

SMELLS LIKE MONEY: A PROPOSAL TO RE-EXAMINE THE ILLINOIS RIGHT-TO-FARM ACT

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INTRODUCTION

“ . . . once in your life you need a doctor, a lawyer, a policeman, and a preacher, but every day, three times a day, you need a farmer.”

Brenda Schoepp¹

The Smiths² are third-generation hog farmers in an area that was formally used exclusively for agriculture. But now, the Smiths are found amid new housing developments as families like the Joneses pack their bags and move to rural America with the promise of a simple and safe life outside the city. The Smiths receive a call from their neighbor, the Joneses, complaining that they can smell the hog farm from their home a half-mile away. The Smiths are shocked by this news and attempt to do all they can to ensure their neighbors are able to enjoy their property. Unfortunately, for both parties, their state’s Right-to-Farm Act (“RTFA”) neither properly protects responsible farmers nor allows affected neighbors to obtain relief from farmers that are not responsible. For these reasons, both parties call for a change in the current RTFA, seeking to create a balance between both their property rights.

All fifty states currently have an RTFA in place.³ These laws bar nuisance lawsuits against a farmer when the farm meets certain qualifications, such as being in operation for at least one year, not having a change in operation, and not having negligent farming practices.⁴ All fifty

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¹ Amanda Radke, *We Need Farmers Three Times Each Day*, BEEF MAG. (Oct. 20, 2021), <https://www.beefmagazine.com/blog/we-need-farmers-three-times-each-day>.

² The Jones and Smiths are not real people but are used to illustrate how these laws would come into play in the real world and just how impactful RTFAs can be to farmers and their neighbors.

³ Kyle Weldon & Elizabeth Rumley, *States’ Right-to-Farm Statutes*, NAT’L AGRIC. L. CTR., <http://nationalaglawcenter.org/state-compilations/right-to-farm/> (last visited Aug. 31, 2017).

⁴ Madeleine Skaller, *Protecting the Right to Harm: Why State Right to Farm Laws Should Not Shield Factory Farms from Nuisance Liability*, 26 SAN JOAQUIN AG. L. REV. 209, 212 (2017-18) (citing 13-124 Agricultural Law § 124.01 (2016)).

RTFAs vary from state to state but contain similar provisions.⁵ However, these small differences can have a big impact on the way these Acts are carried out; for example, whether an Act preempts local laws can mean the difference between absolute and conditional protection.⁶

This Note argues that while Illinois' RFTA has protected farmers from nuisance claims, more can, and should, be done to address the social, economic, and environmental changes taking place. As agriculture changes, so must our RTFAs. However, this should be done with caution by considering multiple factors, such as the property rights of rural Americans. To support this argument, this Note will examine Florida, North Carolina, Indiana, and Louisiana's recent RFTA changes and what Illinois can take away from these states' laws. Illinois can use the experience of these three states to formulate an amendment to its own RTFA that fulfills the law's intended purpose.

Part I of the Note looks at the history and purpose of RTFAs. The first subsection discusses the history and background of RTFAs, including why they were enacted in the mid-20th century. The second subsection talks about the purpose behind RTFAs, specifically Illinois' RTFA. The next subsection examines the changes that have taken place in America since the first RTFAs were enacted. The final subsection discusses Illinois' current RTFA and relevant case law.

Part II of this Note discusses an in-depth, comparative analysis of state statutes that Illinois may use to determine how its statute should be amended. These subsections will analyze recent RFTA changes in North Carolina, Florida, and Indiana as well as the case law established from these amendments. This discussion will include how each of these provisions would and would not be beneficial for Illinois to include.

Next, Part III examines reasons for more pro-agriculture legislation and why Illinois should consider an amendment to its current RTFA. Finally, Part IV discusses a proposal for amending Illinois' current RTFA based on the results in North Carolina, Florida, Indiana, and Louisiana. Regardless of one's position on this issue, Illinois' RTFA affects every Illinoisan, and therefore, it is vitally important that this amendment be seriously considered.

⁵ *Id.* at 210 (citing 13-124 Agricultural Law § 124.01 (2016)).

⁶ Gina Moroni, *Mediating Farm Nuisance: Comparing New Jersey, Missouri, and Iowa Right to Farm Laws and How They Utilize Mediation Techniques*, 2018 J. DISP. RESOL. at 1.

I. WHAT ARE RIGHT-TO-FARM ACTS AND WHY DO WE NEED THEM?

A. History and Background

American farming has come a long way.⁷ Advancements have been made from the early days of horses and plows to genetically-engineered seeds and livestock.⁸ A change in farming legislation was also needed as the world of farming changed from a family surviving off its three-acre plot and two head of cattle to large corporate farms bringing in millions of dollars a year.⁹ In the twentieth century, farms transformed due to the use of new fertilizers, hybrid seeds¹⁰, pesticides, and new machinery.¹¹ This era, particularly the 1950s, paved the way for the first RFTAs—laws that protect certain farmers from nuisance suits.¹²

However, until the 1970s, states did not truly consider implementing these laws.¹³ The 1970s opened the eyes of state legislators to how crucial farming is to America, especially to the American economy.¹⁴ This time period saw a worldwide decrease in agriculture production due to factors such as a global food shortage from poor weather in Russia and post-World War II diets consisting of more meat and bread; this caused America's agriculture industry to explode.¹⁵ Additionally, land values in the United States were on the rise, and interest rates were falling; this created the perfect formula for American farmers to buy more land and expand the agriculture industry.¹⁶

One important factor that provoked the passage of the first RTFA was urban sprawl, which led to the rural-urban fringe.¹⁷ Rural-urban fringe is a

⁷ *The Development of Agriculture*, NAT'L GEOGRAPHIC (Aug. 19, 2019), <https://www.nationalgeographic.org/article/development-agriculture/>.

⁸ *5 Ways Technology Has Changed Farming*, IOWA AGRIC. LITERACY FOUND. (June 2, 2018), <https://iowaagliteracy.wordpress.com/2018/06/02/5-ways-technology-has-changed-farming/>.

⁹ *Id.*; Carolyn Dimitri, Anne Efland & Neilson Conklin, *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, U.S. DEP'T OF AGRIC. (2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf?v=41055.

¹⁰ Madeline Fisher, *Exploring the First 50 Sequenced Plant Genomes*, CROP SCI. SOC'Y OF AM. (Sept. 10, 2013), <https://www.crops.org/news/science-news/exploring-first-50-sequenced-plant-genomes/>.

¹¹ *The 1970s See Good Times in Agriculture (3) | 1980s Farm Crisis*, PBS LEARNING MEDIA, <https://illinois.pbslearningmedia.org/resource/336d9cc3-42a9-4233-9d4d-98d9c1eff0d5/the-1970s-see-good-times-in-agriculture-farm-crisis/> (last visited Jan. 24, 2023).

¹² *Right-to-Farm Laws: History & Future*, FARM FOUND., <http://www.farmfoundation.org/news/articlefiles/129-hipp.pdf>; Moroni, *supra* note 6, at 1.

¹³ *Id.*

¹⁴ *See The 1970s See Good Times in Agriculture (3) | 1980s Farm Crisis*, *supra* note 11.

¹⁵ *Farm Boom of the 1970s*, WESSELS LIVING HIST., https://livinghistoryfarm.org/farminginthe70s/money_02.html (last visited Oct. 18, 2021).

¹⁶ *The 1970s See Good Times in Agriculture (3) | 1980s Farm Crisis*, *supra* note 11.

¹⁷ Rodney L. Clouser & Michael T. Olexa, *Issues at the Rural-Urban Fringe: Florida State Laws*

term used to describe “where rural and urban land uses intermix.”¹⁸ Thousands of acres of farmland were lost to urban sprawl as the masses moved from the cities to the suburbs for the promise of a better life.¹⁹ These suburbs were once family farms, but the farms were met with new neighbors who were not yet accustomed to the world of agriculture.²⁰ As can be imagined, those leaving cities for a more peaceful and quiet life were unhappy when met with the smells and sounds of farms.²¹ It was expected that private nuisance suits would come not long after.²² This is precisely the type of situation that RTFAs were designed to protect.²³ All of these events helped set the stage for the enactment of the first RFTA by Montana in 1973, and by 1992, every state had a RFTA in place.²⁴

B. Purpose of RTFAs

The primary goal of Illinois’ RFTA is to “conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agriculture.”²⁵ Illinois’ RTFA statute helps to achieve this goal by blocking certain nuisance suits when the farm meets certain qualifications so that farms will not be forced to cease operation.²⁶ RTFAs are in place to protect farmers for two reasons: (1) to strengthen the legal position of farmers when neighbors sue them for private nuisance; and (2) to protect farmers from local ordinances and state controls that restrict agriculture production.²⁷ Most laws include a number of additional protections such as zoning, damage caps, a statute of limitations, and management requirements.²⁸

Related to Land Use, UNIV. OF FLA. IFAS EXTENSION, <http://ufdcimages.uflib.ufl.edu/IR/00/00/20/25/00001/FE55000.pdf> (last visited Oct. 18, 2021); *Right-to-Farm Laws: History & Future*, *supra* note 12.

¹⁸ Rashid Faridi, *Rural-urban Fringe: The Concept and History*, RASHID'S BLOG: AN EDUC. PORTAL (Mar. 11, 2020), <https://rashidfaridi.com/2020/03/11/rural-urban-fringe-the-concept-and-history/>.

¹⁹ *Urban Sprawl*, AM. INST. FOR GOAT RSCH., <http://www.luresext.edu/?q=content/urban-sprawl> (last visited Oct. 18, 2021).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Montana's Right to Farm Summary*, ONE RURAL, <https://onerural.uky.edu/right-to-farm/MT#:~:text=Since%201973%2C%20Montana%27s%20Constitution%20commits,of%20nuisance%20claims%20by%20newcomers> (last visited Dec. 02, 2022).

²⁵ 740 ILL. COMP. STAT. 70/1 (1981).

²⁶ *Id.*

²⁷ *Fact Sheet Right-To-Farm Laws*, THE FARMLAND INFO. (1998), <https://www.whatcomcounty.us/DocumentCenter/View/4044/2006-Right-to-Farm-Review-PDF?bidId=>.

²⁸ *See id.*

C. Changes from the First RTFA to Today and Why Now Is the Time to Re-Evaluate

American agriculture has seen dramatic changes since 1973, when Montana passed the first RTFA.²⁹ The technology boom in agriculture production during the mid-twentieth century played a role in the need for RTFAs.³⁰ Today, a similar technology boom is happening.³¹ Additionally, similar to when the first RTFAs were passed, there is currently an increasing demand for agriculture production.³² This demand is due in part to climate change, population growth, the COVID-19 pandemic, and urbanization.³³ Unfortunately, there also has been an increase in farm nuisance suits with large punitive damages, causing several states to increase their RTFA protections.³⁴

These factors—climate change, population growth, the COVID-19 pandemic, and urbanization—have created a need for new agricultural technology.³⁵ Innovations such as vertical farming, which strives to bring agriculture to more urban areas using the ability to farm in greenhouses that consist of multiple stories, are now taking shape.³⁶ iFarm, a company leading the innovation in urban farming, has described vertical farming as “. . . an urban farming technique that involves stacking plants in dense layers in a highly controlled indoor environment, using LED lighting to replace sunlight to power all-year-round agriculture.”³⁷ An increase in urban farming will call

²⁹ Kitt Tovar, *Update on Right-to-Farm Legislation, Cases, and Constitutional Amendments*, IOWA STATE UNIV. (May 28, 2019), <https://www.calt.iastate.edu/article/update-right-farm-legislation-cases-and-constitutional-amendments>.

³⁰ *5 Ways Technology Has Changed Farming*, *supra* note 8.

³¹ Lutz Goedde, Joshua Katz, Alexandre Ménard & Julien Revellat, *Agriculture's Connected Future: How Technology can Yield New Growth*, MCKINSEY & CO. (Oct. 9, 2020), <https://www.mckinsey.com/industries/agriculture/our-insights/agricultures-connected-future-how-technology-can-lead-new-growth#:~:text=The%20agriculture%20industry%20has%20radically%20improved%2C%20helping%20farmers%20increase%20yields>.

³² Maarten Elferink & Florian Schierhorn, *Global Demand for Food Is Rising. Can We Meet It?*, HARV. BUS. REV. (Apr. 7, 2016), <https://hbr.org/2016/04/global-demand-for-food-is-rising-can-we-meet-it>.

³³ *Id.*

³⁴ Tom Fusonie, Dan Shuey & Andrew Guran, *Nuisance Lawsuits may Threaten Livestock Farmers*, FARM & DAIRY (Nov. 23, 2018), <https://www.farmanddairy.com/news/nuisance-lawsuits-may-threaten-livestock-farmers/524745.html>.

³⁵ Goedde, Katz, Ménard & Revellat, *supra* note 31.

³⁶ Natasha Lomas, *Agtech Startup iFarm Bags \$4M to Help Vertical Farms Grow More Tasty Stuff*, TECHCRUNCH (Aug. 20, 2020), <https://techcrunch.com/2020/08/20/agtech-startup-ifarm-bags-4m-to-help-vertical-farms-grow-more-tasty-stuff/>.

³⁷ *Id.*

for RTFAs to be re-evaluated as the country begins to shift from a rural-urban fringe to agriculture production in urban areas.³⁸

An additional innovation in the twenty-first century is the self-driving tractor.³⁹ A driverless tractor is an autonomous farm vehicle that can essentially perform all the functions of a traditional tractor with the aid of GPS, laser, cameras, and sensors.⁴⁰ These autonomous vehicles can carry out all of the same functions as a typical tractor operated by a driver.⁴¹ These self-driving tractors have unique features that come with advanced farm machinery technology.⁴² Because of new technology and urban farming, farmers can now grow crops in weather conditions that would not have been possible before and are able to grow larger quantities of food in small areas.⁴³ Due to self-driving tractors being able to carry out agricultural procedures that farmers would have traditionally had to perform manually, fatigue can be minimized, and production time can increase.⁴⁴ This ramped-up agriculture production, which is now possible with autonomous tractors, may create distributions for nearby neighbors.⁴⁵ As the world of agriculture changes, Illinois' RTFAs should be amended to stay current with agriculture as it evolves.⁴⁶

Similarly, changes to the planet are contributing to the need for Illinois' RTFA to be re-evaluated.⁴⁷ Climate change—including the increased prevalence and severity of droughts, fires, pests, and diseases—is threatening the production of food around the world.⁴⁸ The United Nations has cited that “[h]eat and blazing fires across the Western U.S. are threatening crops and livestock, and a derecho storm devastated millions of acres of corn and

³⁸ Anwesha Chatterjee, Sanjit Debnath & Harshata Pal, *Implication of Urban Agriculture and Vertical Farming for Future Sustainability*, INTECHOPEN, <https://www.intechopen.com/chapters/71024> (last visited Jan. 22, 2022).

³⁹ *What are Driverless Tractors and How Do They Work For You?*, TEAM TRACTOR RANCH (June 17, 2021), <https://www.teamtractor.com/blog/what-are-driverless-tractors-and-how-do-they-work-for-you--35588>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Autonomous Tractors – The Future of Farming*, FIELD BEE (Aug. 25, 2021), <https://www.fieldbee.com/blog/autonomous-tractors-the-future-of-farming/> (citing the changes in the way agriculture is produced).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Ryan Hobert & Christine Negra, *Climate Change and the Future of Food*, U.N. FOUND. BLOG (Sept. 1, 2020), <https://unfoundation.org/blog/post/climate-change-and-the-future-of-food/>. This article cites the importance of “[f]ood security” due to climate change. The author suggests that to continue to be able to feed the world, farms must operate sustainably, and farms must be protected. RTFAs are one way to achieve both goals of having green farming practices and mass agriculture production.

⁴⁸ *Id.*

soybean production in the Midwest.”⁴⁹ While agriculture often takes the blame for its contributions to global warming,⁵⁰ because there is a future risk of not being able to produce enough food to feed the world, agriculture must also be protected.⁵¹ According to the Food and Agriculture Organization (“FAO”), by 2050, the world will need to produce sixty percent more food than it currently is.⁵² This means there is an increased need for productivity, but climate change is also making it more difficult for agriculture production.⁵³ The United Nations has stated that global warming does not call for halting agriculture production; rather, “. . . agriculture is at the heart of the solution of the sustainability issue, contributing from the environmental, economic, and social sides. If we improve agricultural and food systems, we can improve the livelihoods and health of people, and produce healthier ecosystems as well.”⁵⁴ Thus, as the population grows and agriculture production becomes more difficult, agriculture needs to be protected more than ever.⁵⁵

The COVID-19 pandemic demonstrated another reason for Illinois to re-evaluate its RFTA.⁵⁶ The Florida Legislature cited COVID-19 as contributing to the need for amending their RFTA.⁵⁷ “Numerous countries are experiencing high food price inflation at the retail level, reflecting lingering supply disruptions due to COVID-19 social distancing measures, currency devaluations, and other factors.”⁵⁸ Grocery stores and restaurants are raising their food prices due to the “domino effect in the food supply chain.”⁵⁹ The food crisis will only worsen if agriculture is not protected.⁶⁰ Florida State Senator Jason Brodeur stated, “[d]uring the last very trying year of the COVID-19 pandemic, we had no diminishment of our food supply and farmers worked very hard to help us stay healthy. Since the COVID-19

⁴⁹ *Id.*

⁵⁰ *Id.* (“In a recent report, the Intergovernmental Panel on Climate Change found that more than a third of global greenhouse gas emissions come from the production, distribution, and consumption of food. When it comes to producing food, the majority of agricultural emissions are related to raising livestock, followed by rice cultivation and the production of synthetic fertilizers”).

⁵¹ José Graziano Da Silva, *Feeding the World Sustainably*, UN CHRONICLE (June 2012), <https://www.un.org/en/chronicle/article/feeding-world-sustainably>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Food Security and COVID-19*, THE WORLD BANK (March 3, 2021), <https://reliefweb.int/report/world/brief-food-security-and-covid-19>.

⁵⁷ Zippy Duvall, *Preserving the Right to Farm*, FARM BUREAU (March 3, 2021), <https://www.fb.org/viewpoints/preserving-the-right-to-farm1> (stating that “[l]egislatures in all 50 states have enacted right-to-farm laws to assure that normal farming activities”).

⁵⁸ *Food Security and COVID-19*, *supra* note 56.

⁵⁹ Emirrora Austin, *COVID-19 pandemic still causing food shortages*, NEWS CHANNEL 3 (Sept. 16, 2021), <https://wwmt.com/news/local/covid-19-pandemic-still-causing-issues-for-the-food-industry>.

⁶⁰ Duvall, *supra* note 57.

pandemic, there has been an increase in the number of people facing acute food insecurity.”⁶¹

The COVID-19 pandemic also meant devastation for farmers.⁶² A decrease in eating out in restaurants and driving caused agricultural commodity prices to decline significantly.⁶³ Furthering the problem was a lack of sufficient protection from nuisance suits for farmers.⁶⁴ In the past few years in North Carolina, twenty-six lawsuits have been brought against a meat processing company, affecting eighty-nine North Carolina hog farmers who were accused of being a “nuisance” to their neighbors.⁶⁵ According to Farm Bureau President Vincent Duvall, when these RTFAs are not applied properly or in accordance with their purpose, farmers suffer, causing even more of an increase in world hunger.⁶⁶ The world cannot afford for this to happen, especially due to the COVID-19 pandemic. Thus, changes in technology and to the planet are calling for Illinois to amend its RTFA as many other states, such as North Carolina,⁶⁷ Florida,⁶⁸ and Indiana⁶⁹ have recently done.

D. Illinois’ Farm Nuisance Suit Act and Substantial Case Law

Illinois’ Farm Nuisance Suit Act (the state’s name for their RTFA) begins with the policy and reasons for the creation of the Act, previously cited above in the “purpose” section of this Note.⁷⁰ Next, the Act contains a single definition of “farm,” which is defined as “any parcel of land used for the growing and harvesting of crops; for the feeding, breeding, keeping, and

⁶¹ Press Release, Jason Brodeur, Florida Senator for the Ninth District, Brodeur on Senate Passing S.B. 88 (Mar. 18, 2021), <https://www.flsenate.gov/Media/PressReleases/show/3937>.

⁶² Robert Johansson, *America’s Farmers: Resilient Throughout the COVID Pandemic*, U.S. DEP’T OF AGRIC. (Jul 29, 2021), <https://www.usda.gov/media/blog/2020/09/24/americas-farmers-resilient-throughout-covid-pandemic>.

⁶³ *Id.* (“ . . . [T]he reduction in miles driven as the public sheltered in place, meant less demand for biofuels, which in turn led to reduced demand for grains used in biofuels, particularly corn. In addition, the immediate and drastic decline in food demand by restaurants and hotel customers isolated farmers and food processors from some of their biggest buyers, especially for meat, dairy, and specialty crops.”).

⁶⁴ Duvall, *supra* note 57.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Tovar, *supra* note 29.

⁶⁸ Renzo Downey, *Expanded ‘Right to Farm’ Protections Pass*, FLA. POLITICS (April 22, 2021), <https://floridapolitics.com/archives/422988-house-gives-bill-protecting-farmers-from-nuisance-suits-final-ok/>.

⁶⁹ Chris Braun, *Keep Makin’ Bacon” Indiana’s Right to Farm Act Statute Upheld As Constitutional*, JD SUPRA (Jan. 12, 2021), <https://www.jdsupra.com/legalnews/keep-makin-bacon-indiana-s-right-to-9557259/>.

⁷⁰ 740 ILL. COMP. STAT. 70 (2018).

management of livestock; for dairying, horse keeping, or horse boarding or for any other agricultural or horticultural use or combination thereof.”⁷¹

In the substance of the statute, it declares when a farm should not be considered a nuisance.⁷² The Act bars nuisance suits when there is a change in the area around the farm after the farm has been in operation for one year and the operation has not been a nuisance for that period.⁷³ Illinois’ RTFA states that negligent acts and improper farming practices are not barred by the Act.⁷⁴ Also, any actions that cause pollution or changes in water will not receive the benefits of the Act.⁷⁵ Section 4.5 of the Illinois Farm Nuisance Suit addresses damages for a prevailing defendant by stating that “a prevailing defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in the defense of the nuisance action, together with a reasonable amount for attorney fees.”⁷⁶ The statute does not have any provisions on what damages a prevailing plaintiff may recover except:

[The] Act shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by them on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation.⁷⁷

The Illinois statute does have regulations in place to protect responsible farmers, such as the provision on damages allowing a prevailing defendant to collect costs and expenses incurred in the lawsuit; however, the statute lacks a damage cap.⁷⁸ A damage cap is a stipulation that many other states, such as North Carolina and Florida, already have in place.⁷⁹ Also, the Act lacks several common definitions for RTFAs, leaving the courts to fill in gaps that may be better suited for a definition by the legislature in order to ensure that all farms have the same protections statewide.⁸⁰ Additionally, Illinois does not have a best management practice manual in place.⁸¹ States such as

⁷¹ 740 ILL. COMP. STAT. 70/2 (2018).

⁷² 740 ILL. COMP. STAT. 70/3 (2018).

⁷³ *Id.*

⁷⁴ 740 ILL. COMP. STAT. 70 (2018).

⁷⁵ *Id.*

⁷⁶ 740 ILL. COMP. STAT. 70/4.5 (2018).

⁷⁷ 740 ILL. COMP. STAT. 70/4 (2018).

⁷⁸ 740 ILL. COMP. STAT. 70/4.5 (2018).

⁷⁹ 740 ILL. COMP. STAT. 70 (2018); N.C. GEN. STAT. § 106-702(A)-(D) (2018); FLA. STAT. § 823.14(7) (2021).

⁸⁰ 740 ILL. COMP. STAT. 70 (2018).

⁸¹ *Id.*; Amanda Nichols, *Comparison of State Right-to-Farm Laws That Include Aquaculture*, SEA GRANT L. CTR. (June 2018), <https://nsglc.olemiss.edu/projects/ag-food-law/files/rtf-comparison.pdf>.

Louisiana have included a manual to aid farmers in creating green and safe farming practices.⁸²

Illinois courts have attempted to fill in the gaps left by the legislators. In *Village of Chadwick v. Nelson*, the Illinois Second District Appellate Court reversed the trial court holding and found that the farm was not a nuisance because the city ordinance was preempted by the Farm Nuisance Suit Act.⁸³ As only a small village of approximately 600 residents, the Village used land-use restrictions as a substitution for localized zoning laws.⁸⁴ The Nelsons, the defendants in the case, bought the land in 2014 and originally only mowed hay on the property for his neighbor's livestock.⁸⁵ In 2016, the Nelsons shifted their original operation to "a commercial calf nursing operation."⁸⁶ The Nelsons stated that the plan for the calf operation was to sell "show calves" to 4-H⁸⁷ children.⁸⁸

Disturbing the Nelsons' small operation was the Village's "Ordinance No. 540," which was enacted on July 11, 2016.⁸⁹ The ordinance declared that the presence of certain animals automatically deems the farm to be a nuisance.⁹⁰ The Nelsons' calving operation fell under this ordinance.⁹¹ The defendant's argument was that the village ordinance was preempted under Illinois' RTFA.⁹² The trial court reasoned that the Nelsons' operation did not qualify for the protections under the state's RTFA as the Nelsons had altered their use of the property from a permissible farming operation to an impermissible "feedlot" and this type of change in operation, according to the trial court, is not covered by the Act.⁹³

The Appellate Court clarified the state's RTFA when they found that the Village had the authority to enact the ordinance, but that the suit was barred by Illinois law.⁹⁴ In making its ruling, the court relied on the holdings in *Toftoy v. Rosenwinkel* and *Village of LaFayette v. Brown*.⁹⁵ In *Toftoy*, the Illinois Supreme Court held that a change in the surrounding area of the farm

⁸² LA. REV. STAT. § 3:3604 (2019); VICTORIA L. KILLION, CONG. RSCH. SERV., R46484, UNDERSTANDING FEDERAL LEGISLATION: A SECTION-BY-SECTION GUIDE TO KEY LEGAL CONSIDERATIONS (2021).

⁸³ *Vill. of Chadwick v. Nelson*, 2017 IL App (2d) 170064, ¶ 18.

⁸⁴ *Id.* at ¶¶ 2-6.

⁸⁵ *Id.* at ¶¶ 2-4.

⁸⁶ *Id.* at ¶ 5.

⁸⁷ *What is 4-H?*, 4-H, <http://4-h.org/about/what-is-4-h/> (last visited Nov. 11, 2022). 4-H is a youth organization centered around empowering young people to be well-informed citizens who are actively engaged in their communities and the world.

⁸⁸ *Nelson*, 2017 IL App (2d) at ¶ 6.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at ¶ 7.

⁹² *Id.* at ¶ 8.

⁹³ *Id.*

⁹⁴ *Nelson*, 2017 IL App (2d) at ¶ 10.

⁹⁵ *Id.* at ¶ 13.

did not affect the farm’s protections offered by the state RTFA.⁹⁶ Further aiding the court’s decision, in *Village of LaFayette*, it was held that “the enactment of an ordinance prohibiting ‘any commercial farming’ in the village constituted a ‘changed condition’ in the area.”⁹⁷ While dicta in *Village of LaFayette*, an Illinois Third District Appellate case, suggested that a change from crops to livestock constituted a changed condition, the court found “the Act’s protections are not limited to ‘a farm operated by the same owner and growing the exact same crops.’”⁹⁸ Thus, the court in *Village of Chadwick* ruled that Illinois’ RFTA should be interpreted to bar nuisance suits even when the operation has changed from one agricultural use to another, as long as the use remains agricultural for the one-year period required by the statute.⁹⁹ These cases aid in interpreting Illinois’ RFTA, and they expand on the statute’s plain language. However, the statute still lacks clarity on many aspects and consistency throughout the state’s circuit courts. Further, the courts only discuss the RFTA when applied to a narrow set of facts in individual cases. Thus, more should be done in regard to amending the statute itself.

II. COMPARATIVE ANALYSIS OF STATE RIGHT-TO-FARM ACTS

A. North Carolina: Lawsuits get the Boot

North Carolina plays a vital role in American agriculture.¹⁰⁰ The state is the top producer of tobacco and sweet potatoes and second in hog and turkey production.¹⁰¹ The state also has a profitable agritourism industry, being second in Christmas tree sales.¹⁰² Additionally, North Carolina is composed of a large amount of farmable land, totaling eight million acres.¹⁰³

The state’s previous 2013 RTFA amendment (before the 2018 amendment) recognized the importance of agriculture in the state with requirements such as:

No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about

⁹⁶ *Id.* at ¶ 13 (citing *Toftoy v. Rosenwinkel*, 2012 IL 113569, ¶¶ 9, 22-23).

⁹⁷ *Id.* at (citing *Vill. of LaFayette v. Brown*, 2015 IL App (3d) 130445, ¶ 9).

⁹⁸ *Id.* at ¶ 13. (citing *Brown*, 2015 IL App (3d) at ¶ 32).

⁹⁹ *Id.* at ¶ 18.

¹⁰⁰ Edgar Barrios, *Right-to-Farm in America: Overview and Case Studies*, STATE GOV’T LEADERSHIP FOUND. (Mar. 30, 2021), <https://statelibrary.ncdcr.libguides.com/ncagriculture#:~:text=North%20Carolina%20is%20number%20one,more%20than%208.4%20million%20acres.>

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Dee Shore, *Farmland Challenges in a Fast-Growing State*, N. C. STATE UNIV. (Mar. 16, 2021), <https://cals.ncsu.edu/news/farmland-in-a-fast-growing-state/>.

the locality outside of the operation after the operation has been in operation for more than one year, when such operation was not a nuisance at the time the operation began.¹⁰⁴

However, this previous amendment left several gaps to be filled.¹⁰⁵ For example, there was no statute of limitations set out in the law, and this led to complaints being filed fifteen years after the nuisance had occurred.¹⁰⁶ Another problem that the North Carolina legislature sought to cure was, as one policy analysis reported, “[t]he farms that were sued and subsequently lost did not break any laws or regulations in place; they were duly punished on the premise of a jury finding their industry to be a nuisance to the community present.”¹⁰⁷

In 2018, the North Carolina legislature amended the statute once again to fix a number of the problems that had resulted from the previous amendment.¹⁰⁸ Florida and North Carolina both amended their RTFA statutes to limit the number of compensatory damages to the actual value decrease of the property for a permanent nuisance and the decrease in rental value when the nuisance is temporary.¹⁰⁹ North Carolina’s section on damages states:

(1) for permanent nuisances, compensatory damages are measured by the reduction in the fair market value of the plaintiff’s property caused by the nuisance, not to exceed the fair market value of the property; (2) for temporary nuisances, compensatory damages are limited to the diminution of the fair rental value of the plaintiff’s property caused by the nuisance.¹¹⁰

Both states expanded the coverage of their RFTAs through definitions. Florida’s amendment included “agrotourism,”¹¹¹ while North Carolina broadened its “fruit and vegetable handlers” definition.¹¹² North Carolina’s new definition of a handler is anyone in the business of “buying, receiving, selling, exchanging, negotiating, processing for resale, or soliciting the sale, resale, exchange, or transfer of any fruits and vegetables purchased from a N.C. farmer, received on consignment from a N.C. farmer, or received to be

¹⁰⁴ Barrios, *supra* note 100.

¹⁰⁵ Shore, *supra* note 103 (noting the gaps in this amended RTFA).

¹⁰⁶ *Id.*

¹⁰⁷ Barrios, *supra* note 100.

¹⁰⁸ Lulu Ramadan, *Lawyers for Glades residents fear Florida Legislature Just Made it Harder for Them to Sue Over Sugarcane Burning*, THE PALM BEACH POST (April 27, 2021), <https://www.palmbeachpost.com/story/news/2021/04/27/glades-residents-fear-farm-law-protections-may-hinder-lawsuit/7395855002/>; *Farm Protection From Nuisance Lawsuits*, PENN STATE LAW, <https://pennstatelaw.psu.edu/file/aglaw/FarmProtectionFromNuisanceLawsuits.pdf> (last visited Jan. 18, 2022).

¹⁰⁹ FLA. STAT. § 823.14 (2021); N.C. GEN. STAT. § 106-702 (2018).

¹¹⁰ N.C. GEN. STAT. § 106-702 (2018).

¹¹¹ FLA. STAT. § 823.14 (2021).

¹¹² N.C. GEN. STAT. § 106-501.1 (2018).

handled on a net return basis from a N.C. farmer.”¹¹³ Under this new definition, companies, farmers, and those involved in the stream of commerce of fruit handling in the state will now have North Carolina’s RFTA as a shield from litigation.¹¹⁴

The amendment was praised for its new expansions by lawmakers and farm advocates, such as Steve Troxler, the North Carolina Agriculture Commissioner.¹¹⁵ The push for an amendment came after several lawsuits in the state aimed at farmers.¹¹⁶ In 2014, a trial lawyer found a loophole in the previous RFTA that allowed him to secure \$550 million in damages through twenty-six lawsuits against eighty-nine hog farms in the state.¹¹⁷ Farm Bureau Federation (an independent national organization that focuses on lobbying for pro-agriculture legislation and agricultural education)¹¹⁸ President Zippy Duvall criticized these lawsuits, writing, “[t]hese lawsuits were not based on any violations of environmental laws or regulations: they simply claimed that these farms were a nuisance.”¹¹⁹

The focus for these multimillion-dollar lawsuits against farmers was Murphy-Brown, a subsidiary of Smithfield food.¹²⁰ In 2017, the North Carolina courts saw between 400 and 500 suits filed against Murphy-Brown.¹²¹ The extensive number of lawsuits filed against Murphy-Brown began in 2014 when neighbors started complaining about the condition of these Murphy-Brown farms.¹²² One of the neighbor’s complaints was that the storage of hog manure outside in open-air pits caused a foul odor.¹²³ Making matters worse, the hog farmers broke down the manure and sprayed the waste across fields to help with fertilization.¹²⁴ In two cases, these conditions tested the RFTA North Carolina had in place at the time.¹²⁵

¹¹³ Rochelle Sparko, *A Breakdown of North Carolina’s Farm Act of 2018*, CAROLINA FARM STEWARDSHIP ASS’N (Aug. 22, 2018), <https://www.carolinafarmstewards.org/a-breakdown-of-north-carolinas-farm-act-of-2018/> (citing N.C. GEN. STAT. § 106-501.1 (2018)).

¹¹⁴ *Id.*

¹¹⁵ Steve Troxler & Dr. Mike Strain, *Guest opinion: Reduce the threat of nuisance lawsuits against farmers*, NEWS-PRESS (Mar. 31, 2021), <https://www.news-press.com/story/opinion/2021/03/31/reduce-threat-nuisance-lawsuits-against-farmers-florida-legislature/4819208001/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Working Together to Build Strong Agricultural Communities Since 1919*, FARM BUREAU, <https://www.fb.org/about/impact> (last visited March 21, 2022).

¹¹⁹ Duvall, *supra* note 57.

¹²⁰ Sparko, *supra* note 113 (discussing the vast number and size of the lawsuits filed against Murphy-Brown and the link between these suits and the 2018 North Carolina Amendment).

¹²¹ *Id.*

¹²² Christopher Coleman, Katherine May, P. Derek Petersen, & Meredith Weinberg, *Large Jury Verdicts in Hog Nuisance Cases Signal CAFO Litigation Is Rising*, PERKINS COIE (Aug. 9, 2018), <https://www.perkinscoie.com/en/news-insights/large-jury-verdicts-in-hog-nuisance-cases-signal-cafo-litigation.html>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

In the first case, *McKiver v. Murphy-Brown, LLC*, the plaintiffs were awarded \$51 million in damages.¹²⁶ The plaintiffs did not allege that the practice of open-air lagoons and spray fields were illegal, nor did they argue that a local ordinance was violated; rather, all they alleged was that Murphy-Brown could afford to implement a system that would have better prevented or minimized the odors.¹²⁷ In the second case, *McGowan v. Murphy-Brown, LLC*, a couple was awarded \$250,000 in punitive damages after moving to property near an already operating farm with about 4,700 hogs.¹²⁸

These two lawsuits sparked a flood of litigation against Murphy-Brown and similar operations.¹²⁹ Courts were struggling to apply the provisions of the previous North Carolina RTFA, as these situations did not fit within the Act.¹³⁰ North Carolina's law was focused on changes outside of the operation, such as new subdivisions moving next to operating farms.¹³¹ The amended RTFA includes changes to the operation itself when there is a change in new technology, ownership, agriculture type, and other similar changes that a farm may go through.¹³² These small changes in the RTFAs could have been the difference between a complete bar to the suit or millions in damages.¹³³

In 2019, after the amendment, Paul Lewis filed a nuisance and negligence claim against his neighbor who raised hogs under contract for Murphy-Brown.¹³⁴ The neighboring farm had been in operation since 1995, and Lewis argued that, prior to the farm's existence, he had a peaceful and enjoyable home that had since been ruined by the hog farm next door.¹³⁵ Lewis further argued that the hog farm caused his chronic health conditions, as he was drinking well water that was "contaminated by [d]efendant's hog operation."¹³⁶

The District Court judge found that the amended RTFA blocked both the nuisance and negligence claims.¹³⁷ The judge found the suit was blocked on three grounds by the RTFA; the farm had been in operation since "in or around 1995," which is well within the one-year rule, the defendant lived more than a half-mile from the farm, and the removal of the hogs did not

¹²⁶ *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 976 (4th Cir. 2020).

¹²⁷ Coleman, May, Petersen & Weinberg, *supra* note 122.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² N.C. GEN. STAT. § 106-701(a)(4) (2018).

¹³³ See Coleman, May, Petersen & Weinberg, *supra* note 122.

¹³⁴ *Lewis v. Murphy-Brown*, No. 7:19-CV-127-BR, 2020 U.S. Dist. LEXIS 44997, at *1-3 (E.D. N.C. Mar. 16, 2020).

¹³⁵ *Id.*

¹³⁶ *Id.* at *3.

¹³⁷ *Id.* at *6-7.

constitute a change in operation.¹³⁸ The judge then found the negligence claim to be barred by the statute of limitations.¹³⁹ The *Lewis* lawsuit illustrates what these lawsuits look like when the RTFA is implemented and what lawmakers intended the Act to do.

In 2020, the first lawsuit filed against Murphy-Brown, *McKiver*, went to the Fourth Circuit Court after Murphy-Brown appealed.¹⁴⁰ On appeal, Murphy-Brown argued that the new amendment was a clarification of existing law and, therefore, would apply to McKiver even though the suit was filed before the amended RTFA.¹⁴¹ The court disagreed with Murphy-Brown, reasoning that the amendment was not a clarification of the existing law, but that it was a true amendment meant to provide change to the existing law.¹⁴² This was fatal to Murphy-Brown, as the court indicated that had the new RTFA applied, the entire suit would have likely been barred, but since it was not a clarification and was amended after the case was filed, it did not apply here.¹⁴³ Robert Branan, an agricultural and environmental law professor at North Carolina State University, commented that “[w]hile the *McKiver* opinion is not considered precedent for state courts in North Carolina, the reasoning provided by the case is a good guide as to how future nuisance suits would be handled under the amended Right to Farm law.”¹⁴⁴

During the *McKiver* case, Judge Harvie Wilkinson III made an impactful speech about the shameful conditions that neighbors (and the pigs) were enduring.¹⁴⁵ Judge Wilkinson III stated:

Yes, the hog farming certainly provides many jobs in eastern North Carolina. It’s important to the economy and national food supply. But it’s harmful to the people who live nearby. It’s got to be environmentally harmful to the waterways. Nobody wants another Flint, Michigan. It can’t be good for children’s respiratory systems. And the inhumanity to the animals and the fatality rate. Some people may think [pigs] are ugly and they can treat them the way they want. If this were my property I’d be outraged at some of these conditions that were allowed to persist. Less

¹³⁸ *Id.* at *7.

¹³⁹ *Id.* at *6-7.

¹⁴⁰ Robert Branan, *Swine Nuisance: Branan Discusses Recent 4th Circuit Opinion in McKiver v. Murphy Brown*, N.C. STATE EXTENSION (Jan. 14, 2021), <https://farmlaw.ces.ncsu.edu/2021/01/swine-nuisance-branan-discusses-recent-4th-circuit-opinion-in-mckiver-v-murphy-brown/>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Lisa Sorg, *A federal appeals court judge’s remarkable speech is the latest surprise in NC’s hog nuisance lawsuits*, NC POL’Y WATCH (Feb. 3, 2020), <https://ncpolicywatch.com/2020/02/03/a-federal-appeals-court-judges-remarkable-speech-is-the-latest-surprise-in-ncs-hog-nuisance-lawsuits/>.

fortunate citizens have property rights, too. They have a right to good health and enjoyment of their property.¹⁴⁶

Surely, there is much for lawmakers to learn from Wilkinson's speech.¹⁴⁷ While North Carolina's RTFA may be successful in protecting farmers from nuisances, these Acts may go too far and exceed the scope of who and what they were intended to protect.¹⁴⁸

B. Florida: Trading Smoke for Sugarcane

Agriculture is the second biggest industry in Florida.¹⁴⁹ The state produces more than 300 diverse agricultural commodities.¹⁵⁰ Florida is also home to more than 47,000 farms, with over eighty percent being small farms (small farms are farms with sales of \$100,000 or less).¹⁵¹ Florida ranks first in the production of many fruits and vegetables—including cucumber, grapefruit, squash, tomatoes, radishes, guavas, mangoes, passion fruit, watermelon, and kumquats.¹⁵² The state is also first nationwide in sugarcane and second (to California) in citrus production.¹⁵³

Before the 2021 amendment to Florida's RTFA, the state limited local regulation and created a one year statute of limitation.¹⁵⁴ Florida saw challenges to this previous amendment that came from sources such as the growth of urban sprawl pushing into land that was previously farmland, which increased nuisance suits and complaints.¹⁵⁵ Also, large class actions over sugarcane burnings created multi-million-dollar lawsuits.¹⁵⁶ Thus, the state amended its RTFA again to account for the growing number of lawsuits.¹⁵⁷

When amending its own RTFA, the Florida Legislature relied heavily on North Carolina's amended RTFA.¹⁵⁸ On July 1, 2021, Florida's Senate Bill 88 became effective and made similar changes as North Carolina's RTFA did in 2018.¹⁵⁹ This amendment broadened the definition of activities

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* (discussing J. Wilkinson's speech in the *McKiver* case).

¹⁴⁸ *See id.* (discussing J. Wilkinson's speech in the *McKiver* case and the negative effects that will go unpunished after the new amendment to North Carolina's RTFA).

¹⁴⁹ *What Are The Biggest Industries In Florida?*, WORLD ATLAS, <https://www.worldatlas.com/articles/what-are-the-biggest-industries-in-florida.html> (last visited Nov. 11, 2022).

¹⁵⁰ Barrios, *supra* note 100.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Barrios, *supra* note 100.

¹⁵⁷ *Id.*

¹⁵⁸ Ramadan, *supra* note 108.

¹⁵⁹ FLA. STAT. § 823.14 (2021).

that qualify for immunity and are thus no longer considered nuisances.¹⁶⁰ The statute now protects noise, smoke, odors, dust, fumes, particle emissions, or vibration from being a nuisance.¹⁶¹ The previous bill did not protect against smoke or particle emissions, but only noise, odor, dust, and fumes.¹⁶² Florida's new amendment also includes protection for agritourism operations.¹⁶³ Additionally, any nuisance suits are restricted to plaintiffs located within a half-mile of the activity or structure targeted in the suit.¹⁶⁴ The amendment expands the scope of the bill to protect farmers from not only nuisance lawsuits, but also challenges involving negligence, personal injury, and other torts.¹⁶⁵ Lastly, plaintiffs who sue over activities that are later found to be barred by the Act could be asked to pay the defendant's attorney's fees.¹⁶⁶

Florida lawmakers and farm advocates were quick to praise the law. Senator Jason Brodeur, who is Senate Bill 88's sponsor, stated,

As more and more people leave densely populated areas of the country and relocate to rural areas of our state, residential development encroaches on our rural areas, friction between these competing land uses can lead to litigation that threatens the survival of legacy farming communities. While we are always happy to welcome more Floridians, we also have to preserve existing farms. This legislation strikes the right balance by modernizing Florida's Right to Farm Act, and I am grateful to Gov. DeSantis for signing it into law today.¹⁶⁷

Senate President, Wilton Simpson, agreed with Brodeur and stated that laws need to be changed as the industry and world change.¹⁶⁸

Some view this Act as a way to help protect Florida's large and profitable sugarcane industry.¹⁶⁹ Florida's sugarcane corporations, such as

¹⁶⁰ FLA. STAT. § 823.14(3)(f) (2021).

¹⁶¹ *Id.*

¹⁶² Downey, *supra* note 68.

¹⁶³ FLA. STAT. § 823.14(3)(c) (2021).

¹⁶⁴ FLA. STAT. § 823.14(4)(d) (2021).

¹⁶⁵ FLA. STAT. § 823.14(2)(f) (2021) As of July 1, Florida's RTFA now reads; "The term [nuisance] also includes all claims that meet the requirements of this definition, regardless of whether the plaintiff designates those claims as brought in nuisance, negligence, trespass, personal injury, strict liability, or other tort."

¹⁶⁶ FLA. STAT. § 823.14(9) (2021).

¹⁶⁷ Frank Giles, *What You Should Know About the New Right to Farm Act in Florida*, GROWING PRODUCE (May 12, 2021), <https://www.growingproduce.com/farm-management/floridas-right-to-farm-act-now-law/>.

¹⁶⁸ News Release, Staff of Governor Ron DeSantis, Governor Signs Right to Farm Bill Following Overwhelming Legislative Support (April 29, 2021) (on file at <https://www.flgov.com/2021/04/29/governor-signs-right-to-farm-bill-following-overwhelming-legislative-support/#header>).

¹⁶⁹ Ryan Weston, *Sugarcane Farmers Play Important Role in Florida's Economy*, TALLAHASSEE DEMOCRAT (Apr. 16, 2016, 12:06 AM), <https://www.tallahassee.com/story/opinion/2016/04/16/sugarcane-farmers-play-important-role-floridas-economy/83095274/>.

Clewiston and U.S. Sugar generate millions of dollars each year for the state.¹⁷⁰ The sugarcane industry in south Florida alone contributes over \$3.2 billion to Florida's economy every year.¹⁷¹ U.S. Sugar states that “[s]ugarcane farming is the second leading contributor to Florida's agricultural economy.”¹⁷² While many in the legislature see this bill as a win for the state's agriculture production and the economy,¹⁷³ others view the bill as the state giving the sugarcane industry a “get out of jail free card.”¹⁷⁴ In response, Florida Senate Democratic Minority Leader, Gary Farmer, told *The Palm Beach Post* and *ProPublica*, “[the new RTFA] is about allowing corporate entities to pollute without any real ramifications.”¹⁷⁵

Many environmentalists and Florida residents raised concerns about the new difficulties of bringing a nuisance suit against sugarcane farmers.¹⁷⁶ The protest is mainly aimed at sugar companies like Clewiston, which produces twenty-five percent of the sugar in the United States and controls approximately 500,000 acres of the Everglades' farmable land.¹⁷⁷ Sugarcane farmers such as Clewiston burn off the undesirable parts of the sugarcane plant starting in October and ending between March and May.¹⁷⁸ These burnings create a black smoke that may cause breathing difficulties¹⁷⁹ for those within a twenty-five-mile radius.¹⁸⁰ This produces pollutants, many of which have been designated as “hazardous substances” under both federal and Florida law.¹⁸¹ The soot from the burnings can become so thick that it has been known to cover cars and homes.¹⁸² A Brazilian study on the effects of sugarcane burning found the burnings to be linked to respiratory diseases,

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² U.S. SUGAR, <https://www.ussugar.com/economic-engine/> (last visited Jan. 9, 2023).

¹⁷³ News Release, Staff of Governor Ron DeSantis, Signs Right to Farm Bill Following Overwhelming Legislative Support (Apr. 29, 2021) (on file at <https://www.flgov.com/2021/04/29/governor-signs-right-to-farm-bill-following-overwhelming-legislative-support/#header>).

¹⁷⁴ Lulu Ramadan, “*They’re Trying to Make It So We Walk Away*”: *It’s About to Get Harder to File Lawsuits Saying Sugar Harvesters Poisoned the Air*, *PROPUBLICA* (Apr. 28, 2021, 5:00 AM), <https://www.propublica.org/article/florida-sugar-cane-legislation>.

¹⁷⁵ Ramadan, *supra* note 108.

¹⁷⁶ Ramadan, *supra* note 174.

¹⁷⁷ Tony D’souza, *Poor, Black, and Sick Floridians Battle Big Sugar in Court*, *MIAMI NEW TIMES* (Feb. 2, 2021, 9:00 AM), <https://www.miaminewtimes.com/news/lawsuit-targets-sugar-industry-in-florida-everglades-11834085>.

¹⁷⁸ Ramadan, *supra* note 174.

¹⁷⁹ *Id.*

¹⁸⁰ Robbie Gaffney, *Environmentalists Say Bill to Protect Farmers from Lawsuits Disenfranchises Communities Impacted by Sugarcane Burning*, *WFSU PUB. MEDIA* (Mar. 5, 2021, 2:50 PM), <https://news.wfsu.org/state-news/2021-03-05/environmentalists-say-bill-to-protect-farmers-from-lawsuits-disenfranches-communities-impacted-by-sugarcane-burning>.

¹⁸¹ Order Granting in Part Def.’s Mot. to Dismiss, *Coffie v. Fla. Crystals Corp.*, 460 F. Supp. 3d 1297, 1302-03 (S.D. Fla. 2020).

¹⁸² D’souza, *supra* note 177.

especially in children under five.¹⁸³ In the bill, lawmakers expanded the definition of protected farming operations to include “particle emissions,” which include byproducts of sugarcane burning to be barred from nuisance suits.¹⁸⁴

In 2019, just before Florida’s RTFA was amended, a class-action lawsuit, *Coffie v. Florida Crystals Corporation*, was filed in western Palm Beach County, citing smoke from sugarcane burnings as the grounds for the lawsuit.¹⁸⁵ Low-income African Americans in rural communities in the Everglades were the focal point of the lawsuit due to the sugarcane burnings effect on them.¹⁸⁶ Since the Florida RTFA was amended while this suit was still pending, some suggest it was aimed at this lawsuit.¹⁸⁷ In response to these concerns, lawmakers have stated that this amendment was unrelated to the pending class action.¹⁸⁸

On July 2, 2021, the day after the state’s new RTFA went into effect for lawsuits not yet filed, Judge Rodney Smith championed the fight for more restrictions on the sugarcane industry.¹⁸⁹ In an order for the *Coffie* lawsuit, Judge Rodney Smith of the U.S. District Court for the Southern District of Florida denied a motion to dismiss “finding that the plaintiffs—central Florida residents who allege that their health and property are damaged by sugarcane burning—sufficiently plead claims for negligence, strict liability and medical monitoring.”¹⁹⁰

If Florida’s legislature amended the RTFA sooner, the result in *Coffie* might have been different. The *Coffie* class action was composed of members from three different zip codes and several towns.¹⁹¹ As the new RTFA blocks claims from over one-half of a mile,¹⁹² a class action may not have even been possible with such narrow restrictions. Further, the prayer for relief also

¹⁸³ Maria Leticia de Souza Paraiso & Nelson Gouveia, *Health Risks Due to Pre-harvesting Sugarcane Burning in São Paulo State, Brazil*, 18 REV. BRAS. EPIDEMIOL., 691, 693 (2015).

¹⁸⁴ Ramadan, *supra* note 108.

¹⁸⁵ D’souza, *supra* note 177.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Ramadan, *supra* note 174.

¹⁸⁹ *Hagens Berman and Berman Law Group: Court Upholds Florida Residents’ Claims in Sugarcane Burning Pollution Lawsuit Against Big Sugar*, BUS. WIRE (July 2, 2021, 7:34 PM), <https://www.businesswire.com/news/home/20210702005458/en/Hagens-Berman-and-Berman-Law-Group-Court-Upholds-Florida-Residents%E2%80%99-Claims-in-Sugarcane-Burning-Pollution-Lawsuit-Against-Big-Sugar>.

¹⁹⁰ *Id.*; Order Granting in Part Def.’s Mot. to Dismiss, *Coffie v. Fla. Crystals Corp.*, 460 F. Supp. 3d 1297, 1302-03 (S.D. Fla. 2020).

¹⁹¹ Corrado Rizzi, *‘Big Sugar’ Facing Class Action Lawsuit Over Alleged Environmental Effects from Pre-Harvest Sugarcane Burning in Florida*, CLASSACTION, <https://www.classaction.org/news/big-sugar-facing-class-action-lawsuit-over-alleged-environmental-effects-from-pre-harvest-sugarcane-burning-in-florida> (Mar. 2, 2022).

¹⁹² FLA. STAT. § 823.14(4)(d) (2021).

would have been more limited.¹⁹³ Now, damages are limited to the “reduction in the fair market value of the plaintiff’s property caused by the nuisance but may not exceed the fair market value of the property.”¹⁹⁴ The *Coffie* case illustrates how small changes in a state’s RTFA can create outcomes that vastly vary from before an amendment.

C. Indiana: Hog Farm Giants and Nuisance Suits

While Indiana did not amend its RTFA as recently as Florida and North Carolina, in 2020, the United States Supreme Court denied certiorari of an Indiana RTFA case and thus handed a major victory to Indiana agriculture.¹⁹⁵ Indiana faced strong opposition on constitutional grounds after the 2005 amendment to its RTFA.¹⁹⁶ The amendment barred nuisance suits when the operation changed from crops to livestock.¹⁹⁷ One Indiana suit in particular, *Himsel v. 4/9 Livestock, LLC*, drew attention to Indiana’s RTFA.¹⁹⁸ An Indiana environmental group challenged the RTFA on behalf of two similarly suited neighbors.¹⁹⁹ The defendant was 4/9 Livestock LCC, a farm that had been in operation for decades and housed approximately 8,000 hogs.²⁰⁰ The plaintiffs claim that at times the neighbor’s farm made their homes “unlivable.”²⁰¹ Richard Himsel, one of the plaintiffs, stated, “[n]o one wants to buy our property because of the smell, so we can’t even move away—we’re prisoners in our own home.”²⁰² Himsel later said that the odor from 4/9 Livestock LLC was so potent that his wife went to live with their daughter.²⁰³ Thus, the plaintiffs brought suit against 4/9 Livestock LLC and Co-Alliance LLP on the grounds that the amended RTFA was unconstitutional under the Indiana Constitution and U.S. Constitution.²⁰⁴

The defendant filed a Motion for Summary Judgment with the trial court.²⁰⁵ In the motion, the defendants stated the grounds on which the plaintiffs were challenging the amended RTFA.²⁰⁶

¹⁹³ Rizzi, *supra* note 191 (citing the novel damage cap in the state’s new RTFA).

¹⁹⁴ FLA. STAT. § 823.14(7) (2021).

¹⁹⁵ Chris Braun, *supra* note 69.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Himsel v. Himsel*, 122 N.E.3d 935, 938 (Ind. Ct. App. 2019).

¹⁹⁹ Associated Press, *Environmental Group Tackles Indiana’s Right-to-Farm Laws*, PORK BUS., (Oct. 9, 2015), <https://www.porkbusiness.com/news/hog-production/environmental-group-tackles-indianas-right-farm-laws>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Himsel*, 122 N.E.3d at 938.

²⁰⁶ *Id.* at 941.

The Plaintiffs challenge the constitutionality of the RTFA claiming that it: (1) violates Article I, Section 1 of the Indiana Constitution; (2) violates Article I, Section 12 of the Indiana Constitution (the “Open Courts provision”); (3) violates the Fifth Amendment of the U.S. Constitution and Article I, Section 21 of the Indiana Constitution (the “Takings Clause(s)”; and (4) violates Article I, Section 23 of the Indiana Constitution (the ‘Equal Privileges and Immunities provision’).²⁰⁷

The trial court dismissed the case on summary judgment as the Indiana Court found that the Plaintiffs’ nuisance claims were precluded by the RTFA and that their trespass claims should be properly treated as nuisance claims as “they were essentially a repackaged version of the nuisance claims, and determined that the application of the RTFA did not effect a regulatory taking of the Plaintiffs’ properties.”²⁰⁸ This ruling was later upheld on appeal by the Indiana Court of Appeals in 2019, and in 2020, the Indiana Supreme Court denied the hearing of the case.²⁰⁹ The Court of Appeals stated, “the coming to the nuisance doctrine, as applied by the RTFA, now encompasses coming to the potential future nuisance.”²¹⁰ The Indiana Courts cited a piece of the RTFA that states that the policy of the Act is to “conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products” and finds that “when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits,” which discourage “investments in farm improvements.”²¹¹

In 2020, the plaintiffs filed petition for a writ of certiorari with the United States Supreme Court.²¹² The plaintiffs requested that the Court grant certiorari on the grounds that the new RTFA violated the Fifth Amendment’s Takings Clause as the Act essentially rendered the plaintiffs without grounds to file suit against the defendants.²¹³ The U.S. Supreme Court denied certiorari of the *Himsel v. 4/9 Livestock, LLC* lawsuit, thus, ensuring a victory for the defendants, 4/9 Livestock LLC, and agriculture producers across the country.²¹⁴

After the denial of certiorari by the Supreme Court, both those on the side of the hog farmers and the environmentalists agree that Indiana’s RTFA

²⁰⁷ Mot. for Summ. J., *Himsel*, 122 N.E.3d 935.

²⁰⁸ Braun, *supra* note 69.

²⁰⁹ *Id.*

²¹⁰ *Himsel*, 122 N.E.3d at 944.

²¹¹ Braun, *supra* note 69; IND. CODE § 32-30-6-9(b).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Himsel*, 122 N.E.3d at 935; See SCOTUS Docket No. 20-72 to access the Cert Petition and related briefs at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-72.html>.

should be changed to pave the way for a brighter future for both sides.²¹⁵ Those in favor of stronger agriculture protection cite agriculture as an economic necessity in Indiana²¹⁶ and the need to reverse the trend of dwindling agriculture in the state.²¹⁷ According to the Indiana State Department of Agriculture, agriculture production in the state contributes approximately \$31.2 billion to Indiana's economy and over eighty percent of Indiana's land is devoted to farms, forests, and woodlands.²¹⁸ Chris Braun, partnering attorney at Plews, Shadley, Racher & Braun and the representative for the livestock producers in the *Himsel* lawsuit, proclaimed this case was a victory for farmers in Indiana.²¹⁹ Braun stated that due to the denial of the petition by the U.S. Supreme Court, farmers using safe farm management practices will be assured that they will not be sued as a nuisance.²²⁰ Braun further stated that there are plans to push for an amendment of Indiana's RTFA to hold organizations like the Hoosier Environmental Council financially responsible for lawsuits he says target farmers.²²¹ "I think that would be a tremendous benefit, and it would deter a lot of the frivolous actions and lawsuits," he said. "And again, if there's a bad actor farmer out there, and they don't get the protection of the Right to Farm Act, you know what, have at them."²²² On the other hand, Kim Ferraro, an attorney with the Hoosier Environmental Council and attorney for the environmentalist group in *Himsel*, believes there is a need for change to ensure fair property rights to all and that the Indiana legislature should reconsider the RTFA in order to not give large animal confinement operations so much protection that they become essentially immune to nuisance suits.²²³

III. REASONS FOR MORE PRO-AGRICULTURE REGULATIONS IN ILLINOIS

The Illinois legislature should consider amending Illinois' current RTFA in favor of local agriculture producers, as agriculture plays a vital role

²¹⁵ Samantha Horton, *After Supreme Court Rejects Hearing Right to Farm Case, Both Sides Look To Policy Changes*, IND. PUB. RADIO, (Oct. 19, 2020), <https://indianapublicradio.org/news/2020/10/after-supreme-court-rejects-hearing-right-to-farm-case-both-sides-look-to-policy-changes/>.

²¹⁶ Braun, *supra* note 69.

²¹⁷ Wes Mills, *Farmer Sentiment Continues to Decline*, INSIDE IND. BUS. (Oct. 5, 2021), <https://www.insideindianabusiness.com/articles/farmer-sentiment-continues-to-decline>.

²¹⁸ *About Indiana Agriculture*, IND. STATE DEP'T OF AGRIC., <https://www.in.gov/isda/about/about-indiana-agriculture/> (last visited Nov. 11, 2022).

²¹⁹ Horton, *supra* note 215.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

in Illinois' economy.²²⁴ Illinois is one of the top agricultural-producing states in the nation.²²⁵ In addition to being the top-producing state of soybeans²²⁶ and pumpkins,²²⁷ the state is also one of the top producers of corn, cattle, sheep, wheat,²²⁸ and hogs.²²⁹ Other top agricultural-producing states like Florida²³⁰, North Carolina²³¹, and Indiana²³² have amended their RTFAs to reflect the importance of agriculture in their state. Thus, Illinois, as one of the top ten agricultural production states,²³³ should follow suit and amend its RTFA to better insulate farmers from nuisance suits.

Since Illinois became a state in 1818, agriculture has been a driving force for Illinois' economy.²³⁴ Although farming has been decreasing across the country in recent years, agriculture still remains essential to Illinois.²³⁵ Approximately seventy-five percent of Illinois consists of farmland (roughly twenty-seven million acres), making Illinois one of the largest agricultural states in the nation.²³⁶ Additionally, agriculture adds approximately \$51.1 billion in value to Illinois' total GDP.²³⁷

²²⁴ *Facts About Illinois Agriculture*, ILL. DEP'T OF AGRIC. <https://www2.illinois.gov/sites/agr/About/Pages/Facts-About-IllinoisAgriculture.aspx#:~:text=hunting%20and%20fishing.How%20does%20agriculture%20benefit%20Illinois'%20economy%3F.and%20poultry%20generates%2013%20percent> (last visited Nov. 7, 2022).

²²⁵ *Id.* (citing Illinois as a top agriculture producer due to the ideal climate and soil to grow a variety of high yielding commodities).

²²⁶ *US Soybean Production by State: Top 11 Rankings*, CROP PROPHET, <https://www.cropprophet.com/soybean-production-by-state-top-11/> (last visited Nov. 7, 2022).

²²⁷ *Pumpkins: Background & Statistics*, U.S. DEP'T AGRIC., <https://www.ers.usda.gov/newsroom/trending-topics/pumpkins-background-statistics/#:~:text=Illinois%20harvests%20the%20largest%20share,larger%20share%20of%20processing%20acres> (last visited Nov. 7, 2022).

²²⁸ *Facts About Illinois Agriculture*, *supra* note 224.

²²⁹ Caroline Christen, *Top Pork Producing States: Who is the Largest Pork Producer in the U.S.?*, SENTIENT TIMES (Jan. 29, 2021), <https://sentientmedia.org/top-pork-producing-states/#:~:text=The%20top%20five%20states%20pork,any%20given%20point%20in%20time>.

²³⁰ Tovar, *supra* note 29.

²³¹ Olivia F. Fajen, *North Carolina Expands Protections for its Farmers Under the Right to Farm Act*, FOX ROTHSCHILD LLP: BLOG (Mar. 1, 2019), <https://animallaw.foxrothschild.com/2019/03/01/north-carolina-expands-protections-for-its-farmers-under-the-right-to-farm-act/>.

²³² Braun, *supra* note 69.

²³³ *USDA FAQs*, U.S. DEP'T AGRIC. (Apr. 26, 2022), <https://www.usda.gov/our-agency/future-of-work/faqs> (citing North Carolina and Indiana as top agricultural states); *Florida: Florida Economy*, NETSTATE: ECON. (last visited Nov. 9, 2022), https://www.netstate.com/economy/fl_economy.htm#:~:text=Oranges%20are%20Florida's%20most%20important,fruits%20grown%20include%20bananas%2C%20papayas (providing Florida's agriculture product in oranges as well as other fruits such as bananas, tomatoes, and vegetables such as cabbage, celery, cucumbers, green peppers, and lettuce).

²³⁴ Tom Emery, *Region has rich history in state agriculture*, JOURNAL-COURIER (Sep. 29, 2019, 1:16 PM), <https://www.myjournalcourier.com/news/article/Region-has-rich-history-in-state-agriculture-14477110.php>.

²³⁵ *Facts About Illinois Agriculture*, *supra* note 224.

²³⁶ *Id.*

²³⁷ *Id.*

Agriculture affects the state's economy through multiple channels of commerce.²³⁸ Marketing and selling agricultural products generate over \$19 billion for Illinois' economy.²³⁹ Illinois also ranks first in production of farm and construction machinery.²⁴⁰ Illinois agriculture plays a substantial role in the fuel and gas industries by producing more corn for ethanol than any other state and turning Illinois-grown soybeans into biodiesel, allowing the state to help create renewable gases.²⁴¹

There are also agricultural benefits outside of intrastate economics.²⁴² Illinois' agriculture industry generates economic value through international exports of agricultural commodities.²⁴³ Illinois ranks third in the nation for states with the most agricultural exports bringing in about \$8.2 billion in value of products shipped internationally.²⁴⁴ The Illinois Department of Agriculture has stated, "[e]xports from Illinois account for 6 percent of all U.S. agricultural exports. Illinois is the nation's second-leading exporter of both soybeans and feed grains and related products. Approximately 44 percent of grain produced in Illinois is sold for export."²⁴⁵

As for employment benefits, approximately six percent of Illinois jobs are in agriculture-related fields, making up about 482,000 jobs in total, and Illinois' role in ethanol production produces over 365,000 of those jobs.²⁴⁶ Considering these factors, it is in Illinois' best interest to support and protect this economically beneficial industry.

IV. A PROPOSAL FOR ILLINOIS TO AMEND THEIR RTFA

While Illinois has taken steps to protect safe and green farmers and agriculture operations, more should be done.²⁴⁷ By looking at what has improved the co-existence of farmers and their neighbors in states such as North Carolina, Florida, Indiana, and Louisiana, Illinois is better able to re-evaluate their current RTFA.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Facts About Illinois Agriculture*, *supra* note 224.

²⁴² *Id.* (explaining exports of Illinois agriculture products); *What We Grow and Raise: The Illinois Supply Chain*, ILL. FARM BUREAU, <https://www.ilfb.org/resources/learn-about-il-agriculture/what-we-grow-and-raise-the-illinois-supply-chain/> (last visited Dec. 26, 2021) (describing employment in the field of agriculture).

²⁴³ *Facts About Illinois Agriculture*, *supra* note 224.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See supra* note 242.

²⁴⁷ 740 ILL. COMP. STAT. 70/3-4.5 (2018). Illinois' RTFA includes provisions similar to North Carolina, Florida, and Indiana such as barring nuisance suits when the farm has been in continuous operation for at least one year, barring nuisance suits due to a change in condition to the area surrounding the operation, and a prevailing defendant is able to have their attorney fees paid.

A. Best Management Practices

Right to Harm is a 2019 documentary that “exposes the devastating public health impact that factory farming has on many of our country’s most disadvantaged citizens.”²⁴⁸ The documentary features a North Carolina resident, Elsie Herring, who has been a victim of her family’s property being sprayed with hog manure.²⁴⁹ Herring came forward in the film to speak about the risk of illness, decreased home value, and water pollution caused by the nearby farms.²⁵⁰ These are concerns that lawmakers should take into consideration when passing or amending an Act, but often interests conflict.

Some states, such as Louisiana, have included “best management practices” (“BMP”) in their RTFAs to ensure farmers are using proper management practices to avoid inequity to disadvantaged neighbors.²⁵¹ Louisiana’s RTFA states, “[e]ach person engaged in agricultural operations shall be presumed to be operating in accordance with generally accepted agricultural practices or traditional farm practices.”²⁵²

Several states with a BMP requirement also create a BMP manual that details the proper practices for farmers.²⁵³ States, like Louisiana, that have BMP manuals allow farmers to abide by these practices and therefore have RTFA protection.²⁵⁴ If farmers do not abide by these practices, the lack of cooperation can be used as evidence against them in any litigation involving the RTFA.²⁵⁵

While Illinois’ RFTA excludes protection for those who have caused pollution or contaminated waterways, it does not further specify that farmers must comply with BMPs, nor does the state have a BMP manual for farmers to follow.²⁵⁶ If Illinois was to implement a BMP requirement in its statute and create a BMP manual, Illinois could ensure that farmers are not taking advantage of the RTFA and not harming their rural neighbors.²⁵⁷ Therefore, the amendment of an Illinois’ statute to include BMPs and create a BMP manual to ensure rural neighbors are not being taken advantage of would assist in resolving the issue.

²⁴⁸ *Right to Harm*, ONE EARTH FILM FESTIVAL, <https://www.oneearthfilmfest.org/films-az-2020/right-to-harm> (last visited Nov. 11, 2022).

²⁴⁹ Siena Chrisman, *How the Right to Farm Became the Right to Harm*, FOODPRINT (Aug. 5, 2019), <https://foodprint.org/blog/right-to-farm-right-to-harm-film/>.

²⁵⁰ *Id.*

²⁵¹ Nichols, *supra* note 81; LA. REV. STAT. ANN. § 3:3604 (2019).

²⁵² LA. REV. STAT. ANN. § 3:3604 (2019).

²⁵³ Nichols, *supra* note 81.

²⁵⁴ *Id.*; LA. REV. STAT. ANN. § 3:3602(12) (2019).

²⁵⁵ Nichols, *supra* note 81.

²⁵⁶ 740 ILL. COMP. STAT. 70 (2018).

²⁵⁷ Nichols, *supra* note 81.

B. Inclusion of Additional Definitions

Illinois' RFTA includes a single definition, "farm."²⁵⁸ In contrast, Florida's RTFA includes definitions for "agritourism," "farm product," "established date of operation," and "nuisance."²⁵⁹ As discussed in the section of this Note on Florida's RTFA, the new definition of "farm operation" created conflict between the farm operators and their neighbors, as the definition now protects those who create emissions from sugarcane burning.²⁶⁰

While legislators may choose to leave the statute open-ended for courts to interpret, it can also be beneficial to include definitions in statutes to aid courts in decision-making.²⁶¹ Further, courts may read the statute differently or contradictory to how the legislators intended the Act to be read.²⁶² For example, the Florida legislators specifically intended to further the RTFA's protection for sugarcane producers, and had the definition been omitted from the statute, the courts may not have included the actions of the sugarcane farmers.²⁶³ On the other hand, legislators need to use caution when making definitions that may be too broad and expand the protection to harmful operators²⁶⁴ or create definitions too narrow, causing the protections to not be expanded to classes the legislature intended to include.²⁶⁵ For the above considerations, the Illinois legislature should amend the current RTFA to include more definitions to promote uniformity among Illinois courts and provide clarity to judges, advocates, and property owners.

C. Limited Scope of Plaintiffs

North Carolina and Florida's RTFA amendments limited the scope of who may bring a nuisance suit against an agricultural operation to one half-mile.²⁶⁶ What sparked this change was a multi-million dollar class action of approximately 500 plaintiffs suing Smithfield, the giant of pork

²⁵⁸ 740 ILL. COMP. STAT. 70/2 (2018).

²⁵⁹ FLA. STAT. § 823.14(3) (2022).

²⁶⁰ Ramadan, *supra* note 108 (discussing the conflict created by the change in definition to include "particle emissions," which includes byproducts of sugarcane burning to be barred from nuisance suits).

²⁶¹ VICTORIA L. KILLION, CONG. RSCH. SERV., R46484, UNDERSTANDING FEDERAL LEGISLATION: A SECTION-BY-SECTION GUIDE TO KEY LEGAL CONSIDERATIONS (2021).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ N.C. GEN. STAT § 106-701(a)(2) (2018); FLA. STAT. § 823.14(f)(4)(d) (2021).

production.²⁶⁷ In response to the suit, North Carolina's legislature attempted to block large class actions by limiting the jurisdiction of plaintiffs.²⁶⁸ However, North Carolina's amendment has come with heavy backlash as some suggest one half-mile is too small.²⁶⁹ Many have argued that 960,000 North Carolinians live within three miles of a pig or poultry farm, and when the data shrinks to one half-mile, only 160,000 North Carolinians live in this radius.²⁷⁰ Only six percent of those within a three-mile radius would be eligible to bring a lawsuit, even though many report being affected by the hog and poultry farms.²⁷¹ However, states such as Florida and North Carolina are hesitant to open a "floodgate" to litigation that would allow a higher percentage of the population to join large class actions.²⁷²

A study on the distance the scent of hogs can travel revealed that North Carolina and Florida's laws may not be too far off.²⁷³ A study by Purdue University on the distance hog smell can travel revealed that the distance can vary depending on local topography, landscape, ventilation system used on the farm, and size of the hog farm.²⁷⁴ The study concluded that the smell still only traveled one mile even when a farm housed 1,500 plus hogs, the wind was in the direction of the neighboring home, there were poor ventilation systems at the farm, and had topography favoring a longer distance for smells to travel.²⁷⁵ While various factors can affect the amount of distance the odor travels, research suggests that a proposed one-mile radius would accomplish the goals of the legislators in amending the RTFA.²⁷⁶

In consideration of the benefits to farms with the limited jurisdiction and the injustice to those still close enough to have their property rights affected, Illinois should consider the same amendment to prevent large profitable class actions and limit nuisance suits under Illinois' RTFA to only those close enough to the farm to be truly affected. However, Illinois should limit the jurisdiction to one mile rather than one half-mile, as studies have shown that one mile is the approximate distance that hog scent travels.²⁷⁷

²⁶⁷ Leah Douglas, *Big Ag is Pushing Laws to Restrict Neighbors' Ability to Sue Farms*, NPR (Apr. 12, 2019, 7:00 AM), <https://www.npr.org/sections/thesalt/2019/04/12/712227537/big-ag-is-pushing-laws-to-restrict-neighbors-ability-to-sue-farms>.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Erica Hellerstein & Ken Fine, *A Million Tons of Feces and an Unbearable Stench: Life Near Industrial Pig Farms*, THE GUARDIAN (Sept. 20, 2017, 7:00 PM), <https://www.theguardian.com/us-news/2017/sep/20/north-carolina-hog-industry-pig-farms>.

²⁷¹ *Id.*

²⁷² Douglas, *supra* note 267.

²⁷³ A. HEBER, *Protection Distances for Sufficient Dispersion and Dilution of Odor from Swine Buildings*, in 1997 SWINE DAY REPORTS 30 (1997).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

Therefore, Illinois' statute be amended to include a provision that limits neighbors that may bring nuisance suits.

D. Limited Punitive Damages

Damages are a heavily-weighted factor that varies greatly between the various RTFAs. Currently, Illinois allows the prevailing plaintiff to recover any amount found at trial, as there are no compensatory or punitive damage caps.²⁷⁸ Florida and North Carolina both limit the number of compensatory damages to the actual value decrease of the property for a permanent nuisance and the decrease in rental value when the nuisance is temporary.²⁷⁹ Also, a plaintiff may not recover any punitive damages unless the claim is based on the same conduct from an environmental violation by a government agency or a criminal suit within the past three years.²⁸⁰

The inclusion of qualifications for a plaintiff to be awarded punitive damages came after the series of Murphy-Brown litigation.²⁸¹ As cited in the Section on North Carolina's RTFA law, there were a series of lawsuits against Murphy-Brown that caused concern to many in North Carolina's legislative branch.²⁸² Punitive damages are normally only reserved for egregious behavior²⁸³ and conduct. Lawmakers have suggested that when farmers are not negligent, punitive damages are inappropriate.²⁸⁴ However, these new limits on punitive damages have theoretically halted punitive damages altogether, as there is also now a causation requirement connecting the nuisance to criminal activity or civil enforcement action.²⁸⁵ North Carolina lawmakers champion this as an economic success, as North Carolina ranks number two in hog production,²⁸⁶ but for many, this is a cause of concern.²⁸⁷ They argue that these multi-million-dollar awards of punitive damages were against Murphy-Brown, a subsidiary of the world's largest

²⁷⁸ 740 ILL. COMP. STAT. 70/4.5 (2018).

²⁷⁹ N.C. GEN. STAT § 106-701(a)(2) (2018); FLA. STAT. § 823.14(f)(4)(d) (2021).

²⁸⁰ *Id.*

²⁸¹ *North Carolina's Right-to-Farm Summary*, ONE RURAL, https://onerural.uky.edu/right-to-farm/NC#footnoteref33_m64h1qp (last visited Nov. 11, 2022).

²⁸² Fajen, *supra* note 231.

²⁸³ *What are Punitive Damages and When are you Entitled to Them?*, COSTA IVONE L. FIRM: LEGAL NEWS, <https://costaivone.com/blog/what-are-punitive-damages-when-entitled-to-them/> (last visited Nov. 11, 2022).

²⁸⁴ Robert Branan, *North Carolina's Right to Farm Law After Smithfield Litigation*, NC STATE EXTENSION, <https://farmlaw.ces.ncsu.edu/land-use-and-zoning/land-ownership-and-liability/north-carolinas-right-to-farm-law-after-smithfield-litigation/> (last visited Nov. 11, 2022).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Chrisman, *supra* note 249.

pork producer, Smithfield Foods, and not a small family hog farm.²⁸⁸ Activists in other states have also shown concern for punitive damages caps.²⁸⁹ Cory Booker, a U.S. Senator from New Jersey, called the Murphy-Brown punitive damages a “huge victory for the residents of Bladen County and all Americans who believe that clean air and water is a basic human right.”²⁹⁰

Illinois should include a punitive damages cap in its amendment, but not as narrow of a gap as North Carolina and Florida.²⁹¹ As stated before, analyzing other states’ RTFAs can be helpful in several ways. While a punitive damages cap has aided in the prevention of large and devastating class-action lawsuits that would hinder the hog industry’s ability to produce food, the caps in North Carolina and Florida have gone too far and caused a large amount of backlash and disadvantaged people groups to feel they cannot obtain relief.²⁹² Therefore, Illinois should consider following North Carolina and Florida, but cap punitive damages at three times the awarded compensatory damages or \$250,000—whichever is greater. This compromise was in North Carolina’s previous RTFA.²⁹³ It would allow for the protection needed for farmers to be able to efficiently produce their product while also ensuring that those affected have a way of recourse in situations when a judge or jury finds that punitive damages are proper for the situation.²⁹⁴ To promote protection for Illinois farmers while still providing relief for affected rural property owners, a proposal that the Illinois legislature amend the current RTFA in accordance with this proposal is necessary.

E. Protecting Agritourism

As of 2019, thirty-one states—including Indiana, Florida, and North Carolina—have liability protection for their agritourism industry.²⁹⁵ Illinois

²⁸⁸ Erica Hellerstein, *Attorneys Suing Murphy-Brown Say the Punitive Damages Cap is Unconstitutional*, INDY WEEK (May 3, 2018, 11:57 AM), <https://indyweek.com/news/archives/attorneys-suing-murphy-brown-say-punitive-damages-cap-unconstitutional/>.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ See N.C. GEN. STAT. §106-701(a)(2) (2018); FLA. STAT. §823.14(f)(4)(d) (2021).

²⁹² Leah Douglas, *The Farm Industry is Pushing for Tighter Right-to-Farm Laws Across the Country. What Does That Mean for Farm Neighbors?*, FERN’S AG INSIDER (April 11, 2019), https://thefern.org/ag_insider/the-farm-industry-is-pushing-for-tighter-right-to-farm-laws-across-the-country-what-does-that-mean-for-farm-neighbors/.

²⁹³ Fajen, *supra* note 231.

²⁹⁴ *Id.*

²⁹⁵ Peggy Kirk Hall & Evin Bacheloth, *Agritourism Immunity Laws in the United States*, NAT’L AGRIC. L. CTR. (2019), <https://nationalaglawcenter.org/wp-content/uploads/assets/articles/Agritourism-series-Immunity-laws.pdf>.

currently does not.²⁹⁶ Such protection for agritourism in Illinois would promote growth for the industry while protecting agritourism operations already existing.²⁹⁷ In the past, Illinois has introduced legislation to protect agritourism, but no bill was ever passed.²⁹⁸

In 2021, Illinois proposed the most recent potential agritourism bill.²⁹⁹ This bill stated agritourism operators shall not be liable for the injury or death of a participant that resulted from the inherent risks of the agritourism activities if the operator posted a warning notice.³⁰⁰ While this bill's passing would have been a win for agritourism advocates, it still fails to achieve the protections of similar agritourism statutes in other states, such as Florida.³⁰¹

The Illinois legislature should protect those in the agritourism industry, as agritourism has increased in Illinois in recent years and added numerous benefits to the state.³⁰² Agritourism is an extensive industry that includes popular seasonal attractions such as pumpkin patches, corn mazes, apple picking, sunflower field photo shoots, Christmas tree farms, farmer's markets, and you-pick-flowers.³⁰³ Illinois, like many other states, including Florida,³⁰⁴ has created a year-long agritourism industry.³⁰⁵ These agritourism activities take advantage of urban sprawl by creating agricultural operations near cities to attract visitors.³⁰⁶ Additionally, many agritourism operations have restored value to farms by creating a successful business from a dying family farm operation.³⁰⁷

The agritourism industry is economically beneficial to Illinois and is currently seeing growth.³⁰⁸ According to the United States Department of Agriculture, the agritourism business is seeing growth nationwide as trends

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Jessica Guarino, Renata Endres, Tyler Swanson & Bryan Endres, *Defining the Bounds of Booming Agritourism*, UNIV. OF ILL.: FARMDOC DAILY (12):19 (Feb. 14, 2022), <https://farmdocdaily.illinois.edu/2022/02/defining-the-bounds-of-booming-agritourism.html>.

²⁹⁹ H.B. 5487 102nd Gen. Assemb., Reg. Sess. (Ill. 2022).

³⁰⁰ H.B. 5487 102nd Gen. Assemb., Reg. Sess. (Ill. 2022).

³⁰¹ Kitt Tovar Jansen, *Florida's Amended Right to Farm Law Goes into Effect July 1*, IOWA STATE UNIV.: AG DOCKET BLOG (July 1, 2021), <https://www.calt.iastate.edu/blogpost/florida%E2%80%99s-amended-right-farm-law-goes-effect-july-1>.

³⁰² Kyle Kimball, *Agritourism is Big Business in Illinois*, ADVANTAGE NEWS, https://www.advantagenews.com/news/local/granite-city-news/agritourism-is-big-business-in-illinois/article_3581703a-38eb-11ec-92b7-df7a2bd254cf.html (last visited Nov. 11, 2022).

³⁰³ *Id.*

³⁰⁴ *Agritourism*, UNIV. OF FLA., <https://www.floridafarmbureau.org/wp-content/uploads/2015/09/AgritourismBooklet07.pdf> (last visited Nov. 11, 2022).

³⁰⁵ Kimball, *supra* note 302.

³⁰⁶ Bruce E. Wicks & Christopher D. Merrett, *Agritourism: An Economic Opportunity for Illinois*, in 14 Rural Research Report 1 (Ill. Inst. for Rural Affs. 2003), https://www.researchgate.net/publication/237300326_Agritourism_An_Economic_Opportunity_for_Illinois.

³⁰⁷ *Id.*

³⁰⁸ Luke Runyon, *States Working Out Kinks in Agritourism*, NPR ILL. (July 8, 2014, 8:20 AM), <https://www.nprillinois.org/health-harvest/2014-07-08/states-working-out-kinks-in-agritourism>.

such as locally grown foods increase in popularity.³⁰⁹ According to a recent census of agriculture, between 2007 and 2012, U.S. farms engaging in some form of agritourism grew forty-two percent with a profit of more than \$700 million, and the amount of money brought in by agritourism rose by twenty-four percent.³¹⁰

Those in the agritourism industry are faced with many concerns, including local ordinances and zoning laws, nuisance suits, and liability to visitors.³¹¹ A recent survey shows that eighty-three percent of agritourism operators cited liability issues, including available insurance and insurance costs, as a major concern of liability issues.³¹² The Illinois Farm Bureau has been lobbying for legal protection for the agritourism industry to minimize the risk of litigation, which would lower insurance premiums and expand the industry.³¹³

Florida's amended RTFA added protection for agritourism so that they will receive the same nuisance lawsuit protection as traditional farming activities.³¹⁴ Florida's RTFA specifically states that agritourism activities are included under the Act, adding agritourism activities under the definition of protected "farm operation."³¹⁵ The Florida statute reads, "[f]arm operation' means all conditions or activities by the owner, lessee, agent, independent contractor, or supplier which occur on a farm in connection with the production of farm, honeybee, or apiculture products or in connection with complementary agritourism activities."³¹⁶ These conditions and activities include, but are not limited to, the marketing of farm products at roadside stands or farm markets."³¹⁷ Illinois' RTFA defines "farm" as "any parcel of land used for the growing and harvesting of crops; for the feeding, breeding, keeping, and management of livestock; for dairying, horse keeping, or horse boarding or for any other agricultural or horticultural use or combination thereof."³¹⁸ Without amending the current Illinois RTFA to include agritourism activities as Florida's statute does,³¹⁹ Illinois is missing an opportunity to protect and promote a lucrative industry that benefits the state. For these reasons, the current RTFA should be amended to ensure agritourism operations have the protections needed to operate effectively.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ Guarino, Endres, Swanson & Endres, *supra* note 298.

³¹² *Id.*

³¹³ Kimball, *supra* note 302.

³¹⁴ Jansen, *supra* note 301.

³¹⁵ FLA. STAT. § 823.14(3)(c) (2021).

³¹⁶ FLA. STAT. § 823.14(3)(c) (2021).

³¹⁷ *Id.*

³¹⁸ 740 ILL. COMP. STAT. 70/2 (2018).

³¹⁹ FLA. STAT. § 823.14(3)(c) (2021).

CONCLUSION

The issue of RTFAs involves conflicting viewpoints between farmers who are passionate about their work and neighbors who feel as if they are at a disadvantage in nuisance suits compared to large corporate farms. However, a compromise can be struck by looking at how Florida, North Carolina, Indiana, and Louisiana have amended their laws, what has been successful, and what Illinois could do differently. Steps can be taken to ensure Illinois farmers can produce their products and all property owners can have the opportunity to enjoy their property.

The first states enacted RTFAs, primarily due to the rural-urban fringe, and now is the time for Illinois to re-evaluate its RTFA, as changes in agriculture have led to more urban agriculture production.³²⁰ Also, changes in the world surrounding COVID-19 and global warming are calling for an increase in agriculture production.³²¹ While case law in Illinois has expanded the RTFA beyond the text of the statute to include preemption of local laws and changes in the operation and surrounding areas,³²² progress in Florida, North Carolina, Louisiana, and Indiana has demonstrated that Illinois can and should still do more.

To better serve the purpose of the RTFA, Illinois should (1) include agritourism, which is a booming industry in the state; (2) include further definitions in the statute; (3) add a best management practices requirement and BMP manual to ensure responsible farming practices; (4) limit the scope of plaintiffs that may bring nuisance suits based on research of how far the smell of hogs travels; and (5) create a bar for punitive damages. With these changes, farmers will have more guidance on how to operate their farms in a green and mindful way while ensuring their neighbors will still have proper protection under the law.

³²⁰ *Urban Sprawl*, *supra* note 19.

³²¹ *See* Hobert & Negra, *supra* note 47.

³²² *See Nelson*, 2017 IL App (2d) 170064; *Toftoy*, 2012 IL 113569; *Brown*, 2015 IL App (3d) 130445.