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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Honorable Joseph F. Anderson, Jr., United States District Judge

Appellate Case No. 2012-212711

Perrin and Debbie Babb, Wayne and Sarah
Elstrom, Alan and Kathy Jackson, ...Plaintiffs,

v.

Lee County Landfill SC, LLC, ...Defendant.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to South Carolina Rules of Appellate Practice Rule 213, the Chamber of Commerce of the United States of America (the Chamber) respectfully moves for leave to file the accompanying brief as an amicus curiae in support of the defendant, Lee County Landfill SC, LLC. Plaintiffs' counsel does not consent to this motion.

The Chamber wishes to address primarily the certified question whether, when a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, the plaintiff may maintain an independent cause of action for negligence. In the Chamber's view, this

Court should clarify that plaintiffs bringing offensive-odor claims cannot also state claims for negligence.

The Chamber is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents approximately 300,000 direct members and has an underlying membership of more than three million businesses and organizations of every size in every industry sector and geographic region of the country, including South Carolina. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

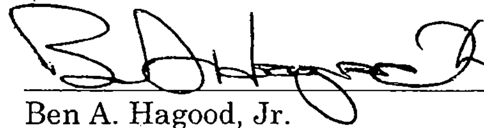
This appeal raises issues of substantial importance to the Chamber's members. It asks this Court to determine the contours of the legal regime that should govern businesses like the Lee County Landfill, which inevitably run some risk of generating odors or other irritating externalities in the lawful operation of their businesses. The regime urged by plaintiffs would leave businesses facing endless lawsuits and limitless damages. That would, in turn, undermine the basic purpose of nuisance law: to strike a fair balance between the rights of residents, like the plaintiffs here, to enjoy their property and the rights of businesses, like the Landfill here, to beneficially use *their* property.

Nuisance law includes important doctrinal limits that negligence law lacks. Among other things, nuisance requires plaintiffs to prove they have an

interest in property before they can ask the court to restrain or penalize other property owners. If this Court permits negligence claims in addition to nuisance claims, however, plaintiffs will easily evade that and other important restraints. Defendant businesses will no longer enjoy the beneficial, lawful use their properties. And businesses that provide socially useful if unpopular services, such as landfills, farms, and factories, will struggle under the weight of endless litigation.

The Chamber has frequently participated as an amicus in cases raising important questions concerning the scope of tort liability in courts throughout the country. E.g., *Green* v. *N.B.S., Inc.*, 409 Md. 528, 976 A.2d 279 (2009). Because of its broad, national experience, the Chamber believes it brings to this case a valuable perspective on the issues before this Court. Accordingly, the Chamber requests leave to file the accompanying brief.

Respectfully submitted, this 15th day of March, 2013.



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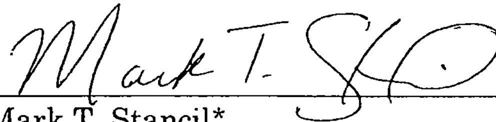

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PROOF OF SERVICE

This is to certify that I have this day served copies of the foregoing ***Motion for Leave to File Amicus Curiae Brief of the Chamber of Commerce of the United States of America*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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BRIEF OF PROPOSED AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT LEE COUNTY LANDFILL SC, LLC

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CERTIFIED QUESTIONS

1. Under South Carolina law, when a plaintiff seeks recovery for a temporary trespass or nuisance (asserting claims for annoyance, discomfort, inconvenience, interference with their enjoyment of property, loss of enjoyment of life, and interference with mental tranquility and abandoning all claims for loss of use, diminution of value, and personal injury), are the damages limited to the lost rental value of the property?

2. Does South Carolina law recognize a cause of action for trespass solely from invisible odors rather than a physical invasion such as dust or water?

3. Is the maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action (temporary or permanent) the full market value of the plaintiff's property where no claim for restoration or cleanup costs has been alleged?

4. When a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, may the plaintiff maintain an independent cause of action for negligence or is the plaintiff limited to remedies under trespass and nuisance?

5. If an independent cause of action for negligence exists under South Carolina law when a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, does the standard of care for a landfill operator and a breach thereof need to be established through expert testimony?

STATEMENT OF THE CASE

The Chamber adopts the defendant Lee County Landfill SC, LLC's statement of the case.

INTEREST OF AMICUS

The Chamber of Commerce of the United States of America (the Chamber) has a direct and substantial interest in the issues presented by these cases. The Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country, including South Carolina. An important function of the Chamber is to represent its members' interests in matters before the courts, Congress, and the Executive Branch. The Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the Nation's business community. This is such a case.

Many Chamber members are businesses that inevitably produce externalities. From landfills to train yards to farms, many Chamber businesses cannot avoid the possibility of emitting odors, making noise, generating light, or other acts that litigants may characterize as a nuisance. Indeed, as in the case with the Lee County Landfill SC, LLC (the Landfill), often the objected-to activity benefits the community: trash and refuse need to be processed somewhere. Businesses like the Landfill

are prime targets for endless lawsuits alleging all manner of injuries from lawful, responsible activities.

The Chamber has a substantial interest in ensuring that the law reasonably balances the need of owners to enjoy their property with the right of businesses to lawfully operate landfills, farms, factories, and other enterprises that may produce externalities. That balance is properly struck under legal doctrines such as nuisance that embody long-established limits on who may bring claims and the damages plaintiffs can recover. Without such boundaries, plaintiffs could sue until enterprises—vital to the community yet unpopular to its neighbors—are forced to close their doors.

SUMMARY OF ARGUMENT

This case asks this Court to decide what legal framework should govern firms that conduct lawful, even socially useful, business that may emit odors or other potentially irritating—but otherwise physically harmless—externalities. This brief focuses on one of the five certified issues: Whether offensive-odor and similar claims can give rise to an independent cause of action for negligence, as opposed to traditional remedies under trespass and nuisance. It touches on other questions as well, including whether plaintiffs can state trespass claims for invisible odors.

Offensive-odor claims are properly limited to nuisance because, unlike negligence law, nuisance doctrine is deliberately calibrated to balance property owners' competing rights. Disputes like this one essentially are conflicts among property owners. The Landfill has a right to operate its business on its property; the plaintiffs, residential property owners, have a right to enjoy their property. For centuries, nuisance law has operated to address precisely these potentially competing interests.

In recognition of that balancing act, nuisance law requires plaintiffs to satisfy additional requirements that negligence law lacks. Nuisance allows only those with a property interest to sue, requires plaintiffs to prove a significant interference with their enjoyment of their property, and stresses balancing plaintiffs' interference with the utility of the defendant's conduct. And, as the Landfill correctly argues, nuisance law properly impose limits on damages—keyed to the underlying property interests at stake—that plaintiffs may recover. That balance respects both property owners' rights.

Embracing an independent cause of action for negligence would skew that balance irretrievably in favor of plaintiffs and against businesses like the landfill that may generate odors and other externalities while conducting lawful and socially valuable enterprises. Plaintiffs' negligence theory would invite lawsuits from a host of litigants with only the most remote or tangential connection to a defendant's property and would allow the recovery of virtually unlimited damages. For

businesses, the end result would be highly damaging: any unpopular activity—no matter how lawful or generally beneficial to a community—would yield endless and potentially crippling litigation. When such complaints are addressed exclusively via nuisance, operators can at least predict and account for the universe of potential plaintiffs and some reasonable limitations on possible recoveries.

Limiting the universe of plaintiffs that can sue and setting significant standards for what they must prove before recovering damages helps protect the rights of defendants to use their property for socially useful activities like processing garbage, constructing houses, or raising cattle. It protects businesses from the harmful consequences of unending, unpredictable litigation. And it allows businesses to rely on zoning decisions permitting operation of a particular enterprise in a designated location. That reliance is essential to companies, like the Landfill here, that commit vast amounts of capital to establishing and expanding facilities on the reasonable belief that they will not be subject to limitless and repeated liability for their basic operations.

I. NUISANCE LAW—NOT AN INDEPENDENT NEGLIGENCE ACTION—CORRECTLY BALANCES PROPERTY OWNERS' COMPETING INTERESTS IN OFFENSIVE-ODOR AND SIMILAR CASES.

Every property owner has "an unrestricted right of use, enjoyment, and disposal" of his property. *Painter* v. *Town of Forest Acres*, 231 S.C. 56, 60 97 S.E.2d 71, 73 (1957). That right applies equally to businesses, which use their property to create jobs, produce valuable goods and services, and

grow local economies. See *ibid.* But often firms like the Landfill here rightfully use their property to conduct business that many would prefer not to live near. People generally prefer not to live near airports, factories, railways, power plants, farms, and so on. Yet most people fly, use manufactured products, take trains, use power, and eat cultivated food. As a result, tension sometimes arises between businesses' rights to use their property, residents' rights to enjoy their property, and the public's need for things like landfills, airports, and farms.

Private nuisance is designed to "strik[e] a balance as nearly as possible between" a property owner's right to "conduct . . . a lawful business thereon" and a resident's right "to be protected in the reasonable enjoyment of his property." *Winget* v. *Winn-Dixie Stores, Inc.*, 242 S.C. 152, 159, 130 S.E.2d 363, 367 (1963). As one commentator explains:

> Nuisance law starts from an implicit assumption that uses of land may have detrimental effects on others but still not necessarily be either socially intolerable or in any sense blameworthy. A legal rule that tried to prohibit all detrimental effects of land use would be not only highly impractical but, probably, an economic disaster. Therefore, when people suffer harm caused by others' land uses, there is often no sensible policy choice but to decide that, on balance, the public interest is best advanced by allowing the uses (such as important industries) to proceed despite their harmful effects on neighbors or the community at large.

John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 10-11 (1993).

This Court has long recognized that fact. "People who live in organized communities must of necessity suffer some inconvenience and

annoyance from their neighbors and must submit to annoyances consequent upon the reasonable use of property by others." *Winget*, 242 S.C. at 159, 130 S.E.2d at 367. Even if one property owner's activities actually impair the value of a neighbor's property, those activities are not necessarily a legal nuisance. "In many instances in populous neighborhoods the property of one person is depreciated by the near proximity of the property of another. Such burdens are ordinary incidents to residence and ownership in a city." *Strong* v. *Winn-Dixie Stores, Inc.*, 240 S.C. 244, 257, 125 S.E.2d 628, 634 (1962) (quoting *Dean* v. *Powell Undertaking Co.*, 55 Cal. App. 545, 203 P. 1015, 1018 (1921)) (quotation marks omitted).

Complaints about odors emanating from private property are quintessentially private-nuisance claims and should be treated as such, rather than morphed into negligence law. *See* DAN B. DOBBS, THE LAW OF TORTS § 463, at 1322 (2000). That is because nuisance law is specifically designed to balance property owners' competing rights. Nuisance law is more tailored than negligence law (and, to some extent, trespass[1]) in three important ways.

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[1] This brief addresses primarily the fourth question this Court certified in this matter, whether plaintiffs can state negligence claims as well as nuisance and trespass when they allege offensive odors have migrated onto their property. But question two asks whether plaintiffs can state trespass claims for invisible odors. Some reasons why courts should treat offensive-odor claims in nuisance rather than negligence also apply to trespass.

First, and most significantly, only those with an interest in property can bring nuisance claims. See *Silvester* v. *Silver Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001); RESTATEMENT (SECOND) OF TORTS § 821E (1979). Negligence, by contrast, permits suits by anyone within smelling distance—however that might be defined—even if that person is a mere visitor or passerby. See, *e.g.*, *Thomasko* v. *Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (interest in land not an element of negligence).

Second, nuisance recognizes claims only for "significant" interferences with an owner's enjoyment of her property. RESTATEMENT (SECOND) OF TORTS § 821F. "If a lawful business is operated in an unlawful or unreasonably manner as to produce *material* injury or *great* annoyance to others or *unreasonably* interferes with the lawful use and enjoyment of their property, it will constitute a nuisance." *Winget*, 242 S.C. at 159, 130 S.E.2d at 367 (emphasis added). That means that plaintiffs cannot bring a claim for every personal annoyance and frees other property owners from fear of liability for the emission of trivial odors and externalities. Negligence, by contrast, does not require plaintiffs to show their damages are substantial or material; it simply requires that plaintiffs prove *any* damages. See *Thomasko*, 349 S.C. at 11, 561 S.E.2d at 599. Trespass raises similar concerns: plaintiffs can recover in trespass for any physical invasion of their property, however slight. See *Silvester*, 344 S.C. at 286, 543 S.E.2d 563, 566.

The distinction between nuisance on one hand and negligence (and trespass) on the other boils down to how much injury a plaintiff must suffer before being able to sue. As this Court has long recognized, plaintiffs cannot necessarily recover nuisance damages even if their property loses value. *Strong*, 240 S.C. at 257, 125 S.E.2d at 634. A person whose neighbor decides to paint his house garishly and adorn his lawn with pink flamingoes likely cannot bring a nuisance claim even if her property loses some value. But because negligence law only requires injury—and does not require a "significant" injury—that person could sue and seek damages based solely on her lost property value. Permitting plaintiffs to bring negligence claims for quintessentially nuisance complaints would open the courthouse doors to every disgruntled neighbor who has tired of another resident's offbeat home-decoration choices. The consequences on private-property rights would be devastating.

Third, the utility of the defendant's conduct is particularly important in nuisance law, more so than in negligence law. See RESTATEMENT (SECOND) OF TORTS §§ 826, 828; DOBBS, *supra*, § 465, at 1330. Again, property law—including nuisance—is about balancing the rights of competing property owners and the public interest. The usefulness of a defendant's conduct is highly relevant to deciding where to draw lines among those competing claims. "[I]f [a defendant's] activity is useful to the community or to society, the plaintiff might reasonably expect to put up with more annoyance." DOBBS, *supra*, § 465, at 1330. And

if the law overpunishes businesses conducting socially useful activity, those businesses will stop operating, to the detriment of the public at large.

Negligence law, however, does not function primarily to balance property interests. Negligence is fundamentally about fault. See DOBBS, *supra*, §§ 112-13, at 263-68. Because nuisance law is principally concerned with protecting property rights, it recognizes that even a faultless defendant can be liable, but it also restricts when that liability is imposed. See William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 416-17 (1942) ("Nuisance . . . is . . . a kind of damage done, rather than any particular type of conduct.").

Though plaintiffs do not need to show negligence or other fault by the defendant, nuisance law does not *prevent* plaintiffs from claiming that negligent conduct, rather than intentional conduct, created a nuisance. Plaintiffs can bring negligent-nuisance claims instead of intentional-nuisance claims. RESTATEMENT (SECOND) OF TORTS § 822; DOBBS, *supra*, § 464, at 1324. The distinction is in the reason for the alleged nuisance: In an intentional nuisance, the defendant knows that flying a jet will be noisy but intentionally flies the jet. In a negligent nuisance, a defendant gas station did not intend to leak fuel on a neighboring property but negligently failed to maintain fuel tanks, which then leaked. See DOBBS, *supra*, § 465, at 1324-25.

But plaintiffs claiming negligent nuisance are not done: they still must satisfy *all other elements of a nuisance claim*, including having an interest in property that the alleged nuisance significantly impairs. DOBBS, *supra*, §§ 463-65, at 1321-30. Indeed, permitting plaintiffs to bring offensive-odor claims in negligence would make negligent-nuisance claims superfluous. That is, if a plaintiff may state an independent cause of action for simple negligence, why bother to also bring a negligent nuisance claim at all? The law should not be interpreted to yield such an illogical result. Cf. *CFRE, LLC* v. *Greenville Cnty. Assessor*, 395 S.C. 67, 75, 716 S.E.2d 877, 881 (2011) (courts construe statutes "so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'" (quoting *State* v. *Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008)). It also would permit plaintiffs to evade doctrinal restrictions that, as explained in more detail below, serve important legal and practical goals.[2]

[2] Plaintiffs rely on *Ravan* v. *Greenville County*, in which the Court of Appeals noted (albeit without supporting citation) that "[a] nuisance presupposes negligence in many instances, if not in most, and the two torts may be coexisting and practically inseparable if the acts or omissions constituting negligence create a nuisance." 315 S.C. 447, 465 n.4, 434 S.E.2d 296, 307 n.4 (Ct. App. 1993). But there is no indication in *Ravan* that the impermissible overlap between these causes of action was even argued. Indeed, the plaintiffs there were complaining about the trial court's failure to instruct the jury on nuisance in addition to negligence, so the court had no occasion to consider whether the failure to present the *more demanding* nuisance theory could somehow have prejudiced the plaintiffs.

II. APPLYING ONLY NUISANCE, NOT NEGLIGENCE, LAW TO OFFENSIVE-ODOR CLAIMS PROTECTS BUSINESSES' SOCIALLY VALUABLE ACTIVITIES AND REASONABLE RELIANCE INTERESTS.

The limitations on potential plaintiffs and damages embodied in nuisance law promote important concerns. They protect businesses' property rights and give businesses, within limits, sufficient certainty and predictability to conduct socially beneficial but sometimes unpopular activities. Equally important, confining offensive-odor and similar claims to their historical home in nuisance ensures that businesses can continue to make necessary capital investments in reliance on decisions by land-use officials permitting them to operate in a particular manner and location.

A. Respecting Proper Limits on These Claims Prevents Costly, Frivolous Litigation and Helps Businesses Predict Their Litigation Exposure.

Massively expanding liability for offensive odors, as the plaintiffs seek in this case, would have severe practical consequences for many businesses whose operations may generate externalities. Many businesses cannot realistically eliminate all possible odors, noises, and light altogether without shutting their doors—quite simply, a landfill exists to process garbage, and there may be times when that garbage stinks. Exposing such businesses to a cause of action for negligence risks endless lawsuits with potentially crippling costs and damages.

There will be no shortage of plaintiffs eager to file such lawsuits. Members of the business community already are prime lawsuit targets

because plaintiffs perceive them as "deep pockets." And over the last several decades, tort causes of action and damages—particularly the size and availability of punitive damages—have grown dramatically. Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 170 (2004) (reporting a "spectacular increase" in noneconomic tort damages that "have continued to mushroom"); Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: a Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1, 3-4 (2000) (describing "judicial decisions that dramatically expanded [tort] liability" and "looser standards" for obtaining punitive damages).

Thus, standards for tort liability and obtaining substantial damages have loosened dramatically. That has created a combustible mix of "[h]igh stakes and vague rules" that drive up litigation costs and "inhibit settlement." Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 & n.24 (1984). Plaintiffs hoping to hit the "jackpot" are more willing to sue and less willing to settle reasonably. George L. Priest, *Punitive Damages Reform: the Case of Alabama*, 56 LA. L. REV. 825, 829-30 (1996). Defendants feel compelled to spend more money defending themselves because of the (however small) risk of losing a massive jury verdict. Easterbrook, *supra*, at 12-13.

The risk of large and unpredictable damages affects how firms operate. Businesses cannot easily predict litigation costs and struggle to

manage litigation risk, leaving them pressured to settle simply to manage costs. Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 371-72 & n.9 (2009). And uncertain liability discourages firms from operating and growing their businesses. Schwartz, *supra*, at 4. Simply put, predictability in litigation exposure is essential to planning and running any enterprise, particularly those that, like the Landfill here, are easy targets for complaints.

Recognizing a cause of action for negligence here would exacerbate these concerns by loosening restrictions on offensive-odor and similar claims until they have no force. As explained above, virtually anyone could sue on a negligence theory. That possibility, standing alone, cripples businesses' ability to evaluate the potential for litigation; there is no end to plaintiffs' conceptions of injury and willingness to sue. Cf. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972))). Negligence suits would also upend nuisance law's tried-and-true balancing approach, which requires plaintiffs to prove a "significant" interference with their property and encourages courts to weigh the utility of the defendant's activity. Additionally, plaintiffs press this Court to eliminate any limits on what damages they can recover. They even seek to

recover *more money than they would earn from outright selling their homes*.

Combined, these rules would create exactly the "[h]igh stakes and vague rules" that encourage parties to prolong expensive litigation. Easterbrook, *supra*, at 12-13 & n.24. And they would subject businesses like the Landfill to deep uncertainty about their litigation risk. By contrast, affirming the doctrinal limits the Landfill presses to this Court would give many businesses much-needed clarity about their legal obligations and exposure. Business are able to assess the universe of affected parties (nearby property holders) and appreciate the potential damages. That sort of predictability is an important objective of the law, and it is absolutely essential to businesses' operations.

B. Restricting Plaintiffs' Claims Would Respect Businesses' Good-Faith Reliance on Applicable Zoning and Regulatory Regimes.

As we have explained, this case is a classic dispute among neighboring property owners wishing to put their properties to conflicting uses. The "precise limits of each" owner's claims "are difficult to define," leaving courts to "strik[e] a balance as nearly as possible between their respective rights." *Winget*, 242 S.C. at 159, 130 S.E.2d at 367. When socially useful but unpopular businesses like landfills operate in a community, they raise questions about the interests of their immediate neighbors; the interests of the business and its constituents, including employees who depend on the business's success for their livelihoods; and

the interests of the larger community that needs somewhere to put its garbage.[3]

Businesses justifiably rely on the grant of permission when establishing and growing their operations. Companies devote massive resources to building out facilities that they have been given permission to operate. Landfills, for example, require tremendous capital expenditures for land, equipment, and supporting infrastructure. Companies are willing to make such investments only because they can comfortably rely on the basic grant of authority inherent in a favorable zoning determination.

If such permission may be effectively second-guessed under the guise of expansive tort liability, however, these reliance interests will be seriously and unfairly undermined. Once a capital-intensive business is situated somewhere, it is unlikely to move—that is particularly true for landfills, which by their very nature are fixed in place. Going forward, anyone who lives near a landfill or moves into its vicinity might object to the landfill's presence or operations. But that basic question has already been resolved in the landfill's favor. That is, zoning decisions rest on the premise that permission to operate a particular kind of business in a

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[3] Courts and commentators have labeled these conflicts "NIMBY" (not-in-my-backyard) syndrome. Everyone needs landfills, farms, and factories, but no one wants to live near them. The most-modern iteration of this age-old problem is cell-phone towers. "[P]roperty owners resist [new towers] in populated areas because they find wireless facilities unsightly and worry facilities lower property values; yet as cell phone consumers these same people want quality service where they are most." *Omnipoint Holdings, Inc.* v. *City of Cranston*, 586 F.3d 38, 51 n.9 (1st Cir. 2009).

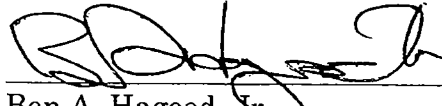
particular location is not subject to endless relitigation. Causes of action like negligence pose the threat of significant and repeated liability for conduct that is inherent in the nature of these businesses; that risk is inconsistent with the fact that elected officials authorized such a business to operate.

Businesses depend on certainty, and certainty promotes the interests of the larger community. Many of the businesses that produce unpopular (but not harmful) externalities also create jobs and promote economic development. Although homeowners might dislike living near a factory or an airport, communities welcome the economic opportunities that such facilities create. Expansive tort liability that impairs a business's ability to make reliable and predictable investments has far-reaching consequences. More-than-adequate safeguards for the community are already in place in the form of zoning, statutory and regulatory regimes, and well-recognized legal theories such as nuisance. With respect, adding an independent negligence cause of action to the mix is both unnecessary and harmful to the businesses and the communities they serve.

CONCLUSION

For the foregoing reasons, this Court should hold that an independent cause of action for negligence is not available when offensive odors are alleged to have migrated from one neighbor's property onto the plaintiff's property.

Respectfully submitted, this 15th day of March, 2013.



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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Honorable Joseph F. Anderson, Jr., United States District Judge

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Appellate Case No. 2012-212711

Perrin and Debbie Babb, Wayne and Sarah
Elstrom, Alan and Kathy Jackson, ...Plaintiffs,

v.

Lee County Landfill SC, LLC, ...Defendant.

PROOF OF SERVICE

This is to certify that I have this day served copies of the foregoing ***Brief of Proposed Amicus Curiae the Chamber of Commerce of the United States of America in Support of Defendant Lee County Landfill SC, LLC*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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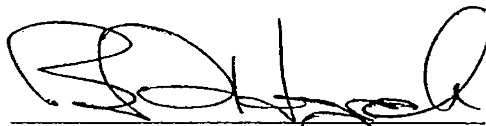

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