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Appellants' Reply Brief

by

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APPELLANTS' REPLY BRIEF

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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

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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*

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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.