**No. 19-1019**

# 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 at Wilmington in Case No. 7:14-cv-00180-BR (Hon. W. Earl Britt, Senior U.S. District Court Judge)

## BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE


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May 6, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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Signature: /s/ Jeffrey R. White Date: May 6, 2019

Counsel for: American Association for Justice

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I certify that on May 6, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jeffrey R. White (signature) May 6, 2019 (date)



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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than 70-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

This case is of acute interest to AAJ because retroactive application of statutes, as requested by Defendant and its amici, would have the effect of eliminating common law rights, impairing legal recourse for injury, weakening the civil justice system, and hampering access to the courts. Defendant's proposal would even require the rejection of the

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Plaintiffs and Defendant have consented to the filing of this brief.

longstanding jurisprudence of the U.S. Supreme Court, North Carolina, and this Circuit regarding retroactive legislation. As such, in this brief AAJ will limit its discussion to any proposed retroactive application of amendments to North Carolina's Right to Farm Act.

## SUMMARY OF ARGUMENT

On their face, the 2017 and 2018 amendments to North Carolina's Right to Farm Act ("RTFA") do not permit a retroactive application. Significantly, the plain text of the 2017 and 2018 amendments to the RTFA make it clear that they are only to be applied prospectively, as does the legislative history. When enacted, each bill unequivocally provides: "This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date."

Before the advent of these amendments, it is without question that the type of nuisance damages for loss of use and enjoyment of one's home, which are at issue in this case, have long been recognized under the common law of North Carolina. Such possible nuisance has always included compensation for the type of damages Defendant's concentrated animal feeding operations ("CAFO") foisted upon the homeowners in this case, who had long lived in their communities.

The label "to clarify," found in the title of the 2017 bill, does not alter the analysis. Substantive changes to the law may not be made retroactive under the guise of labeling a bill as a "clarification." Because the text of the statutes here are plain and unambiguous, if applied at all, they must be applied prospectively according to their terms.

The legislature could have included express retroactivity language in the bills. It did not. Absent such language, the presumption against retroactive application cannot be overcome, as it is firmly entrenched. Moreover, it is well-settled under North Carolina law that the right to sue for compensatory damages is a vested right that cannot be retroactively taken away.

In addition to running afoul of North Carolina's approach to vested rights, retroactive application would raise constitutional problems under the Fifth Amendment's Takings Clause, which protects property rights from legislative interference. Additionally, the proper separation of powers between the legislature and the courts would be adversely implicated, because the legislature would be impermissibly interfering with the court's performance of its constitutionally-assigned functions via special-interest legislation.

## ARGUMENT

### I. ON THEIR FACE, THE 2017 AND 2018 RTFA BILLS DO NOT PERMIT RETROACTIVE APPLICATION, LEAVING NORTH CAROLINA NUISANCE DAMAGES UNCHANGED.

#### A. The Texts of the 2017 and 2018 RTFA Bills Make It Clear That They Are Only to Be Applied Prospectively.

Under a plain reading of the 2017 and 2018 bills,[2] each is only to be applied "to causes of action commenced on or after [the] date" of enactment. *See* JA 2847. Under controlling North Carolina and U.S. Supreme Court precedents, Defendant-Appellant Murphy-Brown ("Defendant") (Defendant Brief 41-46) and its amici, The American Farm Bureau Federation, et. al., (Doc.28-1 14-19), are wrong when they argue to the contrary.

On May 11, 2017, the North Carolina legislature enacted HB 467. JA 2847-48; N.C. Sess. Laws 2017-11. Notably, however, the bill as

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[2] Defendant's Notice of Appeal (JA 9690-94) references only the 2017 bill. Its Brief cites the 2018 bill in its facts (Defendant Brief 5, 12), but does not cite it or argue it in its argument section. Accordingly, Defendant appears to have waived any argument relying on the 2018 bill. Fed. R. App. P. 28(a)(8)(A) ("The appellant's brief must contain … the argument, which must contain … appellant's contentions and the reasons for them…."); *Shopco Distrib. Co. v. Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (claim that was not briefed or argued was waived). Nevertheless, given that Defendant's amici The American Farm Bureau, et. al., raised the issue of the 2018 amendment, amicus AAJ will discuss it herein.

enacted unambiguously provides: "This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date." N.C. Sess. Laws 2017-11. Therefore, it cannot apply to this action, as the bill was not even introduced until March 23, 2017, more than two years after this action was commenced in August 2014. *Id.*

Nor can there be any question that HB 467, when passed, was meant to be prospective. The original draft stated that "[t]his act is effective when it becomes law and applies to actions filed, arising, or pending on or after that date." JA 2228, 2841 (emphasis added). *See also In re N.C. Swine Farm Nuisance Litig.*, No. 5:15-cv-13-BR (Doc.319-3) (making it clear that the first version was meant to be retroactive). However, this proposed retroactivity led to vigorous House floor debate on April 10, 2017.[3] The House then passed an amendment to the bill, stating: "This Act shall not affect pending litigation." JA 2331-32, 2843 (emphasis added); Doc.386-18.

[3] *See* JA 2273-2329, Gen. Assem. Sess. 2017, Apr. 10, 2017, 21:2 (JA 2292), 22:4-10 (JA 2293), 29:8-30:1 (JA 2300-2301), 33:1-10 (JA 2304), 34:19-35:2 (JA 2305-06), 37:7-9 (JA 2308), 48:17-49:1 (JA 2319-20), 51:22-52:14 (JA 2322-23) (also filed at No. 5:15-cv-13-BR (Doc.386-6)).

The bill then went to the Senate and on April 25, 2017, after various revisions were made, a final version was proposed which included the effective date language: "This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date." Agriculture and Forestry Nuisances Remedies, H.B. 467, Gen. Assem. N.C. (2017), *available at* https://www.ncleg.gov/Sessions/2017/Bills/House/PDF/H467v3.pdf. As stated by one of the bill's co-sponsors, Senator Jackson: "This bill does not pertain to anything dealing with pending lawsuits." No. 5:15-cv-13-BR (Doc.386-10) (emphasis added). Then, on April 27, 2017, before the House vote, Representative Dixon stated, "this is an instance to where the will of the House was sent to the Senate and it has actually come back in an improved condition … maintaining absolutely zero retroactivity relative to causes of actions filed…. This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date." JA 2819-20 (emphasis added); Doc.386-11.

On June 27, 2018, the North Carolina legislature enacted another RTFA bill, SB 711. *See* N.C. Sess. Laws 2018-113. Its text, at section 10.(c) of SB 711, unambiguously provides: "This section is effective when

it becomes law and applies to causes of action commenced on or after that date." *Id.* at § 10.(c).[4]

Thus, on their face, both the 2017 and 2018 bills eschew retroactive application, making them inapplicable to cases commenced before each became law.

### B. The Type of Nuisance Damages at Issue Have Long Been Recognized under North Carolina Law and Elsewhere.

Nuisance suits have their historical roots based on English common law. *See* Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 Cornell L. Rev. 761, 765-71 (1979) (discussing the evolution of early private nuisance common law). The landmark *William Aldred's Case,* 77 Eng. Rep. 816, 821 (1611) established the common law principle of *sic utere tuo ut alienum non laedas* (the use of one's property should be limited so as not to injure that of another). *William Aldred's Case* rejected the defendant's claim that the social utility of its conduct, akin to the hog

[4] A later amendment on December 14, 2018, HB 1025, made clerical changes, retaining the prospective language. *See* N.C. Sess. Laws 2018-142 § 14.

farming operation described here, operated as a defense to that conduct. As the court resoundingly stated:

> [T]he building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve skins and sheep skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it . . . and this stands with the rule of law and reason, . . . *sic utere tuo ut alienum non laedas*.

*Id.*

After this*, William Aldred's Case* served as the guiding principle for the development of nuisance law, including in North Carolina. For instance, in *Thomason v. Seaboard Air Line Ry.*, 142 N.C. 300, 55 S.E. 198 (1906), the North Carolina Supreme Court stated that it was "[a]dopting Blackstone's definition" that a nuisance encompasses "[a]nything done to the hurt or annoyance of the lands, tenements or hereditaments of another." 142 N.C. at 305-06. *See also Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682 (1953) ("The law of private nuisance rests on the concept embodied in the ancient legal maxim …, meaning, in essence, that every person should so use his own property as not to injure that of another.").

Indeed, the North Carolina Supreme Court has long defined a private nuisance as "any substantial non-trespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct." *Id*. *See also* Morris & Daye, North Carolina Law of Torts § 25.30 (3d ed. 2015); Restatement (Second) of Torts § 821D (1977) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."); *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 455, 553 S.E.2d 431 (2001) (citing *Watts v. Pama Mfg. Co.,* 256 N.C. 611, 616-617, 124 S.E.2d 809 (1962), which states that"[a] person is subject to liability for an intentional non-trespassory invasion of an interest in the use and enjoyment of land when his conduct is unreasonable under the circumstances of the particular case; a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless or ultrahazardous.").

Courts in North Carolina have long recognized actionable claims resulting from interferences such as noise and odors. *See, e.g.*, *Jones v. Queen City Speedways, Inc.*, 276 N.C. 231, 242-43, 172 S.E.2d 42 (1970) (noise from drag racing); *Watts,* 256 N.C. at 618 (noise and vibrations

from hosiery facility); *Barrier v. Troutman*, 231 N.C. 47, 51, 55 S.E.2d 923 (1949) (airport noise); *Mayes v. Tabor*, 77 N.C. App. 197, 199, 334 S.E.2d 489 (1985) (odor from neighboring hog farm).

The common law provided for a broad array of damages, including not only diminished real estate value, but also costs to replace or repair, incidental loss, damage to personal property, lost wages, lost ability to rent out property to others, and so on. *See, e.g.*, *BNT Co. v. Baker Precythe Dev. Co.*, 151 N.C. App. 52, 59, 564 S.E.2d 891, *rev. denied*, 356 N.C. 159, 569 S.E.2d 283 (2002) (recovery for "damages to various items of personal property," "lost wages," costs for landscaping); *Phillips v. Chesson*, 231 N.C. 566, 570-71, 58 S.E.2d 343 (1950) (noting that in claim against "the author of the nuisance" for a "noxious condition," the measures of damages may include "diminished rental value, reasonable costs of replacement or repair, or restoring the property to its original condition with added damages for other incidental items of loss"); *Whiteside Estates (2001)*, 146 N.C. App. at 461 ("reasonable costs … for repairing or restoring the plaintiff's property"); *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 169 N.C. App. 209, 212, 609 S.E.2d 804 (2005) ("the cost of repairs, necessitated by defendant's actions"); *The Shadow Group, LLC*

*v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 198, 579 S.E.2d 285 (2003) (costs of "waterproofing to remedy the problem"); *Rudd v. Electrolux Corp.*, 982 F.Supp. 355, 372 (M.D.N.C. 1997) ("reasonable costs of replacement or repair"); *Hanna v. Brady*, 73 N.C. App. 521, 527, 327 S.E.2d 22 (1985), *rev. denied*, 313 N.C. 600, 332, S.E.2d 179 (1985) (damages for discomfort and annoyance resulting from "noise and dust from the [defendant's] quarrying operation" affecting "enjoyment of daily life"); *Oates v. Algodon Mfg. Co.*, 217 N.C. 488, 489, 8 S.E.2d 605 (1940) (damages for "any inconvenience and annoyance by way of odors suffered by him to his land"); *King v. Ward*, 207 N.C. 782, 783-84, 178 S.E. 577 (1935) (damages for loss of enjoyment caused by odors); *Broadbent v. Allison*, 176 N.C. App. 359, 370, 626 S.E.2d 758 (2006) (instruction to the jury to award "such dollar amount that you find the plaintiffs have proved by the greater weight of the evidence that the value of their real property has been damaged, and in addition any damages you find that the plaintiffs have suffered for the loss of use and enjoyment of their property"). Juries have been regularly charged with the ability to award such forms of consequential damages by North Carolina courts. JA 434-57.

### C. Neither the Enactment of the 1979 RTFA Nor Any Amendment Before 2017 Changed the Nature of Nuisance Damages Available in North Carolina; the 1979 Act Only Served to Codify the Defense of "Coming to the Nuisance."

In response to concerns over the loss of farmland, states began enacting "right-to-farm" laws to protect agricultural operations from urban sprawl. *See* Harrison M. Pittman, Annotation, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6th 465, 480 (2005); Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 Drake J. Agric. L. 103, 111-12 (1998); Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. Rev. 1694, 1707 (1998).

The North Carolina RTFA was one of the first in the country. *See* Act of Mar. 26, 1979 (codified at N.C. Gen. Stat. § 106-700, *et seq*.). The RTFA enabled defendants to assert a "coming to the nuisance" defense for preexisting agricultural operations against lawsuits brought by plaintiffs arriving later and transforming neighboring properties to non-agricultural use. Under the 1979 Act, a party could raise a "coming to the nuisance" defense to an action by meeting certain requirements. *See* N.C.

Gen. Stat. § 106-701(a) (1979), *available at* https://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/1979-1980/SL1979-202.html.

Under the RTFA, the defendant maintained the burden of proof when raising a defense pursuant to the Act. *See Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178 (1974) (holding that the burden of proof generally lies with the party raising an affirmative defense); *Durham v. Britt*, 117 N.C. App. 250, 252, 451 S.E.2d 1 (1994) (RTFA details "an affirmative defense").

From 1979 to 1991 there were no changes to the RTFA. In 1991, it was amended to add "forestry" operations. N.C. Sess. Laws 1991-892, *available at* https://www.ncleg.gov/Sessions/1991/Bills/House/PDF/H978v4.pdf. In 2013, it was amended to broaden the circumstances when there could be a change in the farm operations without losing the defense, as well as to allow fees and costs for the frivolous assertion of a claim or defense. N.C. Sess. Laws 2013-314, *available at* https://www.ncleg.net/Sessions/2013/Bills/House/PDF/H614v6.pdf. *See also* Vanessa Zboreak, *"Yes, in Your Backyard!" Model Legislative Efforts to Prevent Communities from Excluding CAFOs*, 5 Wake Forest J. L. & Pol'y 147,

175 (2015) (discussing "change in operation" and fee-shifting provisions in right to farm acts).

Neither the RTFA nor any amendments through 2013 have any effect on the claims here, because the nuisance came to Plaintiffs-Appellees Joyce McKiver et al. ("Plaintiffs") after they had resided in the area for years. *See* Plaintiffs' Brief 3-12 (describing Plaintiffs' long-term residency (up to 50 years or more) and Defendant's later establishment of a large industrial hog facility emitting noxious smells, dust and noise). In fact, in a summary judgment proceeding, Plaintiffs put on unrefuted evidence that the residential community pre-existed the hog operation, and that the operation was a nuisance at the time it began. *See* No. 5:15-cv-13-BR (Docs.305,306,311).

### D. Substantive Changes May Not Be Made Under the Guise of "Clarification," and, In Any Case, the Clear, Unambiguous Language of the Prospective Text Here Overrides Any So-Called "Clarifying" Language.

Defendant argues that the legislature adopted "clarifying" amendments to the 2017 RTFA.[5] Defendant Brief 5. Defendant, however,

[5] The label "clarify" does not appear in the post-2017 2018 Act. Therefore, the text of those subsequent revisions cannot be argued to support a claim that the legislature intended to apply them retroactively.

fails to mention or discuss the significance of the actual effective date text of the 2017 Act, utterly ignoring the controlling language: "SECTION 2.(a). This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date." N.C. Sess. Laws 2017-11.

Defendant argues that the title to the 2017 Act states that it was enacted "to clarify the remedies available in private nuisance actions against agricultural and forestry operations." Defendant Brief 41-42 (citing N.C. Sess. Laws 2017-11). However, this title does not contradict the effective date text, rather it clarifies how the nuisance damages law will henceforth apply to new claims subsequently filed.

It cannot be read otherwise. The standard for prescribing the retroactive temporal reach of a statute is demanding, at minimum requiring language that is express and unequivocal. *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *see also Gordon v. Pete's Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 458 (4th Cir. 2011); *Ward v. Dixie Nat'l Life Ins. Co. (Ward II),* 595 F.3d 164, 173 (4th Cir. 2010). A mere statement in the title of a bill that it is meant to "clarify" an area of law or a prior statute does not constitute an express and unequivocal statement of retroactivity,

particularly when both the actual text and the legislative history state quite the opposite.

This Circuit has held that a legislature may not turn a bill that changes the law into a retroactive application simply by using the word "clarify" in the bill's title, as that would enable the legislature "to make substantive changes in the guise of 'clarification.'" *United States v. Capers*, 61 F.3d 1100, 1110 (4th Cir. 1995) (citation omitted). Here, by contrast, the effective date text is clear and unequivocal. If the language of the statute is plain and unambiguous, it must be applied according to its terms. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning," quoting *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)). "Clarification" by way of a mere label cannot override the unambiguous text of the 2017 bill which by its own terms operates prospectively.

## II. EVEN IF THE TEXT OF THE BILLS DID NOT INCLUDE SPECIFIC LANGUAGE ARTICULATING PROSPECTIVE APPLICATION, THE RTFA STILL COULD NOT BE RETROACTIVELY APPLIED.

### A. The Strong Presumption Against Retroactivity Is Not Overcome By the RTFA.

It is well-settled that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). It has been described as "[a]mong the most venerable of the[ ] [judicial] default rules," *Tasios v. Reno*, 204 F.3d 544, 549 (4th Cir. 2000), a "time-honored presumption," *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997), and a "rule of general application." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (citation and internal quotations omitted).

"Retroactive law-making challenges the presumptions underlying democracy and the fundamentals of civilized and just societies." Jackie M. McCreary, *Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues through the Revised Civil Code Articles on Disinherison*, 62 La. L. Rev. 1321 (2002). "Certainty and stability in the law is preferred. Individuals expect to be able to rely on established law without any rights potentially being affected. In sum, retroactive laws meddle with already-established legal interests and rights." *Id.* at 1322. *See also* Elizabeth J. Armstrong, *Perry v. Perry: Retroactive Application of North Carolina General Statutes Section 39-13.6 under a Vested Rights*

*Analysis*, 65 N.C. L. Rev. 1195, 1199 (1987) ("Historically, retroactive laws have been disfavored since the times of the Greeks and Romans. The principle of disfavoring retroactive laws was well established at English common law and came to be considered part of the 'natural law' as described by Coke and Blackstone." (footnotes omitted)).

When determining whether the presumption bars the retroactive application of a statute in a given case, courts must first "determine whether [the legislature] has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If the plain text of the statute does not call for retroactive application, it becomes unnecessary to evaluate the presumption's effect. *Id.* In *Landgraf*, the U.S. Supreme Court was faced with the issue of whether Congress intended to apply new, expanded damage remedies under Title VII retroactively or prospectively. Holding that the legislation lacked a clear congressional intent to apply it retroactively, the Court held that it should only be applied prospectively. *Id.* at 286.

The presumption against retroactive application is firmly ensconced in this Circuit's law, particularly when retroactivity is not expressly stated within the statutory text. "Retroactivity is not favored

in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). *See also Gordon*, 637 F.3d at 458 ("When triggered, the presumption against retroactivity instructs courts not to apply a statute to conduct that took place before the statute went into effect."); *West Langley Civic Ass'n v. FHA*, 11 Fed. Appx. 72, 76, 2001 WL 308967 (4th Cir. March 30, 2001) (following *Bowen*); *Church v. Att'y Gen. of the Commonwealth of Va.*, 125 F.3d 210, 214 (4th Cir. 1997) (where "the actual language used by Congress [in the act] gives no directive as to retroactive application" the court will "follow the Supreme Court's pronouncement in *Bowen* … that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'"); *Guan v. Carroll*, 77 F.3d 468, 1996 WL 23356 at *3 (4th Cir. Jan. 23, 1996) ("Statutory changes apply only prospectively absent clear intent by the legislature to the contrary").

A statute operates retroactively when it attaches new legal consequences to events completed before its enactment. *See Miracle v. N.C. Local Gov't Emps. Ret. Sys.*, 124 N.C. App. 285, 292, 477 S.E.2d 204

(1996). Here, if the North Carolina legislature wished to avoid triggering the presumption against retroactivity, it at minimum needed to expressly make the bills retroactive. It did the opposite.

Indeed, the U.S. Supreme Court in *Martin v. Hadix* rejected a claim similar to what defendants argue here. 527 U.S. 343 (1999). In *Hadix*, petitioners argued that Congress made a statute retroactive by stating that it applied to "*any* action *brought* by a prisoner who *is* confined." *Id.* at 353 (emphasis in original). The Court held that this language "falls short" of being a sufficiently express directive to overcome the presumption, because it failed to include "language more obviously targeted to addressing the temporal reach of that [statute]." *Id.* at 354. The U.S. Supreme Court's ruling in *Hadix* accords with its longstanding precedent. As enunciated in *U.S. Fid. & Guar. Co. v. United States for the Use and Benefit of Struthers Wells Co.*, 209 U.S. 306, 314 (1908):

> The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

That guidance has been followed by the North Carolina Supreme Court. *See Vanderbilt v. Atlantic Coast Line R. Co.*, 188 N.C. 568, 575, 125 S.E. 387 (1924) (quoting "presumption" language from *U.S. Fid. & Guar. Co.*); *Barnhardt v. Morrison,* 178 N.C. 563, 566-67, 101 S.E. 218 (1919) (same) (also quoting *Merwin v. Ballard,* 66 N.C. 398-399 (1872)). Thus, courts refuse to apply a statute retroactively absent "statutory language ... so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997).

In fact, the U.S. Supreme Court has already evaluated language materially indistinguishable to that found in both the 2017 and 2018 amendments: "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. *See also Link v. Receivers of Seaboard Air Line Ry. Co.*, 73 F.2d 149, 152 (4th Cir. 1934) ("The use of the future tense ... effectually negatives any suggestion that the statute was intended to apply retroactively.") (citation omitted).

### B. The Presumption is Supported by Fairness Principles.

The presumption against retroactive effect arises out of constitutional concerns as well as deeply held fairness principles in a democracy with separate branches of government. "[R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 267. Therefore, a presumption against retroactivity "accords with widely held intuitions about how statutes ordinarily operate" and, as such, "coincide[s] with legislative and public expectations." *Id.* at 272. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'" *INS v. St. Cyr*, 533 U.S. at 316 (quoting *Landgraf*, 511 U.S. at 265-66, citing *Kaiser Aluminum & Chem.*

*Corp. v. Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring)); *accord Gordon*, 637 F.3d at 458.

### C. The Right to Sue for Compensatory Damages is a Vested Right Not Subject to Retroactive Effacement.

Under North Carolina law, the right to sue for compensatory damages is a vested right. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1 (2004) (noting that "compensatory damages … vest in a plaintiff upon injury" and a "right to sue for an *injury* is a right of action; it is a thing in action, and is property.") (citations omitted) (emphasis in original); *Osborn v. Leach*, 135 N.C. 628, 632-34 (1904) ("The right to recover damages for an injury is a species of property, and vests in the injured party immediately on the commission of the wrong. It is not the subsequent verdict and judgment, but the commission of the wrong, that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guarantees.").

As has been discussed, in 2017, HB 467 changed the RTFA. It did so by adding new N.C. Gen. Stat. § 106-702, which limited available damages for a permanent nuisance to "the reduction in the fair market value of the plaintiff's property caused by the nuisance" or for a temporary nuisance "the diminution of the fair rental value of the

plaintiff's property." N.C. Sess. Laws 2017-11, § 1; N.C. Gen. Stat. § 106-702(a); JA 2847. All other previously available compensatory damages were eliminated by the statute.

There can be no serious contention that, at the time the wrongs first occurred, plaintiffs' right to seek compensation for their discomfort and annoyance was vested when they suffered their injuries. Indeed, the right to seek such compensation for loss of use and enjoyment was not only permitted by North Carolina law (*Hanna*, 73 N.C. App. at 527), but in most other states.[6]

Thus, if successful, Defendant's strained argument that the RTFA should be construed to be retroactive would result in depriving residents of rights which had already vested prior to the passage of the 2017 Act. Once vested, these rights may not be taken away by subsequent legislation. *See Fogleman v. D & J Equip. Rental, Inc.*, 111 N.C. App. 228, 232-33, 431 S.E.2d 849 (1993) (""The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect.' … The trial court's application of the amended version of section 97-10.2 deprived appellants

[6] *See* No. 5:15-cv-13-BR (Docs.19-6; 319-8 (50 state surveys)).

of vested rights and, thus, was unconstitutionally retroactive.") (citing *Booker v. Medical Center,* 297 N.C. 458, 467, 256 S.E.2d 189, 195 (1979)); *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 444, 302 S.E.2d 868 (1983) ("[S]ince plaintiff's cause of action had not accrued at the time this legislation was passed, no vested right is involved.").

## III. EVEN ABSENT THE COMPELLING ARGUMENTS AGAINST RETROACTIVITY, APPLYING THE 2017 RTFA TO THE INSTANT ACTION WOULD STILL IMPLICATE SERIOUS CONSITUTIONAL INFIRMITIES

### A. Application of these Statutes Would Violate the Fifth Amendment.

The Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This "Takings Clause" is applicable to both federal and state governments under the Fifth and Fourteenth Amendments. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citing *Chi., B. & Q. R. Co. v. City of Chi.*, 166 U.S. 226, 241 (1897)). It "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Lingle*, 544 U.S. at 536 (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 314 (1987)). Given the property rights of the Plaintiffs who sue alleging direct

impairment of their use and enjoyment, an application, which would eviscerate their long-pending claims, would raise constitutional concerns.

A statute's constitutionality is evaluated by examining the governmental action's "justice and fairness." *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (citations omitted). Although this inquiry does not lend itself to any set formula, three factors have informed a regulatory "takings" analysis: "[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 500, 538 (1998) (holding that economic regulation violated the Takings Clause).

The recent changes to North Carolina's RTFA are economic changes favoring the narrow special interest of a for-profit commercial enterprise in derogation of private neighboring homeowners' pre-existing use and enjoyment of their property. The Takings Clause "prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" *Landgraf*, 511 U.S. at 266. The hog

enterprise here is not a public use, and elimination of the sole compensatory damages claim made by Plaintiffs constitutes an unjust deprivation without any compensation, much less "just compensation."

### B. Retroactive Application of the Recent Changes to North Carolina's RTFA Law Also Would Raise Serious Constitutional Separation of Powers Concerns.

As James Madison declared, "If there is a principle in our constitution, indeed in any free constitution, more sacred than another, it is that which separates the legislative, executive, and judicial powers." 1 Annals of Cong. 604 (J. Madison ed., 1789).

The drafters of the Constitution had a powerful reason to insist upon the strict separation of the independent branches of government. Madison and his contemporaries spoke from hard experience. As Justice Scalia wrote, "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

Under the Articles of Confederation, the States, recalling their bitter experience under British governors and Crown judges, gave predominant governmental power to their legislatures. Soon, however, Americans who had fought so hard for their independence, found

themselves oppressed by the exercise of judicial power by the state legislatures." *INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring). Madison, Jefferson, and other leaders "from many quarters, official as well as private, decried the increasing legislative interference with the private-law judgments of the courts." *Plaut*, 514 U.S. at 220.

"It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches." *Chadha*, 462 U.S. at 962. Our Constitution unambiguously enunciates a fundamental principle that the 'judicial Power of the United States' must be reposed in an independent Judiciary.

The separation of powers doctrine is violated "when one branch assumes a function that more properly is entrusted to another" or when one branch "interfere[s] impermissibly with the other's performance of its constitutionally assigned function." *Chadha*, 462 U.S. at 963. Chief Justice Marshall, in *Marbury v. Madison*, declared in no uncertain terms: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). Here, the North Carolina's legislature could not weigh in two years after suit was commenced in order to "say what the law is" without usurping the judicial power of the

district court and the separation of powers between the legislature and the judiciary.

That the legislature declares what the law shall be but may not declare what the law has been is a principle that was well-settled as early as *Ogden v. Blackledge*, 6 U.S. 272 (1804). As the U.S. Supreme Court later noted:

> When counsel, in *Ogden v. Blackledge* (2 Cranch 272, 277), announced that, to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our government is that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point.

*Town of Koshkonong v. Burton*, 104 U.S. 668, 678-79 (1881). It was therefore "not within the constitutional power of the legislature to take from the plaintiff his right" to interest on coupons that existed under state law at the time the coupons were delivered. *Id.* at 679. *See also United States v. Klein*, 80 U.S. 128 (1871); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *Plaut*, 514 U.S. 211 (1995).

The North Carolina Legislature may not dictate the rule of decision in pending cases. The separation of powers doctrine protects not only the court's responsibility to declare what the law is but also its core judicial

function of adjudicating cases. The wisdom of this rule is obvious. To permit legislative majorities to dictate the results in pending cases would trigger a race to the statehouse by politically influential litigants. The outcome of cases would not be governed by the rule of law but by the rule of lobbyists.

An example is provided by *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999), involving protracted litigation over water rights. In the midst of the litigation, the Arizona legislature adopted changes to the law to the benefit of one group of litigants. One enactment, for example, changed the legal consequences of adverse possession of water rights, retroactive as far back as 1919. *San Carlos Apache Tribe*, 972 P.2d at 206-07. The Arizona Supreme Court held that the enactments deprived parties of vested rights, and that "any attempt by the Arizona Legislature to adjudicate pending cases by defining existing law and applying it to fact is prohibited by" the separation of powers provision of the state constitution. *Id.* at 210. The court noted that the power to define existing law in adjudicating disputes "rests exclusively within the judicial branch." *Id.* at 206.

This Circuit is in accord. *See Ward v. Dixie Nat'l Life Ins. Co. (Ward I)*, 257 Fed.Appx. 620 (4th Cir. 2007) (per curiam); *Ward II*, 595 F.3d at 171-72 (4th Cir. 2010). After *Ward I* ruled for the plaintiffs in an insurance matter, "[i]n response to *Ward I*, and before the district court could follow this court's instructions on remand, the South Carolina state legislature took action" and adopted a new definitional statute. *Id.* at 171. "The definition adopted by the state legislature was, in effect, that advocated by defendants and rejected by this court in *Ward I*." *Id.* at 171. This Court, however, declined to apply the new statute retroactively, noting "the presumption against statutory retroactivity, under which a statute does not apply retroactively unless the legislature clearly and explicitly expresses an intent that it do so." *Id.* at 171-75.

This Court should hold no differently here. It would serve neither the exalted position of the legislature nor respect for the rule of law to allow the legislative body to be "transformed from a tribune of the people into a justice shop for the seeker after special privilege." *Anderson v. Bd. of Comm'rs of Cloud Cty.*, 95 P. 583, 586 (Kan. 1908). Constitutional concerns require that the legal rights and remedies that existed at the

time this matter was initiated be those rights and remedies that the courts consider when adjudicating this matter.

## CONCLUSION

For the foregoing reasons, AAJ respectfully urges this Court to affirm the judgment of the district court below.

Respectfully submitted,

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Date: May 6, 2019

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,410 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook type style.

Date: May 6, 2019

/s/ Jeffrey R. White
JEFFREY R. WHITE

## CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, certify that on May 6, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jeffrey R. White
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