Foreword

by

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FOREWORD

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The *South Dakota Law Review* accepted the opportunity to publish a Special Issue that would focus exclusively on the Amendment E litigation and issues related to the regulation of "corporate farming" by the States shortly after the Eighth Circuit had affirmed the District Court's opinion that Amendment E violated the dormant Commerce Clause. At the time the decision was made to proceed with publishing this Issue, the petition for writ of certiorari had not yet been filed with the United States Supreme Court but the Defendants and Intervenors had announced plans to file the petition. The petition for writ of certiorari was filed on January 29, 2004. On May 3, 2004, the United States Supreme Court denied certiorari. Because the issue remains important in South Dakota and several surrounding states, the *South Dakota Law Review* is proceeding to publish this Issue.

The Board of Editors would like to acknowledge and express appreciation for the writing contributions that were submitted for this Issue. All parties were invited to submit articles for publication. The *South Dakota Law Review* endorses no party that was involved in the *South Dakota Farm Bureau v. Hazeltine* litigation.

Randy Canney, one of the attorneys for the Intervenors (Dakota Rural Action and South Dakota Resources Coalition), and Neil Fulton, one of the attorneys representing investor owned utility companies, provided insight into the work of an attorney in litigating a constitutional issue. Representatives from the Farmers' Legal Action Group who submitted amici curiae briefs to the Eighth Circuit and United States Supreme Court wrote from the perspective of the need to preserve the family farm and the necessity of laws such as Amendment E to support the family farm. From the sociological perspective, Meredith Redlin and Brad Redlin considered the impact of corporate farming on rural communities.

Several students including *South Dakota Law Review* Board members contributed articles for this Special Issue. Jeffrey Banks provided an historical perspective of the corporate farming laws in South Dakota beginning with the 1974 Family Farm Act. This article focuses on the challenge to the Amendment E and addresses subsequent attempts to revise the corporate farming laws in South Dakota. Jeremy Jehangiri wrote an overview of an article written by Professor Noel T. Dowling in 1940 and discusses the theories and assertions advanced by Dowling in regards to dormant Commerce Clause jurisprudence. In

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addition, Justice Scalia's formalistic approach to the dormant Commerce Clause is highlighted from the perspective of one current Supreme Court Justice. The article by Jennifer Larsen article provides an overview of the dormant Commerce Clause from an historical perspective and focuses on the discrimination tier – the tier in which the United States Supreme Court has utilized in the past decade to determine the constitutionality of a state statute when considering a dormant Commerce Clause challenge. Finally, the recognition of economic liberties in dormant Commerce Clause jurisprudence is discussed in an article written by Bruce Broll. Each of the articles submitted by the parties involved and/or interested in this litigation and student written articles are intended to provide a comprehensive understanding of the Amendment E and corporate farming and their relationship to the dormant Commerce Clause.

I. BRIEF BACKGROUND OF SOUTH DAKOTA CORPORATE FARMING LAWS

Amendment E was not the first restriction on the restriction of corporate farming in South Dakota. The 1974 Family Farm Act was passed to restrict corporate farming and it restricted corporate ownership of agricultural land.[1] The 1974 Act provides for "the importance of the family farm to the economic and moral stability of the state" and "recognizes that the existence of the family farm is threatened by conglomerates in farming."[2] The statutes that are included in the 1974 Family Farm Act address cultivation of land.[3] Exempt from the Act are family farms and "authorized small farm corporations."[4]

In 1988, the statutes in the Family Farm Act were amended to address confined hog operations.[5] These amended statutes were aimed strictly at corporations that bred, farrowed and raised swine.[6] Neither the 1974 Family Farm Act nor its 1988 amendments restricted any other corporate livestock feeding corporations.[7]

Amendment E[8] was placed on the ballot through an Initiative and Referendum and was voted upon in November 1998. The Amendment essentially barred corporate ownership of farmland in addition to corporate livestock feeding operations. The voters of South Dakota passed the amendment to its constitution making it Article XVII, Sections 21-24 of the South Dakota

1. *See* S.D.C.L. § 47-9A-1 (2003).
2. *Id.*
3. S.D.C.L. § 47-9A-2 (2003).
4. S.D.C.L. § 47-9A-13 (2003).
5. S.D.C.L. § 47-9A-13.1 (2003).
6. *Id. See also* Op. S.D. Att'y Gen. 95-02 (1995). The amended statute applies only to hog confinements operations that carry out all three operations. *Id.*
7. *See* S.D.C.L. § 47-9A-11 (2003).
8. The Amendment was called "Amendment E" because of its location on the 1998 election ballot. Brief for Appellants at 1, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (Nos. 02-2366, 02-2644, 02-2646, 02-2588) (hereinafter Appellant's Brief).

Constitution. The first challenge to the constitutionality of the amendment was filed on June 28, 1999.[9]

II. CHALLENGES TO AMENDMENT E

The plaintiffs in *South Dakota Farm Bureau, Inc. v. Hazeltine*[10] included a variety of individual plaintiffs, individuals representing farm corporations, corporations organized for non-farm purposes and organizations aimed at representing farmers and ranchers. The plaintiffs originally brought claims that Amendment E violated the dormant Commerce Clause, the Equal Protection doctrine, the Contracts Clause, the Supremacy Clause, and the Americans with Disabilities Act (ADA).[11] After a court trial in December 2001, Judge Kornmann issued an opinion in May 2002 that Amendment E: 1) was preempted by the ADA;[12] 2) was unconstitutional under the dormant Commerce Clause; and, 3) that cooperatives were not subject to Amendment E.[13]

A. DORMANT COMMERCE CLAUSE CHALLENGE

The plaintiffs argued that Amendment E (also referred to as the Corporate Farming Ban) discriminated against interstate commerce.[14] The plaintiffs claimed that the Amendment E facially discriminated against interstate commerce and that the Amendment constituted discrimination through its purpose and in its effect.[15] While the District Court did find that the Amendment violated the dormant Commerce Clause, it applied the *Pike*[16] balancing test. The plaintiffs, however, wanted Amendment E to be ruled unconstitutional on the first-tier of the dormant Commerce Clause test, thus finding that it discriminated against interstate commerce.[17]

B. A TWO-TIERED ANALYSIS OF THE DORMANT COMMERCE CLAUSE

The modern day dormant commerce clause doctrine has evolved to recognize a two-tiered approach to determine the validity of a state regulation affecting interstate commerce.[18] This two-tiered approach is described in

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9. *Id.*

10. 2002 DSD 13, 202 F.Supp 2d 1020 (D.S.D. 2002), *aff'd in part*, 340 F.3d 583 (8th Cir. 2003), and *cert. denied*, 124 S.Ct. 2095 (2004).

11. *South Dakota Farm Bureau*, 2002 DSD 13, ¶1, 202 F.Supp. 2d at 1023.

12. On appeal, the Eighth Circuit Court of Appeals ruled that the ADA issue had effectively been dismissed prior to the trial at the District Court. Therefore, the court could not "revive" the ADA claim *sua sponte*. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 591 (8th Cir. 2003).

13. *South Dakota Farm Bureau*, 202 F.Supp. 2d at 1039.

14. Brief of Appellees and Cross-Appellants at 9, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (No. 02-2588, 02-2644, 02-2646, 02-2366) (hereinafter Appellees' Brief).

15. *Id.* at 9-10.

16. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

17. Appellees' Brief at 12.

18. Shane D. Buntrock, *Quill Corporation v. North Dakota: Spawning the Physical Presence*

Oregon Waste Systems, Inc. v. Dep't of Environmental Quality.[19] In that case, the Court found an Oregon statute that imposed a greater surcharge on in-state disposal of solid waste generated in other states to be facially discriminatory and in violation of the dormant Commerce Clause.[20] The approach utilized in analyzing a dormant "Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce."[21] The Court defined "discrimination" in this case to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[22] A restriction on commerce that is discriminatory is "virtually *per se* invalid."[23] In *Oregon Waste Management*, the Court found that the differential surcharge imposed by the statute favored shippers of Oregon waste over shippers "handling waste generated in other States . . . patently discriminates against interstate commerce."[24]

Judge Kornmann, in his District Court opinion, opined that before the court engages in a full-fledged analysis of the challenged statute, the court must first determine whether or not the statute "regulates or discriminates against interstate commerce."[25] If so, the first tier, or the discrimination tier, applies.[26] Under the first tier, there are three ways in which discrimination may be found: the statute may be facially discriminatory,[27] the statute may have a discriminatory purpose,[28] or, the statute may have a discriminatory effect.[29]

If a statute is not to be discriminatory, the second tier will be applied by the Court.[30] In this tier, the statute will be "struck down only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'"[31] This tier, referred to as the non-discrimination tier, was firmly established in *Pike v. Bruce Church* and uses a "balancing test" to weigh the putative local benefits against the burden the regulation places on interstate commerce.[32]

In the District Court, Judge Kornmann applied the second-tier balancing test and found that Amendment E created a substantial burden on interstate

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"Nexus" Requirements Under the Commerce Clause, 38 S.D. L. Rev. 130, 137 (1993).

19. 511 U.S. 93, 99 (1994).
20. *Id.* at 108.
21. *Id.* at 99 (citations omitted).
22. *Id.*
23. *Id.* (citations omitted).
24. *Oregon Waste Sys, Inc.*, 511 U.S. at 100.
25. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶88, 202 F.Supp. 2d 1020, 1045.
26. *See id.*
27. Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997)).
28. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003).
29. *Id.*
30. *See generally* South Dakota Farm Bureau, 340 F.3d at 593.
31. *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).
32. *See generally Pike*, 397 U.S. at 142.

commerce when considering the utilities and other interstate companies that must cross through the state in order to carry out business.[33] Furthermore, "the burdens imposed on interstate commerce are clearly excessive in relation to the putative local benefits."[34]

On appeal to the Eighth Circuit, however, the Court of Appeals found Amendment E to violate the dormant Commerce Clause on the first-tier.[35] Specifically, the court found that Amendment E had a discriminatory purpose.[36] Finding this discriminatory purpose, the court determined that it did not need to apply the two other first-tier tests or the second-tier balancing test.[37] Evidence of discriminatory purpose was found in the "pro" statement, drafting meeting notes, drafting process irregularities and testimony at the district court trial.[38] Applying the strict scrutiny test, the Defendants were required to show that there existed no reasonable non-discriminatory alternatives "to advance their legitimate local interests."[39] In this case, the court found that the Defendants were unable to meet their burden of demonstrating "that non-discriminatory alternatives would not advance Amendment E's interests."[40]

III. IN DEFENSE OF AMENDMENT E

Defending the amendment to the South Dakota Constitution included the offices of the Secretary of State and Attorney General, and Intervenors, Dakota Rural Action and South Dakota Resources Coalition. In addition, Amicus Briefs were filed with the Eighth Circuit by a number of interested parties in support of Amendment E including the State of Nebraska, the State of Minnesota, and the Farmers Unions from the National Farmers Union and from the states of Minnesota, South Dakota, Iowa and North Dakota. Those supporting Amendment E focused on the social, economic and environmental concerns that may be created by corporate farm ownership. It was argued that, by restricting corporate farming in South Dakota, the tide will be turned "on the adverse social, economic, and environmental impacts imposed on rural communities by non-family, corporate farms."[41] According to the defenders of Amendment E, "corporate farming causes adverse sociological effects on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have

33. South Dakota Farm Bureau,Inc. v. Hazeltine, 202 DSD 13, ¶105, 202 F.Supp. 2d 1020, 1050 (2002).

34. *Id.*

35. South Dakota Farm Bureau, 340 F.3d at 597.

36. *Id.* at 593.

37. *Id.*

38. *Id.* at 593-94.

39. *Id.* at 596-97.

40. *Id.* at 597.

41. Brief of Intervenor-Appellants at 16, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (No. 02-2588) (hereinafter Intervenor-Appellant's Brief).

independent markets for their products."[42] Family farmers are squeezed out of the market by anti-competitive forces that are created when limited liability entities with limited risk exposure and attractive tax advantages are allowed to operate in the state.[43] Furthermore, "the inability of the family farmer to compete changes social demographics in rural communities"[44] and the loss of farms ultimately leads to a loss of businesses in the rural communities.[45]

In addition, Amendment E was thought to be a means of protecting the environment from contamination of soil and water that is caused by waste from large agribusinesses.[46] The Amendment would "limit the availability of reduced risk exposure provided by corporate status to family farmers who are personally involved in the farming operation."[47] Defenders of Amendment E argued that owners of agricultural operations that are organized under a corporate limited liability status are able to avoid liability for contamination of the environment.[48] Hence, some means of promoting environmental responsibility by large agribusinesses was necessary.

Specifically opposing the finding that Amendment E violated the dormant Commerce Clause, the Defendants argued before the Eighth Circuit that the Amendment regulates evenhandedly as it applies to all in-state and out-of-state corporations and limited liability syndicates conducting business in this state.[49] Furthermore, the Amendment created no "preferential treatment in favor of in-state businesses or discriminating against out-of-state entities."[50] The purpose of Amendment E was not "to economically protect in-state businesses to the detriment of out-of-state businesses."[51] As reflected in the "Pro-Con Statement" published before the 1998 election, the purpose of Amendment E was "to protect family farms and the environment and to maintain the rural way of life."[52]

In applying tier-two of the dormant Commerce Clause analysis, the Defendants argued that the incidental effects imposed upon interstate commerce by Amendment E were not "excessive in relation to the putative local benefits."[53] Citing precedent from the United States Supreme Court and Eighth Circuit Court of Appeals, the Defendants argued that a state has a legitimate

42. Appellant's Brief at 7.

43. Intervenor-Appellant's Brief at 16.

44. *Id.* at 16-17.

45. *See generally* Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Service Practitioners*, 29 CLEARINGHOUSE REV. 1087, 1092 (1996).

46. Intervenor-Appellants Brief at 17.

47. *Id.*

48. *Id.*

49. Appellant's Brief at 19.

50. *Id.* at 20. *See also* U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1067 (8th Cir. 2000) (describing that discrimination under the dormant Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (citations omitted)).

51. Appellant's Brief at 21.

52. *Id.* at 20. *See also* Trial Ex. 513, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583(8th Cir. 2003); *South Dakota Farm Bureau*, 340 F.3d at 594-97.

53. Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970); *see also* Appellant's Brief at 29.

interest in preventing corporate ownership of farms in order to promote family farm operations and the welfare of citizens in rural farm communities.[54] In addition, the Defendants' experts at trial in the District Court testified that laws such as Amendment E are needed to "protect[] the socioeconomic structure of rural life and traditional family-farm based agriculture."[55]

IV. PETITION FOR WRIT OF CERTIORARI FILED BUT DENIED

The South Dakota Secretary of State and Attorney General timely filed a Petition for Writ of Certiorari with the United States Supreme Court in January 2004.[56] Using the rationale upon which the Supreme Court will grant a petition for writ of certiorari, the Petitioners argued that the decision of the Eighth Circuit was "in conflict" with the Supreme Court's analysis of the dormant Commerce Clause[57] and that this is an "important and recurring issue."[58] Contrary to the opinion of the Eighth Circuit, the Petitioners argued that the proper test in determining whether a law is discriminatory is found within the text and effects of the state law.[59] Furthermore, "[t]he Court has never held that a state law violates the dormant Commerce Clause based *solely* on a finding of discriminatory purpose."[60] The Eighth Circuit Court of Appeals also deviated from the usual dormant Commerce Clause analysis when it based "its ruling not only on the "purpose" generally, but on . . . the subjective intent of the *drafters* of Amendment E."[61] Finally, this case was argued to be a relevant issue for the Supreme Court to consider because of the importance of family farms particularly in those states with corporate farming laws.[62] *South Dakota Farm Bureau* is likely to impact the "power of states to enact regulations affecting interstate commerce"[63] and the courts need to be making proper and consistent analyses.

V. CONCLUSION

After five years in the courts, the fate of Amendment E has been settled. Because South Dakota's corporate farming law has been compared to the corporate farming laws in North Dakota, Minnesota, Nebraska, Iowa, Kansas,

54. Appellant's Brief at 23-24. *See, e.g.*, Asbury Hosp. v. Cass County, 326 U.S. 207 (1945); Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001); MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991); State ex rel. Webster v. Lehndorff Geneva, Inc. 744 S.W.2d 801 (Mo. 1988).

55. Appellant's Brief at 28-29.

56. Brief of Petitioners, Nelson v. South Dakota Farm Bureau, Inc., 124 S.Ct. 2095 (2004) (No. 03-1111), *cert. denied*, (U.S. May 3, 2004).

57. *Id.* at 12.

58. *Id.* at 21.

59. *Id.* at 16.

60. *Id.* at 15.

61. *Id.* at 17.

62. *Id.* at 21.

63. *Id.* at 23.

Oklahoma and Missouri, those states have closely watched the outcome of *South Dakota Farm Bureau, Inc. v. Hazeltine.* Iowa's corporate farming law has recently been challenged, with the District Court for the Southern District of Iowa's decision vacated and remanded by the Eighth Circuit Court of Appeals.[64] Upon being ruled unconstitutional by the District Court for the Southern District of Iowa, the law in Iowa was amended; thus, the law in effect at the time of its appeal to the Eighth Circuit Court of Appeals had been changed.[65] The Eighth Circuit ordered the District Court to consider whether the new law "unconstitutionally discriminates against interstate commerce."[66]

It is likely that plaintiffs in other states will come forward to challenge the constitutionality of the corporate farming laws of their states now that the law in South Dakota (which arguably is fashioned after those of other states) has been ruled unconstitutional on a dormant Commerce Clause challenge. For that reason, the *South Dakota Law Review* is pleased to present this Special Issue.

The following briefs are those that were submitted to the United States Eighth Circuit Court of Appeals in *South Dakota Farm Bureau v. Hazeltine.* The order in which they appear is the order in which the brief was filed with the court.

These briefs have been formatted for publication purposes in the *South Dakota Law Review* and do not include the original cover page, table of contents, table of authorities or certificates of compliance and service. Otherwise, the content of the briefs has not been intentionally altered.

64. Smithfield Foods, Inc. v. Miller, 367 F.3d 1061 (8th Cir. 2004).
65. *Id.*
66. *Id.*

Intervenor-Appellants' Opening Brief

by

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INTERVENOR-APPELLANTS' OPENING BRIEF

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CASE SUMMARY AND REQUEST FOR ORAL ARGUMENT

This appeal is from a final order entered by the District Court on May 17, 2002. The order determined that S.D. Const. Art. XVII, §§ 21-24 (hereinafter "Amendment E") violated the Dormant Commerce Clause of the United States Constitution and was preempted by the Americans with Disabilities Act. Amendment E banned, with multiple exceptions non-family, limited liability agricultural operations. The Court found that Amendment E interfered with utility transmission easements, and that such effect improperly burdened interstate commerce. The Court also found that Amendment E discriminated against the disabled, and thus was preempted by the ADA.

The decision should be reversed. The Court erred in finding that Amendment E violated the Commerce Clause, in that Amendment E does not apply to transmission easements and advances legitimate State interests. The Court erred in even addressing the ADA claim, as that issue was not before the court, and Amendment E does not implicate the ADA.Appellant-Intervenors request twenty-five minutes for oral argument

JURISDICTIONAL STATEMENT

This appeal is from a final order entered by the District Court on May 17, 2002. The order determined that S.D. Const. Art. XVII, §§ 21-24 (hereinafter "Amendment E") violated the Dormant Commerce Clause of the United States Constitution and was preempted by the Americans with Disabilities Act. A timely Notice of Appeal was filed. The jurisdiction of the lower court rested on 28 U.S.C. § 1331 and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES FOR REVIEW

I. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT AMENDMENT E APPLIED TO UTILITY COMPANY TRANSMISSION EASEMENTS.

Knight v. Madison, 634 N.W.2d 540 (S.D. 2001)
Musch v. H-D Elec. Coop. Inc., 460 N.W.2d 149 (S.D. 1990)

II. WHETHER THE LOWER COURT ERRED IN APPLYING THE *PIKE* BALANCING TEST AND IN DETERMINING THAT AMENDMENT E VIOLATED THE DORMANT COMMERCE CLAUSE.

Pike v. Bruce Church, 397 U.S. 142 (1970).
Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814, 821 (8th Cir. 2001)

III. WHETHER THE LOWER COURT LACKED JURISDICTION TO DECIDE WHETHER AMENDMENT E WAS PREEMPTED BY THE AMERICANS WITH DISABILITIES ACT, GIVEN THAT THERE WAS NO CASE IN CONTROVERSY INVOLVING THIS ISSUE.

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

IV. WHETHER THE AMERICANS WITH DISABILITIES ACT IS EVEN IMPLICATED BY AMENDMENT E.

Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 174 (9th Cir. 1999)
Hanson v. Medical Board of California, 279 F.3d 1167, 1192 (9th Cir. 2001).

STATEMENT OF THE CASE

On November 3, 1998, the people of South Dakota by ballot initiative amended their State Constitution to ban, with multiple exceptions non-family, limited liability agricultural operations. S.D. Const. Art. XVII, §§ 21-24. The plaintiffs in this case sought to overturn Amendment E, contending that Amendment E violates the Commerce, Equal Protection, and Due Process Clauses of the United States Constitution. (App. 150-185 – Intervenors are jointly using Appellants' Appendix in joined Case No. 02-2366) Originally, some plaintiffs also claimed that Amendment E violated the Americans with Disabilities Act. (App. 39-40) However, the Court dismissed this claim (App. 140-141), and the Plaintiffs thereafter filed an amended complaint that did not allege an Americans With Disabilities Act claim. (App. 150-185)

The lower court struck down Amendment E, finding both that it violated the Dormant Commerce Clause with respect to utility transmission easements, and finding that it was preempted by the Americans with Disabilities Act. (App. 236-276 and Addendum)

STATEMENT OF THE FACTS

At trial, the Defendants and Intervenors presented evidence of the putative benefits of Amendment E, and the harms of corporate farming. One of the major concerns of the proponents of Amendment E was preservation of the family farm. (Bixler, Tr. 403) The United States has continued to lose family farms at a rate of two percent per year. (Tweeten, Tr. 576) As noted by most of the named plaintiffs who testified, as well as summarized by noted economist Dr. Tweeten, the family farm provides a positive impact on the society. Family farms are characterized by more cohesive families, less divorce, more church going, and lower crime rates. (Tweeten, Tr. 575)

Further, Amendment E acts to lessen the concentration of agriculture, reduce the number of concentrated animal feeding operations, and remove non-qualifying corporations from limited liability. (Thompson, Tr. 225-231) The environmental aspects of Amendment E were also crucial to its supporters. (Napton, Tr. 382) Dr. Cahoon, an environmental scientist, made clear the

devastating environmental impact that concentrated animal feeding operations have had in North Carolina, including degradation of air and water quality. (Cahoon, Tr. 763-769) Such concentrated feeding operations also have led to a decline in surrounding property values. (Tweeten, Tr. 570-571)

Amendment E also seeks to avoid distant ownership of farmland by non-qualifying entities. There is an advantage to have owner/operators live on their farms. (Aeschlimann, Tr.144-145) A further problem with distant corporate ownership is that crucial decisions regarding operations are not made in the community. (Tweeten, Tr. 573) Finally, on-site ownership lessens the likelihood of environmental problems. (Thompson, Tr. 225)

Further, other attempts to address the problems above have been unsuccessful. First, citizens were unsuccessful in getting several environmental bills through the South Dakota Legislature in 1997. (Napton, Tr. 383) Second, governmental programs and laws have had only mixed success in dealing with farm related environmental problems. (Tweeten, Tr. 574). Finally, governmental programs have not been successful in saving family farms. (Tweeten, Tr. 578-579)

At trial, Plaintiff Utility Companies contended that Amendment E would adversely effect utility transmission easements, and also contended that it would impair plant expansion. (Tr. 281-343, 593-611)

SUMMARY OF THE ARGUMENT

1. Amendment E does not apply to utility transmission easements. Under South Dakota law, an easement for a utility right-of-way is a separate, non-possessory estate in land and is not an interest in real estate "used for farming" as defined under Amendment E.

2. The court erred in its application of the *Pike* balancing test for determining whether Amendment E unconstitutionally burdens interstate commerce. Regardless of whether a state law affects interstate commerce, as long as the value of the legitimate purpose outweighs any incidental burdens, it must be upheld.

3. The Court lacked jurisdiction to decide any claim based on the Americans with Disabilities Act. Such claim was initially dismissed by the Court and the Plaintiffs filed an amended complaint that lacked any such claim. The issue was not ripe, there was no case in controversy, and the Plaintiffs lacked standing. The matter was not addressed at trial.

4. The lower court erred in finding that Amendment E is pre-empted by the Americans with Disabilities Act. The Americans with Disabilities Act is inapplicable to a State constitutional amendment regulating farming.

ARGUMENT

1. Amendment E Does Not Apply To Utility Transmission Easements

This involves the trial court's determination of applicable state law, and the appellate standard of review is *de novo*. *Salve Regina College v. Russell*, 499

U.S. 225, 231 (1991).

As the Court has recognized Amendment E broadly prohibits corporations, such as the Utility Plaintiffs, from acquiring or otherwise obtaining "an interest, whether legal, beneficial, or otherwise, in any real estate used for farming." Article XVII § 21. But, the breath of this language is not without limit. It obviously can be limited by the nature of the "interest" in real estate obtained. Most importantly, if an easement does not include a right to farm, the owner of the easement has no interest in land used for farming. The easement owner has an interest in land used to support power poles, nothing more. *See* Exhibit. 88 (standard utility easement form under which grantor "reserves the right to *cultivate*, use, and occupy said land" (emphasis added)). Under South Dakota law, an easement for a utility right-of-way is a separate, non-possessory estate in land and is not an interest in real estate "used for farming" as defined under Amendment E. The trial court erred in finding that the restrictions of Amendment E apply to easements granted solely for the purpose of providing a right-of-way for transmission lines, pipelines and similar utility conveyances. Easements are separate real property estates and are limited to the purpose and scope enumerated in the grant. The interest acquired is the easement for a utility right-of-way, not for the underlying fee. A utility easement for right-of-way is not an interest in real estate "used for farming." Use of a right-of-way easement for utility purposes does not cause a utility to be engaged in farming. Under South Dakota law, an easement is "an interest in the land in the possession of another which entitles the owner of such interest to a *limited use* or enjoyment of the land in which the interest exists." *Knight v. Madison*, 634 N.W.2d 540 (S.D. 2001) (emphasis added). SDCL 43-13-5 provides in part "[t]he extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." *Id.* Neither the physical size, nor the purpose or use to which an easement may be used can be expanded or enlarged beyond the terms of the grant of the easement. *Id.*

The court in *Musch v. H-D Elec. Coop. Inc.*, 460 N.W.2d 149 (S.D. 1990), limited the use of the grant to those specified. The *Musch* court, citing *Langazo v. San Joaquin Light & Power*, noted:

The record shows that the owner of the real property granted a "right of way" to the Power Company over a strip of land 20 feet in width. The Power Company had a right to erect a single line of towers or poles thereon and wire suspended thereon. "The rights on any person having an easement in the land of another are measured and defined by the purpose and character of that easement; and the right to use the land remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement." 17 Am. Jur. 993. Appellant had no right to fence the right of way, nor did it have any right to the use or possession thereof, except for limited purposes, such as repair, maintenance and construction, as set forth in the grant. Thus except for the reservations made in the grant, the owner had the same complete dominion and control over this 20-foot strip as he had over the remainder of his property.

32 Cal. App. 2d at 682, 90 P.2d at 829.

Similarly, the recently revised Restatement (Third) of Property, Servitudes § 1.2, cmt. d (2000) states:

The holder of the easement or profit is entitled to make only the uses reasonably necessary for the specified purpose. The transferor of an easement or profit retains the right to make all uses of the land that do not unreasonable interfere with exercise of the rights granted by the servitude. For example, the transferor of an easement for an underground pipeline retains the right to enter and make any use of the area covered by the easement and that does not unreasonably interfere with use of the easement for pipeline purposes. The holder of the easement may only use the area for purposes reasonably related to the pipeline. Any other interpretation of a right-of-way easement would ignore the rule that ". . . function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements.

Id. (Introductory Note) p. 494.

The standard utility "Right of Way Easement" form, introduced into evidence by the Utility Plaintiffs is entirely consistent with the above understanding of property law. *See* Exhibit 88. Most importantly, pursuant to this standard easement form, the utility company acquires only the right to construct, operate, maintain, etc. a power line, and the right to cut down trees, shrubs, etc. that might by necessary for the construction, operation, and maintenance of a power line. The grantor, (farmer or rancher) specifically retains the "right to cultivate, use, and occupy said land." Exhibit 88 at 2. Accordingly, a mere utility easement holder has no interest in land that can be used for farming. The interest in land that can be used for farming is entirely retained by the farmer. Indeed, were a utility easement holder to "engage in farming" it would illegally expand the terms of the easement granted.

A conclusion that a right-of-way solely for utility purposes is not an interest in land used for agriculture is apparent, and is implicit in the general concept of real property estates developed at common law. Thus, it is far from surprising that during the trial the Utility Plaintiffs failed to produce any testimony that the very similar I-300 initiative from Nebraska required any change in power industry operations. Easements acquired solely to build and maintain power lines, and specifically precluding any right to cultivate land, are not affected by Amendment E. A contrary conclusion would stand property law on its head and ignore the intent of voters for Amendment E, which to the extent it can be determined, did not contemplate utility easements in any manner. This is a case about the voters' attempt to limit corporate agriculture, not an effort to restrict utility operations.

The lower court also expressed concern about land owned by utilities such as the Big Stone Partners that is currently leased to farmers. The court asserted that this land is necessary to the present and future operations of the power plant, without any explanation except to say that the leases generate thousands of dollars each year. Although maximizing profits is in the interest of every business, there is no support for the idea that this rent money is significant

compared to the annual budgets of these corporations. There is no demonstration of why these companies need to hold these lands.

The drafters of Amendment E, however, provided for this situation with a grandfather clause. S.D. Const. art. XVII, §22(4). Corporations that currently own or have an interest in land that is being farmed may maintain this arrangement as long as the land is under continuous ownership or lease. Id. The court was concerned that this would inhibit the transfer of lands between utilities for development purposes. But if the land were transferred for development purposes, there would no longer be any reason to use it for agriculture.

In any case, the requirement to divest the land only kicks in if the land is "agricultural." The lower court seemed to conflate undeveloped land with agricultural land, referring to "unimproved agriculture land." But the absence of other uses is not a condition sufficient to make land "agricultural." The term "agricultural land" is never defined in the South Dakota Constitution, but the plain meaning of the language shows that it refers to land used for farming. For example, corporations can acquire or lease agricultural land for development for non-farm purposes. S.D. Const. art. XVII, §22(10). Since it has already been established that corporations can't own land used for agriculture or engage in agriculture, S.D. Const. art. XVII, §21, it is clear that §22(10) means that corporations can acquire such land on the condition that they use it for something else.

The lower court also expressed concern that land in which corporations had any interest would have to be fenced to keep out grazing animals, to keep the land from being used for agriculture. But this assertion rests on an incorrect presumption. The presence of grazing animals on land does not automatically change the designated use of the land. Rather, in this case, if the animals strayed on to non-agricultural land, it would be no more than a common trespass.

Amendment E is similar to the statutory or constitutional provisions eight other mid-western states. (N.D. Cent. Code §§10-06.1-01 – 27; Neb. Const. Art. XII, §8; Kan. Stat. Ann. §17-59-4; Okla. Const. Art. XXII, §2; Okla. Stat. Ann. Tit. 18 §951; Wisc. Stat. Ann. §182.001; Minn. Stat. Ann. §500.24; Iowa Code, Ch. 9H1-9H15; Mo. Rev. Stat. 350.015.) It is an outgrowth of South Dakota's earlier Family Farm Act of 1974, S.D. Compiled Laws Ann. §§ 47-9A-1 - 23. There is no evidence that such statues have posed any problem for utility companies.

II. INTERSTATE COMMERCE IS NOT BURDENED BY AMENDMENT E

The appellate standard of review on this issue is *de novo.Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 821 (8th Cir. 2001).

The lower court incorrectly found that the burdens Amendment E imposes on interstate commerce outweigh the "putative local benefits." Despite not having unconstitutional extraterritorial reach or a discriminatory purpose, and although there is a compelling state interest in protecting family farms and in requiring liability for corporate entities, the lower court concluded Amendment

E violates the dormant Commerce Clause of the U. S. Const. art. I, § 8, cl. 3.

A. THE FIRST PRONG OF THE DORMANT COMMERCE CLAUSE ANALYSIS: DISCRIMINATION

In assessing constitutionality of Amendment E under the Commerce Clause, the lower court correctly relied on the two-step approach established by the Supreme Court. *Pike v. Bruce Church*, 397 U.S. 142 (1970). The first step requires the court to determine whether the challenged measure discriminates against out-of-state entities. The lower court correctly concluded that Amendment E regulates evenhandedly. It has no unconstitutional extraterritorial reach and thus readily survives the first prong of analysis. Amendment E applies only to businesses operating within South Dakota's borders and regulates all farms on the same basis. The court also correctly concluded that Amendment E does not have a discriminatory purpose or effect.

It is well within South Dakota's prerogative to protect its

environment and way of life by regulating corporate ownership of farms and agricultural land. Amendment E was designed to take away competitive advantages for corporate farm entities so that small, family farmers are not forced to compete against larger establishments that have liability protection and tax advantages. This purpose is not a ruse to ban out-of-state competition.

The lower court correctly concluded that protecting family farmers from competition with corporate entities and protecting the environment are compelling state interests. It makes no difference to the family farmer whether the corporate factory farms are owned by in-state or out-of-state corporations. Courts rarely find a discriminatory purpose because they accept the state's purported objectives as the actual purpose of the law. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462 n. 7 (1981).

Further, Amendment E only regulates within the State of South Dakota and has no extraterritorial reach or impact. In this respect, Amendment E is quite similar to the Missouri livestock price discrimination law recently upheld against a Commerce Clause challenge in *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 821 (8th Cir. 2001). In that case, the court found that Missouri's livestock price discrimination law did not discriminate between in-state and out-of state packers or producers, nor did it attempt to regulate out-of-state commerce, and thus did not burden interstate commerce. Because Amendment E is similar to that law in purpose and effect, this court should use similar reasoning to uphold it.

B. THE SECOND PRONG OF THE DORMANT COMMERCE CLAUSE ANALYSIS: PIKE

The lower court erred in concluding that although indirect, the burden on interstate commerce outweighs the local benefit of Amendment E. The second prong of the dormant Commerce Clause analysis requires a balancing of the local benefits of the law against the burdens on interstate commerce. In reliance on the *Pike* balancing test, the lower court found that the burden on interstate

commerce was "clearly excessive in relation to the putative local benefits." But the party challenging the legislative action must prove that the burdens on interstate commerce are greater than the local benefits, and in this case the South Dakota Farm Bureau et. al. failed to do so. *Clover Leaf Creamery Co.*, 449 U.S. at 464, 66. "Where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are incidental, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 142, 143 (1970).

First, the lower court applied the balancing test inappropriately, failing to adequately compare the purpose and the benefits of Amendment E with what it found to be the drawbacks. The court limited its inquiry to the conclusory statement, "There is no legitimate state interest of any kind in burdening utilities or rate payers or, for that matter, owners of agricultural land, with any of this "utility business." There has been no claim that this is the interest in which Amendment E was passed. And in fact, elsewhere in the opinion, the court approved of the purposes of Amendment E.

The legitimate state purposes of Amendment E are monumental

compared to the purported harms that would be caused to interstate utility companies. The standard for finding that a particular state interest is sufficiently legitimate to survive dormant Commerce Clause analysis is rational basis review. *Burlington Northern R. Co. v. Department of Public Service Regulation*, 763 F.2d 1106, 1109 (9th Cir. 1985). This is the same as the standard for judging the constitutionality of a regulation of economic activity under the due process or equal protection clauses. This Court should apply the logic that it used in deciding *MSM Farms*, when it found that the Nebraska law meant to protect family farms was a legitimate state interest under the equal protection clause. *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991).

Amendment E attempts to turn the tide on the adverse social, economic, and environmental impacts imposed on rural communities by non-family, corporate farms. Limited liability entities enjoy limited risk exposure and tax advantages, which allow them to attract investment capital with which to expand. This creates anti-competitive forces that squeeze traditional, family farmers out of the market. The inability of the family farmer to compete changes social demographics in rural communities by replacing the independent farmer with disempowered sharecroppers and destroys the social fabric of small towns.

In addition, Amendment E aims to make farm owners responsible for environmental contamination in a way that family farmers are likely to automatically be. Large agribusinesses, such as hog operations, have a propensity to produce an enormous amount of waste that saturates soil, deluges water channels, and contaminates groundwater. Corporate limited liability status allows owners of agricultural operations to avoid personal liability for environmental contamination. Accordingly, Amendment E seeks to limit the availability of reduced risk exposure provided by corporate status to family farmers who are personally involved in the farming operation. Family farmers,

even if they do enjoy limited liability due to corporate organization, are exempt under Amendment E due to their obvious disincentive to "foul their own nest." These social, economic, and environmental concerns are without a doubt areas where states have a legitimate interest in regulating.

The lower court incorrectly relied on the analysis in *Kassel v. Consolidated Freightways*, 450 U.S. 662, 669 (1981). In that case, unlike here, the regulation at issue had no legitimate state purpose. Plaintiffs assertion that the statute was necessary for safety was disproved. *Id.* at 1316. Here, there *are* legitimate state interests in protecting family farms, and the social, economic and environmental structure of South Dakota's communities, as the lower court acknowledged in its discussion of a similar statute in *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991).

Plaintiffs merely demonstrated one negative consequence of the statute. They provided no explanation for how concern about encumbering land easements is enough of a burden to overcome the social, economic and environmental benefits that the citizens of the state were after when they voted for the referendum.

The South Dakota Farm Bureau cannot show that Amendment E's burden on interstate commerce is "clearly excessive" in relation to the State's legitimate interest in protecting its way of life and environment. *Pike*, 397 U.S. at 142. Further, such a dismissal of the clearly expressed priorities of citizens is beyond the court's power. It is not within the purview of courts to "decide on the wisdom and utility" of state laws. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

Moreover, the possibility that Amendment E may impose some economic hardship on the Plaintiffs in this case does not violate the Commerce Clause. The Court in the *Hampton Feedlot* case, in applying the *Pike* balancing test, stated:

The Missouri Legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harms and benefits to all stakeholders in creating its price discrimination law. In the event that the implemented statute adversely affects Missouri farmers or consumers, appellees are free to petition the legislature to amend or repeal the statute. Appellees have asked us to strike Missouri's statute because it burdens interstate commerce, but they have failed to show how the measure has this unconstitutional effect. Economic hardship experienced by Missouri feedlots does not rise to the level of a dormant commerce clause violation.

Hampton, 249 F.3d at 820-21.

III. THE COURT LACKED JURISDICTION TO DECIDE THE AMERICANS WITH DISABILITIES ACT ISSUE

Before a federal court may address itself to a question, there must exist "a

real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Further, the Constitution requires a party to satisfy the elements of injury in fact, causation, and redressability to establish standing to bring a suit. *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1016-17 (1998). Standing is a threshold matter that, if absent, prevents a court from exercising jurisdiction. *Arkansas Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998). The appellate standard of review is *de novo*. See, *Steger v. Franco*, 228 F.3d 889, 892 (8th Cir. 2000).

In the instant case, the Court dismissed the ADA claim before trial, and the Plaintiff's filed an amended complaint that no longer contained an ADA claim. The issue regarding the ADA claim was not even tried to the Court, and the Defendants and Intervenors did not defend against such claim nor adduce any evidence regarding such claim. The Court in this case simply decided a hypothetical issue that was not presented by the parties. There was no case in controversy, the issue was not ripe, and the Court accordingly lacked jurisdiction.

IV. THE ADA IS INAPPLICABLE TO THIS CASE

As this issue was not tried to the court, it is merely a determination of law and is reviewed *de novo*.

A. THE PLAIN LANGUAGE OF THE ADA DOES NOT APPLY TO A STATE CONSTITUTIONAL PROVISION SUCH AS AMENDMENT E

The District Court interpreted the application of the ADA too broadly, in contradiction to the statutory language and to the precedent binding on this court. Of the four titles of the ADA, only Title II is applicable to state and local governments.42 U.S.C. § 12132 (1995). Title II states:

"No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."

Id.

This provision establishes two prohibitions applicable to public entities. Individuals with a qualifying disability can not be, on the basis of their disability: (1) "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity;" or (2) "be subjected to discrimination by any public entity." These two prohibitions are considered in turn.

The federal regulations implementing the first part of the statutory provision mirror its language almost exactly, providing Title II applies to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102(a) (1991). This is not ambiguous language. Title II applies

only when a local government offers services or programs. Accordingly, it does not apply to Amendment E, which regulates farming. Farming is a private activity conducted by private citizens. It is in no way a service, program, or activity conducted by a state government. Government regulation is different from government services and programs. By the court's logic, the government couldn't pass a regulation that restricted narcoleptics from being truck drivers because this would be discrimination.

The second prohibition of Title II, that no individual with a qualifying disability can be, on the basis of that disability, "subjected to discrimination by any public entity" could arguably be extended to apply. 42 U.S.C. § 12132. However, the legislative history behind this additional prohibition of Title II indicates that its purpose is to require integrated services for persons with disabilities and those without. H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 3 (1990). It was not intended to expand the scope of Title II beyond situations concerning the state's provision of benefits and services. Consistently, the Federal Regulations implementing Title II of the ADA focus solely on local government's provision of aid, benefits, and services—not on the government's regulation of private conduct. *See, e.g.,* 28 U.S.C. § 35.130 (1991) entitled "general prohibitions against discrimination," but dealing only with the government's provision of benefits and services.

In sum, that the ADA might well prohibit similar conduct by a private employer or those private entities offering public accommodation is neither here nor there. Amendment E is a state regulatory action, but through Amendment E the State does not offer employment or public accommodation, or provide benefits or services to individuals. For the preceding reasons, the District Court was wrong to find that Amendment E "constitutes an attempt to override the ADA."

B. AMENDMENT E IS NOT PRE-EMPTED BY TITLE II OF THE ADA

1. Title II of the ADA Does Not Govern Corporate Law

To determine whether Title II applies to a certain situation, the Court must consider two issues. The plaintiff must have a disability and there must have been a discriminatory government action. 42 U.S.C. §12131.

The lower court mistakenly analogized Amendment E's limitations on farm ownership to zoning decisions. Courts in other circuits have found that zoning is covered by the ADA. *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 45 (2nd Cir. 1997)); *Bay Area Addiction Research and Treatment, Inc.* 179 F.3d 725, 730 (9th Cir. 1999) (involving the citing of alcohol and drug treatment centers). The Eight Circuit has not ruled on this issue.

Municipal governments make zoning decisions as a way of guiding development. Permits must be issued every time a new building is built, modified, or the use is substantially changed. The individualized nature of this process makes it liable to discrimination, in contrast with the functioning of

corporate law. States establish laws to govern corporations; corporations are regulated by these laws, but without any case-by-case decision-making by the government. In creation of corporate law, no individualized discrimination is possible.

Courts have considered whether Title II of the ADA covered certain government functions in terms of inputs and outputs. *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169, 174 (9th Cir. 1999); *Hanson v. Medical Board of California*, 279 F.3d 1167, 1192 (9th Cir. 2001). While outputs, such as medical licensing, are covered by Title II, inputs such as employment are not. 170 F.3d at 1174 and 279 F.3d at 1173. (*See Zimmerman* for an explanation of how Title I exempts some government entities and Title II does not apply to employment.) Case-by-case decisions are clearly outputs, but it does not logically follow that lawmaking is. Thus, although two circuits have found that zoning decisions, as normal functions of a governmental entity, are covered by the ADA, reaching corporate law would require a further extension of the terms "service, program, or activity."

2. *Whether Plaintiffs are Disabled Within the Meaning of the ADA Was Not Tried by the Lower Court*

Even if a constitutional provision governing the incorporation of businesses in the State of South Dakota is a "service, program, or activity of a public entity," covered by the ADA, the lower court failed to consider whether the plaintiffs were disabled as defined by the act. "To prevail on a Title II claim, including a claim under the second clause, a plaintiff must prove that he or she is a 'qualified individual with a disability.'" *Zimmerman,* 170 F.3d at 1175.

Under this statute, "qualified individual with a disability" is defined as

"an individual with a disability who, with or without reasonable modifications to the rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

42 U.S.C. § 12131(2) (1995).

The regulations for this title refer to the regulations for Title III for the definition of "disability." 28 CFR Pt. 35, App. A (1991). "Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 28 CFR § 36.104. "Major life activity" is further defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* The statutory definition of disability is the same. 42 U.S.C. §12102(2) (1995).

"[N]eutral essential eligibility requirements" do not make a government entity liable under the ADA." *Johnson v. City of Saline* 151 F.3d 564, 571 (6th Cir. 1998). In that case, the court explained that in situations where a

government entity is required to make reasonable accommodations for a beneficiary, the accommodation they must make is limited. If the accommodation needed is too extreme, the beneficiary is no longer a "qualified individual with a disability." *Id.* In this case, a neutral requirement such as one obligating farmers who own land in a limited liability format to live or work on it does not make the government liable under the ADA.

3. *Amendment E Offers the Required Accommodation*

Contrary to the lower court's conclusion that Amendment E prohibits farmers "who cannot do substantial physical exertion on a daily basis," South Dakota does not preclude any category of people from owning agricultural land or engaging in farming. The lower court seems to have missed the "or" in the exception to the prohibition of corporate farms. Under § 22 of Article XVII of the South Dakota Constitution, even if a person cannot do "daily or routine substantial physical exertion and administration," if the person owns the farm with his family and *lives* there, he can choose to be free from liability through corporate ownership. S. D. Const. Art. XVII, §22.

This is a facial challenge to the regulation. Since it has not been applied, there has been no examination of what reasonable accommodation would be under the ADA and Amendment E. Usually, reasonable accommodation means making a government service accessible to someone with a disability. *Board of Trustees of Universtiy of Alabama v. Garrett*, 121 S. Ct. 955, 969 (2001). In this case, there is no service being offered by the government. Reasonable accommodation might take the form of interpreting the language of the statute favorably in light of the condition of any person wishing to meet the exception.

Amendment E allows family farmers to own their agricultural land in limited liability format if one member of the family "reside(s) on or (is) actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration." S. D. Const. Art. XVII, §22.

CONCLUSION

Based on the foregoing arguments, Defendant-intervenors request that the District Court's Judgment be reversed.

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An Agricultural Law Research Article

Appellants' Opening Brief

by

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APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

This case concerns Article XVII, Sections 21-24 of the South Dakota Constitution. These provisions were adopted by initiated measure and became effective on November 16, 1998. These provisions have also been referred to as "Amendment E," a reference to their placement on the 1998 ballot. The amendments prohibit certain business structures from farming and owning farmland. S.D. Const. art. XVII, § 21.

Plaintiffs SD Farm Bureau, SD Sheep Growers, Haverhals Feedlot, Sjovall Feedyard, Brost, Tesch, Aeschlimann, Spear H. Ranch, and Holben filed their Complaint for Declaratory and Injunctive Relief on June 28, 1999. App. 12. Among the various claims, Plaintiffs asserted that Amendment E violated the dormant aspect of the federal commerce clause. App. 33-35. SD Farm Bureau also claimed that Amendment E was invalid under the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101, et seq. App. 39-40. In addition to the two named State Defendants involved in this appeal, the Complaint also named the State of South Dakota.

The State Defendants filed their Answer on July 28, 1999. On October 21, 1999, the State Defendants filed a Motion to Dismiss on the basis of sovereign immunity and the Eleventh Amendment. App. 43-45. In the alternative, Defendants sought to dismiss claims relating to the privileges and immunities clause and to the Americans With Disabilities Act. App. 44. Hearing was scheduled.

In the meantime, Dakota Rural Action and South Dakota Resources Coalition sought and received permission to intervene as Defendants. *South Dakota Farm Bureau, Inc., et al. v. Hazeltine, et al.*, 189 F.R.D. 560 (D.S.D. 1999).

Also, Plaintiffs filed their Motion Instanter to Join Parties and File First Amended Complaint. App. 83-87. Plaintiffs sought to add the Utilities as Plaintiffs. The proffered Amended Complaint did not add any new claims for relief, but added factual allegations pertaining to rules that Defendant Hazeltine promulgated in implementing the provisions of Amendment E.

Hearing on the various motions was held on January 18, 2000. The court orally (1) granted the Utilities' motion to join as Plaintiffs (MHT 51, 53), (2) dismissed the case as against the State of South Dakota (MHT 5), and (3) dismissed the ADA claim (MHT 6). He took other issues under advisement, including the request to dismiss State Defendants Barnett and Hazeltine. MHT 47, 54.

Subsequently, on February 8, 2000, Plaintiffs filed another Motion Instanter to File First Amended Complaint. App. 119-22. Among other things, the Plaintiffs amended their Complaint to delete the ADA claim and to add the Marston and Marian Holben Trust and the Utilities as Plaintiffs. App. 119-22.

On September 15, 2000, Judge Kornmann denied the remaining motion to dismiss and granted the Plaintiffs' motion to amend. App. 136-49. The

September 15 Order also dismissed the ADA claim. App. 140. The Amended Complaint and the Answer to Amended Complaint were both filed on September 27, 2000. App. 150-96.

Following an unsuccessful motion for partial summary judgment, trial was scheduled for December 4, 2001. Plaintiffs' trial brief set forth the various issues that it would try at hearing. App. 197-234. It included the commerce clause issue as well as other claimed issues, but included no reference to an ADA claim.

A court trial was held from December 3 through 7, 2001. At the close of trial, the court requested post-trial briefs.

The next week, on December 12, 2001, Judge Kornmann issued a memorandum indicating that he would again consider the ADA claim. App. 235. Defendants' post-trial briefs responded to this issue. Plaintiffs filed post-trial briefs, but did not address the ADA issue at all.

On May 17, 2002, Judge Kornmann filed his Memorandum Opinion. App. 236-76. He first held that cooperatives are not subject to Amendment E. App. 258-59. Second, he found that Amendment E is preempted by the ADA. App. 259-65. Third, he declared that Amendment E is unconstitutional under the dormant aspect of the federal commerce clause when considered in light of the claims made by Utilities. App. 265-76. The Judgment was also filed on May 17, 2002. App. 277.

On May 20, 2002, the State Defendants filed their notice of appeal.

STATEMENT OF FACTS

South Dakota has restricted corporate farming since 1974.[1] SDCL ch. 47-9A. The 1974 Family Farm Act generally bars corporate ownership of agricultural land. It recognizes "the importance of the family farm to the economic and moral stability of the state," and that the "existence of the family farm is threatened by conglomerates in farming." SDCL 47-9A-1. Family farms and "authorized small farm corporations"[2] are exempt.

The 1974 statutes concern cultivation of land. In 1988, these statutes were amended to address confined hog operations. SDCL 47-9A-13.1. This amendment applies only to corporations that bred, farrowed, and raised swine. SDCL 47-9A-13.1; Attorney General Memorandum Opinion 89-05. Swine operations that do not engage in breeding are exempt from the 1974 Act. SDCL 47-9A-13.1. Other types of corporate livestock feeding operations are not restricted by the Family Farm Act. SDCL 47-9A-11.

Since the 1970s, agricultural and livestock ventures have increasingly changed from traditional agricultural business structures (single proprietorship

1. This is not unique. Other corporate farming statutes include Iowa Code. Ann. § 172C.4; Kan. Stat. Ann. § 17-5904; Minn. Stat. Ann. § 500.24(1)(c); Mo. Ann. Stat. § 350.015; N.D. Cent. Code § 10-06-01; Wis. Stat. Ann. § 182.001(1)(a).

2. Corporations with less than ten shareholders and whose revenues from rent, royalties, dividends, interest, and annuities do not exceed twenty percent of their gross receipts. SDCL 47-9A-14.

and partnerships) to business structures such as limited liability corporations and other types of corporations. App. 8-11. Between 1978 and 1997, the number of farm corporations in South Dakota increased from 776 to 1298. App 9. While the number of corporations grew the number of farmers declined. The number of farm operators (by principal occupation) in South Dakota fell from around 36,821 in 1974 to approximately 22,704 in 1997. App. 11.

Although the 1974 Family Farm Act was designed to protect family farming, it did not stem the trend toward larger corporate farms and fewer family farms. As addressed later in this brief, corporate farming causes adverse sociological impacts on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have independent markets for their products.

This problem was also of concern to the federal government. The USDA studied this issue in 1981 and issued a report known as A Time to Choose: Summary Report on the Structure of Agriculture. Exh. 311. A second study seventeen years later in 1998 reported:

When Secretary Bergland's report, A Time to Choose was published, it warned that ". . . unless present policies and programs are changed so that they counter, instead of reinforce or accelerate the trends toward ever-larger farming operations, the results will be a few large farms controlling production in only a few years."

Looking back now nearly two decades later, it is evident that this warning was not heeded, but instead, policy choices made since then perpetrated the structural bias toward greater concentration of assets and wealth in fewer and larger farms and fewer and larger agribusiness firms.

A Time to Act, Exh. 312 (also published at www.reeusda.gov/smallfarm/report.htm).

In the meantime, in 1982, the Nebraska Constitution was amended (by initiated measure) to include corporate farming restrictions designed to protect family farms. *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332-33, *cert. denied*, 502 U.S. 814 (1991). This measure was "intended to address the social and economic evils perceived as related to corporate farming." *Id.*

Ultimately in 1998, Amendment E was placed on the ballot in South Dakota. Like the Nebraska measure, it was designed to amend the State Constitution. Like the Nebraska measure, it generally bars both corporate ownership of farmland, as well as corporate livestock feeding operations. Amendment E passed and became effective on November 16, 1998. It is now included in the South Dakota Constitution as Article XVII, Sections 21-24.

SUMMARY OF ARGUMENTS

The district court erred in finding that utility easements are an "interest" in "land used for farming" within the meaning of Amendment E. This is a matter of state law construction. Under South Dakota law, utility easements are limited

to the use for utility purposes and are not a general interest in land used for any other purpose. Transmission line easements are not within the purview of Amendment E.

The district court further erred in finding that Amendment E violates the commerce clause when considered in light of Utilities' interest in land at Big Stone, South Dakota ("Big Stone"). Part of the Big Stone property is "grandfathered" under Amendment E. The rest is exempt from Amendment E because the involved project is likely to be developed during the five-year "window" for construction allowed in Amendment E.

Moreover, any effect on the Big Stone property is outweighed by the beneficial effect of protecting family farming. Corporate farming causes adverse sociological effects on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have independent markets for their products.

The district court also erred in several ways in holding that Amendment E violates the American Disabilities Act. First, although one party (SD Farm Bureau) originally made an ADA claim, it abandoned the claim and did not renew it at trial. Indeed, SD Farm Bureau lacked standing. Yet, Judge Kornmann sua sponte revived the claim after trial. This is reversible error.

Further, Judge Kornmann expanded the ADA claim to include other parties (retired CPA Holben and retired lawyer Brost) who had presented minimal evidence on heart disease on other claims (equal protection and commerce clause). Brost and Holben have never, to this day, made an ADA claim. The claim has been waived or abandoned by all parties. Also, evidence that a retired CPA and a retired lawyer cannot perform strenuous ranching activities is not sufficient to show that they suffer substantial limitations on life activity and are "qualified individuals with a disability" within the meaning of the ADA. Further, these family-held corporations would be exempt from Amendment E if a family member resides on a ranch.

Finally, the district court erred in holding that Amendment E does not apply to cooperatives. Amendment E was designed to bar risk-shielding business structures from farming in South Dakota, and cooperatives are a form of a risk-shielding business structure. Further, Amendment E specifically applies to corporations. Cooperatives are a form of corporation and must be analyzed like any other corporation under Amendment E.

ARGUMENTS AND AUTHORITIES

I. ARTICLE XVII, SECTIONS 21-24 OF THE SOUTH DAKOTA CONSTITUTION DOES NOT APPLY TO ELECTRIC TRANSMISSION LINE EASEMENTS.

Judge Kornmann held that Article XVII, Section 21 of the South Dakota Constitution (Amendment E) bars Utilities from purchasing new easements for

transmission lines.

A. Standard of Review.

This issue involves whether, under state property law, utility easements crossing agricultural land are "interests in land used for farming" within the meaning of the State Constitution.

This question involves neither a federal statute nor an issue of federal constitutional dimension. Rather it involves an interpretation of South Dakota property law pertaining to easements and the South Dakota Constitution. Because matters of state law are involved, the district court is to defer to the construction given by the highest court of the state. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Becker v. Lockhart*, 971 F.2d 172, 174 (8th Cir. 1992). Here, the state court has opined on the scope and extent of utility easements, and deference should be afforded in that regard. *Knight v. Madison*, 2001 S.D. 120, 634 N.W.2d 540, 542; *Musch v. H-D Electric Cooperative, Inc.*, 460 N.W.2d 149 (S.D. 1990).

The further question is whether such utility easements, as defined by South Dakota law, are "interests in land used for farming" within the meaning of the South Dakota Constitution. The state supreme court has not ruled on this precise question. The district court was therefore required to "predict" as best it could, how the state's highest court would rule. *Brandenburg v. Allstate Ins. Co.*, 23 F.3d 1438, 1440 (8th Cir. 1994).

The appellate standard of review is de novo. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991); *Brandenburg*, 23 F.3d at 1440.

B. Utility Easements Are Not Prohibited by the Corporate Farming Laws.

Article XVII, Section 21 bars corporations and syndicates from holding "an interest whether legal, beneficial, or otherwise, in any real estate *used for farming* in this state." (Emphasis added.) Section 21 is silent as to utility easements. There is good reason: the easements obtained by Utilities are not used for farming.

Under South Dakota property law, an easement is "an interest in the land in the possession of another which entitles the owner of such interest to a *limited use or enjoyment of the land* in which the interest exists." *Knight*, 2001 S.D. 120, ¶ 4, 634 N.W.2d at 542 (emphasis added). SDCL 43-13-5 provides that, "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Neither the physical size nor the purpose or use to which an easement may be used can be expanded or enlarged beyond the terms of the grant of the easement. *Knight*, 634 N.W.2d at 542.

The South Dakota Supreme Court specifically examined the scope of utility easements in *Musch*. The court recognized that the easement is limited to the use specified in the grant, and the remaining rights to use the land lie with the grantor. 460 N.W.2d at 154. Under *Musch*, utility easements are a legal interest limited to the use specified by their easement: the placement of utility poles and

wires.

The easements in question here are consistent in scope. Utilities submitted exhibits showing that the purpose of the easements are for electrical power cables (Exh. 90) and for overhead or underground electric lines (Exh. 88). App. 1-2, 5-6. In both cases, the *grantor* of the easements reserved the right to cultivate the land not providing support for the utility line. Article XVII, Section 21 does not bar corporations from acquiring utility easements, as Utilities do not have an interest in land used for farming. The corporate farming laws do not apply to them.

II. PLAINTIFFS HAVE NOT ESTABLISHED THAT ARTICLE XVII, SECTIONS 21-24 OF THE SOUTH DAKOTA CONSTITUTION IS UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE.

Judge Kornmann held that Amendment E is unconstitutional as applied to the Utilities. In large part, he was concerned with the transmission line easements. App. 252-53, 265-67. As set forth in Issue I, Amendment E does not apply to utility easements at all. The only other utility interest involved the Big Stone property. As described below, that situation does not merit a determination that Amendment E is unconstitutional.

A. The Big Stone Issue Does Not Require Constitutional Review.

There are two parcels of Big Stone property involved. First, Utilities own 552 acres adjacent to the Big Stone Power Plant in northeast South Dakota. It was leased to farmers previous to 1998 and continues to be leased to them. All parties acknowledge (and Judge Kornmann found) that this property is exempt under Section 22(4) of Amendment E. App. 265. This clause allows the Utilities (who own the land under a tenancy in common) to continue to own this land and lease it to farmers so long as the ownership interests of the tenancy in common are not altered. App. 252, 253.

The same tenancy in common also owns the nearby power plant. The Utilities may need to change the ownership percentages of the power plant in the future. T 286. Accordingly, the Utilities claim that if the percentages of ownership within the tenancy in common change, then "it would destroy the grandfather which Amendment E offers." T 286. State Defendants submit that even if the *industrial* plant is operated by a different configuration of tenants in common *in the future*, there is no requirement that such new group would be required to own the farmland or farm the *nearby land.* T 304. Indeed, Utilities acknowledge that they could continue to maintain the tenancy in common under its current configuration for the 552 acres of land regardless of any change in corporate structure for operating the nearby power plant.[3] T 304.

3. In *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 127 (1978), the Court held that the commerce clause does not protect "the particular structure of methods of operation" for businesses. Instead, it protects interstate firms from prohibitive or burdensome regulations. 437 U.S. at 127, 128. Moreover, the commerce clause does not immunize corporations from regulation. *Id.*

Even though this property is currently farmed (pursuant to the grandfather exemption), the Utilities are holding it for future development, for ash disposal, and for a buffer zone for the plant. T 299. These purposes would exist even if the land were not used for farming. Due to its proximity to a rail line and good water supply, various industrial projects have been proposed in the past at this location. These projects have included an ethanol plant and a processing plant called ProGold. T 299. Some land is currently leased to an ethanol plant. T 300. The land is well adapted for industrial use. There is little reason to expect this 552 acres would ever be sold as farm property and invoke the corporate farming laws. Hence, the constitutional question need not be addressed. *United States v. Thomas*, 198 F.3d 1063, 1065 (8th Cir. 1999) (if the issue is so premature that court would have to speculate as to real injury, the court should not address constitutional questions).

At trial, the Utilities raised a second Big Stone claim. They recently purchased additional farmland for a new plant near the existing plant. T 283. They intend to turn this land over to the new owners of Big Stone II, a group not yet formed. T 288, 289. They have also purchased an option on additional land for the cooling pond for this project. T 287, 306. None of this additional property would be grandfathered under Amendment E. For these lands, the Big Stone Partners must comply with Section 22(10), which permits a corporation purchasing agricultural land for development purposes to rent the land (to a family farmer) for no more than five years. The Utilities cannot use the land for agricultural production after the five years and would have to sell the land or let it lie idle pending development.

Construction of the existing plant took only five years. T 301. At trial, the plant manager estimated that construction of Big Stone II may be complete as early as 2007. T 304. Construction itself would take as many as four construction seasons and begin within the five-year period. T 304, 305. The actual land on which construction occurs cannot physically be farmed during construction. T 302. A constitutional requirement that the farmland must be taken out of production after five years would not be burdensome if the land is already taken out of production while the plant is being constructed.

The constitutionality of Amendment E need not be addressed with respect to this property that will soon be dedicated to industrial use. The Utilities have not shown that they will be harmed. To find otherwise would be to engage in speculation regarding regulatory approval and construction delay. The Court should refuse to engage in such premature debate. *Thomas*, 198 F.3d at 1065.

B. Standard of Review.[4]

Plaintiffs' burden on a constitutional claim is to demonstrate beyond a reasonable doubt that the challenged law is unconstitutional. *Equipment*

4. As seen, Utilities have not established that the facts regarding the Big Stone property merit constitutional review. However, assuming for the sake of argument that such review is merited, Amendment E survives constitutional scrutiny.

Manufacturers Institute, et al. v. Janklow, et al., No. 01-2062, slip op. at 28 (8th Cir. Aug. 6, 2002); *Knowles v. United States*, 829 F. Supp. 1147 (D.S.D. 1993), *aff'd in part*, 29 F.3d 1261 (8th Cir. 1994), *rev'd in part*, 91 F.3d 1147 (8th Cir. 1996).

The appellate standard for reviewing the district court's conclusions of law on this issue is "de novo." *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001).

C. Commerce Clause Framework.

The states retain authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980); *Maine v. Taylor*, 477 U.S. 131, 138 (1986). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 126 (1978). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (rejecting a claim of discrimination because the challenged statute "'regulates evenhandedly' . . . without regard to whether the [commerce came] from outside the State").

"For purposes of the dormant Commerce Clause, 'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000); *Oregon Waste Systems, Inc. v. Dep't of Env. Quality of Ore.*, 511 U.S. 93, 99 (1994).

Discrimination may take one of three forms. The law may be (a) discriminatory on its face, (b) may have a discriminatory purpose, or (c) may have a discriminatory effect. *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995); *U&I Sanitation*, 205 F.3d at 1067. If a state regulation is discriminatory in one of these ways, it will be subjected to one of two dormant commerce clause tests, depending on the discriminatory nature of the statute.

One test applies if a law regulates evenhandedly and has only incidental effects on, and does not overtly discriminate against, interstate commerce. *Hampton Feedlot*, 249 F.3d at 818. Under this test, the law will be stricken only if the incidental effects it imposes upon interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

If the law overtly discriminates against interstate commerce, the second test applies: It will be struck down unless the state can demonstrate "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Hampton Feedlot*, 249 F.3d at 818; *U&I Sanitation*, 205 F.3d at 1067.

Under this strict scrutiny test, the State bears the burden of justifying the interstate discrimination or burden by showing that: (1) local benefits flow from the challenged law, and (2) nondiscriminatory alternatives, adequate to preserve

the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). It is considered a persuasive or overriding basis for validity when the state legitimately seeks to further a *police power objective* rather than when merely economic interests are at stake. *Carbone*, 511 U.S. at 405-6 (concurrence); *U&I Sanitation*, 205 F.3d at 1070.

D. Amendment E Is Not Facially Discriminatory and Does Not Discriminate Against Interstate Commerce in Purpose or Effect.

Section 21 of Article XVII (Amendment E) applies to all corporations and limited liability syndicates doing business in South Dakota; it prohibits all corporations and syndicates from owning real estate used for farming or from engaging in farming. It clearly applies both to in-state and out-of-state corporations and syndicates. On its face, Amendment E thus regulates evenhandedly.

Amendment E does not establish preferential treatment in favor of in-state businesses or discriminating against out-of-state entities. Neither Utilities nor any other Plaintiff presented evidence to this effect. Plaintiff Northwestern Public Service has its principal place of business in Sioux Falls, and its service area is in South Dakota. App. 4, Exh. 89. Otter Tail and Montana-Dakota Utilities are located in South Dakota and other states. Yet, all three Utilities claim to be affected in the same way.

The testimony of other plaintiffs is also telling. Plaintiff SD Farm Bureau's witness stated that Amendment E "actually hurts South Dakota farmers rather than protects them against out-of-state competition." T 38. Although Plaintiff Brost attempted to assert that Amendment E provides differential treatment, he admitted that he is "not claiming that Amendment E benefits South Dakota farmers to the detriment of out-of-state farmers" from a "profit-making perspective." T 100.

In-state economic hardship does not violate the commerce clause. In *Hampton Feedlot*, 249 F.3d at 820-21, the Court stated:

The Missouri Legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harm and benefits to all stakeholders in creating its price discrimination law. In the event that the implemented statute adversely affects Missouri farmers or consumers, appellees are free to petition the legislature to amend or repeal the statute. Appellees have asked us to strike Missouri's statute because it burdens interstate commerce, but they have failed to show how the measure has this unconstitutional effect. Economic hardship experienced by Missouri feedlots does not rise to the level of a dormant commerce clause violation.

Another facet of the discrimination determination is whether the purpose of Amendment E is to economically protect in-state businesses to the detriment of

out-of-state businesses. It clearly is not. Amendment E's purpose, as most clearly expressed in the "Pro-Con Statement" and as determined by a South Dakota circuit court, *see supra*, is to protect family farms and the environment and to maintain the rural way of life. It is thus not designed for economic protection of in-state businesses, neither helping in-state syndicates nor placing additional burdens on out-of-state syndicates.

At trial Plaintiffs argued that the drafters of Amendment E were motivated by economic protectionism or other discriminatory purpose, based upon Plaintiffs' characterization of the drafters' purpose and intent. Judge Kornmann properly rejected that argument, finding as a matter of fact that the drafters' motives were proper. *See also* Pro-Con Statement (Exh. 19), governmental documents (Exhs. 501, 502), and academic research (Exhs. 314, T 232-42, 802-63).

Amendment E is neither an economic protectionist measure nor was it enacted for other discriminatory purposes. Therefore, Amendment E regulates evenhandedly with only incidental effects on interstate commerce. The test to be applied is whether the local benefits of Amendment E are outweighed by its burdens on interstate commerce: the *Pike* test.

E. The Burden Imposed By Amendment E Upon Interstate Commerce Is Not Excessive in Relation to Its Local Benefits.

Under the Pike test, the law will be stricken only if the incidental effects it imposes upon interstate commerce are "clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

Judge Kornmann found that the burden on Utilities outweighed the local benefits. His analysis considered both the transmission line issue and the Big Stone issue together, although it appears to be premised largely on the transmission line issue. It is unclear whether Judge Kornmann would have found Amendment E constitutional or unconstitutional on the Big Stone issue alone.[5] App. 265-67. Judge Kornmann did find that the Big Stone property leased to local farmers generates income of fifteen to twenty thousand dollars annually. He did not separate which Big Stone lands are "grandfathered" and which lands are being held for development. App. 265.

Assuming, for sake of argument, that Judge Kornmann correctly found that the harm arising to the Utilities from Amendment E was fifteen to twenty thousand dollars, that sum is the "burden" that must be examined for commerce clause purposes.[6] That monetary burden would be weighed against the putative local benefits.

Legislation that promotes or protects South Dakota agriculture is a valid local benefit and a reasonable exercise of police power under South Dakota law.

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5. As described above, the transmission lines are not barred by Amendment E and should not factor into this analysis at all.

6. This sum is used for commerce clause argument only. State Defendants do not acknowledge that Utilities are damaged in this amount.

In re Request for an Advisory Opinion, 387 N.W.2d 239, 243 (S.D. 1986).

Measures to promote and protect a state's major industry are within a state's police powers. "[I]t cannot be reasonably contended that the protection and promotion of [South Dakota's agriculture economy] is not a matter of public concern or that the Legislature may not determine within reasonable bounds what is necessary for the protection and expedient for promotion of that industry."

Id. (citations omitted).

This finding is consistent with cases where corporate ownership of farmland has been considered. *Asbury Hospital v. Cass*, 326 U.S. 207 (1945) (barring all corporations (except cooperatives) from owning farmland is an appropriate legislative application of a state policy against the concentration of farming lands in corporate ownership); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988) (protecting the welfare of citizens in the traditional farm community is a legitimate state interest); *MSM Farms*, 927 F.2d at 333 (retaining and promoting family farm operations and preventing unrestricted corporate ownership is a legitimate state interest).

Similarly, this Court recently upheld a Missouri livestock pricing statute against a commerce clause challenge recognizing that the statute was designed to "preserve the family farm and Missouri's rural economy." *Hampton Feedlot*, 249 F.3d at 820. As this Court recognized in *MSM Farms* and in *Hampton Feedlot*, the protection of the family farm and the rural way of life are legitimate local benefits.

At trial, expert sociologists testified regarding this issue. Drs. Lobao and Heffernan used different approaches and demonstrated that two major types of corporate farming (industrialized farming and production contracting) caused detrimental effects in farm communities over the long term.

Dr. Lobao reviewed thirty-eight studies that are representative of the major sociological work regarding industrialized farming[7] and its effect on communities. T 455, 474. Dr. Lobao looked at studies that used four generally accepted sociological methodologies: case study designs, macro-social accounting designs, regional economic impact models, and surveys. T 457-59. The studies included federally funded studies (T 463), as well as various private studies. Over seventy-five percent of the studies showed that industrialized farming caused some detrimental effects on communities. T 496; Exh. 314, Table 1. These detrimental socioeconomic effects include income inequality and corresponding social disruption, crime rates, lack of education attainment, lower total community employment, and higher unemployment rates. T 475. Detrimental effects on the social fabric of the community include the decline in quality of local governance, reduced enjoyment of property, lack of civic participation, and social disruption. Exh. 314, at 16-17. Sociologists have also found that industrialized farming causes detrimental health effects. Exh. 314, at

7. Industrialized farming refers to farming where different groups of people are engaged in management of the operation beyond just a household situation. T 451.

16-17.

Secondly, Dr. Lobao testified regarding her own research on socioeconomic wellbeing in various communities. T 464. She compared small family, larger family, and industrialized farming. T 454. Dr. Lobao found that the middle-sized family owned and operated, locally controlled farms tended to be related to a higher quality of life in terms of socioeconomic well being. T 464. Although there was not a clear-cut detrimental impact on an immediate basis, she found a detrimental impact occurring over time, such as a ten-year period. T 465.

Dr. Heffernan testified regarding production contracting, a type of industrialized farming that is largely prohibited by Amendment E as it is practiced primarily by corporations. Production contracting is becoming more commonly used in the hog business, but has been in use in the broiler industry for decades. T 802. The experience in the broiler industry is useful to analyze the possibilities in the hog industry (or other livestock industries using production contracts in the future).

Dr. Heffernan testified regarding his case study of sociological effects of production contracting in one Louisiana parish over thirty years. T 803. In 1969, the parish was impoverished, and contract production had been in place for about ten years. T 806, 810. Contracts were issued by four companies (integrators) for terms long enough for the grower to pay off his capital investment (building, waste management system, water supply). T 810.

In 1981, the number of integrators had dropped to two. T 813. Contracts were offered only for seven or eight weeks (the time to feed a batch of broilers) rather than a period of years. T 814. Growers had done well economically during the period from 1969 to 1981, but were still in debt for the broiler buildings. T 815-16.

By 1999, there was one integrator. T 818. The number of independent family farmers had decreased dramatically over the thirty years, and the number of contract growers had doubled. T 818. The contracts remained at a term of seven weeks, but there was an inconsistent supply of broilers for the growers to feed. T 820. Integrators were able to vary the supply of broilers to meet market needs; growers sat with buildings empty and a continuing debt load. T 820.

By 1999, this parish had the highest farm sales of any parish in the state, yet was still a persistent poverty county. T 824. Growers had made capital expenditures for the buildings, but were unable to build collateral. T 826. The integrators often required the growers to make additional improvements. T 826. The growers never built up equity in the stock. Yet, the growers still had to bear the cost of livestock death loss when contract payments were made. T 827.

Poultry growers now have no opportunity to become independent producers in Louisiana or anywhere else in the country. Due to the rise in production contracting, the large corporations own ninety-five to ninety-eight percent of the broilers at all stages of production and manufacturing. T 827. They do not buy broilers on the market, and there is no independent market for broilers. As

Dr. Heffernan stated, the "bird never sells." T 827.[8]

Poultry production in Louisiana is not an isolated example of the asymmetrical position between the growers and integrators in production contract situations. *See, e.g., Crowell v. Campbell Soup Company*, 264 F.3d 756 (8th Cir. 2001) (broilers in Minnesota) and *Seegers v. Pioneer Hi-Bred International, Inc.*, 997 F. Supp. 1124 (N.D. Ind. 1998) (seed corn in Indiana).

Dr. Heffernan also testified regarding concentration among processors in the food system. T 831. Because of increasing concentration, farmers have fewer options to sell their product. T 832. It is undeniable that the corporate farming issue and continuing concentration is an area of intense concern. *See* USDA Reports "A Time to Act" And "A Time to Choose." Exhs. 311, 312.

Amendment E addresses these socioeconomic and market concentration issues by prohibiting corporate entities from farming unless they are closely tied (by residence or routine labor) to the farm itself. This ensures that farm owners are involved in the farm operation themselves, more like a traditional family farmer than a corporate CEO who, in the days of Enron, cannot be presumed to act to the benefit of the farm (or indeed, corporate stockholders). It prevents corporations from conducting farming by having their animals raised by others under production contracts. By controlling these problems, Amendment E protects the socioeconomic structure of rural life and traditional family-farm based agriculture.

Therefore, even if it is assumed that Amendment E has incidental effects on interstate commerce, Amendment E does not burden interstate commerce in excess in relation to its local benefits of protecting family farms. As such, under *Pike*, 397 U.S. 137, Amendment E does not violate the commerce clause.

F. *In the Alternative, Amendment E Also Satisfies the Second Commerce Clause Test.*

If the Court determines that Amendment E does discriminate against or burden interstate commerce, it still satisfies the "strict scrutiny" test. The legitimate local purpose served by Amendment E, described above, is the protection of the family farm and rural way of life.

Nondiscriminatory alternatives to Amendment E were attempted by the State; these failed to provide adequate protection for family farms. SDCL ch. 47-9A, which restricts corporate farming activities, has been in effect since 1974 and has not stemmed the trend toward larger corporate farms and fewer family farms. Other alternatives, such as restricting the size of farms, affect interstate commerce in the same manner as Amendment E; they would apply to both in-state and out-of-state corporations and syndicates just as does Amendment E. Legislation or constitutional amendments which prohibit vertical integration by corporations and syndicates would, in effect, act almost entirely

8. While there is an opportunity for direct neighborhood sales (such as the sales by Hutterite Colonies in South Dakota) or niche markets, those enterprises represent as little as two percent of the broiler market nationwide. The Hutterite Colonies, for example, process the broilers themselves and sell the broilers in local communities.

on out-of-state businesses, as in South Dakota it is out-of-state businesses that have the capital and power to vertically integrate. Such legislation would burden interstate commerce far more than does Amendment E, and may indeed be viewed as per se economic protectionism.

Another alternative would be an "excess land tax," whereby corporate farms would be required to pay more property tax than smaller farms. This alternative may make the cost of doing business higher for corporations, but would not address the problem of consolidation of farms, declining numbers of family farmers, and adverse changes in communities.

Thus, Defendants submit that no alternatives exist that would accomplish the goals involved here and that would have less of an impact on interstate commerce than does Amendment E. Even under the strict scrutiny test, Amendment E does not violate the commerce clause.

III. PLAINTIFFS HAVE NOT ESTABLISHED THAT ARTICLE XVII, SECTION 22(1) VIOLATES ARTICLE II OF THE AMERICANS WITH DISABILITIES ACT.

Judge Kornmann erred in ruling, sua sponte, that Amendment E violates the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

A. Standard of Review.

This issue addresses several errors pertaining to the ADA question. The standard of review will be referenced at the beginning of each of these areas.

B. Sua Sponte Consideration of Abandoned Claim.

The appropriate standard of review is "de novo" because it involves consideration of whether legal claims may be considered "sua sponte" on a post-trial basis.

The only ADA claim ever filed by a Plaintiff in this case was made by SD Farm Bureau. App. 39-40. The State Defendants moved to dismiss, asserting that SD Farm Bureau lacked standing to assert that claim, and that the Eleventh Amendment barred suit. *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (ADA is not a valid abrogation of Eleventh Amendment immunity). At hearing on January 18, 2000, the court orally dismissed the ADA claim on the basis of *Alsbrook*. MHT 6.

In February 2000, Plaintiffs sought permission to file an Amended Complaint. App. 119-22. They sought to delete the ADA claim to "reflect the court's rulings on January 18, 2000." App. 121. The district court's written ruling on the subject was filed six months later in September 2000. App. 140, 141. Although the district court's oral ruling and its written opinion dismissed the claim, it did not require the claim to be stricken from the Complaint.

Plaintiffs filed a trial brief thirty days before trial and never mentioned the ADA claim. Likewise, no ADA issues whatsoever were raised at trial. When a

pretrial motion excludes evidence on a particular issue, the issue must be raised again at trial to preserve the record. *Keeper v. King*, 130 F.3d 1309, 1315 (8th Cir. 1997). The issue was abandoned in the Amended Complaint, was not tried, and was waived.

Yet, a week after trial the district court issued a *post-trial* Memorandum indicating that the court might reconsider its previous decision due to the recent decision in *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001).

The *Grey* decision had been filed on November 6, 2001. It held that ADA claims may be brought against state officers for prospective injunctive relief, notwithstanding the Eleventh Amendment. In so holding, *Grey* reiterated this Court's decision in *Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001). *Randolph* was issued in July 2001. Had Plaintiffs brought the *Randolph* decision to the district court's attention in July 2001 (or even brought up the *Grey* decision in November 2001), there might still have been time for discovery before trial. As it was, Plaintiffs never brought the issue up at all. Indeed, Plaintiffs' post-trial brief (filed after the court's post-trial memorandum) did not address this issue at all.[9]

Although Judge Kornmann found that the issue was raised in an offer of proof during trial, Plaintiffs simply made no such offer. The rationale for an offer of proof is twofold. One reason is to provide the appellate court with a record. *Kline v. City of Kansas City*, 175 F.3d 660, 665 (8th Cir. 1999). The second reason is to apprise the judge *and opposing counsel* of the evidence involved. *Id.* ("the offer of proof is to inform the [trial] court and opposing counsel of the substance of the excluded evidence, enabling them to take appropriate action").

Although no Plaintiff ever indicated that an offer of proof was being made, two Plaintiffs (who had never raised ADA claims) testified generally on their physical well-being for purposes of their equal protection and commerce clause claims. Plaintiffs Holben and Brost testified that they have chosen not to reside on their respective ranches and that they cannot engage in strenuous ranching activities. T 76, 259. However, Holben and Brost had claimed in their Complaint that Amendment E impaired their rights under the equal protection and commerce clauses.[10] The evidence of physical hardship was admissible under those constitutional claims.

Where a party is making an offer of proof, that party must articulate that an offer of proof is being made and explain the various uses for the evidence. *New York v. Microsoft*, ___ F. Supp. 2d ___, 2002 WL 1311434 (D.D.C. May 29, 2002); *Clausen v. Sea-3*, 21 F.3d 1181, 1194 (1st Cir. 1994). Plaintiffs failed to do so. Because Holben and Brost had <u>never</u> raised the ADA issue, the State Defendants had no reason to object and did not cross-examine on ADA issues

9. Even if Plaintiffs had made the argument on a post-trial basis, the issue would have been waived. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722, 723 (10th Cir. 1993). The fact that the issue was raised sua sponte should not salvage the issue when it was never tried.

10. *To date, neither of these Plaintiffs have asked for relief under the ADA.*

such as the extent of the disability, and whether the disability was a "substantial impairment" within the meaning of the ADA. An offer of proof that is accepted and denies opposing counsel the ability to cross-examine is improper. *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Comm'n*, 665 F.2d 1210, 1216 (D.C. Cir. 1981). Indeed, had there been *any* indication that the Holben and Brost evidence would be used to support the ADA theory, the State Defendants would have objected. Since there was no indication that this unpled issue was being introduced at trial, the State Defendants certainly did not consent to bringing it up. Where evidence is not recognizable as an independent issue, failure to object cannot be construed as consent to try the issue. *Portis v. First National Bank of New Albany*, 34 F.3d 325, 331 (5th Cir. 1994). The issue was not tried and Judge Kornmann erred.

C. Standing.

The standard of review on this standing argument is "de novo." *Steger v. Franco*, 228 F.3d 889, 892 (8th Cir. 2000).

As stated, the only ADA claim ever filed in this case was made in the initial Complaint by SD Farm Bureau. The State Defendants raised the question of SD Farm Bureau's standing in a pretrial motion. App. 44. Judge Kornmann did not rule on the standing issue due to his Eleventh Amendment ruling. After the trial he held that the Eleventh Amendment did not bar suit, so he considered the ADA claim and the standing issue. He held that SD Farm Bureau had standing to raise the ADA claim:

There is no evidence in the record to support associational standing as to the ADA claims by Farm Bureau, perhaps because of the erroneous previous ruling by the court. Farm Bureau, however, like the Farmers Union broadly represents farmer members' interests before legislative and other bodies on a routine basis. The court takes judicial notice of this. Representing the claims of presently "disabled farmers" who are members of Farm Bureau and farmer members yet to be disabled may be something of a "stretch" but the court will allow associational standing.

App. 259, 260.

The State Defendants submit that allowing associational standing is more than a stretch, it is reversible error. App. 39-40.

As Judge Kornmann recognized, there was no evidence in the record to support associational standing. SD Farm Bureau, in the original Complaint, alleged that it is "an independent, non-governmental federation made up of 47 County Farm Bureaus," and "represents the interests of more than 10,000 voluntary member farm, ranch, and rural families in the State of South Dakota." Complaint, ¶ 32; T 19. SD Farm Bureau was "founded to protect, promote, and improve the political, social, economic, and personal status of South Dakota farm, ranch, and rural families." Complaint, ¶ 33. It meets the needs of its members through "the provision of beneficial services." Complaint, ¶ 34. According to the initial Complaint (but not in the Amended Complaint), SD

Farm Bureau includes members "who are or may become disabled." Complaint, ¶ 127.

At trial, SD Farm Bureau called its administrative director, Mike Held, as a witness. He testified generally about SD Farm Bureau's concerns with Amendment E, did not mention the ADA, or the protection of impaired persons in any manner. T 23-36. Judge Kornmann recognized the standing problem and tried to overcome it by taking judicial notice that SD Farm Bureau is a general farm advocate. The test is, however, much more restrictive. Organizations whose own legal rights and interests have not been injured have standing to seek redress on behalf of their members only under certain circumstances. *Kessler Inst. For Rehab. v. Essex Fells Mayor*, 876 F. Supp. 641 (D.N.J. 1995). The Supreme Court has set out the test for organizational or associational standing as:

an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343; *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 470 (8th Cir. 1985).

The first prong of the *Hunt* test mandates that the association's members have standing to sue in their own right. SD Farm Bureau has not alleged that any of its members are "qualified individuals with a disability" as required by the applicable ADA provision, 42 U.S.C. § 12132. App. 160-62. This definition

requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." Sec. 12102(2). *Thus whether a person has a disability under the ADA is an individualized inquiry.*

Sutton, et al. v. United Air Lines, Inc., 527 U.S. 471, 483 (1999). Specific facts must be asserted in the complaint if a plaintiff is bringing a claim asserting that the defendants regard their disability as substantially limiting their ability to work. *Sutton*, 527 U.S. at 483.

Further, a limit on *one* type of job (such as farming, in the case here at issue) is not a "substantially limiting impairment" under the ADA. *Sutton*, 527 U.S. at 491. Moreover, ADA claims must demonstrate that the disabled claimants are injured by the challenged law, policy, or government act. *Steger*, 228 F.3d at 893 (blind persons not "among the injured" when they have never entered the building where non-compliant facilities exist).

Thus, more than a bare allegation of a disability that might exist (Complaint, ¶ 127 and no allegation at all in the Amended Complaint, App. 160-62) is necessary in order to state a claim for relief under the ADA. The judicial notice taken that SD Farm Bureau lobbies on behalf of all of its members does not cure the problem. In order to support an ADA claim, more fact-specific information is clearly required. Neither the Complaint nor any evidence at trial make the necessary allegations to demonstrate that SD Farm Bureau has standing

to sue under the ADA. The first prong of the *Hunt* test has not been met.

The third prong of *Hunt* generally provides that participation of individual members in the lawsuit is not necessary to maintain associational standing. However, a claim brought under the ADA necessarily requires participation by individual members because ADA claims are individualized. *Sutton*, 527 U.S. at 483. *See Kessler*, 876 F. Supp. at 653 (entity which *serves* the disabled is not *disabled* as contemplated by 42 U.S.C. § 12132 and, therefore, subchapter II of the ADA confers no substantive rights upon it to provide a basis for standing). The SD Farm Bureau does not have standing to bring this ADA claim.

Consequently, SD Farm Bureau cannot:

shoehorn an unknown number of supposed, but unknown, victims into their cause of action by the mechanism of associational standing. *See, e.g., Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 426 (8th Cir. 1985) ("[a]ssociational standing is properly denied where, as here, the need for 'individualized proof,' [citation to *Hunt* omitted], so pervades the claim that the furtherance of the members' interests required individual representation").

Concerned Parents to Save Dresher Park Center v. City of West Palm Beach, 884 F. Supp. 487, 489 (S.D. Fla. 1994) (action filed against city for alleged violations of Title II of the ADA). *See also Jeanine B. By Blondis v. Thompson*, 877 F. Supp. 1268, 1286 (E.D. Wis. 1995). ("The plaintiffs have failed to state claims under the ADA . . . because they have not sufficiently alleged that any of the individual plaintiffs are disabled as defined under those acts. The failure to so allege is fatal to the complaint's claims against the State defendants. . . .")

Judge Kornmann relied on *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997). In that case, however, the court specifically noted that the city did not challenge the plaintiff's standing. *Innovative Health*, 117 F.3d at 46. Further, in *Innovative Health*, the plaintiff was a drug and alcohol rehabilitation center offering services to disabled persons. It involved the revocation of a building permit for a facility to serve disabled persons. That situation constituted a specific injury to the association itself because it actually ran the rehabilitation center. SD Farm Bureau never alleged that it provides disability-related services that are impacted by Amendment E.

D. The ADA Was Not Violated in Light of the Evidence in this Case.

The ADA has four titles, of which only Title II applies to state government. Title II states:

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such public entity.

42 U.S.C. § 12132. Thus, in order to raise a claim under 42 U.S.C. § 12132, the Plaintiffs must meet the definition of a "qualified individual with a disability." This definition appears at 42 U.S.C. § 12102(2) as:

(A)A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B)A record of such an impairment; or

(C)Being regarded as having such an impairment.

Judge Kornmann held that because Plaintiff Brost (a retired lawyer and government executive) and Plaintiff Holben (a retired CPA) suffer from heart disease, they are disabled. The evidence simply does not merit this result.

In some cases, heart disease does constitute a physical impairment under the ADA. *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1227 (11th Cir. 1999). Physical limitations due to heart conditions are not, however, a per se disability covered by the ADA. *Weber v. Strippit*, 186 F.3d 907, 914 (8th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 974 (2000). Moderate limitations on major life activities caused by some restrictions on physical labor do not constitute a "disability." *Id.* at 914.

Under the ADA, the physical impairment must substantially limit one or more of the individual's major life activities.[11] *Id.*; 42 U.S.C. 12102(2); 29 C.F.R. 1630.2(j); *Strippit*, 186 F.3d at 913. Major life activities include, for example, eating, breathing, walking, and working. A limit on one type of job is not a "substantially limiting impairment" on a "major life activity" as contemplated by the ADA. *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000). Instead, the claimant must demonstrate the inability to work in a broad range of jobs. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, ___ U.S. ___, 122 S.Ct. 681 (2002); *Sutton*, 527 U.S. 471; *Fjellstad v. Pizza Hut of America*, 188 F.3d 944, 949 (8th Cir. 1999).

Brost and Holben do not meet this criteria. There are several reasons. First, Plaintiff Brost participated in this lawsuit as an individual. His ranch was incorporated under Brost Land and Cattle, an entity not a party to this suit. T 62. Brost has standing only to pursue his own claims in this case. Because Brost Land and Cattle was not participating as a party in this suit, Brost lacks standing to advance claims on behalf of Brost Land and Cattle. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Any disability of Brost should not be imputed to the corporation in a lawsuit where the corporation is not even a party.

Further, Brost, as an individual, has not demonstrated that he has a substantially limiting impairment on the major life activity of working. He received a J.D. from the University of South Dakota School of Law in 1965 and practiced law until 2001. T 61, 68. He was a business, tax, and estate lawyer. T 72.

Brost still wishes to maintain this corporation and has a "desire to remain in the cattle business and the ranching business because I'm plum [sic] able to do that and participate at the level that I was before this event [heart surgery] occurred." T 66. He is on the ranch twice a week during the growing season. T 105. He is still capable of making financial investments, making decisions on

11. State Defendants were denied the opportunity to cross-examine on this issue since the ADA claim was not raised at trial.

crop planting, and livestock marketing. T 66. He has also been a state government executive. T 63. There is no indication that his heart disease has diminished his ability to use his communication skills, political contacts, or other executive skills. T 84, 85. According to his own direct testimony, Brost would be able to work in a range of jobs.

Brost did testify that he is unable to "do the daily and routine physical exertion" that would be required if his corporations were to qualify as family farm corporations within the meaning of Amendment E. T 76 (Article XVII, Section 22(1) requires that a family farm corporation must have a family member residing on the farm or engaged in day-to-day labor and management of the farm). Brost testified that the reason he cannot live on the ranch is that the hired men already occupy the homes. T 88. While he cannot engage in strenuous activity and is not in a position to live on the ranch, neither situation means that he is suffering from a substantial impairment within the meaning of the ADA.

Marston Holben is a CPA and worked in the accounting field starting in 1959. T 249. Holben is now retired. Spear H. Ranch, Inc. and Plaintiffs Holben and the Marston and Marion Holben Family Trust (through their operation of the Spear H. Ranch) are in compliance with Amendment E under the family farm exception in Section 22(1). Holben purchases steers for the corporation in the springtime, has them branded and vaccinated, and then pastures them on unimproved ranch property in western South Dakota. T 250-53. Once on the ranch, the cattle graze in the pasture for the summer. Day-to-day labor is not required. T 257. Holben oversees matters every week or two, sometimes two or three times a week. T 258. He rides herd and checks to make sure the steers are healthy. T 259. He and his wife completely manage the operation. T 258. To the extent heavy physical work is required, he hires the work done. T 259.

Amendment E does not require that a family member be present on a daily basis if the operation does not require that level of activity. The extent of labor and management required "depends in large part on the type of farm or ranch operation being conducted." *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420, 428 (2000) (interpreting Nebraska's similar requirement). It is undisputed that ranches like Holben's do not require daily chores. T 257. The activities of Marston Holben qualify Plaintiff Spear H. Ranch, Inc. under the family farm exception of Section 22(1).

In sum, Brost and Holben's evidence of heart disease was made in support of their equal protection and commerce clause claims. The ADA claim filed in the original Complaint was not made by these parties. Each testified generally that he had heart disease that limits (but does not bar) physical labor on ranches they own. T 58, 198, 255. However, neither Brost nor Holben established that the nature, duration, and long-term medical problems of their heart disease caused them to be substantially limited in a major life activity. Neither has claimed or demonstrated that he is within the class of disabled persons protected by the ADA.

For each of these reasons, the district court erred in holding that

Amendment E violated the ADA.

IV. ARTICLE XVII, SECTION 21 OF THE SOUTH DAKOTA CONSTITUTION APPLIES TO COOPERATIVES.

Judge Kornmann found that cooperatives are not subject to Amendment E.

A. Standard of Review.

Because this issue involves solely an interpretation of state law, the standard of review is "de novo." *See infra*, in Issue I.

B. Cooperatives Are Subject to Amendment E.

Although no cooperatives are parties in this suit, some of the Plaintiffs do business with cooperatives and claimed to be affected by the issue of whether cooperatives are barred by Amendment E. Judge Kornmann held that cooperatives are not included as one of the business enterprises included in Amendment E.

The issue of whether cooperatives are included in the Amendment E depends on state constitutional construction. South Dakota courts apply the general principles of statutory construction in interpreting constitutional sections. *Breck v. Janklow*, 2001 S.D. 28, 623 N.W.2d 449, 455; *In Re Request of Governor Janklow*, 2000 S.D. 106, ¶ 4, 615 N.W.2d 618, 620. State laws are to be "construed according to its manifest intent as derived from the statute as a whole, as well as other enactments relating to the same subject. Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies departure." *Moore v. Michelin Tire Company, Inc.*, 1999 S.D. 152, 603 N.W.2d 513, 518.

Importantly, the language of Section 21 broadly prohibits "*any corporation* organized under the laws of any state of the United States or any country" and "*syndicates*, *including* any limited partnership, limited liability partnership, business trust, or limited liability company organized under the law of any state." (Emphasis added.) It is significant that the term "including" was used after the term "syndicates" and before a list of specific types of business entities. The word "including" in this type of situation is not a limiting or all-embracing definition, but is "an illustrative application of the general principle." *Argo Oil Corp. v. Lathrop*, 72 N.W.2d 431, 434 (S.D. 1955). Indeed,

Where a statute contains a grant of power enumerating certain things which may be done and also a general grant of power which standing alone would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive.

Id. By using the term "corporation" and then listing various business entities as illustrations of the interpretation of "syndicates," it is apparent that Section 21 applies to all types of business entities where liability has been limited by statute.

Judge Kornmann failed to analyze whether cooperatives were risk-shielding entities within the ambit of Amendment E. He held that cooperatives were not included because cooperatives are inherently a different kind of enterprise than the entities listed in Article XVII, Section 21. The State Defendants submit, however, that cooperatives are the same as the various entities listed in Article XVII, Section 21 insofar as the critical determinative aspect is concerned: risk protection. For each of the entities specifically listed in Article XVII, Section 21, the stockholders or partners are shielded from the liability of the corporation. Cooperative members enjoy the same protection. SDCL 47-16-30 provides:

Except for debts lawfully contracted between the member and the cooperative, no member or patron is liable for the debts of the cooperative to an amount exceeding the sum remaining unpaid on his subscription for shares of the cooperative, and the sum unpaid on such members membership fees, if such fee is required by the cooperative.

This liability risk shield for cooperative members has been in place since 1965. Consequently, every cooperative entity formed since 1965 has insulated investors from the liability of the cooperative or corporation. Since the cooperative risk shield law was solidly in place many years before Amendment E, it is presumed to have been considered by the drafters. Courts assume that the "the legislature, in enacting a provision, had in mind previously enacted statu[t]es relating to the same subject." *Moore*, 603 N.W.2d at 518, 519.

Because Article XVII, Section 21 was designed to bar entities that insulate investors from liability, the prohibition necessarily applies to cooperative corporations like other corporations.

Cooperatives not only shield risk, but they also are actually *corporations*. Although Judge Kornmann found that some cooperatives are not corporations, entities calling themselves cooperatives must be incorporated in South Dakota. SDCL 47-15-41. No separate cooperative "associations" and the like can be formed in South Dakota.

Further, Judge Kornmann's decision fails to give effect to Article XVII, Section 22(2) which exempts certain types of cooperatives.

Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock;

A constitutional provision must be read giving full effect to all of its parts. *Breck*, 2001 S.D. 28, 623 N.W.2d at 454; *South Dakota Bd. of Regents v. Meierhenry*, 351 N.W.2d 450, 452 (S.D. 1984). "No wordage should be found to be surplus." *Kneip v. Herseth*, 87 S.D. 642, 659, 214 N.W.2d 93, 102 (1974). No provision can be left without meaning." *Id.*

If all cooperatives were generally exempt from Amendment E, as Judge Kornmann found, then the exemption for limited types of cooperatives would be mere surplusage. The State Defendants submit that this interpretation is erroneous because it is inconsistent with recognized constitutional construction.

In sum, cooperatives should be analyzed in the same way that other corporations or limited liability business enterprises would be analyzed. That fact that an entity is a cooperative is not an automatic "loophole" out of Amendment E.

CONCLUSION

Based on the foregoing arguments and authorities, the State Defendants respectfully request that the district court's Judgment be reversed.

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An Agricultural Law Research Article

Appellants' Opening Brief

by

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APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

This case concerns Article XVII, Sections 21-24 of the South Dakota Constitution. These provisions were adopted by initiated measure and became effective on November 16, 1998. These provisions have also been referred to as "Amendment E," a reference to their placement on the 1998 ballot. The amendments prohibit certain business structures from farming and owning farmland. S.D. Const. art. XVII, § 21.

Plaintiffs SD Farm Bureau, SD Sheep Growers, Haverhals Feedlot, Sjovall Feedyard, Brost, Tesch, Aeschlimann, Spear H. Ranch, and Holben filed their Complaint for Declaratory and Injunctive Relief on June 28, 1999. App. 12. Among the various claims, Plaintiffs asserted that Amendment E violated the dormant aspect of the federal commerce clause. App. 33-35. SD Farm Bureau also claimed that Amendment E was invalid under the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101, et seq. App. 39-40. In addition to the two named State Defendants involved in this appeal, the Complaint also named the State of South Dakota.

The State Defendants filed their Answer on July 28, 1999. On October 21, 1999, the State Defendants filed a Motion to Dismiss on the basis of sovereign immunity and the Eleventh Amendment. App. 43-45. In the alternative, Defendants sought to dismiss claims relating to the privileges and immunities clause and to the Americans With Disabilities Act. App. 44. Hearing was scheduled.

In the meantime, Dakota Rural Action and South Dakota Resources Coalition sought and received permission to intervene as Defendants. *South Dakota Farm Bureau, Inc., et al. v. Hazeltine, et al.*, 189 F.R.D. 560 (D.S.D. 1999).

Also, Plaintiffs filed their Motion Instanter to Join Parties and File First Amended Complaint. App. 83-87. Plaintiffs sought to add the Utilities as Plaintiffs. The proffered Amended Complaint did not add any new claims for relief, but added factual allegations pertaining to rules that Defendant Hazeltine promulgated in implementing the provisions of Amendment E.

Hearing on the various motions was held on January 18, 2000. The court orally (1) granted the Utilities' motion to join as Plaintiffs (MHT 51, 53), (2) dismissed the case as against the State of South Dakota (MHT 5), and (3) dismissed the ADA claim (MHT 6). He took other issues under advisement, including the request to dismiss State Defendants Barnett and Hazeltine. MHT 47, 54.

Subsequently, on February 8, 2000, Plaintiffs filed another Motion Instanter to File First Amended Complaint. App. 119-22. Among other things, the Plaintiffs amended their Complaint to delete the ADA claim and to add the Marston and Marian Holben Trust and the Utilities as Plaintiffs. App. 119-22.

On September 15, 2000, Judge Kornmann denied the remaining motion to dismiss and granted the Plaintiffs' motion to amend. App. 136-49. The

September 15 Order also dismissed the ADA claim. App. 140. The Amended Complaint and the Answer to Amended Complaint were both filed on September 27, 2000. App. 150-96.

Following an unsuccessful motion for partial summary judgment, trial was scheduled for December 4, 2001. Plaintiffs' trial brief set forth the various issues that it would try at hearing. App. 197-234. It included the commerce clause issue as well as other claimed issues, but included no reference to an ADA claim.

A court trial was held from December 3 through 7, 2001. At the close of trial, the court requested post-trial briefs.

The next week, on December 12, 2001, Judge Kornmann issued a memorandum indicating that he would again consider the ADA claim. App. 235. Defendants' post-trial briefs responded to this issue. Plaintiffs filed post-trial briefs, but did not address the ADA issue at all.

On May 17, 2002, Judge Kornmann filed his Memorandum Opinion. App. 236-76. He first held that cooperatives are not subject to Amendment E. App. 258-59. Second, he found that Amendment E is preempted by the ADA. App. 259-65. Third, he declared that Amendment E is unconstitutional under the dormant aspect of the federal commerce clause when considered in light of the claims made by Utilities. App. 265-76. The Judgment was also filed on May 17, 2002. App. 277.

On May 20, 2002, the State Defendants filed their notice of appeal.

STATEMENT OF FACTS

South Dakota has restricted corporate farming since 1974.[1] SDCL ch. 47-9A. The 1974 Family Farm Act generally bars corporate ownership of agricultural land. It recognizes "the importance of the family farm to the economic and moral stability of the state," and that the "existence of the family farm is threatened by conglomerates in farming." SDCL 47-9A-1. Family farms and "authorized small farm corporations"[2] are exempt.

The 1974 statutes concern cultivation of land. In 1988, these statutes were amended to address confined hog operations. SDCL 47-9A-13.1. This amendment applies only to corporations that bred, farrowed, and raised swine. SDCL 47-9A-13.1; Attorney General Memorandum Opinion 89-05. Swine operations that do not engage in breeding are exempt from the 1974 Act. SDCL 47-9A-13.1. Other types of corporate livestock feeding operations are not restricted by the Family Farm Act. SDCL 47-9A-11.

Since the 1970s, agricultural and livestock ventures have increasingly changed from traditional agricultural business structures (single proprietorship

1. This is not unique. Other corporate farming statutes include Iowa Code. Ann. § 172C.4; Kan. Stat. Ann. § 17-5904; Minn. Stat. Ann. § 500.24(1)(c); Mo. Ann. Stat. § 350.015; N.D. Cent. Code § 10-06-01; Wis. Stat. Ann. § 182.001(1)(a).

2. Corporations with less than ten shareholders and whose revenues from rent, royalties, dividends, interest, and annuities do not exceed twenty percent of their gross receipts. SDCL 47-9A-14.

and partnerships) to business structures such as limited liability corporations and other types of corporations. App. 8-11. Between 1978 and 1997, the number of farm corporations in South Dakota increased from 776 to 1298. App 9. While the number of corporations grew the number of farmers declined. The number of farm operators (by principal occupation) in South Dakota fell from around 36,821 in 1974 to approximately 22,704 in 1997. App. 11.

Although the 1974 Family Farm Act was designed to protect family farming, it did not stem the trend toward larger corporate farms and fewer family farms. As addressed later in this brief, corporate farming causes adverse sociological impacts on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have independent markets for their products.

This problem was also of concern to the federal government. The USDA studied this issue in 1981 and issued a report known as A Time to Choose: Summary Report on the Structure of Agriculture. Exh. 311. A second study seventeen years later in 1998 reported:

When Secretary Bergland's report, A Time to Choose was published, it warned that ". . . unless present policies and programs are changed so that they counter, instead of reinforce or accelerate the trends toward ever-larger farming operations, the results will be a few large farms controlling production in only a few years."

Looking back now nearly two decades later, it is evident that this warning was not heeded, but instead, policy choices made since then perpetrated the structural bias toward greater concentration of assets and wealth in fewer and larger farms and fewer and larger agribusiness firms.

A Time to Act, Exh. 312 (also published at www.reeusda.gov/smallfarm/report.htm).

In the meantime, in 1982, the Nebraska Constitution was amended (by initiated measure) to include corporate farming restrictions designed to protect family farms. *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332-33, *cert. denied*, 502 U.S. 814 (1991). This measure was "intended to address the social and economic evils perceived as related to corporate farming." *Id.*

Ultimately in 1998, Amendment E was placed on the ballot in South Dakota. Like the Nebraska measure, it was designed to amend the State Constitution. Like the Nebraska measure, it generally bars both corporate ownership of farmland, as well as corporate livestock feeding operations. Amendment E passed and became effective on November 16, 1998. It is now included in the South Dakota Constitution as Article XVII, Sections 21-24.

SUMMARY OF ARGUMENTS

The district court erred in finding that utility easements are an "interest" in "land used for farming" within the meaning of Amendment E. This is a matter of state law construction. Under South Dakota law, utility easements are limited

to the use for utility purposes and are not a general interest in land used for any other purpose. Transmission line easements are not within the purview of Amendment E.

The district court further erred in finding that Amendment E violates the commerce clause when considered in light of Utilities' interest in land at Big Stone, South Dakota ("Big Stone"). Part of the Big Stone property is "grandfathered" under Amendment E. The rest is exempt from Amendment E because the involved project is likely to be developed during the five-year "window" for construction allowed in Amendment E.

Moreover, any effect on the Big Stone property is outweighed by the beneficial effect of protecting family farming. Corporate farming causes adverse sociological effects on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have independent markets for their products.

The district court also erred in several ways in holding that Amendment E violates the American Disabilities Act. First, although one party (SD Farm Bureau) originally made an ADA claim, it abandoned the claim and did not renew it at trial. Indeed, SD Farm Bureau lacked standing. Yet, Judge Kornmann sua sponte revived the claim after trial. This is reversible error.

Further, Judge Kornmann expanded the ADA claim to include other parties (retired CPA Holben and retired lawyer Brost) who had presented minimal evidence on heart disease on other claims (equal protection and commerce clause). Brost and Holben have never, to this day, made an ADA claim. The claim has been waived or abandoned by all parties. Also, evidence that a retired CPA and a retired lawyer cannot perform strenuous ranching activities is not sufficient to show that they suffer substantial limitations on life activity and are "qualified individuals with a disability" within the meaning of the ADA. Further, these family-held corporations would be exempt from Amendment E if a family member resides on a ranch.

Finally, the district court erred in holding that Amendment E does not apply to cooperatives. Amendment E was designed to bar risk-shielding business structures from farming in South Dakota, and cooperatives are a form of a risk-shielding business structure. Further, Amendment E specifically applies to corporations. Cooperatives are a form of corporation and must be analyzed like any other corporation under Amendment E.

ARGUMENTS AND AUTHORITIES

I. ARTICLE XVII, SECTIONS 21-24 OF THE SOUTH DAKOTA CONSTITUTION DOES NOT APPLY TO ELECTRIC TRANSMISSION LINE EASEMENTS.

Judge Kornmann held that Article XVII, Section 21 of the South Dakota Constitution (Amendment E) bars Utilities from purchasing new easements for

transmission lines.

A. Standard of Review.

This issue involves whether, under state property law, utility easements crossing agricultural land are "interests in land used for farming" within the meaning of the State Constitution.

This question involves neither a federal statute nor an issue of federal constitutional dimension. Rather it involves an interpretation of South Dakota property law pertaining to easements and the South Dakota Constitution. Because matters of state law are involved, the district court is to defer to the construction given by the highest court of the state. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Becker v. Lockhart*, 971 F.2d 172, 174 (8th Cir. 1992). Here, the state court has opined on the scope and extent of utility easements, and deference should be afforded in that regard. *Knight v. Madison*, 2001 S.D. 120, 634 N.W.2d 540, 542; *Musch v. H-D Electric Cooperative, Inc.*, 460 N.W.2d 149 (S.D. 1990).

The further question is whether such utility easements, as defined by South Dakota law, are "interests in land used for farming" within the meaning of the South Dakota Constitution. The state supreme court has not ruled on this precise question. The district court was therefore required to "predict" as best it could, how the state's highest court would rule. *Brandenburg v. Allstate Ins. Co.*, 23 F.3d 1438, 1440 (8th Cir. 1994).

The appellate standard of review is de novo. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991); *Brandenburg*, 23 F.3d at 1440.

B. Utility Easements Are Not Prohibited by the Corporate Farming Laws.

Article XVII, Section 21 bars corporations and syndicates from holding "an interest whether legal, beneficial, or otherwise, in any real estate *used for farming* in this state." (Emphasis added.) Section 21 is silent as to utility easements. There is good reason: the easements obtained by Utilities are not used for farming.

Under South Dakota property law, an easement is "an interest in the land in the possession of another which entitles the owner of such interest to a *limited use or enjoyment of the land* in which the interest exists." *Knight*, 2001 S.D. 120, ¶ 4, 634 N.W.2d at 542 (emphasis added). SDCL 43-13-5 provides that, "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Neither the physical size nor the purpose or use to which an easement may be used can be expanded or enlarged beyond the terms of the grant of the easement. *Knight*, 634 N.W.2d at 542.

The South Dakota Supreme Court specifically examined the scope of utility easements in *Musch*. The court recognized that the easement is limited to the use specified in the grant, and the remaining rights to use the land lie with the grantor. 460 N.W.2d at 154. Under *Musch*, utility easements are a legal interest limited to the use specified by their easement: the placement of utility poles and

wires.

The easements in question here are consistent in scope. Utilities submitted exhibits showing that the purpose of the easements are for electrical power cables (Exh. 90) and for overhead or underground electric lines (Exh. 88). App. 1-2, 5-6. In both cases, the *grantor* of the easements reserved the right to cultivate the land not providing support for the utility line. Article XVII, Section 21 does not bar corporations from acquiring utility easements, as Utilities do not have an interest in land used for farming. The corporate farming laws do not apply to them.

II. PLAINTIFFS HAVE NOT ESTABLISHED THAT ARTICLE XVII, SECTIONS 21-24 OF THE SOUTH DAKOTA CONSTITUTION IS UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE.

Judge Kornmann held that Amendment E is unconstitutional as applied to the Utilities. In large part, he was concerned with the transmission line easements. App. 252-53, 265-67. As set forth in Issue I, Amendment E does not apply to utility easements at all. The only other utility interest involved the Big Stone property. As described below, that situation does not merit a determination that Amendment E is unconstitutional.

A. The Big Stone Issue Does Not Require Constitutional Review.

There are two parcels of Big Stone property involved. First, Utilities own 552 acres adjacent to the Big Stone Power Plant in northeast South Dakota. It was leased to farmers previous to 1998 and continues to be leased to them. All parties acknowledge (and Judge Kornmann found) that this property is exempt under Section 22(4) of Amendment E. App. 265. This clause allows the Utilities (who own the land under a tenancy in common) to continue to own this land and lease it to farmers so long as the ownership interests of the tenancy in common are not altered. App. 252, 253.

The same tenancy in common also owns the nearby power plant. The Utilities may need to change the ownership percentages of the power plant in the future. T 286. Accordingly, the Utilities claim that if the percentages of ownership within the tenancy in common change, then "it would destroy the grandfather which Amendment E offers." T 286. State Defendants submit that even if the *industrial* plant is operated by a different configuration of tenants in common *in the future*, there is no requirement that such new group would be required to own the farmland or farm the *nearby land.* T 304. Indeed, Utilities acknowledge that they could continue to maintain the tenancy in common under its current configuration for the 552 acres of land regardless of any change in corporate structure for operating the nearby power plant.[3] T 304.

3. In *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 127 (1978), the Court held that the commerce clause does not protect "the particular structure of methods of operation" for businesses. Instead, it protects interstate firms from prohibitive or burdensome regulations. 437 U.S. at 127, 128. Moreover, the commerce clause does not immunize corporations from regulation. *Id.*

Even though this property is currently farmed (pursuant to the grandfather exemption), the Utilities are holding it for future development, for ash disposal, and for a buffer zone for the plant. T 299. These purposes would exist even if the land were not used for farming. Due to its proximity to a rail line and good water supply, various industrial projects have been proposed in the past at this location. These projects have included an ethanol plant and a processing plant called ProGold. T 299. Some land is currently leased to an ethanol plant. T 300. The land is well adapted for industrial use. There is little reason to expect this 552 acres would ever be sold as farm property and invoke the corporate farming laws. Hence, the constitutional question need not be addressed. *United States v. Thomas*, 198 F.3d 1063, 1065 (8th Cir. 1999) (if the issue is so premature that court would have to speculate as to real injury, the court should not address constitutional questions).

At trial, the Utilities raised a second Big Stone claim. They recently purchased additional farmland for a new plant near the existing plant. T 283. They intend to turn this land over to the new owners of Big Stone II, a group not yet formed. T 288, 289. They have also purchased an option on additional land for the cooling pond for this project. T 287, 306. None of this additional property would be grandfathered under Amendment E. For these lands, the Big Stone Partners must comply with Section 22(10), which permits a corporation purchasing agricultural land for development purposes to rent the land (to a family farmer) for no more than five years. The Utilities cannot use the land for agricultural production after the five years and would have to sell the land or let it lie idle pending development.

Construction of the existing plant took only five years. T 301. At trial, the plant manager estimated that construction of Big Stone II may be complete as early as 2007. T 304. Construction itself would take as many as four construction seasons and begin within the five-year period. T 304, 305. The actual land on which construction occurs cannot physically be farmed during construction. T 302. A constitutional requirement that the farmland must be taken out of production after five years would not be burdensome if the land is already taken out of production while the plant is being constructed.

The constitutionality of Amendment E need not be addressed with respect to this property that will soon be dedicated to industrial use. The Utilities have not shown that they will be harmed. To find otherwise would be to engage in speculation regarding regulatory approval and construction delay. The Court should refuse to engage in such premature debate. *Thomas*, 198 F.3d at 1065.

B. Standard of Review.[4]

Plaintiffs' burden on a constitutional claim is to demonstrate beyond a reasonable doubt that the challenged law is unconstitutional. *Equipment*

4. As seen, Utilities have not established that the facts regarding the Big Stone property merit constitutional review. However, assuming for the sake of argument that such review is merited, Amendment E survives constitutional scrutiny.

Manufacturers Institute, et al. v. Janklow, et al., No. 01-2062, slip op. at 28 (8th Cir. Aug. 6, 2002); *Knowles v. United States*, 829 F. Supp. 1147 (D.S.D. 1993), *aff'd in part*, 29 F.3d 1261 (8th Cir. 1994), *rev'd in part*, 91 F.3d 1147 (8th Cir. 1996).

The appellate standard for reviewing the district court's conclusions of law on this issue is "de novo." *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001).

C. Commerce Clause Framework.

The states retain authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980); *Maine v. Taylor*, 477 U.S. 131, 138 (1986). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 126 (1978). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (rejecting a claim of discrimination because the challenged statute "'regulates evenhandedly' . . . without regard to whether the [commerce came] from outside the State").

"For purposes of the dormant Commerce Clause, 'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000); *Oregon Waste Systems, Inc. v. Dep't of Env. Quality of Ore.*, 511 U.S. 93, 99 (1994).

Discrimination may take one of three forms. The law may be (a) discriminatory on its face, (b) may have a discriminatory purpose, or (c) may have a discriminatory effect. *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995); *U&I Sanitation*, 205 F.3d at 1067. If a state regulation is discriminatory in one of these ways, it will be subjected to one of two dormant commerce clause tests, depending on the discriminatory nature of the statute.

One test applies if a law regulates evenhandedly and has only incidental effects on, and does not overtly discriminate against, interstate commerce. *Hampton Feedlot*, 249 F.3d at 818. Under this test, the law will be stricken only if the incidental effects it imposes upon interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

If the law overtly discriminates against interstate commerce, the second test applies: It will be struck down unless the state can demonstrate "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Hampton Feedlot*, 249 F.3d at 818; *U&I Sanitation*, 205 F.3d at 1067.

Under this strict scrutiny test, the State bears the burden of justifying the interstate discrimination or burden by showing that: (1) local benefits flow from the challenged law, and (2) nondiscriminatory alternatives, adequate to preserve

the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). It is considered a persuasive or overriding basis for validity when the state legitimately seeks to further a *police power objective* rather than when merely economic interests are at stake. *Carbone*, 511 U.S. at 405-6 (concurrence); *U&I Sanitation*, 205 F.3d at 1070.

D. Amendment E Is Not Facially Discriminatory and Does Not Discriminate Against Interstate Commerce in Purpose or Effect.

Section 21 of Article XVII (Amendment E) applies to all corporations and limited liability syndicates doing business in South Dakota; it prohibits all corporations and syndicates from owning real estate used for farming or from engaging in farming. It clearly applies both to in-state and out-of-state corporations and syndicates. On its face, Amendment E thus regulates evenhandedly.

Amendment E does not establish preferential treatment in favor of in-state businesses or discriminating against out-of-state entities. Neither Utilities nor any other Plaintiff presented evidence to this effect. Plaintiff Northwestern Public Service has its principal place of business in Sioux Falls, and its service area is in South Dakota. App. 4, Exh. 89. Otter Tail and Montana-Dakota Utilities are located in South Dakota and other states. Yet, all three Utilities claim to be affected in the same way.

The testimony of other plaintiffs is also telling. Plaintiff SD Farm Bureau's witness stated that Amendment E "actually hurts South Dakota farmers rather than protects them against out-of-state competition." T 38. Although Plaintiff Brost attempted to assert that Amendment E provides differential treatment, he admitted that he is "not claiming that Amendment E benefits South Dakota farmers to the detriment of out-of-state farmers" from a "profit-making perspective." T 100.

In-state economic hardship does not violate the commerce clause. In *Hampton Feedlot*, 249 F.3d at 820-21, the Court stated:

The Missouri Legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harm and benefits to all stakeholders in creating its price discrimination law. In the event that the implemented statute adversely affects Missouri farmers or consumers, appellees are free to petition the legislature to amend or repeal the statute. Appellees have asked us to strike Missouri's statute because it burdens interstate commerce, but they have failed to show how the measure has this unconstitutional effect. Economic hardship experienced by Missouri feedlots does not rise to the level of a dormant commerce clause violation.

Another facet of the discrimination determination is whether the purpose of Amendment E is to economically protect in-state businesses to the detriment of

out-of-state businesses. It clearly is not. Amendment E's purpose, as most clearly expressed in the "Pro-Con Statement" and as determined by a South Dakota circuit court, *see supra*, is to protect family farms and the environment and to maintain the rural way of life. It is thus not designed for economic protection of in-state businesses, neither helping in-state syndicates nor placing additional burdens on out-of-state syndicates.

At trial Plaintiffs argued that the drafters of Amendment E were motivated by economic protectionism or other discriminatory purpose, based upon Plaintiffs' characterization of the drafters' purpose and intent. Judge Kornmann properly rejected that argument, finding as a matter of fact that the drafters' motives were proper. *See also* Pro-Con Statement (Exh. 19), governmental documents (Exhs. 501, 502), and academic research (Exhs. 314, T 232-42, 802-63).

Amendment E is neither an economic protectionist measure nor was it enacted for other discriminatory purposes. Therefore, Amendment E regulates evenhandedly with only incidental effects on interstate commerce. The test to be applied is whether the local benefits of Amendment E are outweighed by its burdens on interstate commerce: the *Pike* test.

E. The Burden Imposed By Amendment E Upon Interstate Commerce Is Not Excessive in Relation to Its Local Benefits.

Under the Pike test, the law will be stricken only if the incidental effects it imposes upon interstate commerce are "clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

Judge Kornmann found that the burden on Utilities outweighed the local benefits. His analysis considered both the transmission line issue and the Big Stone issue together, although it appears to be premised largely on the transmission line issue. It is unclear whether Judge Kornmann would have found Amendment E constitutional or unconstitutional on the Big Stone issue alone.[5] App. 265-67. Judge Kornmann did find that the Big Stone property leased to local farmers generates income of fifteen to twenty thousand dollars annually. He did not separate which Big Stone lands are "grandfathered" and which lands are being held for development. App. 265.

Assuming, for sake of argument, that Judge Kornmann correctly found that the harm arising to the Utilities from Amendment E was fifteen to twenty thousand dollars, that sum is the "burden" that must be examined for commerce clause purposes.[6] That monetary burden would be weighed against the putative local benefits.

Legislation that promotes or protects South Dakota agriculture is a valid local benefit and a reasonable exercise of police power under South Dakota law.

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5. As described above, the transmission lines are not barred by Amendment E and should not factor into this analysis at all.

6. This sum is used for commerce clause argument only. State Defendants do not acknowledge that Utilities are damaged in this amount.

In re Request for an Advisory Opinion, 387 N.W.2d 239, 243 (S.D. 1986).

Measures to promote and protect a state's major industry are within a state's police powers. "[I]t cannot be reasonably contended that the protection and promotion of [South Dakota's agriculture economy] is not a matter of public concern or that the Legislature may not determine within reasonable bounds what is necessary for the protection and expedient for promotion of that industry."

Id. (citations omitted).

This finding is consistent with cases where corporate ownership of farmland has been considered. *Asbury Hospital v. Cass*, 326 U.S. 207 (1945) (barring all corporations (except cooperatives) from owning farmland is an appropriate legislative application of a state policy against the concentration of farming lands in corporate ownership); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988) (protecting the welfare of citizens in the traditional farm community is a legitimate state interest); *MSM Farms*, 927 F.2d at 333 (retaining and promoting family farm operations and preventing unrestricted corporate ownership is a legitimate state interest).

Similarly, this Court recently upheld a Missouri livestock pricing statute against a commerce clause challenge recognizing that the statute was designed to "preserve the family farm and Missouri's rural economy." *Hampton Feedlot*, 249 F.3d at 820. As this Court recognized in *MSM Farms* and in *Hampton Feedlot*, the protection of the family farm and the rural way of life are legitimate local benefits.

At trial, expert sociologists testified regarding this issue. Drs. Lobao and Heffernan used different approaches and demonstrated that two major types of corporate farming (industrialized farming and production contracting) caused detrimental effects in farm communities over the long term.

Dr. Lobao reviewed thirty-eight studies that are representative of the major sociological work regarding industrialized farming[7] and its effect on communities. T 455, 474. Dr. Lobao looked at studies that used four generally accepted sociological methodologies: case study designs, macro-social accounting designs, regional economic impact models, and surveys. T 457-59. The studies included federally funded studies (T 463), as well as various private studies. Over seventy-five percent of the studies showed that industrialized farming caused some detrimental effects on communities. T 496; Exh. 314, Table 1. These detrimental socioeconomic effects include income inequality and corresponding social disruption, crime rates, lack of education attainment, lower total community employment, and higher unemployment rates. T 475. Detrimental effects on the social fabric of the community include the decline in quality of local governance, reduced enjoyment of property, lack of civic participation, and social disruption. Exh. 314, at 16-17. Sociologists have also found that industrialized farming causes detrimental health effects. Exh. 314, at

7. Industrialized farming refers to farming where different groups of people are engaged in management of the operation beyond just a household situation. T 451.

16-17.

Secondly, Dr. Lobao testified regarding her own research on socioeconomic wellbeing in various communities. T 464. She compared small family, larger family, and industrialized farming. T 454. Dr. Lobao found that the middle-sized family owned and operated, locally controlled farms tended to be related to a higher quality of life in terms of socioeconomic well being. T 464. Although there was not a clear-cut detrimental impact on an immediate basis, she found a detrimental impact occurring over time, such as a ten-year period. T 465.

Dr. Heffernan testified regarding production contracting, a type of industrialized farming that is largely prohibited by Amendment E as it is practiced primarily by corporations. Production contracting is becoming more commonly used in the hog business, but has been in use in the broiler industry for decades. T 802. The experience in the broiler industry is useful to analyze the possibilities in the hog industry (or other livestock industries using production contracts in the future).

Dr. Heffernan testified regarding his case study of sociological effects of production contracting in one Louisiana parish over thirty years. T 803. In 1969, the parish was impoverished, and contract production had been in place for about ten years. T 806, 810. Contracts were issued by four companies (integrators) for terms long enough for the grower to pay off his capital investment (building, waste management system, water supply). T 810.

In 1981, the number of integrators had dropped to two. T 813. Contracts were offered only for seven or eight weeks (the time to feed a batch of broilers) rather than a period of years. T 814. Growers had done well economically during the period from 1969 to 1981, but were still in debt for the broiler buildings. T 815-16.

By 1999, there was one integrator. T 818. The number of independent family farmers had decreased dramatically over the thirty years, and the number of contract growers had doubled. T 818. The contracts remained at a term of seven weeks, but there was an inconsistent supply of broilers for the growers to feed. T 820. Integrators were able to vary the supply of broilers to meet market needs; growers sat with buildings empty and a continuing debt load. T 820.

By 1999, this parish had the highest farm sales of any parish in the state, yet was still a persistent poverty county. T 824. Growers had made capital expenditures for the buildings, but were unable to build collateral. T 826. The integrators often required the growers to make additional improvements. T 826. The growers never built up equity in the stock. Yet, the growers still had to bear the cost of livestock death loss when contract payments were made. T 827.

Poultry growers now have no opportunity to become independent producers in Louisiana or anywhere else in the country. Due to the rise in production contracting, the large corporations own ninety-five to ninety-eight percent of the broilers at all stages of production and manufacturing. T 827. They do not buy broilers on the market, and there is no independent market for broilers. As

Dr. Heffernan stated, the "bird never sells." T 827.[8]

Poultry production in Louisiana is not an isolated example of the asymmetrical position between the growers and integrators in production contract situations. *See, e.g., Crowell v. Campbell Soup Company*, 264 F.3d 756 (8th Cir. 2001) (broilers in Minnesota) and *Seegers v. Pioneer Hi-Bred International, Inc.*, 997 F. Supp. 1124 (N.D. Ind. 1998) (seed corn in Indiana).

Dr. Heffernan also testified regarding concentration among processors in the food system. T 831. Because of increasing concentration, farmers have fewer options to sell their product. T 832. It is undeniable that the corporate farming issue and continuing concentration is an area of intense concern. *See* USDA Reports "A Time to Act" And "A Time to Choose." Exhs. 311, 312.

Amendment E addresses these socioeconomic and market concentration issues by prohibiting corporate entities from farming unless they are closely tied (by residence or routine labor) to the farm itself. This ensures that farm owners are involved in the farm operation themselves, more like a traditional family farmer than a corporate CEO who, in the days of Enron, cannot be presumed to act to the benefit of the farm (or indeed, corporate stockholders). It prevents corporations from conducting farming by having their animals raised by others under production contracts. By controlling these problems, Amendment E protects the socioeconomic structure of rural life and traditional family-farm based agriculture.

Therefore, even if it is assumed that Amendment E has incidental effects on interstate commerce, Amendment E does not burden interstate commerce in excess in relation to its local benefits of protecting family farms. As such, under *Pike*, 397 U.S. 137, Amendment E does not violate the commerce clause.

F. *In the Alternative, Amendment E Also Satisfies the Second Commerce Clause Test.*

If the Court determines that Amendment E does discriminate against or burden interstate commerce, it still satisfies the "strict scrutiny" test. The legitimate local purpose served by Amendment E, described above, is the protection of the family farm and rural way of life.

Nondiscriminatory alternatives to Amendment E were attempted by the State; these failed to provide adequate protection for family farms. SDCL ch. 47-9A, which restricts corporate farming activities, has been in effect since 1974 and has not stemmed the trend toward larger corporate farms and fewer family farms. Other alternatives, such as restricting the size of farms, affect interstate commerce in the same manner as Amendment E; they would apply to both in-state and out-of-state corporations and syndicates just as does Amendment E. Legislation or constitutional amendments which prohibit vertical integration by corporations and syndicates would, in effect, act almost entirely

8. While there is an opportunity for direct neighborhood sales (such as the sales by Hutterite Colonies in South Dakota) or niche markets, those enterprises represent as little as two percent of the broiler market nationwide. The Hutterite Colonies, for example, process the broilers themselves and sell the broilers in local communities.

on out-of-state businesses, as in South Dakota it is out-of-state businesses that have the capital and power to vertically integrate. Such legislation would burden interstate commerce far more than does Amendment E, and may indeed be viewed as per se economic protectionism.

Another alternative would be an "excess land tax," whereby corporate farms would be required to pay more property tax than smaller farms. This alternative may make the cost of doing business higher for corporations, but would not address the problem of consolidation of farms, declining numbers of family farmers, and adverse changes in communities.

Thus, Defendants submit that no alternatives exist that would accomplish the goals involved here and that would have less of an impact on interstate commerce than does Amendment E. Even under the strict scrutiny test, Amendment E does not violate the commerce clause.

III. PLAINTIFFS HAVE NOT ESTABLISHED THAT ARTICLE XVII, SECTION 22(1) VIOLATES ARTICLE II OF THE AMERICANS WITH DISABILITIES ACT.

Judge Kornmann erred in ruling, sua sponte, that Amendment E violates the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

A. Standard of Review.

This issue addresses several errors pertaining to the ADA question. The standard of review will be referenced at the beginning of each of these areas.

B. Sua Sponte Consideration of Abandoned Claim.

The appropriate standard of review is "de novo" because it involves consideration of whether legal claims may be considered "sua sponte" on a post-trial basis.

The only ADA claim ever filed by a Plaintiff in this case was made by SD Farm Bureau. App. 39-40. The State Defendants moved to dismiss, asserting that SD Farm Bureau lacked standing to assert that claim, and that the Eleventh Amendment barred suit. *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (ADA is not a valid abrogation of Eleventh Amendment immunity). At hearing on January 18, 2000, the court orally dismissed the ADA claim on the basis of *Alsbrook*. MHT 6.

In February 2000, Plaintiffs sought permission to file an Amended Complaint. App. 119-22. They sought to delete the ADA claim to "reflect the court's rulings on January 18, 2000." App. 121. The district court's written ruling on the subject was filed six months later in September 2000. App. 140, 141. Although the district court's oral ruling and its written opinion dismissed the claim, it did not require the claim to be stricken from the Complaint.

Plaintiffs filed a trial brief thirty days before trial and never mentioned the ADA claim. Likewise, no ADA issues whatsoever were raised at trial. When a

pretrial motion excludes evidence on a particular issue, the issue must be raised again at trial to preserve the record. *Keeper v. King*, 130 F.3d 1309, 1315 (8th Cir. 1997). The issue was abandoned in the Amended Complaint, was not tried, and was waived.

Yet, a week after trial the district court issued a *post-trial* Memorandum indicating that the court might reconsider its previous decision due to the recent decision in *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001).

The *Grey* decision had been filed on November 6, 2001. It held that ADA claims may be brought against state officers for prospective injunctive relief, notwithstanding the Eleventh Amendment. In so holding, *Grey* reiterated this Court's decision in *Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001). *Randolph* was issued in July 2001. Had Plaintiffs brought the *Randolph* decision to the district court's attention in July 2001 (or even brought up the *Grey* decision in November 2001), there might still have been time for discovery before trial. As it was, Plaintiffs never brought the issue up at all. Indeed, Plaintiffs' post-trial brief (filed after the court's post-trial memorandum) did not address this issue at all.[9]

Although Judge Kornmann found that the issue was raised in an offer of proof during trial, Plaintiffs simply made no such offer. The rationale for an offer of proof is twofold. One reason is to provide the appellate court with a record. *Kline v. City of Kansas City*, 175 F.3d 660, 665 (8th Cir. 1999). The second reason is to apprise the judge *and opposing counsel* of the evidence involved. *Id.* ("the offer of proof is to inform the [trial] court and opposing counsel of the substance of the excluded evidence, enabling them to take appropriate action").

Although no Plaintiff ever indicated that an offer of proof was being made, two Plaintiffs (who had never raised ADA claims) testified generally on their physical well-being for purposes of their equal protection and commerce clause claims. Plaintiffs Holben and Brost testified that they have chosen not to reside on their respective ranches and that they cannot engage in strenuous ranching activities. T 76, 259. However, Holben and Brost had claimed in their Complaint that Amendment E impaired their rights under the equal protection and commerce clauses.[10] The evidence of physical hardship was admissible under those constitutional claims.

Where a party is making an offer of proof, that party must articulate that an offer of proof is being made and explain the various uses for the evidence. *New York v. Microsoft*, ___ F. Supp. 2d ___, 2002 WL 1311434 (D.D.C. May 29, 2002); *Clausen v. Sea-3*, 21 F.3d 1181, 1194 (1st Cir. 1994). Plaintiffs failed to do so. Because Holben and Brost had <u>never</u> raised the ADA issue, the State Defendants had no reason to object and did not cross-examine on ADA issues

9. Even if Plaintiffs had made the argument on a post-trial basis, the issue would have been waived. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722, 723 (10th Cir. 1993). The fact that the issue was raised sua sponte should not salvage the issue when it was never tried.

10. *To date, neither of these Plaintiffs have asked for relief under the ADA.*

such as the extent of the disability, and whether the disability was a "substantial impairment" within the meaning of the ADA. An offer of proof that is accepted and denies opposing counsel the ability to cross-examine is improper. *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Comm'n*, 665 F.2d 1210, 1216 (D.C. Cir. 1981). Indeed, had there been *any* indication that the Holben and Brost evidence would be used to support the ADA theory, the State Defendants would have objected. Since there was no indication that this unpled issue was being introduced at trial, the State Defendants certainly did not consent to bringing it up. Where evidence is not recognizable as an independent issue, failure to object cannot be construed as consent to try the issue. *Portis v. First National Bank of New Albany*, 34 F.3d 325, 331 (5th Cir. 1994). The issue was not tried and Judge Kornmann erred.

C. Standing.

The standard of review on this standing argument is "de novo." *Steger v. Franco*, 228 F.3d 889, 892 (8th Cir. 2000).

As stated, the only ADA claim ever filed in this case was made in the initial Complaint by SD Farm Bureau. The State Defendants raised the question of SD Farm Bureau's standing in a pretrial motion. App. 44. Judge Kornmann did not rule on the standing issue due to his Eleventh Amendment ruling. After the trial he held that the Eleventh Amendment did not bar suit, so he considered the ADA claim and the standing issue. He held that SD Farm Bureau had standing to raise the ADA claim:

There is no evidence in the record to support associational standing as to the ADA claims by Farm Bureau, perhaps because of the erroneous previous ruling by the court. Farm Bureau, however, like the Farmers Union broadly represents farmer members' interests before legislative and other bodies on a routine basis. The court takes judicial notice of this. Representing the claims of presently "disabled farmers" who are members of Farm Bureau and farmer members yet to be disabled may be something of a "stretch" but the court will allow associational standing.

App. 259, 260.

The State Defendants submit that allowing associational standing is more than a stretch, it is reversible error. App. 39-40.

As Judge Kornmann recognized, there was no evidence in the record to support associational standing. SD Farm Bureau, in the original Complaint, alleged that it is "an independent, non-governmental federation made up of 47 County Farm Bureaus," and "represents the interests of more than 10,000 voluntary member farm, ranch, and rural families in the State of South Dakota." Complaint, ¶ 32; T 19. SD Farm Bureau was "founded to protect, promote, and improve the political, social, economic, and personal status of South Dakota farm, ranch, and rural families." Complaint, ¶ 33. It meets the needs of its members through "the provision of beneficial services." Complaint, ¶ 34. According to the initial Complaint (but not in the Amended Complaint), SD

Farm Bureau includes members "who are or may become disabled." Complaint, ¶ 127.

At trial, SD Farm Bureau called its administrative director, Mike Held, as a witness. He testified generally about SD Farm Bureau's concerns with Amendment E, did not mention the ADA, or the protection of impaired persons in any manner. T 23-36. Judge Kornmann recognized the standing problem and tried to overcome it by taking judicial notice that SD Farm Bureau is a general farm advocate. The test is, however, much more restrictive. Organizations whose own legal rights and interests have not been injured have standing to seek redress on behalf of their members only under certain circumstances. *Kessler Inst. For Rehab. v. Essex Fells Mayor*, 876 F. Supp. 641 (D.N.J. 1995). The Supreme Court has set out the test for organizational or associational standing as:

an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343; *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 470 (8th Cir. 1985).

The first prong of the *Hunt* test mandates that the association's members have standing to sue in their own right. SD Farm Bureau has not alleged that any of its members are "qualified individuals with a disability" as required by the applicable ADA provision, 42 U.S.C. § 12132. App. 160-62. This definition

requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." Sec. 12102(2). *Thus whether a person has a disability under the ADA is an individualized inquiry.*

Sutton, et al. v. United Air Lines, Inc., 527 U.S. 471, 483 (1999). Specific facts must be asserted in the complaint if a plaintiff is bringing a claim asserting that the defendants regard their disability as substantially limiting their ability to work. *Sutton*, 527 U.S. at 483.

Further, a limit on *one* type of job (such as farming, in the case here at issue) is not a "substantially limiting impairment" under the ADA. *Sutton*, 527 U.S. at 491. Moreover, ADA claims must demonstrate that the disabled claimants are injured by the challenged law, policy, or government act. *Steger*, 228 F.3d at 893 (blind persons not "among the injured" when they have never entered the building where non-compliant facilities exist).

Thus, more than a bare allegation of a disability that might exist (Complaint, ¶ 127 and no allegation at all in the Amended Complaint, App. 160-62) is necessary in order to state a claim for relief under the ADA. The judicial notice taken that SD Farm Bureau lobbies on behalf of all of its members does not cure the problem. In order to support an ADA claim, more fact-specific information is clearly required. Neither the Complaint nor any evidence at trial make the necessary allegations to demonstrate that SD Farm Bureau has standing

to sue under the ADA. The first prong of the *Hunt* test has not been met.

The third prong of *Hunt* generally provides that participation of individual members in the lawsuit is not necessary to maintain associational standing. However, a claim brought under the ADA necessarily requires participation by individual members because ADA claims are individualized. *Sutton*, 527 U.S. at 483. *See Kessler*, 876 F. Supp. at 653 (entity which *serves* the disabled is not *disabled* as contemplated by 42 U.S.C. § 12132 and, therefore, subchapter II of the ADA confers no substantive rights upon it to provide a basis for standing). The SD Farm Bureau does not have standing to bring this ADA claim.

Consequently, SD Farm Bureau cannot:

shoehorn an unknown number of supposed, but unknown, victims into their cause of action by the mechanism of associational standing. *See, e.g., Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 426 (8th Cir. 1985) ("[a]ssociational standing is properly denied where, as here, the need for 'individualized proof,' [citation to *Hunt* omitted], so pervades the claim that the furtherance of the members' interests required individual representation").

Concerned Parents to Save Dresher Park Center v. City of West Palm Beach, 884 F. Supp. 487, 489 (S.D. Fla. 1994) (action filed against city for alleged violations of Title II of the ADA). *See also Jeanine B. By Blondis v. Thompson*, 877 F. Supp. 1268, 1286 (E.D. Wis. 1995). ("The plaintiffs have failed to state claims under the ADA . . . because they have not sufficiently alleged that any of the individual plaintiffs are disabled as defined under those acts. The failure to so allege is fatal to the complaint's claims against the State defendants. . . .")

Judge Kornmann relied on *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997). In that case, however, the court specifically noted that the city did not challenge the plaintiff's standing. *Innovative Health*, 117 F.3d at 46. Further, in *Innovative Health*, the plaintiff was a drug and alcohol rehabilitation center offering services to disabled persons. It involved the revocation of a building permit for a facility to serve disabled persons. That situation constituted a specific injury to the association itself because it actually ran the rehabilitation center. SD Farm Bureau never alleged that it provides disability-related services that are impacted by Amendment E.

D. The ADA Was Not Violated in Light of the Evidence in this Case.

The ADA has four titles, of which only Title II applies to state government. Title II states:

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such public entity.

42 U.S.C. § 12132. Thus, in order to raise a claim under 42 U.S.C. § 12132, the Plaintiffs must meet the definition of a "qualified individual with a disability." This definition appears at 42 U.S.C. § 12102(2) as:

(A)A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B)A record of such an impairment; or

(C)Being regarded as having such an impairment.

Judge Kornmann held that because Plaintiff Brost (a retired lawyer and government executive) and Plaintiff Holben (a retired CPA) suffer from heart disease, they are disabled. The evidence simply does not merit this result.

In some cases, heart disease does constitute a physical impairment under the ADA. *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1227 (11th Cir. 1999). Physical limitations due to heart conditions are not, however, a per se disability covered by the ADA. *Weber v. Strippit*, 186 F.3d 907, 914 (8th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 974 (2000). Moderate limitations on major life activities caused by some restrictions on physical labor do not constitute a "disability." *Id.* at 914.

Under the ADA, the physical impairment must substantially limit one or more of the individual's major life activities.[11] *Id.*; 42 U.S.C. 12102(2); 29 C.F.R. 1630.2(j); *Strippit*, 186 F.3d at 913. Major life activities include, for example, eating, breathing, walking, and working. A limit on one type of job is not a "substantially limiting impairment" on a "major life activity" as contemplated by the ADA. *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000). Instead, the claimant must demonstrate the inability to work in a broad range of jobs. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, ___ U.S. ___, 122 S.Ct. 681 (2002); *Sutton*, 527 U.S. 471; *Fjellstad v. Pizza Hut of America*, 188 F.3d 944, 949 (8th Cir. 1999).

Brost and Holben do not meet this criteria. There are several reasons. First, Plaintiff Brost participated in this lawsuit as an individual. His ranch was incorporated under Brost Land and Cattle, an entity not a party to this suit. T 62. Brost has standing only to pursue his own claims in this case. Because Brost Land and Cattle was not participating as a party in this suit, Brost lacks standing to advance claims on behalf of Brost Land and Cattle. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Any disability of Brost should not be imputed to the corporation in a lawsuit where the corporation is not even a party.

Further, Brost, as an individual, has not demonstrated that he has a substantially limiting impairment on the major life activity of working. He received a J.D. from the University of South Dakota School of Law in 1965 and practiced law until 2001. T 61, 68. He was a business, tax, and estate lawyer. T 72.

Brost still wishes to maintain this corporation and has a "desire to remain in the cattle business and the ranching business because I'm plum [sic] able to do that and participate at the level that I was before this event [heart surgery] occurred." T 66. He is on the ranch twice a week during the growing season. T 105. He is still capable of making financial investments, making decisions on

11. State Defendants were denied the opportunity to cross-examine on this issue since the ADA claim was not raised at trial.

crop planting, and livestock marketing. T 66. He has also been a state government executive. T 63. There is no indication that his heart disease has diminished his ability to use his communication skills, political contacts, or other executive skills. T 84, 85. According to his own direct testimony, Brost would be able to work in a range of jobs.

Brost did testify that he is unable to "do the daily and routine physical exertion" that would be required if his corporations were to qualify as family farm corporations within the meaning of Amendment E. T 76 (Article XVII, Section 22(1) requires that a family farm corporation must have a family member residing on the farm or engaged in day-to-day labor and management of the farm). Brost testified that the reason he cannot live on the ranch is that the hired men already occupy the homes. T 88. While he cannot engage in strenuous activity and is not in a position to live on the ranch, neither situation means that he is suffering from a substantial impairment within the meaning of the ADA.

Marston Holben is a CPA and worked in the accounting field starting in 1959. T 249. Holben is now retired. Spear H. Ranch, Inc. and Plaintiffs Holben and the Marston and Marion Holben Family Trust (through their operation of the Spear H. Ranch) are in compliance with Amendment E under the family farm exception in Section 22(1). Holben purchases steers for the corporation in the springtime, has them branded and vaccinated, and then pastures them on unimproved ranch property in western South Dakota. T 250-53. Once on the ranch, the cattle graze in the pasture for the summer. Day-to-day labor is not required. T 257. Holben oversees matters every week or two, sometimes two or three times a week. T 258. He rides herd and checks to make sure the steers are healthy. T 259. He and his wife completely manage the operation. T 258. To the extent heavy physical work is required, he hires the work done. T 259.

Amendment E does not require that a family member be present on a daily basis if the operation does not require that level of activity. The extent of labor and management required "depends in large part on the type of farm or ranch operation being conducted." *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420, 428 (2000) (interpreting Nebraska's similar requirement). It is undisputed that ranches like Holben's do not require daily chores. T 257. The activities of Marston Holben qualify Plaintiff Spear H. Ranch, Inc. under the family farm exception of Section 22(1).

In sum, Brost and Holben's evidence of heart disease was made in support of their equal protection and commerce clause claims. The ADA claim filed in the original Complaint was not made by these parties. Each testified generally that he had heart disease that limits (but does not bar) physical labor on ranches they own. T 58, 198, 255. However, neither Brost nor Holben established that the nature, duration, and long-term medical problems of their heart disease caused them to be substantially limited in a major life activity. Neither has claimed or demonstrated that he is within the class of disabled persons protected by the ADA.

For each of these reasons, the district court erred in holding that

Amendment E violated the ADA.

IV. ARTICLE XVII, SECTION 21 OF THE SOUTH DAKOTA CONSTITUTION APPLIES TO COOPERATIVES.

Judge Kornmann found that cooperatives are not subject to Amendment E.

A. Standard of Review.

Because this issue involves solely an interpretation of state law, the standard of review is "de novo." *See infra*, in Issue I.

B. Cooperatives Are Subject to Amendment E.

Although no cooperatives are parties in this suit, some of the Plaintiffs do business with cooperatives and claimed to be affected by the issue of whether cooperatives are barred by Amendment E. Judge Kornmann held that cooperatives are not included as one of the business enterprises included in Amendment E.

The issue of whether cooperatives are included in the Amendment E depends on state constitutional construction. South Dakota courts apply the general principles of statutory construction in interpreting constitutional sections. *Breck v. Janklow*, 2001 S.D. 28, 623 N.W.2d 449, 455; *In Re Request of Governor Janklow*, 2000 S.D. 106, ¶ 4, 615 N.W.2d 618, 620. State laws are to be "construed according to its manifest intent as derived from the statute as a whole, as well as other enactments relating to the same subject. Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies departure." *Moore v. Michelin Tire Company, Inc.*, 1999 S.D. 152, 603 N.W.2d 513, 518.

Importantly, the language of Section 21 broadly prohibits "*any corporation* organized under the laws of any state of the United States or any country" and "*syndicates*, *including* any limited partnership, limited liability partnership, business trust, or limited liability company organized under the law of any state." (Emphasis added.) It is significant that the term "including" was used after the term "syndicates" and before a list of specific types of business entities. The word "including" in this type of situation is not a limiting or all-embracing definition, but is "an illustrative application of the general principle." *Argo Oil Corp. v. Lathrop*, 72 N.W.2d 431, 434 (S.D. 1955). Indeed,

Where a statute contains a grant of power enumerating certain things which may be done and also a general grant of power which standing alone would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive.

Id. By using the term "corporation" and then listing various business entities as illustrations of the interpretation of "syndicates," it is apparent that Section 21 applies to all types of business entities where liability has been limited by statute.

Judge Kornmann failed to analyze whether cooperatives were risk-shielding entities within the ambit of Amendment E. He held that cooperatives were not included because cooperatives are inherently a different kind of enterprise than the entities listed in Article XVII, Section 21. The State Defendants submit, however, that cooperatives are the same as the various entities listed in Article XVII, Section 21 insofar as the critical determinative aspect is concerned: risk protection. For each of the entities specifically listed in Article XVII, Section 21, the stockholders or partners are shielded from the liability of the corporation. Cooperative members enjoy the same protection. SDCL 47-16-30 provides:

Except for debts lawfully contracted between the member and the cooperative, no member or patron is liable for the debts of the cooperative to an amount exceeding the sum remaining unpaid on his subscription for shares of the cooperative, and the sum unpaid on such members membership fees, if such fee is required by the cooperative.

This liability risk shield for cooperative members has been in place since 1965. Consequently, every cooperative entity formed since 1965 has insulated investors from the liability of the cooperative or corporation. Since the cooperative risk shield law was solidly in place many years before Amendment E, it is presumed to have been considered by the drafters. Courts assume that the "the legislature, in enacting a provision, had in mind previously enacted statu[t]es relating to the same subject." *Moore*, 603 N.W.2d at 518, 519.

Because Article XVII, Section 21 was designed to bar entities that insulate investors from liability, the prohibition necessarily applies to cooperative corporations like other corporations.

Cooperatives not only shield risk, but they also are actually *corporations*. Although Judge Kornmann found that some cooperatives are not corporations, entities calling themselves cooperatives must be incorporated in South Dakota. SDCL 47-15-41. No separate cooperative "associations" and the like can be formed in South Dakota.

Further, Judge Kornmann's decision fails to give effect to Article XVII, Section 22(2) which exempts certain types of cooperatives.

Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock;

A constitutional provision must be read giving full effect to all of its parts. *Breck*, 2001 S.D. 28, 623 N.W.2d at 454; *South Dakota Bd. of Regents v. Meierhenry*, 351 N.W.2d 450, 452 (S.D. 1984). "No wordage should be found to be surplus." *Kneip v. Herseth*, 87 S.D. 642, 659, 214 N.W.2d 93, 102 (1974). No provision can be left without meaning." *Id.*

If all cooperatives were generally exempt from Amendment E, as Judge Kornmann found, then the exemption for limited types of cooperatives would be mere surplusage. The State Defendants submit that this interpretation is erroneous because it is inconsistent with recognized constitutional construction.

In sum, cooperatives should be analyzed in the same way that other corporations or limited liability business enterprises would be analyzed. That fact that an entity is a cooperative is not an automatic "loophole" out of Amendment E.

CONCLUSION

Based on the foregoing arguments and authorities, the State Defendants respectfully request that the district court's Judgment be reversed.

Brief of Amicus Curiae Everett Holstein, Rudy Meduna and Dan Hodges in Support of Defendants – Appellants Joyce Hazeltine and Mark W. Barnett and Intervenors-Appellants Dakota Rural Action and South Dakota Resources Coalition

by

Robert V. Broom

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BRIEF OF AMICUS CURIAE EVERETT HOLSTEIN, RUDY MEDUNA AND DAN HODGES IN SUPPORT OF DEFENDANTS - APPELLANTS JOYCE HAZELTINE AND MARK W. BARNETT AND INTERVENORS-APPELLANTS DAKOTA RURAL ACTION AND SOUTH DAKOTA RESOURCES COALITION

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STATEMENT OF IDENTITY OF AMICUS CURIAE, THEIR INTERESTS IN THE CASE AND SOURCE OF AUTHORITY

As identified in the Motion, the Amicus Curiae are as follows:

Everett Holstein is a crop and livestock producer from Blair, Nebraska. Holstein is past chair and present member of Friends of the Constitution, a Nebraska unincorporated association of eighteen farm, church, and environmental organizations formed in 1983 to support the defense and enforcement of Article XII, Section 8 of the Nebraska Constitution (hereafter to be called Initiative 300). Initiative 300 restricts certain corporations from owning farmland or engaging in the production of crops and livestock. Organizational members of Friends of the Constitution include the American Corn Growers Association, the Center for Rural Affairs, the Nebraska Farmer's Union, the Nebraska Catholic Conference, the Nebraska Farmer's Union, the Nebraska Wildlife Federation, the Saunders County Livestock Association, and WIFE (Women Involved in Farm Economics).

Rudy Meduna is a crop and livestock producer from Colon, Nebraska. Meduna is a principle shareholder in Meduna Land and Cattle Company, a corporation legally qualified under Initiative 300, and engaged in the production of crops and cattle on 2000 acres of land. Meduna Land and Cattle Company also operates a 2500 head capacity feedlot in Saunders County Nebraska where it custom feeds cattle. Meduna is Vice-President of Saunders County Livestock Association, a member of Nebraska Cattlemen, and has served on the Farmers Stockmen Committee of Nebraska Cattlemen.

Dan Hodges is a crop and livestock producer from Julian, Nebraska. He raises purebred Berkshire hogs for sale to domestic and foreign buyers. Hodges is a member of the Nebraska Pork Producers Association and has served in numerous leadership positions within the Association. He is currently Nebraska's representative to the National Pork Producers Federation Council.

Amicus Curiae have an interest in this case because:

There is at least some similarity between Nebraska's Initiative 300 and South Dakota's Amendment E, movants have a concern that any adverse decision in this matter might provide opponents of Initiative 300 with additional incentive and legal precedent to recommence litigation attacking Nebraska's Initiative 300, a law that movants believe is crucial to the future of their operations and to the health of rural communities in which they live. Movants wish to supplement the Appellants and Intervenor-Appellants' Briefs on this matter. Furthermore, the District Court made several misinterpretations of Initiative 300 as the Court attempted to assess Amendment E. Most of those errors are irrelevant for purposes of Amendment E and clearly are dicta but at least those that are relevant to the Amendment E analysis should be addressed.

The source of authority for filing Amicus Curiae Brief is Rule 29 of the Federal Rules of Appellant Procedure and Amicus Curiae's interest in this case as set forth herein and the fact that Amicus Curiae were granted leave to

participate in the District Court as Amicus Curiae.

ARGUMENT

I. INTRODUCTION

Every constitutional attack on Initiative 300 in Nebraska has been unsuccessful. The Nebraska Supreme Court in *Omaha National Bank v. Spire*, 223 Neb. 209 (1986), had absolutely no difficulty in determining that Initiative 300 related to a legitimate state interest. The Court also noted that in view of the deference given to legislative determinations "it would appear that the U.S. Supreme Court would even more readily defer to the state constitutional determination as to the desirability of particular constitutional discriminations." *Id.* at 231. Likewise, the United States Court of Appeals for the Eighth Circuit, in rejecting an equal protection challenge to Initiative 300, had:

little difficulty concluding . . . that MSM has failed to carry its 'heavy burden' of showing that Nebraska's prohibition on non-family corporate farm ownership is arbitrary and irrational.

MSM Farms v. Spire, supra 927 F.2d at 334.

Most recently the Nebraska Supreme Court again upheld Initiative 300 in the face of an equal protection attack with respect to classifications within the constitutional provision. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 417-421, 610 N.W.2d 420, 429-431 (2000). In doing so the Court utilized the constitutional analysis set forth in this Court's decision in the *MSM Farms* case. The Supreme Court cited with approval the Eighth Circuit's conclusion that the policy of Initiative 300 "represented a legitimate state interest under the Equal Protection Clause." *Id.* 259 Neb. at 419, 610 N.W.2d at 430-431.

When the proper legal analysis is made on the facts in the record in the present case Amendment E must also withstand constitutional attack and the District Court's determination otherwise must be reversed.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT COOPERATIVES ARE NOT CORPORATIONS COVERED BY AMENDMENT E.

The District Court determined that cooperatives are not included in Amendment E, i.e. that Amendment E does not prohibit a cooperative from engaging in farming or having ownership of farm land because, District Court held, cooperatives are not corporations. The Court noted

"A cooperative is not a corporation. No one, at least in South Dakota calls a cooperative a corporation." (At p. 12; 202 F.Supp. 2d at 1031)[1]

1. Citation to the District Court's Opinion will be made in two ways: First, to the page number of the Opinion in the Addendum which is part of both opening briefs and secondly, to the reported decision at 202 F. Supp. 2d 1020 (D.S.D., 2002)

Firstly, and not insignificantly, Chapter 47, of which the cooperative statutes are a part, is the chapter of South Dakota statutes entitled "Corporations". (See p. 1, Vol. 14a South Dakota Codified Laws). The various subparts of Chapter 47 deal with various kinds of corporations, including business corporations, medical corporations, cooperatives, nonprofit corporations, limited liability companies, etc. (*Id.*) SDCL 47-15-1 specifically defines a cooperative as "a cooperative *corporation* which is subject to the provisions of Chapters 47-15 to 47-20." (emphasis supplied). SDCL 47-15-3 specifically states that, as a requisite for forming a cooperative, three or more natural persons of legal age must file and record "articles of incorporation".

The organizers of a cooperative are "incorporators" SDCL 47-15-4 (13) (14). They are not "cooperativers".

The District Court further relies on the fact that cooperatives "in general" are exempt under federal law from federal income taxes "unlike the corporations sought to be reached by Amendment E." (At p. 13, 202 F.Supp. 2d at 1031) However, there is nothing in Amendment E that limits the reach of Amendment E to only those corporations who must pay federal income taxes.

The District Court further attempted to distinguish a cooperative from a corporation because the cooperative is an organization of "members" not "stockholders" and the method of reward of the members vs. the stockholders is different. (At p. 13; 202 F.Supp. 2d at 1031) However, this is a distinction without a difference. Indeed, the South Dakota cooperative statute specifically provides that articles of incorporation for a cooperative must specifically include, in pertinent part, the following:

> (4) Whether the cooperative is organized with or without stock;
>
> (6) The number and par value of shares of each authorized class of stock; if more than class is authorized, the designation, preferences, limitations and relative rights of each class shall also be set forth;
>
> (7) Which class of stock are membership stock;
>
> (8) As to each class of stock, the rate of dividend, or that the rate of dividend may be fixed by the Board, or that no dividend will be paid;
>
> (9) Reservation of right to acquire or recall stock;

SDCL 47-15-4.

The Nebraska Supreme Court, although not faced with exactly the same issue, had no problem in determining that cooperatives under Nebraska law were profit corporations that were subject to the constraints of Initiative 300. *Pig Pro Nonstock Co-op v. Moore*, 235 Neb. 72 (1997). In so doing, the Court made it clear that it could see no reason why Nebraska statutes regarding cooperatives should be interpreted to permit five individuals to form a nonstock cooperative corporation but, at the same time, prohibit a business corporation whose shareholders were five unrelated farmers from owning and operating a farm operation on Nebraska land. *Id.* at 91. The Nebraska Supreme Court also noted that other courts have found agriculture cooperatives to be corporations for other purposes. For example, the Nebraska Supreme Court cited *Schuster v. Ohio Farmers Co-op Milk Ass'n*, 61 F.2d 337 (6th Cir. 1932) noting the holding in

that case that an agriculture cooperative was a 'business and commercial' corporation within the meaning of the federal bankruptcy act . . ." *Pig Pro Nonstock Co-op v. Moore, supra* 235 Neb. at 88. (see also other cases cited therein).

Notwithstanding the clear ruling of the Nebraska Supreme Court that cooperatives are corporations subject to the strictures of Initiative 300 in the *Pig Pro Nonstock Co-op* case the District Court still misinterpreted Initiative 300 and opined that "no cooperative of any kind is circumscribed by the constitutional provision in Nebraska." (P. 16-17; 202 F.Supp. 2d at 1032)[2] The Court was wrong in so concluding as to Nebraska's Initiative 300 and the Court was wrong on Amendment E in South Dakota.

The District Court's determination that cooperatives are not corporations is also belied by the existence of a specific exemption in Amendment E for certain cooperatives. See §22(2). Thus, certain cooperatives meeting a certain definition are exempted from the strictures of Amendment E. Obviously, if cooperatives had not been deemed to be corporations there would be no need for any exemption for a certain kind of cooperative. The District Court's determination that the §22(2) exemption is "meaningless" and "mere surplusage" violates fundamental tenets of statutory construction which were acknowledged by the District Court but then ignored. It is clear that "legislative enactments should not be construed to render their provisions mere surplusage". *Dunn v. Commodity Futures Trading Com'm* 519 U.S. 465, 472 (1997). Furthermore, as, again, recognized by the District Court "if possible, effect should be given to every part and every word." *State ex rel Oster v. Jorgenson*, 126 N.W.2d 870, 875 (SD 1965). It is clearly possible and in fact legally compelled to give meaning to the cooperative exemption, i.e. the exemption is necessary for certain cooperatives because without that exemption those cooperatives would be constrained by Amendment E because they are corporations.

III. THE DISTRICT COURT ERRED IN CONCLUDING AMENDMENT E VIOLATES THE ADA

The District Court correctly noted

"There is no evidence to support associational standing as to the ADA claims by Farm Bureau." (At p. 24; 202 F.Supp. 2d at 1039).

Notwithstanding that correct conclusion, the District Court proceeded to hold that Farm Bureau had associational standing. Obviously, that holding is in error because there is no evidence to support it and also for the various reasons advanced by Appellants Hazeltine and Barnett in their opening brief. (See Defendant-Appellants' Brief at pp. 32-36).

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2. The District Court also misinterpreted other aspects of Initiative 300. For example, concluding that Nebraska's exemption for limited partnership is broader than South Dakota's (p. 9), stating that all general partnerships in Nebraska are exempt (p. 10), and concluding that Nebraska's exemption for livestock purchase for slaughter is "much broader" than Amendment E's exemption at p. 22). Since none of these issues are relevant to the Court's disposition of the Amendment E issues on appeal, they will not be further discussed herein.

The District Court then went on to determine that Amendment E violated Title II of the ADA as applied to the Plaintiffs, i.e. Frank Brost and Marsten Holben. In doing so, the Court references evidence submitted at trial by way of offers of proof which the District Court concluded were now being accepted. (At p. 25). Amicus Curiae cannot find in the trial transcript any offers of proof made by Brost or Holben. There is only very limited testimony from Brost and Holben and, it is clearly inadequate to establish an ADA claim or violation.

Amicus Curiae agree with the positions of the Defendant/Appellants and Intervenor-Appellants the the issue was not properly before the Court. (See pp. 28-31 of Defendant-Appellants Brief and pp. 19-20 of Intervenor-Appellants Brief). However, assuming *arguendo* the Court had jurisdiction over the ADA claims and that it had been adequately and properly pled and was otherwise properly before the Court, the Court's determination is still clearly erroneous.

The District Court acknowledged that "Title II of the ADA provides in part that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by any such entity.'" (At p. 27; 202 F.Supp. 2d at 1040) (citing 42 U.S.C. §12-132). This Court has explained that in a Title II case, in order to establish a prima facie claim under the ADA,

A Plaintiff must show:

1) He is a person with a disability as defined by statutes;

2) He is otherwise qualified for the benefit in question; and

3) He was excluded from the benefit due to discrimination based on disability

Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999).

Furthermore, to ultimately establish a violation of the acts the Plaintiff must demonstrate:

1) He is a qualified individual with a disability;

2) He was excluded from participation in or denied the benefits of a public entities' services, programs, or activities, or was otherwise discriminated against by the entity; and

3) That such exclusion, denial of benefits, or other discrimination, was by reason of his disability.

Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998).

There are compelling arguments that Amendment E does not rise to the level of a public benefit or discrimination by a public entity and thus the second prong cannot be established. See Intervenors-Appellants Brief at pp. 20-22. However, it is clear in this case that Plaintiffs did not establish that any Plaintiff was a qualified individual with a disability. Thus Plaintiffs have not met their burden on the first prong.

In *Otting v. J.C. Penney Co.*, 223 F.3d 704 (8th Cir. 2000), this Court noted

The ADA defines "disability" as: "A) a physical or mental impairment that substantially limits one or more of the major life activities . . . ; B) a record of such an impairment; or C) being regarded as having such an impairment." 42

U.S.C. §12102(2) . . . The Equal Employment Opportunity Commission (EEOC) has issued regulations defining the three elements of disability contained in subsection A. *See* 29 C.F.R. §1630.2 (1999). "Physical or mental impairment" is defined as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. §1630.2(h)(1). "Major Life Activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i). "Substantially limits" means an individual is "[u]nable to perform [, . . .] or [is s]ignificantly restricted as to the condition, manner or duration under which [he] . . . can perform [, . . .] a major life activity . . . which the average person in the general population can perform . . ." 29 C.F.R. §1630.2(j)(1). *Id.* at 708-709.

This Court also stated:

We note the Supreme Court's statement in *Sutton* that "whether a person has a disability under the ADA is an individualized inquiry." *Sutton*, 119 S.Ct. at 2147. Moreover, we are mindful of recent Supreme Court pronouncements on the issue of whether an individual is substantially limited in a major life activity. In *Bragdon v. Abbott*, the Court states "[t]he [ADA] addresses substantial limitations on major life activities, not utter inabilities." 524 U.S. 624, 641, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). The *Bragdon* Court also noted that when an individual's impairment created significant limitations, the ADA definition of disability is met even if the difficulties created by the impairment are not insurmountable. *Id.* at 710.

In order to substantially limit a major life activity, there must be proof that establishes that an individual was unable to perform a basic function that the average person in the general population can perform, or the person is significantly restricted in the condition, manner, or duration of which he or she can perform a particular major life activity as compared to an average person in the general population. *Otting v. J.C. Penney Co., supra*, 223 F.3d at 711. Whether an impairment substantially limits a major life activity also depends on the following factors:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or expected long term impact.

29 C.F.R. §1630.2(j)(2) *Otting v. J. C. Penney, supra* 223 F.3d at 711.

Furthermore,

"It is not enough that an impairment affect a major life activity: The Plaintiff must proffer evidence from which a reasonable inference can be drawn that such activity is substantially or materially limited."

Snow v. Ridgeview Medical Center, 128 F.3d 1201, 1207 (8th Cir 1997).

Furthermore, this Court noted

> We have described general statements in affidavits and deposition testimony similar to [the Plaintiffs] as conclusory and has determined that such statements standing alone, are insufficient to withstand a properly supported Motion for Summary Judgment.

Helfter v. United Parcel Service, Inc., 115 F.3d 613, 616 (8th Cir 1997) [citing *Berg v. Bruce*, 112 F.3d 322, 327-28 (8th Cir 1997).]

Finally, it is clear that in order to demonstrate that an impairment "substantially limits" the major life activity of working, an individual must show "significant restrictions in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. §1630.2(j)(3)(i); *Kellogg v. Union Pacific Railroad Co.*, 233 F.3d 1083 (8th Cir. 2000). In order to show a party is substantially limited in his or her ability to work, it is required that the person's overall employment opportunities be limited. *Miller v. City of Springfield*, 146 F.3d 612, 614 (8th Cir. 1998).

When the evidence in this case is assessed, it is clear that Plaintiffs did not meet their burden of establishing that any of the Plaintiffs had a disability.

The two "farmers" who had purported standing to raise the ADA claim were Frank Brost and Marsten Holden. Mr. Brost's testimony is limited with regard to his alleged disability to the following:

> . . . I've been given a clean bill of health as long as I behave myself, lose some weight, and watch my diet. But, you know, I'm limited physically in what I can do as far as day-to-day activities. But certainly hasn't diminished my desire to remain in the cattle business and the ranching business because I'm plum able to do that and participate at the level that I was before this event occurred. So I should feel better in the future than I have in the past. Q. Would you be willing or be able to participate on a daily basis doing the actual farming, the labor that's required, the management?
>
> A. I have - - for some time I've had some bad knees and I've not been able to do the physical activities. . . . So, I'm unable to do, on a day-to-day basis, you know, in the words of the constitutional amendment, daily routine substantial physical exertion, I am unable to do that. . . .

(T66:5 - 67:3)

Mr. Holden testified: that he had had a heart bypass in 1989. He then testified it was difficult for him to "do such tasks as fix fence" or "anything that is strenuous it is very difficult for me to do". (T255: 3-6). He testified "the physical work, I don't fix fence and I don't go out and rope cattle and don't doctor - - and I don't doctor them and rope them and that. I ride herd and I review the herd." (T59: 2-6).

The above testimony makes it clear that neither Plaintiff even established that he has a physical impairment. Mr. Brost does not establish exactly what his physical impairment is, other than to say he has some "bad knees". He further is not specific in exactly what he is limited in doing based on his "bad knees". Mr. Holden testified that he had a heart bypass. However, merely having such

surgery doesn't establish a physical impairment. He doesn't explain that his heart condition itself or any physical condition that he has causes any limitation in his physical activities. He simply testified that it is difficult for him to do certain limited tasks but he doesn't indicate why, nor that it is actually related to any physical impairment. He certainly does not explain his specific limitations in any major life activities.

The testimony of Brost and Holden are akin to the conclusory statements rejected by this Court and held to be insufficient to even raise a genuine issue of material fact. See pp. 12-13 above. On this basis alone this testimony is simply inadequate to establish that either Brost or Holden has a disability.

Besides failing to even identify the physical impairment i.e the nature and severity of the impairment; Brost's and Holben's testimony is totally devoid of any reference to the duration or expected duration of the impairment; and the permanent or expected long term impact. Their testimony identifies no major life activities that were limited, let alone "substantially limited." Plaintiffs simply did not prove they have a disability within the meaning of the ADA. In the end, assuming *arguendo* that either Plaintiff had established a physical impairment and some limitation on the major life activity of work, neither Plaintiff adduced sufficient evidence to establish that

> [his] impairment rendered [him] unable to perform a class of jobs or a broad range of jobs in various classes within a geographical area in which [he] has reasonable access.

Helfter v. United Parcel Service, supra 115 F.3d at 617-618.

Plaintiffs ADA claim fails for lack of sufficient evidence on the merits of the claim.

IV. AMENDMENT E DOES NOT VIOLATE THE COMMERCE CLAUSE

The District Court's determination that Amendment E violates the Commerce Clause is dependent primarily on the conclusion that amendment E applies to utility company transmissions lines. Amicus curiae agree with Defendants-Appellants and Intervenors -Appellants that Amendment E does not curtail a utility's ability to place transmission lines across agricultural land.

The issue of application of Amendment E to transmission easements involves application of principles of statutory or constitutional interpretation. A review of those principles and other South Dakota court decisions with other interpretative principles is helpful in assessing the utility issue raised in this case.

As noted in *Poppen v. Walker*, 520 N. W. 2d 238 (S.D. 1994)

> First and foremost, the object of construing a constitution is to give effect to the intent of the framers of the organic law and of the people adopting it. The Supreme Court has the right to construe a constitutional provision in accordance with what it perceives to be its plain meaning. When words in a constitutional provision are clear and unambiguous, they are to be given their natural, usual meaning and are to be understood in the sense in which they are popularly employed. If the meaning of a term is unclear, the Court may look to the intent of the drafting body.

Id. at 242 (see also cases cited therein).

The South Dakota Supreme Court has summarized many other principles that are pertinent in this case:

> Challenges to the constitutionality of a statute meet formidable restrictions." *State v. Hauge*, 1996 SD 48, ¶ 4, 547 N.W.2d 173, 175. . . . We recognize a strong presumption of constitutionality. *Kyllo v. Panzer*, 535 N.W.2d 896, 898 (S.D. 1995) (citing *Specht v. City of Sioux Falls*, 526 N.W.2d 727, 729 (S.D. 1995)). To be invalidated a statute must be proved a breach of legislative power beyond a reasonable doubt. *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 131 (S.D. 1994). Only when the unconstitutionality of a statute is plainly and unmistakably shown will we declare it repugnant to our constitution. *South Dakota Educ. Ass'n v. Barnett*, 1998 SD 84, ¶ 22, 582 N.W.2d 386, 392 (quoting *Poppen v. Walker*, 520 N.W. 2d 238, 241 (S.D. 1994) (citations omitted)). "If a statute can be construed so as not to violate the constitution, that construction must be adopted.' *Cary v. City of Rapid City*, 1997 SD 18, ¶ 10, 559 N.W.2d 891, 893 (citation omitted).

State of South Dakota v. Allison, 607 N.W.2d 1, 2 (2000).

The Court in *Allison* quoted approvingly the following important principle:

> It is a fundamental proposition of law that where a court is faced with two possible interpretations of a statute or ordinance, one which would render it constitutional and another which would render it unconstitutional, it is the duty of the court to choose that interpretation which will uphold the validity of the statute or ordinance.

Id. at 5.

These principles are consistent with federal court decisions on assessing the constitutionality of a statute or state constitutional provision. See e.g. *Planned Parenthood of Minnesota v. State of Minnesota*, 910 F.2d 479, 482 (8th Cir. 1990) ("If a law is susceptible of a reasonable interpretation which supports its constitutionality the court must accord the law that meaning ."); *Irving v. Clark*, 758 F.2d 1260 (8th Cir. 1985) ("A statute should be construed to make sense . . . so as to support, rather than defeat, its constitutionality"); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995) cert. denied 134 L.Ed 2d 679. (". . . courts must read statutes as constitutional whenever possible . . .") [(citing *State v. Stone*, 467 N.W.2d 905, 906 (S.D. 1991)]; *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983).

Furthermore, in determining the constitutionality of a South Dakota constitutional provision a court may "also consider the circumstances under which a constitutional provision was formed, the general spirit of the times and the prevailing sentiment of the people." *Poppen v. Walker, supra*, 520 N.W.2d at 246 - 247.

Finally, the South Dakota Supreme Court has made it clear that it ". . . will not construe a constitutional provision to arrive at a strained, impractical, or absurd result." *State of South Dakota v. Allison, supra* 607 N.W.2d at 5. See also *Brim v. South Dakota Bd. Of Pardons and Paroles,* 563 N.W. 2d 812, 816 (1997).

Any interpretation that the people of the State of South Dakota intended to prohibit power companies from having easements across farm land when that land can continue to be used by the family farmer (or other permissible entity under Amendment E) for agricultural purposes is a construction of Amendment E that arrives at "a strained, impractical [and] absurd result". *State of South Dakota v. Allison, supra* 607 N.W.2d at 5. This Court can clearly interpret Amendment E to conclude that the interpretation of Amendment E on the easement issue as advocated by the Plaintiffs and accepted by the District Court is incorrect and the Court should render an interpretation that would render it constitutional. Thus, this Court should give effect to the intent of the framers of Amendment E to ensure family involvement in any farming done in South Dakota when the corporate structure is utilized. South Dakotans did not intend to prohibit delivery of electrical power by non-family farm corporations to family farms and elsewhere when that incidentally may involve some "use" of agricultural land. This is particularly so because the underlying agricultural activity by a qualified entity still continues on the same land. Amendment E is about corporate *farming* not power lines.

Assuming *arguendo* that Amendment E does somehow impact on the ability of a utility company to obtain easements on farmland there is still no violation of the Commerce Clause.

As noted by this Court in *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814 (8th Cir. 2001) there are two frameworks to evaluate a dormant commerce clause claim.

> First, if the law in question overtly discriminates against the interstate commerce, we will strike the law unless the state or locality can demonstrate 'under rigorous scrutiny, that it has no other means to advance a legitimate local interest;' . . .
>
> 'Second, even if a law does not overtly discriminate against interstate commerce, the law will be stricken if the burden it opposes upon interstate commerce is 'clearly excessive in relation to the putative local benefits' . . . those challenging the legislative action have the burden of showing that the statutes burden on interstate commerce exceeds its local benefit.

Id. at 818.

The District Court agreed that Amendment E passes the first test, i.e. Amendment E does not discriminate against interstate commerce and it does not differentially treat in state and out-of-state economic interests to the benefit of South Dakota and to the burden of out-of-state interests. (See pp. 36-37). The Court declined to find sufficient discriminatory purpose and determined that the effects on commerce in South Dakota do not translate into unconstitutional discrimination.[3] Accordingly, the focus is on the second test, i.e. whether the Plaintiffs have carried their burden to show that the statutes' burden on interstate

3. Indeed, as noted by Defendants-Appellants in their Brief, Plaintiffs' testimony supports at least even handedness if not a greater burden on South Dakota farmers as opposed to out-of-state farmers. (See p. 18 of Defendants-Appellants Brief).

commerce exceeds its local benefit or their burden to show that the burden it imposes upon interstate commerce is *clearly* excessive in relation to the local benefits. *Hampton Feedlot, Inc. v. Nixon, supra* 249 F.3d at 818. The Plaintiffs have not met that burden. The Plaintiffs submitted virtually no evidence making any kind of comparative analysis of putative local benefits versus the burden upon interstate commerce. On that basis alone, they failed to meet their burden. Indeed, their own expert, Dr. Tweeten, agreed with numerous putative local benefits from Amendment E. For example, he agrees Amendment E may eliminate some aspects of vertical coordination. (T562: 18-21). He then agrees that integrated ownership results in numerous societal disadvantages, i.e. decisions regarding operations are made by persons outside the entity who are less sensitive to local needs. (T573: 1-7). He seems to agree (and certainly acknowledges reasonable minds may differ) that increased industrialization results in displacement of family farms. (T573: 12-19). He certainly agrees that, in the poultry industry, independent producers have a hard time competing with the integrated broiler industry. (T587: 12-21). On the other hand, he acknowledges that there are numerous societal benefits from preservation of the family farm. Family farmers are more likely to grow up in two parent families, less likely to be divorced, more likely to attend church, less likely to commit crimes, more likely to be a positive force in American society. (T575: 4-24). Thus, Dr. Tweeten's testimony, particularly taken together with Dr. Lobao's and Dr. Heffernan's, supports the conclusion that there are clear putative local benefits from limiting certain corporate farming activity based on the detrimental effects of that farming on farm communities over the long term. (See summary of Dr. Lobao's and Dr. Heffernan's testimony in Defendant-Appellants' Brief at p. 22-26).

As noted in the Opening Briefs of the Defendants-Appellants and Intervenors-Appellants, this Court has clearly recognized that the protection of family farms and the rural way of life are legitimate state interests. *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991).

Other courts have agreed. In *State ex rel Webster v. Lehndorff Geneva*, 744 S.W.2d 801, 805 (Mo., 1988) the Court noted: of the

> concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of natural persons primarily engaged in farming.

Id.

The United States Supreme Court has stated:

> The Hawaii legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated land ownership in Hawaii—*a legitimate public purpose.*

Hawaii Housing Authority v. Midkiff, 467 U.S. 225 at 245 (1984) (emphasis supplied).

In *Asbury v. Cass County*, 326 U.S. 207 at 214 (1945), the United States

Supreme Court approved state required corporate divestments of farmland and stated:

> We cannot say there are not differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a *state policy against the concentration of farming lands in corporate ownership.*

See also *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (limitations on who could engage in business of debt adjustment upheld); *North Dakota State Board of Pharmacy v. Schneider Drug Store*, 414 U.S. 153 (1973) (limitation on who can own or operate a pharmacy upheld); *New Orleans v. Duke*, 472 U.S. 297 (1976) (limitation of who could operate food street vending).

There is no question that states like Nebraska and South Dakota have a legitimate governmental interest in protecting family rural life and values. See, e.g. *Village of Bell Terr v. Borras*, 416 U.S. 1 (1974). (A state has legitimate interests in protecting family life and values.)

The issue of state corporate farming restrictions is most similar to the facts presented in *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1991). In the *Clover Leaf Creamery* case, the Supreme Court acknowledged that the statute which banned retail sale of milk in plastic, non-returnable, non-refillable containers permitted the sale of other kinds of non-returnable, non-refillable containers, did not affect "simple protectionism", but rather regulated even handling because it placed restriction on all milk retailers, without regard to whether the retailers were out-of-state sellers. *Id.* at 472. Despite the possibility that the out-of-state plastic industry would be burdened more than in-state industry, the court still held that the level of burden imposed was "not clearly excessive in light of the substantial state interests." *Id.* at 473.

The Eighth Circuit has acknowledged in *MSM Farms v. Spire, supra* 927 F.2d at 333 that if concentrated or corporate farming were to become widespread throughout the country, that the impact would likely be felt by farm families and in addition those "firms supplying the farmer/products, rural communities and consumers would also be affected." *Id.* Since it is well established that these corporate restrictions serve a legitimate concern as to a non-family corporation posing a threat to the family farmer and the negative impact on the rural social structure and environment, there can be no question, on balance, that the benefits far outweigh the very limited and elusive burden on utility companies.

V. CONCLUSION

For all the foregoing reasons and for the issues advanced by Defendants and Defendants-Intervenors, Amicus Curiae submit that Amendment E is constitutional and includes cooperatives in its coverages except those cooperatives exempted by Section 22(2). Accordingly, the decision of the District Court should be reversed with instructions to dismiss the Plaintiffs' Complaint.

An Agricultural Law Research Article

Brief of the State of Nebraska as Amicus Curiae in Support of Defendants – Appellants for Reversal

by

Don Stenberg

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BRIEF OF THE STATE OF NEBRASKA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS - APPELLANTS FOR REVERSAL

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INTEREST OF AMICUS CURIAE

The Amicus State of Nebraska, represented by the Nebraska Attorney General, is a state with an interest in the decision in this matter for several reasons. FRAP 29(a). The District Court elected to make legal declarations of the meaning of Neb. Const. art. XII, § 8 provisions without affording the State of Nebraska the opportunity to appear and argue regarding those determinations. The District Court's analysis of provisions of S.D. Const. art. XVII, §§ 21 to 24 (hereinafter "Amendment E") may affect, and possibly be asserted to overturn, the provisions of Neb. Const. art. XII, § 8 (hereinafter "Initiative 300"). The District Court's decision may be relied upon to restrict what types of limited liability entities the Nebraska Attorney General may allege violate Initiative 300. Lastly, the District Court's analysis may render meaningless the initiative decision of the voters of Nebraska to promote family-farm based agriculture.

STATEMENT OF FACTS

Amicus State concurs with the Defendant's statement of facts, but additionally points out specific facts herein. The economic health of South Dakota is dependent upon South Dakota's agricultural economy. Plnt. Ex. 19, T 634. A majority of South Dakota voters reasonably believed they would be promoting family farm-based production agriculture as opposed to non-family farm corporate agriculture by voting for Amendment E, which was adopted on November 16, 1998. *Id.* South Dakota voters could reasonably believe agribusiness corporations tend to consolidate profits and control of agricultural production, to the harm of independent farmers. Intervenors Ex. 501, 502, T 231-234, Ex. 14, T 241, T 854. South Dakota voters have been exposed to arguments relating to agribusiness corporations and consolidation. T 798-800. South Dakota citizens wish to apply liability to those persons who may harm the environment with livestock waste. T 275, Plnt. Ex. 19, T 634. Family farms are more likely to transact their business locally, maintain stable families, be involved in their community, promote better health for the residents and lower the incidence of crime. T 452-454, 464-465, 467, 475-476, T 835-836, 845, 859. Industrialized farming is more likely to cause the opposite effects for its residents. T 450, 464, 475-476. Family farms are less likely to degrade their environment than are persons or entities who do not reside near the land. T 225-226, T 476.South Dakota voters had the opportunity to weigh the pros and cons of approving Amendment E. Plnt. Ex. 19, T 634.

Several proponents of Nebraska's Initiative 300 were involved in the drafting of Amendment E, hence it contains similar, if not identical, provisions to Initiative 300. T 222, 230, 245. Nebraska was not a party in this matter, nor was it asked to be a party. The court in this matter analyzed and interpreted provisions of Amendment E and Initiative 300. The court ruled on the meaning of these provisions. The Court determined that cooperatives are not corporations and are not restricted by Amendment E. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1031, 1038-1039 (2002). The Court determined

living and testamentary trusts are also "business trusts" under Amendment E. *Id.* at 1035 to 1036. The Court determined Initiative 300 does not apply to livestock which were purchased for slaughter, regardless of the anticipated date of slaughter. *Id.* at 1037.

Plaintiff Farm Bureau represents family farmers and corporations. T 39-40, 50. Farm Bureau admits new members who are involved in agriculture, regardless of disability. T 20. Plaintiff Frank Brost, an attorney, is the owner of four separate ranching entities. T 61-62, 63-64, 72. Mr. Brost performs supervisory, planning and financing activities for his ranching entities, including physical checks of the property and livestock. T 66, 106-107. Mr. Brost does not live upon his ranch. T 104. Mr. Brost alleges that he cannot do physical labor. T 66, 76. Mr. Brost has persons who work for him on the ranch. T 66, 105. Plaintiff Marston Holben, an accountant, lives most of the year in Arizona, spending a few months in South Dakota. T 254, 249. Mr. Holben is the owner of Spear H Ranch, LLC in trust, with said LLC owning South Dakota ranch land. T 250-252. Mr. Holben performs physical review of the LLC's livestock, on horseback or all terrain vehicles. T 259. Mr. Holben manages the LLC's transactions. T 258.

Otter Tail Power Company, Montana Dakota Utilities Company and Northwestern Public Service Company own Big Stone power plant in South Dakota. T 284. These companies expect to acquire transmission right-of-way easements over South Dakota farm and ranch land. T 289. Mr. Mark Rolfes and Mr. Robert Krava, Otter Tail managers, testified that increased costs for easements were expected after Amendment E. T 281, 289-290, 323, 326. Mr. Krava, Otter Tail's Land Management division manager, was not aware of Otter Tail actually offering to purchase any easements since Amendment E's enactment. T 325-326. Ms. Burnadeen Brutlag, Otter Tail's regulatory manager, stated none of the Otter Tail employees calculated the actual increased costs to electrical ratepayers since Amendment E's enactment. T 307, 317. Otter Tail's alleged double to triple costs are based upon assumptions that landowners could not use nor cross easement property under Amendment E. T 326-330. The purchase price for an easement is alleged by Otter Tail to be two to three times the fair market value of the property. T 326-328. According to Otter Tail's expert, there would be no excess economic loss to Otter Tail if Amendment E were found not to apply to the agricultural land between the utility towers, since farming would be able to continue between the towers. T 605-606. The Plaintiffs requested declaratory and injunctive relief on constitutional issues in their Amended Complaint.

SUMMARY OF ARGUMENT

The District Court issued declaratory judgment on Amendment E's provisions on issues not raised by the pleadings, an erroneous finding of pre-emption of Amendment E by the Americans with Disabilities Act (hereinafter "ADA") and an erroneous dormant commerce clause determination. The Court

construed Amendment E language which is either similar to or the same as Nebraska's Initiative 300 language, but failed to provide Nebraska an opportunity to appear to protect its substantial interest in interpreting its own Constitution. The Court findings on the legal meaning of cooperatives, business trusts and livestock purchased for slaughter are not clearly dicta, and are likely unnecessary for the Court's decision, especially as to cooperatives. These findings are also clearly in error and their construction unsolicited by any party.

The ADA's restrictions were erroneously determined to conflict, and thence pre-empt, applications of Amendment E's family farm restrictions. The Court issued an advisory opinion upon a claim no longer alleged, upon little or no evidence even applicable to any claimed disability, and failed to recognize there was no actual violation of Amendment E by the allegedly impaired Plaintiffs. The scant evidence does not support a finding of a disability under ADA. The Court prejudicially ignores the regulatory scheme and case law precedent for ADA, and incorrectly applies severability doctrines, assuming ADA is somehow implicated.

After correctly finding Amendment E did not directly discriminate under the dormant commerce clause, the Court relied upon speculative evidence to erroneously determine utilities suffered an undue burden under Amendment E. The Court correctly found the South Dakota voters had compelling interests in protecting family farms, supporting its decision that Amendment E did not discriminate against nor unduly burden out-of-state farmers, but the Court proceeds to ignore these compelling interests in erroneously finding Amendment E burdened utilities to a degree violating the Commerce Clause. The Court's legal determinations should be reversed and Amendment E should be found to be constitutional, not pre-empted by the ADA and either its restrictions aren't applicable to cooperatives, or a finding that said issue is not fairly raised by the pleadings.

ARGUMENT

I. THE DISTRICT COURT ERRED BY INTERPRETING LANGUAGE IN SOUTH DAKOTA'S AND NEBRASKA'S CONSTITUTIONS WITHOUT PROPER REPRESENTATION FOR NEBRASKA'S INTERESTS, WHICH SIMULTANEOUSLY INVOLVED AN IMPROPER ADVISORY OPINION ON PROVISIONS NOT AT ISSUE.

A. The District Court erred by analyzing Neb. Const. art. XII, § 8 ("Initiative 300") without requiring representation for Nebraska's interests.

This court must review the District's Court's failure to join the State of Nebraska as prejudicial error. *Fetzer v. Cities Service Oil Co.*, 572 F.2d 1250, 1254 (C.A.Ark. 1978). "When necessary, [ ] a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmens Bank & Trust Co. v. Patterson* , 390 U.S. 102, 111, 88 S.Ct. 733, 738-739 (U.S.Pa.

1968). The District Court determined that Initiative 300 does not apply to cooperatives. *South Dakota Farm Bureau, Inc.* at 1031, 1033, 1038 & 1039. The Court further opined that business trusts and livestock purchased for slaughter are not subject to Initiative 300 restrictions. *South Dakota Farm Bureau, Inc.* at 1028, 1029, 1033, 1034& 1036. The State of Nebraska was not a party, nor was it represented in this matter. Neb. Rev. Stat. § 84-202. The State of Nebraska has the right to defend and litigate the meaning of its laws. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1495 (D.C.Cir. 1995). The Court of Appeals can raise indispensibility of the State's claim sua sponte. *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 772 n. 6 (D.C.Cir. 1986). The District Court erroneously failed to recognize that construction of Nebraska's constitution without Nebraska's interests being represented in the litigation prejudiced Nebraska's enforcement of its law.

The District Court erroneously issued a declaratory judgment regarding South Dakota and Nebraska constitutional provisions, for which an actual controversy did not exist. The Court's improper advisory opinion interpreted the legal meaning of both South Dakota's and Nebraska's constitutional provisions on "business trusts", "cooperatives" and "livestock purchased for slaughter", which the Plaintiffs didn't even request.

The Plaintiffs Amended Complaint does not request a construction of Amendment E provisions on cooperatives, business trusts, nor livestock purchased for slaughter. In fact, Amicus cannot locate the words "business trust" nor "cooperative"in the Plaintiffs Amended Complaint or briefs. Declaratory judgment should not be used unless there is an actual case or controversy, to avoid issuing an advisory opinion. *Barnes v. Kansas City Office of Federal Bureau of Investigation*, 185 F.2d 409, 411 (8th Cir. 1950). Plaintiffs, lacking a claimed adverse effect in their complaint or briefs, and having no evidence in the record of probable enforcement by the Defendant officials, fail to present an actual controversy to the District Court. *Garcia v. Brownell*, 236 F.2d 356, 358 (9th Cir. 1956), *cert. denied*, 362 U.S. 963, 80 S.Ct. 880 (1960). This court should determine, after reviewing the record, that there was no controversy regarding "business trusts", "cooperatives" nor "livestock purchased for slaughter" amendment provisions. *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 855 (Fed. Cir. 1999).

The Court clearly erred by issuing declaratory judgment on the meaning of "cooperatives" without an actual controversy before it, and said judgment is an improper advisory opinion. *Brown v. Ramsey*, 185 F.2d 225, 227 (8th Cir. 1951). Its opinion on "business trusts" and "livestock sold for slaughter" may be interpreted as dicta or a judgment. However, Courts should avoid opining on constitutional language not at issue. In declining to examine numerous issues not clearly before the court, the 9th Circuit stated: "Were we to attempt to respond in like measure, we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 (9th Cir. 1985).

If the Court's opinion is considered authoritative, the construction of

"business trusts" to apply to all trusts is clearly wrong. "Business trust" is a legal term, clearly distinguishable from living or testamentary trusts. "Business trusts and Massachusetts Business Trusts are synonymous definitions of an unincorporated association which operates similarly to a corporation." Black's Law Dictionary 974 (6th ed. 1999). A Missouri Court describes the distinction, by citing 2 Bogert, Trusts and Trustees, § 291, which contrasts the gift or transfer intent of a regular trust to the profit-making capital combination of a business trust. *Plymouth Securities Company v. Johnson,* 335 S.W.2d 142, 149 (1960); *see also Inside Scoop, Inc. v. Curry*, 755 F.Supp. 426, 429 (D.D.C. 1989) ("A business trust differs from a conventional trust in the manner of its creation and in its purpose").

Further, the Court's failure to presume that all words in a constitutional amendment should be given meaning, and should be interpreted as a whole, results in it foregoing a meaningful and logical construction of "business trust". *Boise Cascade Corp. v. U.S. E.P.A.* 942 F.2d 1427, 1432 (C.A.9,1991), *See also Kifer v. Liberty Mut. Ins. Co.* 777 F.2d 1325, 1332 (C.A.8 (Ark.),1985). The South Dakota voters could have well understood that "business trusts" operate much like a corporation, rather than like living or testamentary trusts. Courts have found them analagous in many respects. *Carey v. U. S. Industries, Inc.*, 414 F.Supp. 794, 795 (D.C.Ill. 1976) (citing *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 359, 56 S.Ct. 289, 296 (1935)); *see also Home Lumber Co. v. Hopkins*, 190 P. 601, 604-605 (Kan. 1920). The Court's erroneous reading of SDCL 47-14A-1, which deletes the word "business" from the provision, also ignores the statutes clear indication that common law business trusts and Massachusetts trusts are its focus. South Dakota voters likely did not intend to prohibit ownership of agricultural property by all trusts in South Dakota, but rather intended to restrict business trusts, which are similar to corporations.

II. THE DISTRICT COURT ERRED BY DECLARING THAT ART. XVII, §§ 21 TO 24 OF SOUTH DAKOTA'S CONSTITUTION ("AMENDMENT E"), AND NEBRASKA'S INITIATIVE 300 BY IMPLICATION, DO NOT APPLY THEIR RESPECTIVE AGRICULTURAL PROPERTY RESTRICTIONS ON CORPORATIONS TO COOPERATIVES.

The Court of Appeals reviews questions of constitutional interpretation *de novo* on the record. *U.S. v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002). Since the District Court legally misinterpreted the scope of the limitation on corporations in Amendment E, the Court's determination should reversed. Nebraska's Supreme Court clearly interprets "corporations" to include cooperative corporations. *Pig Pro Nonstock Co-op. v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). The District Court determined Amendment E, and by implication Initiative 300, do not include cooperatives in their corporation restrictions, clearly ignoring Nebraska's prior interpretation. The Court ignores a canon of statutory construction in failing to use the same construction on the "borrowed" Nebraska "corporation" language. *Shannon v. U.S.*, 512 U.S. 573, 582, 114 S.Ct. 2419, 2426 fn. 8 (1994). The Court should have adopted the meaning given to

the terms of Nebraska law by a Nebraska court. *Id.*

Cooperatives are formed as corporations, not partnerships or associations. All 8th Circuit states clearly allow cooperatives to file articles of incorporation, register themselves with the Secretary of State, have a registered office and agent, and issue stock, just like a regular corporation. Neb. Rev. Stat. §§ 21-1301, 21-1302 (2001); *see also* Ark. Code Ann. §§ 2-2-119, 4-26-101; Iowa Code §§ 501.102, 501.202 (1999); Minn. Stat. §§ 308A.005, 308A.201 (1997), 308A.131 (1998); Mo. Rev. Stat. §§ 357.010, 357.020 (2001); N.D. Cent. Code §§ 10-15-03 (1987), 10-15-05 (1999); S.D. Codified Laws Ann. §§ 47-15-3 (1965), 47-15-4 (1992), 47-15-27 through 47-15-39 (1965). Profits may be distributed by patronage, rather than by percentage ownership, which does not having any bearing on the status of the cooperative entity. If the District Court stated a lease was not a contract, but something else, the appellate could would find that ruling legally wrong. The District Court's decision here is legally wrong, in addition to being an advisory opinion, and should be reversed.

III. THE DISTRICT COURT ERRED BY RULING ON PLAINTIFFS' ADA CLAIM, WHICH WAS NOT AT ISSUE BEFORE THE COURT; IN THE ALTERNATIVE, THE ADA CLAIM FAILS ON ITS MERITS BECAUSE PLAINTIFFS WERE NOT DISABLED, THE ADA DOES NOT DISCRIMINATE AGAINST THEM BECAUSE OF ALLEGED DISABILITIES, AND THE DISTRICT COURT DID NOT PROPERLY APPLY AMENDMENT E'S "TEMPORARY NON-COMPLIANCE" PROVISION.

The District Court's decision on the ADA claim should be dismissed or vacated and remanded for trial since it was dismissed before trial and therefore not an issue before the court, and Plaintiffs did not re-allege the claim nor make any relevant offers of proof after the District Court rescinded its dismissal of the claim.

The Court of Appeals reviews claims of constitutional error and issues of statutory construction *de novo. United States v. Allen*, 247 F.3d 741, 757 (8th Cir. 2001). Plaintiffs' original Complaint included the allegation that Amendment E violated Title II of the ADA. [Plaintiff's Complaint for Injunctive and Declaratory Relief, at 28.] In a pre-trial order, the District Court dismissed this claim for lack of subject matter jurisdiction, based on *Alsbrook v. City of Mamuelle*, 189 F.3d 999 (8th. Cir. 1999). [9/13/2001 Order, at 12.] Subsequently, the Plaintiffs filed an Amended Complaint, omitting the ADA claim. Shortly after trial, the District Court notified both parties that *Alsbrook v. City of Mamuelle* had recently been overruled by the 8th Circuit Court of Appeals in *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001) and *Gibson v. Arkansas Dept. of Correction*, 265 F.3d 718 (8th Cir. 2001). *Id.* [12/13/2001 Memorandum Letter.] The court stated that under *Grey* and *Gibson*, subject matter jurisdiction now exists to entertain an ADA claim for prospective, injunctive relief against South Dakota, and that "[c]ounsel should keep this in mind as [they] submit further arguments." *Id.* Subsequently, plaintiffs failed to re-allege or brief the existence of factual evidence in the record on the ADA claim, much less argue

the merits of the non-existent claim.

An Amended Complaint supercedes an original Complaint and renders the original Complaint without legal effect. *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000). Plaintiffs' Amended Complaint did not contain an ADA claim; therefore, the ADA was not an issue before the court at trial. Plaintiffs did not present any offers of proof in relation thereto. However, the court claims Plaintiffs' testimony on equal protection and commerce clause claims amount to an offer of proof on ADA issues. *South Dakota Farm Bureau, Inc.* at 1039. This renders incomprehensible and disingenuous the District Court's declaration that plaintiffs submitted ADA offers of proof at trial, since such was not an issue before the court under the Amended Complaint. *Id.* Further, plaintiffs' failure to pursue an ADA claim *in any way* after the District Court's December 13, 2001 letter surely constitutes a waiver of this claim.

In short, the District Court's letter which allowed the ADA claim to erroneously go forward procedurally, despite the pleadings of the parties, later expanded into a validation of the claim on its merits, without any discussion or cross examination of relevant evidence in between.

The ADA claim fails on its merits because Plaintiffs are not disabled as defined under the ADA, and Amendment E does not discriminate against Plaintiffs based upon their disabilities.

This Court's review under the clear error standard should result in a "definite and firm conviction that a mistake has been committed." *Willis v. Henderson*, 262 F.3d 801, 808 (8th Cir. 2001). Assuming *arguendo* that the District Court overlooks these problems and renders *post hoc* plaintiffs' testimony as evidence of a disability, even though it obviously was not intended to be such, the ADA claim still fails on its merits.

Title II of the ADA states, in part:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

To state a prima facie claim under Title II, a plaintiff must show: (1) he is a person with a disability as defined by statute; (2) he is otherwise qualified for the benefit in question; and (3) he was excluded from the benefit due to discrimination based upon the disability. *Randolph v. Rodgers*, F.3d 850, 858 (8th Cir. 1999). Plaintiffs' ADA claim fails because they cannot satisfy the first and third elements of the *Randolph* test.

First, Plaintiffs are not disabled as required by statute, and thus do not invoke the ADA. Under § 12132, an individual has a "disability" if he has "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; (C) regarded as having such an impairment." Under 28 C.F.R. § 35.104, "substantially limits" means "unable to perform a major life activity that the average person in the general population can perform or significantly restricted

as to condition, manner, or duration of such performance as compared with a member of the general population." *Id.* Examples of major life activities include self-care, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* Plaintiffs Brost and Holben must allege they are disabled because they are substantially limited in performing strenuous manual labor on their farms, which constitutes work—i.e. a major life activity—under the ADA. Gleaning from the scant evidence on the record, and testimony that both were able to do some physical labor, neither Brost nor Holben are disabled under ADA Title II.

When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). Assuming Brost and Holben were unable to perform strenuous day-to-day labor on their farms, such inability to perform this single job falls short of the requirement of being unable to perform a broad class of jobs, as required by the ADA. Indeed, Brost is an attorney, and Holben is an accountant. Surely the versatile skills developed by the training of each individual in their professions have enabled them to pursue a wide range of employment. Simply because one cannot pursue the "job of their dreams" does not make them disabled under the ADA.

The trial record is utterly devoid of any substantive proof of the plaintiffs' alleged disabilities, as required by the ADA. All that exists is vague, highly generalized personal testimony by each plaintiff. Brost testified that he had surgery and chest and arm pain within the past month, and thus was unable to make the trial. T 58. Such testimony was not proffered as proof of an ADA disability, but rather a response to an introductory question as to why he was not present for trial. *Id.* For all intents and purposes, Brost's physical condition may have been a temporary condition stemming from his surgery, which would not constitute a "substantial limitation" under Title II. *See* 29 C.F.R. § 1630.2(j)(2) ("To determine whether an individual is substantially limited in a major life activity, a court should consider the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or expected long-term impact of the impairment"). Of course, neither party's attorney delved any deeper, since the ADA claim was not a trial issue. Holben admitted during cross-examination that he actually performed such physical activity as riding on his All-Terrain-Vehicle or a horse to examine the health of his cattle. T 259. These facts contradict a finding that he is "substantially limited" in performing day-to-day labor on the farm.

In addition, Amendment E does not discriminate against Plaintiffs because of their alleged disabilities. Rather, Amendment E "discriminates" against certain farmers based on *distance* from the farm. According to a South Dakota state court, Amendment E was passed in order to protect family farms and the environment, and to maintain the rural way of life. *Knittel v. South Dakota*, S.D.

Sixth Judicial Circuit, Civ. 99-45. In the judgement of South Dakota voters, the best way to achieve such goals was to connect farm owners to the land, which necessarily requires eliminating distance between farm and owner. Two effective ways of tying owners to the land are to require residence or day-to-day labor. Thus, Brost's and Holben's difficulty is not that they are disabled, but that they live away from their farms.

The Court erred by not properly applying Amendment E's "temporary non-compliance" provision, after misinterpreting Plaintiff's temporary impairment to be a violation of Amendment E.

The District Court erroneously failed to recognize that Mr. Brost's entities were family farms, and were within the safe harbor of S.D. Const. art. XVII, §§ 23. Despite no evidence of South Dakota enforcing the law against Brost's entities, the District Court believed that even a temporary impairment forces divestment of corporate or syndicate-held agricultural property. T 869. Mr. Brost's impairments, assuming *arguendo* they constitute disabilities, could be temporary. The scant facts available indicate most of the Brost companies, if not all, likely qualified as "family farms" after the 1998 passage of Amendment E, since Mr. Brosts labors likely would fit "the day-to-day labor" requirements of Amendment E.T 58, 68, 106. If the entities were "family farms" before Mr. Brost became temporarily disabled, they would have 20 years to become compliant again under S.D. Const. art. XVII, §§ 23.

The District Court, much like its cooperative determinations, does not have a justiciable issue before it relating to Mr. Brost's supposed impairment. If South Dakota didn't believe Mr. Brost's entities were violating Amendment E (since they were "family farms"), there was no present controversy before the District Court. *Garcia v. Brownell*, 236 F.2d 356, 358 (9th Cir. 1956), *cert. denied*, 362 U.S. 963, 80 S.Ct. 880 (1960). The Court's opinion, resting on uncertain future facts relating to the Brost entities, and lacking an actual controversy, constitutes an improper advisory opinion. *Brown v. Ramsey*, 185 F.2d 225, 227 (8th Cir. 1951). The court cannot rely upon what may happen 20 years from now to the ownership, stockholders or Mr. Brost in determining that there is a current controversy surrounding the application of the ADA to Amendment E's requirements. The Court clearly erred in ignoring the "safe harbor" set out in S.D. Const. art. XVII, §§ 23, as it applies to Brost's entities and then further erred by determining Mr. Brost presented a justiciable controversy before the Court.

IV. THE DISTRICT COURT ERRED BY HOLDING THAT AMENDMENT E VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE THE AMENDMENT DOES NOT DIRECTLY DISCRIMINATE AGAINST INTERSTATE COMMERCE, NOR FAIL THE *PIKE* TEST BY IMPOSING AN ACTUAL BURDEN ON INTERSTATE COMMERCE THAT IS "CLEARLY EXCESSIVE" TO THE AMENDMENT'S PUTATIVE LOCAL BENEFITS.

A. Defendants need not introduce bolstering proof that Amendment E is constitutional until Plaintiffs satisfy their heavy burden of overcoming a presumption of constitutionality.

All statutes are presumed constitutional and the heavy burden of proving otherwise rests with the challenger of the statute. *South Carolina State Highway Dept. v. Barnwell*, 303 U.S. 177, 58 S.Ct. 510 (1938); *Nat'l Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co.*, 337 U.S. 582, 604, 69 S.Ct. 1173, 1183 (1949); *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 55 S.Ct. 538 (1935). The only time any burden shifts to the state is when the statute affirmatively or directly discriminates against interstate commerce, which Amendment E does not. *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447 (1986). Further, Defendant need not show the absence of a less burdensome alternative to Amendment E in order to prove constitutionality, unless Plaintiffs satisfy their heavy burden of proving a statute directly discriminates against interstate commerce. *Cotto Waxo v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995).

B. The District Court was correct in determining that Amendment E does not directly discriminate on its face, or in its purpose or effect.

When a state statute's constitutionality is challenged under the Dormant Commerce Clause, the court must determine whether the statute discriminates against interstate commerce directly and/or indirectly. *United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d 762, 765-67 (8th Cir. 1999). A state law may not directly discriminate against interstate commerce on its face, or in its purpose or effect. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1383 (8th Cir. 1997). The District Court correctly determined that Amendment E does not directly discriminate in any of these fashions.

First, the District Court correctly concluded that Amendment E does not discriminate on its face, because corporate or syndicate farmers both inside *and* outside South Dakota cannot own real estate used for farming. *South Dakota Farm Bureau, Inc.* at 1046 - 1047. Thus, whether incorporated within South Dakota or not, corporate or syndicate farmers are treated the same. Further, Amendment E has no extraterritorial reach, since it does not require out-of-state commerce to be conducted according to in-state terms. *Id.*; *see also Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995). Second, the District Court also correctly concluded that the expressed purpose of Amendment E (e.g. to retain family farms and to prevent limited liability companies from gaining control of

the food supply) is not discriminatory, since it applies to both in-state and out-of-state entities also. *Id.* Third, the District Court correctly concluded that Amendment E is not discriminatory in its effect. *Id.* "Negatively affecting interstate commerce is not the same as discriminating against interstate commerce." *Cotto Waxo*, 46 F.3d at 794. Amendment E may prevent out-of-state limited liability entities from raising livestock in South Dakota, but it does not prevent them from doing so elsewhere. In short, this "raising the costs" of doing business in South Dakota does not represent unconstitutional discrimination.

Plaintiffs have previously admitted that Amendment E does not directly discriminate against interstate commerce. In the "Pro-Con Statement" regarding Amendment E, under "Con – Constitutional Amendment E" it reads "[t]he language of Amendment E *does not* clearly distinguish between South Dakota farmers and out-of-state-based farmers and ranchers." Plaintiff's Exhibit 19, T 634 (emphasis added). This "con" statement was submitted to the Secretary of State by none other than Plaintiff Frank Brost. *Id.* The Plaintiffs continue this argument in the trial in this matter. T 852.

C. The District Court erred by determining that Amendment E fails the Pike test because its alleged burden on interstate commerce was proven by mere opportunistic speculation that when properly mitigated, does not "clearly exceed" Amendment E's straightforward putative benefits.

Any potential Dormant Commerce Clause violation would occur because Amendment E *indirectly* discriminates against interstate commerce. When a "statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is *clearly excessive in relation to the putative local benefits*." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970) (emphasis added). The *Pike* balancing test does not involve determining whether a less restrictive statutory alternative would accomplish similar ends. *United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d at 767. Appellants theorize less restrictive statutory alternatives to Amendment E, but such is only required under a "direct discrimination" inquiry, and therefore it is irrelevant here. *Id.* at 768; *see also Cotto Waxo Co. v. Williams*, 46 F.3d at 793.

The putative state benefits of Amendment E, as determined by a South Dakota Circuit Court, include protecting family farms and the environment, and maintaining the rural way of life. *See Knittel v. South Dakota*, S.D. Sixth Judicial Circuit, Civ. 99-45. According to the District Court below, these benefits represent a compelling state interest:

> The evidence presented in court, the court's knowledge of the economic hardships endured by family farmers in competing with large 'other players' in agriculture, and the evidence of fears of spoilation of the environment by entities in which the owners are sheltered from personal responsibility all show not only a legitimate state interest but a compelling state interest.

South Dakota Farm Bureau, Inc. at 1048.

In light of this factual finding, in order to violate the Dormant Commerce Clause under *Pike*, Amendment E's burden on interstate commerce must "clearly exceed" this compelling state interest.

In discussing Amendment E's alleged burden on interstate commerce, the District Court speculated that Amendment E would greatly increase the costs of utility, pipeline, and railroad companies needing corridors for interstate transmission or transport. *Id.* at 1050. The court's finding of any clearly excessive burdens on interstate commerce hinged on the fact that Amendment E prohibited corporations or syndicates from obtaining easements for these corridors, and that such prohibitions would force the entities to purchase the real estate, causing "greatly increased costs" therefore concluding "interstate commerce would be greatly affected." *Id.*

In *Ben Oehrleins*, this court stated the following:

> [Plaintiff's] theory also assumes that an out-of-state concern that permanently locates an operation within the state is still an 'out-of-state' entity that can complain that a law that even-handedly restricts a local market is 'discriminatory.' . . . A Delaware corporation doing business in Minnesota could not argue that it is discriminated against by Minnesota laws that apply equally to all businesses operating in the state. South Dakota companies may choose not to locate operations in Minnesota because of comparatively high state taxes that apply to all businesses, but this is not discrimination under the Commerce Clause. Like any other local market regulation, [the statute] may or may not encourage companies from doing business in the state. But while this may be a relevant concern in forming economic policies, it is simply not the proper inquiry for considering discrimination under the Commerce Clause.

Supra. at 1386-87.

The situation in the case at hand parallels that described above. In-state *and* out-of-state corporations or syndicates alike may not own an interest in real estate used for farming, since both in-state and out-of-state entities are subject to this same burden.

At trial, Plaintiffs claimed that post-Amendment E, the price of constructing transmission lines through South Dakota would be drastically increased, since Amendment E would force utility companies to buy "corridor land" because the legislation forbids them from having an easement on agricultural land. Plaintiffs alleged that purchasing such land would cost two to three times the price of obtaining an easement, which represents an undue burden on interstate commerce that clearly exceeded the statute's putative local effects.

The evidence used to support the 200-300% number was vague and questionable in nature. Bernadeen Brutlag, regulatory services manager for Plaintiff Otter Tail's rate design and administration, testified that despite her company's claim that buying agricultural land for transmission corridors would supposedly pose an undue burden to their company, she had not been asked to perform a calculation to determine the amount of such an increase. T 317. She also testified that to her knowledge, no one at Otter Tail had performed such a

calculation. *Id.* Robert Krava, manager of the Land Management Department for Otter Tail, also testified regarding the increased costs of acquiring easements, post-Amendment E. T 323-343. When asked how he arrived at said figure, Krava "predicted" that the costs of obtaining an easement would double or triple, for the reason a farmer could not farm nor even cross the strip of easement property. T 341. It is clear that plaintiffs' witnesses seek to pile assumption upon assumption not established by the evidence, in order to finally arrive at a sum total that amounts to a "clearly excessive" burden on interstate commerce. However, the assumptions could just as easily cut the other way, and other mitigating factors exist that decrease plaintiffs' inflated estimate.

First, it is unclear whether plaintiffs' cost estimate was based upon purchase of an easement, or acquiring the property by condemnation. T 328. Assuming Mr. Krava's assertion the Plaintiff utilities would have to take fee title to the land, rather than an easement upon it, the structure payments paid the land owner for each pole in the right of way would no longer be paid to land owners, since the utility companies would now own the land. Second, assuming the land was purchased in fee, there is no evidence that utilities would not grant easements across their corridors, since use of these rights-of-way pose little threat or disadvantage to them. Alternatively, if only an easement is granted by the land owner, it seems likely the owner will retain a right of passage across the land. Mr. Krava's speculation on no crossing of utility corridors by farmers in his testimony is not supported by the likelihood that reasonable utility companies would grant easements or access to parcels "split-up" on farms, thereby reducing farmers incentive to hold out for higher-than-fair-market-value prices. Third, the "hold-out" price of 200-300% of fair-market-value for an easement, or purchase in fee, is wholly arbitrary, speculative, and without tangible support.

To allow plaintiffs to satisfy their substantial burden with mere speculation on prospective actions by utilities confuses the roles of the parties involved. *See Mittlieder v. Chicago & N.W. Ry. Co.*, 413 F.2d 77, 83 (8th Cir. 1969) (stating that speculation is generally inadmissible). While *defendants* merely need to assert *putative* local benefits of the legislation, *plaintiffs* are required to assert *actual* burdens to interstate commerce. *See Hertz Corp. v. City of New York*, 1 F.3d 121, 132 (2nd Cir. 1993); *Designs in Medicine, Inc. v. Xomed, Inc.*, 522 F.Supp. 1054, 1059 (E.D.Wis. 1981). The court should note that the Plaintiff utilities did not actually acquire any right-of-way easements during the nearly four years Amendment E was enacted further calling into doubt any self-induced lack of actually known damages upon the utility. T 325. The plaintiff utilities lack of actual cost figures is a burden that's self-inflicted. Their reliance on speculative cost assumptions, which are mitigated by the relevant factors above, hardly represent an actual burden that clearly exceeds the compelling putative state interests, as required under *Pike.* Further, Amicus asserts it is very likely other utilities in South Dakota *did* acquire rights-of-way after the enactment of Amendment E, and the Plaintiff utilities either ignored the actual costs of these easements or purchases, or could not find a utility with a post-Amendment E easement who would testify to a double or triple cost for

easements or purchase.

V. THE DISTRICT COURT ERRED BY CONSTRUING AMENDMENT E TO PRECLUDE CORPORATIONS FROM OBTAINING LIMITED-USE LAND GRANTS, SUCH AS EASEMENTS.

An easement is a servitude on land. S.D. Codified Laws Ann. § 43-13-2 (1999). The South Dakota Supreme Court has stated that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." *Knight v. Madison*, 2001 S.D. 120, ¶ 4, 634 N.W.2d 541, 542 (2001). It has also stated that an easement is "an interest in the land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." *Id.*

In *Musch v. H-D Electric Cooperative, Inc.*, 460 N.W.2d 149, 154 (S.D. 1990), the South Dakota Supreme Court examined a utility easement and recognized that its use was limited to the use specified in its grant, with the remaining rights-to-use existing with the grantor. Thus, utility easements are a legal interest limited to the use specified by their easement: the placement of poles and wires for transmission purposes. Obviously, farming and agriculture cannot be performed in the small place allotted for pole bases, nor on electronic wires. Accordingly, this utility easement is not an interest contemplated by Amendment E, and therefore outside of the "interest . . .in real estate used for farming". S.D. Const. art. XVII, § 21.

CONCLUSION

South Dakota's Amendment E should be properly construed to describe cooperatives as corporations, then properly exempt the described cooperatives, reversing the District Court's interpretation. Amendment E's provisions should further be construed to apply only to business trusts and not all trusts by reversing the District Court's interpretation. The District Court's conclusions amounting to advisory opinions should be reversed. Amendment E should be found to be consistent with the ADA, since a violation of the ADA was not alleged, there was no actual controversy and since Plaintiffs do not meet the definition of disability under the ADA, thereby reversing the District Court. The District Court should be reversed on its determination that Amendment E violates the dormant commerce clause, since the putative benefits clearly outweigh any speculative burdens Plaintiffs asserted. This Court should reverse the decision of the lower court in its entirety and dismiss the Amended Complaint.

An Agricultural Law Research Article

Brief of Appellees Montana-Dakota Utilities Co., Northwestern Public Service, and Otter Tail Power Company

by

Neil Fulton and Dave Gerdes

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BRIEF OF APPELLEES MONTANA-DAKOTA UTILITIES CO., NORTHWESTERN PUBLIC SERVICE, AND OTTER TAIL POWER COMPANY

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CORPORATE DISCLOSURE STATEMENT

Montana-Dakota Utilities CO. is a division of MDU Resources, Inc. Northwestern Public Service is a division of NorthWestern Corporation. On 9 April 2002 Otter Tail Power Company changed its corporate name to Otter Tail Corporation. No publicly traded company owns 10% or more of the stock of any of these entities.

SUMMARY OF THE CASE

Defendants appeal the judgment of the District Court for the District of South Dakota, The Honorable Charles B. Kornmann presiding, declaring that Article XVII, Sections 21 through 24 of the South Dakota Constitution (known as "Amendment E") violate the Commerce Clause of the United States Constitution. Following a bench trial the District Court held that Amendment E imposed an undue burden on interstate commerce in violation of the Commerce Clause, did not apply to cooperatives, and was preempted by the Americans With Disabilities Act. This appeal has been consolidated with cross-appeals of various named Plaintiffs. Appellees request oral argument of 30 minutes per side because this case involves the interpretation of both state and federal constitutional and statutory provisions and involves multiple parties participating in cross-appeals of various aspects of the District Court judgment.

STATEMENT OF THE ISSUES[1]

1) DOES SOUTH DAKOTA'S CONSTITUTIONAL AMENDMENT E VIOLATE THE DORMANT ASPECT OF THE COMMERCE CLAUSE BY DIRECTLY DISCRIMINATING AGAINST OR IMPOSING AN UNDUE BURDEN ON INTERSTATE COMMERCE?

S.D. Const., Art. XVII, §§ 21-22
SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995)
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)

2) ARE UTILITY EASEMENTS INTERESTS IN "REAL ESTATE USED FOR FARMING" COVERED BY AMENDMENT E?

S.D. Const., Art. XVII, § 21
Kaberna v. School Board of Lead-Deadwood, 438 N.W.2d 542 (S.D. 1989)
Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992)

STATEMENT OF THE CASE

This appeal involves an action for declaratory and injunctive relief filed

1. Appellants' argument that Amendment E does not cover cooperatives is not addressed. Since the District Court's declaration that Amendment E is unconstitutional should be affirmed, the scope of its coverage need not be addressed.

against South Dakota's Secretary of State and Attorney General in their official capacities (collectively referred to as "the State"). The Plaintiffs sought a declaration that Article XVII, §§ 21 through 24 of the South Dakota Constitution (popularly known as "Amendment E") violated the Commerce Clause of the U.S. Constitution. After a week long court trial, the District Court, the Honorable Charles B. Kornmann, took the case under advisement. On 17 May 2002 the District Court entered judgment in favor of the Plaintiffs declaring that Article XVII, §§ 21 through 24 of the South Dakota Constitution violated the Commerce Clause and was unenforceable. The District Court denied the request for injunctive relief in the same judgment. The State filed this appeal.

STATEMENT OF THE FACTS

Through a 1998 popular initiative, South Dakota adopted "Amendment E" to its constitution as Article XVII, Sections 21 through 24. The heart of Amendment E is its provision that, "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const. Art. XVII, § 21. Addendum p. A-2. Amendment E provides certain exceptions, the largest being for any "family farm corporation or syndicate." S.D. Const. Art. XVII, § 22(1). That exception applies only if a majority of ownership in the "corporation or syndicate" is held by natural persons within the fourth degree of kinship and at least one owner "shall reside on or be actively engaged in the day to day labor and management of the farm," through "both daily or routine substantial physical exertion and administration." *Id.*

Livestock and real estate owned, leased, or contracted for prior to the approval date of Amendment E is exempt. S.D. Const., Art. XVII, § 22(4) & (5). Real estate must be held in "continuous ownership" to fit within this exception and no contract involving livestock may be extended beyond the termination date it had when Amendment E was approved. *Id.* Amendment E also exempts "agricultural land" acquired for non-agricultural development purposes if it is developed within five years of acquisition and not used for farming (unless by a "family farm") during that five year period. S.D. Const., Art. XVII, § 22(10).

An atmosphere of protectionism for South Dakota agriculture surrounded the passage of Amendment E. South Dakota Farmer's Union President Dennis Wiese was a primary supporter of Amendment E. He testified that Amendment E was intended to protect "family farms" by keeping corporate livestock producers like Murphy Farms and Tyson out of South Dakota. T. 123, 634, 646.[2] Wiese and Nancy Thompson, an attorney involved in drafting Amendment E, agreed that it was written to prevent out of state corporations from qualifying for its exceptions. T. 224, 226, 228, 649. The "family farm" exemption incorporated its requirement for daily residence or labor on the

2. Citations to the trial transcript are made by "T. ___" as in the State's brief.

property to achieve that purpose. T. 228. Despite discussion that Amendment E might violate the Commerce Clause, T. 377-78, it was put together quickly because some out of state corporations were rumored to be coming to South Dakota and supporters "wanted to get a law in place to stop them." T. 224.

Amendment E has substantially disrupted interstate commerce with South Dakota in agriculture and other areas. Ron Wheeler, head of South Dakota's Governor's Office of Economic Development, testified that numerous business prospects declined to come to South Dakota because of inability to comply with Amendment E. T. 737, 739. South Dakota Farm Bureau President Mike Held testified that Amendment E has prevented neighbors who were not in the same family from jointly purchasing farm machinery or livestock and prevented farms from entering contracts to feed livestock for out of state companies. T. 23-24. Important sources of capital, particularly for beginning farmers, are frozen out of South Dakota by Amendment E. T. 24, 27.

Individual producers also testified that Amendment E severely disrupted their operations. Frank Brost owns land and cattle individually and with his children and a long time ranch employee through several business entities. T. 64-65. Heart surgery and a knee replacement prevent him from engaging in "routine substantial physical exertion" on the ranch. T. 62, 66, 75-77, 78, 80, 98. Since Brost cannot comply with Amendment E, he must liquidate or disband his existing business structures and destroy a sophisticated estate plan. T. 85-87, 88-89. The value of his ranch is diminished because Amendment E severely narrows the realm of possible purchasers. T. 91.

About 70 percent of the cattle John Haverhals feeds on a contract basis belong to entities that cannot do business in South Dakota under Amendment E. T. 163-65. Ivan Sjovall has lost almost two thirds of his feeding clients since Amendment E was enacted. T. 192-93. Both men take in so many cattle from out of state companies that they will be out of business if Amendment E remains in place. T. 173, 200. Plaintiff Donald Tesch has already lost his contract to feed hogs for Harvest States Cooperative because of Amendment E. T. 184.

Plaintiffs Montana-Dakota Utilities, Northwestern Public Service, and Otter Tail Power Company (collectively known as the "Big Stone Partners") are also injured by Amendment E. The Big Stone Partners own farming real estate both for an existing power plant's disposal needs and for planned construction of a new plant. T. 284-86. The Big Stone Partners will change their ownership percentages in the course of building the new plant, ending the continuous ownership needed to fit within an exception to Amendment E. T. 286-87. Acquiring new land for development and easements for transmission lines is also severely hampered by Amendment E. It may not be possible to complete development on farming property within Amendment E's five year window, current ownership percentages cannot be altered without losing an existing exemption, and new easements cannot allow farming to take place on them because the Big Stone partners will have an interest in real estate used for farming. T. 286-289, 326, 330. Easements across pastures, for example, will now require acquisition in fee and fencing of the easement corridor to prevent

livestock grazing. T. 330.

The expert testimony at trial indicated that Amendment E provides little, if any benefit to family farms. Dr. Lisa Labao, a sociologist, testified that industrialized farming had no clear cut detrimental impact on the social fabric. T. 465. Dr. Labao's own research actually indicated that "industrialized farming" improves the economy while small farming corresponds to increased poverty. T. 503-04. Dr. Luther Tweeten, an economist, testified that prohibiting corporate ownership of agricultural real estate and livestock would hurt small farmers because it would prevent the introduction of outside capital and management expertise. T. 538, 552, 554. Additionally, it prevents South Dakota farmers from competing on an even footing with out of state producers because they are barred from achieving the efficiencies and economies of scale that "corporate farming" provides. T. 540, 544, 550, 555. Amendment E burdens interstate commerce by limiting trade with South Dakota. T. 613.

SUMMARY OF THE ARGUMENT

Amendment E prohibits ownership of livestock or agricultural real estate by any "corporation or syndicate" that does not meet an enumerated exception. It both directly discriminates against interstate commerce and places an undue burden upon it in violation of the "dormant" aspect of the Commerce Clause. U.S. Const., Art. I, §8. Amendment E's discriminatory purpose is apparent both from the testimony of its proponents that it was proposed to keep certain large agricultural corporations out of South Dakota and from the poor fit between its means and stated ends. The effective inability of out of state business entities to fit within its primary exceptions demonstrates its discrimination in practical effect. Amendment E also imposes an undue burden on interstate commerce that is clearly excessive in relation to its ostensible local benefit: it totally forecloses many avenues of interstate commerce while protecting small farms, the environment, and rural life little if at all.

Amendment E's prohibition on corporate ownership of agricultural real estate applies to easements in land. The language of Amendment E states that, "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming. . . ." That prohibition applies to any interest in real estate used for farming, including easements. Easements are only excluded if the modifying phrase "used for farming" is improperly applied to "interest" rather than "real estate" in violation of the rules of statutory construction and common grammar.

ARGUMENT

This Court reviews the factual findings of the District Court for clear error. *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995). Legal conclusions are reviewed de novo. *Id.*

I) AMENDMENT E VIOLATES THE COMMERCE CLAUSE BOTH BY DIRECTLY DISCRIMINATING AGAINST AND BY PLACING AN UNDUE

BURDEN UPON INTERSTATE COMMERCE.

The power of Congress to regulate commerce among the states has long been held to include a concurrent restriction on the ability of individual states to do so. *See e.g., Hunt v. Washington Advertising Commission*, 432 U.S. 333, 350 (1977). State laws can violate this "dormant" aspect of the Commerce Clause in two ways.

First, state laws that discriminate against interstate commerce in their text, purpose, or effect are unconstitutional "virtually per se." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). A directly discriminatory law must be struck down unless the state demonstrates that it is the only means to advance a legitimate local purpose. *Hunt*, 432 U.S. at 353.

Second, laws that do not directly discriminate against interstate commerce in their text, purpose, or effect, may not impose a burden on interstate commerce that is clearly excessive in relation to their putative local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The District Court determined that Amendment E violated only the second standard. The record demonstrates that it fails both tests, however, and this Court may affirm on any basis supported by the record. *Mead v. Intermec Technologies Corp.*, 271 F.3d 715, 716 (8th Cir. 2002).

1) Amendment E directly discriminates against interstate commerce in both purpose and effect.

Amendment E directly discriminates against interstate commerce in its purpose and practical effect. As this Court recognized in striking down another protectionist popular initiative from South Dakota, discriminatory purpose can be identified by the intent and public statements supporting Amendment E. *SDDS, Inc., v. State of South Dakota*, 47 F.3d 263, 268-69 (8th Cir. 1995).

Amendment E was drafted quickly because out of state agricultural corporations, particularly Murphy Farms, were poised to enter South Dakota and Amendment E's proponents "wanted to get a law in place to stop them." T. 224, 397, 634, 646. That discriminatory purpose was communicated to the voters through the "Pro-Con" ballot statement regarding Amendment E. Addendum, p. A-1. The "Pro" statement demonstrates Amendment E's protectionist intent to keep agricultural profits from being "skimmed out of local economies and into the pockets of distant corporations." Addendum, p. A-1. Dennis Wiese, a drafter of the "Pro" statement, testified that Amendment E was intended to keep certain corporations out of South Dakota and to "provide local economies a very strong position," at their expense. T. 123, 634, 646, 666. Amendment E's drafters specifically tailored its language and the language of its exceptions to prevent out of state corporations from qualifying to do business in South Dakota. T. 224, 228, 649. As in *SDDS*, the atmosphere surrounding Amendment E was "brimming with protectionist rhetoric" that demonstrates its purpose of discriminating against interstate commerce.

Amendment E's discriminatory purpose can also be seen in the fact that the means used to achieve its ostensible purposes are relatively ineffective. *SDDS*, 47 F.3d at 268-69, *citing Hunt*, 432 U.S. at 352. The only legitimate purposes presented in Amendment E's "Pro" ballot statement are protecting South Dakota's rural and agricultural economy and environment. Addendum, p. A-1. Research by the State's own expert indicated that large scale farming improved the local economy while small farming was corresponded to higher poverty rates. T. 465, 505-04. Likewise, Dr. Luther Tweeten testified that Amendment E would hurt small farmers in South Dakota because it prevented access to capital and expertise that corporate farming enterprises could inject into South Dakota markets. T. 538, 552, 554. No evidence was introduced about environmental conditions or problems in South Dakota that Amendment E could address. The only thing that Amendment E did with precision is prevent out of state business entities from owning agricultural real estate and livestock. That further demonstrates its discriminatory purpose. *SDDS*, 47 F.3d at 268-69.

Amendment E also directly discriminates against interstate commerce in its practical effect. The language of Amendment E is clear, "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const., Art. XVII, § 21. To own livestock or agricultural property as an active producer, a "corporation or syndicate" must have a majority of ownership in the hands of individuals within the fourth degree of kinship with one family member who will ". . .reside on or be actively engaged in the day-to-day labor and management of the farm" through "both daily or routine substantial physical exertion and administration." S.D. Const., Art. XVII, § 22(1). This sweeping prohibition and narrowly limited exception has the practical effect of prohibiting almost all out of state business entities from engaging in production agriculture in South Dakota.

Almost by definition out of state businesses will not have an interest holder who meets the "residence" requirement of § 22(1). Likewise, it is far less likely that an out of state business entity will have an interest holder who can engage in "day to day labor and management of the farm" through physical work there. This makes it effectively impossible for most out of state business entities to farm or ranch legally in South Dakota—a fact recognized by several witnesses who testified that Amendment E had already driven out of state agricultural business from South Dakota. T. 102, 124, 126, 167, 184, 192-93.

Although some South Dakota business entities may not be able to comply with Amendment E's "sweat of the brow" requirement, out of state entities almost certainly cannot. Disproportionately burdening out of state businesses in this manner violates the Commerce Clause. *South Central Bell v. Alabama*, 526 U.S. 160, 169-70. *South Central Bell* held that allowing only in state corporations to chose to be taxed on the par value of their stock rather than actual capitalization violated the Commerce Clause because it disproportionately burdened out of state businesses. *Id.* Providing exceptions favoring in state trucking interests also violated the Commerce Clause. *Kassel v. Consolidated*

Freightways, Corp., 450 U.S. 662, 676 (1981). Likewise, Amendment E's requirement of daily residence or physical labor on the farm creates a burden that becomes increasingly severe the further one gets from the South Dakota border. As a result, it discriminates against interstate commerce in practical effect. *Id.*

Because Amendment E discriminates against interstate commerce in purpose and effect, the State must show that it advances a legitimate purpose which nondiscriminatory means cannot. *Hunt*, 432 U.S. at 353. The record demonstrates that the State has not met that burden.

The State identifies "protection of the family farm and rural way of life" as the ostensible legitimate purposes of Amendment E. Appellant's Brief, p. 26. Assuming the legitimacy of those purposes, other means to achieve them exist that do not discriminate against interstate commerce.

The State quickly identifies, but dismisses, three alternatives to Amendment E in its brief: those and other nondiscriminatory options do exist, however. South Dakota could limit the number of livestock or acres owned by any one person or corporation. If the concern of Amendment E is "large scale" farming, nothing would be more effective. South Dakota could more aggressively enforce its existing antitrust statutes (SDCL § 37-1-1, et seq.) or expand them to stop vertical integration and unfair use of market power by large agricultural production companies. South Dakota could impose a progressive tax on livestock and agricultural real estate as a disincentive to expansion beyond a certain level. Concerns about the environment and rural way of life can be addressed through existing or new laws on zoning and environmental contamination.

An additional problem with the State's argument is that the testimony at trial indicated that small farms correlate to increased poverty in rural communities. T. 465, 504-04. Ultimately, not only do nondiscriminatory options exist to achieve Amendment E's stated purpose, much more effective options exist. The State therefore fails to meet its burden to demonstrate that no alternatives that do not discriminate against interstate commerce exist to achieve Amendment E's ostensible purposes. The District Court's declaratory judgment that Amendment E violates the dormant aspect of the Commerce Clause should therefore be affirmed.

2) Amendment E places an undue burden on interstate commerce that is clearly excessive in comparison to its purported local benefit.

Amendment E imposes a burden on interstate commerce that is clearly excessive in comparison to any local benefit that it provides. The record shows that several forms of interstate commerce in South Dakota have been lost or severely hampered by Amendment E while little, if any, benefit is attributable to it. The District Court therefore properly determined that Amendment E violates the Commerce Clause. *Pike*, 397 U.S. at 142.

Plaintiffs Montana Dakota Utilities Company, Otter Tail Power Company, and Northwestern Public Service own land and power generating facilities

together as the Big Stone Partners. T. 284. The Big Stone Partners own an existing power generation plant and have a plan in place to construct another plant. T. 283. The plan is sufficiently concrete that the Big Stone Partners have bought some of the land they will need to build on and applied to South Dakota's Public Utilities Commission for a site permit. T. 283. To build the new plant, the Big Stone Partners will need to convey some of the property they owned prior to Amendment E to a new ownership group, destroying the ability of that land to fit within Amendment E's "grandparent" exception. T. 288. The new plant will also require acquisition of transmission easements across farm property. T. 289. The cost of those easements is expected to triple because Amendment E prevents the Big Stone Partners from having an easement interest in land used for farming; as a result, they would have to purchase the entire easement corridor in fee and prevent agricultural access. T. 326-28, 330. These problems would exist for any future easements or construction by the Big Stone Partners or other businesses.

The injury to the Big Stone Partners is, contrary to the State's argument, ripe for consideration. The Big Stone Partners have purchased agricultural real estate for development of a new power plant. While that land currently fits within Amendment E's exception for land obtained for development, if plant construction is not completed within five years, the Big Stone Partners must divest themselves of the land. S.D. Const., Art. XVII, § 22(10). If they do not divest, the State may bring an action to force divestment or escheat to the State. *Id* at § 24. Additionally, the Big Stone Partners have previously readjusted their ownership percentages for agricultural real estate owned for future development and as a "buffer zone" for their plant. T. 284-85, 299, 301. Any future change of ownership would destroy the Big Stone Partners' qualification under the "grandparent" exception costing them rental income off the farm property and forcing them to divest within five years. T. 286, 325; S.D. Const., Art. XVII, § 24. Development and construction of a large power plant often takes more than five years, making Amendment E a substantial hurdle to new construction. T. 288-89. Additionally, the Big Stone Partners cannot buy land when the price is right unless it will be developed within five years. The Big Stone Partners thus have specific existing injuries from Amendment E: they cannot change ownership of existing real estate, are limited in their ability to acquire development real estate for future development, and face increased acquisition costs.

Although not heavily relied on by the District Court, the record demonstrates that Amendment E unduly burdens other areas of interstate commerce as well. Feedlot operators Ivan Sjovall and John Haverhals have both lost numerous out of state clients as a result of Amendment E. T. 165, 173, 192-93. Both men will be unable to continue their business if Amendment E remains in place. T. 173, 200. Donald Tesch lost a feeding contract with Harvest States Cooperative to feed hogs because of Amendment E. T. 184. Rancher Frank Brost and South Dakota Farm Bureau president Mike Held both testified that Amendment E severely limits the possible business forms for agricultural

enterprises, and by extension shuts off out of state sources for capital, marketing expertise, and business opportunities. T. 23-24, 27, 91, 102, 124-26.

Otter Tail Power has bypassed South Dakota as a location for wind energy generation due to uncertainty surrounding Amendment E. T. 313. Florida Power and Light likewise has a wind power generation project on hold due to Amendment E. Deposition of Bob Bergstrom, p. 13, 19. The Governor's Office of Economic Development had numerous business prospects reject South Dakota because of Amendment E. T. 737, 739.

On the other side of the ledger, however, Amendment E does little if anything to advance its ostensible purposes of protecting small farms and the rural way of life. Haverhals, Sjovall, and Tesch testified how Amendment E has already hurt them as small producers. Held and Brost also addressed how Amendment E limits the ability of South Dakota farmers and ranchers, particularly younger producers just starting out, to compete in today's markets. These harms spill over into small communities by decreased purchases of goods and services. T. 193-95.

Both sides of the case produced expert testimony demonstrating that Amendment E's benefit is substantially outweighed by its harm. Dr. Tweeten testified that Amendment E hurts South Dakota's small farmers by depriving them of capital and marketing expertise, economies of scale, and placing them at a competitive disadvantage in relation to producers in other states. T. 538, 540, 550, 552, 554. The State's expert, Dr. Labao, testified that the presence of "industrialized farming" was a much worse predictor of community health than things like quality and quantity of non-agricultural employment opportunities and community capital. T. 494. Her own research did not demonstrate a detrimental impact on communities from "industrialized farming." T. 497. In fact, in the central portion of the United States, the presence of industrialized farming correlated to better economic conditions. T. 503. Poverty and community decay varied little, if at all, in relation to the presence of small or industrialized farms. T. 503.

The balance of Amendment E's benefits and harms is clear. In its limited lifespan, Amendment E has terminated or impaired contract livestock feeding enterprises, cooperative agricultural machinery agreements between neighbors, farming and ranching enterprises operated by older or disabled farmers, utility construction and easement acquisition, and general economic development. In opposition to this checkered record, there is little, if any, evidence of benefits Amendment E has created for small farmers. Amendment E imposes an undue burden on interstate commerce and the District Court's declaratory judgment that its provision violates the dormant aspect of the Commerce Clause should be affirmed. *Pike*, 397 U.S. at 142.

II) AMENDMENT E APPLIES TO EASEMENTS.

Amendment E is clear: "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming. . . ." S.D. Const., Art. XVII, § 21. There is no listed exception for easements. S.D. Const., Art. XVII, § 22. There is also no doubt

that an easement is "an interest in the land in the possession of another" under South Dakota law. *See Knight v. Madison*, 634 N.W.2d 540, 542 (S.D. 2001) (internal citation omitted). The State is not arguing that an easement is not an interest in land, but that the Court should rewrite Amendment E to make "used for farming" describe the "interest" obtained by easement rather than the "real estate" it is obtained in. That argument is wrong.

It is true that an easement is an interest in land that is limited to its terms and subservient to the owner's remaining bundle of rights in the property. *See e.g., Knight*, 634 N.W.2d at 542-43 (right of way easement did not include right to exclude other users); *Musch v. H-D Elec. Co-op. Inc.*, 460 N.W.2d 149, 152-53 (S.D. 1990) (easement holder could not assert landowner defense of no duty to trespasser). The phrase "used for farming" in Amendment E does not limit its application to easements for certain uses, however, but describes the type of real estate in which a "corporation or syndicate" may not acquire "an interest, whether legal, beneficial, or otherwise."

The plain meaning of Amendment E must be given effect. *Apa v. Butler*, 638 N.W.2d 57, 70 (S.D. 2000). The plain meaning of "an interest, whether, legal, beneficial or otherwise in any real estate used for farming" is that "used for farming" modifies "any real estate" rather than "an interest." The rules of statutory construction and grammar dictate that a modifier be read to modify its last antecedent unless the context clearly dictates otherwise. *Kaberna v. School Board of Lead-Deadwood*, 438 N.W.2d 542, 543 (S.D. 1989); *see also FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389-90 (1959); Strunk & White, *The Elements of Style*, (3d ed.) p. 30-31, Macmillian Publishing Co., Inc., 1979. Nothing in Amendment E indicates that "used for farming" refers to anything other than the immediately antecedent "any real estate." Interpreting this portion of Amendment E as the State suggests would require an improper rewriting of the text of the South Dakota Constitution. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992) *citing Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). The District Court's reading of Amendment E to prohibit the acquisition of easements by any "corporation or syndicate" should therefore be affirmed.

CONCLUSION

Amendment E discriminates against interstate commerce in its purpose and effect and imposes a burden on interstate commerce that is clearly excessive in relation to its local benefit. It applies to all interests in land used for farming, including utility easements. The declaratory judgment of the District Court that Amendment E violates the Commerce Clause of the U.S. Constitution should therefore be affirmed.

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An Agricultural Law Research Article

Appellees and Cross-Appellants's Brief

by

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APPELLEES AND CROSS-APPELLANTS' BRIEF

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Corporate Disclosure Statement

Spear H Ranch, Inc. (properly known as Spear H Ranch, L.L.C.) is a limited liability corporation. No publicly traded company owns ten percent or more of its stock.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case involves a challenge to the constitutionality of a South Dakota state constitutional amendment which bans, subject to many exceptions, the use of certain corporate, or limited liability, business structures from use by farmers and ranchers in their farming businesses ("the Corporate Farming Ban"). This case addresses the constitutional limits on States which use regulation of corporate structure as a *means* to pursue certain governmental *goals*. The District Court held that the Corporate Farming Ban was preempted under the Supremacy Clause because it conflicted with Title II of the Americans With Disabilities Act and that the Corporate Farming Ban was unconstitutional because it violated the dormant commerce clause doctrine.

Appellees-Cross-Appellants respectfully request that the Court schedule oral argument in this case and ask for 30 minutes to present argument. This case has regional and national significance because regulations of "corporate farming" exist, albeit in less draconian terms, in other States, and this is the first case presenting a dormant commerce clause challenge to such a regulation. Oral argument would also aid the Court in its *de novo* review of certain issues.

STATEMENT OF THE ISSUES

ISSUE 1. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS IMPLIEDLY PREEMPTED BY TITLE II OF THE AMERICANS WITH DISABILITY ACT?

Grier v. American Honda Motor Co., 529 U.S. 861 (2000)

Crosby v. National Trade Council, 530 U.S. 363 (2000)

Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board, 467 U.S. 461 (1984)

ISSUE 2. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS CONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE DOCTRINE?

South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999).

SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995), *cert. denied*, 523 U.S. 1118 (1998).

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988).

STANDARD OF REVIEW

The constitutionality of a statute is a question of law which this Court reviews *de novo*. United States v. Carter, 294 F.3d 978, 980 (8th Cir. 2002); United States v. Prior, 107 F.3d 654, 658 (8th Cir. 1997).

This Court typically reviews a district court's factual findings for clear error. Friends of the Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 885 (8th Cir. 1997).

The Challengers will reiterate the standard of review as necessary in the appropriate sections of the Argument.

STATEMENT OF THE CASE

This case concerns Article XVII, Sections 21-24 of the South Dakota Constitution. These provisions were adopted by initiated measure and became effective in November 1998. The amendments prohibit certain business structures from farming and owning farmland. S.D. Const. art. XVII, § 21. (These provisions will be called the "Corporate Farming Ban" or the "CFB".)

Plaintiffs South Dakota Farm Bureau ("SDFB"), SD Sheep Growers, Haverhals Feedlot, Sjovall Feedyard, Brost, Tesch, Aeschlimann, Spear H. Ranch, and Holben filed their Complaint for Declaratory and Injunctive Relief on June 28, 1999 and challenged the constitutionality of the Corporate Farming Ban pursuant to several constitutional theories and 42 U.S.C. § 1983. (These Plaintiffs will be referred to as the "Agricultural Challengers".) Appellants' Appendix 12. (Hereinafter "App.") Among the various claims, Agricultural Challengers asserted that CFB violated the dormant aspect of the federal commerce clause. App. 33-35. This claim distinguished the case from any other challenge to a state corporate farming restriction. The Complaint also alleged claims under the Equal Protection doctrine of the U.S. Const. amend. XIV and under the Privileges and Immunities doctrine of U.S. Const. art. IV. In addition, the Complaint stated a claim that the CFB was invalid under the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101, et seq.

The State Defendants ("the State") filed their Answer on July 28, 1999. On October 21, 1999, the State filed a Motion to Dismiss on the basis of sovereign immunity and U.S. Const. amend. 11. App. 43-45. The State also sought to dismiss claims relating to the Privileges and Immunities clause and to the ADA. App. 44. A hearing was scheduled.

In the meantime, Dakota Rural Action and South Dakota Resources Coalition sought and received permission to intervene as Defendants [the "Intervenors"]. *South Dakota Farm Bureau, Inc., et al. v. Hazeltine, et al.*, 189 F.R.D. 560 (D.S.D. 1999).

Prior to the hearing, the Agricultural Challengers filed their Motion to Join Parties and File First Amended Complaint. App. 83-87. This motion sought to add the Utilities as Plaintiffs (the "Utility Challengers"). The proffered Amended Complaint added factual allegations pertaining to rules that Defendant Hazeltine had promulgated in implementing the provisions of Amendment E during the intervening six months.

A hearing and oral argument on the various motions was held on January 18, 2000. The District Court orally ordered that: (1) the Utilities' motion to join as Plaintiffs was granted (Doc. 66, Transcript of Oral Argument at 51, 53), (2) the State of South Dakota be dismissed as a party (*Id.* at 5), and (3) the ADA claim would be dismissed on Eleventh Amendment grounds (*Id.* at 6). He took other issues under advisement, including the request to dismiss State Defendants Barnett and Hazeltine. (*Id.* at 47, 54.) (Hereinafter, this will be referred to as the "January Order".)

In light of the Court's January Order, Challengers revised the Motion to File First Amended Complaint. App. 119-22. Among other things, the Plaintiffs amended their Complaint to delete the ADA claim which had been dismissed in the January Order and to add the Marston and Marian Holben Trust and the Utilities as Plaintiffs. App. 119-22.

On September 15, 2000, the District Court denied the remaining motions to dismiss and granted the Plaintiffs' motion to amend. App. 136-49. The September 15 Order also reiterated the dismissal of the ADA claim. App. 140.

The State and the Intervenors subsequently filed motions for partial summary judgment. In a Memorandum Opinion dated February 1, 2001, the District Court denied these motions. Add. 10. One of the State's rejected arguments was the argument that the SDFB did not have standing as an association. Add. 2.

Trial was scheduled for December 4, 2001. All parties submitted pretrial briefs. App. 197-234.

A court trial was held from December 3 through 7, 2001. At the close of trial, the court requested post-trial briefs.

The next week, on December 12, 2001, the District Court issued a memorandum order indicating that the Court was reversing its January Order dismissing the Challengers' ADA claim. With its December 12 Order, the District Court reinstated the ADA claim. App. 235. The Court's December 12 order was adverse to the State and the Intervenors, but neither of those parties sought reconsideration or took other action. The State did include an argument against the ADA claim in its post-trial brief. Appellants' Brief at 3. Despite the State's argument, the District Court ruled against the State on the ADA issue in an Order dated May 17, 2002.

On May 17, 2002, the District Court filed its Opinion and Final Order ("the Final Order"). App. 236-276, reported at *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002). It first held that cooperatives are not subject to the Corporate Farming Ban. App. 259. Second, it found that the Corporate Farming Ban was preempted by the ADA. App. 265. Third, it held

that the Corporate Farming Ban was unconstitutional under the dormant commerce clause even when considered only in light of the claims made by Utilities Challengers. App. 275. The Judgment was filed on May 17, 2002. App. 277.

Although the Final Order and Judgment were adverse to the State and the Intervenors, neither defendant party sought a new trial. Neither the State nor Intervenors sought other relief, such as a motion under Federal Rule of Civil Procedure 60(b). Instead, the State filed its notice of appeal even before the Court filed its Final Judgment. Certain of the Challengers subsequently filed notices of appeal to cross-appeal parts of the Final Order.

STATEMENT OF FACTS

The factual threshold in this case is recognition that South Dakota has restricted corporate farming since 1974. SDCL ch. 47-9A. The 1974 Family Farm Act ("the 1974 Act") generally banned corporate ownership of agricultural land. The 1974 Act exempted so-called "family farms" and "authorized small farm corporations".[1]

The 1974 Act concerned only cultivation of land. In 1988, these statutes were amended to address hog confinement operations. SDCL 47-9A-13.1. This amendment applies only to corporations that bred, farrowed, and raised swine. SDCL 47-9A-13.1; S.D. Attorney General Official Opinion 95-02. Swine operations that do not engage in breeding are exempt from the 1974 Act. SDCL 47-9A-13.1. Other types of corporate livestock feeding operations are not restricted by the 1974 Act. SDCL 47-9A-11.

In 1998, the Corporate Farming Ban was placed on the ballot in South Dakota as an initiated measure. It was designed as an amendment to the State Constitution rather than a statute. As an initiated measure, the Corporate Farming Ban bypassed the normal legislative process. The Corporate Farming Ban bans corporate livestock feeding operations as well as corporate ownership of farmland. The CFB is broader than the 1974 Act because it applies to the livestock industry generally. The CFB has a more restrictive criteria for the Family Farm exception than did the 1974 Act. The Corporate Farming Ban passed and became effective in November 1998. It is now included in the South Dakota Constitution as Article XVII, Sections 21-24.

The CFB has adversely impacted the businesses of the Challengers. The Agricultural Challengers are all involved in the livestock production industry. Whether they are producing beef cattle, lamb or pork, all the Agricultural Challengers are engaged in interstate commerce. The Utilities Challengers are involved in the production and transmission of electric power for interstate commerce. All of the Challengers demonstrated at trial that they had been economically injured by the State because of the passage of the CFB. The

1. The "authorized small farm corporation" was a corporation with less than ten shareholders and whose revenues from rent, royalties, dividends, interest, and annuities do not exceed twenty percent of their gross receipts. SDCL 47-9A-14.

Challengers presented, through expert economic testimony, evidence that the CFB burdened interstate commerce in the livestock and electric power production and transmission industries. (Trial Transcript at 536, 537, 616) The State and the Intervenors did not present any economic expert testimony at all.

SUMMARY OF ARGUMENTS

THE PREEMPTION ISSUE

Title II of the ADA applies to all the "services, programs or activities" of the State of South Dakota. The CFB is a service, program or activity of the State. Under the CFB, the "family farm exception" is available to farmers who do not reside on the property only if the farmer performs "day-to-day labor" which requires "both daily or routine substantial physical exertion and administration".

The District Court found, as a fact, that Challengers Holben and Brost have, for purposes of the ADA, disabilities (heart conditions). Because of their disabilities, Holben and Brost cannot perform the "daily or routine substantial physical exertion" required for the Family Farm exception and, therefore, are denied that option to satisfy the criteria of S.D. Const. art. XVII, § 22(1). By denying disabled persons such as Holben and Brost access to the Family Farm exception, the CFB conflicts with Title II of the ADA. Because the CFB conflicts with the ADA, the CFB is preempted by the ADA.

THE DORMANT COMMERCE CLAUSE ISSUE

The Challengers, both Agricultural and Utility, are persons or businesses participating in interstate commerce. They have suffered, because of the CFB, economic injuries to their businesses.

The provisions of the CFB are state actions that discriminate, for several reasons, against interstate commerce. First, because of its language and structure, the CFB facially discriminates against interstate commerce. Second, because of its historic context and legislative history, the CFB constitutes purposeful discrimination against interstate commerce. Third, the Challengers demonstrated, through unrebutted economic experts, that the CFB has effects which discriminate against interstate commerce. In each of these areas, the District Court erred by concluding the CFB did not discriminate regarding interstate commerce.

The District Court utilized a concept of discrimination that was too narrow. Discrimination, for purposes of the dormant commerce clause, is more than just negative treatment of out-of-state entities. Discrimination is also found when the State acts in a protectionist manner, even when the State is ingenious or crafty. The District erred when it defined discrimination by ignoring protectionism.

A state regulatory scheme that discriminates regarding interstate commerce must be tested against the "virtually *per se*" standard which is a version of strict

scrutiny. The District Court did not properly apply the standard. First, the District Court never examined the availability of less drastic means by which the State might achieve its objectives. Second, the District Court erred in concluding that the State's interests in protecting certain "rural lifestyles" and "communities" was a compelling state interest.

In addition, even if the CFB is considered as nondiscriminatory, the CFB has effects that significantly burden interstate commerce in the livestock production and electric power generation and transmission industries. The State has not employed more carefully tailored alternatives and generally lacked proof that its asserted reasons were actually a "putative local benefit". Thus, the State failed the three-part "undue burden" standard, and the CFB is unconstitutional.

ARGUMENTS

ISSUE I. THE CORPORATE FARMING BAN IS IMPLIEDLY PREEMPTED BY TITLE II OF THE ADA.

In its Final Order, the District Court held that the CFB was preempted by Title II of the ADA. The Challengers urge that this holding be affirmed.

Under the Supremacy Clause, the congressional exercise of its plenary powers permits it to preempt state law. The Supremacy Clause commands that federal laws "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl.2.[2] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001); *Jones v. Vilsack*, 272 F.3d 1030, 1033 (8th Cir. 2001).

Pursuant to the Supremacy Clause, Congress may preempt state action by implication, even when Congress has not expressly preempted a particular area. Thus, Congress preempts by implication when the Court determines, from the depth and breadth of the congressional scheme, that Congress has occupied a particular legislative field. *See, e.g., Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 478 (1984).

Congress also preempts state action by implication when the state law conflicts with a congressional enactment. *See Grier v. American Honda Motor Co.*, 529 U.S. 861, 869-874 (2000). In this case, the District Court relied on the preemption by conflict doctrine. App. 264-265.

In the doctrine of "conflict" preemption, as the District Court recognized, App. 264, there are two types of "conflict". Preemptive conflict occurs when the state law makes the application of federal law "impossible". *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Grier*, 529 U.S. at

2. The Intervenors have argued that the preemption doctrine does not apply because the CFB is found in the State constitution. A simple reading of the text of the Supremacy Clause should dispose of that contention. Just because a conflicting state law is found in its state constitution does not immunize that law from the Supremacy Clause. *Cf., Cooper v. Aaron*, 358 U.S. 1, 9 (1958).

886. Preemptive conflict also occurs when the state action "frustrates the purpose" of the federal law. *See Michigan Canners*, 467 U.S. at 478; *Crosby v. National Trade Council*, 530 U.S. 363, 373 (2000). Either type of conflict is a sufficient basis for preemption. *See Michigan Canners*, 467 U.S. at 470, n.10.

This Court should affirm the District Court both because of CFB's Family Farm exception frustrates the purpose of the ADA and because the exclusionary structure of the Family Farm exception makes it impossible to comply simultaneously with both state and federal law.

A. Title II of the ADA Applies to All State Government "Activities".

The preemption analysis starts with the language of the statute. See *Lorillard*, 533 U.S. at 542. Congress used exceptionally broad language in Title II of the ADA. Under § 12131(1)(A), Congress made the ADA applicable to "public entities", defining them as "any State or local government".

The State of South Dakota, of course, is a "public entity" for purposes of the ADA. There can be no doubt that the CFB, including the Family Farm exception of §22(1), is an action by a covered public entity.

B. The CFB is a "Service, Program Or Activity" of a Public Entity Because It Confers "Benefits" on Certain Farmers and Ranchers.

In § 12132 of the ADA, Congress declared:

> Subject to the provisions of this subchapter, no qualified individual with a disability *shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity* . . . . (emphasis added).

The District Court held that the CFB was one of the "services, programs or activities of a public entity." App. 262. This holding should be affirmed, for the reasons below.

1. The Family Farm Exception Confers Economic "Benefits" To Eligible Farmers.

Analysis of this issue starts with the reason why the State has the § 22(1) Family Farm exception in the CFB. The obvious purpose of § 22(1) is to permit certain farmers to have the "benefits" of a corporate business structure while generally prohibiting other farmers from having these economic advantages.

What are the benefits conferred by § 22(1)? The two main advantages are: (1) favorable treatment under federal tax laws, and (2) favorable treatment in terms of limiting liability. These are obviously significant economic advantages. Under the CFB, the State as a public entity provides these economic "benefits" to those farmers or ranchers eligible for § 22(1). Thus, Title II applies to these "benefits".[3]

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3. Despite the argument by Intervenors, there can be no doubt that Title II applies to the CFB. Imagine if the State had declared that only men could be "family farmers". Under these circumstances,

The CFB involves, therefore, certain "benefits" conferred by a public entity. The only remaining issue is whether these benefits flow from the "services, programs, activities" of the State.

2. The CFB is a "Service, Program or Activity" of the State.

The District Court held that the CFB was a covered "service, program or activity." App. 262. The State and the Intervenors contest this holding. The District Court primarily analogized the CFB's regulatory program to a "zoning" program. The District Court properly cited to Innovative *Health Systems v. City of White Plains*, 117 F.3d 37 (2d.Cir. 1997). There, the Court of Appeals for the Second Circuit held that the ADA applied to the "zoning decisions [by the defendant City] because making such decisions is a normal function of a governmental entity." *Id.*, at 44. *Accord. Tsombandisis v. City of West Haven*, 180 F.Supp.2d 262, 283 (D.Conn., 2001). This analogy was proper, and this Court should affirm the District Court on this ground.

For additional support of the District Court, Challenger Holben contends that, based on textual, precedential and policy analysis, the District Court's decision was proper,.

a. The Text of Section 12132 Supports the District Court.

The text of §12132 is expansive. The phrase "services, programs or activities" uses sweepingly generic terms. It is also stated in the conjunctive. This evidences a Congressional intent to have the ADA provision have broad application; as one Circuit has reasoned, the § 12132 language is intended as a "catch-all phase that prohibits all discrimination by a public entity, regardless of context . . . ." *Innovative Health Systems*, 117 F.3d at 45. Congress chose this broad language to "avoid the very type of hair-splitting arguments" advanced here by the Intervenors. Id.

Besides the text of § 12132, the federal government's administrative regulations are consistent with a broad interpretation. According to the CFR, Title II " . . . applies to all services, programs and activities provided or made available by public entities . . . ." 28 CFR pt. 35, §35.102(a) (2001).

b. The Precedent Supports the District Court Regarding This Issue.

This Circuit's decisions are supportive of Challengers' position. This Court has held that a "meeting" held at a county courthouse was a "service" covered by Title II. *See Layton v. Elder*, 143 F.3d 461, 472-73 (8th Cir., 1998). If Title II would apply to meetings, then it must apply to the services regulated by the CFB.

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women would have been denied significant economic benefits. For the same reason, the CFB is impacting the distribution of significant economic benefits by discriminating against disabled persons (who do not reside on and who cannot perform the required day-to-day "substantial physical exertion").

The precedent regarding this issue is persuasive. For example, the Northern District of Iowa held that a City's "regulation of open burning" is an "activity" covered by Title II. *Heather K. v. City of Mallard, Ia.*, 946 F.Supp. 1373, 1387 (N.D.Ia., 1996). If Title II applies to the regulation of leaf burning, it certainly would apply to the regulation of business structures used by ranchers and farmers.

In another persuasive decision, the State of Utah prohibited certain disabled persons from being married. The Court, in *T.E.P. v. Leavitt*, 840 F.Supp. 110, 111 (D.Utah, 1993), held that the state law regulating marriage was preempted by Title II. If Title II would apply to a state's laws regulating such an important matter as marriage, it must apply to a state's laws regulating business structures used in agriculture.

In general, the courts examining these issues have not been kind to governmental "hair-splitting". For example, the opportunity to participate in a public hospital's "Lamaze class" was a covered "service". *See Bravin v. Mount Sinai Medical Center*, 186 F.R.D. 293, 304-05 (S.D.N.Y., 1999). If the opportunity to participate in a Lamaze class is covered by Title II, then the opportunity to participate in the Family Farm exception is a covered program or activity.

c. Section 22(1) is Analogous to a Licensing Scheme.

The CFB's Family Farm exception may also be analogized to a licensing scheme. Licensing criteria for the Bar Exam, for example, is a program covered by Title II. *See Clark v. Virginia Board of Bar Examiners*, 880 F.Supp. 430, 442 (E.D.Va, 1995). In this case, only certain farmers get the "family farm license": only those who either reside on the farm or perform the day-to-day substantial physical exertion. Thus, if the CFB would be analogized as a licensing scheme, Title II still applies because the opportunity to get the license is denied to those with certain disabilities.

3. Conclusion.

In sum, the State of South Dakota is a "public entity". The CFB regulatory scheme is a "service, program or activity" provided by the State. Accordingly, Title II applies to the CFB and the Family Farm exception.

C. The Family Farm Exception Criteria Limit Access To The "Benefits" Of The State Program.

1. The Family Farm Exception Has A "Substantial Physical Exertion" Requirement.

In order to "participate" in the Family Farm exception, there are *only* two ways an individual farmer or rancher may satisfy the § 22(1) criteria. For

someone like Holben to achieve this Family Farm status, a rancher must either (1) reside on the ranch or (2) "be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require *both* daily or routine substantial physical exertion and administration." CFB, § 22(1) (emphasis added).

As the District Court found, neither Holben nor Brost reside on their respective ranches. App. 260-261. Brost lives in a metropolitan area, over one hundred miles away from this ranch. Holben resides in Arizona. Thus, in order to satisfy the § 22(1) criteria, Holben and Brost have only one option—to satisfy the "daily or routine substantial physical exertion" option. § 22(1).

2. As Ranchers, Holben and Brost Have Only One Option To Satisfy The Family Farm Exception.

With respect to persons with disabilities such as Holben and Brost, access to the CFB's Family Farm exception is significantly limited. While most farmers have two options to qualify for the Family Farm exception, farmers with physical disabilities like Holben and Brost are restricted to only one option. Since they have only the one option to secure the benefits of the program, Holben and Brost are precluded from participating in the State's program on an equal footing with other ranchers who do not reside on the ranch. App. 263.

D. Challengers Holben and Brost Have Disabilities Limiting Their Access To The "Benefits" Of the CFB

After hearing five days of evidence, the District Court made its Findings of Fact. These included the Court's Findings that Challengers Holben and Brost suffered from heart conditions which, for purposes of the ADA, constituted "disabilities." App. 260-216. The State and Intervenors now contest these Findings of Fact. The standard of review would be the clear error standard.

1. The District Court's Findings Are Supported By Substantial Evidence.

The District Court heard the evidence of the respective medical conditions of Holben and Brost. (Trial Transcript at 76, 259.) Indeed, Challenger Brost's disability prohibited him from attending the trial, and he had to testify by a video hookup. App. 260. Both Brost and Holben suffer from serious medical conditions (heart diseases), which preclude them from performing "substantial physical exertion" on their ranches. *See* 28 CFR pt. 35, §35.104 (2001).

2. Under The Clear Error Standard, The District Court's Findings Should Be Affirmed.

The State appears to argue that the District Court's conclusion that Holben and Brost are disabled is flawed because the record is somehow not complete. But, if the State wanted to complete a record, the State could have moved for a new trial to complete, or to clarify, the record. The record has sufficient

evidence of Holben's and Brost's disabilities, and this Court should uphold the District Court findings in this regard. There was no error.

E. The ADA Conflicts With The "Substantial Physical Exertion" Criteria of The Family Farm Exception.

It is congressional policy, expressed in § 12132 of the ADA, to eliminate discrimination by public entities in their delivery of services, programs or activities. As the District Court found, when South Dakota imposed the day-to-day "substantial physical exertion" requirement on farmers as the eligibility criterion for the Family Farm exception, the CFB had the effect of excluding farmers with certain disabilities from access to the benefits of the Family Farm exception. App. 264. This exclusionary effect also requires, under these circumstances, federal preemption.

In this case, Congress has articulated, in the ADA, the national policy that public entities will not exclude persons with disabilities from the provision of "services, programs or activities". *See* ADA, § 12132. When South Dakota limits the options for disabled farmers to qualify for the economic benefits of the Family Farm exception, South Dakota excludes disabled persons and thereby interferes with the Congressional intent. The CFB empowers the State to exclude disabled persons from the Family Farm exception when that is "precisely what the federal act forbids [the State] to do." *Michigan Canners*, 467 U.S. at 477-478. This frustration of congressional intent is a conflict, and this Court should hold that the CFB is preempted.

F. Because The "Substantial Physical Exertion" Criterion Conflicts With The ADA, The Family Farm Exception Is Preempted.

1. The "Substantial Physical Exertion" Requirement Frustrates Congressional Objectives.

This exclusionary effect of the CFB obviously frustrates one of the congressional objectives of the ADA. This frustration of congressional intent constitutes a conflict. In the face of such a conflict, the state law (CFB) is preempted. *See Crosby*, 530 U.S. at 373.

The *Crosby* decision is a close parallel to the present case. In Crosby, Congress had established policies with respect to the country of Myanmar (Burma). *See* 530 U.S. at 368. These policies were designed to enhance Myanmar's progress to democratization. In contrast, the State of Massachusetts passed legislation that economically sanctioned any company doing business with Myanmar. The State obviously discouraged companies from doing business while federal policies sought to encourage appropriate business with Myanmar. *Id.* at 377. Thus, the Supreme Court unanimously determined that the state law was preempted because it frustrated the congressional policies. *Id.* at 381.

2. The "Substantial Physical Exertion" Requirement Actually Conflicts With Congressional Objectives.

The CFB also stands in "actual conflict" with the ADA. As the District Court properly determined, because of this conflict, the CFB is preempted. *See* App. 264-265. The ADA's requirements of expanding access are mutually exclusive of the Family Farm exception's requirement of "substantial physical exertion". It is, therefore, impossible for the State to enforce its law (the CFB) and still comply with the ADA.

Because of this impossibility, the CFB presents a conflict with the ADA. When such a conflict exists, the federal law is supreme. Art VI, cl.2.

The District Court's conflict preemption holding should, for both reasons, be affirmed.

G. The State's "Procedural" Argument is Fatally Flawed.

The State and Intervenors contend, in their Briefs to this Court, that the District Court erred because, somehow, the Challengers "waived" their claim under the ADA. For the reasons below, this argument is flawed. Since this waiver argument is essentially an argument based on alleged facts, the standard of review would be clear error. To the extent the argument is addressed at the District Court's discretionary rulings, the standard would be abuse of discretion. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1062 (8th Cir. 1997).

1. The Procedural Burden, If Any, Actually Rests on the State.

In its oral ruling in January 2000, the Court granted the State's motion and dismissed the ADA claim. App. 140. The District Court relied on its understanding of the Eighth Circuit's precedent.

Then, in its December 12, 2001 Order, the Court reversed its prior order and reinstated the ADA claim. By reinstating the ADA claim, this was a ruling adverse to the State. In December 2001, the State could have moved to reconsider the Court's decision. But, the State did not take the available step to protect its position.

In May 2002, the Court's Final Order made findings of fact about the disabilities of Holben and Brost. The District Court used its authority, under Fed. R. Civ. P. 15(b), to conform the pleadings (the reinstated ADA claim) to the proof at trial. Specifically, the District Court added Holben and Brost as Plaintiffs under the reinstated ADA claim. The District Court certainly had, especially in a court trial, this authority. *See* Fed. R. Civ. P. 15(b); Kim, 123 F.3d at 1062. After conforming the pleadings to the proof, the District Court then concluded that the ADA preempted the Corporate Farming Ban. All of these rulings in the May 2002 Order were, again, adverse to the State.

Upon receipt of the May 2002 Final Order, the State could have sought, pursuant to Fed. R. Civ. P. 59(a), a new trial to reexamine the evidence. Rule 59(a)(2) seems to provide a remedy for the "dilemma" faced by the State. The

Rule states:

> On a motion for a new trial in an action tried without a jury [like this action], the Court may open the judgment if one has been entered, *take additional testimony*, amend findings of fact and conclusions of law or *make new findings and conclusions*, and direct entry of a new judgment (emphasis added).

Thus, in May 2002, the State could have introduced, through Rule 59(a), evidence on the nature of the disabilities, or the State could have registered its "objections" to the evidence upon which the District Court relied. The State, however, did not make any motion for new trial or other reconsideration. Once again, the State did not avail itself of an available procedural approach.[4]

The State's procedural options, moreover, were not exhausted. Even after the Judgment was entered, the State could have sought relief, under Fed. R. Civ. P. 60(b), from the claimed errors in the Judgment. But, again, the State did not avail itself of this procedural remedy.

The sequence of events reveals that the State and Intervenors did not utilize the available procedural options. These options would have afforded the District Court, as the fact finder, a chance to reopen the record or to reexamine its factual findings. But, the State chose to pursue an appeal and to deny the District Court any chance to rectify the alleged errors.

The core of the argument by the State and Intervenors seems to be a complaint about the District Court's decision to conform the pleadings to the evidence at trial by its decision to add disabled ranchers Holben and Brost as plaintiffs to the ADA claim. App. 259. Challengers contend that, under Fed. R. Civ. P. 15(b), the District Court had the authority. Indeed, this Court has encouraged the use of Rule 15(b), stating that conforming the pleadings to the evidence under Rule 15(b) can be done "at any time, even after judgment". *See Kim*, 123 F.3d at 1042. Here, of course, the District Court performed the conforming action before the Judgment was filed.

As the *Kim* Court explained, Rule 15(b) amendments are allowed as long as the adversely affected party has "actual notice of the unpleaded issue and have been given an adequate opportunity to cure any surprise resulting from the change." *Id.*, at 1063. Here, the State had actual notice of the ADA claim; indeed, the State had filed motions to dismiss it. The State also argued against the ADA claim in its Post-Trial Brief. See Appellants' Brief at 3. Moreover, the State and Intervenors had an "adequate opportunity to cure and surprise" through available motions for new trial or relief from the judgment.

In sum, the Challengers were the prevailing party on each decision regarding the ADA claim. Hence, the burden to take action rested on the State and the Intervenors who lost each decision. Under these factual circumstances, here was no "waiver" by the Challengers.

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4. Instead, the State filed a notice of appeal even before a Final Judgment was entered.

2. Conclusion

The Challengers, of course, contend that there were no procedural errors by the District Court. The preemption issue was properly before the District Court. The Challengers contend, alternatively, that the State's "procedural" argument should be rejected because the State did not afford the District Court a proper opportunity to cure any alleged defects. The District Court's May 2002 Final Order should be affirmed.

H. The Challengers Had Standing To Assert The ADA's Preemptive Effect.

Finally, the State questions the standing of the South Dakota Farm Bureau (the "SDFB") to bring the ADA preemption claim. This argument ignores the authority of the District Court, under the Fed. R. Civ. P. 15(b), to conform the pleadings to the evidence at trial. Here, the District Court added Brost and Holben as Plaintiffs to the ADA claim. App. 259. The District Court's holding on the preemption issue was based on Holben and Brost.

The State also complains about the SDFB's associational standing. The District Court took judicial notice that the SDFB has many members who have disabilities.5 App. 260. Thus, the SDFB satisfies the associational standing inquiry.

Alternatively, Challengers contend that, since Brost and Holben are disabled and are members of the SDFB, the SDFB has standing to represent them. Indeed, the District Court determined as much in its Summary Judgment Order. Add. at 6.

In sum, even if the SDFB lacked associational standing, the individual ranchers Holben and Brost certainly have standing. Thus, under the District Court's Orders of December 12 (2001) and May 17 (2002), the reconfigured ADA claim survives and supports the District Court's conclusion that Title II of the ADA preempts the Family Farm exception of the CFB.

1. Conclusion.

In conclusion, this Court should affirm the District Court and hold that Title II of the ADA conflicts with, and therefore preempts, § 22(1) of the Corporate Farming Ban. Alternatively, if this Court would reverse, this Court should remand to the District Court with instructions to reopen the trial and hear further evidence on these issues.

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5 In its Brief, the State complains about the District Court's finding of fact through judicial notice. App. 260.. It is precisely this type of complaint that could be reexamined by a Rule 59(a) motion for new trial. Challengers, of course, do not concede that the District Court made any error in its use of judicial notice, or otherwise.

ISSUE II. THE CORPORATE FARMING BAN IS UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE

For purposes of this issue, Challenger Holben respectfully joins the arguments in the briefs filed by the Appellees/Cross-Appellants South Dakota Farm Bureau, et. al., and the Appellees Utilities in this matter. Holben urges that this Court affirm the District Court on the District Court's holding that the CFB violates the dormant commerce clause.

CONCLUSION

Appellee/Cross-Appellant Holben joins with the other Challengers to urge that this Court affirm the District Court's ruling that the ADA preempts the Corporate Farming Ban. Holben also urges that this Court affirm, and affirm on other grounds, the District Court's ruling that the Corporate Farming Ban unconstitutionally violates the dormant commerce clause.

An Agricultural Law Research Article

Brief of Appellees and Cross-Appellants

by

Richardson O. Gregerson and David S. Day

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BRIEF OF APPELLEES AND CROSS-APPELLANTS

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Corporate Disclosure Statement

South Dakota Farm Bureau, Inc. and the South Dakota Sheep Growers Association, Inc. are not-for-profit corporations organized under the laws of South Dakota; Haverhals Feedlot, Inc. and Sjovall Feedyard, Inc., are privately held companies; and there are no other persons, associations, firms partnerships, or corporations with a pecuniary interest in the outcome of this case.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case involves a challenge to the constitutionality of a South Dakota state constitutional amendment which bans, subject to many exceptions, the use of certain corporate, or limited liability, business structures from use by farmers and ranchers in their farming businesses ("the Corporate Farming Ban"). This case addresses the constitutional limits on States which use regulation of corporate structure as a *means* to pursue certain governmental *goals*. The District Court held that the Corporate Farming Ban was preempted under the Supremacy Clause because it conflicted with Title II of the ADA and that the Corporate Farming Ban was unconstitutional because it violated the dormant commerce clause doctrine.

Appellees-Cross-Appellants respectfully request that the Court schedule oral argument in this case and ask for 30 minutes to present argument. This case has regional and national significance because regulations of "corporate farming" exist, albeit in less draconian terms, in other States, and this is the first case presenting a dormant commerce clause challenge to such a regulation. Oral argument would also aid the Court in its *de novo* review of certain issues.

STATEMENT OF ISSUES

ISSUE I. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS CONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE DOCTRINE?

South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999).
SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995), *cert. denied*, 523 U.S. 1118 (1998).
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).
Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988).

ISSUE II. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS IMPLIEDLY PREEMPTED BY TITLE II OF THE AMERICANS WITH DISABILITY ACT?

Grier v. American Honda Motor Co., 529 U.S. 861 (2000)
Crosby v. National Trade Council, 530 U.S. 363 (2000)
Michigan Canners and Freezers Association v. Agricultural Marketing and

Bargaining Board, 467 U.S. 461 (1984)

STATEMENT OF THE CASE

This case concerns Article XVII, §§ 21-24 of the South Dakota Constitution. These provisions were adopted by initiated measure and became effective in November 1998. The amendments prohibit certain business structures from farming and owning farmland. S.D. Const. art. XVII, § 21. (These provisions will be called the "Corporate Farming Ban" or the CFB.)

Plaintiffs South Dakota Farm Bureau, South Dakota Sheep Growers, Haverhals Feedlot, Sjovall Feedyard, Brost, Tesch, Aeschlimann, Spear H Ranch, and Holben filed their Complaint for Declaratory and Injunctive Relief on June 28, 1999, and challenged the constitutionality of the Corporate Farming Ban pursuant to several constitutional theories and 42 U.S.C. § 1983. (These Plaintiffs will be referred to as the "Agricultural Challengers".) Appellants' Appendix 12. (Hereinafter "App".) Among the various claims, Agricultural Challengers asserted that CFB violated the dormant aspect of the federal commerce clause. App. 33-35. This claim distinguished the case from any other challenge to a state corporate farming restriction. The Complaint also alleged claims under the Equal Protection doctrine of U.S. Const. amend. XIV and under the Privileges and Immunities doctrine of U.S. Const. art. IV. In addition, the Complaint stated a claim that Amendment E was invalid under the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101, *et seq.*

The State Defendants filed their Answer on July 28, 1999. On October 21, 1999, the State Defendants filed a Motion to Dismiss on the basis of sovereign immunity and U.S. Const. amend. XI. App. 43-45. Defendants also sought to dismiss claims relating to the Privileges and Immunities clause and to the ADA. App. 44. A hearing was scheduled.

In the meantime, Dakota Rural Action and South Dakota Resources Coalition sought and received permission to intervene as Defendants [the "Intervenors"]. South Dakota Farm Bureau, Inc. v. Hazeltine, 189 F.R.D. 560 (D.S.D. 1999).

Prior to the hearing, the Agricultural Challengers filed their Motion to Join Parties and File First Amended Complaint. App. 83-87. This motion sought to add the Utilities as Plaintiffs (the Utilities Challengers). The proffered Amended Complaint added factual allegations pertaining to rules that Defendant Hazeltine had promulgated in implementing the provisions of Amendment E during the intervening six months.

A hearing and oral argument on the various motions was held on January 18, 2000. The District Court orally ordered that: (1) the Utilities' motion to join as Plaintiffs was granted (Doc. No. 66, Transcript of Oral Argument at 51, 53), (2) the State of South Dakota be dismissed as a party (*id.* at 5), and (3) the ADA claim would be dismissed on Eleventh Amendment grounds (*id. at* 6). He took other issues under advisement, including the request

to dismiss State Defendants Barnett and Hazeltine. (*Id.* at 47, 54.) (Hereinafter, this will be referred to as the "January Order".)

Subsequently, on February 8, 2000, Plaintiffs filed another Motion to File First Amended Complaint. App. 119-22. Among other things, the Plaintiffs amended their Complaint to delete the ADA claim which had been dismissed in the January Order and to add the Marston and Marian Holben Trust and the Utilities as Plaintiffs. App. 119-22.

On September 15, 2000, Judge Kornmann denied the remaining motions to dismiss and granted the Plaintiffs' motion to amend. App. 136-49. The September 15 Order also reiterated the dismissal of the ADA claim. App. 140.

The State and the Intervenors filed subsequently motions for partial summary judgment. In an Order dated January 29, 2001, the District Court denied these motions. (Doc. No. 135, filed February 1, 2001.) One of the rejected arguments was the argument that the SDFB did not have standing as an association.

Trial was scheduled for December 4, 2001. All parties submitted pretrial briefs. App. 197-234.

A court trial was held from December 3 through 7, 2001. At the close of trial, the court requested post-trial briefs.

The next week, on December 12, 2001, the District Court issued a memorandum order indicating that the Court was reversing its January Order dismissing the Challengers' ADA claim. With its December 12 Order, the District Court reinstated the ADA claim. App. 235. The Court's December 12 order was adverse to the State and the Intervenors, but neither of those parties sought reconsideration or took other action. The State did include an argument against the ADA claim in its post-trial brief. Appellants' Brief at 3. Despite the State's argument, the District Court ruled against the State on the ADA claim in an Order dated May 17, 2002.

On May 17, 2002, the District Court filed its Opinion and Final Order. App. 236-276, published at *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020 (D.S.D. 2002). The court first held that cooperatives are not subject to the Corporate Farming Ban. App. 259. Second, it found that the Corporate Farming Ban was preempted by the ADA. App. 265. Third, it held that the Corporate Farming Ban was unconstitutional under the dormant commerce clause even when considered only in light of the claims made by Utilities Challengers. App. 275. The Judgment was filed on May 18, 2002. App. 277.

Although the Final Order and Judgment were adverse to the State and the Intervenors, neither defendant party sought a new trial. Neither the State nor Intervenors sought other relief, such as a motion under Federal Rule of Civil Procedure 60(b). Instead, the State filed its notice of appeal even before the Court filed its Final Judgment. Certain of the Challengers subsequently filed notices of appeal to cross-appeal parts of the District Court's Final Order.

STATEMENT OF FACTS

The factual starting point is recognition that South Dakota has restricted corporate farming since 1974. SDCL ch. 47-9A. The 1974 Family Farm Act generally banned corporate ownership of agricultural land. The 1974 Act exempted so-called "family farms" and "authorized small farm corporations."[1]

The 1974 statutes concern cultivation of land. In 1988, these statutes were amended to address hog confinement operations. SDCL § 47-9A-13.1. This amendment applies only to corporations that bred, farrowed, *and* raised swine. SDCL § 47-9A-13.1; S.D. Attorney General Official Opinion 95-02. Swine operations that do not engage in breeding are exempt from the 1974 Act. SDCL § 47-9A-13.1. Other types of corporate livestock feeding operations are not restricted by the Family Farm Act. SDCL § 47-9A-11.

In 1998, the Corporate Farming Ban was placed on the ballot in South Dakota as an initiated measure. It was designed as an amendment to the State Constitution rather than a statute. As an initiated measure, the Corporate Farming Ban bypassed the normal legislative process. The Corporate Farming Ban generally bars corporate livestock feeding operations as well as corporate ownership of farmland. The CFB is broader than the 1974 Act because it applies to the livestock industry generally. The Corporate Farming Ban passed and became effective in November 1998. It is now included in the South Dakota Constitution as Article XVII, §§ 21-24.

Although the 1974 Act had an exception for "family farmers", the CFB's Family Farm exception is much narrower. CFB, S.D. Const. art. XVII, § 22(1). The application of the CFB to the livestock industry, when coupled with the narrower Family Farm exception, excluded many farmers from the benefits of § 22(1).

The CFB has adversely impacted the businesses of the Challengers. The Agricultural Challengers are all involved in the livestock production industry. Whether they are producing beef cattle, lamb or pork, all the Agricultural Challengers are engaged in interstate commerce. The Utilities Challengers are involved in the production and transmission of electric power for interstate commerce. All of the Challengers demonstrated at trial that they had been economically injured by the State because of the passage of the CFB. The Challengers presented, through expert testimony, evidence that the CFB

1. The authorized small farm corporation was a corporation with less than ten shareholders and whose revenues from rent, royalties, dividends, interest, and annuities do not exceed twenty percent of their gross receipts. SDCL § 47-9A-14.

burdened interstate commerce in the livestock and electric power production and transmission industries. (Doc. No. 173, Trial Transcript (hereinafter "T") 536, 537, 616) The State and Intervenors did not present any expert economic testimony at all.

SUMMARY OF ARGUMENTS

DORMANT COMMERCE CLAUSE ISSUE

The Challengers, both Agricultural and Utility, are persons or businesses participating in interstate commerce. They have suffered, because of the CFB, economic injuries to their businesses.

The CFB is a state action that discriminates, for several reasons, against interstate commerce. First, because of its language and structure, the CFB facially discriminates against interstate commerce. Second, because of its historic context and legislative history, the CFB constitutes purposeful, protectionist discrimination against interstate commerce. Third, the Challengers demonstrated, through unrebutted economic experts, that the CFB has effects which discriminate against interstate commerce. In each of these areas, the District Court erred by concluding the CFB did not discriminate regarding interstate commerce.

The District Court utilized a concept of discrimination that was too narrow. Discrimination, for purposes of the dormant commerce clause, is more than just negative treatment of out-of-state entities. Discrimination is also found when the State acts in a protectionist manner, even when the State is ingenious or crafty. The District erred when it defined discrimination by ignoring protectionism.

A state regulatory scheme that discriminates regarding interstate commerce must be tested against the "virtually *per se*" standard. Treating the standard as a version of strict scrutiny, the District Court did not properly apply the standard. First, the District Court never examined the availability of less drastic means by which the State might achieve its objectives. Second, the District Court erred in concluding that the State's interests in protecting certain rural lifestyles and communities was a compelling state interest.

In addition, even if the CFB is considered as nondiscriminatory, the CFB has effects that significantly burden interstate commerce in the livestock production and electric power generation and transmission industries. The State has not employed more carefully tailored alternatives and generally lacked proof that its asserted reasons were the actual reasons for the CFB. Thus, the State fails the three-part "undue burden" standard, and the CFB is unconstitutional.

PREEMPTION ISSUE

Title II of the ADA applies to all the "services, programs or activities" of the State of South Dakota. The CFB is a service, program or activity of the State. Under the CFB, the "family farm exception" is available to farmers who do not reside on the property only if the farmer performs "day-to-day labor" which requires "both daily or routine substantial physical exertion and administration". CFB § 22(1).

The District Court found, as a fact, that Challengers Holben and Brost have disabilities (heart conditions). Because of their disabilities, Holben and Brost cannot perform the "daily or routine substantial physical exertion" required for the CFB exception and, therefore, are denied that option to satisfy the family farm exception. By denying disabled persons such as Holben and Brost access to the family farm exception, the CFB conflicts with Title II of the ADA. Because the CFB conflicts with, and is an obstacle to the purpose of, the ADA, the CFB is preempted by the ADA.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law which this Court reviews *de novo*. *United States v. Carter*, 294 F.3d 978, 980 (8th Cir. 2002); *United States v. Prior*, 107 F.3d 654, 658 (8th Cir. 1997).

This Court typically reviews a district court's factual findings for clear error. *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995).

The Challengers will reiterate the standard of review as necessary in the appropriate sections of the Argument.

ARGUMENT

ISSUE I. THE CORPORATE FARMING BAN IS UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE.

Although the District Court concluded that the CFB was unconstitutional for various reasons, it decided that the CFB was not "discriminatory" regarding interstate commerce. In this regard, Challengers contend that the District Court erred, as a matter of law. Challengers asks this Court to hold that the CFB *was* "discriminatory" regarding interstate commerce, thereby providing an additional ground for affirming the judgment below.

A. An Overview of the "Well-Settled" Dormant Commerce Clause Doctrine.

The dormant commerce clause doctrine judicially expresses one of the constitutional "norms of national cohesion." *See* Laurence Tribe, *American*

Constitutional Law, 542 (2d ed. 1988). Along with the Privileges and Immunities doctrine of Article IV and the equal protection doctrine of the Fourteenth Amendment, the dormant commerce clause doctrine represents a significant limit on state regulation of interstate commerce. This constitutional concern regarding state interference with interstate commerce is particularly acute when a State regulates the actions of nonresidents and other political "outsiders" who are participating in interstate commerce. *See South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 184 n. 2 (1938); Tribe, at 545 n. 94.

Over some 175 years, the judiciary has developed a "well-settled", two-tiered doctrine. *See Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 889 (1988). In recent years, the Supreme Court has repeatedly announced its two-tier doctrine:

> We have ruled that that Clause prohibits discrimination against interstate commerce, see, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978), and bars state regulations that unduly burden interstate commerce, see, e.g., Kassell v. Consolidated Freightways Corp. of Del., 450 U.S. 662 (1981).

Quill Corp. v. North Dakota, 504 U.S. 310, 312 (1992). *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *Oregon Waste Sys. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 99 (1994);

The first tier of the dormant commerce clause doctrine is the "discrimination" tier. The standard of judicial review is known as the "virtually *per se*" test. *Oregon Waste Sys.*, 511 U.S. at 99. The virtually *per se* standard is a heavy burden for the State. It is, in practical effect, a "strict scrutiny" standard. The state has the burden of persuasion; the state must have a compelling reason for its discriminatory regulation and must utilize the least restrictive means of achieving that end.[2] *See, e.g., SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995).

The applicable standard in the second tier is an "undue burden" standard. *See Quill Corp.*, 504 U.S. at 312; *Bendix Autolite Corp.*, 486 U.S. at 895 (the test is whether the state regulation "is an unreasonable burden on commerce"). The second tier standard applies even when the State's regulation of interstate commerce is conducted in a nondiscriminatory manner. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Under the second tier standard, the Court will consider three factors: (1) the burden on interstate commerce created by the state restriction; (2) the substantiality of the State's non-protectionist interest; and (3) the availability to the State of less burdensome regulatory means to achieve its goals. *See, e.g.,*

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2. Challengers have found only one Supreme Court decision where a state has successfully met the standard of the first tier. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986). This decision is markedly distinguishable from the present case because, here, the State has many alternatives available to achieve its purported goals and cannot otherwise satisfy strict scrutiny.

Bendix Autolite Corp., 486 U.S. at 894; *Pike*, 397 U.S. at 142 (part of the standard is whether the state's interest "could be promoted as well with a lesser impact on interstate activities."); *C & A Carbone*, 511 U.S. at 405 (O'Connor, J., concurring in the judgment). The undue burden test is, in essence, similar to the "substantial relationship" standard from equal protection doctrine. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (the "intermediate scrutiny" standard used in gender discrimination).

The Supreme Court initially examines a case on the first tier. If the Court would determine that a State has "discriminated" against interstate commerce (*i.e.*, engaged in "economic protectionism"), the Court applies the virtually *per se* test and does not consider the second tier. *See, e.g., C & A Carbone*, 511 U.S. at 390.

B. Under All Three Theories, The CFB Constitutes Discrimination.

Under Supreme Court and Eighth Circuit precedent, there are generally three ways a court would find that a State regulation would be discriminatory regarding interstate commerce. *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1383 (8th Cir. 1997); *SDDS, Inc.*, 47 F.3d at 267.[3] First, a regulatory scheme may "facially discriminate". *See, e.g., C & A Carbone*, 511 U.S. at 391; *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 (1997). Second, a regulatory scheme, even though it is facially neutral, may have a "discriminatory purpose". *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-353 (1977); *SDDS, Inc.*, 47 F.3d at 270. Third, even if the text were facially neutral and had not been enacted for the purpose of discriminating against interstate commerce, a regulatory scheme may have "discriminatory effect" that constitutes a facial discrimination. *See, e.g., Camps Newfound*, 520 U.S. at 578; *SDDS, Inc.*, 47 F.3d at 271.

C. The CFB Is Facially "Discriminatory".

The District Court, in a brief discussion, held that the CFB was not facially discriminatory. App. 270. The Court's reasoning recognized the facially discriminatory features of the CFB (*i.e.*, the exceptions of § 22), but concluded that the discrimination was "in the nature of mere surplusage since the court has already found clear violation of the ADA". App. 270. For the reasons below, the District Court erred. The standard of review is *de novo*.

As to the District Court's "surplusage" reasoning, this is legally flawed. Just because the Court had found that the CFB violated the ADA does not mean that the CFB could not also be a violation of the dormant commerce clause. Not

3. Although the terminology varies from decision to decision, the Supreme Court has utilized all three of these theories for determining the existence of State "discrimination."

all the Challengers had standing under the ADA claim; for the vast majority - - the nondisabled farmers - - the CFB's impact on interstate commerce was not "surplusage." This Court should reject the "surplusage" rationale as unsupported and erroneous.

Challengers contend that the CFB is facially protectionist. Especially in recent decades, the United States Supreme Court has developed a generally broad concept of "facial" discrimination. These decisions teach that a court should look at the state provisions *as a whole* and, when necessary, look at other state provisions that, as a whole, contribute to the regulatory scheme.

1. The CFB, Read As A Whole, Is Facially Discriminating.

The Supreme Court has held that facial discrimination is determined by examining *the whole statute* - - not just one provision. *See South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 169 (1999). In *South Central Bell*, Alabama required each corporation doing business in Alabama to pay a franchise tax based on the firm's capital. *Id.* at 162. The rub - - *i.e.*, the protectionism - - emerged when the Court examined another provision of Alabama's franchise tax code. Alabama permitted domestic corporations to control their tax base and tax liability. *Id.* A domestic corporation could set its stock's par value well below its book or market value. *Id.* at 169. A domestic corporation, therefore, could lower its franchise tax liability simply by lowering its par value. In contrast, Alabama did not permit foreign corporations to lower their franchise tax liability because the Alabama franchise tax code tightly regulated how foreign corporations had to define their stock's par value. *Id.* at 162. Taken as a whole, the franchise tax code created an advantage for domestic corporations, *see id.* at 169, and was facially discriminatory. *Id.*

For present purposes, *West Lynn Creamery , Inc. v. Healy*, 512 U.S. 186 (1994), is also persuasive. In determining facial discrimination, the Supreme Court not only requires that a regulatory statute should be read as whole, it has also held that *the whole regulatory scheme must be considered. See West Lynn Creamery*, 512 U.S. at 194. In *West Lynn Creamery*, the state of Massachusetts sought to protect its in-state dairy farmers from competition from out-of-state dairy farmers. *Id.* Massachusetts imposed a tax on all milk "dealers" selling in Massachusetts, whether domestic or foreign. The State took the proceeds of this tax on dealers and used the funds to pay a subsidy exclusively to in-state "dairy farmers". *Id.* at 194.

Since the tax applied to all "dealers", the State argued that the tax was "nondiscriminatory". The Supreme Court, however, looked at *the State's regulatory scheme as a whole* and held that Massachusetts was engaged in facial discrimination against interstate commerce. *Id.*, at 194. The *West Lynn Creamery* Court held that "[b]y so funding the subsidy, [Massachusetts] not only assists local farmers but burdens interstate commerce." *Id.* at 199.

The rationale for the Court's holistic approach to determining facial

discrimination is easy to understand. The Constitution is "not so rigid as to be controlled by the form by which a State erects barriers to commerce." *Id.* at 201. Unless a Court examines the regulatory scheme as a whole, the States will think that their regulatory efforts can be camouflaged by cleaver drafting. State officials, however, cannot be rewarded for engaging in cute or deceptive drafting practices.

The Supreme Court's facial discrimination doctrine applies to the CFB. The Court should consider the CFB as a whole - - and not just the text of § 21. When the restrictions of § 21 are considered together with the many exceptions created in § 22, the focus of the CFB clearly emerges: the CFB facially discriminates against interstate commerce because it favors certain in-state farmers with the exceptions and narrow criteria for satisfying the exceptions. Paraphrasing the Supreme Court's recent facial discrimination decision:

> [The CFB] law grants domestic [farmers] considerable leeway in controlling [decisions about corporate format] . . . . [South Dakota] law does not grant a foreign [farmer] similar leeway. . . .

South Central Bell Telephone, 526 U.S. at 162. Moreover, South Dakota's attempt to preserve local farmers' interests by protecting them from the rigors of interstate competition is exactly the type of economic protectionism that the dormant commerce clause doctrine prohibits. *See West Lynn Creamery*, 512 U.S. at 205.

2. The CFB Is Facially Discriminatory Because of its Structure.

The discriminatory nature of the CFB is also observable from reading its text. The drafters of the CFB chose to create many "exceptions" in §§ 22(l)-22(15) to the general prohibition of § 21. These exceptions have significant substantive import. Challengers contend that the mere presence of such substantive exceptions is the basis for finding the CFB is facially discriminatory. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 676 (1981) ("Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks . . . ."). *Cf. Police Department of Chicago v. Mosley*, 408 U.S. 92, 94 (1970) ("exceptions" in a regulatory scheme are the basis for judicial determination that government was "discriminating" against free speech).

Just like the "exemptions" in *Kassel*, the exceptions in § 22 of the CFB have the consequence of securing to South Dakota farmers many of the benefits of a limited liability format while denying farmers or farm investors in neighboring States such benefits. This approach constitutes facial discrimination against interstate commerce.

3. The CFB Is Inherently Protectionist.

In addition to a textual and structural analysis, the Court can find that the CFB is facially discriminatory because of the subject matters of the CFB. The

CFB is inherently protectionist because, in this case, the CFB is directed at the *livestock industry*. The livestock raising and livestock feeding industries are, however, part of an "integrated interstate market". *See West Lynn Creamery*, 512 U.S. at 203. Since the CFB was targeted at the livestock industry, it was inherently an attempt to regulate interstate commerce.

Because of the text and the structure of the CFB as well as the inherent implications for interstate commerce, this Court should determine that the CFB is facially discriminatory, and affirm the Judgment below on these broader grounds.

C. The CFB Was Motivated By Discriminatory Purposes.

For this issue, the standard of review regarding the findings of fact is clear error. For the District Court's legal conclusion about "sufficiency", the standard is the *de novo* review.

The District Court addressed the Challengers' claim that, even if not facially discriminatory, the CFB was purposeful discrimination regarding interstate commerce. Referring to the official election pamphlet, the District Court made a finding of fact that: "This is clearly some evidence of discriminatory purpose." Add 271. More generally, the District Court found as a fact that: "There was some evidence at trial that Amendment E was motivated by discriminatory purposes." *Id.* Even with these findings, however, the District Court held that the CFB was not discriminatory: "I decline to find sufficient discriminatory purpose." *Id.* The Court did not elaborate or provide any citation to authority for its "sufficiency" analysis.

Challengers respectfully disagree with the District Court's "sufficiency" standard. First, the District Court cited no authority. Second, even if there is a "sufficiency" standard, Challengers provided more than enough evidence to satisfy it.

Under applicable Supreme Court and Eighth Circuit authorities, Challengers presented both *direct* and *circumstantial evidence* of the protectionist purpose underlying the CFB. *See SDDS, Inc.*, 47 F.3d at 267-269. Regarding the determination of purposeful discrimination, a Court "is not bound by the name, description or characterization given by the legislature or the courts of the State but will determine for itself the practical impact of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (internal quotation omitted).

The types of circumstantial evidence of discriminatory purpose include: (1) impact or effect of CFB on interstate commerce; (2) the historical context and background of the development of the CFB; (3) the sequence of events leading up to the development of the text of the CFB; (4) any departures from normal procedures involved in the Development of the CFB's text; (5) the legislative history of the text; and (6) testimony from the decision-making or drafters of the CFB. *Cf., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (purposeful discrimination in equal protection).

In determining whether a state regulation is discriminatory, the Supreme Court has considered the impact, or effect, of the regulation on interstate commerce. *Wyoming v. Oklahoma*, 502 U.S. 437,455 (1992); Kassel, 450 U.S. at 668-669.

A second evidentiary factor in determining discriminatory purpose is the historical context of the State regulation. *See Kassel*, 450 U.S. at 677. Part of the historical context includes the state of the relevant law at the time that challenged regulation becomes effective. Here, the context is the existence of the regulatory scheme in the 1974 Family Farm Act, which did not apply to the livestock industry.

Another evidentiary factor in determining discriminatory purpose is the sequence of events leading up to the adoption of the challenged State regulation. *See Kassel*, 450 U.S. at 677 (prior legislation had been vetoed by the state's governor, forcing the Legislature to adopt the challenged regulation). A fourth evidentiary factor in determining discriminatory purpose would be any departures from normal procedures. *Cf.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526 (1993) (city council held "an emergency public session"). Regarding these two factors, the Challengers presented evidence of the rapidity of the CFB's drafting and the lack of careful study involved in the drafting of the CFB.

A fifth evidentiary factor in determining discriminatory purpose is the "legislative history" of the challenged regulation. *See Kassel*, 450 U.S. at 677. Here, Challengers presented evidence about the drafts of the CFB's language and the other "inputs" into the drafting process. Challengers also presented the official Ballot Question Pamphlets for the CFB. This Court should conclude that the legislative history of the CFB "is brimming with protectionist rhetoric". *SDDS, Inc.*, 47 F.3d at 268.

A sixth evidentiary factor recognized by Supreme Court authority for determining discriminatory purpose is testimony (including admissions) from the regulatory decision makers or "drafters". *See Kassel*, 450 U.S. at 677; *Hunt*, 432 U.S. at 352. *Cf.*, *City of Hialeah*, 508 U.S. at 541. Here, Challengers presented, at trial, admissions from the Intervenors' key drafter and from the State's expert witness. (T 505)

1. The "Direct" Evidence: The Official Ballot Statement

Challengers placed the state-sponsored explanatory pamphlet, Add. 1, in the record. (T 634) Commonly known as the "Pro Statement," Add. 1 is "direct" evidence of discriminatory purpose.

The Pro Statement is candid about its protectionist goal: protecting certain South Dakota livestock producers from the competitive forces of the interstate marketplace. The Pro Statement asserted that "Amendment E is needed to prevent corporations from using interlocking boards and other anti-competitive ties *with the meatpacking industry from limiting and then ending market access*

for independent livestock producers". (Add. 1 (emphasis supplied).) Even more flagrantly, the proponents stated that, unless the Amendment would pass, "Desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." *Id.* Under the governing Eighth Circuit precedent, *see SDDS, Inc.*, 47 F.3d at 268, the Pro Statement is sufficient for this Court to find that, despite clever drafting, the proponents had a purpose to discriminate against interstate commerce.

Another type of *direct* evidence recognized by the caselaw would be any admissions by the State as to its purposes. Perhaps the most notable example in the caselaw was the "admission" by Iowa's Governor in the *Kassel* decision that Iowa's truck length regulation was actually adopted for the protectionist purpose of holding down the state's highway repair costs. *See Kassel*, 450 U.S. at 677. In this case, while the witness was not a State official, the State's *testimonial expert* witness made the "admission" that the CFB was purposeful discrimination against interstate commerce. The State's rural sociologist, Dr. Lobao, essentially "admitted" that Amendment E was a discriminatory regulation. Dr. Lobao stated that the CFB was a "South Dakota law designed to restrict operation of global agribusiness firms." (T 505; Add. 2) Challengers contend that, under the *SDDS* decision, the statements in the Pro Statement and the admissions in the trial testimony are sufficient direct evidence to establish the discriminatory purpose theory.

2. Circumstantial Evidence of the "Climate" Concerning the Development of the CFB Demonstrates Impermissible Purpose.

In pursuing the theory that CFB was motivated by discriminatory purposes Challengers submitted evidence regarding the "climate" surrounding the adoption of the Amendment. From this record, the following story emerges; as in *SDDS*, it is "brimming" with protectionism. *SDDS*, 47 F.3d at 268.

The drafting of the CFB was strikingly rapid. The proponents completed drafting the Corporate Farming Ban in less than six weeks. (T 245.) The proponents' haste was caused by the need to have the proposed amendment certified by the Secretary of State and the requisite initiative petitions submitted by November 1997 (one year in advance of the November 1998 election).

In this hasty process, the proponents appointed a Drafting Committee which held its first meeting on March 25, 1997. (Add. 3.) The Drafting Committee was composed of five members, only one of which was a lawyer (Mr. Jay Davis). Ms. Luann Napton was the recording secretary. At the March 25 meeting, Mr. Davis, the lawyer, warned the Committee that the proposed initiative raised "Commerce Clause" problems. Mr. Davis said, "The problem with [the eventual Amendment] is that it might be struck down for violating the Commerce Clause." (Add. 3.) Ms. Napton dutifully recorded the "Davis warning" and distributed it.

During the drafting process, one Committee member, Ms. Rene Morog,

engaged in some additional research. Ms. Morog contacted Dr. Neil Harl, a prominent agricultural economist at Iowa State University. Ms. Morog had Dr. Harl review a draft of the CFB. Dr. Harl sent Ms. Morog a fax with his comments and concerns. (Add. 4-5.) Dr. Harl, like Mr. Davis, warned about various problems. Dr. Harl specifically identified that the proposed amendment would constitute a "complete" ban on the flow of investment capital to South Dakota agriculture. (*See* Add. 5; Add. 6-9.) The Amendment's proponents ignored the Harl warning about the effect of the Amendment on the flow of investment capital.

This sequence of events and this legislative history are certainly circumstantial evidence relevant to the issue of discriminatory purpose. Taken together with the Pro Statement and other "direct" evidence, the circumstantial evidence regarding the haste and recklessness of the proponents demonstrates that the Amendment was designed for a discriminatory purpose: the protection of South Dakota farmers. *See SDDS*, 47 F.3d. at 270.

D. The CFB Is Protectionist "In Effect".

Alternatively and additionally, Challengers contend that, under the evidence in the record, this Court should find that the CFB is also discriminatory because its provisions are protectionist in effect. *See SDDS, Inc.*, 47 F.3d at 267-269. The District Court "rejected" this theory without citation to any authority. App. 271-272. Numerous Supreme Court decisions have found that state laws are "discriminatory" because the regulations had an adverse impact on interstate commerce. For example, in the *South Central Bell* decision, *supra.*, the Supreme Court considered the effect of the state's franchise tax scheme on out-of-state corporations. Since the out-of-state corporations could not avail themselves of the tax-lowering technique available to Alabama corporations, the Supreme Court found that the franchise tax scheme was discriminatory in effect. *See id.*, 526 U.S. at 169. In *West Lynn Creamery*, also discussed above, the Supreme Court considered the impact of the "dealer tax-producer subsidy" regulatory scheme and concluded that it had the effect of discriminating against non-Massachusetts dairy farmers. *See id.*, 512 U.S. at 195-196.

The Challengers presented overwhelming evidence about the effect of the CFB on various aspects of interstate commerce: utility transmission; wind power development; livestock custom feeding; and investment in the livestock industry. The District Court, for the reasons below, erred, and this Court should reverse. The standard of review is *de novo*.

The District Court did make some findings of fact which bear on the discriminatory effect theory. The Court found, for example, that the CFB "clearly places a substantial burden on interstate commerce" regarding the costs of transmission easements in South Dakota when compared to the costs in adjoining states served by the Utility Challengers. App. 274-275. This Court should recognize that this finding of fact about the CFB's effect contributes to a

determination that the CFB is discriminatory.

The Challengers' economist, Dr. Tweeten, testified that the CFB obstructs and virtually eliminates the practice of "production contracts" from the South Dakota livestock industry. (T 536.) The restriction of production contracts interferes with the flow of investment capital into agriculture and, thereby, burdens interstate commerce. (T 537.) Dr. Tweeten also testified that the CFB will negatively affect the national practice of vertical coordination and, thereby, burden interstate commerce.[4]

Other evidence of the effects of the CFB came from state officials who testified that millions of dollars of commercial development have been suppressed by the CFB, to the permanent detriment of interstate commerce. One state official, cabinet member Mr. Ron Wheeler, testified at the trial based on his many years as head of the Governor's Office of Economic Development. As head of GOED, Wheeler was uniquely qualified to observe the effects of Amendment E. He testified that the Amendment had a suppressive and inhibiting effect on the flow of interstate investment. (T 737, 739, 745) He testified that the GOED had learned of over 20 investment projects suppressed by the Amendment. (T 741) Wheeler testified that the Amendment burdened a "full range" of projects. (T 742)

Significantly, Wheeler's testimony was not refuted or rebutted by the State or the Intervenors.

In the context of a "discriminatory effect" theory, the District Court's unfortunately relied on a narrow definition of discrimination. The District Court defined as discrimination *only* those policies that burden out-of-state interests. App. 270-271. This is an inappropriately narrow definition of discrimination. It ignored, for example, the protectionist effects of the CFB. *See Kassel*, 450 U.S. at 676. The CFB interferes with the flow of investment capital and the resulting effect will be isolationist. *See* Wyoming, 502 U.S. at 457. The District Court's failure to consider protectionist and isolationist effects of the CFB as "discrimination" distorted its analysis and was an error.

For all these reasons, this Court should determine that the CFB is discrimination in effect. On this basis, this Court should affirm the District Court.

E. The CFB Fails The Strict Scrutiny Standard.

Under each of the three theories, and cumulatively, this Court should find that the Amendment's regulatory scheme was discriminatory. Hence, this Court should test the regulatory scheme against the strict scrutiny standard.

The State cannot meet the strict scrutiny test. First, none of the governmental interests is "compelling" even though they may be arguably

4. Dr. Tweeten also opined that Amendment E denied farmers the types of nationally common "tools" which give producers the flexibility to respond to a consumer-driven marketplace. (T 616.)

"legitimate". The District Court, without citation to authority, concluded that the State had a compelling interest in protecting "small" farmers. App. 272. This is unsupported and unsupportable. *See Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2536 (2002). The State cannot create compelling interests by fiat.

Additionally, the State did not prove that the means (*i.e.*, the regulation of corporation structure) is the *least drastic alternative* for achieving any compelling interest. The State did not put on any evidence about less drastic alternatives. Although the State's Brief contains a discussion of certain South Dakota statutes, it is significant that, in the entire discussion, there is no citation to the record or the Transcript. The State failed its burden.

There are many alternatives available. The State's failure to utilize them means that the State fails the strict scrutiny test. Since the State failed both prongs of strict scrutiny, this Court should hold that, as a discriminatory state regulation, the CFB violates the dormant commerce clause.

F. The State Also Fails the "Undue Burden" Standard

If the CFB would be deemed "nondiscriminatory, then the applicable standard is the "undue burden" test. *E.g.*, *Bendix Autolite Corp.*, 486 U.S. at 889. There are three elements: (1) the extent of the burden on interstate commerce; (2) the weight of the purported nondiscriminatory state interest; and (3) the State's alternative means. The State failed this standard.

1. The Plaintiffs Satisfy the "Burden" Element

The Challengers have the burden of proof to show the extent of the burden on interstate commerce. Challengers have satisfied that element. The CFB has a suppressive and profoundly negative impact on interstate commerce. (T 742; Wheeler testimony.) The State never even contested that issue with appropriate economic testimony.

2. The State Failed the Burden of Proof on the "Local Benefit" Element.

The State and the Intervenors have tried to defend the CFB based on two asserted "local benefits" of the Amendment. The State sought to defend the CFB as a means to protect small family farms. The State's record was based on two sociologists, testifying as experts. It is significant that the District Court essentially ignored the State's sociologists. The State's problem here is that the State's experts did not establish in any way that a ban on *corporate business structure* actually was related to preserving family farms.

The Intervenors also failed to establish that the asserted interest in preventing water pollution from manure lagoon spills was more than theoretical. Neither the State nor the Intervenors presented any evidence about any manure lagoon problems in South Dakota. This was a critical omission. Without

appropriate proof, the Court should conclude that the small farm interest and the manure lagoon interest were essentially illusory. *See Kassel*, 450 U.S. at 671 ("the State's safety interest has been found to be illusory").

3. The State Failed To Demonstrate That It Lacked Alternative Means.

In the undue burden standard, the State had the burden to show "the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. 333, 353 (1977). Neither the State nor the Intervenors made any showing that alternatives were not available. (Of course, alternatives such as regulating based on farm "size" or even the "industrialized nature" of a farm were available.) Since the State failed its burden here, the Court should follow controlling Supreme Court precedent and rule for Challengers. *See Bendix Autolite*, 486 U.S. at 895.

4. Summary

In sum, while the Challengers satisfied the element where it had the burden, the Stated failed its burden regarding the purported "local interests" and its burden on "alternative means." Therefore, even if the Court would use the undue burden standard, the Court should rule for Challengers and affirm the District Court.

G. Conclusion

For the reasons above, this Court should conclude that the Corporate Farming Ban is discriminatory regarding interstate commerce and rule that the CFB unconstitutionally violates the dormant commerce clause. This Court, therefore, should affirm the lower court on other, broader grounds

ISSUE II. THE CORPORATE FARMING BAN IS PREEMPTED BY TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

For purposes of this Preemption Issue, Challengers respectfully join the arguments in the briefs filed by the Appellee/Cross-Appellant Holben, *et. al.*, and the Appellees Utilities in this matter. Challengers urge that this Court affirm the District Court on the holding that the CFB is preempted by Title II of the ADA.

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An Agricultural Law Research Article

Appellants' Reply Brief

by

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PRELIMINARY STATEMENT

Appellants Hazeltine and Barnett (hereinafter State Defendants) submit this brief in response to the following briefs in this consolidated appeal:

Brief of Appellees and Cross-Appellants South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers, Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; and William A. Aeschlimann (September 13, 2002)

Brief of Appellees and Cross-Appellants Marston Holben; Spear H. Ranch, Inc.; Marston and Marion Holben Family Trust (September 13, 2002)

Brief of Appellees Montana-Dakota Utilities Co.; Northwestern Public Service; and Otter Tail Power Company (September 12, 2002)

The Brief of Appellees and Cross-Appellants South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers, Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; and William A. Aeschlimann will be referred to herein as the "FB Brief." The Brief of Marston Holben; Spear H. Ranch; and the Marston and Marion Holben Family Trust will be referred to as the "Holben Brief." The foregoing Cross-Appellants (except the Marston and Marion Holben Family Trust) refer to themselves collectively as the "Agricultural Challengers" and that designation will be used for references to the entire group.

Appellees Montana-Dakota Utilities Co.; Northwestern Public Service; and Otter Tail Power Company will be referred to as the "Utilities."

ARGUMENTS

I. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS CONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE?

The FB Brief presents the Agricultural Challengers' argument on cross-appeal of the dormant commerce clause issue. The Holben Brief joins in the FB Brief on the commerce clause issue (Holben Brief at 30, 31). The Utilities also present a commerce clause argument in their Appellee's Brief. State Defendants respond here to all three briefs.

A. The Agricultural Challengers Lack Standing Under Article III.

Before a federal court has jurisdiction under Article III, a case or controversy must be presented. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 (1993); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). "[A] real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract" is required. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979).

Agricultural Challengers have not met these requirements. First, Plaintiff Farm Bureau ("FB") presented no evidence of direct or tangible harm. FB does not farm or own farmland. Its claims concern alleged harm caused to its members. Mike Held, an executive with FB and its only witness, gave three examples of "concern" to FB. T 23-25. In giving these examples it was evident that Farm Bureau could not describe how Amendment E affected particular members, let alone show direct or tangible harm. One example involved joint ownership of machinery by a group of neighbors. T 23. Held did not explain the name or nature of the business organization and stated that he is "not qualified to interpret whether [t]his business structure is in compliance" with Amendment E. T 39. Moreover, it is clear that joint ownership of machinery is not affected by Amendment E.

The second example was a livestock finishing scenario where neighbors would divide up the different facets of raising the same livestock (breeding, raising feeders, finishing). T 24. Although testimony was offered that each of these neighbors would be family farmers, the organizational structure was not described, and these entities are not parties. T 40.

In addition, FB asserted that Amendment E harms those who feed livestock on a contract basis. T 24-25. No specific contract was identified. Held testified that the evidence of such harm would be provided by other parties. T 27. However, no other party testified as a FB member.

FB did not demonstrate that Amendment E directly or tangibly harmed it or its members. Under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), Plaintiffs must show "injury in fact," evidence that invasion of its own interests are (a) concrete and particularized and (b) result in actual or imminent harm. *Lujan*, 504 U.S. at 560. The law requires that "the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972). FB must show that "it or its members would be affected" apart from their "special interest" in the subject. *Id.* at 735, 739. FB has not done so.

South Dakota Sheep Growers is a farm association created to enhance the viability of the sheep industry. T 131. Aeschlimann testified both as a member of Sheep Growers and individually. T 130, 142. He did not know how many sheep growers are family farmers qualified under Amendment E. None of his testimony established that Amendment E has in fact injured this association. T 130-31.

Further, Aeschlimann himself operates a family-owned sheep business and is not incorporated. T 143. He is not barred from operating under Amendment E.

Haverhals and Sjovall operate as corporations (Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.), but are exempt from Amendment E under the family farm exemption: Section 22(1). They live on the facility and a family member provides substantial day-to-day labor and management. T 163, 173, 197, 198, 201.

Haverhals, Sjovall, and Aeschlimann testified that their suppliers or customers included business entities that might be in violation of Amendment E. T 133-34, 167, 169, 202. While these Plaintiffs may do business with those in who are in violation of Amendment E, they cannot assert the legal rights of those third parties. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Tesch, an individual, operates currently under a production contract with Harvest States Cooperative. T 180; Exhibit 64. That contract is "grandfathered" under Amendment E (Section 22(5)). Tesch continues to receive new stock under this contract on a periodic basis. T 190. However, renewal of that contract is not grandfathered, and Harvest States Cooperative (not Tesch) would need to qualify (if it can) under Amendment E's cooperative exemption in Section 22(2) in order to renew the contract. Tesch cannot bring claims of Harvest States. *Allen*, 468 U.S. at 751.

Brost filed this suit individually. He is involved in Brost Land and Cattle Co., Inc., which was incorporated in 1979. T 64. This corporation can continue to own the farm/ranch land it owned prior to Amendment E, but cannot purchase additional land or livestock. Sections 21 and 22(4). Brost Land and Cattle Co. is not a party. Plaintiff Brost is an individual and does not have standing to raise these issues on behalf of Brost Land and Cattle Co., Inc. *Allen*, 468 U.S. at 751.

Spear H. Ranch, Inc. and Holben and the Marston and Marion Holben Family Trust (through their operation of Plaintiff Spear H. Ranch) are in compliance with Amendment E under the family farm exception of Section 22(1). Holben purchases steers for the corporation in the springtime, has them branded and vaccinated, and then pastures them on unimproved ranch property in western South Dakota. T 250-53. Once on the ranch, the cattle graze in the pasture for the summer. Day-to-day labor is not required for this type of operation. T 257. Holben generally oversees matters every week or two, sometimes two or three times a week. T 258. He rides herd and checks to make sure the steers are healthy. T 259. He and his wife completely manage the operation. T 258. To the extent heavy physical work is required, he hires the work done on behalf of the corporation. T 259. Amendment E does not require that a family member be present on a daily basis or be the sole caretaker of the farm if the farming operation does not require that level of activity. Simply put, not every farming operation requires daily chores. The activities of Marston Holben qualify Plaintiff Spear H. Ranch, Inc. under the family farm exception of Section 22(1).

As seen, none of the Agricultural Challengers have shown the kind of direct tangible harm necessary to support standing.

B. The Big Stone Issue Does Not Require Constitutional Review.

As part of the various dormant commerce clause claims in this proceeding, the Utilities asserted that Amendment E affects their ability to manage property at their Big Stone power plant in northeast South Dakota. There are two

situations here, neither of which call for constitutional consideration.

One situation is that the Utilities have purchased new property for building a new power plant. They want to lease the property to nearby farmers for agricultural use pending the construction of the plant. Both the Utilities and the State Defendants recognize that Amendment E allows for a five-year window for a corporation to hold land pending development. S.D. Const. art. XVII, § 22(10). If the land is not developed in the five years, it can no longer be used for farming. *Id.* In that event it must sit idle or be used for some other purpose than farming.

Utilities speculate that the plant *might* not be completed within the five years. "[I]f plant construction is not completed within five years, the Big Stone Partners must divest themselves of the land." Utilities' Brief at 15. Based on evidence at trial, however, the new plant at Big Stone could well be constructed during the five-year window. The existing plant at the same location took only five years. T 301. Moreover, the testimony at trial indicates that the land will be used for the construction process during the five-year period, thereby precluding planting and harvesting crops (or haying) on the land anyway. T 302. There is certainly no requirement that the plant be generating energy in five years.

Further, Utilities' Brief even discloses the uncertainty in the Utilities' position regarding plant construction: ". . . if the plant construction isn't completed within five years . . . ." (page 15) (emphasis added). The Utilities' Brief indicates (without any citation to the record) that the Utilities are "limited in their ability to acquire development real estate for future development, and face increased acquisition costs." Utilities' Brief at 15. These statements disclose that any "harm" from Amendment E regarding construction at Big Stone is speculative.

The second situation with respect to Big Stone is the "grandfathered" property. The Utilities are concerned with the "need to convey some of the property they owned prior to Amendment E to a new ownership group, destroying the ability of that land to fit within Amendment E's 'grandparent' exception." Utilities' Brief at 14. Testimony at trial discloses that this "need" is in fact the desire of the Utilities to restructure ownership of the power generation plant itself. Their witness acknowledges that even if the industrial plant is operated by a different business entity in the future, there is no requirement that such new group would be required to own the farmland or farm the nearby land under that same new configuration. T 304. Utilities acknowledge that they could continue to maintain the existing tenancy in common under its current configuration for the rental of the 552 acres regardless of the corporate structure of the nearby power plant. T 304. Moreover, the 552 acres involved is suitable for sale or use for industrial purposes insofar as it is on a rail spur and is located near a good water supply. T 299.

For the foregoing reasons (as well as the rationale set forth in their Appellants' Brief at 11-14), the State Defendants submit that the Utilities'

situation at Big Stone does not require a constitutional determination. Because the issue is so premature that the Court would have to speculate as to the real injury, the Court should not address the constitutional issue. See *United States v. Thomas*, 198 F.3d 1063, 1065 (8th Cir. 1999).

C. Amendment E Is Not Facially Discriminatory.

Agricultural Challengers (through the FB Brief) assert that Amendment E is facially discriminatory.[1] Under the Dormant Commerce Clause, laws that facially discriminate against out-of-state entities require States to bear an almost impossibly high burden of proof. Accordingly, the FB Brief attempts to shoehorn the challenge here into a facial discriminatory challenge.

First, the FB Brief claims that Amendment E is facially discriminatory against out-of-state business when considered under a "holistic approach" where the challenged law is considered in light of all other laws and regulations pertaining to the same subject. FB Brief at 18.

The Agricultural Challengers have, however, waived the facial challenge argument through their own admissions. Farm Bureau's witness stated that Amendment E "actually hurts South Dakota farmers rather than protects them against out-of-state competition." T 38. Brost admitted "he is not claiming that Amendment E benefits South Dakota farmers to the detriment of out-of-state farmers" from a "profit making" perspective. T 100.

In the "Pro-Con Statement," Brost wrote "the language of Amendment E does not clearly distinguish between out-of-state farmers and ranchers." Exhibit 19; T 634. Indeed, Agricultural Challengers did not even call any fact witness to testify who was from out of state.

The second problem with the facial challenge/holistic argument is that the cases referenced are much different than the situation at hand. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), the Court considered a situation where the State of Massachusetts imposed a tax on all milk dealers, but then basically remitted rebates to in-state dairy farmers. The case at bar clearly does not involve such subterfuge, no matter whether Amendment E is considered on its own or in light of all regulatory statutes as a whole.

In *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), the Court considered a situation where all corporations in Alabama were required to pay a franchise tax, but allowed the in-state businesses the opportunity to value their corporate assets differently for tax purposes. Again, the situation here is not one where the State has imposed regulation on a cross section of corporations, but then "given back" some privilege to in-state corporations. All are in fact treated equally.

The State Of South Dakota has neither engaged in "regulatory efforts camouflaged by clever drafting" nor stooped to "cute or deceptive drafting

1. The Utilities do not make a "facial discrimination" argument.

practices" like those referred to in the FB Brief at 19.

In addition to the foregoing, the FB Brief also mounts a facial discrimination/structural challenge. This theory focuses on the number of exemptions in the amendment. According to the FB Brief "the mere presence of such substantive exceptions is the basis for finding the CFB[2] is facially discriminatory." FB Brief at 21 (footnote added). It is not, however, the mere presence of exceptions, substantive or not, that drives the constitutionality of state law. Indeed, the remainder of the FB Brief purports to suggest that a much more searching analysis is required than counting the number or size of exemptions. In *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 676 (1981) (cited by Agricultural Challengers), the exemptions actually favored Iowa businesses. The apparent discrimination in that case arose from the history of the legislation (clearly discriminatory statement by Governor Ray) in addition to the type of exemptions involved that favored Iowa.

As a final facial challenge, the FB Brief asserts that the subject matter alone is dispositive. The brief states that Amendment E is facially discriminatory because (in Farm Bureau's opinion) the law was "targeted" against the livestock industry. FB Brief at 22. Because livestock raising and livestock feeding industries are interstate in nature, the FB Brief claims that Amendment E is "inherently an attempt to regulate interstate commerce." FB Brief at 22. Under that analysis, any regulation whatsoever of livestock and

livestock feeding would be facially discriminatory and unconstitutional. That claim flies in the face of *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814 (8th Cir. 2001) (recognizing that regulation of prices for livestock sales in Missouri did not have an unlawful discriminatory "extraterritorial reach" when it did not impose requirements on out-of-state livestock sales). Indeed, branding laws, animal health laws, and animal feed laws would automatically be facially discriminatory. Agricultural Challengers' suggestion that all livestock regulation is facially discriminatory is flatly wrong.

For the foregoing reasons, the State Defendants submit that each of the facial challenge arguments advanced in the FB Brief should be rejected.

D. Amendment E Was Not Enacted for Discriminatory Purposes.

All of the Plaintiffs below (Agricultural Challengers and Utilities) assert that Amendment E was enacted for discriminatory purposes and is unconstitutional under *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263 (8th Cir. 1995). Judge Kornmann, as fact finder, weighed the evidence and found that the purpose was to "retain family farms and to prevent limited liability entities, regardless of their home base, from gaining control of the food supply." *South Dakota Farm Bureau v. Hazeltine*, 202 F. Supp. 2d 1020, 1047 (D.S.D. 2002). There was not a discriminatory purpose. *Id.* The trial court is in the

2. Agricultural Challengers refer to Amendment E as the CFB or corporate farm ban.

position to weigh the credibility of the witnesses. As such, a factual determination is reversible only if it "is not supported by substantial evidence in the record, if the finding is based on an erroneous view of the law, or if [the court] is left with the definite and firm conviction that an error has been made." *Tadlock v. Powell*, 291 F.3d 541, 546 (8th Cir. 2002).

Agricultural Challengers assert that reference should be made to the historical context of the challenged law and the sequence of events leading up to passage of the challenged law. *See* FB Brief at 24, *citing to Kassel*, 450 U.S. at 678. In *Kassel*, the Iowa governor had refused to sign a bill treating out-of-state entities the same as in-state entities. His veto message asserted that the bill would not afford adequate protection to in-state interests: It would "benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." *Id.* at 677. After the veto, a bill was passed (with the Iowa governor's signature) that favored Iowa trucking companies. The Iowa history in *Kassel* is far different than this case.

The history of the corporate farming laws in South Dakota began in 1974. The original South Dakota Family Farm Act (SDCL ch. 47-9A) pertained only to ownership of cultivated farmland. It was amended in 1989 to include "farrow to finish" hog operations involving breeding, farrowing, and raising swine. SDCL 47-9A-13.1; Attorney General Memorandum Opinion 89-05. Other types of corporate livestock feeding operations were not restricted by state law until Amendment E was enacted. SDCL 47-9A-11.

The State Defendants submit that the structure of agriculture has changed in such a way as to now require adding livestock production to the corporate farming law. Since the 1970s, when the Family Farm Act was passed, agricultural and livestock ventures have changed. According to Agricultural Census data, farming has been changing from traditional business structures (single proprietorships and partnerships) to business structures such as limited liability corporations and other types of corporations. State Defendants App. 8-11. Importantly, there are two major types of changes in the livestock industry. First, there is production contracting. Agricultural Challengers' expert Luther Tweeten asserts that production contracting is "critical to the vitality of the state's family farms in the 21st Century." Exhibit 47, page 6. He recognizes that "production contracts are now nearly universal in broiler production and are expanding rapidly in hog production." Exhibit 47, page 14. Further, "beef cattle contracts have also increased since 1990." These are undisputed facts. Due to the more recent increase in production contracting, the 1974 Family Farm Act would not have addressed production contracts. As identified in the testimony of Dr. Heffernan (T 806-27), there are long-term detrimental problems with production contracts. The contracts are asymmetrical contracts: the grower finances the barn, installs the waste and water systems, and undertakes all labor. In turn, the corporation owns the animals, dictates the rations, requires grower-paid improvements in the facilities, owns the genetics, and even directs the

brands of feeding equipment used. T 807-9. Although growers provide half the capital, they are not able to build collateral. T 808, 809, 826. The corporations basically pay the growers on a "price rate" basis. T 807, 809. Ultimately, increasing production contracting contributes to the situation where there is no market whatsoever for "independents" who choose to grow and market their own livestock. T 827. In the words of the Agricultural Challengers' expert, Luther Tweeten, "Farmers need access to markets." Exhibit 47, page 24. *See also* Exhibit 501 "A Time to Act," pages 61-63 (explaining the ultimate market problems with production contracts and the "feeling of servitude" felt by producers). Amendment E attempts to address this growing situation by preventing corporate production contracts before the producers realize the long-term adverse effect of such asymmetrical arrangements.

Another way that livestock production is changing is in "industrialized" farming where "different groups of people beyond the household" are engaged in livestock production. T 450. The testimony of Dr. Lobao addressed the adverse sociological impacts on communities. See Exhibit 314: Based on her work and that of other social scientists, there are long-term adverse effects of industrialized farming. These effects include negative socioeconomic well-being (growth, employment, and distribution of growth) and social fabric (population change, crime rates, births to teenagers, community conflict, education, health, mortality rates, and school qualities). T 451-53.

Both production contracting and the industrialized feeding operations have increased since the 1974 Farm Act and are now addressed in Amendment E. This is the history and sequence of events leading up to Amendment E.

The FB Brief states that another evidentiary factor in determining discriminatory purpose is whether the law was enacted in a way that departed from normal procedures. FB Brief at 24 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526 (1993)) (ordinances passed in one night at city council emergency session targeting religious practices of specific church). Amendment E was not enacted on an emergency basis. It was filed in May 1997 and put to the public vote in November 1998. South Dakota law (SDCL 2-1-6.2) requires that initiated measures be prefiled with the Secretary of State before signatures are gathered. Further, the signatures must be gathered and submitted a full year in advance of the election. SDCL 2-1-2.1. All sides of the issue had eighteen months to educate the voters on the relative merits. Plaintiffs had an opportunity to advance their position to the decision makers—the public. Exhibits 19 (Pro-Con Statement), 107-113 ("No on E press releases"), 305 ("No on E" brochure), 309 ("No on E" speech), 342 (deposition testimony of Deb Mortenson). The normal procedure for constitutional amendments was followed.

The FB Brief relies on the legislative history of Amendment E and statements made by the drafters as additional evidentiary factors on the issue of discriminatory purpose. In *SDDS*, the Eighth Circuit addressed the scope of

South Dakota legislative history and included two "official" documents that comprise the legislative history: (a) the Attorney General's Explanation on the ballot and (b) the informational Pro-Con pamphlet developed by those in favor of the measure and those opposed to the measure, a public information document. 47 F.3d at 268.

The FB Brief does not attack the Attorney General's official ballot explanation prepared under SDCL 12-13-9. It does attack the Pro-Con pamphlet.[3] The Pro-Con Statement provides (as its name implies) information for and against the measure. It is written by two members of the public and is not authored or edited by the State. The "Con" Statement in this case was written by attorney Frank Brost, a Plaintiff in this action.

At page 27, the FB Brief points to a so-called "admission" by one of the State's expert witnesses, Dr. Linda Lobao (that Amendment E was a "South Dakota law designed to restrict operation of global agribusiness firms"). The comment was made in Dr. Lobao's curriculum vitae. T 504, 505. It is not a characterization made by a lawyer and was not a characterization given to Dr. Lobao to work from. T 506. The comment in her curriculum vitae was "a characterization to show to sociologists. It would be for the sociological profession to integrate what I did in the report in theory." T 506. In other words, the comment simply served as a notation that the report belonged in a general category of sociological thought.

The Utilities also use the testimony of Dr. Lobao to attack the purpose of Amendment E. They claim that Dr. Lobao, in essence, admitted that Amendment E would not accomplish the purposes of protecting the rural and agricultural economy and environment. Utilities' Brief at 9, 10. Dr. Lobao made no such admission or statement. One of the cited references to the record (T 465) clearly indicated that Dr. Lobao views industrialized farming as detrimental to rural communities over the long haul. The detrimental factors include income inequality and poverty (which, in turn, bear on educational attainment, crime, and mortality). T 467. This supports the background for Amendment E.

The FB Brief suggests that testimony from "regulatory decision makers or 'drafters'" is a proper evidentiary factor for considering whether a law is founded on a discriminatory purpose. FB Brief at 25. State Defendants submit, however, that information gleaned from drafters is far different than information used by the actual decision makers as part of their consideration of the law. Indeed, the cases cited in the FB Brief involve decision makers, not drafters. The *Kassel* reference is to a gubernatorial position on passage of a state law he signed. 450 U.S. at 677. The *City of Hialeah* reference is to statements made by city council members when enacting a city ordinance. 508 U.S. at 541. In *Hunt*

3. The FB Brief announces in bold letters that the Pro-Con Statement is "The Official Ballot Statement." FB Brief at 26. The reference to that document as a ballot statement is improper if it is intended to suggest that the Pro-Con language was actually on the ballot.

v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1981), the state official with authority to grant exemptions was quoted regarding his own protectionist rationale for denying exemptions. 432 U.S. at 352.

Although cases sometimes refer to the phrase "intent of the drafters," the phrase obviously refers to decision making of the lawmakers. For example, *Holloway v. United States*, 526 U.S. 1 (1999) refers to intent of the drafters, but states that the intent is gleaned from the congressional enactment itself and the statements of members of Congress. In *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996), the Court referred to the "drafting history" of legislation as the versions acted upon by both houses of Congress.

Actual drafts and other information gathered during the drafting process is not legislative history of Amendment E. That is because the drafting committee was not the decision maker. Neither Agricultural Challengers nor Utilities cite to one single decision where the drafting decisions of congressional staffers, state legislative research staff, or groups drafting statewide votes are "legislative history."

Moreover, evidence on "purpose" or "intent" is different from the "motives" of individuals, even the motives of individual lawmakers. In *Palmer v. Thompson*, 403 U.S. 217 (1971), the Supreme Court held that evidence of legislators' motives should not be considered in adjudicating the constitutionality of governmental action. Proving intent based on individual legislator's motives would be difficult because motives may vary among legislators. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). The United States Supreme Court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). The motives of individual legislators simply are not those of the body itself. *Government Suppliers v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990). As a matter of law, the examples of drafters' conduct in the FB Brief do not support Agricultural Challengers' case.

Further, the facts do not support Agricultural Challengers' case. The FB Brief points to a situation where one of the persons on the drafting committee was disgruntled when her ideas for more and more research were disregarded. FB Brief at 28. Although she suggested that the group adhere to the views of Dr. Neil Harl, an economist/lawyer from Iowa State University, the group did not do so. It relied on Nancy Thompson, a lawyer whose life's work is rural policy analysis and representation of family farmers. She worked as a farm law attorney for individual rural clients for seven years. After that she worked for the Center for Rural Affairs in Walthill, Nebraska, for twelve years. T 215. The Center for Rural Affairs specializes in farm rural community policies, education, research, and advocacy for family farmers. T 215. Ms. Thompson worked on environmental issues related to livestock production and corporate farming. The Center for Rural Affairs provided evidence in defense of a similar Nebraska constitutional challenge against equal protection claims. *MSM Farms, Inc. v.*

Spire, 927 F.2d 330, 333, *cert. denied*, 502 U.S. 814 (1991). Another person that the drafters relied on was Luanne Napton, who holds a Master's Degree in environmental management from Southwest Texas State University and is a registered environmental professional. T 346, 348. Ms. Napton was employed as an environmental planner in Texas and most recently has been associated with the South Dakota Natural Resources Coalition, a nonprofit environmental group. The fact that one expert felt the law to be problematic does not mean that other experts are wrong or hasty in moving forward with legislation.

The FB Brief also points to advice given by lawyer Jay Davis. According to the notes of the drafting committee, Mr. Davis warned the committee that language pertaining to cooperatives "might be struck down for violating the Commerce Clause." Exhibit 36.[4] None of the Appellants address the cooperative issue at all. Moreover, it is clear from Exhibit 36 that Mr. Davis suggested some alternatives but did not address the constitutionality of any specific language. The Davis comment was made at the very first meeting of the drafting committee. T 376, 377. The drafters responded to this warning by hiring a lawyer (Nancy Thompson) with constitutional corporate farming expertise to avoid commerce clause problems. T 377.

Further, it is noteworthy that not one of the Plaintiffs (Agricultural Challengers or Utilities) called Jay Davis as a witness at trial. The State Defendants submit that they did not do so, because his statement was a general comment on an early draft of Amendment E, not a definitive warning that the law was indeed unconstitutional. Indeed, it is not unusual for lawyers to give "worst case scenario" advice so those clients make prudent decisions in developing policy. No conclusion should be drawn from the Davis comment.

Both the Agricultural Challengers and the Utilities assert that Amendment E was hastily drafted in less than six weeks. However, that claim is contrary to the evidence. The testimony of expert Nancy Thompson was that the final work product may have taken only a few months, but that "we had 15 years experience already with most of the provisions of the law that had been approved by the 8th Circuit." T 245. Indeed, when Ms. Thompson was at the Center for Rural Affairs, its staff provided evidence in the defense of Nebraska's similar law, IM 300. See *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir.), *cert. denied*, 502 U.S. 814 (1991).

Further, Ms. Napton testified that the South Dakota Resource Coalition had advocated passage of similar language before the 1997 Legislature in January 1997. The 1997 legislative effort failed, but the law involved here is similar. As seen, corporate farming laws were considered in great detail before the drafting began, and one version of the bill was even advanced before the South Dakota Legislature several months before the notice of intent to file the initiated measure

4. When Exhibit 36 was introduced at trial, it contained no handwritten markings. Any markings on the version submitted (for emphasis or otherwise) are those of the Challengers, not those of the drafting committee or the State Defendants.

was filed with the South Dakota Secretary of State in May 1997.

Amendment E was no hastily drawn six-week effort as claimed. While the drafting may have been *completed* in less than six weeks, it was not totally researched, outlined, developed, and completed in six weeks.

Moreover, the speed with which the drafting process is completed should not be the determining factor. Indeed, the Federal Constitution was completed in less than 115 days, the Convention having lasted from May 25, 1787, to September 17, 1787. S. Doc. No. 99-16, 99th Cong., lst Sess. XXXII-XXXIV (1982). There were fifty-five delegates, all with different education, experiences, and perspectives. The educational background, experiences, and perspectives of the drafters contributed to the final work product. The same idea applies here. The Amendment E drafters obviously relied on their own education, experiences, and perspectives (and consulted with experts) in developing the final work product.

As seen, the purpose of Amendment E was proper, regardless of so-called "admissions" by individuals involved in the drafting process.

E. Amendment E Is Not Protectionist "In Effect."

Judge Kornmann found that Amendment E was not discriminatory in effect. *South Dakota Farm Bureau*, 202 F. Supp. 2d at 1047, 1048. Agricultural Challengers Brost and Farm Bureau actually admit that Amendment E does not protect in-state businesses to the detriment of out-of-state businesses. They claim Amendment E is more adverse to in-state interests than out-of-state ones. T 38, 100. In-state economic hardship does not violate the Commerce Clause. *Hampton Feedlot*, 249 F.3d at 820-21.

Both the FB Brief (pages 31-32) and the Utilities' Brief (page 3) cite to the testimony of Ron Wheeler, a state official, as an admission by the State as to the discriminatory effect of Amendment E. Yet, Mr. Wheeler testified that he had never read Amendment E. T 735. He testified that various entities seeking to do business in South Dakota have "chosen not to come to South Dakota because of ambiguity over whether they qualified or didn't qualify" under Amendment E. T 735. His testimony is based on conversations with individuals from other states who cited "questions over Amendment E" as a reason they had chosen not to avail themselves of the opportunity to do business in South Dakota. T 737. Because of that perceived ambiguity, he testified that entities from other states have "chosen" not to invest in South Dakota. T 739, 741. Significantly, he did not know whether any of the people he dealt with had read Amendment E. T 749. He did not have any idea what attorneys they were getting their advice from. T 749. He had no idea what research any of these entities' attorneys had undertaken. T 750. Although people gave Amendment E as a reason for not coming to South Dakota, Mr. Wheeler did not know if they were just using that for an excuse. T 750. There "could have been" any number of other privileged business reasons they did not want to come into South Dakota. T 750. The

testimony is far from an admission as to the actual effect of Amendment E. Indeed, neither the Utilities nor the Agricultural Challengers called a single witness among the entities who chose not to come to South Dakota.

Moreover, even if uncertainty about Amendment E does discourage particular types of businesses from doing business in the state, such uncertainty does not invalidate Amendment E under the Commerce Clause. Whether a law encourages or discourages businesses to come in from another state is "simply not the proper inquiry for considering discrimination under the Commerce Clause." *Oehrleins & Sons & Daughter, Inc., v. Hennepin County*, 115 F.3d 1372, 1386 (8th Cir. 1997). For example, the fact that Minnesota imposes more taxes on businesses than some other states may be a factor that detracts from its ability to attract new business; such factor does not automatically make the taxes unconstitutional. *Id.* While such factors "may be of relevant concern in forming economic policies" they do not make the law unconstitutional. *Id.*

The Agricultural Challengers called an economist, Luther Tweeten, regarding the effect that Amendment E has on South Dakota. However, the focus of his testimony was not regarding the actual effects of Amendment E. He relied on other studies he had performed in other states and did not study the issue in South Dakota. Although he consulted with South Dakota State University experts, he did not cite to any information that they provided. T 592. The only information he relied on regarding the effects of Amendment E were from the Sioux Falls *Argus Leader*. T 592.

Ultimately, the focus of the Tweeten testimony was that Amendment E was not a wise economic policy for the state. He suggested that the state should have encouraged production contracting because production contracting is "critical to the vitality of the state's family farms in the 21st century." Exhibit 47, page 6. However, the issue of whether something is projected to be a good or bad economic policy *in the future* is not a study of the effect of the policy choice at present. Indeed, Dr. Tweeten admitted that economic forecasts are sometimes wrong. T 589. He admitted that even economists disagree on whether concentration has affected the market for hogs. T 589. One factor that sociologists and economists agree on is that family farms are desirable.

With respect to the policy choice itself, Dr. Tweeten also recognized that sociology and economics overlap in looking at whether a particular policy ought to be the best policy. T 580. As he stated, it is for "an informed political process" to ultimately answer the question on whether a particular policy ought to be adopted. T 582.

Dr. Tweeten's view that policy ought to be left to an "informed political process" is consistent with the correct legal analysis here. Economics is simply not the only consideration that should be brought to bear in considering whether laws are constitutional. *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) (even if the costs of a law exceed its benefits or it otherwise constitutes "economic folly," that law is not necessarily

unconstitutional). The State Defendants called sociologists to address the overall effect of corporate farming; the Intervenors discussed the environmental issues. The fact that an economist disagrees on whether Amendment E is the best policy for South Dakota is not the crucial factor that the Agricultural Challengers claim.

In addition, the effect on utilities is neutral. Of the three Utilities involved in this case, one is incorporated in South Dakota. Two are foreign corporations. All three corporations appear to be similarly "affected" by Amendment E. There is no preferential treatment to the "in-state" corporation (Northwestern Public Service) as opposed to the others. Further, as set forth in Issue III, the "effect" on any of these Utilities is speculative (with respect to the Big Stone property) or nonexistent (with respect to the transmission line issue).

F. The Pike Test Applies.

As set forth in the State Defendants' opening brief, the appropriate test in this case is the test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970). Under the *Pike* test, the law will be stricken only if the incidental effects it imposes on interstate commerce are "clearly excessive in relation to the putative local benefits." 397 U.S. at 142. *See* Appellants' Brief at 19-26 (setting forth the benefits of protecting farming and the sociological problems involved with corporate farming). *See also* the background and historical setting described in Section D. of this issue, as well as the strict scrutiny analysis described below.

G. Amendment E Is Constitutional Even Under the Strict Scrutiny Standard.

Both Agricultural Challengers and the Utilities assert that the strict scrutiny standard should apply.

Even if the strict scrutiny test did apply (which it does not), the State's interest merits a finding that Amendment E is constitutional. The evidence of Drs. Lobao and Heffernan is compelling with respect to the State's interest in protecting South Dakota farmers and its rural communities. *See* Appellants' Brief at 22-26. As seen, the State's interests are based on actual studies conducted by experts in rural sociology and upon review of studies conducted by a number of other social scientists. Both Dr. Lobao and Dr. Heffernan have engaged in rural sociology as their life's work. Dr. Lobao, a professor at The Ohio State University, testified about her own research on the effects of industrialized agriculture on rural communities and also testified about her review of studies developed by other social scientists using various methods of study. She found that large-scale industrial agricultural was detrimental to rural communities. *See* Appellants' Brief at 22-26; Exhibit 314.

Agricultural Challengers presented the testimony of Dr. Luther Tweeten who asserts that the future of agriculture is in production contracts. Dr. Heffernan, a professor at the University of Missouri, testified regarding his thirty years of research in production contracts and their detrimental long-term

sociological effects on farmers. He also testified, based on long-standing experience, regarding the adverse role that production contracts play in the consolidation in agriculture. *See* Appellants' Brief at 22-26.

This evidence shows that the State has a compelling interest in preventing harm caused by the two major forms of corporate farming: (a) industrialized farming and its detrimental long-term effects on communities and (b) production contracts and their long-term detrimental impacts on farmer well-being and on independent marketing for farmers.

Likewise, there is a compelling interest in the family farm exemption contained in Amendment E. Agricultural Challengers solicited testimony from the drafters' expert (Ms. Thompson) regarding the propriety of the family farm exemption. T 225. Based on her work with family farm issues and studies she reviewed, family farmers are better stewards of the land and are less likely to create pollution than nonfamily corporations. T 225. Like Dr. Heffernan, she spoke to increasing concentration in agriculture. T 231. Among those concerns were the "way that rural communities relate to family farmers and the concentration in production of agriculture and the way in which corporations contribute to that concentration." T 231. Based on her experience and background, Ms. Thompson testified:

anticorporate farming laws do lead to more dispersed agriculture where you have more opportunity for family farmers, less concentration in production. It has led to more liability being placed on the owners of the operations in that they either have to be family farmers where they are actually living there or they have to have personal liability. So, the benefits have been shown to be tremendous.

T 232.

In addition to the compelling rationale set forth above, the evidence includes a recent USDA study showing the benefits of small farms. See Exhibit 501, "A Time to Act," a publication considered in the drafting of Amendment E. T 234. Small farms are "farms with less than $250,000 gross receipts annually on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases the productive assets." Exhibit 501, page 28.

Exhibit 501, the USDA report, explains that because there are "hidden costs" inherent in large-scale farming, small-scale farming is beneficial and should be encouraged. The hidden costs include (a) the fact that large-scale farming results in concentrated oligopsonistic markets and loss in market competition and (b) environmental consequences of concentrating a large number of animals in a limited area. The study found that the public values in small farms include diversity of ownership, cropping systems, landscapes, culture, and traditions. Exhibit 501, page 21. Other public values include environmental benefits, self-empowerment and community responsibility, places for families, and personal connection to food (through farm markets and direct marketing strategies for example). Exhibit 501, pages 21-22.

In light of this evidence the District Court properly found that South Dakota has a compelling interest in protecting small farmers.

Against this background, the FB Brief asserts that the State attempted to "create compelling interests by fiat." FB Brief at 33. In this regard, the FB Brief refers to *Republican Party of Minnesota, et al. v. White*, 122 S.Ct. 2528, 2536 (2002). The reference is inexplicable. The *Republican Party* case involved the Minnesota Supreme Court's canon of judicial conduct (created by "fiat" or judicial decree) that prohibited judicial candidates from announcing their views on disputed legal and political issues. This judicial canon was held to be unconstitutional because it violated the First Amendment, not because it was "created by fiat" or decree. That First Amendment case is not precedent for this case at all.

As seen above, there are compelling reasons for Amendment E and they were not created by "fiat."

The FB Brief also asserts that there are less drastic alternatives for achieving the State's compelling interests. FB Brief at 33. ("There are many alternatives available.")

State Defendants presented evidence regarding the viability of less drastic alternatives. Exhibit 501, "A Time to Act" presents several strategies for protecting small farms. They include enforcement of the antitrust laws, a measure that becomes necessary once the industry has become so consolidated that it results in a monopoly. Amendment E is an effort to continue to provide for at least some degree of independent livestock production before complete monopolies are in place.

Another alternative listed in "A Time to Act" would be to provide for governmental supervision of the drafting of production contracts. Exhibit 501 at 62. In supervising such contracts, the contracts may provide for better terms allowing for impartial dispute resolution, eliminate unilateral termination clauses, require the integrators to pay their pro rata share of the liability for dead livestock and for environmental problems, and prohibit discriminatory practices. Exhibit 501 at 62. Notably, however, review of such contracts will not solve the two basic underlying problems with production contracts as described by the State Defendants' expert witness, William Heffernan. One is the fact that the basic business arrangement remains asymmetrical. The producer would still perform all the work and gain no equity in the business. The other problem is that increases in production contracts are conducive to market consolidation. Reviewing contracts and providing for mediation, etc. will not mitigate these problems.

Another alternative not mentioned in Exhibit 501 is to place a size restriction on the number of livestock that could be held by any particular business. This is a legal issue that was raised before the District Court (State Defendants' Post-Trial Brief). That alternative could apply across the board in the same way that Amendment E does. However, size limitations would not

solve the production contracting scenario. It is not the *size* of production contracts that is necessarily at issue. It is the asymmetrical contractual relationship and the long-term adverse sociological effects. Size restrictions would bar "mega farms," but not restrict corporations from placing a lesser number of animals in many, many production contract facilities.

Other alternatives are addressed in the State Defendants' opening brief.

H. Amendment E Is Not Unconstitutional Under the Undue Burden Standard.

The FB Brief (page 34) advances a third commerce clause test called the "undue burden" or *Bendix Autolite* test. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). The FB Brief asserts that even when a statute is not discriminatory a state must demonstrate there were no alternative means to accomplish its goals. FB Brief at 34. The *Bendix Autolite* case simply does not require a state to make such a showing. *Bendix Autolite* involves a situation where Ohio imposed a statute of limitations for lawsuits against in-state corporations and those submitting to Ohio jurisdiction, but tolled the statute of limitations for out-of-state corporations with no long-arm nexus to Ohio. The Court held that such facial discrimination was practically per se invalid under *Brown Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986). The Court held that despite the facial discrimination against out-of-state interests it would still consider the state's interest and the relative burden on interstate commerce. That test is not applicable here where there is no facial discrimination.

II. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS IMPLIEDLY PREEMPTED BY TITLE II OF THE AMERICANS WITH DISABILITY ACT?

The Holben Brief presents the Agricultural Challengers' argument as Appellees on the American Disability Act issue. The FB Brief joins in the Holben Brief on this issue (FB Brief at 36). In responding to the Holben Brief, the State Defendants intend to reply to the joinder in the FB Brief as well.

The District Court held that the challenged American Disabilities Act impliedly preempts Amendment E. The District Court should be reversed.

A. The Questions of (1) Whether the ADA Preempts Amendment E and (2) Whether Amendment E Is a Service, Program, or Activity of the State Need Not Be Addressed.

For the reasons set forth below, these issues are not properly before this Court, and should not be determinative of this claim.

B. Brost and Holben Lack Standing to Raise the ADA Issue.

As set forth in the State Defendants' opening brief, Brost and Holben lack standing to bring this claim. Holben's corporation already complies with Amendment E by having a family member perform work on the farm as contemplated by the family farm exemption. S.D. Const. art. XVII, § 22(1). Brost did not file this lawsuit as a corporation. He is not harmed individually since individuals are not constrained by Amendment E at all. The standing argument is set forth more fully on pages 32-36 of State Defendants' opening brief.

In their Appellees' Brief, Holben and Brost try to piggyback on Farm Bureau's ADA "claim"[5] to acquire standing. They assert that the Farm Bureau was entitled to make the ADA claim because it has members who are disabled. First, they claim that the District Court correctly took judicial notice that Farm Bureau has disabled members. As addressed in the State Defendants' opening brief, the disability question is a fact-specific evidentiary issue. *Sutton, et al. v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999); Appellants' Brief at 32-36. Further, the judicial notice simply does not cover the issue. The issue of Farm Bureau's membership is not "capable of

immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" as judicial notice requires. *Weaver v. United States*, 298 F.2d 496, 498 (5th Cir. 1962). Certainly if there was a ready reference for such information, Farm Bureau or Holben would have mentioned it in their briefs. Ultimately, the judicial notice was improper. Even if it was proper, it was not specific enough to meet the criteria for standing on this issue.

In an attempt to tie the Farm Bureau "claim" to Holben and Brost, the parties now assert they are disabled members of the South Dakota Farm Bureau. They fail to cite to the record on this question of fact. FRAP 28(b). Indeed, there is no record indicating that either Brost or Holben is a member of the Farm Bureau. No matter how this issue is viewed, Farm Bureau, Brost, and Holben lack standing.

C. The Procedure Requires Reversal.

As set forth in the State Defendant's opening brief, Brost and Holben never brought a claim under the ADA before the District Court whatsoever. *The first time that Brost and Holben ever made an ADA claim was in their Brief in this appeal.*[6]

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5. The Farm Bureau claim had been dismissed two years before trial as discussed in the next section of this brief.

6. The Holben Brief acknowledges that the issue had been dismissed against another party almost two years before trial. Holben Brief at 25. The other party (Farm Bureau) had amended its Complaint and deleted the ADA claim almost two years before trial. App. 119-22. There was no ADA claim pending before the court at trial.

Brost and Holben acknowledge that there was no written claim, but assert that evidence supporting the ADA claim was made at trial and the District Court's ADA ruling conformed to the evidence under Fed. R. Civ. P. 15(b). Yet, in order to meet the requirements of Rule 15(b), the issue would have to be tried by express or implied consent.

There certainly was no express consent to try the ADA issue. Brost and Holben never made any motion at any time before, during, or after trial to amend the pleadings to add the ADA claim. *See* Appellants' Brief at 28-31.

The "implied consent" theory does not merit amendment either because that theory is "allowed when the parties have had actual notice of an unpleaded issue and have been given an adequate opportunity to cure any surprise resulting from the change in the pleadings." *Kim v. Nash Finch*, 123 F.3d 1046, 1063 (8th Cir. 1997).

In this case, Brost and Holben gave *no indication whatsoever* that the new issue was being raised. The State Defendants could not have even guessed that the issue was being raised, considering that the same issue was dismissed against a different Plaintiff (Farm Bureau) for jurisdictional reasons about two years earlier. MHT 6.

Some evidence of heart disease was presented by Holben and Brost in testimony related to their commerce clause and equal protection theories. When evidence is not recognizable as an independent issue, failure to object cannot be construed as consent to try the issue not identified. Kim, 123 F.3d at 1063; *Gray v. Bicknell*, 86 F.3d 1472, 1481, 1482 (8th Cir. 1996); *Portis v. First National Bank of New Albany*, 34 F.3d 325, 331 (5th Cir. 1994). There is no "implied consent" to try an issue "on the basis of some evidence that would be relevant to the new claim if the same evidence was also relevant to a claim originally pled." *Gamma-10 Plastics v. American President Lines, Ltd.*, 32 F.3d 1244 (8th Cir. 1994), *cert. denied*, 513 U.S. 1198 (1995). Such evidence does "not provide the defendant any notice" that the implied claim is being tried. *Kim*, 123 F.3d at 1063. This is simply not a trial by "implied consent" issue allowing for a conforming order to amend the pleadings afterward.

Brost and Holben attempt to cure the lack of notice problem by relying on the District Court's Memorandum issued after trial. The Memorandum identifies the ADA issue and appears to *ask* if Brost and Holben wanted the issue considered. Neither Brost nor Holben responded. As stated above, they never claimed to be covered by the ADA until they filed an appellate brief.

Moreover, even if Brost and Holben had made some kind of post-trial ADA claim, the District Court's post-trial Memorandum would not have met the standards for amendment after trial under Fed. R. Civ. P. 15(b). Amendments should not be allowed where parties are denied the fair opportunity to present evidence. *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 844 (8th Cir. 1981). The District Court made a post-trial suggestion that it would consider the ADA issue. The State Defendants objected to consideration of this issue in their post-

trial brief. The Court ruled anyway and it erred.

D. The State Defendants Were Not Required to Ask For New Trial.

Brost and Holben assert that if the State was troubled by the District Court's Memorandum and ruling on the ADA issue, it should have asked for a new trial or for relief from the judgment under Fed. R. Civ. P. 60(b) and cured the problem. The State Defendants did raise the issue before the District Court. State Defendants' Post-Trial Brief at 22-23. The State Defendants asserted that Brost and Holben had not made ADA claims, had not tried the issue, and were not entitled to relief. State Defendants' Post-Trial Brief at 22-23. In order to preserve issues for appeal, the issues must be presented to the trial court, but it is not necessarily required that they be brought in the form of a motion for new trial. *Sherrill v. Royal Industries, Inc.*, 526 F.2d 507, 509 n.2 (8th Cir. 1975) (objections were made during settling of jury instructions); *Morgan Electric Co. v. Neill*, 198 F.2d 119, 122 (9th Cir. 1952) (objections were made in oral arguments on motion to strike).

In this case, the District Court considered the State Defendants' Post-Trial Brief and rejected the arguments. In light of the District Court's ruling, there was little reason to expect that a new trial motion would be successful. Since the matter was brought before the District Court in the post-trial brief, it preserved the issue for appeal without need of a motion for new trial or a motion for relief from the judgment.

E. The "Clear Error" Standard Is Not Applicable Here.

Minimal testimony offered regarding Brost's and Holben's heart disease (T 76, 259) was offered in support of pending commerce clause and equal protection challenges, not an ADA challenge. The ADA challenge was not before the court. Because the ADA challenge was not before the court, State Defendants did not cross-examine on the disability issue. The State was denied the right to examine on this question. *See Baton Rouge Marine Contractors, Inc. v. Federal Maritime Comm'n*, 655 F.2d 1210, 1216 (D.C. Cir. 1981).

Holben and Brost suggest that sufficient evidence on the disability was in the record anyway and the District Court decision should be affirmed under the "clear error standard." They cite no authority for this premise. Holben Brief at 22.

Further, they argue that if there was insufficient evidence in the record, the State Defendants should have moved for a new trial in order to "complete the record." Holben Brief at 22. As set forth above, the State Defendants made their record before the trial court regarding the lack of evidence.

F. Holben and Brost Are Not Uniquely Constrained Under Amendment E by Reason of Their Health.

Under Amendment E, persons seeking to qualify as "family farms" have the option of either residing on the farm or engaging in day-to-day labor and management of the farm. Holben and Brost are older men with heart issues who claim that they are unique in that they are constrained to one option: engaging in daily or routine substantial physical exertion and administration. They have opted to live away from the farm. Because they live elsewhere, they claim that Amendment E limits them to the one option. Holben Brief at 20. Any limitation in options here is self-made. Nothing in Amendment E limits the place of residence of anyone.

G. The Record Is Not Sufficient to Show That Holben and Brost Are Disabled Within the Meaning of the ADA.

Holben and Brost assert that they presented evidence of their physical disabilities at trial. Although both claimed that they are unable to engage in day-to-day labor and management, neither of these persons made any assertion to the District Court that they claimed to meet the criteria of the ADA. Significantly, neither the term "disability" nor "ADA" was even mentioned in their trial testimony.

It is far different to testify that a person has heart disease (a condition suffered by a significant portion of the United States population) than to claim that the heart disease has caused a disability within the meaning of the ADA. As set forth in the State Defendants' opening brief, a critical question is whether the claimant suffers "an impairment that substantially limits one or more major life activities." *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000). *See* Appellants' Brief at 37. Neither witness testified as to the extent of this condition and whether it has impaired any major life activities such as eating, breathing, or walking. Although "working" might be a life activity, both witnesses revealed that they retain the ability to work in their chosen professions (accounting and the law). T 84, 85, 249; *see* Appellants' Brief at 39, 40. They did not meet the burden of showing they are disabled within the meaning of the ADA.

III. WHETHER AMENDMENT E APPLIES TO ELECTRIC TRANSMISSION LINE EASEMENTS?

Amendment E bars corporate farming, not utility operations. Before the District Court, the Utilities submitted that they were constrained by Amendment E in that it applied to their electric utility lines.

Both State Appellants (charged with enforcing Amendment E) and Intervenors (who were involved in placing Amendment E on the statewide ballot) disagreed. Neither State Appellants nor Intervenors have ever suggested

at any time that Amendment E applies to utility transmission line easements. (The Utilities could easily have sought judgment that they are exempt from Amendment E and avoided the entire constitutional debate. Inexplicably, they chose to assert that Amendment E affects their utility transmission line easements and that Amendment E is unconstitutional.)

In this appeal, the Utilities' Brief does not contain a single reference to any testimony or exhibits suggesting that Amendment E was targeted or intended to apply to transmission line easements. Although the Utilities' Brief is replete with references to the supposedly improper intent of Amendment E, not one of the references pertains to the question of whether Amendment E was intended to apply to transmission easements. Every single reference applies to farming. The reason is, of course, simple. There simply is no testimony or other evidence that Amendment E was intended to apply to utility transmission lines. Utilities rely on a grammar argument to explain how they are prohibited by Amendment E. Utilities' Brief at 18. Yet, the grammar argument does carry the day. The sentence in question is the general prohibition on corporate farming: "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming . . . ." S.D. Const. art. XVII, § 21. Under Utilities' version of the grammar, the term "used for farming" modifies the term "interest in land." Under that argument, Amendment E would apply if the land was used for utility easements and used for farming at the same time.

Under South Dakota law, however, the scope of a utility easement is limited to the specific utility works placed pursuant to the easement. *Musch v. H-D. Electric Co-op. Inc.* 460 N.W.2d 149, 152-53 (S.D. 1990). The utility easements in this case are consistent. App. 1-3. By their terms, the utility easements do not include "land used for farming." The specific space occupied by the Utilities cannot be used for farming at the same time it is occupied by utility works.

Thus, instead of looking simply to the grammar in Amendment E, the scope of the easements should be examined. The utility easements are limited to the part of the real estate actually occupied for utility purposes (poles, lines, supporting wires). As such, it cannot physically be "used for farming" at the same time it is used for purposes of fulfilling the easement. Amendment E cannot apply.

In addition to the foregoing, the State Defendants rely on the arguments set forth in their Appellants' Brief (pages 8-11) and join in that of the Intervenors' Brief (pages 6-12).

IV. WHETHER ARTICLE XVII, SECTION 21 OF THE SOUTH DAKOTA CONSTITUTION APPLIES TO COOPERATIVES?

None of the Appellees have responded to this issue in any way. Accordingly, the State Defendants ask that the Court consider the State Defendants' opening brief and reverse the District Court on this issue.

CONCLUSION

Based on the foregoing arguments and authorities (and those set forth in Appellants' opening brief), the State Defendants ask that the District Court's decision be reversed and that Cross-Appellants' alternative arguments for affirmance be rejected.

Brief of Amici Curiae American Farm Bureau Federation, Alabama Farm Bureau Federation, Arkansas Farm Bureau Federation, Kansas Farm Bureau Federation, Kentucky Farm Bureau Federation, Minnesota Farm Bureau Federation, North Dakota Farm Bureau Federation and Utah Farm Bureau Federation-For Affirmance

by

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BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION, ALABAMA FARM BUREAU FEDERATION, ARKANSAS FARM BUREAU FEDERATION, KANSAS FARM BUREAU FEDERATION, KENTUCKY FARM BUREAU FEDERATION, MINNESOTA FARM BUREAU FEDERATION, NORTH DAKOTA FARM BUREAU FEDERATION AND UTAH FARM BUREAU FEDERATION– FOR AFFIRMANCE

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STATEMENT OF IDENTITY OF AMICI CURIAE, THEIR INTERESTS IN THE CASE AND SOURCE OF AUTHORITY

As identified in the Motion, the Amici Curiae are as follows:

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919, and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in all fifty states and Puerto Rico (including the South Dakota Farm Bureau Federation), representing more than five million member families. The Alabama Farm Bureau Federation, Arkansas Farm Bureau Federation, Kansas Farm Bureau Federation, Kentucky Farm Bureau Federation, Minnesota Farm Bureau Federation, North Dakota Farm Bureau Federation and Utah Farm Bureau Federation, are constituent members of AFBF, have similar purposes and represent the interests of approximately 700,000 member families through their respective state organizations.

The farmer and rancher members of Amici, ("AFBF" and the constituent state amici hereinafter referred to collectively as "Farm Bureau"), produce virtually every agricultural commodity produced commercially in the United States. They own or lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. As market forces have dictated, Farm Bureau's members have, in increasing numbers, implemented some sort of limited liability entity for the ownership and operation of their farms and ranches. This use of limited liability entities has been necessary to secure the economic and tax incentives needed to survive in today's marketplace. In recent years, however, limited liability entities have come under increasing attack by environmental groups and groups allegedly concerned with the plight of "family farms." In South Dakota, these attacks have culminated in the implementation of Article 27, Sections 21 through 24 of the South Dakota Constitution, which is often referred to as Amendment E.

Amendment E was purportedly designed and drafted to help "family farmers" compete in the market place and remain economically viable. Rather than accomplishing its purported goals, however, Amendment E causes irreparable damage to those individuals it proclaimed to protect. Amendment E affects Farm Bureau's members in South Dakota by limiting their ability to employ the limited liability business structures that are available under state law and necessary to obtain financing, engage in estate planning, secure tax incentives and engage in the prudent, general business practice expected in today's market. In addition, Amendment E severely limits the individuals and entities with which Farm Bureau's South Dakota members are allowed to do business, and thereby prohibits those members from effectively engaging in interstate commerce. Finally, Amendment E discriminates against Farm Bureau

members in other states by limiting or precluding those members from participating in South Dakota's agricultural market.

In addition to the burdens Amendment E places on Farm Bureau's members both in and outside of South Dakota, and on interstate commerce, Amendment E has imposed significant burdens on Farm Bureau members who suffer from disabilities and are therefore unable to qualify for the "family farm" exception to Amendment E. Therefore, as the District Court concluded, Amendment E conflicts with the Americans with Disabilities Act; which therefore preempts Amendment E. In addition, while the District Court correctly ruled that Amendment E violates the dormant commerce clause, the District Court erred in finding that Amendment E did not violate the commerce clause with respect to the agricultural challengers. Movants wish to supplement Appellees-Cross Appellants' Briefs on these issues.

It is the policy of Farm Bureau to support the use of any business structure by agricultural producers and that economic incentives should be equally available to any farming operation, whether that operation is a sole proprietorship, partnership, trust, limited liability company or corporation. Farm Bureau also opposes any legislation that is detrimental to agriculture and the general public. Because Amendment E infringes on those policies, Farm Bureau opposes it and joins the Appellee-Cross Appellants in urging this Court to affirm the District Court's order that Amendment E is unconstitutional and unenforceable. The source of authority for filing Amicus Curiae Brief is Rule 29 of the Federal Rules of Appellate Procedure and Amici Curiae's interest in this case as set forth herein.

ARGUMENT

I. AMENDMENT E VIOLATES THE DORMANT COMMERCE CLAUSE.

The United States Supreme Court has established a two-tiered approach by which to analyze claims that a challenged state measure violates the dormant commerce clause. *See Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 889 (1988). The first tier of this analysis is referred to as the "discrimination tier." Under this tier, if a State's regulation is found to be discriminatory, the State must show a compelling reason for its discriminatory regulation and must utilize the least restrictive means available to achieve that end. *See e.g., Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 268 (8th Circuit, 1995). If the State fails to satisfy that burden, the regulation is subjected to the strict scrutiny standard and is "virtually per se" unconstitutional. *See Oregon Waste Systems*, 511 U.S. at 99. The second tier of the dormant commerce clause analysis prohibits state regulations that, while not overtly discriminatory, impose an undue burden on interstate

commerce. *See Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981). Because the District Court adopted an overly restrictive analysis of what constitutes a "discriminatory" regulation, its conclusion that Amendment E is not discriminatory should be revisited.

A. Amendment E is a "discriminatory" regulation.

Initially, it is beyond dispute that the agriculture industry is, by its very nature, inherently interstate commerce. *See West Lynn Creamery v. Healy*, 512 U.S. 186, 203 (1994) (stating that "dairy farmers are part of an integrated interstate market."). Therefore, the only question for this Court is whether Amendment E discriminates against that commerce. According to applicable Supreme Court and 8th Circuit precedent, a state regulation may be discriminatory in one of three ways. First, a regulatory scheme may "facially discriminate." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *SDDS,* 47 F.3d at 267. Second, a regulatory scheme, even though it is facially neutral, may be discriminatory if it has a "discriminatory purpose." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-353 (1977); *SDDS,* 47 F.3d at 267. Third, even if the regulatory scheme is facially neutral and does not have a discriminatory purpose, it may be invalid because of a "discriminatory effect." *Maine v. Taylor*, 477 U.S. 131, 148 n. 19 (1986); *SDDS,* 47 F.3d at 267. When examining Amendment E, it is important to remember that "[e]conomic protectionism is not limited to attempts to convey advantages on local [farmers]; it may include attempts to give local [farmers] an advantage over [farmers] in other states." *Brown-Forman Distillers Corp. v. New York*, 476 U.S. 573, 580 (1986). While Farm Bureau asserts that Amendment E is discriminatory under all three tests, this Court need only find Amendment E discriminatory under one of the tests to apply the strict scrutiny standard.

1. Amendment E is facially discriminatory.

The discriminatory nature of Amendment E can be seen by its structure, its text and the fact that it attempts to regulate the agriculture and livestock industries. While on its face, Amendment E appears to apply even handedly to both in-state and out-of-state farmers, when it is examined as a whole, a clear picture of protectionism materializes. *See Kassel*, 450 U.S. at 676. The drafters of Amendment E created many "exceptions" to the ban on corporate farming, which exceptions are found in Sections 22(1) through 22(15) of Article XVII of the South Dakota Constitution. As the Supreme Court concluded when it examined the exceptions to Iowa's regulatory scheme in *Kassel*, this Court should also conclude that Amendment E is facially discriminatory after examining the "exceptions" it contains. *See Kassel*, 450 U.S. at 676.

The family farm exception is particularly pertinent to this analysis, as it applies only to individuals who live on the farm or engage in the day-to-day labor and management of the farm. S.D. Const., Art. XVII, § 22(1). Clearly, it is impossible for any individual who is not a resident of South Dakota to satisfy

the requirements of this exception. Thus, while individuals residing inside South Dakota may take advantage of this exception and secure the benefits of doing business in a limited liability format, out-of-state individuals and entities are prohibited from securing those very same benefits. Like the exceptions in *Kassel*, the exceptions in Section 22 of Amendment E "secure to [South Dakotans] many of the benefits of [limited liability] while" denying farmers or farm investors in neighboring states such benefits. *Kassel*, 450 U.S. at 675.

In *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 169 (1999), the United States Supreme Court invalidated the state's franchise tax regulations. A domestic corporation's franchise tax was based exclusively on the par value of its stock; therefore, a domestic corporation was able to arbitrarily lower its franchise tax obligation by lowering the par value of its stock. In contrast, a foreign corporation's tax obligation was based on a number of balance sheet items that were governed by GAAP, and were therefore not as easy to manipulate as par value. The Supreme Court invalidated that regulatory scheme because it gave "domestic corporations the ability to reduce their franchise tax liability . . . . while it denied foreign corporations that same ability." *Id.* at 169. Therefore, the regulatory scheme facially discriminated against out-of-state corporations and was declared unconstitutional. *Id.*

In a similar manner, Amendment E denies out-of-state individuals the benefit of the limited liability business organization that it offers to in-state individuals through the family farm exception. Amendment E gives "domestic [farmers] the ability to reduce their [tax obligations, financing expenses and liability exposure] simply by [doing business as a limited liability entity], while it denies foreign [farmers] that same ability." *Id.* Therefore, as in *South Central Bell*, Amendment E facially discriminates against interstate commerce.

Likewise, in *West Lynn Creamery*, the Supreme Court invalidated a tax on milk dealers because that tax, after being in essence "laundered" by the State, was used to subsidize domestic dairy farmers. 512 U.S. at 194. The tax-subsidy was unconstitutional because it "not only assist[ed] local farmers but burden[ed] interstate commerce." *Id.* at 199. As the regulation in *West Lynn Creamery* saddled out-of-state operators with higher tax burdens and operating expenses than local operators, so Amendment E saddles out-of-state farmers with higher taxes and operating expenses than in-state farmers. Therefore, Amendment E is facially discriminatory.

Despite the clear guidance provided in *Kassel*, *South Central Bell*, and *West Lynn Creamery*, the District Court concluded that Amendment E was not facially discriminatory. In its memorandum decision, the District Court reached that conclusion because the family farm exception prohibits an individual living in one part of the state (Aberdeen) from engaging in farming activities in a distant county (Lyman County) as a limited liability entity. *South Dakota Farm Bureau, et al, v. Hazeltine*, 202 F. Supp. 2d 1020, 1047 (D.S.D. 2002). According to the District Court, because this burden applied to in-state farmers as well as out-of-state farmers, the statute was not discriminatory against interstate commerce. This conclusion runs counter to applicable Supreme Court

case law. In *C & A Carbonne, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), for example, the Town argued that its solid waste control flow ordinance did not discriminate against interstate commerce because it applied to all waste that passed through the town, regardless of origin. *Id.* at 390-91. The Supreme Court rejected that argument, stating "the ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." 511 U.S. at 408; *see Dean Milk Co. v. Madison*, 340 U.S. 349, 351 (1951) (noting that it is "immaterial that [in-state] milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."). Therefore, the fact that certain South Dakota residents are also unable to take advantage of the "family farm" exception in Amendment E does not excuse the fact that the exception facially discriminates against out-of-state interests. The District Court erred in concluding otherwise.

2. Amendment E has a discriminatory purpose.

In addition to being facially discriminatory, Amendment E is discriminatory because it was motivated by a protectionistic and discriminatory purpose. In *SDDS,* this Court took note that the history of the challenged state regulation was "brimming with protectionist rhetoric." 47 F.3d at 268. This Court noted that the pamphlet that accompanied the referendum contained statements claiming that "South Dakota is not the nation's dumping ground," and requesting "voters to vote against the 'out-of-state dump," and keep "imported garbage out of South Dakota." *Id.* This Court found these statements, on their own, to be "ample evidence of a discriminatory purpose." *Id.*

The District Court noted that while, in this case, "[t]here is clearly some evidence of discriminating purpose," it "decline[d] to find sufficient discriminatory purpose." *Hazeltine*, 202 F. Supp. 2d at 1047. While it is unclear what standard the District Court was relying on regarding what constitutes sufficient discrimination, when the evidence in this case is juxtaposed against the evidence in *SDDS*, it is clear that Amendment E has, at its heart, a discriminatory purpose.

The proponents of Amendment E drafted a "Pro Statement," which was widely circulated by the Secretary of State, and which displays protectionist rhetoric similar to that seen in *SDDS.* That statement provided that "Amendment E is needed to prevent corporations from using interlocking boards and other anti-competitive ties with the meatpacking industry from limiting and then ending market access for independent livestock producers." (Ex. 19). The Pro Statement further provided that without Amendment E, "[d]esperately needed profits will be skimmed out of *local* economies and into the pockets of *distant corporations*." (Emphasis added). *Id.*; (T 661). In addition to the damning statements in the Pro Statement, evidence surrounding the drafting of Amendment E clearly shows its discriminatory purpose. Participants in the drafting process were "invited to a meeting to finalize plans for the Corporate, contract, concentrated hog factory initiative." (T 370; Ex. 25 at 5). Amendment

E was hastily drafted in less than six weeks. (T 245). Because of this haste, no public debate or deliberate legislative process was allowed to occur. This haste, and departure from the normal legislative process, is further evidence of Amendment E's discriminatory purpose. *See Church of Lukumi Babala Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993) (purposeful discrimination in free exercise doctrine).

Dennis Wiese, President of the South Dakota Farmers Union, testified that the proponents were concerned that large out-of-state corporations, such as Smithfield, Murphy and Tyson would enter South Dakota and take away profits from independent, local producers, and that Amendment E was intended to bar certain out-of-state agricultural corporations from doing business in South Dakota. (T 634, 646). The drafters ignored numerous warnings, even from one of its members, Jay Davis, that Amendment E was constitutionally flawed. (Ex. 4, Ex. 54; T 420). These purported protectors of the "family farm," did not even take the time to fully analyze what effect Amendment E would have on those family farms. The drafters even ignored warnings from Dr. Thu and Dr. Harl, the few experts who were actually consulted, that Amendment E would have a deleterious effect on local farmers. If the drafters' intent was truly to protect the family farms, neither the Defendants nor the Intervenors have been able to explain why they did not more carefully analyze the effects of Amendment E or listen to the voices of reason during the drafting stage. Indeed, even the state's expert admitted at trial that Amendment E was discriminatory when she stated in her report that Amendment E was "designed to restrict operation of global agribusiness firms." (Ex. 313A; T 505).

It is therefore easy to infer that the alleged protection of family farms was not the true purpose of the drafters, but instead was an attempt to keep the out-of-state "hog factor[ies]" from polluting South Dakota and competing with its farmers. In light of the Pro Statement and the circumstances surrounding the enactment of Amendment E, it becomes clear that Amendment E was enacted with a discriminatory purpose. Despite the District Court's conclusion to the contrary, this Court should invalidate Amendment E because its purpose was to discriminate against interstate commerce.

3. Amendment E has a discriminatory effect.

Numerous Supreme Court cases have invalidated state regulatory schemes, the effect of which was to discriminate against interstate commerce. In *South Central Bell*, discussed previously, Alabama's franchise tax scheme was invalidated because its effect was to impose on foreign corporations a tax burden five times heavier than that imposed on domestic corporations. 526 U.S. at 169. The Supreme Court also struck down the tax-subsidy scheme in *West Lynn Creamery*, noting that "the purpose and effect of the [regulatory scheme is] to divert market share to [in-state] dairy farmers. This diversion necessarily injures the dairy farmers in neighboring States." 512 U.S. at 203. Amendment E has a similar effect on interstate commerce as it imposes extra burdens on out-of-state

farmers while at the same time diverting market share to in-state farmers.

In *Hunt*, the Supreme Court struck down North Carolina's regulatory scheme because of its discriminatory effect on out-of-state apple producers. 432 U.S. at 352-53. One discriminatory effect of the state's scheme was to raise the cost of doing business in North Carolina for out-of-state producers, while leaving the costs the same for in-state producers. *Id.* at 350-51. Similarly, Amendment E imposes increased costs on out-of-state farmers doing business in South Dakota. Out-of-state farmers engaging in business in South Dakota face increased tax burdens, increased financing costs and unlimited liability exposure. In-state farmers are immune from these increased costs because of the family farm exception in Section 22(1) of Amendment E, and therefore, their costs of doing business remain the same.[1]

North Carolina's regulatory scheme also stripped away the competitive advantage that out-of-state producers had earned. *Hunt*, 432 U.S. at 351. The Washington state apple industry had built a competitive advantage through a stringent inspection and labeling process. When the North Carolina regulation required all apples to use the USDA labels, it stripped the Washington apple industry of that competitive advantage. In the same way, Amendment E has stripped away all of the competitive advantages of limited liability that out-of-state farmers had earned through incorporation in their respective states.

Finally, North Carolina's scheme had a leveling effect, "which insidiously operate[d] to the advantage of local apple producers." *Id.* Amendment E also attempts to level the local agricultural market against the competitive advantages enjoyed by out-of-state corporations. This is accomplished by allowing in-state farmers to take advantage of the limited liability format and all its economic benefits, through the family farm exception, while denying that benefit to out-of-state farmers. Such an effect provides "the very sort of protection against competing out of state products that the Commerce Clause was designed to prohibit." *Id.* Despite the District Court's conclusion to the contrary, Amendment E has the insidious effect of discriminating against interstate commerce. Therefore, based on the applicable United States Supreme Court precedent, Amendment E should be declared unconstitutional.

4. Summary

Analogous cases, where states have attempted to provide a benefit to a segment of its population to the detriment of interstate commerce, are legion and almost uniformly reach the same result. Whether a state is attempting to protect its dairies from out-of-state competition in *West Lynn Creamery,* attempting to protect its apple growers from out-of-state competition in *Hunt*, attempting to protect its businesses from out-of-state competition in *South Central Bell*, attempting to prevent the import of out-of-state waste in *SDDS,* or in this case,

1. Again, it must be noted that the fact that not all in-state farmers can take advantage of the family farm exception does not excuse the discriminatory effect that no out-of-state farmer can employ that exception to obtain limited liability. *See C & A Carbonne*, 511 U.S. at 408.

attempting to protect family farms from competition by out-of-state corporations, such actions clearly discriminate against interstate commerce and have been resoundingly invalidated. As stated by the Supreme Court, "[t]he essential vice in laws of this sort is that " out-of-state interests "are deprived of access to local demand for their services." *C&A Carbonne*, 511 U.S. at 392. When boiled down to its essence, Amendment E, through the family farm exception, provides in-state farmers the ability to operate as a limited liability entity, while denying that benefit to out-of-state farmers. Because out-of-state farmers are denied this benefit, market forces dictate that they forego business opportunities in South Dakota, which necessarily grants those opportunities to local interests. Amendment E is a clear attempt to protect in-state interests against out-of-state competition. According to applicable Supreme Court precedent, this is precisely the economic protectionism that the Commerce Clause prohibits. *See Hunt*, 432 U.S. at 351. Therefore, Amendment E should be disposed of the same way the protectionist attempts were dealt with in *Hunt, South Central Bell, C&A Carbonne, West Lynn Creamery* and *SDDS*: it should be declared unconstitutional.

5. Amendment E fails the strict scrutiny standard.

Because Amendment E discriminates against interstate commerce, the State bears the burden of showing *both* that Amendment is necessary for compelling reasons *and* that Amendment E is the least restrictive alternative available to accomplish those reasons. The district court erred in concluding that the protection of South Dakota's family farmers is a compelling interest. Such a conclusion is cast into serious doubt by the Supreme Court's decisions in *West Lynn Creamery, South Central Bell, C&A Carbonne* and *Hunt*, which all note that the protection or preservation of a local industry is never a compelling interest. The District Court also erred in not even examining whether Amendment E was the *only* available alternative to protect South Dakota's farmers. As noted in Appellants' brief on this issue and discussed *infra*, numerous options are available to South Dakota, which do not impose a burden on interstate commerce. Therefore, Amendment E fails the strict scrutiny standard and is unconstitutional.

B. Amendment E imposes an undue burden on Interstate Commerce

In its memorandum decision, the District Court held that Amendment E imposes an undue burden on interstate commerce based on the effect it has on the utility industry. While Farm Bureau agrees with the District Court that Amendment E improperly burdens the utility industry, Amendment E also imposes an undue burden on agricultural interstate commerce and should be invalidated on those grounds as well.

Under the "undue burden" test, the State regulation will be declared unconstitutional if the burden imposed on interstate commerce, no matter how incidental that burden may be, "is clearly excessive in relation to the putative

local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Pursuant to the *Pike* test, the burden on interstate commerce and the local benefits must be examined in relation to each other; specifically, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* This analysis requires this Court to consider (i) the extent of the burden on interstate commerce, (ii) the weight to be given to the interest allegedly promoted by the regulation, (iii) and the availability of alternative means to achieve the State's interest. *See id.* As noted by the Supreme Court, "the burden falls on the state to justify [the regulation] *both* in terms of the local benefits flowing from the statute *and* the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353 (emphasis added).

1. Amendment E severely burdens interstate commerce.

As shown at trial, the effect that Amendment E has had and continues to have on interstate commerce is significant. Ron Wheeler, head of the Governor's Office of Economic Development for South Dakota, testified that Amendment E has suppressed and continues to suppress the flow of interstate commerce. (T 737, 739, 745). Wheeler was aware of at least twenty (20) large projects that had been delayed or cancelled because of Amendment E, including a $100 million wind energy project. (T 741-43, Ex. 131 6). Plaintiffs John Haverhals, Ivan Sjovall, and Bill Aeschlimann, and thousands of other South Dakota farmers who feed livestock owned by other parties, including out-of-state limited liability entities, have lost significant business because of Amendment E, and will be forced out of business completely if Amendment E is enforced. (T 164, 173, 134, 192, 196). Out-of-state producers have cancelled their contracts with Plaintiff Don Tesch because of Amendment E. (T 184). According to Mike Held, Administrative Director of the South Dakota Farm Bureau Federation, Amendment E has restricted the flow of capital into South Dakota, and has severely limited the amount of start up capital and additional financing available to farmers. (T 24, 27). In addition, as the District Court recognized, the cost of utilities, and the flow of power across state lines, will be greatly impacted by Amendment E. *Hazeltine*, 202 F. Supp. 2d at 1050. Dr. Luther Tweeten, an Iowa farm boy turned internationally prominent agricultural economist, testified on behalf of the Plaintiffs that Amendment E obstructs and virtually eliminates the practice of "production contracts" in South Dakota, whereby livestock is transferred between various producers, often across state lines, at various stages of development. (T 537). According to Dr. Tweeten, Amendment E will also have a negative impact on some aspects of vertical coordination, which Dr. Tweeten described as "the synchronization of the stages in the food marketing chain." (T 541). Because vertical coordination involves the national agricultural market, Amendment E disrupts not only the agricultural economy in South Dakota, but also the entire nation. (T 543). As shown at trial, Amendment E has had a serious and severe impact on the plaintiffs and the

members of Farm Bureau and has significantly decreased the flow of agricultural commerce into and out of South Dakota.

Critically, among the people who have been, or will be, precluded from entry into the South Dakota market are Farm Bureau members. Those members are restricted or prohibited from entering into various common business transactions with South Dakota farmers because of Amendment E. Many Farm Bureau members employ some variety of a limited liability entity to obtain the economic benefits associated with those entities and remain competitive in today's market. Those members are severely limited in the types of business relationship into which they may engage with South Dakota farmers; specifically, custom feeding and production contracts are virtually prohibited. Farm Bureau supports the ability of all their members to engage in any beneficial business transactions available to its members free of restriction by governmental regulation. Because Amendment E unduly restricts that ability and thereby decreases the number of business transactions between South Dakota farmers and out-of-state farmers, as well as the accompanying volume of agricultural products and capital flowing into and out of South Dakota.

These effects, when considered together, demonstrate that Amendment E, on its own, has a negative impact on interstate commerce. Yet, this Court must also consider the aggregate effect on interstate commerce if multiple jurisdictions were to adopt similar regulations. *See Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992). "The practical effect of [Amendment E] must be evaluated not only by considering the consequences of the statute itself, but also by considering . . . . what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* If every state attempted to limit the use of the limited liability entity to in-state "family farmers" as Amendment E does, the interstate flow of livestock and agricultural products "could be substantially diminished or impaired, if not crippled." *Id.* at 1072. Such an environment would essentially erect a wall around each state's agricultural market, which would severely impact Farm Bureau members. Amendment E is the latest and most draconian effort to date by a State to prohibit "corporate farming," and if it (and the regulations which will follow in other states) is allowed to remain in effect, the agricultural industry will be faced with the very "type of balkanization the [Commerce] Clause is primarily intended to prevent." *Id.* Whether Amendment E is viewed in isolation, or if the aggregate effect of Amendment E and similar regulations are considered, interstate commerce is severely impacted.

2. The State's local purposes are not legitimate and are not furthered by Amendment E.

Because of the severe negative impact on interstate commerce, the State bears the burden of advancing legitimate local purposes that will counteract the negative impact on interstate commerce. *See Hunt*, 432 U.S. at 353 (noting that "the burden falls on the state to justify [the regulation] . . . . in terms of the local benefits flowing from the statute."). To carry its burden, the State argues that the

promotion and protection of South Dakota agriculture and the family farms are a legitimate local purpose. State's Appellate Brief at 21. However, the Supreme Court's opinion of such protectionism is clear: "Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *West Lynn Creamery*, 512 U.S. at 205; *see South Central Bell*, 526 U.S. at 169 (invalidating regulatory scheme that protected local businesses); *Hunt*, 432 U.S. at 352-53 (invalidating regulatory scheme that protected local apple producers).

However, even if this Court determines that protection of local farmers is a legitimate state purpose, the benefits provided to local farmers by Amendment E are negligible when compared to the burden imposed on interstate commerce. As shown at trial, Amendment E has damaged and continues to damage the very people it was intended to protect. Plaintiffs Sjovall, Haverhals, Tesch, and Brost (as well as the thousands of South Dakota farmers in similar situations) have all lost a significant amount of business because of Amendment E. Without limited liability protection, farmers have had difficulty obtaining financing. In addition, thousands of estate plans have been thrown into upheaval, which will result in unanticipated and unnecessary estate taxes being imposed on the very family farmers Amendment E purports to protect. Many family farmers who do not qualify for the "family farm" exception, including Plaintiff Brost, will be forced to divest property to comply with Amendment E, which actions will impose significant capital gain and ordinary income tax burdens on family farmers. As noted by this Court in *SDDS*, it is "somewhat suspect" when "the means used to achieve the state's 'ostensible . . . . purpose' were relatively ineffective." 47 F.3d at 268-69 (citing *Hunt*, 432 U.S. at 352). If South Dakota's purpose was in fact to protect the family farmers, it has failed miserably.

The State's only justification for Amendment E came from Dr. Labao, a sociologist who testified about the "harm" caused to rural communities by industrialized farming. However, Dr. Labao spoke only in broad terms of "industrialized farming," and never connected the alleged harm to any particular business entity. (T 482-83). Ironically, Dr. Labao testified that in the region of the country including South Dakota, "industrialized farming is actually related to better economic conditions" for family farms, and that in areas such as South Dakota, "small farming units impoverish localities . . . ." (T 503-04).

The Intervenors also attempted to justify the burden Amendment E places on interstate commerce by alleging that Amendment E would protect South Dakota's environment by preventing spills from large manure lagoons. Neither the State nor the Intervenors produced any evidence regarding this alleged benefit, and it should therefore be rejected as illusory. Neither the State nor the Intervenors could point to specific benefits that were provided to South Dakota's farmers by Amendment E, other than shielding them from interstate competitive forces. Based on the evidence produced at trial, the State simply did not satisfy its burden to show that Amendment E advances any legitimate local interests.

3. The State failed to carry its burden that less restrictive means were unavailable.

Amendment E negatively affects interstate commerce and the family farms it was allegedly intended to protect. Second, Amendment E provides few, if any, of the intended local benefits it was meant to provide. Third, the State has utterly failed to fulfill its burden of showing that no less restrictive alternatives were available to protect South Dakota's family farms and environment. *See Hunt*, 432 U.S. at 353 (noting that "the burden falls on the state to [prove] . . . . the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."). Neither the State nor the Intervenors presented any evidence on this issue, which omission is a fatal flaw.

Common sense dictates that there are, of course, multiple such alternatives available to South Dakota. The State could allocate a portion of its property or sales tax to fund programs, provide loans or subsidies that would support family farms and rural communities. The State could provide relief from property or sales tax to family farmers. The problem with these alternatives is that they would have to be funded by the State itself, likely through increased taxes, which obviously have "political consequences." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1071 (8th Cir. 2000). The State could also consider other regulatory or taxation options. Finally, the State could expand or increase enforcement of its antitrust statutes. *See* S.D.C.L. 37-1-1 *et seq.* It is easy, albeit unconstitutional, to attack unrepresented corporate outsiders, who cannot assert their rights at the South Dakota ballot box, as the source of South Dakota's ills. However, the fact that South Dakota does not have the political will to help its family farmers by legitimate means does not excuse the fact that several alternatives exist which do not burden interstate commerce.

The Intervenors also attempt to justify Amendment E's burden on interstate commerce by its alleged ability to protect the South Dakota environment. Setting aside for the moment the fact that neither the State nor the Intervenors presented any evidence that Amendment E did in fact protect the environment, multiple legitimate alternatives exist by which to protect South Dakota's environment. At the time Amendment E was enacted, South Dakota law provided an extensive environmental permit program. *See* S.D.C.L. Title 34A. In addition, general nuisance law protects individuals from the noise and odor often mistakenly associated with out-of-state corporations. S.D.C.L. 21-10-1 *et seq.* Counties and local municipalities regulate environmental concerns through zoning ordinances. Neither the State nor the Intervenors produced any evidence at trial that these alternative means were unavailable or are any less effective at protecting South Dakota's environment than the alleged benefits of Amendment E. Even if those alternatives were ineffective, the legislature or applicable governing body need only modify those restrictions to adequately protect South Dakota's environment. There are multiple alternatives available to South Dakota that do not burden interstate commerce to the extent Amendment E does.

4. Conclusion.

The state bears the burden to justify both the local benefits of Amendment E and the unavailability of other nondiscriminatory alternatives. *See Hunt*, 432 U.S. at 353. Because of the heavy burden that Amendment E places on interstate commerce, the State's burden in this case is especially onerous. The record demonstrates negligible local benefits, if any, to counteract the burden it places on interstate commerce. In addition, there are a multitude of less restrictive, non-discriminatory burdens available to protect the environment, family farms and rural communities. The State has failed to carry its burden on both elements and therefore the burden imposed on interstate commerce by Amendment E is clearly excessive in relation to the few, if any, local benefits that it provides. Amendment E constitutes an undue burden on interstate commerce and is therefore unconstitutional.

II. AMENDMENT E IS PREEMPTED BY THE AMERICANS WITH DISABILITIES ACT.

The District Court held that Amendment E was preempted by the Americans with Disabilities Act (ADA), relying on the doctrine of preemption by conflict. *See Hazeltine*, 202 F. Supp. 2d at 1042-43. Preemptive conflict exists whenever the application of the federal law is impossible because of the state law, *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when the state law "frustrates the purpose" of the federal law. *See Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 478 (1984). Amendment E makes the application of the ADA impossible and frustrates the purpose of the ADA, therefore, it is preempted by the ADA and is invalid.

The provision of limited liability benefits is a service, program or activity provided by the state. The court in *Innovative Health Systems, v. City of White Plains*, 117 F.3d 37, 45 (2d. Cir. 1997), concluded that the ADA applied to zoning ordinances and noted that the language of § 12132 is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of context." Courts have generally interpreted the phrase "services, programs or activities" broadly. In *Heather K. v. City of Mallard, Ia.*, 946 F. Supp. 1373, 1387 (N.D.Ia. 1996), the court determined that the regulation of open burning was an "activity" under Title II of the ADA. Likewise, in *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D.Utah 1993), the court concluded that the ADA preempted a state law regulating marriage of disabled persons. The narrow definition of "services, programs or activities" urged by the State and Intervenors is contrary to persuasive case law and contrary to the purpose of the ADA that no individual be denied the benefits provided by a public entity.

South Dakota now provides the benefit of limited liability only to farmers who (i) live on the farm or (ii) engage in the day-to-day labor and management of the farm. Under the family farm exception, "[d]ay-to-day labor and management shall require *both* daily or routine substantial physical exertion *and*

administration." S.D.Const. Art XVII, Section 22(1) (emphasis added). Plaintiffs Holben and Brost do not reside on the farms they own; therefore they are only able to obtain the limited liability benefit conferred by the state if they can engage in daily substantial physical exertion. However, that option is unavailable to both Holben and Brost because each suffers from a heart condition, which constitutes a disability under the ADA. *See Hazeltine*, 202 F. Supp. 2d at 1039-40. Therefore, the substantial physical exertion requirement precludes disabled farmers like Holben and Brost who do not live on the farms they own, and deprives them of a benefit offered by the State of South Dakota.

The substantial physical exertion requirement further violates the ADA because it is highly likely that disabled farmers will not live on their farms. Because of their disabilities, disabled farmers often need to live away from their farms to be closer to needed medical treatment and other services. In addition, Amendment E thwarts disabled farmers' estate planning, as gifting shares of a limited liability entity is a common tool used to transfer ownership of their farms to the next generation, while minimizing estate tax implications. Amendment E also prohibits those disabled farmers from continuing to reap the benefits of their farms through leasing, hired hands or other similar arrangements. Holben and Brost are merely examples of the many disabilities suffered by the farming population in South Dakota and nationwide. The average age of farmers nationwide, and especially in South Dakota, has risen much faster than the general population. As that trend continues, the number of disabled farmers, whether residing in or outside South Dakota, will grow exponentially. Consequentially, the number of farmers that are denied the benefit of limited liability entities because of their disability will parallel that growth.

Amendment E grants use of the limited liability entity to farmers that either live on the farm or engage in substantial physical exertion on that farm. Disabled farmers are unable to engage in substantial physical exertion and often are not able to live on their farm. Those disabled persons are denied the benefit of limited liability entities that is offered by the State of South Dakota to non-disabled persons. The express purpose of the ADA is that no disabled individual be "denied the benefits of the services, programs or activities of a public entity." § 12132. Because Amendment E frustrates that purpose and prevents the application of the ADA, it conflicts with the ADA and is therefore preempted by the ADA.

CONCLUSION

The drafters of Amendment E and the people of South Dakota may have had good intentions when Amendment E was drafted and approved. However, Amendment E is a constitutional train wreck. Amendment E discriminates against interstate commerce through its text, purpose and effect. The burdens it imposes on interstate commerce are severe and clearly exceed any benefits to the farmers of South Dakota that the State was able to prove. The State has failed to show any legitimate local benefits provided by Amendment E. In addition, the

State has utterly failed to prove that less restrictive alternatives were not available to protect South Dakota's farmers. Finally, Amendment E is preempted by the ADA as Amendment E provides benefits to non-disabled farmers of which disabled farmers are unable to take advantage. No amount of good intentions can cure these constitutional defects.

Therefore, the American Farm Bureau Federation, Alabama Farm Bureau Federation, Arkansas Farm Bureau Federation, Kansas Farm Bureau Federation, Kentucky Farm Bureau Federation, Minnesota Farm Bureau Federation, North Dakota Farm Bureau Federation, and Utah Farm Bureau Federation urge this Court to affirm the District Court's judgment that Amendment E is unconstitutional and unenforceable.

Reply Brief of Appellees and Cross-Appellants

by

Richardson O. Gregerson and David S. Day

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REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS

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PRELIMINARY STATEMENT

Appellees and Cross-Appellants South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers, Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; and William A. Aeschlimann submit this brief in reply to Appellants' Reply and Cross-Appellees' Brief (October 15, 2002). Since the Intervenor Defendants-Appellants have not filed a separate reply brief and have joined the brief of the State Defendants Hazeltine and Barnett, this brief will be referred to as "Defendants' Reply Brief."

The State Defendants Joyce Hazeltine and Mark W. Barnett will be referred to herein as "State Defendants." The South Dakota State Constitutional Amendment at issue here will be referred to as the "Corporate Farming Ban" or the "CFB" or the "Amendment."

The Brief of these Appellees and Cross-Appellants will be referred to herein as the "SDFB Brief."

Appellees Montana-Dakota Utilities Co.; Northwestern Public Service; and Otter Tail Power Company will be referred to as the "Utility Challengers." All Appellees and Cross-Appellants will be collectively referred to as "the Challengers."

This brief primarily addresses the dormant commerce clause issues.

I. THE CORPORATE FARMING BAN IS UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE.

A. INTRODUCTION

In this case, the Challengers (both Agricultural and Utilities) advanced, at trial and otherwise, several dormant commerce clause theories on both tiers of the modern doctrine. The Challengers have claimed that the Corporate Farming Ban was a state law "discriminating" against interstate commerce under well-settled Supreme Court authorities and under this Court's governing decision, SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995). Alternatively, Challengers have claimed that, even if considered "nondiscriminatory," the Corporate Farming Ban was unconstitutional because, under Supreme Court authorities, it was an "undue burden" on interstate commerce represented in this case by the interstate livestock industry and the interstate electric power generation and transportation industries.

The District Court below held that the Corporate Farming Ban violated the dormant commerce clause doctrine. See South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F.Supp. 1020, 1050 (D.S.D. 2002). The District Court seemed to select a "narrow grounds" by relying only on the unduly burdensome effect of

the CFB on the Utility Challengers. Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions

69 U.Chi.L.Rev., 429 (2002)Within the Supreme Court's broad concept of discrimination, the recent decisions reveal an expansive analysis of what constitutes facial discrimination. See, e.g., Camps, 520 U.S. at 576;

One preliminary point must be made. The Defendants assert that the Challengers "did not even call any fact witness who was from out of state." Defendants' Reply Brief at 10. This is not accurate. Challengers called Plaintiff Marsden Holben who is a resident of Arizona, and he testified as a "fact witness" about how the Corporate Farming Ban severely burdened his efforts to invest in a ranching operation in western South Dakota and interfered with his estate planning program.

B. THIS CASE FALLS WITHIN THE PRECEDENT GOVERNING FACIAL DISCRIMINATION.

The Supreme Court utilizes an expansive, holistic approach to determining facial discrimination. The Supreme Court looks at the State's regulatory scheme *as a whole.*

The expansive, holistic approach is well illustrated by the cases cited in Challengers' opening brief: *West Lynn Creamery.* In 526 U.S. at 169. The South Dakota Const. art. XVII, § 21South Dakota Const. art. XVII, §§ 21-24South Dakota Const. art. XVII, § 22§ 22 exceptions "give back" to domestic producers the ability to use a corporate business structure even when *South Central Bell.* To determine facial discrimination, the *West Lynn Creamery*, the state had one statute that was a nondiscriminatory tax (on milk dealers) and a different statute that was a subsidy (for in-state milk producers). The milk dealers involved in interstate commerce and subject to the tax challenged on the grounds of the dormant commerce clause. Although the state argued that the challenged tax was facially neutral, the Supreme Court found that the *whole regulatory scheme* was facially discriminatory. *Id.* at 201. ("It is the entire program . . . .") § 22 "give back" to domestic farmers economic options that are denied by *West Lynn Creamery* Court would find the Massachusetts regulatory

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1. The latest Supreme Court decisions are: *Wyoming v. Oklahoma,* 502 U.S. 437 (1992); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 504 U.S. 353 (1992); *Oregon Waste Systems, Inc. v. Environmental Quality Commission of Oregon,* 511 U.S. 93 (1994); *C&A Carbone, Inc. v. Town of Clarkston,* 511 U.S. 383 (1994); *West Lynn Creamery, Inc. v. Massachusetts Dairy Equalization Fund,* 512 U.S. 186 (1994); *Fulton Corp. v. Falkner,* 516 U.S. 315 (1996); *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564 (1997); *General Motors v. Tracy,* 519 U.S. 278 (1997); and *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160 (1999). In this time frame, the Supreme Court also decided one case involving the *dormant foreign commerce clause doctrine. See Intel Containers International Corporation v. Huddleston,* 507 U.S. 60 (1993). There is no dormant foreign commerce clause issue in this case, but Challengers mention the *Huddleston* decision for the convenience of this Court.

scheme to be facial discrimination, the South Dakota regulatory scheme (the CFB) is an easy fit.

The Supreme Court's interpretative methodology for determining facial discrimination has another aspect. In addition to the holistic analysis, the Supreme Court has relied upon evidence of the regulatory scheme's *economic effect* to find facial discrimination. In 512 U.S. at 196. Similarly, in 526 U.S. at 169. This effect was utilized by the unanimous Supreme Court in holding that Alabama's "tax therefore facially discriminates against interstate commerce."

The District Court observed that this case "is akin to Kassel v. Consolidated Freightways, 450 U.S. 662, 669 . . . (1981)." Kassel. Defendants' Reply Brief at 12. In 450 U.S. at 678-679. Two evidentiary aspects were critical to the Supreme Court's analysis in Id. at 676. These exemptions had the effect of securing "to Iowans many of the benefits of large trucks while shunting off to neighboring states many of the costs associated with their use." *Kassel* Court relied on part of the large truck ban's legislative history—namely the now-famous admission by Iowa's Governor that he vetoed a predecessor statute without the border city exemption because allowing large trucks would be "a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." *Kassel.* Like § 21) and then, through the State-crafted series of exceptions (in § 22 exceptions, especially the family farm exception of *Kassel*, 450 U.S. at 676. Moreover, as explained in the SDFB Brief, the record here contains an admission parallel to—or even more significant than—the admission in *Kassel* are clear. Based on it and the Supreme Court's expansive facially discrimination methodology, this Court should conclude that the Corporate Farming Ban is facially discriminatory.

C. EVEN IF THE CORPORATE FARMING BAN WERE CONSIDERED FACIALLY NEUTRAL, IT SHOULD BE CONSIDERED AS PURPOSEFUL DISCRIMINATION REGARDING INTERSTATE COMMERCE.

"The Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1941).

Challengers contend that, even if this Court were to consider the Corporate Farming Ban to be facially nondiscriminatory, it should consider the overriding evidence in the record of the discriminatory purposes underlying the development and adoption of the Amendment. As in any purposeful discrimination analysis, a court must not mistake textual generality for evenhandedness. This Court should recognize the "ingenious" effort underlying the Corporate Farming Ban. For purposes of this argument, Challengers contend that this Court's analysis in *SDDS* STANDARD FOR DISCRIMINATORY PURPOSE.

"There was some evidence at trial that Amendment E was motivated by discriminatory purposes." *SDDS*, 47 F.3d at 267. This Court, of course, reversed

the trial court in *SDDS* decision divided evidence of purpose into two categories: "direct" and "indirect."

a. The District Court's Findings of Fact Are Direct Evidence.

First, the District Court made findings of fact about the purposes underlying the Corporate Farming Ban: "There was some evidence at trial that Amendment E was motivated by discriminatory purposes." *SDDS*, 47 F.3d at 268, constitutes direct evidence of discriminatory purpose.

b. The Pro Statement.

Second, as in *SDDS*, 47 F.3d at 268, the direct evidence here included the Initiative's "Pro Statement." (T 634; SDFB Add. at 1) The Pro Statement urged voters to support the Amendment because otherwise: "Desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." *Id.* The Pro Statement's use of the dichotomy between "local economies" and "the pockets of distant corporations" is exactly the sort of discrimination against which the dormant commerce clause guards.

c. The Admission of the State's Testimonial Expert.

A third type of direct evidence in this case, recognized by Supreme Court decisions such as *SDDS*, 47 F.3d at 268.

d. The Official Ballot Explanation By The Attorney General.

The State Defendants pointedly criticize the Challengers for not discussing the Attorney General's official ballot explanation ("the ballot explanation"), see SDFB Add. at 1, prepared under South Dakota law. *See* SDCL § 12-13-9. In response, the Challengers would note that, although the final version of the ballot explanation was neutral regarding discriminatory purpose, the "legislative history" of the ballot explanation clearly constitutes, under SDDS, direct evidence. As first proposed, the ballot explanation in this case contained the following explanation of the Corporate Farming Ban: "Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution." *Hoogestraat v. Barnett*, 583 N.W.2d 421, 422 (S.D. 1998). On state law grounds, the South Dakota Supreme Court removed the sentence.

In sum, the direct evidence of discriminatory purpose here is more powerful than the direct evidence in SDDS. Therefore, this Court should find that the Corporate Farming Ban was purposefully discriminatory.

e. Under SDDS, the "Indirect" Evidence Also Confirms the Discriminatory Purpose of the Amendment.

In addition to the direct evidence, the Challengers presented extensive "indirect" evidence of discriminatory purpose.

i. The "Speedy" Drafting Process.

The Challengers contend that the short time frame (i.e., six weeks) in which the Corporate Farming Ban was drafted is "indirect" evidence. Challengers will be willing to accept the State's position that 'the drafting may not have been completed in less than six weeks." (Emphasis original.) Defendants' Reply Brief at 25. Challengers contend that the "six weeks" was a short enough time frame to be probative as indirect evidence of discriminatory purpose.

ii. The Historic Context.

In its haste to defeat the speedy drafting evidence, the Defendants argue that the "history" of the Amendment should be considered. See *id.* Challengers agree—but contend that part of that "history" is the fact that the State already had a restriction on corporate farming—the 1974 Family Farming Act. See SDFB Brief at 7-8. The 1974 Act was, as far as the record indicated, an effective regulatory scheme. Just like the new regulation (for waste disposal) added in 47 F.3d at 269. Challengers contend that this historical background evidence is indirect evidence of discriminatory purpose.

iii. The "Warning" by a Member of the Drafting Committee.

The Challengers contend that the "warning" issued by the only lawyer on the Amendment's drafting committee to the rest of the committee should be considered as indirect evidence of discriminatory purpose. See Exhibit 36; SDFB Add. 3. Defendants' Reply Brief seeks to explain Exhibit 36's statement that the Amendment "might be struck down for violating the Commerce Clause." Although the State did not call the lawyer as a witness, the State Defendants now minimize Exhibit 36 because it was only a lawyer's "'worst case scenario' advice."

Challengers doubt that this "advice" can be explained as a lawyer-client communication. But, even if the warning was a "worst case scenario," the existence of the warning is probative as indirect evidence of purpose. The Amendment's proponents went forward, recklessly ignoring the warning.

iv. The Second "Warning" to the Amendment's Proponents.

As the Challengers explained in SDFB Brief at 28 to 29, the proponents of

the Amendment received a second warning about the unconstitutional burdens that would be created by its passage. A distinguished agricultural economist, Dr. Neil Harl, reviewed a draft of the Amendment and warned the drafting committee that the proposal would interfere with interstate commerce. *See* SDFB Add. at 6-9. This distinguished economist was ignored. Challengers contend this pattern of conduct constitutes indirect evidence of discriminatory purpose.

When the direct evidence is considered together with the indirect evidence, the Challengers here have assembled more evidence than present in SDDS. Based on this evidence, this Court should conclude that the Corporate Farming Ban was discriminatory in purpose.

A. The Corporate Farming Ban Is "Discriminatory In Effect" Against Interstate Commerce.

The District Court concluded that Challengers had presented "[e]vidence . . . that Amendment E has prevented millions of dollars of commercial development, *to the permanent detriment of the economy in South Dakota.*" *SDDS* should control.

By the same reasoning, the livestock market of South Dakota is such that the Corporate Farming Ban (adopted by voter initiative) so predominantly affects only out-of-staters that it should be considered discriminatory in effect if it, as the District Court found, permanently suppresses "millions of dollars of commercial development." *Camps* (in-state summer camp) and *Carbone*, 511 U.S. 387-388; 202 F.Supp.2d at 1041. The evidence included the discriminatory effect on the Utility Challengers: "Amendment E clearly places a substantial burden on interstate commerce." *SDDS,* the discriminatory effect of the CFB is that the regulatory scheme "exports costs to out-of-staters." *Oehrleins & Sons & Daughters v. Hennepin Count,* 115 F.3d 1372 (8th Cir. 1997)115 F.3d at 1385-1387. The effect considered in *Id.* at 1385. In contrast to *Carbone*, 511 U.S. at 387-388; *SDDS.* Under these circumstances, the District Court erred. This Court should find that the Corporate Farming Ban is *discriminatory in effect* and should be tested by strict scrutiny.

B. The Corporate Farming Ban Violates The Dormant Commerce Clause Because It Unduly Burdens Interstate Commerce.

While the Challengers contend that the CFB is a state regulation that impermissibly discriminates against interstate commerce (both outside and inside

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2. The District Court cited only to *Cotto Waxo Co. v. Williams* 46 F.3d 790 (8th Cir. 1995)*Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995). Challengers suggest that *Cotto Waxo* should be limited to "extraterritorial effect" analysis.

the boundaries of South Dakota), the two-tier nature of the doctrine requires that, in the alternative, the Challengers consider the "second tier" of the doctrine. *See*

The District Court eschewed any reliance on the discrimination tier and, instead, relied on what it called: the *Pike v. Bruce Church, Inc.* balancing test. The inquiry is whether the state's interest is legitimate and whether the burden on interest commerce clearly exceeds the putative local benefits.

The District Court found that: (1) the CFB "will greatly increase the costs of the [Utilities Challengers] companies doing business in South Dakota *as well as in other states where the companies do business*" (emphasis added); (2) "these [Utilities] companies will . . . incur substantial additional costs to comply with other laws and to keep weeds under control [in transmission line easements];" and (3) "Utility rates in South Dakota and elsewhere, including certainly Minnesota, will undoubtedly increase." 202 F.Supp.2d at 1050.

C. The Findings And Conclusions Regarding "State Benefits."

The District Court made the following finding of fact regarding the record on the "putative local benefits" of the CFB: "It is undisputed that there is no rationality to the matter of prohibiting these easements." *Id.*

Since its finding showed a "substantial" burden on interstate commerce and "no legitimate state interest of any kind" on the benefit side of its analysis, the District Court ultimately concluded that "Amendment E violates the dormant commerce clause of the United States Constitution."

In their Reply Brief (at page 30), the State Defendants state: "Under the [Pike v. Bruce Church, 397 U.S. 137 (1970)] test, the law will be stricken only if the incidental effects it imposes on interstate commerce are 'clearly excessive in relation to the putative local benefits.' *Pike* decision.

The State Defendants' argument is that the second tier standard is simply "burdens" versus "benefits." They cite to the *Pike* decision, the Supreme Court stated the full, three-part nature of the second tier standard.

> . . . the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities*. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, but more frequently it has spoken in terms of "direct" and "indirect" effects and burden. *See, e.g., Shafer v. Farmers Grain Co., supra Pike*, then, the Supreme Court recognized that the

second tier standard was more than the two-part "burden v. benefit" analysis urged by State Defendants. The 397 U.S. at 142.

When the state has alternatives with "lesser impact" on interstate commerce, the State will not prevail on the second tier. *See* SDFB Brief at 34 to 36; *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 895 (1988). This is demonstrated by the *Pike*, the State's interest was in having the cantaloupes "identified as originating in Arizona." *Id.* In *See id.* at 144 n. 7.

Applied to this case, the State's interests could be satisfied with means of "lesser 'impact'" than the Corporate Farming Ban. Expanded educational and extension services for small farmers (which help them improve products and compete in the relevant market) would be state alternatives with "lesser impact." State subsidies such as cash payments or below-market loans would be means with "lesser 'impact'." The State could help small farmers with property tax relief, much as the State exempts charitable entities from property taxes. *Cf.*, In their Reply Brief, the State Defendants argue that the Challengers are asserting a "third commerce clause" test. *Id.* at 30. The "undue burden" test is not some "third" standard or the creation of Challengers. As identified in the SDFB Brief, the phrase "undue burden" is the terminology used by the Supreme Court to describe the second tier test. See SDFB Brief at 14.

To put the State Defendants' argument to rest, there is no doctrinal difference between the *Pike*, the consideration of the State's alternative means of "lesser impact." For the reasons explained above, because the State has numerous alternatives with "lesser impact" on interstate commerce (e.g., property tax credits), the Corporate Farming Ban fails the undue burden standard.

D. Conclusion.

The test in the second tier is properly understood, under prevailing Supreme Court precedent, as the three-part undue burden standard. The District Court concluded that the State failed to establish its state interest. *See* Even though the District Court "rejected" the Challengers' theories of discrimination against interstate commerce, it proceeded to do a "partial" analysis of how the strict scrutiny standard might apply to the Corporate Farming Ban and stated that the State's interests were "compelling." See *Republican Party of Minnesota v. White* 122 S.Ct. 2528 (2002)122 S.Ct. at 2536.

"Compelling state interests" have been described by scholars as "overriding public concerns." *See* Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 Albany.L.Rev. 549, 551 (1992). Under the concept of "overriding public concerns", the State's interests here cannot be considered compelling.

In contrast, South Dakota's interests here—protecting South Dakota farmers

and rural communities—are not compelling because they do not serve any overriding constitutional concern like protecting due process. The South Dakota interests serve, at most, the "economic" interests of certain South Dakota communities. An interest in the economic well-being of the State cannot be considered compelling. *See*

With respect to the preemption issue, the Challengers join the brief submitted by Challenger Holben. The Challengers request that this Court affirm the District Court's decision that the Corporate Farming Ban is preempted by Title II of the ADA.

CONCLUSION

Challengers respectfully request that this Court affirm the District Court, and affirm on broader grounds, that the Corporate Farming Ban violates the dormant commerce clause. The Challengers also ask this Court to affirm the District Court on its ruling that the ADA preempts the Corporate Farming Ban.

Brief of Amicus Curiae National Farmers Union, et al., In Support of Intervenors-Defendants-Appellants Petition for Rehearing *En Banc*

by

Susan E. Stokes and David R. Moeller

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BRIEF OF AMICUS CURIAE NATIONAL FARMERS UNION, ET AL., IN SUPPORT OF INTERVENORS-DEFENDANTS-APPELLANTS PETITION FOR REHEARING *EN BANC*

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STATEMENT OF IDENTITY OF *AMICI CURIAE,* THEIR INTERESTS IN THE CASE, AND SOURCE OF AUTHORITY

As identified in the Motion, the Proposed *Amici Curiae* are as follows: National Farmers Union, Minnesota Farmers Union, South Dakota Farmers Union, Iowa Farmers Union, North Dakota Farmers Union, Land Stewardship Project, Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Illinois Stewardship Alliance, Citizens Action Coalition of Indiana, Campaign for Family Farms, and Western Organization of Resources Councils (collectively, "Proposed *Amici Curiae*").

Proposed *Amici Curiae* have an interest in this case because these organizations and their thousands of members believe in preserving the family farm system of agriculture. The three-judge panel's decision striking down under the dormant Commerce Clause the State of South Dakota's Amendment E that restricts corporations from farming or having an interest in farmland (with certain exceptions) is incorrect as a matter of law and is inconsistent with Supreme Court and Eighth Circuit precedent. It also presents an issue of exceptional importance to the citizens of states in the Eighth Circuit and elsewhere. Proposed *Amici Curiae* believe that allowing corporations to enter into farming and eventually control agriculture in South Dakota and potentially in other states would undermine family farms and the rural communities they support. Proposed *Amici Curiae* have advocated for many years to preserve and strengthen the family farm system of agriculture. The Proposed *Amici Curiae* have sought to enact and protect state laws that support family farmers and therefore have an interest in seeking that the full Eighth Circuit Court of Appeals review *en banc* and reverse the decision of the panel of this Court.

The source of authority for filing this Brief is Federal Rule of Appellate Procedure 29 and Proposed *Amici Curiae's* interest in this case as set forth herein.

INTRODUCTION

On August 19, 2003, a three-judge panel ruled that South Dakota's constitutional amendment ("Amendment E") prohibiting limited liability corporations from owning agricultural land or engaging in farming in South Dakota was unconstitutional under the dormant Commerce Clause. In so ruling, the panel disregarded established rules of statutory construction, basing its decision on selected statements of proponents of the Amendment E initiative and referendum. In addition, the panel backed into the wrong test for dormant Commerce Clause challenges by using the selective legislative history to apply a heightened standard of scrutiny for a constitutional amendment that is neither discriminatory on its face nor in effect.

If allowed to stand, the decision establishes a test that is at odds with Supreme Court and Eighth Circuit authority. Eight other Midwestern states have

laws similar to the South Dakota provision struck down by the panel. These laws were passed in response to the states' justifiable concerns with the takeover of family farms by corporations and the effect the loss of family farms has on the well being of rural communities. The panel's decision could have a devastating effect on family farmers and the rural communities they support.

Proposed *Amici Curiae* respectfully request this Court to grant the Petition for Rehearing *En Banc* of Intervenor Defendants because the decision of the panel presents a question of exceptional importance to thousands of family farmers, their rural communities, and the citizens of the states in the Eighth Circuit.

ARGUMENT

I. THE PANEL IGNORED WELL-ESTABLISHED PRECEDENT BY IMPROPERLY CONSIDERING STATEMENTS BY DRAFTERS RATHER THAN THE TEXT OF AMENDMENT E

The panel looked at the statements and motives of select drafters of Amendment E to find a discriminatory purpose rather than following established precedent for determining legislative intent. The panel did not analyze the actual text of Amendment E that South Dakota voters approved, but instead looked at meeting notes of the drafters, after-the-fact testimony of the drafters, and, according to the court's reading of the record, the lack of economic studies by the drafters that would conclusively show that Amendment E would benefit South Dakota family farmers. Slip Op. at 19-21. The panel noted that while it did not have available evidence of the intentions of South Dakota citizens who voted for Amendment E, it did "have evidence of the intent of individuals who drafted the amendment that went before voters." Slip Op. at 21. Based on that inadmissible evidence, the panel concluded: "It is clear that those individuals had a discriminatory purpose." *Ibid.*

However, the Supreme Court and this Court have repeatedly held that, in interpreting the purpose of laws, courts are not to go beyond the language of the law itself if the language is clear. As the Supreme Court stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). The Eighth Circuit has emphasized this principle, holding that when "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Northern States Power Co. v. United States,* 73 F.3d 764, 766 (8th Cir. 1996); *see also United States v. Vig*, 167 F.3d 443, 448 (8th Cir. 1999) ("Unless exceptional circumstances dictate otherwise, when the terms of a statute are unambiguous, judicial inquiry is complete."); *Security Bank*

Minnesota v. Commissioner, 994 F.2d 432, 436 (8th Cir. 1993) ("As in all cases of statutory interpretation, we must start with the text of the statute.").

The reason the text of the amendment is the best way to determine intent is the inherent unreliability of the type of evidence that this Court utilized in the instant case. As a leading treatise on statutory interpretation states, in the legislative arena, "[r]eferences to the motives of legislators in enacting a law are uniformly disregarded for interpretative purposes except as expressed in the statute itself." Sutherland Statutory Construction, Vol. 2A, § 48.17 at 481 (6th ed. 2000). To extract the purpose of Amendment E from a select number of drafters who may have diverse reasons for participating in a democratic process is improper. *See e.g., American Meat Institute v. Barnett*, 64 F. Supp. 2d 906, 916 (D.S.D. 1999) ("Extrinsic evidence of legislative intent is not admissible.").

The South Dakota Supreme Court likewise has noted that, in analyzing a state constitutional amendment:

> Views of individuals involved with the legislative process as to intent have not received the same recognition from this Court. We held such individual testimony of no assistance in *State v. Bushfield*, 8 N.W.2d 1, 3 (1943) for two reasons: (1) it is the intent of the legislative body that is sought, not the intent of the individual members who may have diverse reasons for or against a proposition and (2) it is "universally held" that "evidence of a . . . draftsman of a statute is not a competent aid to a court in construing a statute."

Cummings v. Mickelson, 495 N.W.2d 493, 499 n.7 (S.D. 1993). The panel in this case did not even stop to look at the actual text of Amendment E but mistakenly proceeded directly to consider the motivations and knowledge of some of the drafters of the text.

In evaluating the purpose of Amendment E, the panel relied on *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995), which considered the pamphlet accompanying a state referendum in a dormant Commerce Clause challenge. Slip Op. at 17. As noted in *SDDS*, that pamphlet was required by South Dakota law and was deemed "part of the legislative history of these initiated and referred measures." *SDDS*, 47 F.3d at 266. Similarly, the "pro" and "con" statements submitted regarding Amendment E are part of the pamphlet and therefore are mere legislative history. *See* Sutherland Statutory Construction, Vol. 2A, § 48.19 at 487-88 (6th ed. 2000) (pamphlets are considered legislative history and subject to rules of statutory construction). As shown above, however, courts are first supposed to consider the text of the law before considering the legislative history.

Using this flawed analysis, this Court completely disregarded the actual text of Amendment E,[1] which states in part: "No corporation or syndicate may

1. It should also be noted that the panel did not analyze the "con" statement which included the claim that Amendment E: "does not clearly distinguish between South Dakota farmers and out-of-state-based farmers and ranchers." Plaintiff's Exhibit 19, T 634. If Amendment E did distinguish on this basis, then it may have violated the dormant Commerce Clause. In fact, instead of harming out-of-state

acquire, otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." Article XVII, § 21. The plain meaning of this text is that no corporation, regardless of whether they are incorporated in South Dakota, Minnesota, or Delaware, may obtain an interest in farmland or engage in farming.

II. THE PANEL APPLIED THE WRONG TEST FOR DORMANT COMMERCE CLAUSE CHALLENGES

A. DISCRIMINATORY PURPOSE ALONE DOES NOT TRIGGER STRICT SCRUTINY

The panel also erred when it viewed Amendment E using "strict scrutiny" based solely on its flawed finding of discriminatory intent. Because Amendment E is not discriminatory on its face or in effect, the court should have applied the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970).

While the panel initially set forth the correct analysis for analyzing a challenge to a state statute under the dormant Commerce Clause, it applied the test incorrectly. The panel correctly noted that dormant Commerce Clause challenges are subject to a two-tiered analysis. First, the court determines if the statute discriminates against interstate commerce. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). If the challenged statute discriminates against interstate commerce "either on its face or in practical effect," it burdens interstate commerce directly and is subject to strict scrutiny. *Maine v. Taylor*, 477 U.S. 131 (1986); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995).

The panel also correctly noted, "If the law is not discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'" Slip Op. at 16, *quoting Pike*, 397 U.S. at 142.

The panel erred, however, by interposing an additional definition of "discrimination" that triggers "first tier" or strict scrutiny, and by using that definition to invalidate Amendment E. Citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), the panel said that if a law "has a discriminatory purpose," that is an "indicator of discrimination against out-of-state interests," thus triggering strict scrutiny. Slip Op. at 16-17. Neither *Bacchus* nor applicable Supreme Court or Eighth Circuit cases have actually applied a strict scrutiny standard based solely on a "discriminatory purpose." The panel thus erroneously held that "discriminatory purpose" alone triggers strict scrutiny.

The panel's approach puts the cart before the horse. The test established by the Supreme Court and applied in this Circuit is that, in order to save

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corporations, the "Con" authors were concerned about the impacts Amendment E would have on South Dakota farmers: "Amendment E bans many business structures currently used by South Dakota farmers. . ." *Ibid.*

discriminating statute under the strict scrutiny standard, a state must show "that the statute serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not be served as well by nondiscriminatory means." *Cotto Waxo*, 46 F.3d at 790, *citing Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The inquiry into the purpose of the legislation accordingly comes *after* the finding that the statute discriminates on its face or in effect; discriminatory purpose is not a stand-alone basis for applying strict scrutiny in the first place.

Bacchus involved a dormant Commerce Clause challenge to Hawaii's liquor tax, which exempted certain liquors produced only in Hawaii. On appeal to the United States Supreme Court, the state did not dispute that the statute discriminated on its face; instead, the state argued that it had been enacted not to engage in "economic protectionism," but to advance a legitimate state interest, and the Court therefore should apply a lower standard of scrutiny than the strict scrutiny standard established in *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981). The Court rejected the state's argument and applied the strict scrutiny standard, citing the clearly discriminatory language, and additionally noting the legislation could not be saved since its undisputed purpose was to aid Hawaii's industry. *Bacchus,* 468 U.S. at 271. *Bacchus* therefore does not stand for the proposition that the panel cites it for — *i.e.,* that an otherwise nondiscriminatory statute is subject to strict scrutiny under the Commerce Clause simply because there is some evidence of a discriminatory purpose. The Court in *Bacchus* only looked to the statute's purpose *after* it found the statute discriminated on its face, and then it was only to determine whether the state had satisfied its burden when reviewing the discriminatory statute under a strict scrutiny standard. *Ibid.*

The panel also cited *SDDS,* in which this Court applied strict scrutiny to invalidate another referendum measure under the Commerce Clause. The referendum at issue in *SDDS* in fact had a discriminatory effect on out-of-state interests, and the court found it was enacted with a discriminatory purpose. *SDDS,* 47 F.3d at 270-71. The *SDDS* decision, however, confusingly stated that discriminatory purpose alone can trigger strict scrutiny, relying on cases that applied a strict scrutiny standard. *Id.* at 268. As in *Bacchus*, however, the courts in those cases found the statutes in question to either discriminate on their face (*see Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342-43 (1992) ("The Act's additional fee facially discriminates against hazardous waste generated in the United States other than Alabama")) or to discriminate in effect. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (statute had the "practical effect" of discriminating against Washington apple growers and dealers while leaving North Carolina apple producers unaffected); *Waste Sys. Corp. v. County of Martin,* 985 F.2d 1381, 1386-87 (8th Cir. 1992) (ordinance discriminated on its face and in effect). *SDDS* therefore is misleading by implying that strict scrutiny can be triggered either by a finding of discriminatory effect *or* by a finding of discriminatory purpose. *SDDS,* 47 F.3d at 268. None of the cases relied on by *SDDS* actually applied a strict scrutiny

standard solely because of a finding of discriminatory purpose; rather, the purpose of the legislation at issue in those cases was discussed *after* a finding that the legislation in fact discriminated on its face or in effect, in order to determine whether or not the statute satisfied strict scrutiny.

The panel in the instant case therefore erred by asserting that a finding of discriminatory purpose itself triggers strict scrutiny and by finding Amendment E unconstitutional under that test. In addition to that standard being based on a mistaken interpretation of Supreme Court precedent, it also makes no sense. If a statute *in fact* does not discriminate — either on its face or in effect — then there is no point in looking at motive or intent. Legislation often may be supported by proponents whose individual motivation may not comport with the motives of those who ultimately pass it. This is also especially true in the case of an initiative or referendum. But the motivation of individual proponents should be relevant—if ever—only if there is discrimination in the first place. The incorrect standard used by the panel puts the cart before the horse.

B. AMENDMENT E IS FACIALLY NEUTRAL AND DOES NOT DISCRIMINATE IN EFFECT AND IS CONSTITUTIONAL

Amendment E does not discriminate on its face or in effect: it forbids all limited liability corporations –regardless of where they are located — from owning agricultural land or engaging in farming. "For purposes of the dormant Commerce Clause, 'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000) (*quoting Oregon Waste Sys.*, 511 U.S. at 99). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (upholding an Indiana corporate takeover law that applied to all hostile tender offers even though its application would fall most often on out-of-state companies); *see also United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d 762, 767 (8th Cir. 1999) ("If taken to an extreme, every state regulation would have some minimal effect on interstate commerce.").

Amendment E is similar to other legislation found to be nondiscriminatory. In *Minnesota v. Clover Leaf Creamery,* the Supreme Court rejected a dormant Commerce Clause challenge, finding that a Minnesota state statute banning the sale of retail milk in plastic, nonrefillable containers in order to conserve Minnesota's natural resources "regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State." 449 U.S. at 471-72.

Similarly, in *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), this Court held that being an out-of-state

corporation that is treated the same as an in-state corporation is not discrimination under the Commerce Clause:

> A Delaware corporation doing business in Minnesota could not argue that it is discriminated against by Minnesota laws that apply equally to all businesses operating in the state. South Dakota companies may chose not to locate operations in Minnesota because of comparatively high state taxes that apply to all businesses, but this is not discrimination under the Commerce Clause. Like any other local market regulation, Ordinance 12 may or may not encourage companies from doing business in the state. But while this may be a relevant concern in forming economic policies, it is simply not the proper inquiry for considering discrimination under the Commerce Clause. *Cf. CTS Corp.*, 481 U.S. at 93-94 (*quoting Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) ("We have rejected the 'notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market."). Plaintiffs' analysis would render virtually all local economic regulations "discriminatory" and subject them to "per se" invalidation. This would vastly expand the implications of the dormant Commerce Clause, and we decline to follow such a course.

Id. at 1386-87.

Accordingly, applying the correct legal standard — the "second tier" of the *Pike v. Bruce Church* balancing test — it is clear that Amendment E is constitutional. Such legislation is clearly an exercise of the state's right to "determine the course of its farming economy." *See Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001). As the court below correctly held, "'It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such statute is rationally related to a legitimate state interest.'" *South Dakota Farm Bureau v. Hazeltine,* 202 F. Supp. 2d 1020, 1049 (D.S.D. 2002), *quoting State ex rel Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 801 (Mo. 1988) (*citing Asbury Hospital v. Cass*, 326 U.S. 207, 214-215 (1945) and *Omaha National Bank v. Spire*, 389 N.W.2d 269, 283 (Neb. 1986)).

If the Eighth Circuit does not rehear the instant case *en banc* and reverse the panel's error, the Eighth Circuit standard in dormant Commerce Clause challenges will be if there is any evidence of discriminatory purpose, regardless of whether the legislation *in fact* discriminates on its face or in its effect, courts should review the legislation with a strict scrutiny standard. This standard is inconsistent with Supreme Court and Eighth Circuit precedent and should be reconsidered *en banc*.

CONCLUSION

For the foregoing reasons, Proposed *Amici Curiae* respectfully request that this Court grant petitioners' request for rehearing *en banc* and reverse the panel's decision.

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An Agricultural Law Research Article

Amendment E: A Personal Perspective on Defending Its Constitutionality

by

Randolph C. Canney

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AMENDMENT E: A PERSONAL PERSPECTIVE ON DEFENDING ITS CONSTITUTIONALITY

RANDOLPH C. CANNEY†

I assisted, along with Jay Tutchton of Earth Justice and John Davidson of the University of South Dakota Law School in representing the Intervenors, Dakota Rural Action and South Dakota Resources Coalition, at both the trial and appeal of Amendment E. These parties were allowed to intervene because of comments made by then Attorney General of South Dakota, Mark Barnett, during the debate and campaign on Amendment E, in which he questioned the constitutionality of the Amendment.

Dakota Rural Action is a grass roots community organization dedicated to preserving the quality of rural life in South Dakota. South Dakota Resources Coalition is a coalition of environmental organizations in the state. Both were instrumental in the passage of Amendment E. These organizations and the other supporters of Amendment E took direct democratic action to try to save the family farm and protect the environment and rural way of life in South Dakota. Amendment E was passed via referendum in November, 1998, with fifty-nine percent of the vote. It was backed by more than two-thirds of farmers and received significant support from South Dakota's urban centers.

Having lost at both the trial and appeal of Amendment E, I hope my view of the matter is not perceived as mere "sour grapes." Handling this case was one of the most remarkable and rewarding experiences of my legal career. I had a chance to assist in the defense of a citizen's initiative with which I agreed, and an opportunity to meet the remarkable people behind the passage of Amendment E.

The Amendment E trial was held in December, 2001, in Aberdeen, South Dakota. I still remember waking early every morning in the Super 8 Motel, going to the small lounge, and preparing for the day's events. At the time, I was obviously wrapped up in the realities and day-to-day cares of the trial of the case. In retrospect, the time has almost a magical quality in my mind, given both the import of the matter and the amazing individuals who were on our side.

Although Amendment E presents crucial legal issues, I admit to first being struck by the human element of the case. In March of 2001, I flew from Denver to South Dakota to meet with representatives of Dakota Rural Action and South Dakota Resources Coalition. I was struck by the incredible knowledge and dedication of individuals such as John Bixler, and Luanne Napton, who headed Dakota Rural Action and South Dakota Resources Coalition respectively.

What truly moved me though, was meeting some of the family farmers and

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† Attorney for Intervenors, Dakota Rural Action and South Dakota Resources Coalition. Mr. Canney served as co-counsel with John H. Davidson, University of South Dakota School of Law. Mr. Canney practices in Denver, Colorado.

ranchers who fought so hard for this Amendment. I was particularly struck by two retired hog farmers, Ralph and Don. They spoke of the changes as the worse that they had seen in agriculture, and how the way of life and land they knew were being destroyed. Throughout the case, when I would get lost in minutia or picky details of the proceedings, I would always be able to think of these two men and how important the case was to them and the many independent farmers and ranchers that they represented. Ralph and Don came to every day of the trial, and also traveled to St. Paul for oral argument. As lawyers, we must not ever forget that our work is truly a human endeavor, and not merely an intellectual exercise.

If one merely reads the Eighth Circuit's opinion, one truly misses both the import and intentions of Amendment E. Quite frankly, when I first read the opinion, I could not believe that they were really deciding the appeal of the trial that had been conducted. The Court focused on the alleged discriminatory purpose of Amendment E, and seemed to me to pick and choose isolated portions of the record to justify the decision. There was simply no mention that the trial court had found to the contrary, that there was no discriminatory purpose.

In my heart, I do not believe Amendment E was designed or passed with a purpose of discriminating against out-of-state corporations. It made no difference if the offensive corporations were located in South Dakota or elsewhere – it was the corporate structure that was the problem. Although not mentioned by the Eighth Circuit, several of the people who helped draft Amendment E testified about the very valid and legitimate purposes of Amendment E.

Amendment E was an attempt to turn the tide on the adverse social, economic, and environmental impacts imposed on rural communities by non-family, corporate farms. Limited liability entities enjoy limited risk exposure and tax advantages which allowed them to attract investment capital with which to expand. This creates anti-competitive forces that squeeze traditional, family farmers out of the market. The inability of the family farmer to compete changes social demographics in rural communities by replacing the independent farmer with disempowered sharecroppers and destroys the social fabric of small towns.

In addition, Amendment E sought to make farm owners responsible for environmental contamination. Large agribusiness, such as hog operations, have a propensity to produce an enormous amount of waste that saturates soil, deluges water channels, and contaminates groundwater. Corporate limited liability status allows owners of agricultural operations to avoid personal liability for environmental contamination. Accordingly, Amendment E seeks to limit the availability of reduced risk exposure provided by corporate status to family farmers who are personally involved in the farming operation. Family farmers, even if they do enjoy limited liability due to corporate organization, are exempt under Amendment E due to their obvious disincentive to "foul their own nest."

Amendment E did not arise in a vacuum, but rather grew out of the earlier South Dakota Family Farm Act of 1974 and was modeled upon a provision of

the Nebraska Constitution that had withstood judicial scrutiny for fifteen years. Most mid-western states also have some form of prohibition on corporate agriculture, some dating back to the turn of the last century.

The significant history of anti-corporate farming legislation was simply ignored by the Eighth Circuit. However, the fact that Amendment E was historically grounded and modeled after similar legislation that had survived scrutiny presents a much larger philosophical problem. Assume for a moment that some citizens of a state want to draft legislation to address a specific problem. They could begin from scratch, eking out every phrase anew, only to witness a succession of challenges to that law. Certainly the better practice would be to look elsewhere, for similar laws that have both addressed the problem and withstood legal scrutiny. The proponents of Amendment E did exactly that, but to no avail.

In law school, I remember being awed by the scope and nature of disciplines that were brought to bear in some of the grand cases of our time. The use of dolls and sociological studies in *Brown v. Board of Education* still sticks in my mind. Back in law school, I wondered if I would ever have the opportunity to use such evidence and ideas in a case of true significance, and luckily I was given that chance.

Although not reflected in the Eighth Circuit's opinion, the trial of Amendment E featured significant and fascinating sociological, economic, and scientific expert testimony to buttress Amendment E. William Heffernan, a sociologist who had studied the impact of corporate agriculture on rural communities, discussed how the influx of corporate ownership in agriculture negatively impacted the social fabric, quality of life, and control of life in local communities. Linda Lobao, a rural sociologist, confirmed this point as well. She recounted how several studies have shown that indicators of quality of life such as economic, social fabric, inequality and others all go down with industrialized farming.

North Carolina has seen its waterways fouled because of the impact of large corporate hog farms there. Lawrence Cahoon is an environmental scientist who has studied the impact that such "nutrient importing" has on an ecosystem, and he testified about the horrors wrought in that state.

Perhaps the most unique expert was the most appropriate, and that was from Stanley Rosendahl, a farmer and rancher from Nebraska. Nebraska passed its I-300 law in 1982, a law very similar to Amendment E and upon which E had been modeled. Mr. Rosendahl explained how I-300 had not negatively impacted agriculture in Nebraska and had created additional opportunities for family farmers. The Eighth Circuit relied on the fact that the supporters of Amendment E conducted no studies on how an anti-corporate farming law might work, but the panel ignored the fact that there was twenty years of practical experience with a similar law in the record.

Philosophically and legally, the case of Amendment E presents several dilemmas. The first is obviously how much deference must be given to validly passed citizens' initiatives, and how such initiatives should be evaluated under

the Commerce Clause. The second is how much power will corporations be allowed to wield in our society, and how much can they be restricted. Finally, perhaps the crucial issue is how much deference will be accorded to pure economic considerations, to the detriment of social and environmental concerns.

Saving the family farm is not going to be a simple or easy task, and to date various other measures have not been successful. According to Luther Tweeten, an economist who testified for the plaintiffs, the United States has been losing family farms at a rate of two percent per year. Agriculture and the family farm have been foundations of the American way of life and both a practical and ideal examples of the values of community, mutual aid, and self-reliance. The citizens of South Dakota made a reasoned and historically grounded attempt at protecting the family farm, and it was an honor to assist in the defense of Amendment E.

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An Agricultural Law Research Article

Amendment E: The Constitutional Dimensions of Unintended Consequences

by

Neil Fulton

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AMENDMENT E: THE CONSTITUTIONAL DIMENSIONS OF UNINTENDED CONSEQUENCES

NEIL FULTON†

For me, any commentary on South Dakota's Amendment E must begin with two admissions in the interest of full disclosure. First, my partner David Gerdes and I represented several investor owned utility companies in an action challenging the constitutionality of Amendment E. Second, from its inception I opposed Amendment E because I thought it was bad policy and probably unconstitutional. With those disclosures made, I can turn to what I see as Amendment E's most interesting and overlooked aspect: the vast array of unintended consequences it produced. Amendment E's impact was much wider than intended or anticipated. This overbreadth was its ultimate undoing.

I. THE PHILOSOPHICAL AND POLITICAL BACKGROUND OF AMENDMENT E

Amendment E has its roots in a romantic (and largely unrealistic at this point) vision of the "small family farmer." It is the successor to South Dakota's Family Farm Corporation Act, which was passed in 1974 because of "the importance of the family farm to the economic and moral stability of the state" and because "the existence of the family farm is threatened by conglomerates in farming."[1] It is the cousin of statutes passed in several other farm states to protect small farms from corporate encroachment.[2] It is the product of the Jeffersonian vision of an agrarian nation whose yeoman farmers serve as the backbone of democracy.[3] From this tradition of thought, Amendment E drew a focus on the practitioners and structures of agricultural activity as the determinant of whether it was good or bad. This left Amendment E without a focus on the actual nature and impact of the activity itself.

While the intellectual roots of Amendment E reach deep into American history, the purpose of its proponents was more immediate: keeping large hog producers like Murphy Farms and Tyson out of South Dakota.[4] South Dakota Farmer's Union President Dennis Wiese testified at the trial regarding Amendment E's constitutionality and demonstrated both the intellectual roots and immediate concerns of Amendment E:

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† Neil Fulton is a partner with the law firm of May, Adam, Gerdes, and Thompson, LLP.

1. S.D.C.L. § 47-9A-1 (2004).

2. *See, e.g.*, IOWA CODE §§ 9H.1 – 9H.6 (2004); MINN. STAT. § 500.24 (2004); N.D. CENT. CODE § 10-06.1-01 (2003).

3. PETER S. ONUF, JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 69-70 (The University Press of Virginia 2000); *see* THOMAS JEFFERSON, WRITINGS 842 (Merrill D. Peterson, ed), (The Library of America 1984).

4. Record at 123, 634, 646, South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F.Supp.2d 1020 (D.S.D. 2002) (No. 99-3018) (Trial Tr.). *See also* Trial Tr. 634; South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003).

> There has been, had been at that time, a lot of pressure on family structure agriculture from companies that wished to control the livestock production in particular at that time. And we saw that as a detriment to the very economy of the community of South Dakota, but specifically to any of the family farmers in that particular livestock production. So it was our effort that if we could sustain the family farm and, then, the independent business way of life that they bring to this, that it was going to be important to the whole economy. We also felt that when these companies came in with large volumes of hogs it diminished the marketplace for those independent producers thus displacing them.[5]

This rationale was communicated to the voters of South Dakota in the "pro" ballot statement, drafted in part by Wiese.[6] That statement indicated an intention to keep agricultural profits from being "skimmed out of local economies and into the pockets of distant corporations."[7] It also argued that Amendment E was needed to control large agribusinesses and to prevent them from cutting market access for family farmers.[8] Amendment E's proponents tailored its exceptions, which allowed certain types of corporate agricultural activity, to prevent out of state corporations from being able to qualify for them.[9]

From the limited but deeply held concern about the effects of large agribusiness on South Dakota farmers came the sweeping language of Amendment E. It prevented any "corporation or syndicate" from holding any interest "whether legal, beneficial, or otherwise" in real estate used for farming or from engaging in farming.[10] The term "syndicate" extended to limited partnerships, limited liability partnerships, business trusts, and limited liability companies.[11] "Farming" was defined to include any "cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products."[12]

Discussion of Amendment E up to this point had focused on philosophical and pocketbook issues for the agriculture industry and environmental concerns relating primarily to large-scale confinement hog feeding. Enter the unintended consequences of the law. Suddenly, many businesses and people were facing the harsh reality that Amendment E outlawed a much broader range of economic activities than its proponents said it would. Utility companies found themselves to be an immediate victim of these unintended consequences in their development of power generation and transmission facilities. Those people and industries that were caught in the unintended reach of Amendment E filed an

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5. *Hazeltine*, 202 F.Supp.2d. at 634.

6. Trial Ex. 513, South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F.Supp.2d 1020 (D.S.D. 2002) (No. 99-3018).

7. *Id.*

8. *Id.*

9. Trial Tr., *supra* note 5, at 226, 228, 649; S.D. CONST., art. XVII, § 22. *See generally* Trial Tr., *supra* note 5, at 224

10. S.D. CONST., art. XVII, § 21.

11. *Id.*

12. *Id.*

action arguing that it violated the Commerce Clause. Then the full consequences of Amendment E could be evaluated.

II. AMENDMENT E'S UNINTENDED IMPACT ON INDUSTRIES OTHER THAN AGRICULTURE

While Amendment E was intended by its sponsors to exclude large agribusinesses from South Dakota,[13] its language prevented other industries from successfully operating here as well. Amendment E's first section prohibited corporations and most other liability limiting business organizations from acquiring or obtaining a legal, beneficial, or other interest in "any real estate used for farming."[14] As the District Court would eventually recognize in its memorandum opinion striking down Amendment E, this meant that corporations were excluded from taking an interest in farm real estate by ownership, lease, easement, option, mineral rights, lien, contract for deed, or eminent domain.[15] The scope of unintended consequences flowing from Amendment E is suddenly clear—*no* corporation could hold *any* interest in real estate that was currently used for farming, regardless of what they intended to do with it. Industries with no real interest in agriculture, nor any direct impact on the agricultural economy, were prohibited from taking interests in land. The law did not distinguish between those pursuing production agriculture and those not. Amendment E clearly controlled many companies besides Murphy Farms and Tyson.

Chief among the unintended casualties of Amendment E were utility companies who generate or transmit gas or electricity. The most powerful example of the limits those companies faced came in the acquisition of easements for transmission lines or pipelines. Prior to Amendment E, utility companies could obtain easements for their transmission facilities with a right of access to maintain those facilities.[16] The character and use of the land would otherwise remain the same—property used for farming or ranching before the easement was granted, continued to be farmed and ranched afterwards with little daily impact on the operation.[17] Amendment E prohibited a utility corporation from obtaining easement in land that was used for farming whether by purchase or eminent domain. In order to comply with Amendment E, a transmitting utility would be forced to acquire strips or chunks of land for transmission facilities and then close that land off from farming by fences or other means.[18] This system would double or triple the expected cost of easement acquisition, place large chunks of land out of agricultural production, and interfere with ordinary farming and ranching operations in a way utility transmission easements

13. *See* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003).
14. S.D. CONST., art. XVII, § 21.
15. South Dakota Farm Bureau, Inc., v. Hazeltine, 202 F. Supp.2d 1020, 1028 (D.S.D. 2002).
16. Trial Tr., *supra* note 5, at 327.
17. *Id.* at. 327, 329.
18. *Id.* at 327-28.

previously did not.[19]

Amendment E likewise dramatically hampered the ability of utility corporations to develop new power generation facilities. Under Amendment E, a corporation could obtain agricultural land for development of a non-farm use, but only if the development was completed within five years, [20] a timeframe roughly half of that common to power plant construction projects.[21] Utility corporations also could no longer obtain options to buy agricultural property for potential future development. These limitations on the ability of utilities to acquire property for future development would significantly impair their ability to plan future development, acquire property and reasonable prices, and to ensure adequate power generation and transmission facilities. Amendment E's prohibitions also delayed the development of renewable energy sources such as wind power due to uncertainty about the ability to acquire and maintain real estate for generation facilities and transmission easements.[22]

Amendment E's impact extended well beyond utilities. Economic development officials from the State of South Dakota testified that numerous economic development prospects chose not to move to South Dakota due to an inability to comply with the law or concerns about compliance.[23] The reach of Amendment E's limits prevented the development of manufacturing, cut off land ownership for commercial hunting or other recreational uses, and limited joint ownership of farm property unless by members of the same family.[24] Ironically, at trial a substantial amount of testimony indicted that Amendment E had cut off business opportunities for "family farmers" and the flow of capital into South Dakota.[25]

Amendment E was indeed the law of unintended consequences. Intended to protect small family farmers, in practice it required that the facilities bringing utility service to rural areas interfere with the existing character and use of the land. Billed as a means to protect South Dakota's environment, it delayed the development of environmentally friendly power sources. Planned as an attack on big agribusiness, it assaulted the ordinary operations of utilities. Sold as means to sustain local economies, it stifled many types of business development. All these were results that few people saw coming.

While these unintended consequences may have been unseen by many who voted for Amendment E, they were readily apparent when the constitutionality of the law was challenged in United States District Court. The Court recognized in its memorandum opinion that requiring fee title acquisition of property for utility transmission, along with the retirement of that property from agricultural use,

19. *Id*.at 326, 327, 330, 332.
20. S.D. CONST., art. XVII, § 22, cl. 10.
21. Trial Tr., *supra* note 5, at 288.
22. *Id.* at 313.
23. *Id.* at 737, 739.
24. S.D. CONST., art. XVII, § 22, cl. 1.
25. Trial Tr., *supra* note 5, at 23-24, 124-126, 165-67, 192-96.

imposed an undue burden on interstate commerce.[26] The Court recognized that Amendment E would impermissibly make South Dakota an island in interstate commerce by the restrictions it placed on the interstate transmission of power; that placed an impermissible undue burden on interstate commerce just as an Iowa law banning the use of certain semi-truck trailers did.[27] The unintended consequences of Amendment E were ultimately the key to its undoing and the District Court's finding that it violated the Commerce Clause.

III. UNINTENTIONAL LESSONS OF AMENDMENT E

There are lessons to be learned from the passage of Amendment E and the litigation surrounding it. Three seem of particular importance.

First, the intent of the framers of any legislation is crucial background information for constitutional litigation. The evidence of the intent behind Amendment E to purposefully exclude certain businesses from South Dakota was clear and powerful.[28] In affirming the District Court's decision that Amendment E violated the Commerce Clause, a panel of the Eighth Circuit Court of Appeals relied on this evidence to find a purpose to discriminate against interstate commerce.[29] The Eighth Circuit's reliance on such evidence to strike down Amendment E and an earlier South Dakota initiative[30] demonstrates how important determining the intent of the framers of a potentially unconstitutional law can be.[31]

Second, when considering the viability of any statute or constitutional provision, its full sweep—including any unintended applications—must be considered. Unlike many Commerce Clause cases where protectionist legislation was attacked by the out of state apple growers[32], milk producers[33], or truckers[34] harmed by it, Amendment E initially fell victim to its unintended impact on transmitting utility corporations.[35] When drafting, challenging, or defending the language of any law, it is important to think about all potential applications of it and the impact it may have to persons and circumstances other than those it was intended to address.[36]

Third, state legislation designed to protect small farming operations will usually face a difficult hurdle in the Commerce Clause.[37] While certainly a topic

26. South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F.Supp.2d 1030, 1042-44, 1049-50 (2002).

27. *Id.* at 1050 (citing Kassel v. Consol. Freightways Corp., 450 U.S. 662, 669 (1981)).

28. Trial Tr., *supra* note 5, at 123, 227-28, 634, 646.

29. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594-95 (8th Cir. 2003).

30. SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995).

31. Great credit goes to Professor David Day for making this point early in the Amendment E litigation and leading the charge to obtain that information in discovery.

32. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 352-53 (1977).

33. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994).

34. Kassel v. Consol. Freightways Corp., 450 U.S. 662, 676 (1981).

35. South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F.Supp.2d 1020, 1050 (2002).

36. *See generally* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

37. *See e.g.*, *West Lynn Creamery*, 512 U.S. at 192; *Hunt*, 432 U.S. at 353-54; Am. Meat Inst. v. Barnett, 64 F.Supp.2d 906, 918-20 (D.S.D. 1999).

calling for fuller exploration elsewhere, this is in no small part due to the fact that in the debates over our constitutional structure the prevailing view was the Hamiltonian view of "a commercial people" rather than the Jeffersonian view of a nation of small agrarians.[38] Statutes that effectively protect local agricultural interests inevitably involve some conflict with interstate commerce; striking a balance between promoting small-scale agriculture and not unduly burdening interstate commerce requires a level of statutory precision that is hard to achieve.[39] More successful avenues may be available in local mechanisms such as zoning ordinances.[40]

IV. CONCLUSION

Amendment E, a law arising from some good intentions, ultimately collapsed under the weight of its poor execution and resulting unintended consequences. The many unintended and unnecessary limitations on non-agricultural activities caused the law to be struck down by the District Court. Its history shows the need for real precision in constitutional drafting and open-ended thinking in constitutional litigation.

38. THE FEDERALIST NO. 24, at 162 (Alexander Hamilton) (Clinton Rossiter ed., 1961); JAMES F. SIMON, WHAT KIND OF NATION, 28-29 (2002).

39. *E.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

40. *See e.g.*, In re Conditional Use Permit Denied to Meier, 645 N.W.2d 579, 580 (S.D. 2002).

Amendment E, Rural Communities and the Family Farm

by

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AMENDMENT E, RURAL COMMUNITIES AND THE FAMILY FARM

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I. INTRODUCTION

There is no doubt that rural communities in the Great Plains are continuing to experience a dramatic loss of population, a loss of infrastructure and a loss of services. Studies focused on this series of losses have offered a variety of solutions, but have mainly concurred about one explanation as to why these losses are occurring. The health of rural communities is suffering due to the loss of the small to mid-sized family farms that surround them.

The connection between rural towns and family farms is not new. In the 1940s, Walter Goldschmidt's famous study, *As You Reap . . .*, was the first to present evidence of this link. He concluded that the viability and the sustainability of rural communities are directly connected to the form of agriculture which surrounds them. While rural communities with a family-farm base demonstrated a healthy local economy, rural communities with a large-scale corporate farm base demonstrated a greater loss of local dollars. Rural communities with a family farm base demonstrated a high rate of local civic participation and support for local services, those without showed little and inconsistent local participation and support. Family farm-based rural communities had less economic and social stratification, large-scale and corporate farm based communities had greater numbers of both poor and rich and a reduced middle class.

Due mostly to controversy over its methodology, the Goldschmidt Hypothesis—as the study has come to be known—has been replicated and refined multiple times in the past 60 years, particularly in the past 10 years given ongoing rural community deterioration.[1] The end result of these years of study guide us back to Goldschmidt's original findings—the health of rural communities is dependent on a family farm base.[2]

Buoyed by the strength of this evidence, beginning in the 1970s policy advocates and legislatures began anew to develop a series of policies designed to

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1. *See* Dr. Rick Welsh & Dr. Thomas A. Lyson, *Anti-Corporate Farming Laws, the "Goldschmidt Hypothesis" and Rural Community Welfare, available at* http://www.i300.org/anti_corp_farming.htm. *See also* DAVID PETERS, REVISITING THE GOLDSCHMIDT HYPOTHESIS: THE EFFECT OF ECONOMIC STRUCTURE ON SOCIOECONOMIC CONDITIONS IN THE RURAL MIDWEST, TECHNICAL PAPER P-0702-1, MISSOURI DEP'T OF ECON. DEV. 25-26 (July 2002).

2. *See generally* Welsh & Lyson, *supra* note 1.

limit the expansion of large-scale corporate agribusiness enterprises. These policies have recently come under legal attack in all nine states which enacted these policies into law. This article will present an overview of rural community development initiatives which have been forwarded to redress rural America's problems. Then the specifics of Amendment E and Initiative 300, as they apply to the social issues which they were intended to address, and the outcomes which they have demonstrated during the period of their enactment will be discussed.

II. RURAL DEVELOPMENT

The strain on rural communities and family farms remains beyond doubt. A brief look at census data in South Dakota reveals parallel drops in both rural community and farm populations, and their standard of living. Between 1973 and 1998, South Dakota lost 13,000 farms although the acreage in farming stayed almost steady during that same time period.[3] Between 1990 and 2000, twenty-nine farm counties in South Dakota showed population losses ranging from two percent to twenty percent.[4] The hardest hit counties are in the northern and western areas of the state. Harding County alone, for example, showed a net population loss of 18.9 percent from 1990 - 2000.[5]

In addition to the loss of people is the loss of income. As their population numbers fell, residents in Harding County also experienced a 17.5 percent drop in personal income.[6] They were not alone. Forty-four counties in South Dakota showed a net drop in employment in the civilian labor force ranging from .3 to 8.4 percent.[7] Four counties show a loss in private business establishments of over 20 percent from 1990 - 1998.[8] For the nonfarm jobs which remain in farm counties, the annual payroll varies from 42 percent to 68 percent of the national average per employee.[9] For many farm counties, the only numbers which have risen in the last decade are the percent change in individuals receiving social security, per capita payments of government funds and average size of farms.[10]

Many different policies and initiatives have been pursued to address the difficulties of rural communities over the past 20 years, and most of them have proven, at best, ineffective. These strategies can be encapsulated in three categories: 1) Economic development and enterprise zoning; 2) Cost-saving and consolidation of rural services and institutions; and 3) Agricultural

3. USDA - South Dakota Agricultural Statistics Service, *available at* http://www.nass.usda.gov/sd/sd-ftp/misc/state/no_farms.pdf (last visited April 21, 2004).

4. Dr. Marcey Moss & Dr. Jim Satterlee, *A Graphic Summary of South Dakota* (Sept. 2001) (Dep't of Rural Sociology, South Dakota State Univ.).

5. U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK: 2000 54 (2001).

6. *Id.*

7. *Id.* at 342.

8. *Id.*

9. *Id.*

10. *Id.* at 486, 630.

development.[11] Each of these strategies will be discussed.

Economic development initiatives in rural America have taken multiple forms. The most prominent in the late 1980s and into the 1990s was the promotion of rural manufacturing. Many rural towns created "enterprise zones"—zoned areas for outside development which were accompanied most often by a lessening of local and/or state taxes, environmental regulations and, on occasion, wage expectations. The goal of the enterprise zone structure was to bring in nonfarm industry to support the town population. Although some towns continue with this form of development today, most evidence establishes that it has not been successful, albeit for several reasons.[12] First, manufacturers were not drawn to rural areas where transportation costs could more than make up for any savings in wages, taxes, or environmental expenses. Second, as international trade agreements expanded, rural manufacturers moved their operations across national boundaries to locations with even lower wages and almost no environmental oversight. Rural American communities, and deep rural communities such as those found in South Dakota, simply could not compete. Third, continuing trade agreements have all decimated the manufacturing sector through the United States, and therefore offer little to no growth potential above and beyond the scattered sites which currently exist.

As manufacturing has faded, many rural communities were encouraged to pursue other industries which were purported to offer better alternatives, from call service centers to high technology assembly.[13] While these businesses have been steadier in the offer of job opportunities, none have shown to stem the loss of population. The jobs offered are generally minimum-wage and part-time, which ensures no company cost for employee benefits. The impact of these jobs is seen as the drop of real wages in nonfarm job sectors as noted at the outset of this section.[14]

The second drive in rural development has been for the communities to focus on consolidation of institutions and services as a cost-saving measure, and thereby balancing the precarious local economy. This solution has clearly served the opposite ends.[15] Rather than shoring up rural communities, the process of consolidation has accelerated their losses. This outcome, too, is apparent in the continuous population drop cited to open this section.

The third focus for rural development has been an emphasis on increasing agricultural scale, forms of production and the introduction of externally owned value-added processing. Although one of the newest forms introduced in the Great Plains region, initiatives for increased agriculture, including opening of

11. *See* OSHA GRAY DAVIDSON, BROKEN HEARTLAND: THE RISE OF AMERICA'S RURAL GHETTO 139-70 (University of Iowa Press 1996).

12. *Id.* at 150.

13. *Id.* at 139–41.

14. *See supra* notes 6–10 and accompanying text.

15. DAVIDSON, *supra* note 11.

agricultural land ownership and investment to absentee and/or corporate owners, has already shown not to be the solution, as is evident in census data for the past ten years. Areas which have experienced a longer presence of industrialized or corporate agriculture in the United States, such as California and the South, have ever increasing evidence of income inequality and environmental damage, which are, as Davidson argues, increased costs to the communities and which place them in even more precarious positions.[16]

In addition, there is evidence that in this development context, the Goldschmidt Hypothesis is once again integral to identifying productive change. For example, Peters' 2002 technical paper highlights several factors connected with change in rural economies which impact quality of life through a study of socio-economic measures of children-at-risk.[17] A key hypothesis in his paper addresses the impact of family farm proprietorship on outcomes of socioeconomic conditions for children. He found that "areas with greater concentrations of owner-operated farms produce better socioeconomic conditions for children."[18] Further, he directly hypothesized that "areas with greater concentrations of industrial agriculture produce worse socioeconomic conditions for children" and this hypothesis too was supported by his data.[19]

Given these results, it is a common conclusion in rural sociological and community development circles that rural communities need better care and protection than what they have previously experienced. In particular, the recent focus has been on implementing policy—whether directly addressing economic development or not—which strengthens the traditional base of rural communities and encourages a local economy. It is in that context, recently, that policy such as Amendment E has emerged.

III. FAMILY FARMS IN THE LAW

The nation's first anti-corporate farming law was placed into the Oklahoma state constitution in 1907.[20] The latest was placed into the South Dakota constitution in 1998.[21] In the intervening time and among additional states, additional laws were produced, existing laws were altered, and legal challenges were made, while the essential objective and identified need have remained virtually constant throughout. Anti-corporate farming laws presently exist in the states of Oklahoma,[22] North Dakota,[23] Minnesota,[24] Wisconsin,[25] Kansas,[26]

16. *Id.* at 153–70.
17. PETERS, *supra* note 1, at 22.
18. *Id.* at 24.
19. *Id.* at 25.
20. OKLA. CONST. art. XXII, § 2
21. S.D. CONST. art. XVII, § 22.
22. OKLA. STAT. ANN. tit. 18, § 951 & § 955 (West 2004).
23. N.D. CENT. CODE § 10-06.1-01 (2003).
24. MINN. STAT. § 500.24 (2004).
25. WIS. STAT. ANN. § 182.001 (West 2003).

Missouri,[27] Iowa,[28] Nebraska,[29] and South Dakota.[30]

Various degrees of changes have been made to these laws, ranging from the outright removal of Oklahoma's constitutional provision in 1969 to the unaltered status of Nebraska's dating back to its 1982 origin. There are varying elements between the state laws, but there are also basic characteristics shared by many in determining what corporations are allowed to own farm land and engage in farming.

Many of the common criteria can be found in the nation's current oldest law, North Dakota's statute, originally passed in 1932.[31] Its requirements that shareholders must be natural persons and that the total number of shareholders in the corporation or LLC must be limited are present in some form in most other state laws.[32] The stipulation that a certain percentage of total income of allowed corporations must come from farming is also shared by many states (i.e. Missouri 2/3 of total income;[33] Oklahoma 35 percent of total income;[34] and Iowa 60 percent of total income over three consecutive years[35]). Also, most require all shareholders or controlling shareholders be related by blood, often within the fourth degree of kinship, and that some or all of the shareholders live or work on the farm or ranch. Additional exemptions often found include those for corporations that owned land or engaged in farming prior to passage of the law, for corporations engaged in research or experimentation, and for non-profit corporations.

It is of course understandable that there would be great similarities in the laws, considering not only the tendency for lawmakers to utilize language that already exists and has defeated challenges elsewhere, but because the forces which drove the enactment were also shared. Whether in North Dakota where it was Depression-era foreclosures moving agricultural land into corporate hands, or in Nebraska where the state's large insurance companies were buying up land as profit-seeking investments, or in South Dakota where corporate encroachment took the form of previously independent farmers assuming the responsibility and risk of raising corporate-owned livestock, in each of the different time periods family farmers were confronted with what was deemed as unfair competition.

IV. DRAWING DISTINCTIONS WITH POLICY

Amendment E, like the anti-corporate farming laws in eight other states,

26. KANS. STAT. ANN. § 17-5904 (2003).
27. MO. REV. STAT. § 350.015 (2001).
28. IOWA CODE ANN. §9H.4 (West 2003).
29. NEB. CONST. art. XII, § 8.
30. S.D. CONST. art. XVII, §§ 21-24.
31. N.D. CENT. CODE § 10-06.1 (2003).
32. *Id.* at § 10-06.1-12 (2003).
33. MO. REV. STAT. § 350.010 (2001).
34. OKLA. STAT. ANN. tit. 18 § 951 (West 2004).
35. IOWA CODE ANN. § 9H.1(9)(C) (West 2004).

sought to isolate the specific elements that differentiate corporate farming from family farming. To do so, it looked to Nebraska's Initiative 300 which had withstood legal challenges up to the level of the United States Supreme Court. Although it contains some differences that affect application, Amendment E is a very close replica of Nebraska's constitutional law.

Purposes for anti-corporate farming law, according to proponents, include leveling the competitive playing field between financially powerful corporations and independent producers of lesser means, maintaining the condition where profit from agricultural production is gained by those who directly face the risk, and preventing the detrimental impacts on communities from the industrial model of farming.

As stated by Dean MacCannell in his 1983 report to Congress on agribusiness and the small community:

> Everyone who has done careful research on farm size, residency of agricultural land owners and social conditions in the rural community finds the same relationship: as farm size and absentee ownership increases, social conditions in the local community deteriorate. In our own studies, we have found depressed median family incomes, high levels of poverty, low education levels, social and economic inequality between ethnic groups, etc., associated with land and capital concentration in agriculture.[36]

MacCannell further summarized his findings: "Communities that are surrounded by farms that are larger than can be operated by a family unit have a bi-modal income distribution with a few wealthy elites, a majority of poor laborers, and virtually no middle class."[37] To address these negative impacts on rural communities from absentee and risk-shielded corporate land owners, Initiative 300 identified in policy the criteria that could best delineate corporate farming from family farming.

First, corporate control of farm and ranch operations was subjected to family, or blood relative, requirements.[38] As stated in Article XII, Section 8 (A), a family farm corporation means "the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses . . . ."[39] South Dakota's Constitution in Article 17, Section 22 (1) states that "the majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family."[40]

Second, the policy seeks to prevent the division between "wealthy elites"

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36. Dean MacCannell, Agribusiness and the Small Community 7 (1983) (unpublished manuscript, on file with author).

37. *Id.*

38. *See, e.g.* NEB. CONST. art. XII, § 8 cl. 1(A).

39. *Id.*

40. S.D. CONST. art. XVII, § 22 cl. 1.

and "poor laborers." This is achieved through residency, labor and management requirements. Nebraska requires that one member of the family "is a person residing on or actively engaged in the day to day labor and management of the farm or ranch . . . ." [41] South Dakota's Constitution further states "[d]ay to day labor and management shall require both daily or routine substantial physical exertion and administration."[42]

V. MEETING OBJECTIVES

The relative success of Nebraska and South Dakota's provisions is on one level answered solely by whether or not corporations continue to own agricultural land and engage in agricultural production. Since the establishment of Nebraska's law, there have been actions taken by the Attorney General's office and citizens against corporate operations within the state that have led business cessation or the restructuring of business. There is some debate as to whether an enforcement effort has been undertaken in South Dakota due to the legal challenges present to that state's provision.

A second approach used in judging the success of anti-corporate farming law is to assess the conditions in states with such laws as compared to states without comparable statutes. Such an assessment was undertaken by Dr. Rick Welsh of Clarkson University and Dr. Tom Lyson of Cornell University.[43] Their 2001 report, *Anti-Corporate Farming Laws, the "Goldschmidt Hypothesis" and Rural Community Welfare*, examined the 433 counties in the United States which meet the definition of agriculturally dependant counties over ten years.[44] By comparing the counties within the nine states nationwide that have anti-corporate farming laws to counties in states without such laws, they found lower poverty levels, lower unemployment, and higher percentage of farms showing cash gains in those communities located in states with anti-corporate farming laws.[45] In fact, when examining only the nine states with anti-corporate farming laws, and comparing those with more restrictive laws such as Nebraska's to those with less, communities in the more-restrictive law states have not only lower unemployment but also have a greater percentage of farms with cash gains.[46]

Additionally, in using an economic basis, according to the 2003 report from Nebraska's state department of agriculture, *The Agricultural Economy in Nebraska: Making Nebraska the Agricultural Leader of the 21st Century*:

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41. NEB. CONST. art. XII, § 8 cl. 1(A).

42. S.D. CONST. art. XVII, § 22 cl. 1.

43. *See* Welsh & Lyson, *supra* note 1. It is interesting to note that this report has been cited as evidence to support the loosening of the state's law, even as its survey found that four out of five farmers and ranchers interviewed rejected the premise that Initiative 300 is harmful to agriculture, and not one of the corporations surveyed asserted that initiative 300 be eliminated or relaxed.

44. *Id.* at 6.

45. *Id.* at 10.

46. *Id.* at 11.

> [Nebraska] is currently the #3 corn producer in the U.S., the #5 soybean producer, the #3 livestock producer, and the largest red meat producer and livestock slaughterer. In total, Nebraska produces more agricultural value than all but three states in the U.S., and it has increased its position in each of the above categories over the past decade.[47]

The social and economic outcomes of the predecessor of Amendment E, Nebraska's I-300, are powerful evidence for the important of this legislation. Indeed, the outcomes demonstrate not only continued agricultural productivity, but more secure rural communities in states where such protections exist. In this way, perhaps we would be better served by approaching Amendment E as a development plan, rather than perceiving it as a market restriction.

VI. CONCLUSION

Rural communities have been the object of multiple forms of development in the recent past, and industrialized agriculture is only the most recent to be encouraged, despite mounting evidence of overall harm. The connection between rural communities and family farms is both clear and common sense. Rural communities, for their survival, require a solid base, a local economy in which income circulates through many hands in the community, and an economy where profit remains in place. An industrialized agriculture economy thrives on an economy where money is extracted from place and returned to centralized investment and control. That is not to say that industrialized agriculture is not a profitable business, but where does the profit go? Can rural communities continue to export not only their people, but also their economy?

Cornelia Flora commented during the 1980s farm crisis that "Agriculture is not the problem. Agriculture is doing just fine. It is the people who are having the problems."[48] And the people are still having problems. It is these problems that Amendment E was intended to address. Ironically, it appears to be the only effective rural development policy to do so.

47. DECISION ANALYST, INC., THE AGRICULTURAL ECONOMY IN NEBRASKA: MAKING NEBRASKA THE AGRICULTURAL LEADER OF THE 21ST CENTURY – FINAL REPORT 38 (2003).

48. DAVIDSON, *supra* note 11, at 13 (quoting Cornelia Butler Flora, Rural Sociologist).

The Eighth Circuit Grants Corporate Interests a New Weapon Against State Regulation in *South Dakota Farm Bureau v. Hazeltine*

by

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THE EIGHTH CIRCUIT GRANTS CORPORATE INTERESTS A NEW WEAPON AGAINST STATE REGULATION IN *SOUTH DAKOTA FARM BUREAU V. HAZELTINE*

SUSAN E. STOKES[†] AND CHRISTY ANDERSON BREKKEN[††]

I. INTRODUCTION

Policy choices about the structure of the agricultural industry are appropriate for society to make deliberately, as the voters of South Dakota did when they passed Amendment E.[1] Family farms are more than just another business that can come and go without notice; their fate affects the livelihoods of a great number of real people who have a direct interest in farm policy. Family farms, and the families that operate them, strive to build sustainable rural communities, promote responsible stewardship of soil, water, and other resources, and ensure through family ownership that land can be farmed by future generations.[2] Rural and urban citizens alike share a connection to family farms and the values they represent.

"Farmers' Legal Action Group, Inc. (FLAG) is a nonprofit law center dedicated to providing legal services to family farmers and their rural communities in order to help keep family farmers on the land."[3] FLAG submitted a brief of *Amici Curiae* on behalf of a broad coalition of farm organizations[4] to the Eighth Circuit in *South Dakota Farm Bureau v. Hazeltine*[5] urging rehearing *en banc*, [6] and to the United States Supreme Court, urging the Court to grant the petitions for certiorari.[7] These organizations, along with their

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†† J.D. expected 2005, University of Minnesota Law School; Law Clerk, Farmers' Legal Action Group, Inc. For a more in depth discussion of the topic, *see* Christy Anderson Brekken, Note, South Dakota Farm Bureau, Inc. v. Hazeltine: *The Eighth Circuit Abandons Federalism, Precedent, and Family Farmers*, 22 LAW & INEQ. __ (forthcoming 2004).

1. S.D. CONST. art. XVII, §§ 21-24 (prohibiting corporations from farming or owning farmland).

2. *See, e.g.*, MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION 32-42 (University of Nebraska Press 1988).

3. *See* http://www.flaginc.org (last visited May 5, 2004).

4. The organizations joining in the Eighth Circuit *amicus* included: the National Farmers Union, Minnesota Farmers Union, South Dakota Farmers Union, Iowa Farmers Union, North Dakota Farmers Union, Land Stewardship Project, Iowa Citizens for Community Involvement, Missouri Rural Crisis Center, Illinois Stewardship Alliance, Citizens Action Coalition of Indiana, Campaign for Family Farms, and Western Organization of Resources Council. Friends of the Constitution, and National Family Farm Coalition, also joined in the United States Supreme Court *amicus*.

5. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (*motion for rehearing* en banc *denied; petitions for cert. filed, (U.S.* January 29, 2004) (Nos. 03-1108 and 03-1111), *cert. denied,* 124 S.Ct. 2095 (2004).

6. Brief of Amici Curiae National Farmers Union et al. in Support of Petition for Rehearing En Banc, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (Nos. 02-2366, 02-2588, 02-2644, 02-2646) (motion for rehearing *en banc* denied) [hereinafter Brief of Amici Curiae for Rehearing En Banc].

7. *See generally* Brief of Amici Curiae National Farmers Union et. al in Support of Petitions for

thousands of members, have an interest in preserving the family farm as the basic unit of American agriculture.[8] They all have worked to enact and protect similar state laws that support family farmers and prevent the corporate takeover of agriculture.[9]

II. LAWS SUPPORTING FAMILY FARMS ARE A NECESSARY AND LEGITIMATE SUBJECT OF STATE REGULATION

Nine states, including South Dakota, have legislation or constitutional amendments that limit corporate ownership of farmland or corporate farming activities.[10] The North Dakota, Missouri and Nebraska laws have been upheld against constitutional challenges under the Privileges and Immunities Clause, Contract Clause, and the Equal Protection and Due Process Clauses of the 14th Amendment.[11] No challenges to such a law have been brought under the dormant Commerce Clause, and commentators had doubted the success of such a challenge.[12] These pro-family farming state laws have long been relied on as critically necessary to support family farms and rural economies, and to stave off corporate concentration and vertical integration in the agricultural sector.

South Dakota voters made a conscious choice about the structure of their local agricultural system in 1998 when nearly 60% of South Dakota voters, including two-thirds of the state's farmers, adopted Amendment E after lively political debate.[13] Voters recognized that it is the secondary effects of the corporate control of farms, such as absentee-ownership, large size, and monopolistic effects, which are a threat to their rural economies and environment.[14]

Writ of Certiorari, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (Nos. 03-1108 and 03-1111) [hereinafter Brief of Amici Curiae for Writ of Certiorari] (Nelson replaced Hazeltine as the South Dakota Secretary of State).

8. Brief of Amici Curiae for Rehearing En Banc at 1, *South Dakota Farm Bureau.*

9. *Id.* at 2.

10. *See* IOWA CODE §§ 9H.1-9H.15 (2001); KAN. STAT. ANN. §§ 17-5902-17-5904 (2003); MINN. STAT. § 500.24 (West 2004); MO. ANN. STAT. § 350.015 (West 2004); Neb. CONST. art. 12, § 8; N.D. CENT. CODE §§ 10-06.1-01 – 10-06.1-27 (2001); OKLA. CONST. art. XXII, § 2; S.D.C.L.§§ 47-9A-1–47-9A-23 (2003) and S.D. CONST. art. XVII, §§ 21-24; and WIS. STAT. § 182.001 (2003).

11. Asbury Hosp. v. Cass Co., 326 U.S. 207 (1945) (upholding North Dakota law against privileges and immunities, contract clause, due process and equal protection challenge); MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) (upholding Nebraska constitutional amendment against equal protection and due process challenges); State ex. rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. 1988) (en banc) (upholding Missouri statute against equal protection and due process challenges).

12. *See* John C. Pietila, *"[W]e're Doing this Ourselves": South Dakota's Anticorporate Farming Amendment*, 27 J. CORP. L. 149, 164-68 (2001). *See* Martin J. Troshynski, *Corporate Ownership Restrictions and the United States Constitution*, 24 IND. L. REV. 1657, 1664-67 (1991).

13. Pietila, *supra* note 12, at 156-57.

14. See infra notes 20-39 and accompanying text.

A. STATES HAVE THE POWER TO STRUCTURE LOCAL MARKETS AND CORPORATE ACTIVITY

It is well-established that states have the power to "exclude a foreign corporation, or to limit the nature of the business it may conduct within the state . . . ."[15] Corporations are a creation of the state, which confers certain advantages and imposes certain burdens, and this has long been recognized by the Supreme Court.[16] For the purposes of a dormant Commerce Clause analysis, the state has a legitimate interest in regulating the operation of corporations in its jurisdiction.[17] Regulating the operation of agricultural corporations within its borders thus seems to fall within these long accepted state powers.

Similarly, a state "has the authority to determine the course of its farming economy."[18] The Eighth Circuit has concluded that the policy "to retain and promote family farm operations . . . by preventing the concentration of farmland in the hands of non-family corporations . . . represents a legitimate state interest."[19]

B. RETAINING FAMILY FARMS IS A LEGITIMATE STATE POLICY CHOICE

Family-owned farms are the backbone of the economy in a rural, farm-dependent state like South Dakota. For decades, studies have demonstrated that residents of rural communities supported by family farms have a much higher standard of living than those living in rural communities surrounded by industrialized farms.[20] Rural development experts have estimated that one business in the local town closes for every five to seven farms that go out of

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15. *Asbury Hosp.*, 326 U.S. at 211.

16. Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

17. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) ("We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.").

18. Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814, 820 (8th Cir. 2001). *See also* Exxon Corp. v. Maryland, 437 U.S. 117, 128-29 (1978) (stating state has power to regulate the local retail petroleum industry).

19. MSM Farms, Inc. v. Spire, 927 F.2d 330, 333 (8th Circ. 1991). The Missouri Supreme Court has echoed the same principle: "It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community . . . ."; State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 806 (Mo. 1988).

20. Walter Goldschmidt, *Small Business and the Community: A Study of the Central Valley of California on Effects of Scale of Farm Operations*, reprinted by Senate Special Committee to Study Problems of American Small Business, 79th Cong., 2d Sess., Report of the Special Committee 13 (Comm. Print. 1946); *see also,* David J. Peters, *Revisiting the Goldschmidt Hypothesis: The Effect of Economic Structure on Socioeconomic Conditions in the Rural Midwest*, Missouri Economic Research and Information Center, Technical Paper P-0702-1, Missouri Dep't of Econ. Dev. 25 (July 2002), *available at* http://www.missourifarmersunion.org/conf03/goldschmidt03.pdf.

business.[21] The loss of farms and local businesses causes further deterioration of rural communities, which already have lower levels of basic services, less diverse economies, and higher levels of poverty in general.[22] States, who shoulder the burden of caring for their residents who live in economically depressed areas and in poverty, have an obvious interest in fostering healthy, vibrant rural communities.

1. Local ownership ensures the health of rural economies

The USDA National Commission on Small Farms associates absentee land ownership with deterioration of rural communities, while recognizing that local and "[d]ecentralized land ownership produces more equitable economic opportunity for people in rural communities, as well as greater social capital."[23] "Land owners who rely on local businesses and services for their needs are more likely [than absentee owners] to have a stake in the well-being of the community and the well-being of its citizens,"[24] a present and long-term connection to their land, and thus both emotional and business incentives to manage their natural resources responsibly.[25] Absentee ownership does not only refer to out-of-state owners; a landowner managing a farm from across the state creates the same absentee-ownership concerns.[26] Amendment E's requirement that landowners be present and participate in the direct management of the farm addresses the problem of absentee ownership directly without targeting only out-of-state farm owners.[27]

2. Family farms mitigate environmental damage

Family-owned farms tend to be smaller and more diverse operations,

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21. OSHA GRAY DAVIDSON, BROKEN HEARTLAND: THE RISE OF AMERICA'S RURAL GHETTO 57 (University of Iowa Press 1996).

22. *See* Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Service Practitioners*, 29 CLEARINGHOUSE REV. 1087, 1092 (1996); Steve H. Murdock et al., *Impacts of the Farm Financial Crisis of the 1980s on Resources and Poverty in Agriculturally Dependent Counties in the United States, in* RURAL POVERTY: SPECIAL CAUSES AND POLICY REFORMS 68-72 (Harrell R. Rodgers, Jr. & Gregory Weither eds., 1989).

23. U.S. DEP'T OF AGRIC., NAT'L COMM'N ON SMALL FARMS, A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS 13 (1998) [hereinafter COMM'N ON SMALL FARMS] *available at* http://www.csrees.usda.gov/ (last visited May 18, 2004).

24. COMM'N ON SMALL FARMS, *supra* note 23, at 13.

25. *See generally* COMM'N ON SMALL FARMS, *supra* note 23, at 13; Richard F. Prim, *Minnesota's Anti-corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 HAMLINE L. REV. 431, 441 (1995) [hereinafter Prim, *Minnesota's Anti-corporate Farm Statute*].

26. *See* South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F.Supp.2d 1020, 1047 (D.S.D. 2002) ("By the same token, a person engaged in agriculture who lives in Aberdeen, for example, and wishes to manage farm land in Lyman County also could personally not do business in a limited liability format.").

27. S.D. CONST. art. XVII, § 21 ("No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming.").

making it easier to responsibly manage natural resources.[28] Conversely, corporate farm operations tend to be larger and are more likely to do one type of operation on a mass scale, resulting in greater industrialization in farming.[29] Serious odor problems and ground and surface water contamination from large manure lagoons arise from greater concentrations of animals confined in smaller areas.[30] In grain production, industrialization requires greater use of petroleum fuels, chemical fertilizers, and pesticides.[31] Amendment E facilitates an agricultural industry based on locally owned farms, which pose less of an environmental threat to the surrounding community.

3. *Diverse local ownership promotes free and fair markets*

Increasing corporate concentration and vertical integration of farming operations have squeezed family farmers out of agricultural markets.[32] In 2000, four firms controlled 81% of the beef processing industry and four firms controlled 56% of the nation's hog processing industry.[33] The number of American slaughterhouses for cattle and pigs has declined by two-thirds since 1980.[34] At the same time, processors have locked up the supply chain through the use of captive supplies. In the hog industry, more than 83 percent of hogs were committed to packers through ownership or contractual arrangements in 2002, up from 38 percent in 1994.[35] "Concentration translates into the loss of open and competitive markets at the local level . . . . The basic tenets of a 'competitive' market are less and less evident in crop and livestock markets

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28. *See* COMM'N ON SMALL FARMS, *supra* note 23, at 13; Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL'Y 203, 206-07 (1993) [hereinafter Prim, *Saving the Family Farm*] ("The family farm of the past was perfectly environmentally efficient. Farmers raised grain and livestock. The farm was its own closed ecological cycle." (citation omitted)). Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC 835, 838 (1996) ("The traditional family farm has been the most socially and environmentally sound method of agricultural production . . . .").

29. *See* Prim, *Saving the Family Farm, supra* note 28, at 207.

30. Prim, *Minnesota's Anti-corporate Farm Statute*, *supra* note 25, at 447; Stout, *supra* note 28, at 842-43 (describing confinement method of industrial hog facilities) and 848-50 (describing the environmental consequences of industrial hog facilities, which "flushes animal waste . . . into football field size lagoons," where leaks and spills kill fish and enter the local water supply.); Marlene Halverson, *The Price We Pay for Corporate Hogs*, Institute for Agriculture and Trade Policy (July 2000) at 47, *available at* http://www.iatp.org/hogreport/indextoc.html (contrasting farms where manageable numbers of livestock are raised and manure can be composted or used as fertilizer for crops with operations raising only one type of livestock in concentrated numbers, where huge amounts of waste cannot responsibly be used or spread at that site).

31. *See* Prim, *Saving the Family Farm, supra* note 28, at 207.

32. *See generally* COMM'N ON SMALL FARMS, *supra* note 23, at 5; Prim, *Saving the Family Farm*, *supra* note 28, at 206.

33. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001* (June 2002) at 18, 38, *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf.

34. *See* Alan Barkema et al., *The New Meat Industry* (2001) at 35, *available at* http://www.kc.frb.org/PUBLICAT/ECONREV/PDF/2q01bark.pdf.

35. University of Missouri and National Pork Board, *Hog Marketing Contract Study* (Jan. 2002), *available at* http://agebb.missouri.edu/mkt/vertstud.htm.

today."[36] As the market is captured by the biggest players, independent farmers find themselves without a competitive market in which to sell their products,[37] driving them into unfavorable contracts or out of business.[38]

As noted above, this loss of family farms has a ripple effect on rural economies.[39] Amendment E was intended by the voters to be a reasonable method of combating the evils of vertical integration of the agricultural industry in South Dakota by not allowing the same firms that control farm inputs and processing farm products to also own the means of production.

C. FAMILY FARMS ARE A VIABLE BASIS FOR A STATE'S AGRICULTURAL INDUSTRY

Opponents to Amendment E claim that the family farm is no longer an economically viable unit in today's agricultural marketplace. Studies show, however, that "small family and part-time farms are at least as [economically] efficient as larger commercial operations. In fact, there is evidence of diseconomies of scale as farm size increases."[40] If family-owned small and medium-sized farms are as "economically" efficient as large corporate-owned farms and also serve additional social goods, such as stabilizing rural economies and avoiding monopolization of markets, states have an incentive to level the playing field for family farms by prohibiting agribusiness firms from engaging in one type of farm activity out of many in the industry—actually owning the farm.

III. THE DORMANT COMMERCE CLAUSE WAS NOT INTENDED TO PROTECT PARTICULAR CORPORATIONS OR TO INVALIDATE LEGITIMATE STATE LAWS

A. DISCRIMINATORY PURPOSE ALONE SHOULD NOT TRIGGER STRICT SCRUTINY

The Supreme Court and Eighth Circuit have stated in *dicta* that a discriminatory purpose can trigger strict scrutiny,[41] but in no case has discriminatory purpose alone been sufficient.[42] One would expect that a law

36. COMM'N ON SMALL FARMS, *supra* note 23, at 13.

37. *See generally* COMM'N ON SMALL FARMS, *supra* note 23, at 37 ("Current concentration figures indicate that the four largest firms control 80 percent of the steer and heifer market . . . . [There is] increasing pressure to conform to contract markets because of reduced buyer competition in the cash market.").

38. Neil Harl, *The Structural Transformation of Agriculture*, Iowa State University (March 20, 2003) at 4-5, *available at* http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf.

39. *See supra* notes 20-22 and accompanying text.

40. COMM'N ON SMALL FARMS, *supra* note 23, at 8 (citation omitted).

41. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 270 (1984); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995).

42. *See, e.g., Bacchus Imps., Ltd.*, 468 U.S. at 273 ("[I]t had both the purpose and effect of discriminating in favor of local products."); *SDDS, Inc.*, 47 F.3d at 272 ("Although facially neutral, the referendum had a discriminatory purpose and a sufficiently discriminatory effect to trigger strict scrutiny.").

would have the *practical effect* of discriminating if it was drafted with the *purpose* of discriminating. This simple principle underlies the analysis of the Court in *Clover Leaf Creamery Co.*[43] and *Exxon*,[44] and of the Eighth Circuit in *Hampton*[45] and *SDDS, Inc.*[46] The *South Dakota Farm Bureau* court failed to find discriminatory effect, however, and seems to reach for a basis to invalidate South Dakota's Amendment E by resting its decision on discriminatory purpose alone.

B. DIFFERENTIAL TREATMENT OF PROTECTED IN-STATE AND OUT-OF-STATE INTERESTS AMOUNTS TO IMPERMISSIBLE DISCRIMINATION

Both the Supreme Court and the Eighth Circuit have made it clear that "[f]or purposes of the dormant Commerce Clause, 'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[47] Amendment E does not treat in-state interests any differently than out-of-state economic interests, nor does it affect the economic interests protected by the dormant Commerce Clause.

1. Differential treatment is required for a finding of discrimination

Differential treatment does not occur if a law has the same impact on the affected in-state and out-of-state interests.[48] If it "regulates evenhandedly" to effectuate a legitimate state purpose, there is no discrimination. Amendment E does not apply "differential treatment" to in-staters and out-of-staters.[49] No non-family farm corporations may engage in farming or own farmland in South Dakota, whether they are in-state or out-of-state corporations. In fact, some of the *South Dakota Farm Bureau* plaintiffs were South Dakota corporations or corporations already operating in South Dakota that were prohibited from buying

43. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

44. Exxon Corp. v. Maryland, 437 U.S. 117, 125-28 (1978).

45. Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814, 819 (8th Cir. 2001).

46. *SDDS, Inc.*, 47 F.3d at 268-72.

47. Hampton Feedlot, Inc., 249 F.3d at 818 (quoting Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

48. *E.g., Exxon Corp.*, 437 U.S. at 125-28; *Clover Leaf Creamery Co.*, 449 U.S. at 471-72 ("Minnesota's statute does not effect 'simple protectionism,' but 'regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State."); Hampton Feedlot, Inc., 249 F.3d at 820.

49. S.D. CONST. art. XVII, §§ 21-24 prohibits corporate ownership of land and corporate farming activities such as contract operations, including most partnership and other limited-liability vehicles. It exempts "family farm" corporations or cooperatives where the majority of the stock is held by related persons and at least one of those persons resides on the property or engages in the day-to-day operation of the farm. Corporations seeking the exemption must file with the secretary of state. It also exempts certain farming activities, such as agricultural research; growing seed, nursery plants or sod; owning mineral rights in agricultural land; custom spraying, fertilizing or harvesting; and others. *See* South Dakota Farm Bureau v. Hazeltine , 202 F.Supp.2d 1020, 1047 (D.S.D. 2002) ("By the same token, a person engaged in agriculture who lives in Aberdeen, for example, and wishes to manage farm land in Lyman County also could personally not do business in a limited liability format.").

more farmland—proving that the law "regulates evenhandedly" while effectuating the legitimate state purpose of regulating the local agricultural industry and corporate activity within its borders.[50]

2. *Particular corporations are not protected interests under the dormant Commerce Clause*

The "interests" protected by the Commerce Clause are defined in terms of the market as a whole; they are *not* the interests of particular firms.[51] The case most analogous to *South Dakota Farm Bureau* is *Exxon Corp. v. Governor of Maryland*,[52] which upheld a Maryland law intended to eliminate vertical integration of the petroleum industry within the state.[53] In *Exxon*, producers and refiners of petroleum were prohibited from operating retail service stations, but because there were virtually no petroleum producers or refiners in the state, the burden of the law fell almost exclusively on out-of-state companies while the benefits fell almost entirely on local independent service stations.[54] The fact that interstate companies bore the burden of the law did not establish a claim of discrimination against interstate commerce.[55] The Supreme Court emphasized that "[t]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[56]

The *South Dakota Farm Bureau* court's preoccupation with the Amendment E drafters' desire to keep Tyson and Murphy hog confinement facilities out of the state has no place in a dormant Commerce Clause analysis.[57] The dormant Commerce Clause does *not* protect particular firms, even if those firms happen to be from out-of-state and control a large portion of the national market. Amendment E does not substantially burden the interstate market for agricultural products, as in-state and out-of-state businesses can still buy

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50. South Dakota Farm Bureau v. Hazeltine, 340 F.3d 583, 588-89 (8th Cir. 2003).

51. *Exxon Corp.*, 437 U.S. at 127-28 ("The Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

52. 437 U.S. 117 (1978).

53. *See generally id. See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 416 (2d ed. 1988) ("[T]he Court upheld a statute that required vertically-integrated oil companies, whether in-state or out-of-state, to divest themselves of their retail operations.").

54. *Exxon Corp.*, 437 U.S. at 125-27. The Court noted:

> Of the class of stations statutorily insulated from the competition of the out-of-state integrated firms . . . more than 99% were operated by local business interests. Of the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms, operating 98% of the stations in the class.

Id. at 138 (Blackmun, J., concurring in part and dissenting in part).

55. *Id.* at 126.

56. *Id.* at 127-28.

57. *See* South Dakota Farm Bureau v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003) (discussing the "hog meetings" dealing with the proposed Tyson and Murphy hog confinement facilities). Additionally, as a matter of statutory construction it was inappropriate for the court to consider private meetings of some of the individuals involved in drafting Amendment E and testimony given after Amendment E was passed. Brief of Amici Curiae for Rehearing En Banc at 3-7, Brief of Amici Curiae for Writ of Certiorari at 14 n. 5, *South Dakota Farm Bureau*.

livestock from South Dakota farmers, and South Dakota farmers can sell their livestock on the interstate market. As in *Exxon*, because the market would continue to operate properly under Amendment E, there is no burden on the movement of goods within interstate commerce and no discrimination exists.[58]

The Court in *Exxon* also rejected the assertion that "the Commerce Clause protects the particular structure or methods of operation in a retail market."[59] The "interests" protected by the dormant Commerce Clause are *not* associated with a particular market structure, such as a vertically integrated industry, or method of operation in the market, such as a form of business organization like a corporation.[60] The dormant Commerce Clause is only implicated when a state's regulation substantially burdens the movement of goods among the states.[61] Amendment E does not burden the movement of goods among the states.

The operation of local agricultural markets is within South Dakota's power to regulate.[62] South Dakota may enact laws to prevent vertical integration of its livestock market, as Maryland did with the petroleum market in *Exxon*. South Dakota also has a legitimate interest in regulating corporate operations within its borders.[63] Tyson and Murphy are free to do business in the state in accordance with the laws of the state.

IV. CONCLUSION

The Eighth Circuit's decision in *South Dakota Farm Bureau* charts a troubling new course in dormant Commerce Clause jurisprudence and should be overturned. First, Amendment E is within the regulatory power of the state and is a legitimate policy choice made by the voters of South Dakota. The decision undermines a state's power to legislate for the health, safety and welfare of its people. Second, Amendment E applies to corporations within and outside of South Dakota equally. Without a discriminatory effect, there is no basis for finding it violates the dormant Commerce Clause. Finally, *South Dakota Farm Bureau* may be used to strike down other legitimate laws intended to support family farms. Other state laws that regulate local economies and the operation of corporations within a state's borders also will be vulnerable to attack. If not overturned, *South Dakota Farm Bureau* will thwart states' legitimate regulations intended to foster healthy rural communities.

58. *Exxon Corp.*, 437 U.S. at 126.
59. *Exxon Corp.*, 437 U.S. at 127.
60. *See id.*
61. *Id.* at 126.
62. *See supra* notes 18-19 and accompanying text.
63. *See supra* notes 15-17 and accompanying text.

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An Agricultural Law Research Article

The Past, Present and Future of Anti-Corporate Farming Laws in South Dakota: Purposeful Discrimination or Permissive Protectionism?

by

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THE PAST, PRESENT AND FUTURE OF ANTI-CORPORATE FARMING LAWS IN SOUTH DAKOTA: PURPOSEFUL DISCRIMINATION OR PERMISSIVE PROTECTIONISM?

JEFFREY M. BANKS†

Since 1974, South Dakota has attempted to restrict corporate access to agricultural land due to a perceived threat against the economic and moral stability of the state represented by the family farm. This threat, brought to South Dakota by conglomerates and other corporate forms of farm ownership, has prompted further restrictions on corporate farm ownership. However, thirty years after the Family Farm Act became law, South Dakota legislators attempted to expand anti-corporate farming laws as the Eighth Circuit Court of Appeals struck down 1998's Amendment E as unconstitutional.

I. INTRODUCTION

The family farm and agricultural production define the economic and rural tradition of South Dakota.[1] While the state of South Dakota boasts strong manufacturing, financial services, and tourism sectors, agriculture remains the state's leading industry.[2] South Dakota is also one of the nation's leading producers of farm commodities.[3] Almost ninety-one percent of land in South Dakota is farm land,[4] and just under fifty percent of the population lives in rural communities.[5] South Dakota's reliance on agriculture has prompted voters and legislators to place restrictions on corporate farm ownership in hopes of preserving the family farm.[6]

The purpose of this note is to examine South Dakota's effort to restrict corporate farming, and whether, in light of these restrictions, the state has

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1. John C. Pietila, *"We're Doing This to Ourselves": South Dakota's AntiCorporate Farming Amendment*, 27 J. CORP. L. 149, 150 (2001). *See also* S.D.C.L. §47-9A-1 (2000 & Supp. 2003) (recognizing "the importance of the family farm to the economic and moral stability of the state."). *Cf.* Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679 (1991).

2. South Dakota Governor's Office of Economic Development, South Dakota Agricultural Profile, at http://www.sdgreatprofits.com/SD_Profiles/sdag.htm (last visited Feb. 16, 2004). South Dakota had a $15 billion agriculture industry as of 1998. William Claiborne, *Fighting the 'New Feudal Rulers'; S. Dakota Farmers Split on Family Tradition vs. Corporate Efficiency,* WASH. POST, *Jan. 3, 1999, available at* 1999 WL 2191913.

3. South Dakota Governor's Office of Economic Development, *supra* note 2. South Dakota ranks second in the nation in production of hay, sunflower and flaxseed, and in the top ten in most commodities. *Id.*

4. *Id.* There are forty-four million acres of farmland out of 48,566,400 acres in South Dakota. *Id.* The average farm size is 1,354 acres. *Id.* There are over 16 million acres of harvested croplands on 32,500 farms. *Id.*

5. South Dakota Governor's Office of Economic Development, South Dakota Demographic Profile, at http://www.sdgreatprofits.com/SD_Profile/demographics.htm (last visited Feb. 16, 2004). As of the 2000 Census, 363,417 people lived in rural communities while 391,427 lived in urban centers. *Id.*

6. S.D.C.L. §§ 47-9A-1 to 9A-23 (2000 & Supp. 2003); S.D. CONST. art. XVII, §§ 21-24.

succeeded in providing the desired protection to the environment and in-state farmers in a constitutionally permissible manner. Part II provides a background of anti-corporate farming laws in South Dakota and the legal challenges to those laws, as well as a review of the rationale underlying the Eighth Circuit Court of Appeals decision holding South Dakota's Amendment E unconstitutional. Then, Part III presents the measures taken by the South Dakota Legislature in the current legislative session in response to the constitutional infirmity of Amendment E, the doctrine underlying the challenge to state anti-corporate farming laws, and analysis addressing the petition for writ of *certiorari* submitted by the state of South Dakota and Dakota Rural Action. Finally, this note concludes that the proposed changes to South Dakota's anti-corporate farming laws will not cure the constitutional defects that exist and will be ineffective in protecting the environment and in-state farmers.

II. BACKGROUND

A. 1974 FAMILY FARM ACT

In 1974, South Dakota joined eight other states in restricting corporate farming when it passed the Family Farm Act.[7] The legislature passed these laws aimed at restricting corporate farming amid fears of increased competition and economic threat to family farmers and ranchers and "an adverse impact on South Dakota's traditional family farms and rural communities" by large corporate entry and "expansion of nonfarm investment in agriculture."[8] Advocates of the Family Farm Act feared a decline in family farm ownership as well as diminished economic, social and educational standards in rural areas.[9] Prior to enacting the Family Farm Act, legislators relied on a comparison of the agriculture trends in North Dakota and South Dakota between 1932 and 1968.[10] These trends showed increases in the number and size of farms but a decrease in overall farm population.[11]

However, the results of this report did not necessarily confirm fears of the adverse effects of corporate farm ownership on the family farm.[12] North Dakota was the second state to place restrictions on corporate farming, and the trends analyzed by the South Dakota Legislature were measured subsequent to the

7. Stayton, *supra* note 1, at 679; NEB. CONST. art. XII, § 8(1); OKLA. CONST. art. XXII, § 2; IOWA CODE § 9H.1-.15 (West 2001); KAN. STAT. ANN. § 17-5904 (West 1995 & Supp. 1998); MINN. STAT. ANN. § 500.24 (West 1990 & Supp. 1999); MO. ANN. STAT. § 350.015 (West 2001 & Supp. 2004); N.D. CENT. CODE § 10-06.1-02 (2001 & Supp. 2003). Oklahoma and Nebraska include these restrictions in their constitutions. Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 DRAKE J. AGRIC. L. 385, 387 (1999).

8. Pietila, *supra* note 1, at 153; Curtis S. Jensen, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer?* 20 S.D. L. REV. 575 (1975).

9. Pietila, *supra* note 1, at 153.

10. Jensen, *supra* note 8, at 578-79.

11. *Id.* at 579.

12. *Id.*

enactment of North Dakota's restrictions.[13] The Legislative Research Council concluded that the corporate ownership restrictions did not significantly protect the family farm in North Dakota, and that "the presence of farm corporations in South Dakota does not appear to have been a major cause of rural decline."[14] Therefore, the Family Farm Act was aimed more at restricting new corporate expansion and curtailing the growth of existing farm corporations rather than eliminating them.[15]

B. 1988 AMENDMENT

While the Family Farm Act contains twelve exceptions in order to best serve the interests of South Dakota's agricultural structure and economy,[16] the legislature proposed an amendment further restricting corporate farm ownership.[17] In 1988, as South Dakota was the target for expansion in hog production facilities, sixty percent of voters passed an initiated measure prohibiting hog confinement facilities.[18] This restriction prohibited corporate ownership of "any real estate used for the breeding, farrowing and raising of swine."[19] However, a number of the largest pork producers in the country were able to circumvent the restrictions as a result of an opinion of the attorney general in 1995.[20] The attorney general opined that "a corporation which engages in less than all three [breeding, farrowing and raising] is not a hog confinement facility."[21] This interpretation allowed corporations to "finance[e] hog confinement facilities [to contract] with individual South Dakota farmers to raise feeder pigs bred and farrowed in a different location."[22] However, the proliferation of production contracting and hog confinement facilities led proponents of anti-corporate farming laws to initiate a proposed constitutional amendment to further restrict corporate farming.[23]

C. AMENDMENT E

Amendment E was presented to voters in 1998 in an effort to further restrict

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13. *See id.*

14. *Id.* Declining prices and technology advancement increasing productivity have been blamed for the decline in the family farm. *Id. See also* Harbur, *supra* note 7, at 386.

15. Jensen, *supra* note 8, at 579.

16. *Id.* at 585. Exceptions were made for raising poultry and feeding livestock. S.D.C.L. §§ 47-9A-3.2, 9A-11 (2000 & Supp. 2003). South Dakota ranks sixth nationally in number of cattle and calves and fourth in number of sheep and lamb. South Dakota Governor's Office of Economic Development, South Dakota Agricultural Profile, at http://www.sdgreatprofits.com/SD_Profiles/sdag.htm (last visited Feb. 16, 2004).

17. Pietila, *supra* note 1, at 155.

18. *Id.*; S.D.C.L. § 47-9A-13.1 (2000 & Supp. 2003).

19. S.D.C.L. § 47-9A-13.1 (2000 & Supp. 2003).

20. Pietila, *supra* note 1, at 155-56.

21. Family Farm Act/Cooperatives, Op. S.D. Att'y Gen. 95-02 (1995), *available at* 1995 WL 155155 (S.D.A.G.).

22. Pietila, *supra* note 1, at 156.

23. *Id.* "North Carolina-based Murphy Family Farms, then the largest hog producer in the nation, was operating twenty contract hog-feeding facilities in South Dakota and had announced plans for at least forty more." *Id.*

corporate ownership of farm land.[24] The proposed constitutional amendment was more restrictive and therefore more appealing than the Family Farm Act to proponents of anti-corporate farming laws.[25] First, "Amendment E applied to the ownership of livestock" in addition to land.[26] Furthermore, the exemptions available for family farm operations and "authorized farm corporations" under the Family Farm Act were much narrower in Amendment E.[27] Next, the "enforcement procedures [of Amendment E] were much broader and potentially intrusive" than those in the Family Farm Act.[28] Finally, proponents of Amendment E were able to thwart the use of "the normal legislative process to correct any mistakes created by Amendment E" by using the Initiative and Referendum process.[29]

Amendment E created heated debate immediately and was challenged in the South Dakota Supreme Court before it was ever put to a vote.[30] Supporters of Amendment E listed protection of the environment and preservation of the "social and economic well-being of rural communities" as the main arguments in favor of the amendment.[31] In contrast, opponents argued that the amendment would fail to achieve its proposed objectives, as well as harm access to capital and financing for family farmers and cooperatives.[32] Despite aggressive argument on both sides, Amendment E gained approval from nearly sixty percent of voters, led by two-thirds of farmers.[33] Although Amendment E was patterned after Nebraska's anti-corporate farming laws, which have withstood constitutional challenges thus far, the challenge to further restrictions on corporate farming in South Dakota had just begun.[34]

As mentioned above, Amendment E was enacted through the Initiative and Referendum process rather than by a bill signed by the Governor following approval in the House and the Senate.[35] The Initiative and Referendum process allows a proposed constitutional amendment to become law following a majority vote of the people without being subject to the veto power of the Governor.[36] The proponents of Amendment E likely had this in mind because then-Governor

24. *See* Brief for Respondents at 9, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) *petition for cert. filed* [hereinafter Brief for Respondents] (on file with author).

25. *Id.* at 9.

26. *Id.*

27. *Id.*

28. *Id.* at 9-10.

29. *Id.* at 9.

30. Hoogestraat v. Barnett, 1998 SD 104, 583 N.W.2d 421 (challenging the attorney general's use of the sentence "Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution" on the ballot). *Id.* ¶4.

31. Pietila, *supra* note 1, at 156.

32. *Id.*

33. *Id.*

34. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, 202 F. Supp. 2d 1020, *aff'd*, 340 F.3d 583 (8th Cir. 2003). Judge Kornmann's opinion provides a complete review of the differences between the Nebraska and South Dakota laws. *Id.*

35. *See* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 587 (8th Cir. 2003).

36. S.D. Const. art. III, §1. In 1898, South Dakota became the first state to authorize the initiative and referendum procedures for the adoption of ordinary legislation. S.D. Sec'y of State, Initiatives and Referendums in South Dakota, at http://www.sdsos.gov/initiati.htm (last visited Feb. 25, 2004).

Janklow was not a supporter of restrictions on corporate farming.[37]

Governor Janklow was active in the economic development of South Dakota and viewed Amendment E as a restriction to attracting agricultural and other industries to South Dakota.[38] Janklow was instrumental in bringing Hematech[39] to South Dakota and was worried that Amendment E would adversely affect Hematech's proposed move to Sioux Falls.[40] Janklow also viewed Amendment E "as a symptom of South Dakota's 'huge schizophrenic problem' with agriculture."[41] By utilizing the Initiative and Referendum provision, proponents of Amendment E were able to avoid a probable veto by Governor Janklow.

D. AMENDMENT A

Facing attack in federal court over Amendment E and fearing a successful challenge, the proponents of anti-corporate farming laws once again proposed a constitutional amendment on corporate farming.[42] Known as Amendment A, this amendment was designed to cure the unintended consequences of Amendment E, namely the restriction on expanding current farms owned by exempt entities under § 22, as well as a restriction on access to capital and financing by exempt entities.[43] According to the attorney general, "Amendment A would repeal 'Amendment E', and replace it with a less restrictive set of prohibitions."[44] These less restrictive prohibitions included allowing "research farms, corporate ownership of agricultural land for wind power projects and corporate ownership of livestock for research or medical purposes."[45] According to Representative Jay Duenwald, "South Dakota risks missing out on such economically important projects under Amendment E, even though these projects pose no threat to the small farm."[46] Although Amendment A would

37. Pietila, *supra* note 1 at 169-70.

38. *See* Farm & Business Scene, ABERDEEN AMERICAN NEWS, Nov. 2, 2001, *available at* 2001 WL 28637073.

39. *Id.* Hematech is a Connecticut-based biotechnology company researching ways "to use genetically altered cow blood to create treatments for human diseases." Jay Kirschenmann, *Trying to Lure Companies in Growing Biotech Field*, ABERDEEN AMERICAN NEWS, Jan. 2, 2004, *available at* 2004 WL 57196923.

40. *Id.*

41. Pietila, *supra* note 1, at 169-70. Governor Janklow "believes Amendment E has failed to make life better for South Dakota's family farmers and has hampered South Dakota's ability to produce the volume of commodities needed to attract value-added agricultural processing to the state." *Id.* Janklow thought that voters "shot themselves in the foot" and chided South Dakota's effort to impact national farm policy by saying that "[t]he world doesn't care [sic] we're doing this to ourselves." Farm & Business Scene, *supra* note 3; Pietila, *supra* note 1 at 170.

42. S.D. Sec'y of State, June 4, 2002 Election Ballot Question Pamphlet, Constitutional Amendment A, http://www.sdsos.gov/2002/02bqprocon.htm (last visited Feb. 16, 2004).

43. *Id. See also* Editorial Comment, *Step Up on Farm Issue*, ARGUS LEADER, November 9, 2003, *available at* 2003 WL 61650962; Molly McDonough, *Down on the Farm; Laws Aimed at Boosting Family Farmers May Violate Commerce Clause*, 89 ABA J. 18, Nov. 2003.

44. S.D. Sec'y of State, June 4, 2002 Election Ballot Question Pamphlet, Constitutional Amendment A, http://www.sdsos.gov/2002/02bqprocon.htm (last visited Feb. 16, 2004).

45. *Id.*

46. *Id.*

have provided more protection than the Family Farm Act of 1974 in the event Amendment E was struck down,[47] voters overwhelmingly refused to expand South Dakota's strict anti-corporate farming laws.[48]

E. CHALLENGE TO AMENDMENT E

Less than one year after it was approved by South Dakota voters, nine plaintiffs brought an action in federal court against the state seeking declaratory and injunctive relief, challenging the constitutionality of the provisions of Amendment E.[49] The plaintiffs challenged Amendment E on the grounds that it was violative of the dormant Commerce Clause, the Equal Protection Clause, the Contracts Clause, the Supremacy Clause, and the Americans with Disabilities Act.[50] Two parties, Dakota Rural Action and South Dakota Resources Coalition, were successful in their motion to intervene on behalf of the "economic viability of the family farm" and environmental interests of South Dakota.[51] The district court then ruled, *inter alia*, that while the state was immune from suit under the Eleventh Amendment, state officials were amenable to suit.[52]

By the time the case was finally decided nearly four years later, the number of plaintiffs had grown to thirteen, representing a variety of interests in the agriculture sector.[53] Two of the plaintiffs were corporations owning custom cattle feedlots.[54] These plaintiffs averred that Amendment E would prohibit them from entering into the necessary contracts with third party cattle owners that deliver cattle to the feedlots because those third parties would be impermissibly engaging in farming.[55] Two other plaintiffs, unincorporated livestock feeding businesses, also argued that § 21 would restrict their ability to contract with third parties who own livestock.[56] Another corporate plaintiff, Spear H Ranch, challenged the prohibition on foreign corporations acquiring land in South Dakota and using it for agricultural purposes.[57] Spear H

47. Editorial Comment, *Replace Amendment E*, ARGUS LEADER, August 29, 2003, *available at* 2003 WL 61649299.

48. *Id.* Over seventy-eight percent of voters voted against Amendment A in 2002. 2002 Constitutional Amendment A Official Returns, at http://www.sdsos.gov/2002/02amendAB.htm (last visited Feb. 16, 2004).

49. South Dakota Farm Bureau, Inc. v. South Dakota, 1999 DSD 36, ¶ 4, 189 F.R.D. 560, 562.

50. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶ 1, 202 F. Supp. 2d 1020, 1023, *aff'd*, 340 F.3d 583 (8th Cir. 2003).

51. *South Dakota Farm Bureau*, 1999 DSD 36, ¶ 16, 189 F.R.D. at 566.

52. South Dakota Farm Bureau, Inc. v. South Dakota, 2000 DSD 43, ¶¶ 12, 28, 197 F.R.D. 673, 677, 681 (D.S.D 2000). The District Court also granted the state's motion to dismiss a claim arising under the Americans with Disabilities Act and a Privileges and Immunities claim because the plaintiffs lacked standing. *Id.* ¶¶ 13, 20. The District Court granted plaintiffs' motion to join the parties and to amend their complaint. *Id.* ¶ 4.

53. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 588-89 (8th Cir. 2003).

54. *Id.* at 588. These corporations were Haverhals Feedlot, Inc. and Sjovall Feedyard, Inc. *Id.*

55. *Id. See* S.D. CONST. art. XVII, §21.

56. *South Dakota Farm Bureau*, 340 F.3d at 588. Donald Tesch "raise[s] hogs for Harvest States Cooperative" of Minnesota under a ten-year contract. *Id.* William Aeschlimann feeds lambs owned by non-exempt third parties. *Id.*

57. *Id.* at 589. The Marston and Marian Holben Family Trust, the sole shareholder of Spear H, and Marston Holben were also plaintiffs. *Id.*

specifically challenged the exemptions in § 22.[58] Frank Brost, a rancher in South Dakota, also challenged § 22, as well as the perceived prohibition of § 21 on corporations acquiring additional land for farming.[59] The South Dakota Farm Bureau and the South Dakota Sheep Growers' Association, two groups representing "the interests of farm, ranch, and rural families in South Dakota," were plaintiffs challenging Amendment E's restrictions on the form of ownership and contracting ability.[60] The final three plaintiffs were utility companies claiming that Amendment E "applie[d] to, and increase[d] the cost, of easements they must acquire for a power plant."[61]

F. AMENDMENT E RULED UNCONSTITUTIONAL

After four years of litigation, the plaintiffs' interests were finally vindicated.[62] First, the district court applied a non-discrimination tier analysis to rule that Amendment E violated the dormant Commerce Clause.[63] Then, a panel of the Eighth Circuit Court of Appeals upheld the district court's ruling that Amendment E was unconstitutional.[64] However, in a fact-based decision, the court of appeals held that Amendment E was *per se* invalid because it was purposefully discriminatory under a first-tier analysis.[65] The court reasoned that the most compelling evidence of a discriminatory purpose was the "'pro' statement on a 'pro-con' statement compiled . . . and disseminated to . . . voters."[66] Further evidence included drafting meeting minutes and memoranda indicating that the purpose of Amendment E was "to get a law in place to stop" Murphy Family Farms and Tyson Foods from building hog confinement facilities in South Dakota.[67]

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58. *Id.*

59. *Id.* Brost also contended that Amendment E diminished the value of his land due to the restrictions on who can acquire farm land. *Id.*

60. *Id.*

61. *Id.* The companies are Montana-Dakota Utilities Company, Northwestern Public Service, and Otter Tail Power Company. *Id.*

62. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶¶ 103-111, 202 F. Supp. 2d 1020, 1050-51, *aff'd*, 340 F.3d 583 (8th Cir. 2003). Although the District Court had previously dismissed the count alleging that Amendment E violated the Americans with Disabilities Act, the court, *sua sponte*, reconsidered the claim prior to issuing its memorandum decision. *Id.* ¶ 61. The court in fact ruled that Amendment E was violative of the ADA. *Id.* ¶ 80. However, since this decision was overturned on appeal, it will not be included in this discussion. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 591 (8th Cir. 2003).

63. *South Dakota Farm Bureau*, 2002 DSD 13, ¶¶ 103-107, 202 F. Supp. 2d at 1049-50. The district court chose to rely on the *Pike* balancing test, which measures the legitimacy of the state's interest and "whether the burden on interstate commerce clearly exceeds the putative local benefits." *Id.* The district court did not find any facial or purposeful discrimination in Amendment E, nor was it discriminatory in its effect under the first tier of dormant Commerce Clause analysis. *Id.* ¶¶ 82-102.

64. *South Dakota Farm Bureau*, 340 F.3d at 598.

65. *Id.* at 596-97.

66. *Id.* at 594. This statement told voters that a 'yes' vote would reduce the threat to "our traditional rural way of life" from large non-family corporations and would reduce foreign corporate control over the livestock market and increase environmental responsibility. S.D. Sec'y of State, 1998 Ballot Question Pamphlet, Constitutional Amendment E, http://www.sdsos.gov/1998/98bqprocone.htm (last visited Feb. 16, 2004).

67. *South Dakota Farm Bureau*, 340 F.3d at 594.

G. SUPREME COURT APPEAL

Although the state and other defendants have submitted a petition for writ of *certiorari* to the United States Supreme Court, the end for Amendment E appears to be on the horizon.[68] Attorney General Larry Long "harbor[s] no illusions about getting the [U.S. Supreme] [C]ourt to hear it or the chances of success if it gets there."[69] Therefore, absent a surprise decision by the Supreme Court to overturn the Eighth Circuit, the legislature must address the restructuring of South Dakota's anti-corporate farming laws.

Despite the appeal to the Supreme Court by the defendants and intervenors, the high court is not expected to grant *certiorari*.[70] The Supreme Court grants only a fraction of the petitions for writs of *certiorari* that are requested each year.[71] Given the low rate at which petitions are granted, it is unlikely that this case meets the standards for a grant of *certiorari*.[72]

The Supreme Court grants petitions for writ of *certiorari* only for "compelling reasons."[73] The reasons stated by the Supreme Court for granting a petition are: 1) a split among the federal circuit courts of appeal; 2) a conflict between the decision of a state supreme court and another state supreme court or federal appeals court on a federal question; and 3) a decision by a state supreme or federal appellate court on a federal question that "has not been, but should be, settled by" the Supreme Court.[74] However, the one caveat in these three considerations is that the federal question or other issue must be deemed "important."[75] Errors by the finder of fact or "the misapplication of a properly stated rule of law" are rarely sufficient to obtain review on a petition for writ of *certiorari*.[76]

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68. *See* Editorial Comment, *supra* note 43. As expected, the Supreme Court denied *certiorari* on May 3, 2004, nearly two months after this article was written. Dakota Rural Action v. South Dakota Farm Bureau, Inc.,No. 03-1108, 2004 WL 194066 (U.S. May 3, 2004); Nelson v. South Dakota Farm Bureau, Inc., No. 03-1111, 2004 WL 203159 (U.S. May 3, 2004). The discussion on the petition for writ of *certiorari* in both the Background and Analysis sections remains useful, however, to better understand how the Court makes its decision regarding petitions for writ of *certiorari*, and the grounds for granting or denying the petition as it related to Amendment E.

69. *Id.*

70. *See* Dennis Gale, *Justices Asked to Step In; Anti-Corporate Farming Law Supporters Appeal to U.S. Supreme Court*, ABERDEEN AMERICAN NEWS, Feb. 17, 2004, 2004 WL 70210184; *see also* Editorial Comment, *supra* note 43.

71. Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 527-28 (explaining that the Court grants *certiorari* in about two percent of cases).

72. *See* Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies*, 92 LAW LIBR. J. 193, 195 (2000). *See also* Sup. Ct. R. 10, http://www.supremecourtus.gov/ctrules/ctrules.html.

73. Sup. Ct. R. 10, *supra* note 72.

74. *Id.*

75. *Id.*

76. *Id.*

III. ANALYSIS

A. CONSTITUTIONAL CHALLENGES TO ANTI-CORPORATE FARMING LAWS

Corporations affected by state anti-corporate farming laws have mounted challenges on multiple constitutional grounds for various reasons.[77] Although one would expect the challengers to state anti-corporate farming laws to be farmers or entities engaged in farming, due to the broad scope of the restrictions this is not always the case.[78] These challenges have been based on the Equal Protection Clause, the dormant Commerce Clause, the Contracts Clause, the Supremacy Clause, and the Americans with Disabilities Act.[79] The main challenges to Amendment E were based on the Equal Protection Clause and the dormant Commerce Clause, which will each be examined.

i. Equal Protection Challenges

Equal protection challenges of state anti-corporate farming laws have had no success.[80] These challenges have been unsuccessful due to the deference given state action under the Equal Protection Clause.[81] It is not necessary, under the Equal Protection Clause, that legislation or constitutional amendments correct problems they are designed to address.[82] It is only necessary that the legislature or voters enact laws which they rationally believe might address the problems they are designed to combat.[83] Social and economic measures such as corporate farming restrictions "run afoul of the equal protection clause only when 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'"[84]

States are accorded wide latitude in the regulation of their local

77. Asbury Hosp. v. Cass County, 326 U.S. 207 (1945); South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, 202 F. Supp. 2d 1020, *aff'd*, 340 F.3d 583 (8th Cir. 2003); MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991); Hall v. Progress Pig, Inc., 610 N.W.2d 420 (Neb. 2000); Omaha Nat'l Bank v. Spire, 389 N.W.2d 269 (Neb. 1986).

78. *Asbury*, 326 U.S. 207 (Minnesota-based non-profit corporation which acquired farm land in satisfaction of a debt); *Omaha Nat'l Bank*, 389 N.W.2d 269 (nationally chartered bank owning land in trust); *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d 1020 (utility companies owning and acquiring land for easements.)

79. *Asbury*, 326 U.S. 207; *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d 1020; *MSM Farms*, 927 F.2d 330; *Hall*, 610 N.W.2d 420; *Omaha Nat'l Bank*, 389 N.W.2d 269.

80. *Asbury*, 326 U.S. 207 (rejecting an equal protection challenge to North Dakota's corporate land divestiture requirement); *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d 1020 (ruling corporate farming prohibitions unconstitutional on other grounds); *MSM Farms*, 927 F.2d 330 (rejecting equal protection and due process challenges to Nebraska restrictions on non-family farm corporations); *Hall*, 610 N.W.2d 420 (rejecting a hog producer's equal protection challenge to an exemption for poultry producers in Nebraska's anti-corporate farming laws); *Omaha Nat'l Bank*, 389 N.W.2d 269 (rejecting an equal protection challenge to Nebraska's anti-corporate farming laws and their exemption for family farm corporations).

81. *See MSM Farms*, 927 F.2d at 333-34.

82. *Id.* at 334.

83. *Id.* at 333.

84. *Id.* at 332 (quoting Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 463 (1988)).

> economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude . . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.[85]

Given the deference state legislatures are afforded under equal protection analysis, challengers to anti-corporate farming laws needed to find a constitutional doctrine holding states to a higher burden in order to be successful.[86]

ii. Dormant Commerce Clause

Challengers to state anti-corporate farming laws have turned to the dormant Commerce Clause to protect their economic rights.[87] The dormant Commerce Clause is the negative implication of the Commerce Clause, which "grants Congress the authority to regulate interstate commerce."[88] The dormant Commerce Clause proscribes state regulation of interstate commerce that is discriminatory or unduly burdensome in nature.[89] Although it is often categorized as a confusing and impracticable judicial creation,[90] there is evidence that the Framers intended this negative aspect of the Commerce Clause in order to prevent state isolationism and economic protectionism following Independence.[91]

The dormant Commerce Clause protects economic rights by prohibiting state regulations that discriminate against or unduly burden interstate

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85. *Id.* (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976)).

86. *See id.* at 333. The Supreme Court specifically noted the challenger's failure to advance a dormant Commerce Clause argument in *Asbury*. Asbury Hosp. v. Cass County, 326 U.S. 207, 210 (1945).

87. Smithfield Foods v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003); South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, 202 F. Supp. 2d 1020 (D.S.D. 2002), *aff'd*, 340 F.3d 583 (8th Cir. 2003).

88. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003).

89. *Id.*

90. Camps Newfound/Owatonna, Inc. v. Town of Harrison, ME, 520 U.S. 564, 610-15 (1997) (Thomas, J., dissenting) (summarizing comments by every member of the current Court and several by their predecessors to this effect). Justice Thomas also provides an exhaustive commentary on the criticism of the dormant Commerce Clause and its lack of a textual basis in the constitution. *Id.*

91. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192-93 n.9 (1994) (explaining that James Madison, the "father of the Constitution" considered "the 'negative' aspect of the Commerce Clause . . . the more important"). *See also* Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1071-72 (2002) (examining the background of the Framer's intent with regard to the Commerce Clause, including a letter on the subject by James Madison); David S. Day, *The Rehnquist Court and Dormant Commerce Clause Doctrine: The Potential Unsettling of the "Well-Settled Principles"*, 22 U. TOL. L. REV. 675, 677 (1991) (recognizing the 170 year precedential history of the dormant Commerce Clause despite its lack of a textual basis and the academic criticism due to its characterization as a judicial creation). The Commerce Clause, and by extension its negative implication, is the embodiment of the concept of federalism. *See* WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 160 (2004). This concept was first espoused by "Dr." Benjamin Franklin in his proposed Albany Plan, and later in 1776 as delegates of the original thirteen colonies voted for Independence from Britain and the Crown at the Second Contintental Congress on July 2, 1776. *See id.* at 291, 312.

commerce.[92] The dormant Commerce Clause doctrine is analyzed under a two-tier analysis with a discrimination and a non-discrimination tier.[93] Statutes affecting interstate commerce can be discriminatory on their face, in their purpose, or in their effect.[94] Statutes found to be discriminatory in nature are subject to strict judicial scrutiny.[95] Once the challenger has shown the statute to be discriminatory, the burden shifts to the proponent to show that the statute is the least restrictive alternative in protecting a compelling state interest.[96] The burden in the discrimination tier is a heavy one[97] that proponents rarely overcome.[98] Statutes that are not found to be discriminatory are subject to a balancing of the state's interest and the burden on interstate commerce.[99] In this second-tier analysis the burden is on the challenger to demonstrate the burden on interstate commerce, and once satisfied, the burden shifts to the state to show that the local benefits cannot be satisfied with less restrictive means.[100] Statutes analyzed under this second-tier balancing test are subject to greater judicial deference.[101]

Amendment E was found to violate the dormant Commerce Clause under both a first and second-tier analysis.[102] The district court eschewed a discrimination tier analysis to find Amendment E violative under the balancing test.[103] On appeal, Amendment E was found to be "discriminatory" in its purpose under the first tier.[104] The court of appeals found that the purpose of Amendment E was to target out-of-state corporations, specifically Murphy Farms and Tyson Foods, and that this discriminatory purpose was repugnant to the Constitution.[105] The court of appeals found evidence of this purpose in trial testimony,[106] the "pro"-statement disseminated to voters in support of Amendment E,[107] as well as committee meeting minutes and correspondence.[108]

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92. *See* Day, *supra* note 91, at 678.

93. *South Dakota Farm Bureau*, 340 F.3d at 593.

94. *Id.*

95. *Id.* (characterizing the level of scrutiny as rigorous).

96. *Id.* at 597.

97. *Id.* (describing the burden as high).

98. *See* Maine v. Taylor, 477 U.S. 131 (1986). The state of Maine prohibited the importation of live baitfish for health and environmental concerns due to "parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine." *Id.* at 141. Maine's statute was upheld despite being found to be discriminatory, and is the only statute to be upheld under the discrimination tier. *Id.* at 151-52.

99. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶ 103, 202 F. Supp. 2d 1020, 1049-50, *aff'd*, 340 F.3d 583 (8th Cir. 2003).

100. *See* David S. Day, *Revisiting* Pike*: The Origins of the Non-Discrimination Tier of the Dormant Commerce Clause Doctrine*, 27 HAMLINE L. REV. 45, 59 (2004).

101. *See id.* at 47.

102. *South Dakota Farm Bureau*, 340 F.3d at 583; *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d at 1020.

103. *South Dakota Farm Bureau*, 2002 DSD 13, ¶ 103, 202 F. Supp. 2d at 1049 (choosing "not [to] cross the 'first tier bridge'" but "to rely on the so-called 'second tier' approach.")

104. *South Dakota Farm Bureau*, 340 F.3d at 596.

105. *Id.* at 594.

106. *Id.* (quoting witness testimony about getting "a law in place to stop" Murphy Family Farms and Tyson Foods from building hog confinement facilities in the state).

107. *Id.* (quoting the "pro"-statement as describing passage of Amendment E as necessary or else "[d]esperately needed profits will be skimmed out of local economies and into the pockets of distant

The Eighth Circuit Court of Appeals faced a similar challenge to an Iowa law restricting vertical integration in the pork industry.[109] In January, 2003, the district court also cited the dormant Commerce Clause in holding Iowa's anti-corporate farming law unconstitutional.[110] The district court found Iowa's law violative of all three types of discrimination under a first-tier analysis, concluding "that Iowa Code § [9H] discriminates against interstate commerce on its face, in purpose, and in effect."[111] The court held that the state was unable to overcome the burden of showing "that the statute serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not be served as well by nondiscriminatory means."[112] The court ruled that the purpose of Iowa's law, similar to that of South Dakota's Amendment E, was "nothing more than protecting local economic interests from out-of-state behemoth Smithfield Foods."[113] The state of Iowa appealed the ruling and oral argument was heard in October, 2003.[114]

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corporations").

108. *Id.* (quoting a memorandum to proponents of Amendment E that "[m]any have commented that just as they do not want Murphys and Tysons walking all over them, they don't want Farmland or Minnesota Corn Producers walking over them . . . either"). The state and intervenors challenge the Eighth Circuit's ruling on the grounds that, *inter alia*, the court incorrectly found a discriminatory purpose. *See* Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) *petition for cert. filed,* 2004 WL 210651 (U.S. Jan. 29, 2004) (No. 03-1108) [hereinafter Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition]; Brief for Petitioner South Dakota Secretary of State, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003), *petition for cert. filed,* 2004 WL 219798 (U.S. Jan. 29, 2004) (No. 03-1111) [hereinafter Brief for Petitioner South Dakota Secretary of State].

109. Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003); Steve Karnowski, *Rulings on Laws Against Corporate Farming Raise Questions for Other States*, ABERDEEN AMERICAN NEWS, Nov. 16, 2003, http://www.aberndeennews.com/mld/aberdeennews/news/7277995.htm.

110. Smithfield Foods, 241 F. Supp. 2d at 992-93.

111. *Id.*

112. *Id.*

113. *Id.* Murphy Farms, Inc. was a plaintiff in this case, the very company that was the target of the drafters of South Dakota's Amendment E. *Id.* at 982; South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003).

114. *See* Karnowski, *supra* note 109. *See also* McDonough, *supra* note 43. On May 21, 2004, nearly two months after this article was written, the Eighth Circuit Court of Appeals vacated the district court's grant of summary judgment to plaintiff Smithfield Foods on appeal by the Attorney General of Iowa. Smithfield Foods, Inc. v. Miller, No. 03-1411, 2004 WL 1124476 (8th Cir. (Iowa) May 21, 2004). The court of appeals remanded the case for further discovery due to a 2003 amendment of § 9H.2 by the Iowa Legislature, which "repealed the cooperative exception from [§] 9H.2, but delayed the requirement that cooperatives comply with section 9H.2. until 2007, if the cooperative engaged in the prohibited activity before the 2003 amendment." *Id.* at *2. However, although remanding for discovery on whether the 2003 amendment discriminates against interstate commerce in its purpose, effect, on its face, or is unduly burdensome, the court of appeals did note that § "9H.2 appears to disadvantage Smithfield the same way it did before the 2003 amendment." *Id.* at *1. On remand, consideration of

> [s]tatements by the legislators and the governor about the 2003 amendment may shed light on whether the General Assembly adopted the amendment as part of an apparent pattern of thwarting Smithfield's attempts to operate in Iowa, or to save section 9H.2 at the expense of in-state interests, or to eviscerate the prior section 9H.2's allegedly discriminatory purpose.

Id. at *3. Furthermore, discovery "showing the amendment's impact on in-state or other out-of-state interests" is required to determine the presence of a discriminatory effect on interstate commerce. *Id.* at *4.

iii. Purposefulness Under The Dormant Commerce Clause

Although the Supreme Court applies a *de novo* standard of review to questions of law,[115] since petitioners focused their briefs on the Eighth Circuit's decision finding a discriminatory purpose in Amendment E, this section will focus on purposeful discrimination under a first-tier analysis.[116]

Although finding a discriminatory purpose is arduous,[117] the Supreme Court in *Arlington Heights* established numerous types and evidentiary sources of discriminatory purpose.[118] "The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes" is one source of evidence of discriminatory purpose.[119] "The [s]pecific sequence of events leading up the [sic] challenged decision," "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures" may "afford evidence that improper purposes are playing a role."[120] Finally, "[t]he legislative or administrative history may be highly relevant, *especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.*"[121]

The Eighth Circuit has previously upheld a dormant Commerce Clause challenge to a South Dakota constitutional amendment.[122] In *SDDS v. South Dakota*, the Eighth Circuit struck down a 1990 referendum vetoing approval for the Lonetree solid-waste disposal facility near Edgemont.[123] The Eighth Circuit referred to the "con" statement issued as part of the referendum that characterized the Lonetree facility as "an out-of-state dump" that "is not an option for South Dakota communities."[124] The Eighth Circuit found the referendum violative of the dormant Commerce Clause because of its discriminatory purpose despite the fact that the referendum was approved by citizen-voters; in effect, the Eighth Circuit imputed the discriminatory purpose of the referendum to the voters.[125]

Petitioners challenge the Eighth Circuit's finding of a discriminatory purpose in Amendment E based on both direct and indirect evidence of this purpose.[126] The direct evidence of discriminatory purpose was found in the

115. Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 297 (2003). The Supreme Court could review all of the bases for challenge under this standard of review. *See id.*

116. *See* Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, *supra* note 108; Brief for Petitioner South Dakota Secretary of State, *supra* note 108.

117. SDDS, Inc. v. South Dakota, 47 F.3d 263 (1995).

118. Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 268 (1977). It is important to note that *Arlington Heights* was decided based on an Equal Protection Clause challenge. *Id.* at 254.

119. *Id.* at 267.

120. *Id.*

121. *Id.* at 268 (emphasis supplied).

122. SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995).

123. *Id.* at 265.

124. *Id.* at 266.

125. *Id.* at 268.

126. *See* Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, *supra*

"'pro' statement on [the] pro-con statement compiled by [the] Secretary of State . . . and disseminated to South Dakota voters prior to the referendum."[127] Further direct evidence was found in drafting meeting minutes, memoranda, and trial testimony evincing a desire by Amendment E supporters to prevent Murphy Family Farms and Tyson Foods from building hog facilities in South Dakota.[128] Indirect evidence was found in testimony by a "registered environmental professional" that despite the fact that "she was unfamiliar with all of South Dakota's environmental regulations at the time Amendment E was drafted . . . Amendment E would be necessary even if the State's current environmental regulations were enforced."[129] Further evidence of a discriminatory purpose was the drafting committee's lack of hesitation despite an expert's inquiry as to "whether it was a good idea to create such 'complete' barriers to capital flow into the state,"[130] and an admission at trial by a committee member "that the committee completed the drafting process quickly because its members wanted to prevent Tyson Foods and Murphy Family Farms from building facilities in South Dakota."[131] This direct and indirect evidence demonstrated a lack of knowledge on the part of the drafters, and presumably the voters, of the effects on the environment and the "economic viability of family farmers" of Amendment E.[132]

Although the drafters and proponents touted protection of the environment and family farm as the goals of Amendment E, the Eighth Circuit found the neglect to "measure the probable effects of Amendment E and of less drastic alternatives" fatal, and that this lack of "evidence supports the conclusion compelled by the direct evidence: the intent behind Amendment E was to restrict in-state farming by out-of-state corporations and syndicates in order to protect perceived local interests."[133] Although there is no prohibition on state laws benefiting in-state interests, this benefit cannot be conferred by "burdening out-of-state interests" because this form of "economic protectionism" is inimical to the purpose underlying the dormant Commerce Clause.[134]

While the legislature proposed a constitutional amendment adopting Nebraska's anti-corporate farming laws in the event that the Supreme Court does not revive Amendment E, that would not necessarily remove the purposefulness from anti-corporate farming laws in South Dakota.[135] In his introduction of the

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note 108; Brief for Petitioner South Dakota Secretary of State, *supra* note 108. *See also* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593-95 (8th Cir. 2003).

127. *South Dakota Farm Bureau*, 340 F.3d at 594.

128. *Id.* (characterizing the trial testimony as "blatant" evidence of purposeful discrimination).

129. *Id.*

130. *Id.* at 595. Furthermore, this expert was contacted by a member of the committee prior to giving this opinion. *Id.*

131. *Id.*

132. *Id.* at 595-96.

133. *Id.*

134. *Id.* at 596.

135. *Proposing and Submitting to the Electors at the Next General Election an Amendment to Article XVII of the Constitution of the State of South Dakota Relating to Certain Restrictions on Corporate Farming in South Dakota: Hearing on S.J.R. 1 before the Senate State Affairs Committee,*

Senate Joint Resolution proposing adoption of Nebraska's anti-corporate farming laws, Senator Kloucek, in describing the attack on corporate farming laws in the midwest, stated that having corporate farming laws in place was important because "what is happening with Enron, Northwestern Public Service, Farmland Industries and many other entities in the corporate sector are really putting pressure on our America as we know it."[136] He went on to say that

> [t]he whole issue of corporations controlling agriculture, the whole issue of capital flow, the whole issue of doing great things in agriculture is a great issue for all of us to be concerned about. Who controls that capital and who gets the profits are the issues that we need to address and that's what these acts are trying to do and have tried to do in the past.[137]

While it is difficult to fathom how criminal conduct in corporate accounting and bankruptcy proceedings are related to anti-corporate farming laws in South Dakota, it appears that the legislature is still intent on preserving access to agriculture and the fruits of that access to South Dakotans at the expense of out-of-state interests.[138]

Furthermore, although the following statements were made by Secretary Gabriel in relation to amendment of the 1974 Family Farm Act, Senator Kloucek did not attempt to dispel the overt statement of the Family Farm Act's discriminatory purpose as described by Secretary Gabriel.[139] Secretary Gabriel stated that the legislature should allow the act to

> do what it was designed to do, so that we don't have multi-national, publicly-traded corporations coming in here and taking over our production agriculture, but facilitate capital from coming in and financing the kind of capital intensive operations that we need if we are going to maintain any kind of viability for our rural communities here in South Dakota.[140]

While Secretary Gabriel did not vote on Senate Bill 21, his unopposed testimony as to the discriminatory purpose of the Family Farm Act was heard by those who did.[141]

Similarly, the voters of South Dakota can only learn the effects and purpose of Amendment E and other constitutional amendments from the drafters and proponents of those amendments.[142] Senator Kloucek and other proponents of

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2004 Leg., 79th Sess. (S.D. 2004) [hereinafter Proposed Constitutional Amendment], http://legis.state.sd.us/sessions/2004/SJR1.htm.; *infra* notes 137-153.

136. *Id.*

137. *Id.*

138. *See id.* Senator Kloucek suggests that adoption of Nebraska's law is intended to try to do what previous laws have done. *Id.* However, what those previous laws have tried to do is to prohibit participation by out-of-state entities in farming. *See South Dakota Farm Bureau*, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

139. *An Act to Revise Certain Provisions of the South Dakota Family Farm Act: Hearing on S.B. 21 Before the Committee on Agriculture and Natural Resources at the Request of the Department of Agriculture*, 2004 Leg., 79th Sess. (S.D. 2004) [hereinafter Family Farm Act Amendment] (statement of Larry Gabriel, Secretary of Agriculture), http://legis.state.sd.us/sessions/2004/index.cfm?FuseAction=-DisplayBills.

140. *Id.*

141. *Id.*

142. *South Dakota Farm Bureau*, 340 F.3d at 596.

Amendment E bemoan the Eighth Circuit's perceived misinterpretation of Amendment E in striking it down as unconstitutional.[143] However, while Senator Kloucek cannot see any "way that any of the original Amendment E supporters could say that they were just trying to exclude the out-of-state corporations" and alleges that the Eighth Circuit "did not even take the context of . . . how it was written," it appears that Senator Kloucek is not aware of the extent to which the district court and the court of appeals examined how Amendment E was written nor the reasons why this type of economic protectionism is considered repugnant to the Constitution.[144] If any court misinterprets Amendment E it is because it must examine the law itself and how it was written, and these inquiries demonstrate a clearly pervasive discriminatory purpose on the part of the drafters of Amendment E, and subsequently South Dakota voters.[145]

B. 2004 SOUTH DAKOTA LEGISLATIVE SESSION

In an effort to continue the promotion of the family farm and environmental responsibility while the challenge to Amendment E was pending, legislators turned to the Family Farm Act of 1974 to regulate agriculture.[146] In the 2004 legislative session, sponsors of Senate Bill 21, with the support of Secretary of Agriculture Larry Gabriel, proposed an amendment to the Family Farm Act with three goals in mind.[147] The main goal of the amendment was to expand the act in terms of the types of permissible corporate involvement in farming in South Dakota.[148] The Secretary cited the "contemporary issue" of "bio-pharmaceutical agriculture crops" where "genetically modified dairy cows producing proteins [are] used to enhance quality of life in humans" as an important agricultural opportunity currently precluded under both Amendment E and the Family Farm Act.[149] Secretary Gabriel cited Hematech and Trans Ova as benefiting from the amendment.[150] At the time Hematech arrived in the state, South Dakotans viewed it "as the potential beginning of a biotech boom in the state, complete

143. *See* Gale, *supra* note 70.

144. *Id.*

145. *See South Dakota Farm Bureau*, 340 F.3d at 592-97.

146. *See* South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶ 111, 202 F. Supp. 2d 1020, 1051, *aff'd*, 340 F.3d 583 (8th Cir. 2003). *See also* Editorial Comment, *supra* note 43; Family Farm Act Amendment, *supra* note 130; S.J.R. 1, 2004 Leg., 79th Sess. (S.D. 2004).

147. Family Farm Act Amendment, *supra* note 130. The first goal was to correct drafting errors in the original Family Farm Act, making the exemptions and restrictions on corporate ownership unambiguous. *Id.* A third goal cited was an interest in easing the restrictions on financing and access to capital by in-state farmers. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* Hematech is a Connecticut-based bio-tech company that chose Sioux Falls over Minneapolis-St. Paul for its new headquarters and testing facility two years ago. Jay Kirschenmann, *Trying to Lure Companies in Growing Biotech Field*, ABERDEEN AMERICAN News, Jan. 2, 2004, *available at* 2004 WL 57196923. Hematech received $7.5 million in incentives from the State of South Dakota for its Sioux Falls lab facility. *Id.* "Trans Ova serves as Hematech's embryo-transfer facility, implanting Hematech embryos in cattle and providing care for the gestating cows." *Id.* Trans Ova received $9 million from the State of Iowa for expansion in Sioux Center. *Id.*

with scientists, laboratories and cloned calves."[151] Senate Bill 21 exempts "any entity that engages in farming primarily for scientific, medical, research, or experimental purposes" from the corporate ownership restrictions as long as "any commercial sales from such farming shall be incidental to the scientific, medical, research, or experimental objectives of the entity."[152] This change will aid in the effort to attract expansion in the bio-tech industry into South Dakota while protecting the family farm from out-of-state corporations.[153] Senate Bill 21 was signed by Governor Rounds after it passed the Senate and the House with little opposition.[154]

In addition to amending the Family Farm Act, the legislature attempted to confront the likely successful challenge to Amendment E head-on by tabling a joint Senate resolution on Amendment E.[155] This resolution provided for a constitutional amendment to be submitted to the voters in the next general election, which would in effect adopt Nebraska's anti-corporate farming act verbatim.[156] This joint resolution was a temporary measure in the event that the Supreme Court acted upon the petition for writ of *certiorari* during the 2004 legislative session.[157] However, discussion on this proposed amendment was not re-opened and the joint resolution expired at the end of the 2004 session.[158]

Although not acted upon during the 2004 Legisltaive Session, South Dakota's proposed adoption of Nebraska's anti-corporate farming laws in the event that the Eighth Circuit is upheld by the Supreme Court would not necessarily cure the defects in Amendment E. Amendment E was modeled after Nebraska's I-300, albeit a more restrictive version.[159] Nebraska's anti-corporate farming laws withstood an Equal Protection challenge, not a dormant Commerce Clause challenge.[160] Nebraska's law could be subject to challenge under the dormant Commerce Clause, and could suffer a similar fate to both Amendment E and Iowa's anti-corporate farming law under more strict scrutiny in a dormant Commerce Clause analysis if found to be discriminatory on its face, in its purpose, in its effect, or if unduly burdensome on interstate commerce.[161]

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151. *Id.* Then Governor Janklow indicated "[t]his will give us the opportunity . . . to become the Silicon Valley in bioprotein." *Id.*

152. S.B. 21, 2004 Leg., 79th Sess. (S.D. 2004); S.D.C.L. §§ 47-9A-1 to 9A-3 (2002 & Supp. 2003).

153. *See* Family Farm Act Amendment, *supra* note 131.

154. S.B. 21, 2004 Leg., 79th Sess. (S.D. 2004). The bill passed the Senate thirty-four to one, and sixty-three to zero in the House. *Id.*

155. Proposed Constitutional Amendment, *supra* note 127.

156. *Id.*

157. *Id.*

158. *Id.*

159. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶¶ 10-55, 202 F. Supp. 2d 1020, 1027-39, *aff'd*, 340 F.3d 583 (8th Cir. 2003).

160. MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) (rejecting equal protection and due process challenges to Nebraska restrictions on non-family farm corporations); Hall v. Progress Pig, Inc. 610 N.W.2d 420 (Neb. 2000) (rejecting a hog producer's equal protection challenge to an exemption for poultry producers in Nebraska's anti-corporate farming laws); Omaha Nat'l Bank v. Spire, 389 N.W.2d 269 (Neb. 1986) (rejecting an equal protection challenge to Nebraska's anti-corporate farming laws and their exemption for family farm corporations).

161. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003); Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003). *See also* Karnowski, *supra* note 109. Neil Harl, a

Finally, the Nebraska legislature is considering a bill that would create "an Agricultural Opportunities Task Force to study trends in agriculture and to recommend changes to state law, including potential modifications of I-300, to provide agricultural producers and landowners with additional avenues to manage risk, access to capital, and transfer assets."[162] South Dakota may choose to either adopt Nebraska's law verbatim or perhaps undertake a study to consider the scope and effectiveness of future anti-corporate laws as it did in 1968, if the Supreme Court upholds the Eighth Circuit.

C. APPEAL TO THE SUPREME COURT

A review of the considerations set forth by the Supreme Court, along with the low rate at which petitions are granted, lead to the conclusion that it is unlikely that the Supreme Court will review the challenge to Amendment E.[163] Petitioners have cited no authority indicating a split among the states or the federal circuits regarding applicability of the dormant Commerce Clause to the states.[164] Furthermore, petitioners do not allege that the applicability of the dormant Commerce Clause to state anti-corporate farming laws is a federal question that "has not been, but should be, settled by" the Supreme Court.[165] In addition, even if the Eighth Circuit were to have incorrectly applied the dormant Commerce Clause, or one of the other bases for the challenge to Amendment E, incorrect application of the dormant Commerce Clause would not, by itself, be sufficient for grant of the petition.[166] Finally, although the issue is of extreme importance to South Dakotans and to a slightly lesser extent to the eight other states having similar restrictions on corporate farming, petitioners must demonstrate a sufficient level of importance of this issue in order for the Supreme Court to grant their petition for writ of *certiorari*.[167] While there is

professor at Iowa State University, who helped draft Amendment E, is quoted as saying "I think there will be activity once the dust settles over these cases," in relation to challenges of other state anti-corporate farming laws. *Id.* David Day, University of South Dakota constitutional law professor and co-counsel for plaintiffs challenging Amendment E, stated that while "the laws are narrower and less burdensome" in other states, "lawyers are likely to take a hard look at those decisions to see if they provide for new challenges." *Id.*

162. L.B. 1086, 98th Leg., 2nd Sess. (Neb. 2004), http://www.unicam.state.ne.us/pdf/INTRO_LB-1086.pdf. LB 1086 follows "a report commissioned by the Nebraska Department of Agriculture on the state's agricultural future [which] concluded that revisions to I-300 and local livestock zoning laws were needed to keep the state competitive with other states." Robert Pore, *I-300 Hearing Set for Saturday in Grand Island*, THE GRAND ISLAND INDEPENDENT, Feb. 13, 2004, *available at* http://theindependent.com/stories/021304/new_pea-ce13.shtml. As in South Dakota, this proposed legislation was met with vigorous opposition. *Id.* Under LB 1086, any changes to I-300 would be proposed by legislators in 2005 and voted on by the people in 2006. *Id.*

163. *See id. See also* Schweitzer, *supra* note 71; Gale, *supra* note 70; Editorial Comment, *supra* note 43.

164. *See* Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, *supra* note 108. *See also* Brief for Petitioner South Dakota Secretary of State, *supra* note 108.

165. See Sup. Ct R. 10, *supra* note 72. See *also* Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 15 (2003) (suggesting that "the dormant Commerce Clause doctrine has among the longest histories of any active constitutional law doctrine").

166. *See* Sup. Ct R. 10, *supra* note 72.

167. *See id.*

some authority in dormant Commerce Clause jurisprudence supporting the important nature of state regulation,[168] even if the challenge to Amendment E meets the standards for review by the Supreme Court, the chance that it will then be heard is still rare.[169]

Petitioner's most cogent argument attacking the Eighth Circuit's ruling that Amendment E has a discriminatory purpose is whether the discriminatory intentions of the drafters can be imputed to the citizen-voters that approved Amendment E.[170] Petitioners implore the Supreme Court to grant *certiorari* in order to "ensure that the Eighth Circuit's misguided and deeply problematic approach to the dormant Commerce Clause is staunched."[171] Petitioners cite numerous examples of statements by the Supreme Court warning against "intrusion into the workings of other branches of government" except in limited circumstances.[172] However, while the Court in *Arlington Heights* did not view the list of sources for determining evidence of a discriminatory purpose as exhaustive,[173] the Eighth Circuit did perform an exhaustive analysis of the evidence, both direct and indirect, of a discriminatory purpose in Amendment E.[174] The Eighth Circuit examined all the sources in *Arlington Heights* and determined that there existed a discriminatory purpose.[175] However, despite the apparent appropriate finding of discriminatory purpose on the part of Amendment E drafters, petitioner's challenge this purpose being imputed to citizen-voters.[176]

Although the question of imputing the discriminatory purpose of drafters to citizen-voters in the rubric of the Initiative and Referendum process is somewhat

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168. *See* Wyoming v. Oklahoma, 502 U.S. 437 (1992) (invalidating an Oklahoma statute requiring power plants to burn a coal mixture containing at least ten percent Oklahoma mined coal on the grounds that it discriminated against interstate commerce on its face and in practical effect); Maine v. Taylor, 477 U.S. 131 (1986) (upholding a regulation banning the importation of baitfish into Maine for health and safety reasons); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upholding a Minnesota law prohibiting sale of milk in plastic containers, but allowing the sale of milk in paper containers); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidating a law prohibiting the importation of waste into New Jersey).

169. *See* Schweitzer, *supra* note 71.

170. Brief for Petitioner South Dakota Secretary of State, *supra* note 108. Petitioners also argue that the Supreme Court has never decided a dormant Commerce Clause challenge solely on the basis of purposeful discrimination. *Id.* at 16. However, as the Eighth Circuit explained:

> [d]iscriminatory purpose is at the heart of dormant Commerce Clause analysis and is often incorporated into both first-tier analysis and second-tier *Pike* balancing analysis. See, e.g., *Fulton Corp.*, 516 U.S. at 330 . . . (explaining dormant Commerce Clause as a prohibition on state regulations designed with the purpose of benefiting in-state interests by burdening out-of-state interests); *W. Lynn Creamery*, 512 U.S. at 196 . . . (noting purpose of state's unconstitutional pricing scheme although resting decision on statute's discriminatory effect); *Taylor*, 477 U.S. at 148 . . . (equating purposeful economic protectionism with per se invalidity).

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir. 2003).

171. Brief for Petitioner South Dakota Secretary of State, *supra* note 108, at 21.

172. *Id.* at 19 (citing Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 268 (1977)).

173. *Id.* It is important to note that *Arlington Heights* was decided based on an Equal Protection Clause challenge. *Id.* at 254.

174. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592-96 (8th Cir. 2003).

175. 340 F.3d 583.

176. Brief for Petitioner South Dakota Secretary of State, *supra* note 108.

novel, previous attempts by the state to overturn the Eighth Circuit have failed.[177] In *SDDS*, the United States Supreme Court denied the state's petition for writ of *certiorari* despite the purposeful discrimination of the drafters of the referendum at issue being imputed to the citizen-voters who defeated it.[178] Furthermore, even if the Supreme Court chooses to review the challenge to Amendment E, the Court will review the questions of law *de novo*.[179] This means that the Supreme Court need not address this somewhat novel question petitioners raise, but may affirm or reverse the Eighth Circuit's decision under either tier of the dormant Commerce Clause.[180]

V. CONCLUSION

South Dakota is an agriculturally rich state that has tried for thirty years to protect its environment and its family farmers from the perceived negative effects of corporate ownership of farmland. A narrow and restrictive constitutional amendment modeled after Nebraska's anti-corporate farming laws was struck down as violative of the dormant Commerce Clause as an example of the economic protectionism that is repugnant to the United States Constitution. The legislature's likely response in the event the Supreme Court does not overturn the Eighth Circuit's decision will be to propose a further amendment adopting Nebraska's less restrictive laws verbatim. However, the fall of South Dakota's Amendment E and Iowa's anti-corporate farming laws could send lawmakers back to the drawing board if Nebraska's laws succumb to a successful constitutional challenge. One piece of advice to future lawmakers considering restrictions on corporate farming; "our America as we know it",

> [o]ur system, fostered by the Commerce Clause, is that every *farmer* and every craftsman shall be encouraged to produce by the certainty that he will have *free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.* Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.[181]

177. South Dakota v. SDDS, Inc., 523 U.S. 1118 (1998).

178. *Id.*

179. Struve, *supra* note 115 at 297.

180. *See id.*

181. Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 993 (S.D. Iowa 2003) (quoting H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533-35 (1949)) (emphasis supplied).

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The Economic Liberty Rationale in the Dormant Commerce Clause

by

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THE ECONOMIC LIBERTY RATIONALE IN THE DORMANT COMMERCE CLAUSE

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I. INTRODUCTION

This article is an attempt to understand the direction the Court has taken under the dormant Commerce Clause. Through recent decisions, the same rationales, or variations of them, have appeared.[1] Prior to the 1990s, two of the rationales had been longstanding in dormant Commerce Clause jurisprudence: national economic solidarity and political process.[2] The rationale that has emerged and contends with equal voice is based on economic liberty.[3] This has been described as "the judicial *protection of persons* involved in interstate commerce."[4] The emergence of this doctrine has been linked to the expansion of the dormant Commerce Clause doctrine in order to broaden the associated protections it affords.[5] With that basis in mind, the foundation of the economic liberty rationale will be explored.

In Section II a necessary definition of economic liberty will be presented with a brief history and explanation of economic liberties. Section III will compare other rationales that have been offered as explanations for the dormant Commerce Clause doctrine. There will also be an attempt to "discount" those rationales in order to substantiate the emergence of the economic liberty rationale. In Section IV economic liberty in action within the framework of the Supreme Court will be discussed. In addition, examples of the "overlapping"[6] of rationales will be demonstrated. Finally, in Section V a conclusion will be sought regarding the emergence and effectiveness of the economic liberty rationale within the dormant Commerce Clause doctrine.

II. WHAT IS ECONOMIC LIBERTY?

As a preliminary first step, the phrase "economic liberty" can be viewed within the definition of its two sub-parts. The term "economic" is not a particularly legal term. However, it is associated with many other secondary terms in order to attach a legal meaning.[7] As every good student of English

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1. David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier* (forthcoming 2004) (manuscript at 1-2, copy on file with author). (This unpublished article was provided by the author during the Summer of 2003. I would like to thank Professor Day for providing such insight into a doctrine that has as many proponents as critics.).
2. *Id.*
3. *Id.* at 2.
4. *Id.* (emphasis added).
5. *Id.*
6. *Id.* at 1.
7. BLACK'S LAW DICTIONARY 530-31 (7th ed. 1999). The list, as follows: "economic coercion,"

knows, the adjective "economic" has several appropriate definitions:

> 3a: of or relating to economics; 3b: of, relating to, or *based on the production, distribution, and consumption of goods and services*; 3c: of or relating to an economy; 4: having practical or industrial significance or uses: *affecting material resources*; 5: *profitable.*[8]

Conversely, the term "liberty" has definite legal implications. *Black's* defines it as "[f]reedom from arbitrary or undue external restraint, esp[ecially] by a government," and "[a] *right*, privilege, or immunity *enjoyed by prescription* or by grant; the absence of a legal duty imposed on a person."[9] A practical definition of "economic liberty" could be "a right enjoyed by prescription of the profitable production, distribution, and consumption of goods and services affecting the material resources of persons."[10] However, while there is no agreement to a single definition, there appears to be agreement on the elements of "economic liberty" which include "(1) [s]ecure rights to property (legally acquired); (2) [f]reedom to engage in voluntary transactions, inside and outside a nation's borders; (3) [f]reedom from governmental control of the terms on which individuals transact; and (4) [f]reedom from governmental expropriation of property (e.g., by confiscatory taxation or unanticipated inflation)."[11] This definition gives us the proper focus of a rationale based in the day-to-day importance of a nation driven by industry and information. The focus needs to be placed within the framework of dynamics that are ordered under an inertia of oscillating economic growth and decline. The apparentness of those dynamics are not only perceived by the Court, but may also explain an acceptance for the rationale.[12] It could be argued that no other institution is as dynamic as the Supreme Court.[13] Decisions in dormant Commerce Clause doctrine, like the Court's dynamic nature, have a similar inertia.[14] As a result, a history of economic liberty before its utilization in dormant Commerce Clause

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"economic discrimination," "economic duress," "economic frustration," "economic indicator," "economic life," "economic loss," "economic obsolescence," "economic rent," "economic strike," "economic substantive due process," "economic warfare," and "economic waste."

8. MERRIAM-WEBSTER ONLINE, *available at* http://www.m-w.com/ (emphasis added).

9. BLACK'S LAW DICTIONARY, *supra* note 7, at 930 (emphasis added).

10. *See supra* notes 8 and 9. Author's note: combining individual term definitions to produce combined definition for purposes of describing "economic liberty."

11. Steve H. Hanke & Stephen J.K. Walters, *Economic Freedom, Prosperity, and Equality: A Survey*, 17 THE CATO JOURNAL 117, 119 (Fall 1997), *available at* http://www.freetheworld.com/papers/Hanke_and_Walters.pdf (numbering added).

12. See *infra*, Section IV, "Economic Liberty at Work" for an explanation of the Court's apparent acceptance of the "economic liberty" rationale regarding the impact of state legislative regulations and taxing schemes on in-state and out-of-state challengers.

13. *See generally* James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO STATE L.J. 149 (2003); Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233 (1999); and Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93 (1996).

14. *Compare, e.g.*, South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (upholding South Carolina's truck and semi-trailer weight and width regulations for safety reasons) with Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (striking down a Wisconsin regulation alleged to be based on safety reasons that generally limited trailers to 55 feet or less in length).

jurisprudence and within the Court's decisions may give a better understanding of its apparentness and acceptance.

We need only travel approximately 790 years back in time to properly address the history of economic liberties.[15] Similar to the appearance of the United States as a new nation, a revolt over the oppression forced upon persons of property was the impetus for recognizing economic rights.[16] In a telling passage of the *Magna Carta* of 1215, "the King agreed that if anyone 'has been *dispossessed* or removed by us, *without* the *legal judgment* of his peers, from his lands, castles, franchises, or *from his right, we will* immediately *restore them* to him.'"[17] Clearly, the outcome and efforts of industry was something to be protected. But of greater importance in tying economic liberty with natural liberty, the *Magna Carta* further guaranteed that "'[n]o freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed . . . except by the lawful judgment of his peers or [and] by the law of the land.'"[18] The protection of personal industry and against personal imprisonment within the context of what is called due process was born.[19] Guarantees of those protections, with the exception of loss by the judgment of peers, elevate the value of property and person.[20] The *Magna Carta* of 1225 would give permanence to the protections of economic and personal liberty and have a far reaching affect on the founders of our country.[21]

With the institution of liberty in place, interpretation and expansion followed. Edward Coke[22] is attributed with that interpretation and expansion such that common-law, good and bad, placed a great dependence upon his

15. Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 43-44 (2003).
16. *Id.* at 43.
17. *Id.* at 44 (emphasis added).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 45-46.
22. Sir Edward Coke [kook], 1552–1634:

English jurist, one of the most eminent in the history of English law. He entered Parliament in 1589 and rose rapidly, becoming solicitor general and speaker of the House of Commons. In 1593 he was made attorney general. His rival for that office was Sir Francis Bacon, thereafter one of Coke's bitterest enemies. He earned a reputation as a severe prosecutor, notably at the trial of Sir Walter Raleigh, and held a favorable position at the court of King James I. In 1606 he became chief justice of the common pleas. In this position, and (after 1613) as chief justice of the king's bench, Coke became the champion of common law against the encroachments of the royal prerogative and declared null and void royal proclamations that were contrary to law. Although his historical arguments were frequently based on false interpretations of early documents, as in the case of the Magna Carta, his reasoning was brilliant and his conclusions impressive. His constant collisions with the king and the numerous enmities he developed : especially that with Thomas Egerton, Baron Ellesmere, the chancellor : brought about his fall. Bacon was one of the foremost figures in engineering his dismissal in 1616. By personal and political influence, Coke got himself back on the privy council and was elected (1620) to Parliament, where he became a leader of the popular faction in opposition to James I and Charles I. He was prominent in the drafting of the Petition of Right (1628). His most important writings are the Reports, a series of detailed commentaries on cases in common law, and the Institutes, which includes his commentary on Littleton's Tenures.

ALLREFER ENCYCLOPEDIA, *at* http://reference.allrefer.com/encyclopedia/C/Coke-Sir.html.

interpretation and expansion of economic liberty.[23] Those expansions, interpretations and the resultant common law were not only the basis of our common law, but "were required reading for most colonial lawyers."[24] There may be some argument about the nature of due process, but it is generally considered that Coke found the economic liberties at stake were of a substantive nature.[25] Thus substantive due process purported to guarantee that if an individual had any property or money taken illegally they would be returned.[26] This is a sure foundation for the protections of all economic liberties.[27] Therefore, the stage was set for the proper challenges to define with detail what economic liberties would be considered by courts.

In 1610 a London physician was prohibited and subsequently punished for practicing medicine in contravention of statute.[28] In that case, the London College of Physicians were given the authority to both approve and penalize physicians that were not part of their membership.[29] Chief Justice Coke ruled that the statute was an "improper infringement on economic liberties."[30] As an added benefit, this statute had implications for both procedural and substantive due process.[31] But of even greater significance, the decision provided a standardized test for balancing the interests with the means to protect those interests. The test involved the interest of "protecting the public health — [which] was legitimate, [but] its means were both overinclusive because it applied to graduates of very prestigious medical schools, as well as underinclusive because it applied only to persons who practiced medicine in London for more than thirty days."[32] This decision contains important jurisprudential elements: the interpretation of a majoritarian law, the effects of its enforcement, an alleged infringement of economic liberties, and a decision that combines a balancing of governmental interests with the burden those interests place on individuals.[33] These are the seeds of a broad rationale necessary to protect economic interests under a range of doctrines. Most importantly, it is the foundation of applying "the broader and more protective rationale[]" of economic liberties to the dormant Commerce Clause doctrine.[34]

Besides protecting the economic liberties of an individual to practice their chosen profession without an infringement, the English common-law also found

23. Siegan, *supra* note 15, at 46. Coke's interpretation and expansion are considered mistakes in either understanding or misinterpreting the documents used as the basis of his "common law." *Id.*

24. *Id.*

25. *Id.* at 49.

26. *Id.*

27. *Id.*

28. *Id.* at 49-50.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Day, *supra* note 1, at 2.

impermissible the application of a fee for finishing cloth that could lead to the inevitability of a monopoly.[35] Again there was a regulation that provided that half of the finishing of cloth be done by guild members or, as an alternative, the merchant could pay the guild a nominal fee for each cloth.[36] Here the court provided a holding that has modern day ramifications in that the ordinance in question could lead to all cloth requiring guild finishing and as such would be:

> against the common law, because it was against the liberty of the subject: for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly; and, therefore, such ordinance, by colour of a charter, or any grant by charter to such effect, would be void.[37]

We can liken this type of monopoly to any invidiousness that might be perpetuated by a state within the context of the dormant Commerce Clause. The economic liberties of a merchant have been significantly shackled by a regulatory scheme that treats all merchants the same and yet it places a burden upon those liberties.[38] This type of nondiscriminatory scheme is the beginnings of the type of conduct that will be investigated within the dormant Commerce Clause.

Coke's contributions are where the literal foundation of economic liberties, found within the *Magna Carta*, are derived. The rights of today can be traced directly to his scholarship and English common-law.[39] Willam Blackstone,[40] another great scholar of the law, echoed the sentiments of Coke regarding the need for protection of economic liberties.[41] However, Blackstone also was the progenitor of the concepts for both Congressional supremacy and the rational

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35. Siegan, *supra* note 15, at 51.
36. *Id.*
37. *Id.* at 52 (emphasis added).
38. *See id.*
39. *Id.* at 58-59.
40. *See id.* at 59-64.

> Sir William Blackstone 1723–80, English jurist. At first unsuccessful in legal practice, he turned to scholarship and teaching. He became (1758) the first Vinerian professor of law at Oxford, where he inaugurated courses in English law. British universities had previously confined themselves to the study of Roman law. Blackstone published his lectures as *Commentaries on the Laws of England* (4 vol., 1765–69), a work that reduced to order and lucidity the formless bulk of English law. It ranks with the achievements of Sir Edward Coke and Sir Matthew Hale, Blackstone's great predecessors. Blackstone's *Commentaries*, written in an urbane, dignified, and clear style, is regarded as the most thorough treatment of the whole of English law ever produced by one man. It demonstrated that English law as a system of justice was comparable to Roman law and the civil law of the Continent. Blackstone has been criticized, notably by Jeremy Bentham, for a complacent belief that, in the main, English law was beyond improvement and for his failure to analyze exactly the social and historical factors underlying legal systems. Blackstone's book exerted tremendous influence on the legal profession and on the teaching of law in England and in the United States. In his later life Blackstone resumed practice, served in Parliament, was solicitor general to the queen, and was a judge of the Court of Common Pleas.

ALLREFER ENCYCLOPEDIA, *at* http://reference.allrefer.com/encyclopedia/B/BlackstoW.html.

41. Siegan, *supra* note 15, at 62.

basis standard of judicial review.[42] With that in mind, and with his unwavering guidance in protecting economic liberty, it is clear that the concept of other forms of judicial review were within his vision of jurisprudence.[43] If that is true, then there must be corresponding rationales to justify the restraint of Congressional authority when economic liberties are at stake.

It was with a concept of protecting economic liberties that brought about our Constitution and Bill of Rights.[44] Even though many believed that the silence of the Constitution regarding specific rights was protected by common law, others saw the necessity of enumerated rights.[45] Thus the Bill of Rights was created "to allay fears that the United States government might some day seek to apply powers that had not been delegated."[46] Although there have been many challenges to the power of government over protected rights, much of the protection of economic rights was provided by common law dating back to Blackstone and Coke.[47]

From this background emerged the guarantees of the original Bill of Rights with the guarantees of those rights in the context of the Fourteenth Amendment.[48] The Due Process Clause found in the Fifth Amendment is the same as that applying to the states in the Fourteenth Amendment.[49] Many early cases regarding due process applied the principles passed from English common law.[50] The power of the Due Process Clause to protect economic liberties is summed well in the words of Judge John Catron from an 1829 state case when he stated that:

> [t]he right to life, liberty and *property*, of *every individual*, must stand or fall by the same rule or law that governs every other member of the body

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42. *Id.* at 63-64.
43. *Id.*
44. *Id.* at 64-70.
45. *Id.* at 68.
46. *Id.*
47. *Id.* at 72-74.
48. *Id.* at 75.
49. *Id.*
50. *Id.* at 75-78. One Supreme Court, one Federal Circuit Court, and five state cases referred to Coke and English common law regarding due process: Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (citing an exception to due process found within the Magna Carta which allowed the United States Treasury to collect delinquencies from a collector of Customs without judicial proceedings); Greene v. Briggs, 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764) (voiding a law that denied a defendant a trial by jury unless a bond was posted to insure payment of penalty and court costs); Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843) (striking down a law that allowed for private roads to be built on private land without due process even if just compensation had been made); Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59 (1836) (negating a law that allowed court appointed guardians of infants to sell land inherited from the parents to pay the debts of the child's parents without judicial proceedings); Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833) (invalidating a law that kept an elected officeholder from his duties when there was no judicial determination that a law had been violated in order to take such prohibitive action); Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599 (1831) (finding unconstitutional a law that allowed a special tribunal to dispose of lawsuits against banks and their customers who wrote bad checks because it denied due process in that no appeal from the tribunal was allowed); Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260 (1829) (upholding a law that allowed special remedies for a holder of notes from two banks to summon persons as garnishees of the banks instead of waiting until the judgment is recovered in the normal course of due process).

> politic, or "Land," under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void . . . [t]he idea of a people through their representatives, *making laws whereby are swept away the life, liberty and property of one or a few citizens*, by which neither the representatives nor their other constituents are willing to be bound, *is too odious to be tolerated in any government* where freedom has a name.[51]

Hence, the early stages of jurisprudence aimed at protecting economic liberties against both discriminatory and nondiscriminatory governmental conduct can be seen in cases as far back as the early 1800s.[52]

In order to understand the concepts embodied in the Constitution and Bill of Rights there must be an understanding of James Madison.[53] During the creation of those great documents, Madison was guided by the ideal of economic liberty "that would depend on freedom of the markets and not on the authority of the state."[54] It appears that Madison distrusted both pure democracy and the one chosen and in use today, representative democracy.[55] Regardless of the form, government must be restrained as to the protection of economic rights, such as property rights.[56] In fact, Madison believed that government must be charged with protecting economic liberties as defined by Blackstone.[57] The restraint on government that was of importance to Madison was in the area of regulation.[58] In this regard, Madison equated economic liberties with the rights associated with speech and religion.[59] His thoughts on economic liberties are crystal clear in a speech he made to the First Congress when he said:

I own myself the friend to a very free system of commerce, and hold it as

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51. Slegan, *supra* note 15, at 80 (quoting *Vanzant*, 10 Tenn. (2 Yer.) at 270-71 (1829) (Catron, C.J., concurring)) (emphasis added).

52. *See generally supra* notes 50 and 51 and accompanying text.

53.

> Madison played [an] important role in bringing about the conference between Maryland and Virginia concerning navigation of the Potomac. The meetings at Alexandria and Mt. Vernon in 1785 led to the Annapolis Convention in 1786, and at that conference he endorsed New Jersey's motion to call a Constitutional Convention for May, 1787. With Alexander Hamilton he became the leading spokesman for a thorough reorganization of the existing government, and his influence on the Virginia plan, which advocated a strong central government, is evident.
>
> At the convention his skills in political science and his persuasive logic made him the chief architect of the new governmental structure and earned him the title "master builder of the Constitution." His journals are the principal source of later knowledge of the convention. He fought to get the Constitution adopted. He contributed with Alexander Hamilton and John Jay to the brilliantly polemical papers of The Federalist, and in Virginia he led the forces for the Constitution against the opposition of Patrick Henry and George Mason.

ALLREFER ENCYCLOPEDIA, *at* http://reference.allrefer.com/encyclopedia/M/MadisonJ-master-builder-of-the-constitution.html.

54. Siegan, *supra* note 15, at 81.

55. *Id.* at 82.

56. *Id.*

57. *Id.* at 83.

58. *Id.*

59. *Id.* at 84.

> a truth, that commercial shackles are generally unjust, oppressive, and impolitic; it is also a truth, that if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out.[60]

In summarizing the background of economic liberties, it can be readily agreed that the concept has its roots in due process jurisprudence. Where the rights of individuals to own property in the pursuit of commerce conflict with regulation, the government must be restrained from infringing upon those rights.[61] To the extent necessary, those economic liberties can be protected within other areas of the law.[62] Consequently, it is not a stretch to incorporate the protections of economic liberties within the dormant Commerce Clause.

III. COMPARISON OF OTHER RATIONALES AND DISCOUNTING THEIR VALUE

Before the other rationales can be adequately discounted in favor of the economic liberty rationale, there must be a set of suitable definitions as a first step. With definitions in hand, the rationales can then be compared. The two prominent rationales have been previously mentioned: national economic solidarity and political process.[63] Therefore, our list of rationales is limited to those generally accepted as applicable to the dormant Commerce Clause.

A. NATIONAL ECONOMIC SOLIDARITY RATIONALE

National economic solidarity rationale has also been called the structural rationale[64] and economic union rationale.[65] This rationale is generally accepted as the original basis upon which the dormant Commerce Clause doctrine has been analyzed.[66] Economic union substantiates the Court's use of the dormant

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60. *Id.* (emphasis added).

61. See *supra* Section II, "What is Economic Liberty?"

62. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (sustaining the economic liberty of a landowner under the Fifth Amendment Just Compensation Clause to protect the right to develop property as he saw fit or be adequately compensated); Saenz v. Roe, 526 U.S. 489 (1999) (safeguarding the economic liberty "right to travel" under the Fourteenth Amendment Privileges or Immunities Clause allowing welfare recipients immediate entitlement privileges); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (protecting the economic liberty of out-of-state lawyer to be licensed in New Hampshire under Article IV Privileges and Immunities Clause); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (upholding Congressional Act that protected Due Process Clause economic liberty of power companies who invested in nuclear power plants).

63. See *supra* notes 2 through 4 and accompanying text.

64. Day, *supra* note 1, at 1, 64 n.7.

65. Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 44 (1988).

66. *Id. See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 406 (1994) (O'Connor, J. concurring) (explaining that "over 20 states have enacted statutes authorizing local governments to adopt flow control laws . . . [that] impose the type of restriction on the movement of waste that Clarkstown has adopted, . . . result[ing] in the type of balkanization the [Commerce] Clause is primarily intended to prevent"); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-326 (1979) (finding that charging $1.40 per ton

Commerce Clause in order to "resolv[e] commercial conflicts between states."[67] The converse of conflict is that of a common market where goods can move in interstate commerce without interference by the states.[68]

To eliminate many conflicts between states, Congress has used its affirmative commerce power to unify certain aspects of government.[69] However, when it comes to the mobility of goods across state borders the conflicts have been numerous.[70] The form that the conflict takes centers on both state taxes and regulations.[71] Nevertheless, any thoughtful understanding of the obstructions created by the states has a direct link to the economic integration of the states.[72] This economic integration is based on a national interest under the commerce clause.[73] This interest can only be harmed when states "restrict market allocations of resources across state borders or in other states."[74] Not all state tax and regulatory schemes restrict interstate commerce.[75] Some of the regulatory schemes attempt to differentiate one state from the next in a form of

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more for out-of-state waste compared to in-state waste was one of the reasons why the "Framers granted Congress plenary authority over interstate commerce ' . . . to avoid the tendencies toward economic Balkanization that had plagued relations among . . . the States . . . '"); Dennis v. Higgins, 498 U.S. 439, 453-54 (1991) (extending 42 U.S.C. § 1983 civil rights remedies to out-of-state individuals injured for violations of the commerce clause where the Court concluded that the "Framers of the Commerce Clause had economic union as their goal . . . [with] intent to secure personal rights under this Clause"); Healy v. Beer Institute, Inc., 491 U.S. 324, 335-37 (1989) (expressing concern for the "national economic union unfettered by state-imposed limitations on interstate commerce" where one state's extraterritorial beer-price affirmation regulation imposing limitations on commerce would lead to other state's adopting similar regulations); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 223-25 (1824) (offering exclusive navigation rights on New York state waterways violates the commerce clause as regulation to be protected by "national measure" against individual states).

67. Collins, *supra* note 65, at 46.

68. *Id.* at 60.

69. *Id.*

70. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (removing charitable organization exemption from in-state land owners who catered almost exclusively to out-of-state summer campers); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (subsidizing in-state dairy producers with tax on in-state and out-of-state dairy producers); *Oregon Waste Sys.*, 511 U.S. 93, (charging more to dump out-of-state waste than in-state waste); Wyoming v. Oklahoma, 502 U.S. 437 (1992) (requiring the burning of in-state coal causing loss of revenue to out-of-state coal producers and the state of Wyoming); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (prohibiting hydroelectricity exports); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (restricting all trailer lengths while traveling on state highways); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (barring out-of-state bank holding company services); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (prohibiting waste imports); Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977) (restricting all apple producers to use only USDA apple quality grading); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (requiring trucks to have unusual mudflaps).

71. Collins, *supra* note 65, at 60.

72. *Id.* at 61.

73. *Id.*

74. *Id.*

75. *See, e.g.*, Exxon Corp. v. Maryland, 437 U.S. 117 (1978) (prohibiting all oil producers and refiners from owning retail gas stations did not violate the commerce clause even though there were no in-state oil producers and refiners); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (state regulation to pay bounties for automobiles abandoned within the state favoring in-state scrap processors over out-of-state scrap processors licensed to do business within the state did not violate the commerce clause).

commerce competition.[76] Unfortunately, most state tax and regulation schemes do interfere with the normal flow of interstate commerce.[77] This interference might be categorized as only a "burden" which may or may not be invalidated upon judicial review.[78] Regardless, there is a national interest that surrounds the dormant Commerce Clause and no state may unduly interfere with that interest.[79]

Competing with a national interest are the individual interests of each state.[80] Supporting a national interest is the notion that private markets are better served when they are efficient.[81] The efficiency of the national market is in direct competition with the efficiency of the localized lawmaking of the states.[82] This puts the courts in the position of determining which of those state laws are valid and which are impermissible under the dormant Commerce Clause.[83] If economic union is the dominant rationale, then market efficiency is secondary to interstate commercial harmony.[84] Consequently, commercial harmony in the pursuit of a national interest must outweigh individual state tax and regulatory schemes in order to eliminate interference with the "policy choices of other states."[85]

B. POLITICAL PROCESS RATIONALE

The other major dominant rationale is the political process or representation reinforcement rationale.[86] This rationale considers that individual state

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76. Collins, *supra* note 65, at 61.

77. *Id. See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 203 (1994) ("State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional. *The idea that a discriminatory tax does not interfere with interstate commerce 'merely because the burden of the tax was borne by consumers' in the taxing State was thoroughly repudiated* .... More fundamentally... Massachusetts dairy farmers are part of an integrated interstate market [and] *the purpose and effect* of the [tax and subsidy scheme] are to *divert market share to Massachusetts dairy farmers.* This diversion necessarily *injures the dairy farmers in neighboring States.*") (citations omitted, emphasis added); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 595 (1997) ("The history of our Commerce Clause jurisprudence has shown that *even the smallest scale discrimination can interfere with the project of our Federal Union.*") (emphasis added).

78. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (affirming the District Court's holding that Arizona law requiring packing cantaloupe at in-state facilities did "burden interstate commerce, and the question then becomes whether it does so unconstitutionally").

79. Collins, *supra* note 65, at 61.

80. *Id.*

81. *Id.* at 63.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 64.

86. Day, *supra* note 1, at 1-2, 64 n.8. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994) ("[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy."); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (finding that where trucking companies were generally prohibited from using trailers longer than 55 feet, the burden fell on out-of-state truckers even though the Court stated that "where such regulations do not discriminate on their face

lawmakers are "unlikely to take into account the effects of their laws on out-of-state interests."[87] Along with that, many states fail to appreciate that the true cost of their tax and regulation schemes are allotted throughout all other affected states.[88] Along with states not recognizing the effects of their tax and regulation schemes, the states have historically demonstrated a lack of consideration of constituency, both in-state and out-of-state.[89]

Generally, in-state constituents have access to the political process in order to influence tax and regulations schemes.[90] On the contrary, out-of-state "non-constituent" market participants do not have access to the political process in another state.[91] Consequently, it is important to determine "whether an in-state interest that is meaningfully represented in the political process ensures functional representation for the relevant out-of-state interests."[92] When the political process fails, it is more likely to adversely affect the out-of-state person instead of the in-state constituent.[93] This failure in the political process can be overcome through dormant Commerce Clause jurisprudence.[94] But courts must first determine the degree to which the tax and regulation scheme benefits the in-state constituent and discriminates against the out-of-state commerce participant.[95]

The discrimination that affects out-of-state commerce participants is considered the direct result of the conduct of legislators more willing to put the burden elsewhere than on constituents within their own state.[96] In the case of regulation schemes, the Court takes the approach that if a state decides to protect the economic interests of its constituents by increasing the costs of out-of-state commerce participants, then the state where they reside could reciprocally request a regulatory decrease for their constituents in retaliation.[97] This type of

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against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations"); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (noting that where out-of-state truckers were subject to state width and weight regulations "of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state").

87. Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 150 (1979).

88. *Id.* at 141.

89. *Id.* at 134-41.

90. *See West Lynn Creamery*, 512 U.S. at 200.

91. Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 40-41 (2003). See *supra* note 86, quoting Justice Stevens in *West Lynn Creamery*.

92. Stearns, *supra* note 91, at 41.

93. *Id.*

94. Tushnet, *supra* note 87, at 164.

95. *See West Lynn Creamery*, 512 U.S. at 203-04.

96. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1051-52 (3d ed., Found. Press).

97. *Id.* at 1052-53. *See, e.g.*, Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) (holding that state public utility commission's interference with rates charged according to contract between utility generating power within its borders and an out-of-state customer violated the dormant commerce clause). *But see* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 390-96 (1983) (holding that under "balancing test" states may regulate rates, regardless of

discrimination would be pervasive if the Court was not able to protect the out-of-state commerce participants "unrepresented in the [offending] state's political process."[98] But the worst transgression of state lawmaking authority is when the out-of-state commerce participant is discriminated against by bearing the whole burden of tax and regulatory schemes.[99]

C. THE "DISCOUNT"

Both the economic union and political process rationales have their proponents and critics. Both rationales must be evidenced by some type of impermissible tax or regulation scheme that results in obstructing interstate commerce.[100] The effects of the obstruction most probably result in potential or actual economic burdens being placed beyond the borders from those who will directly benefit.[101] In both rationales there continues to be present an underlying theme of economic burdens.[102] Generally, those burdens can be measured in tangible costs that the out-of-state commerce participant must bear.[103] It seems

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whether wholesale or retail, to members of cooperatives that participate on the interstate electric "grid," effectively modifying *Attleboro*'s "mechanical test").

98. TRIBE, supra note 96, at 1052. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945) (noting "that to the extent that the burden of state regulation falls on interests outside the state, *it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected*") (emphasis added); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (commenting that "[s]tate regulations affecting interstate commerce, *whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within*, have been thought to impinge upon the constitutional prohibition") (emphasis added).

99. TRIBE, supra note 96, at 1053. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 675-76 (1981) (proving that trailer length "regulation *bears disproportionately on out-of-state residents* and businesses . . . [and] [s]uch a disproportionate burden . . . has several exemptions *that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use*") (emphasis added); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 445 (1978) (showing "that the regulations impose a substantial burden on the *interstate movement of goods . . . substantially increase*[ing] *the cost of such movement* . . . by forcing [out-of-state haulers] to haul doubles across the State separately, to haul doubles around the State altogether, or to incur the delays caused by using singles instead of doubles to pick up and deliver goods") (emphasis added).

100. *See* Collins, *supra* note 65, at 75-81. *See generally* Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Tushnet, *supra* note 87.

101. Collins, *supra* note 65, at 75-81.

102. *Id.*

103. *See, e.g.*, South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 169 (1999) (average in-state corporations paid approximately one-fifth the franchise tax that an out-of-state corporation would pay); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 567 (1997) (the camp paid $20,000 per year in real property taxes because of loss of charitable exemption); Fulton Corp. v. Faulkner, 516 U.S. 325, 329 (1996) (Fulton paid $10,884 in intangibles tax based on out-of-state stock ownership); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 190-91 (1994) (out-of-state dairy producers West Lynn & LeComte paid $1 per hundred weight (cwt) or $100,000 per month added cost to subsidize in-state producers); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 387, 424 (1994) (Souter, J., dissenting) ($81 per ton tipping fee was approximately $11 per ton higher than other out-of-state tipping fees); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 96 (1994) (Oregon Waste paid $2.25 per ton for out-of-state generated waste as compared to $0.85 per ton for in-state waste); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 338-39 (1992) (Chemical Waste paid $72 per ton surcharge for all hazardous waste generated outside of Alabama); Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 395 (1984) (Westinghouse, out-of-state corporation, paid additional franchise tax of $71,970 plus interest for 1972 and $151,437 plus interest for 1973); Bacchus Imps., Ltd. v. Dias, 468

no small leap to see both rationales pointing to another more consistent rationale. Since discriminatory tax and regulatory schemes can be measured in costs that burden out-of-state commerce participants, then the unifying rationale in dormant Commerce Clause doctrine is economic liberty.[104]

Thus, it would be easy to discount both the economic union and political process rationales by a broader rationale that affects each of them.[105] When an out-of-state commerce participant can evidence the discriminatory effect of a state's tax or regulatory scheme in terms of costs, then the Court should be prepared to protect the out-of-state participant's economic liberty or validate that state's conduct.[106] The discounting in favor of economic liberty allows the Court to standardize its rationale in line with that of due process.[107] In a sense, the protections afforded by the dormant Commerce Clause doctrine are more similar than distinct with due process doctrine.[108] In both doctrines the challenger has not been afforded any protection from the state and courts must step in if there is to be any remedy.[109] Due process gives the challenger his day in court when states overreach and deprive him of his economic liberty.[110] In that same way, a challenger asserting his economic liberties within the dormant Commerce Clause is also given his day in court when a state unduly burdens market participants.[111]

IV. ECONOMIC LIBERTY AT WORK

A. *PIKE V. BRUCE CHURCH, INC.*

The factual bases in dormant Commerce Clause cases invariably concern a challenger's unwillingness to pay more than is necessary. A seminal case to begin with involves fresh fruit, a regulation, a regulator, and a desert in which to produce it.[112] In *Pike v. Bruce Church, Inc.*, an Arizona regulation requiring

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U.S. 263, 266 (1984) (importers of out-of-state liquor paid approximately $45,000,000 in taxes over a five-year period where in-state produced liquor was exempted); *Kassel*, 450 U.S. at 674 (out-of-state truckers proved added costs of approximately $12,600,000 each year to comply with state law banning truck lengths greater than sixty feet); Great Atl. & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 369, 375 n.7 (1976) (inability of A&P to use its out-of-state facility in which it invested $1,000,000 for improvements caused it to incur an additional $195,700 annually in reliance on other sources of product); Toomer v. Witsell, 334 U.S. 385, 390-91 (1948) (out-of-state shrimpers must incur the unquantified costs associated with docking, unloading, packing, stamping and reloading the shrimp before leaving South Carolina and must pay $2,500 for each boat license as compared to $25 for in-state shrimpers).

104. *See* Day, *supra* note 1, at 2, 64 n.9; Tushnet, *supra* note 87, at 141-44.
105. Day, *supra* note 1, at 2.
106. *See West Lynn Creamery*, 512 U.S. at 188-92.
107. *See supra* notes 15 through 51 and accompanying text.
108. *See* Tushnet, *supra* note 87, at 147-50.
109. *Id.*
110. *Id.*
111. *Id.*
112. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 138-40 (1970).

packing to be done within its state borders is challenged by a producer who is unwilling to let his cantaloupe crop rot in the desert.[113] The regulation in question was facially non-discriminatory in that all Arizona cantaloupe growers were treated "even-handedly."[114] The Court devised a balancing test where a regulation that "effectuate[s] a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[115] In the Court's decision is a list of references to the costs associated with compliance and an implied desire by the state to see that those associated costs are spent inside the state.[116] The grower had a perfectly good packing operation thirty-one miles across state lines in California that met similar regulations.[117] Ultimately, the cantaloupe grower would need to expend $200,000 for an identical packing shed within Arizona in order to comply.[118] Also, the Court found that this was too great a burden when balancing the state's requirement to package cantaloupe within Arizona with Bruce Church's economic costs of compliance.[119]

This *burden* had nothing to do with a national economic union rationale.[120] Arizona had argued quite properly and accurately that compliance with the regulation would not involve interstate commerce.[121] Also, since Bruce Church was a constituent of Arizona, the political process rationale would not seem to be a factor in the Court's decision.[122] Since compliance was costly and burdensome, the only rationale left to explain this decision is that Bruce Church's *economic liberty* was a greater burden.[123] Consequently, the $200,000 expenditure played a very large role in expanding the power of the dormant Commerce Clause. Later decisions would have a similar outcome, but it is necessary first to review an earlier decision that directly affected the outcome in *Pike*.[124]

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113. *Id.*

114. *Id.* at 142. Thus, the Court created a two-tier analysis of the Dormant Commerce Clause separated into Discrimination and Non-discrimination, or Undue Burden. *See* Tushnet, *supra* note 87, at 125-31.

115. *Pike*, 397 U.S. at 142.

116. *See id.* at 138-40.

117. *Id.*

118. *Id.* at 144-45.

119. *Id.*

120. *Id.* at 146.

121. *Id.* at 140-41.

122. *Id.* at 139.

123. *See id.* at 145-46.

124. Here the Court compares Arizona's requirement that Bruce Church package his in-state grown cantaloupe within its borders to that of the shrimp fishermen in *Toomer v. Witsell*. *Id.* *See infra* notes 125-133.

B. *TOOMER V. WITSELL*

In *Toomer v. Witsell*,[125] the Court discussed the material effect of the costs of certain state enforced regulations.[126] The state of South Carolina wanted all shrimp caught within its maritime waters to be unloaded, packed, and stamped in their state ports.[127] Unlike Bruce Church, here the challengers were out-of-state entities.[128] But the significant aspect of this decision is the Court's clear fix of the economic burdens upon these shrimp fishermen when:

> [t]he record shows that a high proportion of the shrimp caught in the waters along the South Carolina coast, both by appellants and by others, is shipped in interstate commerce. There was also uncontradicted evidence that *appellants' costs would be materially increased* by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, *even though that be economically disadvantageous to the fishermen*, is to divert to South Carolina employment and business which might otherwise go to Georgia; *the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.*[129]

The Court needed little more to find that this regulatory scheme violated the dormant Commerce Clause even though the law, unlike *Pike*, did facially discriminate against out-of-state shrimp fishermen.[130] Although the national economic union rationale is at work, the Court's illustration of the additional costs upon the challenger had an impact on the decision.[131] The relevance of the challenger's economic liberty focused the outcome on those added costs.[132] The Court implied, somewhat, that if the costs had been minimal or advantageous to the challenger, the state might have prevailed.[133]

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125. 334 U.S. 385 (1948). Note that the Court protected economic liberties in *Toomer v. Witsell* by invalidating South Carolina's discriminatory statute that allowed for a $25 license per boat for in-state shrimp fishermen and a $2,500 license per boat for out-of-state shrimp fishermen based on Article IV, section 2, Privileges and Immunities. *Id.* at 389-90.

126. *Id.* at 403-04.

127. *Id.* at 403-07.

128. *Id.* at 387.

129. *Id.* at 403-04 (emphasis added).

130. *Id.* at 389-91.

131. *See id.*

132. *Id.*

133. *Id.* See the Court's explanation regarding out-of-staters qualifying for either $150 or $2,500 license per boat.

> Prior to 1947 there was imposed on resident and non-resident shrimpers alike a boat tax of $1.50 per ton; a personal license tax of $5; and a tax of $5 for each shrimp trawl net . . . was amended [to] . . . [a]ll owners of shrimp boats, who are residents of the State of South Carolina shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One hundred and fifty ($150.00) (sic) dollars per year, and all owners of shrimp boats who are nonresidents of the State of South Carolina and who have not had one or more boats licensed during each of the

C. OTHER NON-DISCRIMINATION TIER CASES

In *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*,[134] the Court looked at the challenger's costs associated with not being able to sell, in retail, milk products from an out-of-state plant it owned.[135] The Great Atlantic and Pacific Tea Co. (hereinafter A&P) had thirty-eight stores in Mississippi and a milk products plant in Kentwood, Louisiana.[136] The plant in Kentwood represented an over $1,000,000 investment by A&P with one of its purposes to provide milk products to the Mississippi stores.[137] It was denied a permit to ship milk products from the plant in Louisiana to the Mississippi outlets because the state of Louisiana had not yet signed a reciprocal agreement to accept each other's processed milk products even though the Kentwood plant's products met Mississippi standards.[138] The Court eventually stated that Mississippi's reciprocity requirement "justified by the State as an economic measure"[139] was "'hostile in conception as well as burdensome in result.'"[140]

In another case, the costs associated with re-labeling Washington apples for sale in North Carolina "burdened the Washington apple industry by increasing its costs of doing business in the North Carolina market and causing it to lose accounts there."[141] Because Washington had its own "equivalent of, or superior to," grading standards, growers in that state already incurred nearly $1,000,000 annually of added expense as a matter of statutory compliance.[142] In *Hunt v. Washington State Apple Advertising Commission*, the Court then illustrated the additional cost of $1,750,000 per year that Washington growers were willing to incur for marketing, research, and education in external markets.[143] Addressing the real economic liberties at stake, the Court stated:

> [h]ere the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types. For example, there is evidence supporting the District Court's finding that individual growers

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> past three years, shall take out a license for each boat owned by him and said license shall be Two thousand five hundred ($2,500.00) dollars per year . . . [t]he appellants *cannot qualify for $150 licenses and hence are subject to the $2,500 provision.*

Id. at 391 n.11 (emphasis added).

134. 424 U.S. 366 (1976).

135. *Id.* at 368-69, 375 n.7.

136. *Id.* at 368-69.

137. *Id.*

138. *Id.* at 369-70.

139. *Id.* at 381.

140. *Id.* (quoting Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 377 (1964) (citations omitted)).

141. Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 348-49 (1977).

142. *Id.* at 336.

143. *Id.* at 337. The yearly figure was for the year that this litigation had begun. *Id.* In a most telling way regarding North Carolina's procedural attempts to prevail concerning the "$10,000 amount-in-controversy requirement," the Court further illustrated the economic plight of the Washington growers. *Id.* at 346. In discussing the requirements of 28 U.S.C. § 1331, the Court stated that the Commission "has standing to litigate the claims of its constituents [and] it may also rely on them to meet the requisite amount in controversy." *Id.*

> and shippers lost accounts in North Carolina as a direct result of the statute. Obviously, those lost sales could lead to diminished profits. There is also evidence to support the finding that *individual growers and dealers* incurred substantial costs in complying with the statute. *As previously noted, the statute caused some growers and dealers to manually obliterate the Washington grades from closed containers to be shipped to North Carolina at a cost of from 5 to 15 cents per carton.* Other dealers decided to alter their marketing practices, not without cost, by repacking apples or abandoning the use of preprinted containers entirely, among other things.[144]

Ruling contrary to North Carolina's arguments, the Court characterized the form of discrimination against the growers' economic liberties as "the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected."[145]

Elsewhere, the Court weighed the insignificant additional annual cost of tug boat escorts to the overwhelming retrofitting costs for oil tankers to comply with Washington state laws in rendering its decision.[146] In *Ray v. Atlantic Richfield Co.*, the Court upheld Washington law requiring pilots and tug boat escorts for tankers in excess of 40,000 dead weight tons (hereinafter DWT).[147] However, part of that same law that the state of Washington passed required tanker designs of 40,000 DWT to 125,000 DWT to be modified substantially from designs required by Congress.[148] Over ninety percent of all tankers used by Atlantic Richfield had been delivering crude oil with 125,000 DWT tankers and, possibly soon, tankers two times that size, also outlawed by the Washington statute, would be used.[149] The Court found that only Congress can act regarding tanker design and that states cannot limit the size of tankers within its coastal waters.[150] Clearly the costs upon challengers, like Atlantic Richfield, associated with Washington's laws played a significant factor in the Court determining that the economic liberties of those directly affected were at stake.[151]

Finally, in *Kassel v. Consolidated Freightways Corp.*,[152] the substantial costs to either reroute trucks or send trailers through the state of Iowa separately was extensively highlighted by the Court.[153] The challenger was a large transportation company providing large truck freight services throughout the contiguous forty-eight states.[154] Here the Court highlighted testimony regarding

144. *Id.* at 347 (emphasis added).
145. *Id.* at 351.
146. *See* Ray v. Atl. Richfield Co., 435 U.S. 151, 172-73 (1978).
147. *Id.* at 160.
148. *Id.* at 160-61.
149. *See id.* at 155-56.
150. *Id.* at 177-78.
151. *See id.* at 177-79.
152. 450 U.S. 662 (1981).
153. *Id.* at 674.
154. *Id.* at 664-65.

the substantial costs that Iowa's law burdened the trucking industry by adding $12,600,000 annually to all carriers, $2,000,000 of which Consolidated alone incurred.[155] Consequently, this testimony provided the Court with a considerable reason to analyze Iowa's law as *burdening* interstate commerce under an economic liberty rationale.[156]

D. RECENT DISCRIMINATION TIER CASES

"Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[157] The Court took a hard look at the effects of a garbage flow control ordinance that appeared to only affect a solitary challenger engaged in interstate commerce.[158] In *C & A Carbone, Inc. v. The Town of Clarkstown*, the Court found it necessary to educate the makers of the trash ordinance on the changing "concept of what constitutes interstate commerce."[159] The challenger, Carbone, provided recycling of solid wastes of which he would then transport the sorted output of value to others for further processing.[160] The regulation involved in this arrangement was that the non-recycled waste was to be sent to the town's new transfer station and transporters were to pay a tipping fee.[161] The Court provides a dormant Commerce Clause definition for the economic liberty rationale when it stated that:

> [w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, *its economic effects are interstate in reach.* The Carbone facility in Clarkstown receives and processes waste from places other than Clarkstown, including from out of State. *By requiring Carbone to send the nonrecyclable portion of this waste to the Route 303 transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste.* Furthermore, even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. *These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause.* It is well settled that actions are within the domain of the Commerce Clause if

155. *Id.* at 674.

156. *Id.* The Court highlights "that Iowa's law substantially burdens interstate commerce [when] [t]rucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them through separately [or] [a]lternatively, trucking companies must use the smaller 55-foot singles or 60-foot doubles permitted under Iowa law [which] . . . *engenders inefficiency and added expense.*" *Id.* (emphasis added).

157. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (citations omitted).

158. *Id.* at 387-88.

159. *Id.* at 389.

160. *Id.* at 387-88.

161. *Id.*

> they burden interstate commerce or impede its free flow.[162]

This new concept affords a broader rationale for invoking the dormant Commerce Clause based upon economic liberties denied to challengers.[163] In a further enlightening statement regarding the dormant Commerce Clause, the Court seemed to highlight the breadth of the economic liberty rationale when it stated that "the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its *practical effect and design*."[164] The *design* was clearly based upon impacting the economic liberty of the challenger in order to create the singular, practical effect of providing enough revenue to pay for the town's new waste transfer station.[165]

Finally, in *Camps Newfound/Owatonna, Inc. v. The Town of Harrison*,[166] the Court recognized the economic burdens that states can and will place upon in-state and out-of-state challengers.[167] Similar to *Pike* in the non-discrimination tier, the challenger here is an in-state resident that could avail itself of Maine's political process.[168] However, unlike *Pike*, the challenger was not faced with an undue economic burden regarding large capital expenditures.[169] Rather Camps Newfound/Owatonna faced mounting operating deficits partially attributable to losing its charitable and religious property tax exempt status at issue in this case.[170] The camp catered almost exclusively to out-of-state campers and operated with an annual deficit of approximately $175,000.[171] The burden created by the loss of their tax exempt status amounted to a little over $20,000 each year.[172] With that, the Court appeared to find that the national economic union is not implicated and then quickly does an about face when it stated that

> the facts of this particular case, viewed in isolation, do not appear to pose any threat to the health of the national economy [and yet] . . . even the smallest scale discrimination can interfere with the project of our Federal Union . . . [a]s Justice Cardozo recognized, to countenance discrimination of the sort . . . would invite significant inroads on our "national solidarity."[173]

Therefore, to allow the small amount of discrimination that affects the economic liberty of the challenger would imply the inevitability that the national economic union would be concerned.[174] This allowed the Court to use a broader rationale

162. *Id.* at 389 (citations omitted) (emphasis added).
163. *See id.*
164. *Id.* at 394 (emphasis added).
165. *Id.* at 387.
166. 520 U.S. 564 (1997).
167. *Id.* at 567-72.
168. *Id.* at 567.
169. *Id.* at 570.
170. *Id.*
171. *Id.* at 567.
172. *Id.*
173. *Id.* at 595.
174. *Id.*

to implicate a more narrow rationale.

V. CONCLUSION

The economic liberty rationale can be used as a standalone or to broaden the scope of the more traditional rationales. The Court may highlight the effects of denial of economic liberty by implying its adverse effect on the national economic union. Consequently, the three dormant Commerce Clause rationales appear to broaden concentrically from economic union on the inside, outward to political process, and then terminating with economic liberty, which encompasses the other two.

Application of the rationale affects more individualized challengers. In both *C & A Carbone* and *Camps Newfound*, the singularity of the affected challengers did not appear to persuade the Court to disregard the effects they alone were burdened with by the state. This acceptance of the economic liberty rationale by the Court can be directly traced to the *Pike* decision. Accordingly, it is apparent that the Court has shown a willingness to protect an individual's economic liberty in the context of the dormant Commerce Clause.

The effects that the Court has considered in the context of individuals centers upon added costs associated with compliance of state regulation and taxing schemes. In each of the cases cited, the overall costs associated vary widely in the effect on the challenger. Regardless of quantifying the effect, the presence of additional costs made an apparent impression on the decision by the Court. In turn, the added costs that burdened the challenger were a deprivation of economic liberty, similar to due process, that the Court seemed most willing to protect.

The broadening of the rationale will aid both individualized and generalized challengers. Using the economic liberty rationale, with its corresponding inclusion of other dormant Commerce Clause rationales, validates the protection of each challenger's right to not be interfered with by state actions when it pertains to interstate commerce. Instead of limiting protection to finding state interference beyond its borders, the Court can use the economic liberty rationale to restrict potential interference that would be inevitable if not for judicial review.

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Discrimination in the Dormant Commerce Clause

by

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DISCRIMINATION IN THE DORMANT COMMERCE CLAUSE

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The dormant Commerce Clause is one of the few constitutional doctrines effectively utilized by the United States Supreme Court to promote the fundamental economic rights implicit in the Constitution. The Court readily employs the dormant Commerce Clause to strike down state regulations for the sake of promoting the economic rationales underlying the doctrine. Hence, the doctrine has become a potent weapon to invalidate statutes that burden interstate commerce.

During the 1970s, the dormant Commerce Clause evolved into a two-tiered model comprised of the "discrimination" tier and the "undue burden" tier.[1] *But in the past decade the undue burden tier has fallen into disuse. In fact, in every dormant Commerce Clause decision since 1990, the Court has analyzed the state statute at issue under the discrimination tier of the doctrine.*[2]

Because of the significance of the discrimination tier in dormant Commerce Clause jurisprudence, the definition of "discrimination" for purposes of the dormant Commerce Clause has become increasingly important. Unfortunately, the definition of discrimination used in the dormant Commerce Clause is broad, vague, and poorly defined. Furthermore, the definition of discrimination under the dormant Commerce Clause is unlike the definition of discrimination used in other constitutional doctrines. This article will explore various definitions of discrimination and how discrimination is found in the dormant Commerce Clause.

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1. David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Potential Unsettling of the "Well-Settled Principles,"* 22 U. TOL. L. REV. 675, 678-79 (1991). Professor Day stated that "the Court has adopted a two-tier approach" and concisely summarized the model as such:

> (1) when a state engages in discriminatory regulatory conduct with respect to interstate commerce, such state laws are subjected to stringent scrutiny approaching per se invalidity; (2) even where the state has a legitimate non-protectionist governmental interest and proceeds in a facially neutral fashion, the Court will employ a "balancing" test and will weigh the putative local benefits of the regulation against the burden it places on interstate commerce.

Id. (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978); Bendix Autolite Corp. v. Midwesco Enter., 486 U.S. 888, 891 (1988); Maine v. Taylor, 477 U.S. 131, 151-52 (1986); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted)). For a more detailed discussion of the two-tiered doctrine *see infra* notes 43-45 and accompanying text.

2. *See* South Cent. Bell Telephone Co. v. Alabama, 526 U.S. 160, 169 (1999); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 297-98 (1997); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 580-81 (1997); Fulton Corp. v. Faulkner, 516 U.S. 325, 333 (1996); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201-02 (1994); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 393 (1994); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353, 359-60 (1992); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342 (1992); Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992).

Throughout the article, there will also be discussions of how discrimination is found in the Equal Protection doctrine to demonstrate how unique the concept of discrimination is within dormant Commerce Clause analysis.

I. DORMANT COMMERCE CLAUSE: HISTORY, RATIONALES AND DOCTRINE

A. ORIGINS OF THE DORMANT COMMERCE CLAUSE

The dormant Commerce Clause arises out of the negative implication of the powers vested in Congress under the Commerce Clause.[3] The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States . . . ."[4] Thus, "[a]lthough the Clause . . . speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade."[5] The negative aspect of the Commerce Clause, the dormant Commerce Clause, "directly limits the power of the States to discriminate against interstate commerce."[6] The doctrine thus prevents states from establishing regulations that discriminate or impose an undue burden on interstate commerce.[7]

B. HISTORY AND RATIONALES UNDERLYING DORMANT COMMERCE CLAUSE DECISIONS

A primary concern of the Founding Fathers was, in order to prosper, the Nation's economy needed to be centrally regulated.[8] There was concern that States would act selfishly and would pass tariffs or impose regulations that would not benefit the greater good of the United States.[9] Furthermore, the

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3. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 418-20 (1946); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, at 1029 (3d ed. 2000). "All of the [dormant Commerce Clause] doctrine . . . is thus traceable to the Constitution's *negative implications*; it is by interpreting 'these great silences of the Constitution' that the Supreme Court has limited the scope of what the state might do." *Id.* (quoting H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 535 (1949)).

4. U.S. CONST. art. I, § 8, cl. 3.

5. *Taylor*, 477 U.S. at 137 (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980)). For cases supporting this concept *see West Lynn Creamery, Inc.*, 512 U.S. at 192; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

6. *Wyoming v. Oklahoma*, 502 U.S. at 454 (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)); *see* TRIBE, *supra* note 3, § 6-2, at 1030.

7. *West Lynn Creamery, Inc.*, 512 U.S. at 192 (declaring that "state statutes that clearly discriminate against interstate commerce" violate the dormant Commerce Clause); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (articulating a balancing test for statutes that impose an undue burden on interstate commerce); TRIBE, *supra* note 3, § 6-2, at 1031.

8. THE FEDERALIST NO. 22 (Alexander Hamilton) (arguing that "there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence [than the power to centrally regulate commerce]"); THE FEDERALIST NO. 42 (James Madison).

9. Hamilton, *supra* note 8; Madison, *supra* note 8. In arguing for the inclusion of the Commerce Clause in the U.S. Constitution, Madison stated:

> The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience . . . . A very material object of this power was the relief of the States which import and export through

Founding Fathers feared that the States' protectionist measures would lead to retaliation by the burdened States.[10] This system would be highly inefficient and could stymie the development of the economy.[11] Consequently, this worry caused the Founding Fathers to draft the Constitution to prevent States from harming interstate commerce.[12] James Madison wrote that the "Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.'"[13] Even in recent years, some Supreme Court opinions indicate that the objective of the dormant Commerce Clause "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[14]

The Founding Fathers' concerns about the prosperity of the Nation were a primary reason for inclusion of the Commerce Clause in the Constitution.[15] Accordingly, these underlying concerns established the foundation for review of dormant Commerce Clause cases.[16] Based on this foundation, the Court has developed several rationales to support its review of cases under the dormant Commerce Clause doctrine.[17]

A recurring rationale supporting judicial review of dormant Commerce Clause cases is the promotion of national unity.[18] Justice Cardozo emphasized

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> other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.

Id.; *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 441 (M. Farrand ed., Yale University Press 1911) (providing transcripts of the Constitutional Convention in which Madison discussed the necessity of the Commerce Clause to prevent abuses by the States); *see* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce* Clause, 84 MICH. L. REV. 1091, 1114-15 (1986). *But cf.* Regan, *supra* note 9 at 1114 n.55 (citing EDMUND W. KITCH, *Regulation and the American Common Market, in* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 17 (A. Tarlock ed., 1981) (discussing that Edmund Kitch argued that "in fact there was almost no actual experience of protectionism and retaliation under the Articles of Confederation")).

10. *See generally* Madison, *supra* note 8.

11. *See generally* Hamilton, *supra* note 8; Madison, *supra* note 8.

12. Madison, *supra* note 8.

13. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994) (quoting 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (M. Farrand ed., Yale University Press 1911) (citations omitted)); *see* Regan, *supra* note 9, at 1114-15.

14. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (citing THE FEDERALIST NO. 22, 143-45 (A. Hamilton) (C. Rossiter ed., 1961)); *see* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

15. *See generally* Hamilton, *supra* note 8; Madison, *supra* note 8.

16. *See generally* Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1206-09 (1986). "[T]he Supreme Court strongly disfavor[s] state discriminations against interstate commerce . . . . The main reasons are adherence to the intentions of the Framers, fear of the economic and political consequences of interstate hostility, and concern about biased local political processes." *Id.* at 1206.

17. *See generally id.*

18. *See generally West Lynn Creamery, Inc.*, 512 U.S. at 193 (acknowledging that tariffs "violate[]

the importance of national unity in constitutional analysis when he stated, "[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[19]

National unity is oftentimes addressed in the context of the two most identifiable harbingers of division among the States: economic protectionism and isolationism.[20] Regulations that constitute economic protectionism are those that are "designed to benefit in-state economic interests by burdening out-of-state competitors."[21] Generally, statutes enacted for the purpose of economic protectionism are deemed unconstitutional.[22] The national unity theory also prohibits statutes that encourage state isolationism.[23] Justice Cardozo discussed the evils of isolationism in *Baldwin v. G.A.F. Seelig, Inc.* when he stated in relevant part:

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation .... Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result.[24]

Justice Cardozo's rationale continues to be cited in modern cases, such as *Chemical Waste Management* where the Court declared, "No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade."[25]

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the principle of the unitary national market"); Wyoming v. Oklahoma, 502 U.S. 437, 453-54 (1992) (stating that statutes must not be reviewed only in light of the effect on the state enacting the statute, but also in light of the effect on other states) (citation omitted); *Baldwin*, 294 U.S. at 523, 527.

19. *Baldwin*, 294 U.S. at 523.

20. *See infra* notes 21-22 and accompanying text; *infra* notes 23-25 and accompanying text; Smith, *supra* note 16, at 1208. "[S]tate discriminations arouse hostility in other states ... [and] tend toward interstate strife and disunity." *Id. Cf.* Regan, *supra* note 9, at 1112-14.

There are three objections to state protectionism ... the 'concept-of-union' objection, the 'resentment/retaliation' objection, and the 'efficiency' objection. The concept of union objection is [that] ... [s]tate protectionism is unacceptable because it is inconsistent with the very idea of political union .... [The resentment/retaliation objection is concerned that] [i]f protectionist legislation is permitted at all, it is likely to generate a cycle of escalating animosity and isolation ... eventually imperiling the political viability of the union itself.

Id. The efficiency objection concerns economic inefficiency produced by state protectionism. *Id.* at 1115-16.

21. *Wyoming v. Oklahoma*, 502 U.S. at 454 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)).

22. *Id.* at 454-55 (citing *New Energy Co.*, 486 U.S. at 273-74). "When a state statute clearly discriminates against interstate commerce, it will be struck down" unless it satisfies strict scrutiny. *Id.* at 454. *See West Lynn Creamery*, 512 U.S. at 192 (citations omitted).

23. *See* Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 339-40 (1992) (stating "[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade"); *Baldwin*, 294 U.S. at 527.

24. *Baldwin*, 294 U.S. at 527.

25. *Chem. Waste Mgmt.*, 504 U.S. at 339-40; *see* City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978) (opining that in dormant Commerce Clause cases a statute is invalidated if "a presumably

A second rationale used by the Court in dormant Commerce Clause jurisprudence is the protection of economic liberties.[26] The Supreme Court has a large arsenal of weapons, including the dormant Commerce Clause, that may be employed to protect these rights.[27] Within the long list of constitutional doctrines at the Court's disposal, the dormant Commerce Clause is possibly the most effective tool for protecting economic liberties.[28] Although the dormant Commerce Clause lends itself to protection of economic liberties, the Court does not describe the rationale in explicit terms in its dormant Commerce Clause opinions.[29]

The "economic liberty" rationale is used more openly in other constitutional doctrines; however, few constitutional doctrines are effective at protecting economic liberty interests.[30] It appears that the Court fears protecting economic interests under other doctrines, such as Equal Protection and Substantive Due Process, because protecting economic interests could cause an expansion of the protection afforded to social interests contemplated under these doctrines as well.[31] Conversely, the dormant Commerce Clause does not protect social interests.[32] Therefore, the Court may expand its protection of economic interests under the dormant Commerce Clause without collaterally expanding protection

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legitimate goal [is] sought to be achieved by the illegitimate means of isolating the State from the national economy").

26. Richard A. Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAP. L. REV. 1, 20-26 (2003) (discussing the concept of constitutional protection of economic liberties as applied in the dormant Commerce Clause); *see* Day, *supra* note 1, at 704-05.

27. Epstein, *supra* note 26, at 1 (stating that economic liberties are protected under the "Takings Clause, both Due Process Clauses, the Equal Protection Clause, the Speech and Religion Clauses of the First Amendment, and the Commerce Clause in both its affirmative and (more controversial) dormant manifestations").

28. *See generally* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 400 (2003) (discussing that the concept of discrimination under the dormant Commerce Clause is broader than under Article IV Privileges and Immunities); Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 573 (1997) (discussing that the Supreme Court's judicial activism in dormant Commerce Clause cases is a "strike against state power in the federalism balance"); *supra* note 2 and accompanying text (stating that the Court has issued ten dormant Commerce Clause opinions since 1990 and that each of these was decided in the discrimination tier of the doctrine); *infra* note 54 and accompanying text (discussing that, when deciding cases in the discrimination tier, there is only one case in which the Court held that the statute passed the strict scrutiny test).

29. *See* Day, *supra* note 1, at 704-05 (discussing that dormant Commerce Clause cases concern economic liberties); O'Grady, *supra* note 28, at 584 n.47 (discussing the economic interests that are protected by the dormant Commerce Clause).

30. *See* New Hampshire v. Piper, 470 U.S. 274, 280-81 (1985) (holding that New Hampshire's restrictions requiring bar applicants to be residents of the state were unconstitutional based on the Article IV Privileges and Immunities Clause; the Court implicitly recognized that the economic liberty of seeking employment in a state is a privilege protected by the Clause); *infra* note 121 and accompanying text (citing cases demonstrating that, unlike in dormant Commerce Clause analysis, a showing of purposefulness is required in order to find a statute invalid under the Equal Protection Clause, Substantive Due Process Clause, and Procedural Due Process Clause); *infra* notes 150-54 and accompanying text (discussing that the Court uses a broader definition of discrimination under the dormant Commerce Clause compared to the Equal Protection Clause).

31. *See also* Day, *supra* note 1, at 706-07 (stating that the fundamental rights doctrine has been tamed through the use of an invidiousness requirement).

32. *See generally* O'Grady, *supra* note 28, at 572-75 (discussing that the dormant Commerce Clause protects interstate commerce).

of social interests.[33] As a result, the Court may liberally protect economic liberties through expansive judicial review of state regulations affecting interstate commerce.[34]

A third rationale utilized by the Court in dormant Commerce Clause cases concerns the political powerlessness of out-of-state interests. [35] "[T]his approach to judicial review rests on the premises that unaccountable power is to be carefully scrutinized and that legislators are in practice accountable only to those who have the power to vote them out of office."[36] In the context of the dormant Commerce Clause, an out-of-state party burdened by a discriminatory regulation of another state does not have any political weight to encourage the legislature to change the regulation.[37] Consequently, the Court has used the dormant Commerce Clause to protect politically powerless interests.[38]

Use of the aforesaid rationales establishes a broad base for judicial review within the dormant Commerce Clause.[39] Other constitutional doctrines, such as the Article IV Privileges and Immunities Clause, also use these rationales to justify decisions protecting economic rights.[40] Generally, the protection granted

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33. *See generally id.*

34. *See* TRIBE, *supra* note 3, § 6-6, at 1062-63 (reviewing characteristics of the dormant Commerce Clause doctrine which, together, allow for expansive judicial review).

35. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981); TRIBE, *supra* note 3, § 6-5, at 1054; *see* Day, *supra* note 1, at 713 (stating the most important rationale underlying dormant Commerce Clause jurisprudence is the "political process rationale"); Smith, *supra* note 16, at 1209 (stating that one of the reasons the Supreme Court disfavors discriminatory state regulations is because of "the concern that such regulations are the product of political processes in which those mainly burdened are inadequately represented").

36. TRIBE, *supra* note 3, § 6-5, at 1054.

37. *See* TRIBE, *supra* note 3, § 6-5, at 1054.

38. *Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17. The Court found a Minnesota statute affecting interstate commerce constitutional in part because "[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Id.* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18, 447 (1978). The Court found a statute affecting interstate commerce constitutional in part because "where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Id.* at 444 n.18. *See also* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 426 (1994) (Souter, J., dissenting) (arguing that the Court's decision to strike down the statute was wrong, in part because there was not a burden imposed on out-of-state interests who could not use the political process to correct it).

The Court, however, rarely uses the political powerlessness rationale explicitly to justify a dormant Commerce Clause decision. TRIBE, *supra* note 3, § 6-5, at 1057. There are two primary theories concerning why the rationale is rarely used in dormant Commerce Clause decisions. *Id.* at 1054-57. First, the concept of protecting the politically powerless is integrally intertwined with the concept of national unity. *See id.* at 1057. An unrepresentative political process is a "political defect [which] should be seen as *underlying* the forms of economic discrimination which the Supreme Court has treated as invalidating certain state actions with respect to interstate commerce." *Id.* Second, the Court somewhat frequently holds that a statute is unconstitutional when in-state, as well as out-of-state interests are burdened. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353, 361 (1992); *C & A Carbone*, 511 U.S. at 426 (Souter, J., dissenting). The politically powerless rationale is not applicable in these cases because there is a party affected by the burdensome statute with the ability to wield political power. *Compare Fort Gratiot Sanitary Landfill*, 504 U.S. at 361; Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951); *with* Day, *supra* note 1, at 713 (stating that the political process rationale is the most "important rationale underlying the dormant commerce clause doctrine").

39. *See generally* TRIBE, *supra* note 3, § 6-6, at 1059-66.

40. Epstein, *supra* note 26, at 1 (discussing the protection provided for economic liberties under the Takings Clause, the Substantive Due Process Clause, the Procedural Due Process Clause, the Equal

to economic rights is limited in the other doctrines, even when these rationales are utilized.[41] In dormant Commerce Clause decisions, however, the Supreme Court employs these broad rationales to create a forum for activist judicial review.[42]

C. APPLICATION OF THE DORMANT COMMERCE CLAUSE

The Court developed a two-tiered framework for analyzing dormant Commerce Clause cases: cases are reviewed under either the discrimination tier or the balancing tier, also known as the "undue burden" standard.[43] In the discrimination tier, if a statute discriminates against interstate commerce, it is deemed unconstitutional unless it satisfies strict scrutiny under dormant Commerce Clause analysis.[44] In the balancing tier, if a statute is not discriminatory but has incidental effects on interstate commerce, it will be found valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[45] Because of the extensive use of the discrimination tier, the Court's application of the strict scrutiny test in dormant Commerce Clause analysis is important.[46]

The strict scrutiny test in dormant Commerce Clause review is different than strict scrutiny employed in other constitutional doctrines.[47] For example, in *Chemical Waste Management*, the Court stated the dormant Commerce Clause

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Protection Clause, the Free Speech Clause, the Freedom of Religion Clause, the Commerce Clause, and the dormant Commerce Clause); *see* New Hampshire v. Piper, 470 U.S. 274, 280-81 (1985) (establishing protection of economic rights under the Article IV Privileges and Immunities Clause).

41. *Infra* notes 150-54 and accompanying text (comparing the restraints on determinations of discrimination in the Equal Protection Clause to the broad definition of discrimination used in the dormant Commerce Clause); *infra* note 121 and accompanying text (discussing the restrictions on the Court in determining that a statute is invalid under the Equal Protection Clause, Substantive Due Process Clause, and Procedural Due Process Clause compared to the activist judicial review under the dormant Commerce Clause doctrine).

42. *Infra* notes 195-98 and accompanying text.

43. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); Day, *supra* note 1, at 678-79.

44. *See Oregon Waste Sys., Inc.*; 511 U.S. at 99 (stating that "if a restriction on commerce is discriminatory, it is virtually *per se* invalid"); West Lynn Creamery, Inc v. Healy, 512 U.S. 186, 192 (1994) (declaring that "state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism"); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342-43 (1992) (citations omitted) (opining that "facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives").

45. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In *Pike*, the Court developed a three-part balancing test to analyze balancing tier cases. *Id.* The test is stated as, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*

46. *Supra* note 2 and accompanying text.

47. *Compare Chem. Waste Mgmt., Inc.*, 504 U.S. at 342-43 (citations omitted) (holding that, under dormant Commerce Clause analysis, strict scrutiny examines whether there is "any purported legitimate local purpose and . . . the absence of nondiscriminatory alternatives"); *with* Grutter v. Bollinger, 123 S.Ct. 2325, 2336 (2003) (holding that, under Equal Protection analysis, satisfaction of strict scrutiny requires a finding that a statute protects "a compelling governmental interest" and that such statute is narrowly tailored to promote that governmental interest) *and* Reno v. Flores, 507 U.S. 292, 302 (1993) (holding that under Substantive Due Process analysis, satisfaction of strict scrutiny requires that an "infringement is narrowly tailored to serve a compelling state interest").

strict scrutiny test as a review of a "legitimate local purpose and of the absence of nondiscriminatory alternatives."[48] In contrast, the construction of the strict scrutiny test under the Equal Protection and Due Process doctrines is more demanding.[49] Generally, strict scrutiny under both the Equal Protection and Due Process doctrines requires a compelling local interest and use of the least restrictive alternative.[50]

As in other constitutional doctrines, the use of a strict scrutiny standard in dormant Commerce Clause analysis provides the Court another vehicle to find that discriminatory statutes are unconstitutional.[51] The consequences of analyzing a statute in the discrimination tier are severe: statutes virtually never satisfy strict scrutiny.[52] The Court has stated, "[I]f a restriction on commerce is discriminatory, it is virtually *per se* invalid."[53] In fact, there is only one United States Supreme Court case where a statute was deemed discriminatory, but was found constitutional.[54] Consequently, only when a state regulation is analyzed

48. *Chem. Waste Mgmt., Inc.*, 504 U.S. at 342-43. In dormant Commerce Clause cases the strict scrutiny test typically uses the standard of "legitimate local interest." C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392-94 (1994). *See also Chem. Waste Mgmt., Inc.*, 504 U.S. at 342-43. *Cf. West Lynn Creamery, Inc.*, 512 U.S. at 192 (stating that the strict scrutiny determination concerns whether the statute promotes a "valid factor"). In other constitutional doctrines "legitimate local purpose" is more commonly used for rational basis scrutiny of statutes. *See* Bd. of Trustees v. Garrett, 531 U.S. 356, 367 (2001) (citations omitted) (holding that under Equal Protection analysis the rational basis test is whether there "is a rational relationship between the disparity of treatment and some legitimate governmental purpose"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (holding that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose"); *Flores*, 507 U.S. at 319 (citations omitted) (holding that the rational basis test in Substantive Due Process cases is whether an action "is rationally connected to a governmental interest"). In dormant Commerce Clause jurisprudence, however, the analysis of a "legitimate" purpose is generally applied as a stricter review than rational basis. *See C & A Carbone*, 511 U.S. at 392-94. In *C & A Carbone*, the Court wrote that the "rigorous scrutiny" applied in dormant Commerce Clause analysis considers whether a state "has no other means to advance a legitimate local interest," but later discusses that "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Id.* at 392-94. *See also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935). Under a rational basis test, revenue generation would be considered a legitimate local interest. *See* Lawrence v. Texas, 123 S.Ct. 2472, 2484 (2003) (O'Connor, J., concurring) (stating that "[l]aws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster"). Therefore, at least in certain cases, the test for a legitimate local interest under dormant Commerce Clause analysis appears to be closer to a compelling interest standard.

49. *Compare supra* notes 47-48 and accompanying text (describing strict scrutiny analysis under the dormant Commerce Clause), *with infra* note 50 and accompanying text (stating the strict scrutiny test under the Equal Protection and Substantive Due Process doctrines).

50. *Grutter*, 123 S.Ct. at 2336 (stating the strict scrutiny analysis under the Equal Protection Clause as review of whether a statute protects "a compelling governmental interest" and that such statute is narrowly tailored to promote that governmental interest); *Flores*, 507 U.S. at 302 (discussing the strict scrutiny test under the Substantive Due Process Clause as an "infringement [that] is narrowly tailored to serve a compelling state interest").

51. *See* TRIBE, *supra* note 3, § 6-6, at 1062 (discussing the rigorous scrutiny applied to discriminatory statutes under dormant Commerce Clause analysis).

52. *See id.* at 1063 (stating that "review of plainly discriminatory state regulations is nearly always fatal"); Smith, *supra* note 16, at 1204 (emphasizing that "discriminatory regulations are almost invariably invalid"); O'Grady, *supra* note 28, at 574 (discussing that if a statute is deemed to be discriminatory, the Court will apply strict scrutiny "under a near-fatal rule of 'virtual per se' invalidity").

53. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); *see supra* note 48 and accompanying text (discussing the use of strict scrutiny under dormant Commerce Clause analysis).

54. Maine v. Taylor, 477 U.S. 131, 151-52 (1986); *see* TRIBE, *supra* note 3, § 6-6, at 1064.

in the balancing tier does it have a realistic chance of survival.[55]

The harsh treatment of statutes analyzed in the discrimination tier is especially profound given the Court's willingness to find discrimination under the dormant Commerce Clause.[56] In recent years the United States Supreme Court has significantly broadened the definition of discrimination for dormant Commerce Clause purposes.[57] Given that discriminatory statutes are "virtually *per se* invalid," the broad definition of discrimination has far-reaching effects: review of state statutes under the dormant Commerce Clause is nearly always fatal to the regulation.[58]

II. DISCRIMINATION IN THE DORMANT COMMERCE CLAUSE: DEFINITIONS

The first inquiry in dormant Commerce Clause analysis is whether a state statute is discriminatory.[59] Consequently, the definition of "discrimination" employed by the Supreme Court in dormant Commerce Clause cases is of consequence. For purposes of the dormant Commerce Clause, discrimination is often viewed as disparate treatment of in-state and out-of-state interests.[60] Professor Smith refined this definition as follows: "[a] regulation is discriminatory if it imposes greater economic burdens on those outside the state, to the economic advantage of those within."[61] Considering the nature of the Court's dormant Commerce Clause decisions, however, this definition is too narrow.[62] Professor Smith's definition requires that there be out-of-state interests burdened at the expense of in-state interests.[63] But in cases throughout the years the Court has routinely held that a statute violates the dormant Commerce Clause when in-state interests are burdened in addition to out-of-state interests.[64] Furthermore, Professor Smith's definition requires that an economic

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55. O'Grady, *supra* note 28, at 574. "A regulation analyzed under the Pike balancing test, on the other hand, has a far better chance of being declared valid" than a regulation analyzed under the discrimination tier. *Id.*

56. *See* TRIBE, *supra* note 3, § 6-6, at 1059. "The Court's operative definition of 'discrimination' is fairly broad." *Id.*

57. *See supra* note 2 (discussing that in dormant Commerce Clause decisions since 1990 the Supreme Court has exclusively analyzed statutes under the discrimination tier of the doctrine).

58. *Oregon Waste Sys.*, Inc., 511 U.S. at 99; *see* TRIBE, *supra* note 3, § 6-6, at 1062. "This expansive notion of discrimination has particular importance because the scrutiny of discriminatory measures is quite strict." *Id.*

59. *See* TRIBE, *supra* note 3, § 6-6, at 1059. "The Court's current approach to state regulation of commerce places great emphasis on the question whether the regulation in question discriminates against interstate or out-of-state commerce." *Id. Cf.* O'Grady, *supra* note 28, at 575 (stating that the preliminary inquiry should be whether a statute is economically protectionist, rather than whether a statute is discriminatory).

60. *Oregon Waste Sys., Inc.*, 511 U.S. at 99. "'[D]iscrimination' simply means differential treatment of in- state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* TRIBE, *supra* note 3, § 6-6, at 1059-60. "Any disparity in the treatment of in-state and out-of-state interests – whether businesses, users, or products - constitutes discrimination, even if the disparity is slight." *Id.*

61. Smith, *supra* note 16, at 1213.

62. *See infra* notes 64-66 and accompanying text.

63. Smith, *supra* note 16, at 1213.

64. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994); Fort Gratiot Sanitary

interest be burdened.[65] In fact, the Court has held that a statute is unconstitutional even when only health and safety interests are burdened.[66]

An alternative definition of discrimination is explicitly used in numerous dormant Commerce Clause cases.[67] In these cases, the issue is phrased as whether a statute regulates "evenhandedly."[68] Although this definition is considerably broader than Professor Smith's definition of discrimination, in practice it is generally only used in the context of a balancing tier case.[69]

A third definition of discrimination in dormant Commerce Clause analysis is that a statute is deemed discriminatory when it imposes a "burden on interstate commerce."[70] Justice Cardozo articulated this standard when he wrote, "[I]t is the established doctrine of this Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business."[71] This definition is broad enough to not require discrimination against out-of-state interests; it only requires that the regulation create a burden on interstate commerce.[72] Considering the generous notion of "commerce" in constitutional doctrines, the definition also encompasses economic, as well as non-economic, burdens.[73] Although this definition of discrimination is frequently utilized by

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Landfill, Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353, 361 (1992); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951). *But see C & A Carbone, Inc.*, 511 U.S. at 411 (Souter, J., dissenting) (basing his dissent, in part, on the idea that in-state and out-of-state interests are treated similarly).

65. *See* Smith, *supra* note 16, at 1213.

66. *C & A Carbone, Inc.*, 511 U.S. at 393 (stating that the discrimination at issue in this case concerns "health and environmental problems"); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670-71 (1981) (discussing that state health and safety regulations are subject to review under the dormant Commerce Clause); Smith, *supra* note 16, at 1220-21 (analyzing cases where non-economic burdens are created by the subject statute); TRIBE, *supra* note 3, § 6-6, at 1060. "[A] finding of discrimination [does not] necessarily depend on economic analysis." *Id.*

67. *See infra* note 68.

68. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); CTS Corp. v. Dynamics Corp., 481 U.S. 69, 94 (1987) (finding a statute constitutional because it regulated "evenhandedly"); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (setting forth the test used in the balancing tier; the preliminary inquiry is whether a statute regulates evenhandedly).

69. *See CTS Corp.*, 481 U.S. at 94. The Court found the statute at issue was constitutional because it regulated "evenhandedly." *Id.* The case was decided in the balancing tier. *Id.* In *Pike*, the Court found the statute unconstitutional. 397 U.S. at 146. Although it regulated evenhandedly, it did not pass the test required under the balancing tier. *Id.* at 142-46. *But see Oregon Waste Sys.*, 511 U.S. at 99. The Court discussed whether the statute regulated evenhandedly although the case was decided in the discrimination tier. *Id.*

70. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 578 (1997) (discussing that "discriminatory burdens on interstate commerce imposed by regulation or taxation may also violate the Commerce Clause"). *See also Kassel*, 450 U.S. at 670 (stating that non-economic burdens on interstate commerce are sufficient to find a statute unconstitutional).

71. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) (citations omitted).

72. *See Kassel*, 450 U.S. at 664 (stating the issue in the case as "whether an Iowa statute . . . unconstitutionally burdens interstate commerce"); TRIBE, *supra* note 3, § 6-6, at 1061. "[A] statute may be deemed to 'discriminate' against interstate commerce even if it does not regulate interstate commerce as such." *Id.*

73. *See* Hodel v. Indiana, 452 U.S. 314, 324 (1981) (citations omitted). "[T]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. The pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce." *Id.* (citations omitted). *But see* United States v. Lopez, 514 U.S. 549, 561 (1995).

> [The] criminal statute [regulating carrying guns] . . . has nothing to do with 'commerce' or any

the Court, whether an opinion uses this broad definition often depends on the author of the opinion and the facts of the case.[74]

The use of a broad definition of discrimination is somewhat remarkable considering the narrower definition of discrimination used in other constitutional doctrines.[75] What makes the use of this broad definition of discrimination incredible, however, is the harsh treatment of statutes that are deemed discriminatory.[76] States face a daunting challenge in defending statutes and regulations which impose a burden on interstate commerce: difficulty overcoming an broad definition of discrimination, and harsh treatment of statutes that are deemed discriminatory.[77]

III. DISCRIMINATION IN THE DORMANT COMMERCE CLAUSE: MODES

Throughout the constitutional doctrines, discrimination is generally found in a statute in one of three ways: the statute discriminates on its face (facial discrimination); the statute discriminates in its effects (discrimination in effect); or, the purpose behind the statute is discriminatory (purposeful discrimination).[78] The Court also uses these three classifications to find discrimination in dormant Commerce Clause cases.[79] Interestingly, the Court utilizes these modes of discrimination differently in dormant Commerce Clause analysis, compared to other constitutional doctrines.[80] The unique use of the modes of discrimination

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> sort of economic enterprise, however broadly one might define those terms. [The statute is] not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.

Id.

74. *E.g.*, *Camps NewFound/Owatonna, Inc.*, 520 U.S. at 578 (stating that "discriminatory burdens on interstate commerce imposed by regulation or taxation may also violate the Commerce Clause"); West Lynn Creamery v. Healy, 512 U.S. 186, 192 (1994) (opining that statutes are unconstitutional if they are "designed to benefit in-state economic interests by burdening out-of-state competitors"); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) (stating that the inquiry under the *Pike* test is whether a statute "imposes a burden on interstate commerce").

75. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring a finding that discrimination may not be found based on the effects of the statute alone in Equal Protection analysis); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (citing *Davis*, 426 U.S. at 242). "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* Day, *supra* note 1, at 707 (discussing that in the Equal Protection and Substantive Due Process doctrines, the use of a "purposefulness" requirement has severely curtailed the effectiveness of those doctrines).

76. *See* TRIBE, *supra* note 3, § 6-6, at 1062-63; Smith, *supra* note 16, at 1204 (stating "discriminatory regulations are almost invariably invalid . . . ").

77. *See* TRIBE, *supra* note 3, § 6-6, at 1062-63; Smith, *supra* note 16, at 1204.

78. *See generally* Smith, *supra* note 16, at 1239-44 (denoting the three types of discrimination).

79. Amerada Hess Corp. v. Director, 490 U.S. 66, 75 (1989). "As our precedents show, a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Id.*

80. *See infra* notes 114-16, 121-22 and accompanying text (comparing how the Court finds discrimination in effect under the dormant Commerce Clause to discrimination in effect under the Equal Protection clause); *infra* notes 150-54 and accompanying text (analyzing the difference in treatment of purposeful discrimination under the dormant Commerce Clause to purposeful discrimination under the Equal Protection Clause).

within the dormant Commerce Clause contributes to the strength of the dormant Commerce Clause as a weapon to be used against statutes and regulations.[81]

In dormant Commerce Clause analysis, the Court sometimes uses discrimination in effect and purposeful discrimination to find that a statute is facially discriminatory.[82] Therefore, this article will first review discrimination in effect and purposeful discrimination, and will conclude by analyzing facial discrimination.[83]

A. DISCRIMINATION IN EFFECT

A statute may be deemed discriminatory in dormant Commerce Clause analysis when the effect of the statute is discriminatory.[84] The classic example in dormant Commerce Clause analysis is found in *West Lynn Creamery, Inc. v. Healy*.[85] In this case the Court reviewed a taxation scheme in Massachusetts.[86] The State imposed a pricing order in which every dealer in milk products was required to pay a monthly premium into the Massachusetts Dairy Equalization Fund.[87] This premium applied to all dealers equally, whether they were located in-state or out-of-state, and regardless of where the milk was purchased, sold or distributed.[88] Standing on its own, this statute was not facially discriminatory.[89]

A completely separate statute, however, provided the Massachusetts Dairy Equalization Fund was to be distributed on a monthly basis to every Massachusetts milk dealer.[90] In prior and subsequent decisions, the Court has indicated that subsidies, without more, do not violate the dormant Commerce Clause.[91] Again, standing on its own, this subsidy was not facially discriminatory.[92] The Court found, however, that the two statutes operating together created a scheme that, in *effect,* discriminated against out-of-state

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81. *See generally* Day, *supra* note 1, at 706-08 (discussing the Rehnquist Court's "pacification" of the fundamental rights doctrine and suggesting that the dormant Commerce Clause has not yet been "pacified" in a similar manner).

82. *See infra* notes 179-86 and accompanying text.

83. The author notes that the Supreme Court usually reviews the modes of discrimination in a different order. The author observes that the Court first determines if the statute is facially discriminatory. Then in many cases, if it is facially discriminatory, the Court will not review whether it is discriminatory in effect or in purpose. If the statute is not facially discriminatory, the Court will consider whether the statute is discriminatory in effect, and finally whether it purposefully discriminates. *See Amerada Hess*, 490 U.S. at 75.

84. Smith, *supra* note 16, at 1243-44; *see* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994).

85. 512 U.S. 186 (1994).

86. *Id.* at 188.

87. *Id.* at 190.

88. *Id.* at 191.

89. *Id.* at 200. The Court described the taxation scheme as "nondiscriminatory" and "evenhanded." *Id.*

90. *Id.* at 191.

91. *Id.* at 199 n.15. The Court has not directly answered the question whether subsidies violate the dormant Commerce Clause. *Id.* But dicta in a few cases indicates that subsidies, without more, do not violate the dormant Commerce Clause. *See id.*; Camps NewFound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 583 n.16 (1997).

92. *West Lynn Creamery, Inc.*, 512 U.S. at 199.

commerce.[93] "Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products."[94] The Court then went on to find that the discriminatory tax did not satisfy strict scrutiny, and deemed the pricing scheme unconstitutional.[95]

In another example of the Court considering the effects of a statute to find it discriminatory, the Court invalidated a city ordinance in *C & A Carbone, Inc. v. Town of Clarkstown*.[96] In *C & A Carbone*, the City enacted an ordinance that required all waste collected within the City to be processed at the local transfer station prior to leaving the town.[97] The statute did not discriminate based on the origin of the waste, or where the waste would ultimately be deposited.[98] It also did not discriminate based on the residence of the waste hauler.[99] Despite the lack of facial discrimination, the Court ruled that the statute was discriminatory in its effects.[100] The Court held that the ordinance directed the waste to the preferred processing facility, instead of allowing waste haulers to choose where to process the waste they collected.[101] "Though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design."[102] The Court held that this "protectionist effect" constituted "[d]iscrimination against interstate commerce."[103] Applying the *per se* invalidity standard, the Court determined that the statute was unconstitutional because the local interests were not sufficient to justify the discrimination.[104]

Similarly, in the earlier case *Hunt v. Washington State Apple Advertising Commission,* the Court found that the effect of a statute was discriminatory.[105] The subject of this case was a North Carolina statute that required all closed containers of apples entering the state to display either the USDA grade of the apples, or no grade at all.[106] Washington apple producers requested an exemption from the North Carolina regulations because they already utilized a more stringent grading system.[107] Despite multiple requests, North Carolina refused to grant Washington apple producers an exemption from the labeling

93. *Id.* at 194.
94. *Id.*
95. *Id.* at 207.
96. 511 U.S. 383, 392-93 (1994).
97. *Id.* at 386.
98. *Id.* at 387-88.
99. *Id.*
100. *Id.* at 394.
101. *Id.* at 391.
102. *Id.* at 394.
103. *Id.* at 392.
104. *Id.* at 392-93.
105. 432 U.S. 333, 350-51 (1977).
106. *Id.* at 337.
107. *Id* at 338-39. The Washington grading system was utilized in order to protect the reputation of Washington apples as being of high quality. *Id.* at 336. Washington's grading system was, in all respects, equivalent to or more stringent than the USDA grading system. *Id.* at 351.

regulation.[108] Consequently, the Washington State Apple Advertising Commission brought suit declaring that the North Carolina statute was invalid under the dormant Commerce Clause.[109] The Court found that the statute was unconstitutional because it unfairly burdened interstate commerce and that this burden was not outweighed by local interests.[110]

Writing for the Court, Chief Justice Burger engaged in an extended discussion of the discriminatory effects of the North Carolina statute. Chief Justice Burger's opinion listed three ways in which the statute had a discriminatory effect.[111] Despite the finding that there was a discriminatory effect in addition to finding a discriminatory purpose, the Court did not analyze the constitutionality of the statute under the discrimination tier.[112] Instead the Court found the statute unconstitutional under the balancing tier of the doctrine.[113]

1. Comparison to Finding Discrimination in Effect in the Equal Protection Doctrine

In dormant Commerce Clause jurisprudence, if the Supreme Court finds that the effect of a statute is discriminatory, the statute will be analyzed in the discrimination tier of the doctrine.[114] Analysis of the effect of the statute alone is sufficient to determine whether it is discriminatory.[115] Determinations of discrimination in effect in dormant Commerce Clause jurisprudence varies from findings of discrimination in effect under the Equal Protection doctrine.[116] The 1976 case of *Washington v. Davis* established the standard for determinations of discrimination in effect under the Equal Protection Clause.[117] The subject of *Davis* was a written employment examination utilized by the District of Columbia Police Department.[118] Four times as many African-American police

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108. *Id.* at 339.

109. *Id.* Washington complained that the North Carolina regulations increased, to Washington apple producers, the cost of selling apples in North Carolina. *Id.* at 338.

110. *Id.* at 353.

111. *Id.* at 350-52.

112. *Id.* at 352-53.

113. *Id. See generally* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (articulating the test for the balancing tier of the dormant Commerce Clause doctrine, also known as the undue burden standard).

114. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994); Amerada Hess Corp. v. Director, 490 U.S. 66, 75 (1989).

115. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994). *But see* Smith, *supra* note 16. In his article written prior to the *West Lynn Creamery* decision, Professor Smith suggested that the Court is unlikely to find a statute is discriminatory based solely on the effects of the statute. *Id.* at 1243-44. Smith suggested that the Court will find a statute is discriminatory based on its effects when it also suspects that there is a discriminatory purpose, "but lacks sufficient evidence to characterize it as such." *Id.* at 1249-50.

116. *Infra* notes 121-24 and accompanying text; *see* Day, *supra* note 1, at 706-07. Professor Day discusses that in the fundamental rights doctrine, the Supreme Court adds an additional burden for the challenger of a statute. *Id.* "[U]nless the state has acted intentionally or purposefully, the state has not violated the liberty interests at issue." *Id.*

117. 426 U.S. 229 (1976).

118. *Id.* at 232-34. The Department used the examination in order to help determine whether police officers were eligible for promotion. *Id.*

officers as Caucasian police officers failed the examination.[119] Despite the greatly disproportionate impact of the examination on African-American applicants compared to Caucasian applicants, the Court held that the examination was not discriminatory.[120] The Court, per Justice White, stated "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[121] Furthermore, the Court declared in relevant part:

> Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.[122]

In so holding, the Court adopted the rule that *effects alone are not enough* to deem a statute discriminatory under the Equal Protection Clause.[123] Conversely, in dormant Commerce Clause jurisprudence, effects alone are sufficient to deem a statute discriminatory.[124]

The willingness of the Court to find a statute discriminatory in its effects, without more, is doctrinally significant.[125] This, combined with the other factors mentioned throughout this article, demonstrates that discrimination analysis in the dormant Commerce Clause is considerably broader than in other constitutional doctrines.[126] Again, this allows the Court to engage in activist judicial review when considering dormant Commerce Clause cases.[127]

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119. *Id.* at 237. All applicants, regardless of race, had to take the same examination. *Id.* at 234.

120. *Id.* at 246.

121. *Id.* at 239; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (citations omitted) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986) (holding that the negligent deprivation of the protection of prisoners is insufficient to implicate Procedural Due Process, implying that a showing of purposefulness is required).

122. *Davis*, 426 U.S. at 242 (citation omitted).

123. *See generally id.*

124. Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 341-42 (1992) (stating that there is no requirement that the State purposefully discriminate in order to find a statute in violation of the dormant Commerce Clause); Amerada Hess Corp. v. Director, 490 U.S. 66, 75 (1989). "As our precedents show, a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Id.* Smith, *supra* note 16, at 1249. *But see* Smith, *supra* note 16, at 1249-50 (arguing an alternative proposition that discrimination in effect is subject to strict scrutiny in situations where the Court also suspects the state of purposefully discriminating, but does not have sufficient evidence to find purposeful discrimination).

125. *See generally* Day, *supra* note 1, at 707.

126. *See* TRIBE, *supra* note 3, § 6-6, at 1059, 1062; Day, *supra* note 1, at 707.

127. *See* TRIBE, *supra* note 3, § 6-6, at 1059, 1062.

B. PURPOSEFUL DISCRIMINATION

The Court will also examine the underlying purpose behind a statute in order to determine if it is discriminatory.[128] To determine whether a statute is enacted with a discriminatory purpose, the Court will consider the motives, objectives and ends of the legislative body.[129] Evidence of the purpose or motive behind enactment of a statute is generally difficult to find.[130] Consequently, this mode of finding discrimination is used less frequently than findings of facial discrimination or discrimination in effect.[131] Irrespective of this difficulty, the Court does periodically find that a state's purpose is discriminatory for dormant Commerce Clause purposes.[132]

In *Kassel v. Consolidated Freightways Corp.*, the Court found that the purpose of the challenged statute was to discriminate against interstate commerce and, ultimately, found the statute unconstitutional.[133] In *Kassel* the Court considered the constitutionality of an Iowa statute enacted to prohibit double-tractor trailers in excess of sixty-five feet in length from using its highways.[134] The statute had several exceptions that primarily benefited Iowans, according to the Court.[135] Iowa's stated purpose of the statute was to increase safety on its highways because double tractor-trailers were not as safe as singles.[136]

In its opinion, the Court relied on three factors in its determination that the statute was enacted with a discriminatory purpose.[137] First, the Court decided that the safety objectives of the statute were "illusory."[138] Second, the Court

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128. *Amerada Hess*, 490 U.S. at 75. "[A] tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Id.* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003). "[D]iscrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose." *Id.* (citations omitted).

129. O'Grady, *supra* note 28, at 593. "A protectionist measure, however, is one that comes complete with affirmative legislative intent." *Id.* Smith, *supra* note 16, at 1241-42; Mitchell N. Berman, Note, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 23 (2001). "Roughly, a governmental 'purpose' refers to the state of affairs that decision-makers seek to achieve by their action or inaction. Its near-synonyms in constitutional discourse include 'motives,' 'objectives,' 'ends,' and 'aims.'" *Id.* at 23 (citations omitted).

130. Smith, *supra* note 16, at 1242.

131. *See generally id.*

132. *Id.* at 1241-43.

133. 450 U.S. 662, 678-79 (1981).

134. *Id.* at 665.

135. *Id.* at 676.

136. *Id.* at 667. A "double" is a "two-axle tractor pulling a single-axle trailer which, in turn, pulls a single-axle dolly and a second single-axle trailer." *Id.* at 665. A double is typically sixty-five feet in length. *Id.* A "single" is a "three-axle tractor pulling a thirty-foot two-axle trailer." *Id.* A single is typically fifty-five feet in length. *Id.*

137. *Id.* at 671-77.

138. *Id.* at 671. In making this determination the Court considered evidence presented by Consolidated Freightways and determined that the State of Iowa failed to prove that singles were safer than doubles. *Id.* at 671-74. As a result, the Court found that the District Court's findings "that the twin is as safe as the semi" were supported by the evidence. *Id.* at 672. The Court went on to state that "Iowa's law tends to *increase* the number of accidents, and to shift the incidence of them from Iowa to other States," implying that the safety argument was pretextual and, in fact, Iowa's purpose was discriminatory. *Id.* at 675. *See also* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594

opined that the statute disproportionately burdened out-of-state interests.[139] Third, the Court relied on statements made by Iowa's governor indicating he supported the ban on double tractor-trailers because it benefited Iowa-based companies.[140] Based on the above factors, the Court determined that Iowa's purpose in enacting the regulation was not to promote safety on Iowa highways, but rather to force the burden of interstate trucking onto neighboring states.[141] Although the Court found that the statute was enacted with a discriminatory purpose, the Court decided this case in the balancing tier of the dormant Commerce Clause and held that the statute was unconstitutional.[142]

The Supreme Court also found purposeful discrimination when it decided *Bacchus Imports, Ltd. v. Dias*.[143] In this case a Hawaii statute imposed a twenty percent excise tax on wholesale sales of liquor.[144] The statute further provided that sales of two varieties of locally-manufactured liquor were exempt from the tax.[145] Hawaii's stated purpose in enacting the exemptions was to "foster the local industries by encouraging increased consumption of their product."[146]

Authoring the Court's opinion, Justice White stated that "we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry."[147] In addition to finding purposeful

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(8th Cir. 2003). The Eighth Circuit determined that there was indirect evidence of the State's discriminatory purpose in proposing Amendment E. *Id.* The Court stated that there were "irregularities in the drafting process" demonstrated by the "impression that the drafters and supporters of Amendment E had no evidence" that Amendment E would accomplish its stated objectives. *Id.* at 594-95.

139. *Kassel*, 450 U.S. at 676. The Court held that disproportionate burdens were demonstrated by the exceptions to the statute that benefited Iowans. *Id.* Furthermore, the existence of the exemptions indicated that the purpose of the statute was not "to ban dangerous trucks, but rather to discourage interstate truck traffic." *Id.* at 677. "Such a disproportionate burden is apparent here. Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use." *Id.* at 676.

140. *Id.* at 677. Iowa's Governor Ray vetoed a 1974 bill that would have permitted 65-foot doubles in the State and later declared:

> I find sympathy with those who are doing business in our state and whose enterprises could gain from increased cargo carrying ability by trucks. However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens.

Id. See also South Dakota Farm Bureau, 340 F.3d at 593-94. The Eighth Circuit determined that the drafters of Amendment E to the South Dakota Constitution "intended to discriminate against out-of-state businesses." *Id.* at 593. The Court demonstrated this intent by stating: "The record contains a substantial amount of such evidence as regards the drafters, the most compelling of which is the 'pro' statement on a 'pro-con' statement compiled by Secretary of State Hazeltine and disseminated to South Dakota voters prior to the referendum." *Id.* at 593-94.

141. *Kassel*, 450 U.S. at 677.

142. *Id.* at 678-79. *But see id.* at 685 (Brennan, J., concurring) (stating that although the Court "recognizes that the State's actual purpose in maintaining the truck-length regulation was 'to limit the use of its highways by deflecting some through traffic,' [it] fails to recognize that this purpose, being *protectionist* in nature, is *impermissible* under the Commerce Clause").

143. 468 U.S. 263 (1984).

144. *Id.* at 265.

145. *Id.* Okolehao and pineapple wine, both manufactured in Hawaii, were exempted from the liquor tax. *Id.*

146. *Id.* at 269.

147. *Id.* at 271. The State defended the exemptions stating that the protected liquors did not compete with other products sold by wholesalers. *Id.* at 268. In claiming there was a low level of competition, the State relied on statistics demonstrating the low level of sales of the Hawaiian products.

discrimination, the Court also found that the effects of the statute were discriminatory.[148] Consequently, the Court determined that the exemption violated the dormant Commerce Clause "because it had both the purpose and effect of discriminating in favor of local products."[149]

1. *Purposeful Discrimination: Comparison to the Equal Protection Clause*

A finding of purposeful discrimination is considerably easier in dormant Commerce Clause analysis than in Equal Protection cases.[150] In Equal Protection cases, the Court will not deem a purposefully discriminatory statute unconstitutional unless the challenger meets "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[151] This burden shifting does not occur within the dormant Commerce Clause doctrine.[152] In fact, at least one author argues that purposefully discriminatory statutes are "per se [sic] invalid."[153] In dormant Commerce Clause analysis, if purposeful discrimination exists, then the statute will be reviewed under the strict scrutiny standard.[154]

C. FACIAL DISCRIMINATION

In most constitutional doctrines a statute is deemed to be facially discriminatory if the prohibited discrimination is found on the face of the

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Id. The Court held that the limited competition between the exempted liquors and other wholesale liquors is not determinative in whether the statute is discriminatory. *Id.* at 269. "[N]either the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present 'competitive threat' to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages." *Id.* The State argued that the limited level of competition, however, indicates that the case should be determined in the balancing tier. *Id.* at 270. The State argued that "taking into account the practical effect and relative burden on commerce" the Court should employ a "more flexible approach" in its analysis. *Id.* The Court held, contrary to the State's argument, that "examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce." *Id.*

148. *Id.* at 271. "[I]t is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory." *Id.*

149. *Id.* at 273.

150. *See infra* notes 151–54 and accompanying text.

151. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977).

152. *See* Smith, *supra* note 16, at 1242 (stating "regulations that are discriminatory in purpose are per se invalid").

153. *Id.*; *see also* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 685 (1981) (Brennan, J., concurring) (asserting that because the purpose of the statute, "being *protectionist* in nature, is *impermissible* under the Commerce Clause").

154. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994). "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid." *Id. See also* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596-97 (8th Cir. 2003). "Because we conclude that Amendment E was motivated by a discriminatory purpose, we must strike it down as unconstitutional unless the Defendants can demonstrate that they have no other method by which to advance their legitimate local interests. The Supreme Court has referred to this test as one of the 'strictest scrutiny.'" *Id.* (citations omitted). *But see Kassel*, 450 U.S. at 678-79 (finding a purposefully discriminatory statute invalid under the balancing tier of the dormant Commerce Clause as opposed to the strict scrutiny applied under the discrimination tier).

statute.[155] While this seems to be a rather straightforward test, its application is somewhat muddled, particularly within the dormant Commerce Clause.[156]

Chemical Waste Management, Inc. v. Hunt presents a clear case of facial discrimination.[157] In *Chemical Waste*, the Court reviewed an Alabama statute regulating hazardous waste disposal.[158] The statute imposed a base fee on the disposal of hazardous waste, and an additional fee if the waste was generated outside of Alabama.[159] The Court held that this statute facially discriminated against hazardous waste generated outside of Alabama.[160] The Alabama statute clearly provided that waste generated out-of-state would be subject to higher taxes.[161] Consequently, there was different treatment of out-of-state interests compared to the treatment of in-state interests.[162] *Chemical Waste* demonstrates a clear example of facial discrimination.[163]

The Court will also find a statute facially discriminatory when the statute does not clearly mention out-of-state interests.[164] In *Wyoming v. Oklahoma*, the Court reviewed the constitutionality of a statute that required Oklahoma coal-fired electrical generating plants to use at least ten percent coal that was mined in Oklahoma.[165] Although the statute did not directly treat out-of-state coal interests differently than in-state coal interests, such as through imposing higher taxes on the out-of-state coal, the Court found that the statute discriminated on its face.[166] The statute expressed a preference for Oklahoma coal, thus benefiting the Oklahoma coal industry at the expense of out-of-state coal industries.[167] Therefore, the statute was found to be facially discriminatory.[168]

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155. *See* Hunter v. Underwood, 471 U.S. 222, 227 (1985) (discussing that the statute at issue was neutral on its face, but held it violated Equal Protection because of a discriminatory purpose); Smith, *supra* note 16, at 1239.

156. *See* Smith, *supra* note 16, at 1240. Professor Smith argues that facial discrimination can be difficult to identify within the dormant Commerce Clause because of two factors: he suggests that "discrimination on the face is a matter of degree" and because the Supreme Court sometimes imposes a "reciprocity requirement." *Id.* O'Grady, *supra* note 28, at 590-91. "[I]dentifying even express facial discrimination is not as straightforward as one would think." *Id.*

157. 504 U.S. 334 (1992).

158. *Id.* at 338.

159. *Id.* The statute provided that "[f]or waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of $72.00 per ton." *Id.* at 338-39 (citing ALA. CODE § 22-30B-2(b) (1990 & Supp. 1991)).

160. *Id.* at 342.

161. *See supra* note 159 and accompanying text.

162. *See supra* note 159 and accompanying text; *see* Smith, *supra* note 16, at 1239 (stating that there is clear facial discrimination when "the very terms of the regulation deal unequally with people inside and outside the state").

163. For another example of clear facial discrimination see Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).

164. *See infra* notes 165–67 and accompanying text.

165. 502 U.S. 437, 443 (1992).

166. *Id.* at 455. "[T]he Act, on its face and in practical effect, discriminates against interstate commerce." *Id.*

167. *Id.*

> [T]he Act expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States. Such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin.

Facial discrimination is also found in cases where in-state interests are burdened in addition to out-of state interests.[169] A logical argument is that a statute cannot be considered discriminatory when its burdens fall on both in-state as well as out-of-state interests.[170] Indeed, the general notion of discrimination is that parties are treated differently.[171] Accordingly, in the context of interstate commerce, discrimination is generally found to occur in the disparate treatment of in-state interests versus out-of-state interests.[172] This argument was considered in *Dean Milk Co. v. City of Madison*.[173]

In *Dean Milk*, the Court reviewed the constitutionality of an ordinance that regulated the sale of milk in Madison, Wisconsin.[174] The statute required that milk sold in Madison must be processed at a facility located within five miles of the City.[175] In effect, this prohibited out-of-state milk processors, as well as in-state milk processors that were located more than five miles outside of the City, from selling milk within the City.[176] The Court held that it was "immaterial" that in-state interests were burdened in addition to out-of-state interests.[177] The Court, therefore, held that the statute was discriminatory on its face.[178]

1. Combination of Modes to Find Facial Discrimination

The Supreme Court has employed numerous tools to create a broad definition of facial discrimination.[179] One of the methods utilized by the

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Id.

168. *Id.*

169. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353, 361 (1992) (stating that the Court disagreed with the State when it argued that the regulations "do not discriminate against interstate commerce on their face or in effect because they treat waste from other Michigan counties no differently than waste from other States"). *But see C & A Carbone*, 511 U.S. at 394 (stating that "ordinance may not in explicit terms seek to regulate interstate commerce," indicating that the Court did not find that the statute was discriminatory on its face).

170. *See C & A Carbone*, 511 U.S. at 391; *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361.

171. *See* Smith, *supra* note 16, at 1239.

172. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." *Id.* Smith, *supra* note 16, at 1239.

173. 340 U.S. 349 (1951).

174. *Id.* at 350-51.

175. *Id.* at 350.

176. *Id.*

177. *Id.* at 354 n.4; *see also* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 203 (1994). "The idea that a discriminatory tax does not interfere with interstate commerce 'merely because the burden of the tax was borne by consumers' in the taxing State [is invalid]." *Id.* (quoting Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 272 (1984)).

178. *Dean Milk Co.*, 512 U.S. at 354. In *Dean Milk*, the Court held that the ordinance "plainly discriminates against interstate commerce." *Id.* The Court went on to apply something of a balancing analysis in its determination that the statute was unconstitutional. *See id.* at 354-57. The *Pike* test had not been articulated at the time of the *Dean Milk* decision. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

179. *See* Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992) (finding an Oklahoma statute unconstitutional because it discriminated against interstate commerce even though the statute did not directly mention out-of-state interests); *Dean Milk Co.*, 340 U.S. at 354 n.4 (holding that a Wisconsin statute discriminated against interstate commerce although the negative effects of the statute were

Supreme Court is to combine multiple modes of discrimination in order to find facial discrimination. For example, the Court appears to sometimes use the existence of a discriminatory effect or discriminatory purpose to determine that the statute is facially discriminatory.[180] In *West Lynn Creamery*, the Court determined that the "purpose and effect of the pricing order" was discriminatory.[181] But the Court also stated that the "pricing order is *clearly* unconstitutional."[182] The Court's language suggests that the combined statutes were facially discriminatory. Additionally, in *C & A Carbone*, the Court indicated that it employed a discriminatory effects analysis plus a purposeful discrimination analysis to find facial discrimination.[183] The Court discussed the language of the statute and asserted it "does not differentiate solid waste on the basis of its geographic origin."[184] The Court went on to discuss that all solid waste leaving the town must be processed at the favored facility, and it suggested that this was discriminatory on its face.[185] Throughout the opinion, the Court referred to the statute as though it was facially discriminatory, and treated it as though it was facially discriminatory.[186]

2. *Theories Why the Court Uses Combinations of Modes of Discrimination*

Using discriminatory effects and purposeful discrimination in order to find facial discrimination creates a very generous notion of facial discrimination.[187] Although it is uncertain why this occurs, there are a few plausible theories. First, the Justices writing for the Court may be attempting to garner additional votes.[188] Justice Scalia has stated several times that he will vote to find a statute unconstitutional as violating the dormant Commerce Clause only if it is facially discriminatory, or if the law is indistinguishable from a law that has previously been held unconstitutional.[189] Consequently, if the Court, through an expanded reading of the dormant Commerce Clause, is able to find that a statute is facially

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experienced by both in-state and out-of-state interests); *see generally* TRIBE, *supra* note 3, § 6-6, at 1059. "[T]he Court's operative definition of 'discrimination' is fairly broad." *Id.*

180. *See infra* notes 181-86 and accompanying text.

181. *West Lynn Creamery*, 512 U.S. at 203.

182. *Id.* at 194 (emphasis added).

183. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994).

184. *Id.* at 390.

185. *See id.*

186. *See id.* "With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." *Id.* at 391. "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid." *Id.* at 392. *But see id.* at 394. "Though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design." *Id.*

187. *See generally* TRIBE, *supra* note 3, § 6-6, at 1059.

188. *See* Day, *supra* note 1, at 695 (quoting Am. Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266, 304 (1987) (Scalia, J. dissenting)) (discussing that Justice Scalia abhors the balancing test of the dormant Commerce Clause and "'all he would require' is that the state regulation 'does not facially discriminate against interstate commerce'").

189. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 209-10 (1994) (Scalia, J., concurring); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 312-13 (1997) (Scalia, J., concurring); Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring); *see also* Day, *supra* note 1, at 695; O'Grady, *supra* note 28, at 576 n.21.

discriminatory and Justice Scalia agrees, he will vote to subject the statute to strict scrutiny.[190]

A second reason why the Court may be using discriminatory effects and discriminatory purpose to find facial discrimination is to broaden the facial discrimination determination.[191] Both discrimination in effect and purposeful discrimination are targets that could be significantly narrowed through the use of existing constitutional tools.[192] For example, if Chief Justice Rehnquist, Justice Scalia and Justice Thomas determined that the dormant Commerce Clause was too broad, they could effectively narrow the discrimination in the effect and purposeful discrimination modes in two respects: 1) through use of a purposefulness requirement; and, 2) a requirement that upon finding purposeful discrimination, a showing that the statute would not have been passed anyway.[193] But, if the other members of the Court successfully establish a base of case law creating a broad definition of facial discrimination, then discriminatory effect and purposeful discrimination will not be necessary to continue the expansive judicial review within the dormant Commerce Clause.[194]

IV. CONCLUSION

The concept of discrimination employed in dormant Commerce Clause jurisprudence is quite broad when compared to the concept of discrimination used in other constitutional doctrines.[195] The Supreme Court readily finds that statutes and regulations are facially discriminatory, discriminatory in effect, and purposefully discriminatory in dormant Commerce Clause cases.[196] In addition to utilization of a broad definition of discrimination, the dormant Commerce

190. *See supra* note 189. Interestingly, Justice Scalia did join the Court in *C & A Carbone*, when it indicated that purposeful discrimination plus discrimination in effect could be used to find facial discrimination. *See supra* notes 183-86 and accompanying text. In *West Lynn Creamery*, however, Justice Scalia filed a concurring opinion indicating that he found the statute discriminatory on *stare decisis* grounds. *See West Lynn Creamery*, 512 U.S. at 210.

191. *See* TRIBE, *supra* note 3, § 6-6, at 1059. Tribe discussed that, under the discrimination tier of the dormant Commerce Clause, "[i]f a state regulation 'discriminate[s] against interstate commerce either on its face or in practical effect,' it will be" subjected to strict scrutiny, and that the "Court's operative definition of discrimination is fairly broad in this context." *Id.* (quoting Maine v. Taylor, 477 U.S. 131, 138 (1986)).

192. *See* Day, *supra* note 1, at 706-07 (citing Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 937, 955 (1990)) (stating that the Burger and Rehnquist Courts effectively reduced judicial review in the fundamental rights doctrine through use of the "purposefulness requirement"); *see also supra* notes 121-23 and accompanying text.

193. *See supra* notes 121-23, 150-52 and accompanying text.

194. *See supra* notes 189-90 and accompanying text.

195. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring a finding that discrimination may not be found based on the effects of the statute alone in Equal Protection analysis); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.* (quoting *Davis*, 426 U.S. at 242). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.*

196. *See supra* note 2 and accompanying text (listing the ten dormant Commerce Clause cases decided since 1990); *supra* notes 52-54 and accompanying text (discussing that, with one exception, in every case decided under the discrimination tier of the dormant Commerce Clause, the Court determined the subject regulation was unconstitutional).

Clause doctrine treats harshly those statutes that are deemed discriminatory. In fact, once the Court deems a statute to be discriminatory, the statute is subject to strict scrutiny.[197] The broad notion of discrimination combined with strict scrutiny creates activist judicial review in the dormant Commerce Clause doctrine.[198]

It is interesting that activist judicial review exists in a doctrine that is not based in the text of the Constitution.[199] Despite the absence of an express proscription on interferences with interstate commerce in the Constitution, the Supreme Court is inclined to actively prohibit such burdens on interstate commerce. Hence, it appears the Supreme Court is attempting to promote the rationales underlying dormant Commerce Clause jurisprudence. Other constitutional doctrines are not well designed or as effective at promoting national unity and protecting economic liberties. As such, it appears that the Supreme Court has created an expansive dormant Commerce Clause doctrine so that it may effectively promote these rationales. Through its generous use of the dormant Commerce Clause, the Supreme Court has established a doctrine to protect the economic rights implicit in the Constitution.

197. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) (citations omitted) ("If a restriction on commerce is discriminatory, it is virtually *per se* invalid."); *see also* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994); Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996).

198. *See also* O'Grady, *supra* note 28, at 631 (discussing that judicial review under the dormant Commerce Clause is too broad and does not leave enough discretion to state legislatures).

199. *See also* Day, *supra* note 1, at 694 (quoting Tyler Pipe Indus. v. Washington Dep't of Revenue, 483 U.S. 232, 254 (1987)) (discussing that Justice Scalia's primary concern with the dormant Commerce Clause is that "it had 'no basis in the Constitution'").