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Intervenor-Appellants' Opening Brief

by

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INTERVENOR-APPELLANTS' OPENING BRIEF

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CASE SUMMARY AND REQUEST FOR ORAL ARGUMENT

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

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

JURISDICTIONAL STATEMENT

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

ISSUES FOR REVIEW

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

ARGUMENT

1. Amendment E Does Not Apply To Utility Transmission Easements

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

U.S. 225, 231 (1991).

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

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

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

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

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

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

Id. (Introductory Note) p. 494.

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

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

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

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

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

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

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

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

II. INTERSTATE COMMERCE IS NOT BURDENED BY AMENDMENT E

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

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

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

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

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

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

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

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

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

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

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

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

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

The legitimate state purposes of Amendment E are monumental

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE ADA IS INAPPLICABLE TO THIS CASE

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42 U.S.C. § 12131(2) (1995).

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

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

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

3. *Amendment E Offers the Required Accommodation*

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

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

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

CONCLUSION

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