cannot operate without a permit). And for any source of a discharge into the environment, there may well be a neighbor that might prefer the source not exist or the discharge not occur. But the proper audiences for those disagreements are North Carolina's administrative and elected officials. *See Adams v. Star Enter.*, 51 F.3d 417, 423 (4th Cir. 1995) (explaining that "complex policy questions regarding environmental protection" are "more suitably resolved through the legislative process") (citation omitted). The District Court's contrary conclusion should be reversed.

CONCLUSION

For the foregoing reasons and those in Murphy-Brown's brief, the Court should reverse the District Court's judgment.

Respectfully submitted,

/s/ Sean Marotta

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/s/ Sean Marotta
Sean Marotta

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I certify that on March 6, 2019, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Sean Marotta
Sean Marotta