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March 20, 2021

Re: Comments on SB1448 Agricultural Nuisance

To Whom it May Concern:

There is an unfortunate common theme with SB1448 s/e: (1) the legislation purports to take on a problem that does not exist; and (2) the specific legislative language is not intended to protect agriculture from frivolous suits, but rather to allow agricultural facilities to operate with impunity. This legislation is a shield for wrongdoing. It is not in the public interest and/or based on sound policy. There are already sufficient protections in place to guard against frivolous litigation and the wrongful imposition of punitive damages (which is likely why the problem does not exist). This legislation does not serve its stated purpose. I have included some background information on "nuisance" to help make this easier to understand.

Nuisance at Common Law

There are two types of nuisance that exist in the common law: (1) private nuisance; and (2) public nuisance. The basis for each claim and the difference between these two causes of action has been clearly defined by the Arizona Supreme Court:

> A private nuisance is strictly limited to an interference with a person's interest in the enjoyment of real property. The Restatement defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 821D. A public nuisance, to the contrary, is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public. RESTATEMENT, supra, § 821B. Accord, PROSSER, supra, § 86, at 618.
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> We have previously distinguished public and private nuisances. In City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938), we noted that a nuisance is public when it affects rights of "citizens as a part of the public, while a private nuisance is one which affects a single individual or a definite number of persons in the enjoyment of some private right which is not common to the public." Id. at 123, 75 P.2d 34. A public nuisance must also affect a considerable number of people. Id. See also Spur Industries v. Del Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972) . . .
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> . . . While we acknowledge that public and private nuisances implicate different interests, we recognize also that the same facts may support claims of both public and private nuisance. As Dean Prosser explained:

> When a public nuisance substantially interferes with the use or enjoyment of the plaintiff's rights in land, it never has been disputed that there is a particular kind of damage, for which the private action will lie. Not only is every plot of land traditionally unique in the eyes of the law, but in the ordinary case the class of landowners in the vicinity of the alleged nuisance will necessarily be a limited one, with an interest obviously different from that of the general public. The interference itself is of course a private nuisance; but is none the less particular damage from a public one, and the action can be maintained upon either basis, or upon both. (Citations omitted.)
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> Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997, 1018 (1966).
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> Thus, a nuisance may be simultaneously public and private when a considerable number of people suffer an interference with their use and enjoyment of land. See Spur Industries, 108 Ariz. at 184, 494 P.2d at 706. The torts are not mutually exclusive. . .

Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona, 148 Ariz. 1, 4–5, 712 P.2d 914, 917–18 (1985); *see also, e.g. Spur Indus., Inc. v. Del E. Webb Dev. Co*., 108 Ariz. 178, 183, 494 P.2d 700, 705 (1972) ("A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood").

Comments on SB1448 s/e:

Section A of the bill provides that an agricultural operation does "not constitute a nuisance unless the agricultural operation has a substantial adverse effect on the public health and safety." This appears to abrogate any cause of action for "private nuisance" at common law. A person or small group of people subjected to the stench of an agricultural operation that interferes with the enjoyment/use of their property can no longer bring suit. Rather than having to demonstrate the existence of "a nontrespassory invasion of another's interest in the private use and enjoyment of land," the legislation requires a landowner to demonstrate that the agricultural operation has a "substantial adverse effect on the public health and safety." There is no longer a cognizable individual right to the use/enjoyment of one's property.

Moreover, at common law, claims for both "public" and "private" nuisance are based on the interference with use and enjoyment of property. This provision redefines nuisance to exclude the "interference with the use and enjoyment of property" as a basis for suit and mandates a "substantial adverse effect on the public health and safety." Thus, in the absence of a public health impact there is no longer any basis for bringing a "public" or a "private nuisance," both of which were historically intended to protect interests in property rights.

Two other issues with Section A. First, it indicates that a nuisance claim can only be brought after an operation has been proven to have a "substantial adverse effect on the public health or safety." That is, the legislation anticipates that there must be a significant public health problem already in existence before anybody can sue for nuisance. I assume it is generally, preferable to avoid the passage of laws

that allow for the creation of a significant effect on public health in the first instance. By way of illustration, there is already a statute that defines the small subset of "Public Nuisances Dangerous to Public Health." A.R.S. 36-601(A) (1), provides, in part, that "any condition or place in populous areas that constitutes a breeding place for flies, rodents, mosquitoes and other insects that are capable of carrying and transmitting disease-causing organisms to any person or persons . . . "is a public nuisance that is dangerous to public health. The statute does not require a showing that people have already been infected but rather that the activity "poses a health or safety hazard to the public." To be clear, the proposed statutory language requires the showing of an actual public health impact as opposed to the threat of a public health impact or the cessation of an activity that poses a health or safety hazard to the public. This is just bad policy, it also abrogates any claim for an "anticipatory nuisance" which exists at common law.

Second, Section A only applies to situations where the agricultural property was in operation before people moved close by. i.e., "came to the nuisance." While coming to the nuisance is generally a mitigating factor, this legislation removes the ability of the courts to address real public health/safety issues that could be created by urban/growth/sprawl. See, e.g., *Spur Industries, supra*.

Section B creates a "presumption" that there is no "nuisance" so long as operations are in compliance with laws and regulations. Arguably this presumption would apply even if the operation was established after other nonagricultural uses were in the area. The issue is that many agricultural operations are subject to exemptions from existing laws and/or lax enforcement.

Section C is of concern for a number of reasons.

Section C(1) awards costs and fees to the prevailing party. This fee shifting provision – awarding fees to the prevailing party – has nothing to do with whether or not a case is frivolous. This provision is intended to have a chilling effect on people's willingness to bring valid claims which they could potentially lose. Again, lawyers take these cases on a contingency basis because, in part, the communities/people impacted generally cannot afford to pay their own attorneys, let alone the corporate attorneys representing CAFOs. It is essentially the same underlying policy that removes fee shifting from tort cases generally (as opposed to contract cases). This also raises a significant environmental justice issue – generally these anticipated agricultural nuisances have a disparate impact on rural, lower income, and/or minority communities. This legislation, including the fee shifting provision, will further disenfranchise those communities most at risk.

Section C(2) simply reiterates already existing remedies for the filing of frivolous suits. That is, the provisions that directly address fees for frivolous suits have been codified for years elsewhere and are even part of the Rules of Civil Procedure – they accomplish/add nothing. See, e.g., Rule 11, Ariz. R. Civ. P. The argument that this provides protection (that does not already exist) to agricultural operations from frivolous suits, is specious.

Section C(3) on punitive damages also serves no legitimate purpose. Under the current law, punitive damages are only available under the most egregious of circumstances. Thus:

> it is the "evil mind" that distinguishes action justifying the imposition of punitive damages. See Rawlings v. Apodaca, supra. In whatever way the requisite mental state is

> expressed, the conduct must also be aggravated and outrageous. It is conscious action of a reprehensible character. The key is the wrongdoer's intent to injure the plaintiff or his deliberate interference with the rights of others, consciously disregarding the unjustifiably substantial risk of significant harm to them. Rawlings v. Apodaca, 151 Ariz. at ——, 726 P.2d at 576. While the necessary "evil mind" may be inferred, it is still this "evil mind" in addition to outwardly aggravated, outrageous, malicious, or fraudulent conduct which is required for punitive damages. We hold that before a jury may award punitive damages there must be evidence of an "evil mind" and aggravated and outrageous conduct.

Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986).

Under the statute, not even "outrageous and aggravated conduct" is sufficient for the imposition of punitive damages. Rather, the operation must have "been subject to a criminal conviction or a civil enforcement action . . ." The point is that, under existing law, it is already extremely difficult to demonstrate that the award of punitive damages is appropriate. Under the proposed legislation, if an agricultural facility is found to have engaged in "outrageous and aggravated conduct" that creates a nuisance (contrary to sound public policy) that operation remains shielded from the prospect of punitive damages. This doesn't protect agricultural operations from frivolous suits – it gives a green light to agricultural operations to operate with impunity.

Section E limits the ability of localities to pursue nuisance actions. This creates a number of problems (including drafting problems) that may not have been addressed. For example, A.R.S. § 36-601(A)(1) provides, in pertinent part, that "[a]ny condition or place in populous areas that constitutes a breeding place for flies, rodents, mosquitoes and other insects that are capable of carrying and transmitting disease-causing organisms . . . is a "public nuisance." Pursuant to A.R.S. § 13-2917(A)(1) it is a "public nuisance" to be "injurious to health. . . offensive to the senses or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons."). *See, also* A.R.S. § 49-141 (Environmental Nuisance). None of these provisions require a "substantial adverse effect on the public health and safety." One question is, can a municipality sue for nuisance if an agricultural facility operates in violation of one of these other nuisance statutes.

Sincerely,

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s/Howard M. Shanker
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