An Agricultural Law Research Article

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

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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.