

Hendry County's Best Kept Secret: Possible Legal Challenges to Non-Human Primate Breeding Facilities

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I. INTRODUCTION

Hendry County is “nestled between the south shores of Lake Okeechobee and the pristine wetlands of the northern Everglades.”¹ It sits on the edge of the Caloosahatchee River, and is surrounded by farmland and sugarcane fields.² Hendry County has a population of approximately 39,000 people.³ The citizens enjoy the quiet, rural lifestyle and its proximity to major cities like Miami and West Palm Beach. Hendry County’s rural lifestyle and agricultural scene is perfect for a business that needs to be far from prying eyes and ears.⁴ In 1998, the executive officer of Primate Products determined Hendry County was the ideal location to build a large, non-human primate breeding facility.⁵ The location “satisfied many of [Primate Products’] needs: it was largely agricultural[,] . . . it was out of sight[,]” and it was relatively close to the Miami International Airport.⁶ This was not just any operation, it was a 640-acre plot of land that would house close to 1,000 monkeys native to Vietnam, China, and Mauritius.⁷

The facility, Panther Tracks Learning Center,⁸ imports and breeds a mix of rhesus and cynomolgus macaques, which are then sold to companies and universities for medical research.⁹ These companies claim the use of monkeys is essential in developing cures for illnesses such as

¹ *Experience the True Nature of Southern Florida*, DISCOVER HENDRY COUNTY, <http://www.discoverhendrycounty.com> (last visited Nov. 6, 2017).

² *Id.*

³ *Quick Facts Hendry County, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hendrycountyflorida/PST045216> (last visited Nov. 6, 2017).

⁴ Felix Gillette, *How Monkeys Became Big Business in Florida: The breeders are proud. The activists are mad. The neighbors are confused. And the monkeys still have good aim.*, BLOOMBERG BUS. WK. (Oct. 14, 2015), <https://www.bloomberg.com/features/2015-florida-monkey-farm/>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Panther Tracks Learning Center*, PRIMATE PRODS., <http://www.primatproducts.com/panther-tracks-learning-center-ptlc/> (last visited Nov. 6, 2017).

⁹ *Live Animal Division*, PRIMATE PRODS., <http://www.primatproducts.com/live-animal-division-lad/> (last visited Nov. 6, 2017).

polio and typhus, and are also essential to the study of incurable diseases such as Alzheimer’s and AIDS.¹⁰

Fifteen years later, in the summer of 2013, neighbors in LaBelle¹¹ heard rumors that a company by the name of SoFlo Ag, LLC¹² had bought approximately thirty-four acres of land and was about to begin construction on a non-human primate breeding facility.¹³ The property’s southern border is immediately adjacent to a residential neighborhood.¹⁴ One of the neighbors who lived about a mile from the planned facility emailed the County Commissioners demanding information.¹⁵ However, she never received a response. Little did the neighbors know, this was not the first monkey breeding facility in Hendry County – in fact, this was the third¹⁶ one of its kind.¹⁷

“There are more [non-human primate] breeding facilities in Hendry County than any other community in the United States.”¹⁸ Currently, the four facilities house approximately 10,000 monkeys,¹⁹ or about one monkey for every four Hendry County residents. The companies went unnoticed for fifteen years because the County officials did not provide any

¹⁰ SCI. COMM. ON HEALTH, ENVTL. & EMERGING RISKS, FINAL OPINION ON THE NEED FOR NON-HUMAN PRIMATES IN BIOMEDICAL RESEARCH, PRODUCTION AND TESTING OF PRODUCTS AND DEVICES 12, 45, 49 (May 18, 2017), http://ec.europa.eu/environment/chemicals/lab_animals/pdf/Scheer_may2017.pdf.

¹¹ LaBelle is the county seat of Hendry County, Florida. *Welcome to the City of LaBelle*, CITY OF LABELLE <https://www.citylabelle.com/> (last visited Nov. 18, 2017).

¹² SoFlo Ag, LLC filed articles of incorporation with the Florida Secretary of State. It listed its principal office as a United Parcel Service (UPS) mailbox at 4846 Sun City Center Blvd., #287, Sun City Center, FL, 33573. SoFlo Ag listed P2B2, LLC as its sole manager. P2B2, LLC, also registered with the Florida Secretary of State, used the same address listed for SoFlo Ag and listed XII, LLC as its manager. XII, LLC is not registered. Complaint for Injunctive Relief and Declaratory Judgment at 7, *Stephens v. Hendry Cty.*, 2014-CA-633 (Fla. Cir. Ct. Nov. 6, 2014).

¹³ Gillette, *supra* note 4.

¹⁴ Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 1.

¹⁵ *Id.* at 9.

¹⁶ A fourth non-human primate breeding facility was authorized during the lawsuit. Gillette, *supra* note 4.

¹⁷ *Where are Florida’s Money Farms Shipping Monkeys?*, ANIMAL RIGHTS FOUND. OF FLA. (Dec. 17, 2014), <http://arff.org/blog/where-are-floridas-money-farms-shipping-monkeys-2> (discussing three non-human primate breeding facilities in Hendry County: Primate Products, Worldwide Primates, and the Mannheimer Foundation).

¹⁸ *Hendry County’s Controversial Monkey Breeding Industry*, ANIMAL RIGHTS FOUND. OF FLA., www.arff.org/hendry (last visited Nov. 6, 2017).

¹⁹ John Howell, *Everglades, Hendry Monkeys: Maybe too close for comfort*, THE DAILY FRAY (June 12, 2015), <http://thedailyfray.com/blog/hendrys-monkeys-everglades-have-enough-its-plate/>.

public hearings or notice to the residents.²⁰ The County reasoned that the facilities were in agriculturally-zoned districts and the monkeys fit into the category of domestic livestock usually bred on agricultural farms.²¹

In 2014, the Animal Legal Defense Fund filed suit against Hendry County for an alleged violation of the Sunshine Law, which requires a municipality to provide notice or hold a public meeting when acting in its “decision-making” capacity.²² However, these facilities were approved behind closed doors.²³ Hendry County does not have an ordinance that addresses wild and exotic animal possession. Instead, the County held a meeting where it concluded the definition of “animal husbandry”²⁴ also included the breeding of non-human primates. With this action, the County categorized the facilities as General Agriculture, avoiding the need to provide any information to the public.

Part II of this paper addresses the history of using non-human primates in medical research and the history of monkey breeding facilities in Florida. Part III explores existing regulations of these facilities in Florida and Puerto Rico. Part IV proposes amending the current Hendry County ordinance to regulate future non-human primate breeding facilities as industrial or commercial facilities, rather than agricultural facilities. A proposal is also made for a nuisance claim to be brought against existing facilities.²⁵

²⁰ ANIMAL RIGHTS FOUND. OF FLA., *supra* note 18.

²¹ Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 6-7.

²² “All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.” FLA. STAT. § 286.011(1) (2017).

²³ Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 10.

²⁴ “Animal husbandry” is defined as: “the science of breeding, feeding, and tending domestic animals, esp. farm animals.” *Animal Husbandry*, WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 2001).

²⁵ The purpose of this article is not to discuss the ethical arguments of using non-human primates in medical research. Rather, the purpose of this article is to ensure the companies and facilities operating these types of

II. NON-HUMAN PRIMATE BREEDING FACILITIES

The topic of using animals in medical research has long been controversial. On one side of the debate are those who believe humans can live longer and contract fewer illnesses thanks to the benefits derived from animal experimentation.²⁶ On the other side are individuals who hold deep convictions that all animal experimentation is an abuse of another species for selfish human gain.²⁷

A. *Using Non-Human Primates in Medical Research*

In the late 1800s, two major discoveries led to broad acceptance of animal experimentation.²⁸ These discoveries were the bacterium for tuberculosis and the discovery of a diphtheria antitoxin that rapidly reduced the infant mortality rate from forty percent to ten percent in those afflicted.²⁹ In 1988, the American Medical Association's Council on Scientific Affairs published a list of medical advances it claimed were possible through research using animals.³⁰ These advances included studies of anesthesia, autoimmune deficiency syndrome (AIDS) and autoimmune diseases, behavioral science, cardiovascular disease, cholera, diabetes, gastrointestinal surgery, genetics, hemophilia, hepatitis, infant health, infection, malaria, muscular dystrophy, nutrition, ophthalmology, organ transplantation, Parkinson's disease, prevention of rabies, radiobiology, reproductive biology, and treatment of spinal injuries, toxoplasmosis, yellow fever, and virology.³¹

facilities are regulated under the correct category and that the citizens have a right of recourse through possible claims of nuisance.

²⁶ MONAMY VAUGHAN, ANIMAL EXPERIMENTATION: A GUIDE TO THE ISSUES 13 (2d ed. 2009).

²⁷ *Id.* at 15.

²⁸ *Id.* at 13; *see* SUSAN HUNNICUTT, ANIMAL EXPERIMENTATION 11-18 (Susan Hunnicutt ed., 2013).

²⁹ VAUGHAN, *supra* note 26.

³⁰ COMM. ON THE USE OF LAB. ANIMALS IN BIOMEDICAL & BEHAVIORAL RESEARCH, USE OF LAB. ANIMALS IN BIOMEDICAL & BEHAVIORAL RESEARCH 27 (1988).

³¹ *Id.* at 27-37.

At the other end of the spectrum are those who believe animals should not be abused for selfish and personal gains in humans.³² In 1824, the Society for the Prevention of Cruelty to Animals (SPCA) was established.³³ Its members are committed to principles of kindness towards animals, educating the public about animal cruelty, and lobbying parliamentarians for the enactment of animal anti-cruelty legislation.³⁴ Opponents of medical research also argue that animal-based research protocols do not yield the best scientific results for humans experiencing the same conditions.³⁵ These opponents explain that these experiments can mislead researchers because each species has significant physiologic and metabolic differences.³⁶ These differences can contribute to illnesses or death by failing to predict the toxic effects of drugs in humans.³⁷

Proponents of the use of non-human primates in medical research argue that the “primates are so similar to people genetically (up to 98 percent) that [primates] show, unlike any other animal, how diseases work in the human body.”³⁸ Monkeys are more predictive than smaller species as to how a disease acts or how a treatment will work in humans.³⁹ “Primate research has led to medical devices, treatments, advancements and cures that have saved and improved millions of lives.”⁴⁰ For example, non-human primate research has contributed to the following discoveries: the polio vaccine, insulin for diabetes, coronary bypass surgery, hip replacements, kidney dialysis and transplants, organ transplants, organ rejection medications,

³² VAUGHAN, *supra* note 26, at 15; HUNNICUTT, *supra* note 28, at 19.

³³ *Our History*, SPCA INT’L, <https://www.spcai.org/about-spcai/our-history/> (last visited Nov. 10, 2017).

³⁴ *Id.*

³⁵ SONIA S. WAISMAN, PAMELA D. FRASCH, & BRUCE A. WAGMAN, *ANIMAL LAW CASES & MATERIALS* 507 (5th ed. 2014).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Critical Role of Nonhuman Primates (NHPs) in Scientific and Medical Research*, UNIV. OF CALI. DAVIS, CALI. NAT’L PRIMATE RESEARCH CTR. (Aug. 24, 2016), <https://www.cnprc.ucdavis.edu/critical-role-of-nonhuman-primates-nhps-in-scientific-and-medical-research/>.

³⁹ *Id.*

⁴⁰ *Id.*

medications for psychiatric illnesses, blood transfusions, chemotherapy, the hepatitis B vaccine, HIV/AIDS medications, lung transplants for children with cystic fibrosis, and treatments for anthrax, Parkinson's disease, and prostate cancer.⁴¹

Each year, thousands of primates are captured from the wild and transported to the United States.⁴² The animals are placed in small crates and are often subjected to restricted food and water intake.⁴³ Studies have shown the primates' physiological systems sometimes takes months to return to baseline levels.⁴⁴ According to the United States Department of Agriculture (USDA), approximately 70,000⁴⁵ non-human primates are used for research in the United States every year.⁴⁶

Macaques and rhesus primates⁴⁷ are two of the six types of primates most commonly used in biomedical research.⁴⁸ Studies have found that most macaques exhibit unpredictable behavior and aggression as they mature.⁴⁹ To defend themselves and establish dominance, macaques are known to cause serious injuries via biting.⁵⁰ In the late 1980s, occupational safety guidelines were published based on evidence that macaque species were inherently dangerous to humans due to the risk for B-virus transmission, as well as the likelihood of serious physical

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ P. E. Honess et al., *A Study of Behavioural Responses of Non-Human Primates to Air Transport and Re-Housing*, LAB. ANIMALS 38, 119 (2004).

⁴⁵ See *Non-Human Primates*, ANIMAL WELFARE INST., <https://awionline.org/content/non-human-primates> (last visited Nov. 10, 2017) (explaining that this figure does not include the number of primates that are not presently assigned to research and are instead part of a laboratory's breeding colony).

⁴⁶ Kathleen M. Conlee & Andrew N. Rowan, *The Case for Phasing Out Experiments on Primates*, THE HASTINGS CTR., <http://animalresearch.thehastingscenter.org/report/the-case-for-phasing-out-experiments-on-primates/#refmark-3> (last visited Nov. 6, 2017).

⁴⁷ See DEBORAH BLUM, *THE MONKEY WARS* 35, 45, 250-51 (1994); ROD & KEN PRESTON-MAFHAM, *PRIMATES OF THE WORLD* 69 (1999).

⁴⁸ Stephanie R. Ostrowski et al., *B-Virus From Pet Macaque Monkeys: An Emerging Threat in the United States?*, 4 EMERGING INFECTIOUS DISEASES 117 (1998).

⁴⁹ *Id.* at 118.

⁵⁰ *Id.*

injury from bite wounds.⁵¹ The B-virus infection is transmitted among free-roaming or group-housed animals.⁵² The virus infection in monkeys is characterized by lifelong infection with intermittent reactivation, and shedding of the virus in saliva or genital secretions.⁵³

B. *The History of Non-Human Primate Breeding Facilities in Florida*

1. Monkeys Wreak Havoc in Florida Keys

Charles River Laboratories, a biomedical company based in Wilmington, Massachusetts, is one of the leading providers of laboratory animals used in medical research.⁵⁴ To date, animal sales still account for approximately sixty-two percent of its revenue.⁵⁵ In 1973, Charles River Laboratories stocked two isolated islands in the Florida Keys with about 1,600 rhesus monkeys.⁵⁶ The company's plan was to let the monkeys breed unimpeded, and then occasionally harvest a portion for laboratories for biomedical research.⁵⁷ The monkeys were sold to laboratories at premium prices, ranging from \$1,500 to \$4,500 each.⁵⁸ The researchers believed the islands' remote location and the water surrounding the islands would serve as a barrier to prevent the primates from escaping the islands.⁵⁹ However, some primates did escape.⁶⁰ The monkeys destroyed the island by stripping the leaves from thousands of federally protected

⁵¹ *Id.* at 119.

⁵² *Id.*

⁵³ *Id.* at 117.

⁵⁴ *Who We Are*, C. RIVER, <http://www.criver.com/about-us/who/overview> (last visited Nov. 11, 2017).

⁵⁵ *Id.*

⁵⁶ JOY WILLIAMS, *THE FLORIDA KEYS: A HISTORY & GUIDE* 114-15 (10th ed. 2003).

⁵⁷ *STRANGERS IN PARADISE: IMPACT AND MANAGEMENT OF NONINDIGENOUS SPECIES IN FLORIDA* 163 (Daniel Simberloff et al. eds., 1997).

⁵⁸ C. RIVER, *supra* note 55.

⁵⁹ *Charles River Labs. v. Fla. Game & Fresh Water Fish Comm'n*, No. 96-2017, 1997 WL 1052489, at *1, *7 (Fla. Div. Admin. Hearings 1997).

⁶⁰ *Id.*

mangroves.⁶¹ The feces-infested waters flourished with algae and the shoreline eroded, taking with it habitat for roseate spoonbills and white ibis.⁶²

In 1992, Charles River Laboratories entered into an agreement with the Board of Trustees of the Internal Improvement Trust Fund where it agreed to restore the vast damage to mangroves and other vegetation caused by the monkeys.⁶³ The agreement required Charles River Laboratories to install chain-link fences to exclude monkeys from the shoreline and certain areas of the islands.⁶⁴ The agreement also required Charles River Laboratories to monitor and meet water quality standards, obtain all necessary governmental permits for its structures on the islands, and phase out free-ranging monkeys by prescribed deadlines.⁶⁵ It took more than fifteen years to remove the primates from the islands.⁶⁶

2. Hendry County's History with Non-Human Primate Breeding Facilities

Paul Houghton, the owner and chief executive of Primate Products, was looking for a place to build a large facility where he could breed monkeys for medical research.⁶⁷ The Florida Keys were out of the question because of the previous disaster the monkeys had caused. After some research, Mr. Houghton found the perfect spot in southwestern Florida – the tropical savanna climate of Hendry County.⁶⁸ Mr. Houghton met with County representatives, and in 2000, he opened the 640-acre site, which housed approximately 1,200 primates.⁶⁹

⁶¹ Michael Warren, *Monkey Business is Giving Company a Bad Reputation: Environment: Monkeys are destroying islands in the Florida Keys. Residents want them moved, but their owner says the herd is vital to medical research*, L.A. TIMES, Nov. 16, 1990, http://articles.latimes.com/1990-11-16/news/vw-4910_1_monkey-business.

⁶² KIM TODD, *TINKERING WITH EDEN: A NATURAL HISTORY OF EXOTIC SPECIES IN AMERICA* 192 (2002).

⁶³ *Charles River Labs.*, 1997 WL 1052489, at *7.

⁶⁴ *Charles River Laboratories, Inc. Lease Revocation*, MY FLA. (Apr. 15, 1997), <http://www.myflorida.com/myflorida/cabinet/agenda97/0429/dep0429.html>.

⁶⁵ *Id.*

⁶⁶ JUNE KEITH, *JUNE KEITH'S KEY WEST & THE FLORIDA KEYS: A GUIDE TO THE CORAL ISLANDS* 287 (5th ed. 2014).

⁶⁷ Gillette, *supra* note 4.

⁶⁸ *Id.*

⁶⁹ *Id.*

According to Primate Products' website, the breeding facilities serve domestic and international lab researchers, and they also offer hands-on education and training in applied behaviorism techniques.⁷⁰ Applied behaviorism techniques include the "willing worker"⁷¹ concept, pole-and-collar handling, and enrichment strategies.⁷² Primate Products conducts educational sessions, including "Primadaption"⁷³ workshops. These workshops provide "a unique learning experience in a campus-like setting for professionals involved in the study, care, training, and regulation of primates."⁷⁴ Workshops can last up to three full days and students receive Continuing Education Units (CEUs) that can be used towards their American Association for Laboratory Animals (AALAS) certification.⁷⁵ Panther Tracks also performs other tasks for the research industry, including: supplying primate biological products such as serum and tissue; selling and testing restraint devices and other products; and providing primate boarding, operant conditioning, and health screening services.⁷⁶

These facilities participate in the breeding, research, testing, teaching, and experimentation of non-human primates, while also participating and publishing studies about the primates in scientific journals.⁷⁷ In the March 2012 issue of *Human Reproduction*, an article

⁷⁰ Panther Tracks Learning Center, PRIMATE PRODS., <http://www.primatproducts.com/panther-tracks-learning-center-ptlc/> (last visited Feb. 24, 2018).

⁷¹ See *The Pole and Collar Handling System, Where it All Began*, PRIMATE PRODS., <https://www.primatproducts.com/blog/2015/01/26/the-pole-and-collar-handling-system-where-it-all-began/?s=willing+worker+concept> (last visited Nov. 11, 2017) [hereinafter *Pole and Collar*] (stating that the Willing Worker concept is a method to train animals to willingly cooperate with handling and procedures required for medical research).

⁷² *Id.*

⁷³ See *Primadaption Workshops*, PRIMATE PRODS., <http://www.primatproducts.com/blog/2015/01/27/primadaption-workshops-in-2015/> (last visited Nov. 12, 2017) (stating that Primadaption workshops are trainings based on the idea that training and enrichment for captive non-human primates are not always compatible with the resources available at many facilities and, therefore, it is necessary to tweak those methods to achieve the desired result within the set means. Registration for the workshops cost \$1,600 per student. Students earn 24 CEUs for AALAS Certification Registry after completion of the workshop.).

⁷⁴ *Id.*

⁷⁵ *Pole and Collar*, *supra* note 70.

⁷⁶ Complaint at 1, 2, Fla. *ex rel.* Tommie v. Panther Tracks, 2016-CA-252 (Fla. Cir. Ct. May 9, 2017) (No. 40636838).

⁷⁷ *Id.* at 16.

indicated Panther Tracks Learning Center had housed three female macaques, surgically removed their ovarian tissue, prepared the tissue, and shipped the tissue for further research.⁷⁸ In 2014, an employee-conducted study detailed a highly-pathogenic, hemorrhagic E. coli outbreak at the facilities that had a nine percent fatality rate among primates.⁷⁹

In the summer of 2013, a rural neighborhood in LaBelle, Florida began hearing rumors that someone had purchased a plot of land with the intention of building a facility to breed monkeys.⁸⁰ The neighbors learned this would be the third monkey breeding facility in Hendry County. In 2014, the neighbors filed suit against Hendry County, alleging the County violated the Sunshine Law when it approved a facility that would confine, quarantine, and breed thousands of wild and imported non-human primates in a rural residential neighborhood.⁸¹ The neighbors further alleged the County failed to provide notice and hold public meetings regarding its decision to approve the primate facility.⁸² The neighbors were concerned that, unlike domestic livestock, the non-human primates were known carriers of a wide array of serious infectious diseases, and that there was potential for the monkeys to escape and cause injury.⁸³

In 2017, Samuel Tommie, a member of the Seminole Tribe of Florida, filed suit against Primate Products in Hendry County.⁸⁴ Mr. Tommie alleged Primate Products' activities posed a nuisance both to him and the community surrounding the facilities.⁸⁵ Mr. Tommie claimed the presence of thousands of non-human primates threatened the community's health, safety, and

⁷⁸ Hornick et al., *Isolated Primate Primordial Follicles Require a Rigid Physical Environment to Survive and Grow in Vitro*, 27 HUMAN REPROD. 1801, 1801 (2012).

⁷⁹ K. Kolappaswamy et al., *Outbreak of pathogenic Escherichia coli in an outdoor-housed non-human primate colony*, 43 J. MED. PRIMATOL 121, 122 (2014).

⁸⁰ Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 9.

⁸¹ *Id.*

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ Complaint at 1, *Tommie*, 2016-CA-252 (No. 40636838).

⁸⁵ *Id.* at 4.

welfare.⁸⁶ Macaques, Mr. Tommie claimed, are common carriers of Plasmodium parasites that may cause malaria in primates and humans.⁸⁷ The primates are often held in open-air cages and exposed to mosquitoes, which can bite the infected macaques and then bite humans, thereby transmitting the disease.⁸⁸ Mr. Tommie's other concern was the hundreds of thousands of pounds of primate feces generated by these facilities.⁸⁹ He alleged the waste, wastewater, and potential runoff from thousands of primates created a risk for infectious waste to enter the environment.⁹⁰

One of Mr. Tommie's greatest concerns was the possibility of the monkeys escaping the facilities and finding refuge in the wilderness, an area where he regularly meditated and engaged in other cultural practices.⁹¹ Florida primates escaped in the past, and as a result, many areas now contain invasive, non-native primate populations.⁹² For example, in 1992, as a result of the devastation of Hurricane Andrew, approximately 1,500 primates escaped from the Mannheimer Foundation,⁹³ resulting in chaos as police and residents had to shoot many of the monkeys.⁹⁴

III. GOVERNING LEGAL FRAMEWORK

The Animal Welfare Act is the only federal law in the United States that regulates animal dealers, research facilities, and exhibitors.⁹⁵ However, there are other agencies,⁹⁶ such as

⁸⁶ *Id.*

⁸⁷ *Id.* at 5.

⁸⁸ *Id.*

⁸⁹ *Id.* at 6.

⁹⁰ *Id.*

⁹¹ *Id.* at 9-10.

⁹² *See generally* EUGENE F. PROVENZO JR. & ASTERIE BAKER PROVENZO, *IN THE EYE OF HURRICANE ANDREW* (2002).

⁹³ The Mannheimer Foundation is one of the four non-human primate breeding facilities in Hendry County.

⁹⁴ Complaint at 9-10, *Tommie*, 2016-CA-252 (No. 40636838).

⁹⁵ *See* 7 U.S.C. §§ 2131-2159 (2012) (explaining that although Congress found it important to protect animals used for experimentation, exhibits, or pets, the Animal Welfare Act expressly excludes farm animals).

⁹⁶ The Public Health Service (PHS) issues the Policy on Humane Care and Use of Laboratory Animals, which regulates the care and use of all vertebrate animals used in research. The Policy also gives mice, rats, and birds the same protections that other vertebrate animals receive under the AWA. The recommendations in the Policy statement have the force of law under the Health Research Extension Act of 1985. Moreover, the Institute of

Florida's Fish and Wildlife Conservation Commission, that regulate captive wildlife. Hendry County has no law or ordinance that regulates wild or exotic animals, nor the research of non-human primates. Although Puerto Rico falls under the authority of the Animal Welfare Act, the Puerto Rico Supreme Court temporarily halted the construction of a non-human primate research facility.⁹⁷

A. *Existing Regulations for Wild and Exotic Animals*

In 1996, Congress enacted the Laboratory Animal Welfare Act, which was later changed to the Animal Welfare Act.⁹⁸ The purpose of the Act was “to ensure that certain animals intended for use in research facilities are provided humane care and treatment.”⁹⁹ The Act established minimum standards for the care, housing, sale, and transport of dogs, cats, primates, rabbits, hamsters, guinea pigs, and other animals held on the premises of animal dealers or laboratories.¹⁰⁰ The USDA,¹⁰¹ the governmental entity that enforces the Animal Welfare Act, requires that for non-human primates, a physical environment adequate to promote their psychological well-being be provided.¹⁰²

Florida's Fish and Wildlife Conservation Commission regulates captive wildlife.¹⁰³ The regulations provide the categories of exotic animals that are both permitted and prohibited, and

Laboratory Animal Resources of the National Research Council, National Academy of Sciences writes the ILAR Guide for the Care and Use of Laboratory Animals. Lastly, the Food and Drug Administration has regulations that address animal care issues and require detailed records of all the aspects of study. *Fact Sheet: Primates in Biomedical Research*, CALI. BIOMEDICAL RESEARCH ASS'N, https://gleek.ecs.baylor.edu/static/pdf/California_Biomedical_Research_Association.pdf (last visited Jan. 11, 2018).

⁹⁷ U.S.C. . §§ 2132(d).

⁹⁸ See 7 U.S.C. §§ 2131-2159.

⁹⁹ *Id.*

¹⁰⁰ Katrina L. Scrogohst, *Cultivating Compassionate Law: Unlocking the Laboratory Door and Shining Light on the Inadequacies & Contradictions of the Animal Welfare Act*, 33 W. NEW. ENG. L. REV. 855, 856 (2011).

¹⁰¹ *Animal Welfare Act*, USDA NAT'L AGRIC. LIBRARY, <https://www.nal.usda.gov/awic/animal-welfare-act> (last visited Nov. 11, 2017).

¹⁰² *Id.*

¹⁰³ *Captive Wildlife Licenses & Permits*, FLA. FISH & WILDLIFE COMM'N, <http://myfwc.com/license/captive-wildlife/n> (last visited Nov. 11, 2017).

separates the animals into three classes: Class I, II, and III.¹⁰⁴ Class II wildlife includes, but is not limited to, the following animals: howler, guereza, vervet monkeys, macaques, langurs, servals, European and Canadian lynx, bobcats, caracals, ocelots, wolves, coyotes, jackals, wolverines, honey badgers, binturongs, dwarf crocodiles, caiman alligators, ostriches, giraffes, and tapirs.¹⁰⁵

B. *Hendry County's Current Regulations*

In 1991, the Hendry County Board of County Commissioners adopted Ordinance Number 91-05, which established a comprehensive zoning plan and zoning regulations for Hendry County.¹⁰⁶ Chapter 1-53 of the Hendry County Land Development Code establishes a zoning map and defines various types of zoning districts.¹⁰⁷ This chapter regulates the use of land for agricultural purposes within Hendry County by establishing several districts for agricultural use.¹⁰⁸ The Code also regulates agricultural land use and development for the future by providing policies designed to preserve and protect the land through the year 2040.¹⁰⁹

Part of Panther Tracks' property is designated as an Agriculture/Conservation (A-1) zoning district, and another part of its property is designated as a General Agricultural (A-2) zoning district by the Code.¹¹⁰ The land is also designated as Agriculture/Conservation Future Land Use Category and Agriculture Future Land Use Category on the Future Land Use Map in

¹⁰⁴ *Id.*

¹⁰⁵ FLA. ADMIN. CODE ANN. r. § 68A-6.002 (2009).

¹⁰⁶ HENDRY COUNTY, FLA. ORDINANCE § 91-05.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Letter from Hendry County Building Licensing & Code Enforcement to The Mannheimer Foundation Inc., (April 7, 2015) <https://www.documentcloud.org/documents/1952816-mannheimer-foundation-code-enforcement-notice.html>; Letter from Hendry County Building Licensing & Code Enforcement to Panther Tracts, LLC., (March 27, 2015) chrome-extension://ecnphlgnajanjnkcmpancdjoidceilk/content/web/viewer.html?source=extension_pdfhandler&file=https%3A%2F%2Fassets.documentcloud.org%2Fdocuments%2F1952554%2Fprimate-products-code-enforcement-notice.pdf; Thomas J. Rowell, *Trial Ends in Favor of Hendry County Paving the Way for Primate Breeding Facilities*, PRIMATE PRODS., (Jul. 12, 2016) <http://www.primateproducts.com/blog/category/news/>

the Hendry County Comprehensive Plan.¹¹¹ In the Code, both zoning districts A-1 and A-2 allow for the practice of “agriculture” as a permissible use by right.¹¹²

In contrast to other counties’ ordinances which specifically regulate wild and exotic animals,¹¹³ Hendry County’s ordinances define “exotic animal” as: “an animal of any non-domestic species that is not indigenous to Florida.”¹¹⁴ The ordinance also defines “livestock animals” as:

Any animal, other than a domestic animal as defined herein, which is normally raised for harness, riding, food, milk, eggs, or wool for local consumption or sold to others, or those animals bred for those purposes and may include but are not limited to cows, horses, mules, goats or chicken or other animal commonly referred to as livestock.¹¹⁵

Additionally, the ordinance contains provisions for domestic livestock under the General Agriculture (A-2) zoning category:¹¹⁶

Agriculture means the use of land for agricultural purposes, including farming, dairying, pasturage, apiculture (beekeeping), horticulture (plants), floriculture (flowers), silviculture (trees), orchards, groves, viticulture (grapes), animal and poultry husbandry, specialty farms, confined feeding operations and the necessary accessory uses for packing, processing, treating or storing the produce; provided, however, that the operation of any such accessory uses shall be secondary to that of the normal agricultural activities.¹¹⁷

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ For example, the ordinances of Sumter County, Florida include a definition of “dangerous animals.” The definition states that “any animal with a propensity, tendency or disposition to attack, cause injury to, or otherwise endanger the health, and safety of human beings or other domesticated animals . . . is a dangerous animal.” SUMTER COUNTY, FLA. ORDINANCE § 4-4. Similarly, Okeechobee County, Florida provides for a special exception in its ordinance. The ordinance states that a special exception is a:

[U]se that would not be appropriate generally or without restriction through a zoning division, district or county at large, but if controlled as to number, area, location, or relation to neighborhoods, would promote the health, safety, welfare, order, comfort, convenience, appearance, prosperity, or the general welfare of the county and its residents.

One of the special exceptions allowed is for the “breeding or raising of exotic animals.” The ordinance states the special exceptions are permissible by the Board of Adjustments and Appeals after public notice. OKEECHOBEE COUNTY, FLA. ORDINANCE § 11.04.01-11.04.02.

¹¹⁴ HENDRY COUNTY, FLA. CODE § 1-5-3 (2017).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

The Hendry County Comprehensive Plan provides that “lands classified as Agriculture/Conservation [A-1]” are wetland areas and that, due to the ecologically delicate nature of those areas, “[n]o industrial development (including agriculture related or extraction related) shall be permitted within a wetland.”¹¹⁸ In addition, “[n]on-residential development shall be limited to ensure that wetlands are preserved and that activities that impair the natural function of the wetland are prohibited.”¹¹⁹

Although agriculture is a permitted use in Agriculture/Conservation (A-1) districts, agricultural processing is specifically prohibited, and is only permitted by the approval of a special exception in General Agriculture (A-2) districts.¹²⁰ “Agricultural processing” is defined as “an industrial use specifically associated with producing, harvesting, processing or marketing of agricultural products.”¹²¹ The Code also provides that “all uses that do not strictly conform to their designated zoning districts are prohibited, but that the landowner, Board of County Commissioners, or local Planning Agency may request a variance or special exception must be considered at a public hearing after due public notice.”¹²²

Neither the Code nor Hendry County’s Comprehensive Plan provides a definition for “animal husbandry.” This lack of definition was in controversy in the lawsuit against Hendry County.¹²³ The plaintiffs urged the court to apply the common dictionary definition in order to determine its clear and plain meaning.¹²⁴ According to Webster’s Dictionary, “animal

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Amy Bennett Williams, *Trial Begins for Hendry County’s Monkey Farms and Whether Sunshine Law Was Violated*, NAPLES NEWS (June 27, 2016) <https://www.naplesnews.com/story/news/crime/2016/06/27/trial-begins-for-hendry-countys-monkey-farms-and-whether-sunshine-law-was-violated/86458644/>

¹²⁴ Complaint at 2, *Tommie*, 2016-CA-252 (No. 40636838).

husbandry” is “the care and production of domestic animals.”¹²⁵ On the other hand, Hendry County argued the meaning of “animal husbandry” should be defined by its historical application to prior site development plans of a similar nature, and by legislative intent.¹²⁶

In analyzing the definition of “animal husbandry,” the court looked to three “historical mileposts.”¹²⁷ The first was the application of the term in agricultural zoning in Hendry County.¹²⁸ The court noted that, in the early 2000s, Hendry County staff approved two non-human primate facilities that were similar to the one at issue in the suit.¹²⁹ Those facilities were the Mannheimer Foundation and the original Panther Tracks.¹³⁰ The court reasoned that the two authorizations served as precedent and indication of Hendry County’s intent as to the placement of non-human primate breeding facilities.¹³¹ The second milepost was the decision of the Director of Building Zoning and the County Attorney in April of 2000, when they determined that A-2 zoning allowed the raising of monkeys.¹³² The third milepost, which the court found most persuasive, was the fact that Hendry County advertised meetings of its Board of County Commissioners to discuss the location of non-human primate breeding facilities.¹³³ On multiple occasions, the Board voted not to reverse decisions concluding that breeding facilities were allowable uses.¹³⁴ The court reasoned that these factors highlighted the legislative intent of Hendry County to allow non-human primate breeding facilities in agricultural zoning districts.¹³⁵

C. *Case Study of Non-Human Primate Breeding Facilities in Puerto Rico*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Order Denying Plaintiff’s Prayer for Relief at 4, *Stephens*, 2014-CA-633.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 5.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Puerto Rico's history with breeding non-human primates for medical research dates back to 1936.¹³⁶ The School of Tropical Medicine of the University of Puerto Rico, jointly with Harvard University and Columbia University, established several medical research facilities.¹³⁷ The principal objective of the facilities was to ensure a controlled and regular supply of monkeys for institutions on the mainland.¹³⁸ At the time of establishment, each rhesus sold for an average of eight dollars to twenty-five dollars.¹³⁹

In the late 1990s, farm activism and public health concerns brought attention to the free-ranging monkey population in Puerto Rico.¹⁴⁰ Farmers from Lajas reported losses to their crops due to the free-ranging monkeys.¹⁴¹ The United Front for the Defense of the Lajas Valley “took up the issue of crop damage as part of its push to establish the Lajas Valley as a protected agricultural area.”¹⁴² In 1999, in an attempt to control and eliminate the monkey population, a “wildlife plan established the authority to manage invasive species through a variety of non-lethal and lethal means, including proscribed [sic] hunting.”¹⁴³ The authorities also initiated a trap-for-export program, where monkeys were exported to Florida and Baghdad, Iraq.¹⁴⁴ Several animal welfare organizations called for humane population control when the government was openly shooting trapped monkeys to prevent their spread across Puerto Rico.¹⁴⁵

¹³⁶ See GEORGE W. BACHMAN, UNIV. OF P.R., SCH. OF TROPICAL MED., REPORT OF THE DIRECTOR 6 (1938).

¹³⁷ GAZIR SUED, TIRANÍA ANTROPOCÉNTRICA HISTORIA DE LA CRUELDAD, MATANZAS Y EXPERIMENTACIONES CON PRIMATES NO-HUMANOS EN PUERTO RICO 59 (2012).

¹³⁸ Richard Rawlings, *Forty Years of Rhesus Research*, 82 NEW SCIENTIST 108, 108 (1979).

¹³⁹ SUED, *supra* note 132, at 42.

¹⁴⁰ Neel Ahuja, *Notes on Medicine, Culture, and the History of Imported Monkeys in Puerto Rico*, in CENTERING ANIMALS IN LATIN AMERICAN HISTORY 180, 193 (Martha Few & Zeb Tortorici eds., 2013).

¹⁴¹ *Id.* at 193.

¹⁴² *Id.*

¹⁴³ *Id.* at 194.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

In 2008, Bioculture, a Mauritius-based breeder of standard pathogen-free research monkeys, initiated the permit process to establish a private breeding operation in Guayama, Puerto Rico.¹⁴⁶ The operations were projected to house approximately 4,000 monkeys, and were to be integrated into a global network of biomedical primate distribution.¹⁴⁷ The permits were granted and construction began in early 2009.¹⁴⁸ The neighbors in Guayama filed a complaint with the Review Board of Permits and Land Use, requesting the permits to be revoked and the construction to be halted.¹⁴⁹ Local residents and People for the Ethical Treatment of Animals (PETA) filed a lawsuit, arguing the use of the primate breeding facilities would be industrial in nature, and that the facilities were not in compliance with the permissible uses in the zoning standards.¹⁵⁰ In addition, they argued that an Environmental Impact Statement (EIS), required under the National Environmental Policy Act (NEPA), was necessary due to the significant risk the project presented to the environment.¹⁵¹

The complaint was later amended to assert that: (1) the plaintiffs faced an inescapable danger to their safety and were at risk of contracting several serious health problems; (2) the habitat would be affected due to the negative effect on the biodiversity of the area; (3) there would be potential crop damage, given that one of the plaintiffs was a farmer and his 139-rope farm was adjacent to the Bioculture facility; (4) the project threatened the fauna and flora of the area; (5) there were risks of infectious diseases associated with primates; (6) the project, being industrial, would cause noise generated by thousands of caged monkeys; and (7) Bioculture's operation was greater than 100,000 square feet, which was incompatible with the district and

¹⁴⁶ Brito v. Bioculture P.R., Inc., 183 P.R. Dec. 720, 722 (2011).

¹⁴⁷ Ahuja, *supra* note 135, at 197.

¹⁴⁸ Brito, 183 P.R. Dec. at 722.

¹⁴⁹ *Id.* at 733-34.

¹⁵⁰ *Id.* at 734.

¹⁵¹ *Id.*

posed a significant health risk due to the feces produced by thousands of confined monkeys.¹⁵²

A lower court in Puerto Rico temporarily halted construction of the facility.¹⁵³ The court's decision was based on the fact that monkey breeding was not an agricultural activity, so the proposed use of the Bioculture project was not in line with the permitted uses for a district classified as General Rural.¹⁵⁴ The court based its decision on evidence presented by an expert witness who evaluated the construction permits presented by Bioculture and determined them to be industrial.¹⁵⁵ The expert witness stated that the monkeys were not being used as food, a goal of agriculture.¹⁵⁶ He further asserted that the context in which the monkeys were bred did not fall under an agricultural activity.¹⁵⁷ The Supreme Court of Puerto Rico denied certiorari, which upheld the lower court's decision to temporarily halt construction of the facility until the appropriate administrative body could determine the legality of the construction.¹⁵⁸ The Court, in denying certiorari, determined the plaintiffs had met their statutory requirements to sustain the provisional injunction.¹⁵⁹

IV. PROPOSAL FOR REGULATING CURRENT AND FUTURE NON-HUMAN PRIMATE BREEDING FACILITIES

There are more non-human primate breeding facilities in Hendry County than in any other community in the United States.¹⁶⁰ The facilities currently conduct business in an agricultural zoning district.¹⁶¹ Under the agricultural zoning districts, the County does not need to provide notice to its residents about new facilities that may open, nor does it provide any

¹⁵² *Id.* at 735.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 739.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 739-40.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ ANIMAL RIGHTS FOUND. OF FLA., *supra* note 18.

¹⁶¹ Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 5.

recourse to concerned residents who may be affected from the facilities currently in operation.¹⁶² This part of the article proposes two solutions to address prospective and existing non-human primate breeding facilities: (1) an amendment to the Hendry County Land Development Plan and Ordinance to include the non-human primate breeding facilities under the industrial¹⁶³ or commercial zoning category, and (2) a proposal to allow residents to bring a nuisance challenge to enjoin current non-human primate breeding operations.

A. *Amending Hendry County's Land Development Plan and Code*

Municipalities generally enact zoning ordinances that incorporate a map of the various districts and specify the permitted uses within each district.¹⁶⁴ “Variances and special use permits enable the municipality to delegate to an administrative body the power to make adjustments that do not alter the basic legislative decisions.”¹⁶⁵ Municipalities are often required to conduct public hearings on proposed amendments to a zoning ordinance.¹⁶⁶ There are two processes to make zoning amendments.¹⁶⁷ First, a textual amendment can modify the text of an ordinance.¹⁶⁸ The legislature can add or subtract words from the existing ordinance in order to articulate the desired amendment.¹⁶⁹ This form of amendment can modify the restrictions applicable in a particular zoning district, or in all zoning districts.¹⁷⁰ Second, a map amendment can alter a particular district.¹⁷¹ Unlike a textual amendment, which modifies the restrictions

¹⁶² *Id.*

¹⁶³ In 2006, a large non-human primate breeding facility in New Jersey had plans to open a new facility in an area that was zoned for agricultural uses. After opponents voiced concern, the company changed the site to an industrial use. Chris Markham, *Covance Changing Sites for Planned Laboratories*, E. VALLEY TRIB., Oct. 4, 2016, http://www.eastvalleytribune.com/local/covance-changing-sites-for-planned-laboratory/article_1eb2302a-ebfc-5f35-ac62-d6bc9e8ddd71.html.

¹⁶⁴ STEWART E. STERK & EDUARDO M. PEÑALVER, *LAND USE REGULATION* 57-58 (2011).

¹⁶⁵ *Id.* at 58.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

applicable in any zoning district, the second form alters the map to change a district where a particular parcel of land is located.¹⁷²

Unlike other counties' ordinances addressing wild and exotic animals, Hendry County's ordinances only contain provisions for domestic livestock under the General Agriculture zoning category.¹⁷³ The Hendry County Land Development Code establishes a zoning map and defines various types of zoning districts, including agricultural and industrial districts.¹⁷⁴ Apart from breeding non-human primates for medical research, the facilities engage in other activities that are inconsistent with agricultural uses.¹⁷⁵ These activities include conducting invasive surgical procedures on primates, research data collection, education, training, and selling products and devices to the research industry.¹⁷⁶

The Supreme Court of Puerto Rico denied certiorari, but upheld a decision by a lower court that found that temporarily halted construction of a non-human primate breeding facility pending administrative review.¹⁷⁷ The lower court heard from an expert witness who stated that one of the goals of agriculture was to use the animals for food.¹⁷⁸ Here, like in Puerto Rico, the non-human primates are being bred for research purposes, not agricultural purposes.

Hendry County should amend its Land Development Plan and Code to regulate these facilities as industrial or commercial, rather than agricultural. The non-human primate facilities in Hendry County engage in other activities, separate and apart from breeding primates, that are inconsistent with the permissible uses in A-1 and A-2 zoning districts of the Hendry County Code and Land Development Plan, and are also inconsistent with how courts around the country

¹⁷² *Id.*

¹⁷³ SUMTER COUNTY, FLA. ORDINANCE, *supra* note 109.

¹⁷⁴ HENDRY COUNTY, FLA. CODE, *supra* note 110.

¹⁷⁵ *Tommie*, 2016-CA-252 (No. 40636838).

¹⁷⁶ PRIMATE PRODS., *supra* note 8.

¹⁷⁷ *Brito v. Bioculture P.R., Inc.*, 183 P.R. Dec. 720, 723 (2011).

¹⁷⁸ *Id.*

have interpreted the term “agricultural.”¹⁷⁹

For example, a California court referred to an oft-cited Webster’s Dictionary definition, stating that “agriculture” is defined as “the art or science of cultivating the ground; the art or science of the production of plants and animals useful to man or beast; it includes gardening or horticulture, fruit growing, and storage and marketing.”¹⁸⁰ In Illinois, a court concluded the words “agricultural purpose” have been generally interpreted to carry a comprehensive meaning involving the art or science of cultivating the ground.¹⁸¹ Similarly, an Indiana court stated a fundamental distinction existed between agricultural uses and commercial or industrial uses of property, and that not all activities with an agricultural nexus are themselves agricultural.¹⁸²

Finally, the United States Supreme Court stated that:

[W]hether a particular type of activity is agricultural is determined not by the necessity of the activity to agriculture nor the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in a particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.¹⁸³

Generally, the term “livestock” is used synonymously with the term “farm animal,” and both usually refer to animals raised as agricultural commodities.¹⁸⁴ Livestock are domesticated animals and are considered naturally harmless and docile through many years of contact with people.¹⁸⁵ When classifying farm animals, courts may look at the relationship to the land and

¹⁷⁹ See *Hagenburger v. Los Angeles*, 124 P.2d 345, 347 (1942); *Cty. of Grundy v. Soil Enrichment Materials Corp.*, 292 N.E.2d 755, 760 (1973); *Day v. Ryan*, 560 N.E.2d 77, 81 (Ind. App. 1990); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761 (1949).

¹⁸⁰ *Hagenburger*, 124 P.2d at 347.

¹⁸¹ *Cty. of Grundy*, 292 N.E.2d at 760.

¹⁸² *Day*, 560 N.E.2d at 81.

¹⁸³ *Farmers Reservoir & Irrigation Co.*, 337 U.S. at 761.

¹⁸⁴ See generally PAMELA D. FRASCH, *ANIMAL LAW IN A NUTSHELL* (2d ed. 2016).

¹⁸⁵ *Id.* at 16-17.

whether the alleged farm is producing common farm products.¹⁸⁶ Here, non-human primate breeding facilities do not fit the agricultural classification.

B. *Nuisance Challenges to Enjoin Current Operations*

A nuisance challenge may be brought against existing non-human primate breeding facilities to enjoin their use.¹⁸⁷ Under nuisance law, the gravity of the injury to the plaintiff is weighed against the utility of the defendant's conduct to arrive at a judgment as to whether a nuisance has taken place.¹⁸⁸ Regardless of the type of nuisance, the interference with the property must be substantial and continuous.¹⁸⁹

A question that often arises in nuisance claims is whether a business that is operated in a lawful manner may be enjoined as a nuisance. The Supreme Court of Arizona held that even though a cattle feedlot was operating in a lawful manner, the feedlot was both a private and public nuisance because of its potential to be dangerous to public health.¹⁹⁰ A Georgia court noted that compliance with zoning restrictions did not conclusively establish that a use was not a private nuisance.¹⁹¹

Nuisance cases involve activity that is “offensive, physically, to the senses and by such offensiveness makes life uncomfortable [*i.e.*] noise, odor, smoke, dust, or even flies.”¹⁹²

Third parties often sue animal owners or caretakers under nuisance theories because the animal is

¹⁸⁶ *Id.* at 17.

¹⁸⁷ Zoning and common law nuisance claims have been used to combat climate change related issues. Lindsay Walton & Kristen King Jaiven, *Regulating Concentrated Animal Feeding Operations for the Well-Being of Farm Animals, Consumers, and the Environment*, in *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW* 112 (Randall S. Abate ed., 2015). Some counties have ordinances that regulate nuisance animals. In Sumter County, the ordinance provides that a public nuisance means any animal that “makes excessive noises that cause unreasonable annoyance, disturbance, or discomfort to the neighbors.” SUMTER COUNTY, FLA. ORDINANCE § 4-7.

¹⁸⁸ See generally Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 115 (2005).

¹⁸⁹ *Id.*

¹⁹⁰ *Spur Indus. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 184 (1972).

¹⁹¹ *Life for God's Stray Animals, Inc. v. New N. Rockdale Cty. Homeowners Ass'n*, 322 S.E.2d 239, 242 (Ga. 1984).

¹⁹² *In re Chicago Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997).

interfering with their right to quiet enjoyment or is posing a health or safety threat.¹⁹³ There are two categories of nuisances – public nuisance and private nuisance.¹⁹⁴

1. Public Nuisance

The Restatement Second of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.”¹⁹⁵ The Restatement also states that:

[C]ircumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) whether the conduct involves a substantial interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect and, to the actor’s knowledge, has a substantial detrimental effect upon the public right.¹⁹⁶

Public nuisance claims often arise in cases where potentially dangerous wild or exotic animals are housed, or in industrial farms with hundreds or thousands of animals.¹⁹⁷ These large operations generate substantial amounts of waste that must be effectively managed.¹⁹⁸ If the waste is not properly managed, serious and potentially harmful air and water pollution may result, substantially impacting the surrounding communities.¹⁹⁹

Local, state, and federal agencies are often involved in public nuisance claims. In an Ohio nuisance case, the county’s public health department, police department, fire department, the state’s wildlife division of its Department of Natural Resources, and the USDA all inspected a property after receiving complaints about odors emanating from the property.²⁰⁰ The

¹⁹³ Chris Erchull, *A Hen in the Parlor: Municipal Control and Enforcement of Residential Chicken Coops*, 6 J. ANIMAL & ENVTL. L. 6, 63 (2014).

¹⁹⁴ RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

¹⁹⁵ *Id.*; FLA. STAT. § 823.05 (2017).

¹⁹⁶ RESTATEMENT, *supra* note 187.

¹⁹⁷ Erchull, *supra* note 186.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Summit Cty. Bd of Health v. Pearson, 809 N.E.2d 80, 81 (Ohio Ct. App. 2004).

landowner kept lions, tigers, leopards, bears, foxes, pigeons, dogs, and an alligator on the premises.²⁰¹ The court held that the landowners failed to abate the nuisance and ordered that all of the animals be removed.²⁰² Even though governmental agencies cannot prohibit an occupation, they can limit or regulate the type of operation by requiring permits.²⁰³ Other courts have upheld ordinances that banned certain animals because the ordinances had a rational relationship to a governmental interest in protecting public health.²⁰⁴

Non-human primate breeding facilities can represent both a public and private nuisance. The presence of these facilities creates a substantial interference with public health, safety, comfort, and convenience. The primates bred in these facilities are imported from “hot zones,” regions known for containing infectious diseases capable of transmission to humans.²⁰⁵ “Eighty to [ninety] percent of all macaque monkeys are infected with Herpes B-virus or Simian B, a virus that is harmless to monkeys[,] but fatal to [seventy] percent of humans who contract it.”²⁰⁶ “Monkeys shed the virus intermittently in saliva or genital secretions, which generally occurs when the monkey is ill, under stress, or during breeding season.”²⁰⁷ “At any given time, about two percent of infected macaque monkeys are shedding the virus.”²⁰⁸ “A person who is bitten, scratched, sneezed on, or spit on by a shedding macaque runs the risk of contracting the disease.”²⁰⁹

In 2014, an employee of Primate Products, one of the four facilities operating in Hendry County, co-authored a study that detailed a highly-pathogenic, hemorrhagic E. coli outbreak

²⁰¹ *Id.* at 82.

²⁰² *Id.* at 85.

²⁰³ *Ex parte Jones*, 133 P.2d 418, 421 (Cal. Ct. App. 1943).

²⁰⁴ *Greater Chi. Combine & Ctr., Inc. v. City of Chi.*, 431 F.3d 1065, 1065 (7th Cir. 2005).

²⁰⁵ *Id.*

²⁰⁶ *Importation of Exotic Species: Hearing Before the Committee on Env't and Pub. Works*, 108th Cong. 89 (2003).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

among primates at the facilities, which had a nine percent fatality rate.²¹⁰ The report stated that during a two month period, an outbreak of diarrhea occurred in Primate Products' outdoor colony.²¹¹ There was an initial population of 109 primates and twenty-nine percent of those were struck by the outbreak.²¹² Pathogenic E. coli has been identified as an etiologic agent in humans, causing acute diarrhea or even death.²¹³

Non-human primate breeding facilities house thousands of primates that are susceptible and known to carry the B virus and pathogenic E. coli.²¹⁴ Studies have shown the non-human primates used in these types of facilities, like the macaques and rhesus monkeys, exhibit unpredictable and aggressive behavior as they mature.²¹⁵ The primates are usually housed in open-air cages and are therefore exposed to mosquitoes.²¹⁶ The mosquitoes can bite the infected primates which can then bite humans, thereby transmitting the disease.²¹⁷ The monkeys also generate hundreds of thousands of pounds of feces.²¹⁸ The waste's runoff potential creates a risk for infectious waste to enter the environment.²¹⁹

In addition to public health, the non-human primate breeding facilities also interfere with public safety. One of the greatest concerns is possible escapes. In 1992, Hurricane Andrew, a

²¹⁰ Kolappaswamy, *supra* note 78, at 122.

²¹¹ *Id.*

²¹² *Id.* at 123.

²¹³ *Id.* at 122.

²¹⁴ Ostrowski, *supra* note 48.

²¹⁵ *Id.*

²¹⁶ Amy Bennett Williams, *Hendry County Didn't Break Sunshine Law in Monkey Farm Suit, Florida Appeals Court Rules*, NEWS-PRESS (Oct. 11, 2017), <https://www.news-press.com/story/news/2017/10/11/hendry-didnt-break-sunshine-law-monkey-farm-suit-florida-appeals-court-rules/754049001/>

²¹⁷ Murray B. Gardner & Paul A. Luciw, *Macaque Models of Human Infectious Disease*, ILAR JOURNAL, Volume 49, Issue 2, 228-230 (Jan 1, 2008).

²¹⁸ Complaint at 6, *Tommie*, 2016-CA-252 (No. 40636838).

²¹⁹ Roy Soumitra et al. *Adenoviruses in Fecal Samples from Asymptomatic Rhesus Macaques, United States*, EMERGING INFECTIOUS DISEASES, 18(7), 1081-88 (2012); Melissa Matthews, *Wild Monkey Poop in Florida Could Spread Killer Herpes Strain, Officials Warn*, NEWSWEEK (Jan. 11, 2018) <http://www.newsweek.com/wild-monkey-poop-florida-could-spread-killer-herpes-strain-officials-warn-778115>

Category 5 hurricane, struck and wreaked havoc in South Miami.²²⁰ During the hurricane, hundreds of monkeys escaped the Mannheimer Foundation, a monkey breeding facility.²²¹ One of the escaped macaques bit a person.²²² The court held the breeder was strictly liable²²³ for damages because macaques are “wild” animals, and conveyed that the “monkeys are a mildly aggressive breed known for carrying the Herpes ‘B’ virus.”²²⁴ In 2014, twenty-six monkeys escaped a breeding facility in South Carolina.²²⁵ Around the same time, in the same facility, a monkey escaped while in the process of being transported; the monkey was never found.²²⁶

The primates in Hendry County constitute a public nuisance. The four facilities together house on average 10,000 primates.²²⁷ These primates generate large amounts of waste that can harm the surrounding communities, they may exhibit aggressive and unpredictable behavior, and pose a risk to humans due to the potential for virus and disease transmission.²²⁸ This conduct involves a substantial interference with the public health, peace, and comfort of those neighboring these facilities.

2. Private Nuisance

The law of private nuisance empowers an owner to challenge a neighbor’s activities

²²⁰ See PROVENZO & PROVENZO, *supra* note 90.

²²¹ *Report: Police Killing Escaped Monkeys*, ORLANDO SENTINEL, Aug. 31, 1992, http://articles.orlandosentinel.com/1992-08-31/news/9208310270_1_monkeys-rubin-gulley.

²²² *Scorza v. Martinez*, 683 So.2d 1115, 1116 (Fla. Dist. Ct. App. 1996).

²²³ *Id.* at 1117; see Gary M. Kaleita & Peter Simmons, *Lions, Tigers, and Bears, Oh My! Owner and HOA Liability for Wild Animal Attacks*, 91 FLA. BAR J. 24 (Nov. 2017) (arguing that HOA’s may be liable for attacks by wild animals if the HOA had actual and constructive notice of the ongoing presence and behavior and failed to take reasonable action).

²²⁴ *Scorza*, 683 So.2d at 1116.

²²⁵ Stephen Fastenau, *Yemassee monkey facility targeted by federal investigation after reports of dead, injured animals*, BEAUFORT GAZETTE, Dec. 31, 2015, <http://www.islandpacket.com/news/local/community/beaufort-news/article52469800.html>.

²²⁶ *Id.*

²²⁷ *Hendry County didn’t break Sunshine Law in monkey farm suit, Florida appeals court rules*, NEWS PRESS, Oct. 11, 2017, <https://www.news-press.com/story/news/2017/10/11/hendry-didnt-break-sunshine-law-monkey-farm-suit-florida-appeals-court-rules/754049001/>.

²²⁸ *Scorza*, 683 So.2d at 1116.

where the neighbor substantially and unreasonably interferes with the use and enjoyment of the owner's property.²²⁹ There are different ways in which the interest in the use or enjoyment of land can be manifested – it may consist of a disturbance of the comfort or convenience of the occupant, as by unpleasant odors, smoke or dust or gas, loud noises, among others; or conditions on adjoining land which impairs the plaintiff's mental tranquility by the fear or offensive nature of their mere presence, such as vicious animals.²³⁰ Anyone whose use and enjoyment of any interest, possessory or non-possessory, in the land is affected can maintain an action at law.²³¹

Non-human primate breeding facilities are also a private nuisance to individuals surrounding them. For example, Mr. Tommie stated in his complaint that he had spent over thirty years visiting the wilderness area that was adjacent to the breeding facilities.²³² He often meditated and harvested herbs for use in his cultural practice.²³³ The possibility of primates escaping the facilities and finding refuge in the wilderness would substantially interfere with Mr. Tommie's use and enjoyment of the land.²³⁴

Concentrated animal feeding operations (CAFOs)²³⁵ are farms in which animals are raised in confinement and have more than 1,000 animal units.²³⁶ These operations are often the subject of nuisance claims²³⁷ because of the noise and odors the animals produce.²³⁸ Non-human primate breeding facilities are not CAFOs, but they are similar in the sense that they house,

²²⁹ RESTATEMENT, *supra* note 187, § 822.

²³⁰ PROSSER AND KEETON ON TORTS, 620-21 (W. Page Keeton et al., eds., 1984); *see id.*

²³¹ RESTATEMENT, *supra* note 187, § 822.

²³² Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 15.

²³³ *Id.* at 7.

²³⁴ *Id.* at 12.

²³⁵ Under the Clean Water Act, CAFOs must obtain permits from the EPA to operate. 33 U.S.C. § 1342 (2012).

²³⁶ Walton & Jaiven, *supra* note 180, at 110.

²³⁷ *See generally* Hanes v. Cont'l Grain Co., 58 S.W.3d 1, 2 (Mo. Ct. App. 2001) (holding that the plaintiffs were entitled to damages for the loss of enjoyment of their properties caused by the stench of manure and swarms of flies).

²³⁸ Richard H. Middleton, Jr. & Charles F. Speer, *A Big Stink*, 47 TRIAL 26 (2011). Some states have enacted regulations and laws that bar these nuisance claims, known as Right to Farm Acts. *See generally* EMILY DOSKOW & LINA GUILLEN, NEIGHBOR LAW: FENCES, TREES, BOUNDARIES & NOISE (2017).

breed, and confine thousands of non-human primates. The noise, smell, and waste created by thousands of caged monkeys can constitute both a private and public nuisance because it is a threat to public health and it is a substantial interference with the use and enjoyment of the property.

3. Defenses to Nuisance Challenges

Many states have passed laws to discourage nuisance claims.²³⁹ These laws are commonly known as “Right to Farm” laws.²⁴⁰ The purpose of these laws is to discourage nuisance claims by creating a statutory presumption that if the operation is causing a nuisance, it is outweighed by the public value in having working farms in the community.²⁴¹ In 1979, the Florida Right to Farm Act was enacted to prevent burdensome lawsuits against farmers that were intended to cease or curtail farm operations and discourage investments in farm improvements.²⁴² The Florida Right to Farm Act states in part:

[T]he Legislature finds that agricultural production is a major contributor to the economy of the state; that agricultural lands constitute unique and irreplaceable resources of statewide importance; that the continuation of agricultural activities preserves the landscape and environmental resources of the state, contributes to the increase of tourism, and furthers the economic self-sufficiency of the people of the state; and that the encouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state. The Legislature further finds that agricultural activities conducted on farm land in urbanizing areas are potentially subject to lawsuits based on the theory of nuisance and that these suits encourage and even force the premature removal of the farm from agricultural use. It is the purpose of this act to protect reasonable agricultural activities conducted on farm land from nuisance suits.²⁴³

If a property holds an agricultural classification and is subject to state or regional regulation, it must also be a “bona fide farm operation” in order to claim protection from local

²³⁹ DOSKOW & GUILLEN, *supra* note 230, at 231.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² FLA. STAT. § 823.14(2) (2017).

²⁴³ *Id.*

regulation under the Right to Farm Act.²⁴⁴ Legislative definitions and intent establish what a “bona fide farm operation” is to be eligible for the Right to Farm Act exemption.²⁴⁵ For purposes of the Act, a “farm” is defined as the “land, buildings, support structures, machinery, and other appurtenances used in the production of farm or aquaculture products.”²⁴⁶

“Farm operation” is defined as:

[A]ll conditions or activities by the owner, lessee, agent independent contractor, and supplier which occur on a farm in connection with the production of farm products and includes, but is not limited to, the marketing of produce at roadside stands or farm markets; the operation of machinery and irrigation pumps; the generation of noise, odors, dust, and fumes; ground or aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor.²⁴⁷

In its Motion to Dismiss Plaintiff’s Amended Complaint, Primate Products raised the Florida Right to Farm Act as grounds for dismissal.²⁴⁸ Primate Products argued the Act expressly prohibited nuisance causes of action against farm operations in Florida.²⁴⁹ It further alleged that “[f]arm products mean[t] any . . . animal . . . useful to humans and includes, but it is not limited to, any product derived therefrom.”²⁵⁰ The Florida Right to Farm Act discourages nuisance claims, but the purpose of the Act is to protect agricultural lands and agricultural production.²⁵¹ Therefore, when the Act refers to “animals,” it is referring to animals that are subject to the agricultural category. Non-human primates are not the type of animals in the agricultural category. They are not livestock, nor are they animals that are raised for food

²⁴⁴ *Id.* § 823.14(6).

²⁴⁵ *Id.* § 823.14(3)(b).

²⁴⁶ *Id.* § 823.14(3)(a).

²⁴⁷ *Id.* § 823.14(3)(b).

²⁴⁸ Motion to Dismiss Plaintiff’s Amended Complaint at 3, *Tommie*, 2016-CA-252 (No. 40636838).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ FLA. STAT. § 823.14(2) (2017).

consumption. The Florida Right to Farm Act would therefore not apply to a nuisance claim against a non-human primate breeding facility.

Another defense that defendants can raise against nuisance claims is the “coming to the nuisance” doctrine. Under this doctrine, if a plaintiff voluntarily elects to live in a particular zoning district (*i.e.*, industrial, agricultural), he cannot complain of noise, noxious odors, or any other unpleasant factors that may arise from the normal operation of businesses in the area merely because they may interfere with personal enjoyment and satisfaction.²⁵² Courts use a reasonableness test to determine whether the claim constitutes a nuisance.²⁵³ The Supreme Court has stated that:

All property is owned and used subject to the laws of the land. Under our system of government property may be used as its owner desires within the limitations imposed by law for the protection of the public and private rights of others. Those who own real estate may use it as desired so long as the rights of others are not thereby invaded. And there is no such invasion when the use is authorized by law and is reasonable with reference to the rights of others.²⁵⁴

The reasonableness of the use of property is often determined from the facts and special circumstances of each case.²⁵⁵ Modern courts often refuse to apply the “coming to the nuisance doctrine,” especially in the context of residential owners confronted with problems emanating from industrial or commercial sources.²⁵⁶

²⁵² *Lee v. Fla. Pub. Utils. Co.*, 145 So.2d 299, 301 (Fla. Dist. Ct. App. 1962) (concluding that it was for the jury to decide whether defendant's use of its property was unreasonable, and whether such use resulted in injury or damage to plaintiffs for which they were entitled to compensation). Here, the Plaintiffs' action was for the recovery of damages suffered as a result of a private nuisance. Plaintiffs lived in an industrial area, and defendant operated a plant close to plaintiffs' property. Defendant installed electrical generating units operated by diesel fuel, and these units were operated on a 24-hour basis. Fumes were emitted from the units, and the noise was intense. The trial court directed a verdict in defendant's favor, and plaintiffs appealed. On appeal, the court held that the evidence adduced by plaintiffs was sufficient to create a jury question as to whether defendant's use of its property was reasonable under the circumstances.

²⁵³ *Id.*

²⁵⁴ *Cason v. Fla. Power Co.*, 76 So. 535, 536 (1917).

²⁵⁵ *Lee*, 145 So.2d at 302.

²⁵⁶ *Spur Indus. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 184-85 (1972) (holding that the developer who placed a retirement community near cattle feedlots had to shut down).

V. CONCLUSION

Hendry County has more non-human primate breeding facilities than any other community in the United States. These facilities are not only breeding primates, they are engaging in activities that do not fall under the permissible agricultural uses. These facilities are conducting workshops and trainings, providing tissue and serum for research, and selling restraint devices. Amending the Hendry County Land Development Plan and Code to include future non-human primate breeding facilities under the industrial or commercial zoning will bring clarity to otherwise vague regulations.

History has demonstrated that monkeys not only cause a great deal of chaos, they are also a threat to the health, safety, and welfare of the community. Primates are a private and public nuisance because they exhibit unpredictable and aggressive behavior, and are capable of transmitting diseases to humans. Therefore, it is important to ensure that these facilities are regulated properly and are held accountable for the impacts of their operations. Additionally, those neighboring these facilities need to have recourse against the nuisances these facilities create.

One of our goals as humans is to be healthy and safe. We seek to prevent and cure health problems, sickness, and diseases that reduce the quality and duration of our lives. At the same time, some would prefer animals not be used to achieve those outcomes, especially if pain or harm is caused. Until medical research companies find alternatives to using animals for research, non-human primate breeding facilities will continue to be controversial.