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An Agricultural Law Research Article

Brief of Appellees and Cross-Appellants

by

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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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Corporate Disclosure Statement

South Dakota Farm Bureau, Inc. and the South Dakota Sheep Growers Association, Inc. are not-for-profit corporations organized under the laws of South Dakota; Haverhals Feedlot, Inc. and Sjovall Feedyard, Inc., are privately held companies; and there are no other persons, associations, firms partnerships, or corporations with a pecuniary interest in the outcome of this case.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

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

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

STATEMENT OF ISSUES

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

South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999).
SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995), *cert. denied*, 523 U.S. 1118 (1998).
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).
Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988).

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

Grier v. American Honda Motor Co., 529 U.S. 861 (2000)
Crosby v. National Trade Council, 530 U.S. 363 (2000)
Michigan Canners and Freezers Association v. Agricultural Marketing and

Bargaining Board, 467 U.S. 461 (1984)

STATEMENT OF THE CASE

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

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

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

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

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

A hearing and oral argument on the various motions was held on January 18, 2000. The District Court orally ordered that: (1) the Utilities' motion to join as Plaintiffs was granted (Doc. No. 66, Transcript of Oral Argument at 51, 53), (2) the State of South Dakota be dismissed as a party (*id.* at 5), and (3) the ADA claim would be dismissed on Eleventh Amendment grounds (*id. at* 6). He took other issues under advisement, including the request

to dismiss State Defendants Barnett and Hazeltine. (*Id.* at 47, 54.) (Hereinafter, this will be referred to as the "January Order".)

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

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

The State and the Intervenors filed subsequently motions for partial summary judgment. In an Order dated January 29, 2001, the District Court denied these motions. (Doc. No. 135, filed February 1, 2001.) One of the rejected arguments was the argument that the SDFB did not have standing as an association.

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

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

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

On May 17, 2002, the District Court filed its Opinion and Final Order. App. 236-276, published at *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020 (D.S.D. 2002). The court first held that cooperatives are not subject to the Corporate Farming Ban. App. 259. Second, it found that the Corporate Farming Ban was preempted by the ADA. App. 265. Third, it held that the Corporate Farming Ban was unconstitutional under the dormant commerce clause even when considered only in light of the claims made by Utilities Challengers. App. 275. The Judgment was filed on May 18, 2002. App. 277.

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

STATEMENT OF FACTS

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

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

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

Although the 1974 Act had an exception for "family farmers", the CFB's Family Farm exception is much narrower. CFB, S.D. Const. art. XVII, § 22(1). The application of the CFB to the livestock industry, when coupled with the narrower Family Farm exception, excluded many farmers from the benefits of § 22(1).

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

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

burdened interstate commerce in the livestock and electric power production and transmission industries. (Doc. No. 173, Trial Transcript (hereinafter "T") 536, 537, 616) The State and Intervenors did not present any expert economic testimony at all.

SUMMARY OF ARGUMENTS

DORMANT COMMERCE CLAUSE ISSUE

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

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

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

A state regulatory scheme that discriminates regarding interstate commerce must be tested against the "virtually *per se*" standard. Treating the standard as a version of strict scrutiny, the District Court did not properly apply the standard. First, the District Court never examined the availability of less drastic means by which the State might achieve its objectives. Second, the District Court erred in concluding that the State's interests in protecting certain rural lifestyles and communities was a compelling state interest.

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

PREEMPTION ISSUE

Title II of the ADA applies to all the "services, programs or activities" of the State of South Dakota. The CFB is a service, program or activity of the State. Under the CFB, the "family farm exception" is available to farmers who do not reside on the property only if the farmer performs "day-to-day labor" which requires "both daily or routine substantial physical exertion and administration". CFB § 22(1).

The District Court found, as a fact, that Challengers Holben and Brost have disabilities (heart conditions). Because of their disabilities, Holben and Brost cannot perform the "daily or routine substantial physical exertion" required for the CFB exception and, therefore, are denied that option to satisfy the family farm exception. By denying disabled persons such as Holben and Brost access to the family farm exception, the CFB conflicts with Title II of the ADA. Because the CFB conflicts with, and is an obstacle to the purpose of, the ADA, the CFB is preempted by the ADA.

STANDARD OF REVIEW

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

This Court typically reviews a district court's factual findings for clear error. *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995).

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

ARGUMENT

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

Although the District Court concluded that the CFB was unconstitutional for various reasons, it decided that the CFB was not "discriminatory" regarding interstate commerce. In this regard, Challengers contend that the District Court erred, as a matter of law. Challengers asks this Court to hold that the CFB *was* "discriminatory" regarding interstate commerce, thereby providing an additional ground for affirming the judgment below.

A. An Overview of the "Well-Settled" Dormant Commerce Clause Doctrine.

The dormant commerce clause doctrine judicially expresses one of the constitutional "norms of national cohesion." *See* Laurence Tribe, *American*

Constitutional Law, 542 (2d ed. 1988). Along with the Privileges and Immunities doctrine of Article IV and the equal protection doctrine of the Fourteenth Amendment, the dormant commerce clause doctrine represents a significant limit on state regulation of interstate commerce. This constitutional concern regarding state interference with interstate commerce is particularly acute when a State regulates the actions of nonresidents and other political "outsiders" who are participating in interstate commerce. *See South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 184 n. 2 (1938); Tribe, at 545 n. 94.

Over some 175 years, the judiciary has developed a "well-settled", two-tiered doctrine. *See Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 889 (1988). In recent years, the Supreme Court has repeatedly announced its two-tier doctrine:

> We have ruled that that Clause prohibits discrimination against interstate commerce, see, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978), and bars state regulations that unduly burden interstate commerce, see, e.g., Kassell v. Consolidated Freightways Corp. of Del., 450 U.S. 662 (1981).

Quill Corp. v. North Dakota, 504 U.S. 310, 312 (1992). *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *Oregon Waste Sys. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 99 (1994);

The first tier of the dormant commerce clause doctrine is the "discrimination" tier. The standard of judicial review is known as the "virtually *per se*" test. *Oregon Waste Sys.*, 511 U.S. at 99. The virtually *per se* standard is a heavy burden for the State. It is, in practical effect, a "strict scrutiny" standard. The state has the burden of persuasion; the state must have a compelling reason for its discriminatory regulation and must utilize the least restrictive means of achieving that end.[2] *See, e.g., SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995).

The applicable standard in the second tier is an "undue burden" standard. *See Quill Corp.*, 504 U.S. at 312; *Bendix Autolite Corp.*, 486 U.S. at 895 (the test is whether the state regulation "is an unreasonable burden on commerce"). The second tier standard applies even when the State's regulation of interstate commerce is conducted in a nondiscriminatory manner. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Under the second tier standard, the Court will consider three factors: (1) the burden on interstate commerce created by the state restriction; (2) the substantiality of the State's non-protectionist interest; and (3) the availability to the State of less burdensome regulatory means to achieve its goals. *See, e.g.,*

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2. Challengers have found only one Supreme Court decision where a state has successfully met the standard of the first tier. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986). This decision is markedly distinguishable from the present case because, here, the State has many alternatives available to achieve its purported goals and cannot otherwise satisfy strict scrutiny.

Bendix Autolite Corp., 486 U.S. at 894; *Pike*, 397 U.S. at 142 (part of the standard is whether the state's interest "could be promoted as well with a lesser impact on interstate activities."); *C & A Carbone*, 511 U.S. at 405 (O'Connor, J., concurring in the judgment). The undue burden test is, in essence, similar to the "substantial relationship" standard from equal protection doctrine. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (the "intermediate scrutiny" standard used in gender discrimination).

The Supreme Court initially examines a case on the first tier. If the Court would determine that a State has "discriminated" against interstate commerce (*i.e.*, engaged in "economic protectionism"), the Court applies the virtually *per se* test and does not consider the second tier. *See, e.g., C & A Carbone*, 511 U.S. at 390.

B. Under All Three Theories, The CFB Constitutes Discrimination.

Under Supreme Court and Eighth Circuit precedent, there are generally three ways a court would find that a State regulation would be discriminatory regarding interstate commerce. *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1383 (8th Cir. 1997); *SDDS, Inc.*, 47 F.3d at 267.[3] First, a regulatory scheme may "facially discriminate". *See, e.g., C & A Carbone*, 511 U.S. at 391; *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 (1997). Second, a regulatory scheme, even though it is facially neutral, may have a "discriminatory purpose". *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-353 (1977); *SDDS, Inc.*, 47 F.3d at 270. Third, even if the text were facially neutral and had not been enacted for the purpose of discriminating against interstate commerce, a regulatory scheme may have "discriminatory effect" that constitutes a facial discrimination. *See, e.g., Camps Newfound*, 520 U.S. at 578; *SDDS, Inc.*, 47 F.3d at 271.

C. The CFB Is Facially "Discriminatory".

The District Court, in a brief discussion, held that the CFB was not facially discriminatory. App. 270. The Court's reasoning recognized the facially discriminatory features of the CFB (*i.e.*, the exceptions of § 22), but concluded that the discrimination was "in the nature of mere surplusage since the court has already found clear violation of the ADA". App. 270. For the reasons below, the District Court erred. The standard of review is *de novo*.

As to the District Court's "surplusage" reasoning, this is legally flawed. Just because the Court had found that the CFB violated the ADA does not mean that the CFB could not also be a violation of the dormant commerce clause. Not

3. Although the terminology varies from decision to decision, the Supreme Court has utilized all three of these theories for determining the existence of State "discrimination."

all the Challengers had standing under the ADA claim; for the vast majority - - the nondisabled farmers - - the CFB's impact on interstate commerce was not "surplusage." This Court should reject the "surplusage" rationale as unsupported and erroneous.

Challengers contend that the CFB is facially protectionist. Especially in recent decades, the United States Supreme Court has developed a generally broad concept of "facial" discrimination. These decisions teach that a court should look at the state provisions *as a whole* and, when necessary, look at other state provisions that, as a whole, contribute to the regulatory scheme.

1. The CFB, Read As A Whole, Is Facially Discriminating.

The Supreme Court has held that facial discrimination is determined by examining *the whole statute* - - not just one provision. *See South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 169 (1999). In *South Central Bell*, Alabama required each corporation doing business in Alabama to pay a franchise tax based on the firm's capital. *Id.* at 162. The rub - - *i.e.*, the protectionism - - emerged when the Court examined another provision of Alabama's franchise tax code. Alabama permitted domestic corporations to control their tax base and tax liability. *Id.* A domestic corporation could set its stock's par value well below its book or market value. *Id.* at 169. A domestic corporation, therefore, could lower its franchise tax liability simply by lowering its par value. In contrast, Alabama did not permit foreign corporations to lower their franchise tax liability because the Alabama franchise tax code tightly regulated how foreign corporations had to define their stock's par value. *Id.* at 162. Taken as a whole, the franchise tax code created an advantage for domestic corporations, *see id.* at 169, and was facially discriminatory. *Id.*

For present purposes, *West Lynn Creamery , Inc. v. Healy*, 512 U.S. 186 (1994), is also persuasive. In determining facial discrimination, the Supreme Court not only requires that a regulatory statute should be read as whole, it has also held that *the whole regulatory scheme must be considered. See West Lynn Creamery*, 512 U.S. at 194. In *West Lynn Creamery*, the state of Massachusetts sought to protect its in-state dairy farmers from competition from out-of-state dairy farmers. *Id.* Massachusetts imposed a tax on all milk "dealers" selling in Massachusetts, whether domestic or foreign. The State took the proceeds of this tax on dealers and used the funds to pay a subsidy exclusively to in-state "dairy farmers". *Id.* at 194.

Since the tax applied to all "dealers", the State argued that the tax was "nondiscriminatory". The Supreme Court, however, looked at *the State's regulatory scheme as a whole* and held that Massachusetts was engaged in facial discrimination against interstate commerce. *Id.*, at 194. The *West Lynn Creamery* Court held that "[b]y so funding the subsidy, [Massachusetts] not only assists local farmers but burdens interstate commerce." *Id.* at 199.

The rationale for the Court's holistic approach to determining facial

discrimination is easy to understand. The Constitution is "not so rigid as to be controlled by the form by which a State erects barriers to commerce." *Id.* at 201. Unless a Court examines the regulatory scheme as a whole, the States will think that their regulatory efforts can be camouflaged by cleaver drafting. State officials, however, cannot be rewarded for engaging in cute or deceptive drafting practices.

The Supreme Court's facial discrimination doctrine applies to the CFB. The Court should consider the CFB as a whole - - and not just the text of § 21. When the restrictions of § 21 are considered together with the many exceptions created in § 22, the focus of the CFB clearly emerges: the CFB facially discriminates against interstate commerce because it favors certain in-state farmers with the exceptions and narrow criteria for satisfying the exceptions. Paraphrasing the Supreme Court's recent facial discrimination decision:

> [The CFB] law grants domestic [farmers] considerable leeway in controlling [decisions about corporate format] . . . . [South Dakota] law does not grant a foreign [farmer] similar leeway. . . .

South Central Bell Telephone, 526 U.S. at 162. Moreover, South Dakota's attempt to preserve local farmers' interests by protecting them from the rigors of interstate competition is exactly the type of economic protectionism that the dormant commerce clause doctrine prohibits. *See West Lynn Creamery*, 512 U.S. at 205.

2. The CFB Is Facially Discriminatory Because of its Structure.

The discriminatory nature of the CFB is also observable from reading its text. The drafters of the CFB chose to create many "exceptions" in §§ 22(l)-22(15) to the general prohibition of § 21. These exceptions have significant substantive import. Challengers contend that the mere presence of such substantive exceptions is the basis for finding the CFB is facially discriminatory. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 676 (1981) ("Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks . . . ."). *Cf. Police Department of Chicago v. Mosley*, 408 U.S. 92, 94 (1970) ("exceptions" in a regulatory scheme are the basis for judicial determination that government was "discriminating" against free speech).

Just like the "exemptions" in *Kassel*, the exceptions in § 22 of the CFB have the consequence of securing to South Dakota farmers many of the benefits of a limited liability format while denying farmers or farm investors in neighboring States such benefits. This approach constitutes facial discrimination against interstate commerce.

3. The CFB Is Inherently Protectionist.

In addition to a textual and structural analysis, the Court can find that the CFB is facially discriminatory because of the subject matters of the CFB. The

CFB is inherently protectionist because, in this case, the CFB is directed at the *livestock industry*. The livestock raising and livestock feeding industries are, however, part of an "integrated interstate market". *See West Lynn Creamery*, 512 U.S. at 203. Since the CFB was targeted at the livestock industry, it was inherently an attempt to regulate interstate commerce.

Because of the text and the structure of the CFB as well as the inherent implications for interstate commerce, this Court should determine that the CFB is facially discriminatory, and affirm the Judgment below on these broader grounds.

C. The CFB Was Motivated By Discriminatory Purposes.

For this issue, the standard of review regarding the findings of fact is clear error. For the District Court's legal conclusion about "sufficiency", the standard is the *de novo* review.

The District Court addressed the Challengers' claim that, even if not facially discriminatory, the CFB was purposeful discrimination regarding interstate commerce. Referring to the official election pamphlet, the District Court made a finding of fact that: "This is clearly some evidence of discriminatory purpose." Add 271. More generally, the District Court found as a fact that: "There was some evidence at trial that Amendment E was motivated by discriminatory purposes." *Id.* Even with these findings, however, the District Court held that the CFB was not discriminatory: "I decline to find sufficient discriminatory purpose." *Id.* The Court did not elaborate or provide any citation to authority for its "sufficiency" analysis.

Challengers respectfully disagree with the District Court's "sufficiency" standard. First, the District Court cited no authority. Second, even if there is a "sufficiency" standard, Challengers provided more than enough evidence to satisfy it.

Under applicable Supreme Court and Eighth Circuit authorities, Challengers presented both *direct* and *circumstantial evidence* of the protectionist purpose underlying the CFB. *See SDDS, Inc.*, 47 F.3d at 267-269. Regarding the determination of purposeful discrimination, a Court "is not bound by the name, description or characterization given by the legislature or the courts of the State but will determine for itself the practical impact of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (internal quotation omitted).

The types of circumstantial evidence of discriminatory purpose include: (1) impact or effect of CFB on interstate commerce; (2) the historical context and background of the development of the CFB; (3) the sequence of events leading up to the development of the text of the CFB; (4) any departures from normal procedures involved in the Development of the CFB's text; (5) the legislative history of the text; and (6) testimony from the decision-making or drafters of the CFB. *Cf., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (purposeful discrimination in equal protection).

In determining whether a state regulation is discriminatory, the Supreme Court has considered the impact, or effect, of the regulation on interstate commerce. *Wyoming v. Oklahoma*, 502 U.S. 437,455 (1992); Kassel, 450 U.S. at 668-669.

A second evidentiary factor in determining discriminatory purpose is the historical context of the State regulation. *See Kassel*, 450 U.S. at 677. Part of the historical context includes the state of the relevant law at the time that challenged regulation becomes effective. Here, the context is the existence of the regulatory scheme in the 1974 Family Farm Act, which did not apply to the livestock industry.

Another evidentiary factor in determining discriminatory purpose is the sequence of events leading up to the adoption of the challenged State regulation. *See Kassel*, 450 U.S. at 677 (prior legislation had been vetoed by the state's governor, forcing the Legislature to adopt the challenged regulation). A fourth evidentiary factor in determining discriminatory purpose would be any departures from normal procedures. *Cf.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526 (1993) (city council held "an emergency public session"). Regarding these two factors, the Challengers presented evidence of the rapidity of the CFB's drafting and the lack of careful study involved in the drafting of the CFB.

A fifth evidentiary factor in determining discriminatory purpose is the "legislative history" of the challenged regulation. *See Kassel*, 450 U.S. at 677. Here, Challengers presented evidence about the drafts of the CFB's language and the other "inputs" into the drafting process. Challengers also presented the official Ballot Question Pamphlets for the CFB. This Court should conclude that the legislative history of the CFB "is brimming with protectionist rhetoric". *SDDS, Inc.*, 47 F.3d at 268.

A sixth evidentiary factor recognized by Supreme Court authority for determining discriminatory purpose is testimony (including admissions) from the regulatory decision makers or "drafters". *See Kassel*, 450 U.S. at 677; *Hunt*, 432 U.S. at 352. *Cf.*, *City of Hialeah*, 508 U.S. at 541. Here, Challengers presented, at trial, admissions from the Intervenors' key drafter and from the State's expert witness. (T 505)

1. The "Direct" Evidence: The Official Ballot Statement

Challengers placed the state-sponsored explanatory pamphlet, Add. 1, in the record. (T 634) Commonly known as the "Pro Statement," Add. 1 is "direct" evidence of discriminatory purpose.

The Pro Statement is candid about its protectionist goal: protecting certain South Dakota livestock producers from the competitive forces of the interstate marketplace. The Pro Statement asserted that "Amendment E is needed to prevent corporations from using interlocking boards and other anti-competitive ties *with the meatpacking industry from limiting and then ending market access*

for independent livestock producers". (Add. 1 (emphasis supplied).) Even more flagrantly, the proponents stated that, unless the Amendment would pass, "Desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." *Id.* Under the governing Eighth Circuit precedent, *see SDDS, Inc.*, 47 F.3d at 268, the Pro Statement is sufficient for this Court to find that, despite clever drafting, the proponents had a purpose to discriminate against interstate commerce.

Another type of *direct* evidence recognized by the caselaw would be any admissions by the State as to its purposes. Perhaps the most notable example in the caselaw was the "admission" by Iowa's Governor in the *Kassel* decision that Iowa's truck length regulation was actually adopted for the protectionist purpose of holding down the state's highway repair costs. *See Kassel*, 450 U.S. at 677. In this case, while the witness was not a State official, the State's *testimonial expert* witness made the "admission" that the CFB was purposeful discrimination against interstate commerce. The State's rural sociologist, Dr. Lobao, essentially "admitted" that Amendment E was a discriminatory regulation. Dr. Lobao stated that the CFB was a "South Dakota law designed to restrict operation of global agribusiness firms." (T 505; Add. 2) Challengers contend that, under the *SDDS* decision, the statements in the Pro Statement and the admissions in the trial testimony are sufficient direct evidence to establish the discriminatory purpose theory.

2. Circumstantial Evidence of the "Climate" Concerning the Development of the CFB Demonstrates Impermissible Purpose.

In pursuing the theory that CFB was motivated by discriminatory purposes Challengers submitted evidence regarding the "climate" surrounding the adoption of the Amendment. From this record, the following story emerges; as in *SDDS*, it is "brimming" with protectionism. *SDDS*, 47 F.3d at 268.

The drafting of the CFB was strikingly rapid. The proponents completed drafting the Corporate Farming Ban in less than six weeks. (T 245.) The proponents' haste was caused by the need to have the proposed amendment certified by the Secretary of State and the requisite initiative petitions submitted by November 1997 (one year in advance of the November 1998 election).

In this hasty process, the proponents appointed a Drafting Committee which held its first meeting on March 25, 1997. (Add. 3.) The Drafting Committee was composed of five members, only one of which was a lawyer (Mr. Jay Davis). Ms. Luann Napton was the recording secretary. At the March 25 meeting, Mr. Davis, the lawyer, warned the Committee that the proposed initiative raised "Commerce Clause" problems. Mr. Davis said, "The problem with [the eventual Amendment] is that it might be struck down for violating the Commerce Clause." (Add. 3.) Ms. Napton dutifully recorded the "Davis warning" and distributed it.

During the drafting process, one Committee member, Ms. Rene Morog,

engaged in some additional research. Ms. Morog contacted Dr. Neil Harl, a prominent agricultural economist at Iowa State University. Ms. Morog had Dr. Harl review a draft of the CFB. Dr. Harl sent Ms. Morog a fax with his comments and concerns. (Add. 4-5.) Dr. Harl, like Mr. Davis, warned about various problems. Dr. Harl specifically identified that the proposed amendment would constitute a "complete" ban on the flow of investment capital to South Dakota agriculture. (*See* Add. 5; Add. 6-9.) The Amendment's proponents ignored the Harl warning about the effect of the Amendment on the flow of investment capital.

This sequence of events and this legislative history are certainly circumstantial evidence relevant to the issue of discriminatory purpose. Taken together with the Pro Statement and other "direct" evidence, the circumstantial evidence regarding the haste and recklessness of the proponents demonstrates that the Amendment was designed for a discriminatory purpose: the protection of South Dakota farmers. *See SDDS*, 47 F.3d. at 270.

D. The CFB Is Protectionist "In Effect".

Alternatively and additionally, Challengers contend that, under the evidence in the record, this Court should find that the CFB is also discriminatory because its provisions are protectionist in effect. *See SDDS, Inc.*, 47 F.3d at 267-269. The District Court "rejected" this theory without citation to any authority. App. 271-272. Numerous Supreme Court decisions have found that state laws are "discriminatory" because the regulations had an adverse impact on interstate commerce. For example, in the *South Central Bell* decision, *supra.*, the Supreme Court considered the effect of the state's franchise tax scheme on out-of-state corporations. Since the out-of-state corporations could not avail themselves of the tax-lowering technique available to Alabama corporations, the Supreme Court found that the franchise tax scheme was discriminatory in effect. *See id.*, 526 U.S. at 169. In *West Lynn Creamery*, also discussed above, the Supreme Court considered the impact of the "dealer tax-producer subsidy" regulatory scheme and concluded that it had the effect of discriminating against non-Massachusetts dairy farmers. *See id.*, 512 U.S. at 195-196.

The Challengers presented overwhelming evidence about the effect of the CFB on various aspects of interstate commerce: utility transmission; wind power development; livestock custom feeding; and investment in the livestock industry. The District Court, for the reasons below, erred, and this Court should reverse. The standard of review is *de novo*.

The District Court did make some findings of fact which bear on the discriminatory effect theory. The Court found, for example, that the CFB "clearly places a substantial burden on interstate commerce" regarding the costs of transmission easements in South Dakota when compared to the costs in adjoining states served by the Utility Challengers. App. 274-275. This Court should recognize that this finding of fact about the CFB's effect contributes to a

determination that the CFB is discriminatory.

The Challengers' economist, Dr. Tweeten, testified that the CFB obstructs and virtually eliminates the practice of "production contracts" from the South Dakota livestock industry. (T 536.) The restriction of production contracts interferes with the flow of investment capital into agriculture and, thereby, burdens interstate commerce. (T 537.) Dr. Tweeten also testified that the CFB will negatively affect the national practice of vertical coordination and, thereby, burden interstate commerce.[4]

Other evidence of the effects of the CFB came from state officials who testified that millions of dollars of commercial development have been suppressed by the CFB, to the permanent detriment of interstate commerce. One state official, cabinet member Mr. Ron Wheeler, testified at the trial based on his many years as head of the Governor's Office of Economic Development. As head of GOED, Wheeler was uniquely qualified to observe the effects of Amendment E. He testified that the Amendment had a suppressive and inhibiting effect on the flow of interstate investment. (T 737, 739, 745) He testified that the GOED had learned of over 20 investment projects suppressed by the Amendment. (T 741) Wheeler testified that the Amendment burdened a "full range" of projects. (T 742)

Significantly, Wheeler's testimony was not refuted or rebutted by the State or the Intervenors.

In the context of a "discriminatory effect" theory, the District Court's unfortunately relied on a narrow definition of discrimination. The District Court defined as discrimination *only* those policies that burden out-of-state interests. App. 270-271. This is an inappropriately narrow definition of discrimination. It ignored, for example, the protectionist effects of the CFB. *See Kassel*, 450 U.S. at 676. The CFB interferes with the flow of investment capital and the resulting effect will be isolationist. *See* Wyoming, 502 U.S. at 457. The District Court's failure to consider protectionist and isolationist effects of the CFB as "discrimination" distorted its analysis and was an error.

For all these reasons, this Court should determine that the CFB is discrimination in effect. On this basis, this Court should affirm the District Court.

E. The CFB Fails The Strict Scrutiny Standard.

Under each of the three theories, and cumulatively, this Court should find that the Amendment's regulatory scheme was discriminatory. Hence, this Court should test the regulatory scheme against the strict scrutiny standard.

The State cannot meet the strict scrutiny test. First, none of the governmental interests is "compelling" even though they may be arguably

4. Dr. Tweeten also opined that Amendment E denied farmers the types of nationally common "tools" which give producers the flexibility to respond to a consumer-driven marketplace. (T 616.)

"legitimate". The District Court, without citation to authority, concluded that the State had a compelling interest in protecting "small" farmers. App. 272. This is unsupported and unsupportable. *See Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2536 (2002). The State cannot create compelling interests by fiat.

Additionally, the State did not prove that the means (*i.e.*, the regulation of corporation structure) is the *least drastic alternative* for achieving any compelling interest. The State did not put on any evidence about less drastic alternatives. Although the State's Brief contains a discussion of certain South Dakota statutes, it is significant that, in the entire discussion, there is no citation to the record or the Transcript. The State failed its burden.

There are many alternatives available. The State's failure to utilize them means that the State fails the strict scrutiny test. Since the State failed both prongs of strict scrutiny, this Court should hold that, as a discriminatory state regulation, the CFB violates the dormant commerce clause.

F. The State Also Fails the "Undue Burden" Standard

If the CFB would be deemed "nondiscriminatory, then the applicable standard is the "undue burden" test. *E.g.*, *Bendix Autolite Corp.*, 486 U.S. at 889. There are three elements: (1) the extent of the burden on interstate commerce; (2) the weight of the purported nondiscriminatory state interest; and (3) the State's alternative means. The State failed this standard.

1. The Plaintiffs Satisfy the "Burden" Element

The Challengers have the burden of proof to show the extent of the burden on interstate commerce. Challengers have satisfied that element. The CFB has a suppressive and profoundly negative impact on interstate commerce. (T 742; Wheeler testimony.) The State never even contested that issue with appropriate economic testimony.

2. The State Failed the Burden of Proof on the "Local Benefit" Element.

The State and the Intervenors have tried to defend the CFB based on two asserted "local benefits" of the Amendment. The State sought to defend the CFB as a means to protect small family farms. The State's record was based on two sociologists, testifying as experts. It is significant that the District Court essentially ignored the State's sociologists. The State's problem here is that the State's experts did not establish in any way that a ban on *corporate business structure* actually was related to preserving family farms.

The Intervenors also failed to establish that the asserted interest in preventing water pollution from manure lagoon spills was more than theoretical. Neither the State nor the Intervenors presented any evidence about any manure lagoon problems in South Dakota. This was a critical omission. Without

appropriate proof, the Court should conclude that the small farm interest and the manure lagoon interest were essentially illusory. *See Kassel*, 450 U.S. at 671 ("the State's safety interest has been found to be illusory").

3. The State Failed To Demonstrate That It Lacked Alternative Means.

In the undue burden standard, the State had the burden to show "the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. 333, 353 (1977). Neither the State nor the Intervenors made any showing that alternatives were not available. (Of course, alternatives such as regulating based on farm "size" or even the "industrialized nature" of a farm were available.) Since the State failed its burden here, the Court should follow controlling Supreme Court precedent and rule for Challengers. *See Bendix Autolite*, 486 U.S. at 895.

4. Summary

In sum, while the Challengers satisfied the element where it had the burden, the Stated failed its burden regarding the purported "local interests" and its burden on "alternative means." Therefore, even if the Court would use the undue burden standard, the Court should rule for Challengers and affirm the District Court.

G. Conclusion

For the reasons above, this Court should conclude that the Corporate Farming Ban is discriminatory regarding interstate commerce and rule that the CFB unconstitutionally violates the dormant commerce clause. This Court, therefore, should affirm the lower court on other, broader grounds

ISSUE II. THE CORPORATE FARMING BAN IS PREEMPTED BY TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

For purposes of this Preemption Issue, Challengers respectfully join the arguments in the briefs filed by the Appellee/Cross-Appellant Holben, *et. al.*, and the Appellees Utilities in this matter. Challengers urge that this Court affirm the District Court on the holding that the CFB is preempted by Title II of the ADA.