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Reply Brief of Appellees and Cross-Appellants

by

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REPLY 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, WILLIAM A. AESCHLIMANN

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PRELIMINARY STATEMENT

Appellees and Cross-Appellants South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers, Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; and William A. Aeschlimann submit this brief in reply to Appellants' Reply and Cross-Appellees' Brief (October 15, 2002). Since the Intervenor Defendants-Appellants have not filed a separate reply brief and have joined the brief of the State Defendants Hazeltine and Barnett, this brief will be referred to as "Defendants' Reply Brief."

The State Defendants Joyce Hazeltine and Mark W. Barnett will be referred to herein as "State Defendants." The South Dakota State Constitutional Amendment at issue here will be referred to as the "Corporate Farming Ban" or the "CFB" or the "Amendment."

The Brief of these Appellees and Cross-Appellants will be referred to herein as the "SDFB Brief."

Appellees Montana-Dakota Utilities Co.; Northwestern Public Service; and Otter Tail Power Company will be referred to as the "Utility Challengers." All Appellees and Cross-Appellants will be collectively referred to as "the Challengers."

This brief primarily addresses the dormant commerce clause issues.

I. THE CORPORATE FARMING BAN IS UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE.

A. INTRODUCTION

In this case, the Challengers (both Agricultural and Utilities) advanced, at trial and otherwise, several dormant commerce clause theories on both tiers of the modern doctrine. The Challengers have claimed that the Corporate Farming Ban was a state law "discriminating" against interstate commerce under well-settled Supreme Court authorities and under this Court's governing decision, SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995). Alternatively, Challengers have claimed that, even if considered "nondiscriminatory," the Corporate Farming Ban was unconstitutional because, under Supreme Court authorities, it was an "undue burden" on interstate commerce represented in this case by the interstate livestock industry and the interstate electric power generation and transportation industries.

The District Court below held that the Corporate Farming Ban violated the dormant commerce clause doctrine. See South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F.Supp. 1020, 1050 (D.S.D. 2002). The District Court seemed to select a "narrow grounds" by relying only on the unduly burdensome effect of

the CFB on the Utility Challengers. Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions

69 U.Chi.L.Rev., 429 (2002)Within the Supreme Court's broad concept of discrimination, the recent decisions reveal an expansive analysis of what constitutes facial discrimination. See, e.g., Camps, 520 U.S. at 576;

One preliminary point must be made. The Defendants assert that the Challengers "did not even call any fact witness who was from out of state." Defendants' Reply Brief at 10. This is not accurate. Challengers called Plaintiff Marsden Holben who is a resident of Arizona, and he testified as a "fact witness" about how the Corporate Farming Ban severely burdened his efforts to invest in a ranching operation in western South Dakota and interfered with his estate planning program.

B. THIS CASE FALLS WITHIN THE PRECEDENT GOVERNING FACIAL DISCRIMINATION.

The Supreme Court utilizes an expansive, holistic approach to determining facial discrimination. The Supreme Court looks at the State's regulatory scheme *as a whole.*

The expansive, holistic approach is well illustrated by the cases cited in Challengers' opening brief: *West Lynn Creamery.* In 526 U.S. at 169. The South Dakota Const. art. XVII, § 21South Dakota Const. art. XVII, §§ 21-24South Dakota Const. art. XVII, § 22§ 22 exceptions "give back" to domestic producers the ability to use a corporate business structure even when *South Central Bell.* To determine facial discrimination, the *West Lynn Creamery*, the state had one statute that was a nondiscriminatory tax (on milk dealers) and a different statute that was a subsidy (for in-state milk producers). The milk dealers involved in interstate commerce and subject to the tax challenged on the grounds of the dormant commerce clause. Although the state argued that the challenged tax was facially neutral, the Supreme Court found that the *whole regulatory scheme* was facially discriminatory. *Id.* at 201. ("It is the entire program . . . .") § 22 "give back" to domestic farmers economic options that are denied by *West Lynn Creamery* Court would find the Massachusetts regulatory

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1. The latest Supreme Court decisions are: *Wyoming v. Oklahoma,* 502 U.S. 437 (1992); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 504 U.S. 353 (1992); *Oregon Waste Systems, Inc. v. Environmental Quality Commission of Oregon,* 511 U.S. 93 (1994); *C&A Carbone, Inc. v. Town of Clarkston,* 511 U.S. 383 (1994); *West Lynn Creamery, Inc. v. Massachusetts Dairy Equalization Fund,* 512 U.S. 186 (1994); *Fulton Corp. v. Falkner,* 516 U.S. 315 (1996); *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564 (1997); *General Motors v. Tracy,* 519 U.S. 278 (1997); and *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160 (1999). In this time frame, the Supreme Court also decided one case involving the *dormant foreign commerce clause doctrine. See Intel Containers International Corporation v. Huddleston,* 507 U.S. 60 (1993). There is no dormant foreign commerce clause issue in this case, but Challengers mention the *Huddleston* decision for the convenience of this Court.

scheme to be facial discrimination, the South Dakota regulatory scheme (the CFB) is an easy fit.

The Supreme Court's interpretative methodology for determining facial discrimination has another aspect. In addition to the holistic analysis, the Supreme Court has relied upon evidence of the regulatory scheme's *economic effect* to find facial discrimination. In 512 U.S. at 196. Similarly, in 526 U.S. at 169. This effect was utilized by the unanimous Supreme Court in holding that Alabama's "tax therefore facially discriminates against interstate commerce."

The District Court observed that this case "is akin to Kassel v. Consolidated Freightways, 450 U.S. 662, 669 . . . (1981)." Kassel. Defendants' Reply Brief at 12. In 450 U.S. at 678-679. Two evidentiary aspects were critical to the Supreme Court's analysis in Id. at 676. These exemptions had the effect of securing "to Iowans many of the benefits of large trucks while shunting off to neighboring states many of the costs associated with their use." *Kassel* Court relied on part of the large truck ban's legislative history—namely the now-famous admission by Iowa's Governor that he vetoed a predecessor statute without the border city exemption because allowing large trucks would be "a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." *Kassel.* Like § 21) and then, through the State-crafted series of exceptions (in § 22 exceptions, especially the family farm exception of *Kassel*, 450 U.S. at 676. Moreover, as explained in the SDFB Brief, the record here contains an admission parallel to—or even more significant than—the admission in *Kassel* are clear. Based on it and the Supreme Court's expansive facially discrimination methodology, this Court should conclude that the Corporate Farming Ban is facially discriminatory.

C. EVEN IF THE CORPORATE FARMING BAN WERE CONSIDERED FACIALLY NEUTRAL, IT SHOULD BE CONSIDERED AS PURPOSEFUL DISCRIMINATION REGARDING INTERSTATE COMMERCE.

"The Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1941).

Challengers contend that, even if this Court were to consider the Corporate Farming Ban to be facially nondiscriminatory, it should consider the overriding evidence in the record of the discriminatory purposes underlying the development and adoption of the Amendment. As in any purposeful discrimination analysis, a court must not mistake textual generality for evenhandedness. This Court should recognize the "ingenious" effort underlying the Corporate Farming Ban. For purposes of this argument, Challengers contend that this Court's analysis in *SDDS* STANDARD FOR DISCRIMINATORY PURPOSE.

"There was some evidence at trial that Amendment E was motivated by discriminatory purposes." *SDDS*, 47 F.3d at 267. This Court, of course, reversed

the trial court in *SDDS* decision divided evidence of purpose into two categories: "direct" and "indirect."

a. The District Court's Findings of Fact Are Direct Evidence.

First, the District Court made findings of fact about the purposes underlying the Corporate Farming Ban: "There was some evidence at trial that Amendment E was motivated by discriminatory purposes." *SDDS*, 47 F.3d at 268, constitutes direct evidence of discriminatory purpose.

b. The Pro Statement.

Second, as in *SDDS*, 47 F.3d at 268, the direct evidence here included the Initiative's "Pro Statement." (T 634; SDFB Add. at 1) The Pro Statement urged voters to support the Amendment because otherwise: "Desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." *Id.* The Pro Statement's use of the dichotomy between "local economies" and "the pockets of distant corporations" is exactly the sort of discrimination against which the dormant commerce clause guards.

c. The Admission of the State's Testimonial Expert.

A third type of direct evidence in this case, recognized by Supreme Court decisions such as *SDDS*, 47 F.3d at 268.

d. The Official Ballot Explanation By The Attorney General.

The State Defendants pointedly criticize the Challengers for not discussing the Attorney General's official ballot explanation ("the ballot explanation"), see SDFB Add. at 1, prepared under South Dakota law. *See* SDCL § 12-13-9. In response, the Challengers would note that, although the final version of the ballot explanation was neutral regarding discriminatory purpose, the "legislative history" of the ballot explanation clearly constitutes, under SDDS, direct evidence. As first proposed, the ballot explanation in this case contained the following explanation of the Corporate Farming Ban: "Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution." *Hoogestraat v. Barnett*, 583 N.W.2d 421, 422 (S.D. 1998). On state law grounds, the South Dakota Supreme Court removed the sentence.

In sum, the direct evidence of discriminatory purpose here is more powerful than the direct evidence in SDDS. Therefore, this Court should find that the Corporate Farming Ban was purposefully discriminatory.

e. Under SDDS, the "Indirect" Evidence Also Confirms the Discriminatory Purpose of the Amendment.

In addition to the direct evidence, the Challengers presented extensive "indirect" evidence of discriminatory purpose.

i. The "Speedy" Drafting Process.

The Challengers contend that the short time frame (i.e., six weeks) in which the Corporate Farming Ban was drafted is "indirect" evidence. Challengers will be willing to accept the State's position that 'the drafting may not have been completed in less than six weeks." (Emphasis original.) Defendants' Reply Brief at 25. Challengers contend that the "six weeks" was a short enough time frame to be probative as indirect evidence of discriminatory purpose.

ii. The Historic Context.

In its haste to defeat the speedy drafting evidence, the Defendants argue that the "history" of the Amendment should be considered. See *id.* Challengers agree—but contend that part of that "history" is the fact that the State already had a restriction on corporate farming—the 1974 Family Farming Act. See SDFB Brief at 7-8. The 1974 Act was, as far as the record indicated, an effective regulatory scheme. Just like the new regulation (for waste disposal) added in 47 F.3d at 269. Challengers contend that this historical background evidence is indirect evidence of discriminatory purpose.

iii. The "Warning" by a Member of the Drafting Committee.

The Challengers contend that the "warning" issued by the only lawyer on the Amendment's drafting committee to the rest of the committee should be considered as indirect evidence of discriminatory purpose. See Exhibit 36; SDFB Add. 3. Defendants' Reply Brief seeks to explain Exhibit 36's statement that the Amendment "might be struck down for violating the Commerce Clause." Although the State did not call the lawyer as a witness, the State Defendants now minimize Exhibit 36 because it was only a lawyer's "'worst case scenario' advice."

Challengers doubt that this "advice" can be explained as a lawyer-client communication. But, even if the warning was a "worst case scenario," the existence of the warning is probative as indirect evidence of purpose. The Amendment's proponents went forward, recklessly ignoring the warning.

iv. The Second "Warning" to the Amendment's Proponents.

As the Challengers explained in SDFB Brief at 28 to 29, the proponents of

the Amendment received a second warning about the unconstitutional burdens that would be created by its passage. A distinguished agricultural economist, Dr. Neil Harl, reviewed a draft of the Amendment and warned the drafting committee that the proposal would interfere with interstate commerce. *See* SDFB Add. at 6-9. This distinguished economist was ignored. Challengers contend this pattern of conduct constitutes indirect evidence of discriminatory purpose.

When the direct evidence is considered together with the indirect evidence, the Challengers here have assembled more evidence than present in SDDS. Based on this evidence, this Court should conclude that the Corporate Farming Ban was discriminatory in purpose.

A. The Corporate Farming Ban Is "Discriminatory In Effect" Against Interstate Commerce.

The District Court concluded that Challengers had presented "[e]vidence . . . that Amendment E has prevented millions of dollars of commercial development, *to the permanent detriment of the economy in South Dakota.*" *SDDS* should control.

By the same reasoning, the livestock market of South Dakota is such that the Corporate Farming Ban (adopted by voter initiative) so predominantly affects only out-of-staters that it should be considered discriminatory in effect if it, as the District Court found, permanently suppresses "millions of dollars of commercial development." *Camps* (in-state summer camp) and *Carbone*, 511 U.S. 387-388; 202 F.Supp.2d at 1041. The evidence included the discriminatory effect on the Utility Challengers: "Amendment E clearly places a substantial burden on interstate commerce." *SDDS,* the discriminatory effect of the CFB is that the regulatory scheme "exports costs to out-of-staters." *Oehrleins & Sons & Daughters v. Hennepin Count,* 115 F.3d 1372 (8th Cir. 1997)115 F.3d at 1385-1387. The effect considered in *Id.* at 1385. In contrast to *Carbone*, 511 U.S. at 387-388; *SDDS.* Under these circumstances, the District Court erred. This Court should find that the Corporate Farming Ban is *discriminatory in effect* and should be tested by strict scrutiny.

B. The Corporate Farming Ban Violates The Dormant Commerce Clause Because It Unduly Burdens Interstate Commerce.

While the Challengers contend that the CFB is a state regulation that impermissibly discriminates against interstate commerce (both outside and inside

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2. The District Court cited only to *Cotto Waxo Co. v. Williams*
46 F.3d 790 (8th Cir. 1995)*Cotto Waxo Co. v. Williams,* 46 F.3d 790, 794 (8th Cir. 1995). Challengers suggest that *Cotto Waxo* should be limited to "extraterritorial effect" analysis.

the boundaries of South Dakota), the two-tier nature of the doctrine requires that, in the alternative, the Challengers consider the "second tier" of the doctrine. *See*

The District Court eschewed any reliance on the discrimination tier and, instead, relied on what it called: the *Pike v. Bruce Church, Inc.* balancing test. The inquiry is whether the state's interest is legitimate and whether the burden on interest commerce clearly exceeds the putative local benefits.

The District Court found that: (1) the CFB "will greatly increase the costs of the [Utilities Challengers] companies doing business in South Dakota *as well as in other states where the companies do business*" (emphasis added); (2) "these [Utilities] companies will . . . incur substantial additional costs to comply with other laws and to keep weeds under control [in transmission line easements];" and (3) "Utility rates in South Dakota and elsewhere, including certainly Minnesota, will undoubtedly increase." 202 F.Supp.2d at 1050.

C. The Findings And Conclusions Regarding "State Benefits."

The District Court made the following finding of fact regarding the record on the "putative local benefits" of the CFB: "It is undisputed that there is no rationality to the matter of prohibiting these easements." *Id.*

Since its finding showed a "substantial" burden on interstate commerce and "no legitimate state interest of any kind" on the benefit side of its analysis, the District Court ultimately concluded that "Amendment E violates the dormant commerce clause of the United States Constitution."

In their Reply Brief (at page 30), the State Defendants state: "Under the [Pike v. Bruce Church, 397 U.S. 137 (1970)] test, the law will be stricken only if the incidental effects it imposes on interstate commerce are 'clearly excessive in relation to the putative local benefits.' *Pike* decision.

The State Defendants' argument is that the second tier standard is simply "burdens" versus "benefits." They cite to the *Pike* decision, the Supreme Court stated the full, three-part nature of the second tier standard.

> . . . the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities*. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, but more frequently it has spoken in terms of "direct" and "indirect" effects and burden. *See, e.g.*, *Shafer v. Farmers Grain Co.*, *supra Pike*, then, the Supreme Court recognized that the

second tier standard was more than the two-part "burden v. benefit" analysis urged by State Defendants. The 397 U.S. at 142.

When the state has alternatives with "lesser impact" on interstate commerce, the State will not prevail on the second tier. *See* SDFB Brief at 34 to 36; *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 895 (1988). This is demonstrated by the *Pike*, the State's interest was in having the cantaloupes "identified as originating in Arizona." *Id.* In *See id.* at 144 n. 7.

Applied to this case, the State's interests could be satisfied with means of "lesser 'impact'" than the Corporate Farming Ban. Expanded educational and extension services for small farmers (which help them improve products and compete in the relevant market) would be state alternatives with "lesser impact." State subsidies such as cash payments or below-market loans would be means with "lesser 'impact'." The State could help small farmers with property tax relief, much as the State exempts charitable entities from property taxes. *Cf.*, In their Reply Brief, the State Defendants argue that the Challengers are asserting a "third commerce clause" test. *Id.* at 30. The "undue burden" test is not some "third" standard or the creation of Challengers. As identified in the SDFB Brief, the phrase "undue burden" is the terminology used by the Supreme Court to describe the second tier test. See SDFB Brief at 14.

To put the State Defendants' argument to rest, there is no doctrinal difference between the *Pike*, the consideration of the State's alternative means of "lesser impact." For the reasons explained above, because the State has numerous alternatives with "lesser impact" on interstate commerce (e.g., property tax credits), the Corporate Farming Ban fails the undue burden standard.

D. Conclusion.

The test in the second tier is properly understood, under prevailing Supreme Court precedent, as the three-part undue burden standard. The District Court concluded that the State failed to establish its state interest. *See* Even though the District Court "rejected" the Challengers' theories of discrimination against interstate commerce, it proceeded to do a "partial" analysis of how the strict scrutiny standard might apply to the Corporate Farming Ban and stated that the State's interests were "compelling." See *Republican Party of Minnesota v. White* 122 S.Ct. 2528 (2002)122 S.Ct. at 2536.

"Compelling state interests" have been described by scholars as "overriding public concerns." *See* Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 Albany.L.Rev. 549, 551 (1992). Under the concept of "overriding public concerns", the State's interests here cannot be considered compelling.

In contrast, South Dakota's interests here—protecting South Dakota farmers

and rural communities—are not compelling because they do not serve any overriding constitutional concern like protecting due process. The South Dakota interests serve, at most, the "economic" interests of certain South Dakota communities. An interest in the economic well-being of the State cannot be considered compelling. *See*

With respect to the preemption issue, the Challengers join the brief submitted by Challenger Holben. The Challengers request that this Court affirm the District Court's decision that the Corporate Farming Ban is preempted by Title II of the ADA.

CONCLUSION

Challengers respectfully request that this Court affirm the District Court, and affirm on broader grounds, that the Corporate Farming Ban violates the dormant commerce clause. The Challengers also ask this Court to affirm the District Court on its ruling that the ADA preempts the Corporate Farming Ban.