Brief of Amici Curiae American Farm Bureau Federation, Alabama Farm Bureau Federation, Arkansas Farm Bureau Federation, Kansas Farm Bureau Federation, Kentucky Farm Bureau Federation, Minnesota Farm Bureau Federation, North Dakota Farm Bureau Federation and Utah Farm Bureau Federation-For Affirmance

by

John J. Rademacher, Michael J. Stientjes, R. Alan Peterson, and Heath R. Oberloh

Originally published in SOUTH DAKOTA LAW REVIEW
49 S. D. L. REV. 743 (2004)

BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION, ALABAMA FARM BUREAU FEDERATION, ARKANSAS FARM BUREAU FEDERATION, KANSAS FARM BUREAU FEDERATION, KENTUCKY FARM BUREAU FEDERATION, MINNESOTA FARM BUREAU FEDERATION, NORTH DAKOTA FARM BUREAU FEDERATION AND UTAH FARM BUREAU FEDERATION– FOR AFFIRMANCE

John J. Rademacher
Michael J. Stientjes
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

R. Alan Peterson
Heath R. Oberloh
LYNN, JACKSON, SHULTZ & LEBRUN, PC
141 N. Main Avenue, Suite 800
PO Box 1920
Sioux Falls, SD 57101-3020
(605) 332-5999
Attorneys for Amici Curiae

STATEMENT OF IDENTITY OF AMICI CURIAE, THEIR INTERESTS IN THE CASE AND SOURCE OF AUTHORITY

As identified in the Motion, the Amici Curiae are as follows:

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919, and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in all fifty states and Puerto Rico (including the South Dakota Farm Bureau Federation), representing more than five million member families. The Alabama Farm Bureau Federation, Arkansas Farm Bureau Federation, Kansas Farm Bureau Federation, Kentucky Farm Bureau Federation, Minnesota Farm Bureau Federation, North Dakota Farm Bureau Federation and Utah Farm Bureau Federation, are constituent members of AFBF, have similar purposes and represent the interests of approximately 700,000 member families through their respective state organizations.

The farmer and rancher members of Amici, ("AFBF" and the constituent state amici hereinafter referred to collectively as "Farm Bureau"), produce virtually every agricultural commodity produced commercially in the United States. They own or lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. As market forces have dictated, Farm Bureau's members have, in increasing numbers, implemented some sort of limited liability entity for the ownership and operation of their farms and ranches. This use of limited liability entities has been necessary to secure the economic and tax incentives needed to survive in today's marketplace. In recent years, however, limited liability entities have come under increasing attack by environmental groups and groups allegedly concerned with the plight of "family farms." In South Dakota, these attacks have culminated in the implementation of Article 27, Sections 21 through 24 of the South Dakota Constitution, which is often referred to as Amendment E.

Amendment E was purportedly designed and drafted to help "family farmers" compete in the market place and remain economically viable. Rather than accomplishing its purported goals, however, Amendment E causes irreparable damage to those individuals it proclaimed to protect. Amendment E affects Farm Bureau's members in South Dakota by limiting their ability to employ the limited liability business structures that are available under state law and necessary to obtain financing, engage in estate planning, secure tax incentives and engage in the prudent, general business practice expected in today's market. In addition, Amendment E severely limits the individuals and entities with which Farm Bureau's South Dakota members are allowed to do business, and thereby prohibits those members from effectively engaging in interstate commerce. Finally, Amendment E discriminates against Farm Bureau

members in other states by limiting or precluding those members from participating in South Dakota's agricultural market.

In addition to the burdens Amendment E places on Farm Bureau's members both in and outside of South Dakota, and on interstate commerce, Amendment E has imposed significant burdens on Farm Bureau members who suffer from disabilities and are therefore unable to qualify for the "family farm" exception to Amendment E. Therefore, as the District Court concluded, Amendment E conflicts with the Americans with Disabilities Act; which therefore preempts Amendment E. In addition, while the District Court correctly ruled that Amendment E violates the dormant commerce clause, the District Court erred in finding that Amendment E did not violate the commerce clause with respect to the agricultural challengers. Movants wish to supplement Appellees-Cross Appellants' Briefs on these issues.

It is the policy of Farm Bureau to support the use of any business structure by agricultural producers and that economic incentives should be equally available to any farming operation, whether that operation is a sole proprietorship, partnership, trust, limited liability company or corporation. Farm Bureau also opposes any legislation that is detrimental to agriculture and the general public. Because Amendment E infringes on those policies, Farm Bureau opposes it and joins the Appellee-Cross Appellants in urging this Court to affirm the District Court's order that Amendment E is unconstitutional and unenforceable. The source of authority for filing Amicus Curiae Brief is Rule 29 of the Federal Rules of Appellate Procedure and Amici Curiae's interest in this case as set forth herein.

ARGUMENT

I. AMENDMENT E VIOLATES THE DORMANT COMMERCE CLAUSE.

The United States Supreme Court has established a two-tiered approach by which to analyze claims that a challenged state measure violates the dormant commerce clause. *See Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 889 (1988). The first tier of this analysis is referred to as the "discrimination tier." Under this tier, if a State's regulation is found to be discriminatory, the State must show a compelling reason for its discriminatory regulation and must utilize the least restrictive means available to achieve that end. *See e.g., Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 268 (8th Circuit, 1995). If the State fails to satisfy that burden, the regulation is subjected to the strict scrutiny standard and is "virtually per se" unconstitutional. *See Oregon Waste Systems*, 511 U.S. at 99. The second tier of the dormant commerce clause analysis prohibits state regulations that, while not overtly discriminatory, impose an undue burden on interstate

commerce. *See Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981). Because the District Court adopted an overly restrictive analysis of what constitutes a "discriminatory" regulation, its conclusion that Amendment E is not discriminatory should be revisited.

A. Amendment E is a "discriminatory" regulation.

Initially, it is beyond dispute that the agriculture industry is, by its very nature, inherently interstate commerce. *See West Lynn Creamery v. Healy*, 512 U.S. 186, 203 (1994) (stating that "dairy farmers are part of an integrated interstate market."). Therefore, the only question for this Court is whether Amendment E discriminates against that commerce. According to applicable Supreme Court and 8th Circuit precedent, a state regulation may be discriminatory in one of three ways. First, a regulatory scheme may "facially discriminate." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *SDDS,* 47 F.3d at 267. Second, a regulatory scheme, even though it is facially neutral, may be discriminatory if it has a "discriminatory purpose." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-353 (1977); *SDDS,* 47 F.3d at 267. Third, even if the regulatory scheme is facially neutral and does not have a discriminatory purpose, it may be invalid because of a "discriminatory effect." *Maine v. Taylor*, 477 U.S. 131, 148 n. 19 (1986); *SDDS,* 47 F.3d at 267. When examining Amendment E, it is important to remember that "[e]conomic protectionism is not limited to attempts to convey advantages on local [farmers]; it may include attempts to give local [farmers] an advantage over [farmers] in other states." *Brown-Forman Distillers Corp. v. New York*, 476 U.S. 573, 580 (1986). While Farm Bureau asserts that Amendment E is discriminatory under all three tests, this Court need only find Amendment E discriminatory under one of the tests to apply the strict scrutiny standard.

1. Amendment E is facially discriminatory.

The discriminatory nature of Amendment E can be seen by its structure, its text and the fact that it attempts to regulate the agriculture and livestock industries. While on its face, Amendment E appears to apply even handedly to both in-state and out-of-state farmers, when it is examined as a whole, a clear picture of protectionism materializes. *See Kassel*, 450 U.S. at 676. The drafters of Amendment E created many "exceptions" to the ban on corporate farming, which exceptions are found in Sections 22(1) through 22(15) of Article XVII of the South Dakota Constitution. As the Supreme Court concluded when it examined the exceptions to Iowa's regulatory scheme in *Kassel*, this Court should also conclude that Amendment E is facially discriminatory after examining the "exceptions" it contains. *See Kassel*, 450 U.S. at 676.

The family farm exception is particularly pertinent to this analysis, as it applies only to individuals who live on the farm or engage in the day-to-day labor and management of the farm. S.D. Const., Art. XVII, § 22(1). Clearly, it is impossible for any individual who is not a resident of South Dakota to satisfy

the requirements of this exception. Thus, while individuals residing inside South Dakota may take advantage of this exception and secure the benefits of doing business in a limited liability format, out-of-state individuals and entities are prohibited from securing those very same benefits. Like the exceptions in *Kassel*, the exceptions in Section 22 of Amendment E "secure to [South Dakotans] many of the benefits of [limited liability] while" denying farmers or farm investors in neighboring states such benefits. *Kassel*, 450 U.S. at 675.

In *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 169 (1999), the United States Supreme Court invalidated the state's franchise tax regulations. A domestic corporation's franchise tax was based exclusively on the par value of its stock; therefore, a domestic corporation was able to arbitrarily lower its franchise tax obligation by lowering the par value of its stock. In contrast, a foreign corporation's tax obligation was based on a number of balance sheet items that were governed by GAAP, and were therefore not as easy to manipulate as par value. The Supreme Court invalidated that regulatory scheme because it gave "domestic corporations the ability to reduce their franchise tax liability . . . . while it denied foreign corporations that same ability." *Id.* at 169. Therefore, the regulatory scheme facially discriminated against out-of-state corporations and was declared unconstitutional. *Id.*

In a similar manner, Amendment E denies out-of-state individuals the benefit of the limited liability business organization that it offers to in-state individuals through the family farm exception. Amendment E gives "domestic [farmers] the ability to reduce their [tax obligations, financing expenses and liability exposure] simply by [doing business as a limited liability entity], while it denies foreign [farmers] that same ability." *Id.* Therefore, as in *South Central Bell*, Amendment E facially discriminates against interstate commerce.

Likewise, in *West Lynn Creamery*, the Supreme Court invalidated a tax on milk dealers because that tax, after being in essence "laundered" by the State, was used to subsidize domestic dairy farmers. 512 U.S. at 194. The tax-subsidy was unconstitutional because it "not only assist[ed] local farmers but burden[ed] interstate commerce." *Id.* at 199. As the regulation in *West Lynn Creamery* saddled out-of-state operators with higher tax burdens and operating expenses than local operators, so Amendment E saddles out-of-state farmers with higher taxes and operating expenses than in-state farmers. Therefore, Amendment E is facially discriminatory.

Despite the clear guidance provided in *Kassel*, *South Central Bell*, and *West Lynn Creamery*, the District Court concluded that Amendment E was not facially discriminatory. In its memorandum decision, the District Court reached that conclusion because the family farm exception prohibits an individual living in one part of the state (Aberdeen) from engaging in farming activities in a distant county (Lyman County) as a limited liability entity. *South Dakota Farm Bureau, et al, v. Hazeltine*, 202 F. Supp. 2d 1020, 1047 (D.S.D. 2002). According to the District Court, because this burden applied to in-state farmers as well as out-of-state farmers, the statute was not discriminatory against interstate commerce. This conclusion runs counter to applicable Supreme Court

case law. In *C & A Carbonne, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), for example, the Town argued that its solid waste control flow ordinance did not discriminate against interstate commerce because it applied to all waste that passed through the town, regardless of origin. *Id.* at 390-91. The Supreme Court rejected that argument, stating "the ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." 511 U.S. at 408; *see Dean Milk Co. v. Madison*, 340 U.S. 349, 351 (1951) (noting that it is "immaterial that [in-state] milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."). Therefore, the fact that certain South Dakota residents are also unable to take advantage of the "family farm" exception in Amendment E does not excuse the fact that the exception facially discriminates against out-of-state interests. The District Court erred in concluding otherwise.

2. Amendment E has a discriminatory purpose.

In addition to being facially discriminatory, Amendment E is discriminatory because it was motivated by a protectionistic and discriminatory purpose. In *SDDS,* this Court took note that the history of the challenged state regulation was "brimming with protectionist rhetoric." 47 F.3d at 268. This Court noted that the pamphlet that accompanied the referendum contained statements claiming that "South Dakota is not the nation's dumping ground," and requesting "voters to vote against the 'out-of-state dump," and keep "imported garbage out of South Dakota." *Id.* This Court found these statements, on their own, to be "ample evidence of a discriminatory purpose." *Id.*

The District Court noted that while, in this case, "[t]here is clearly some evidence of discriminating purpose," it "decline[d] to find sufficient discriminatory purpose." *Hazeltine*, 202 F. Supp. 2d at 1047. While it is unclear what standard the District Court was relying on regarding what constitutes sufficient discrimination, when the evidence in this case is juxtaposed against the evidence in *SDDS*, it is clear that Amendment E has, at its heart, a discriminatory purpose.

The proponents of Amendment E drafted a "Pro Statement," which was widely circulated by the Secretary of State, and which displays protectionist rhetoric similar to that seen in *SDDS.* That statement provided 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." (Ex. 19). The Pro Statement further provided that without Amendment E, "[d]esperately needed profits will be skimmed out of *local* economies and into the pockets of *distant corporations*." (Emphasis added). *Id.*; (T 661). In addition to the damning statements in the Pro Statement, evidence surrounding the drafting of Amendment E clearly shows its discriminatory purpose. Participants in the drafting process were "invited to a meeting to finalize plans for the Corporate, contract, concentrated hog factory initiative." (T 370; Ex. 25 at 5). Amendment

E was hastily drafted in less than six weeks. (T 245). Because of this haste, no public debate or deliberate legislative process was allowed to occur. This haste, and departure from the normal legislative process, is further evidence of Amendment E's discriminatory purpose. *See Church of Lukumi Babala Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993) (purposeful discrimination in free exercise doctrine).

Dennis Wiese, President of the South Dakota Farmers Union, testified that the proponents were concerned that large out-of-state corporations, such as Smithfield, Murphy and Tyson would enter South Dakota and take away profits from independent, local producers, and that Amendment E was intended to bar certain out-of-state agricultural corporations from doing business in South Dakota. (T 634, 646). The drafters ignored numerous warnings, even from one of its members, Jay Davis, that Amendment E was constitutionally flawed. (Ex. 4, Ex. 54; T 420). These purported protectors of the "family farm," did not even take the time to fully analyze what effect Amendment E would have on those family farms. The drafters even ignored warnings from Dr. Thu and Dr. Harl, the few experts who were actually consulted, that Amendment E would have a deleterious effect on local farmers. If the drafters' intent was truly to protect the family farms, neither the Defendants nor the Intervenors have been able to explain why they did not more carefully analyze the effects of Amendment E or listen to the voices of reason during the drafting stage. Indeed, even the state's expert admitted at trial that Amendment E was discriminatory when she stated in her report that Amendment E was "designed to restrict operation of global agribusiness firms." (Ex. 313A; T 505).

It is therefore easy to infer that the alleged protection of family farms was not the true purpose of the drafters, but instead was an attempt to keep the out-of-state "hog factor[ies]" from polluting South Dakota and competing with its farmers. In light of the Pro Statement and the circumstances surrounding the enactment of Amendment E, it becomes clear that Amendment E was enacted with a discriminatory purpose. Despite the District Court's conclusion to the contrary, this Court should invalidate Amendment E because its purpose was to discriminate against interstate commerce.

3. Amendment E has a discriminatory effect.

Numerous Supreme Court cases have invalidated state regulatory schemes, the effect of which was to discriminate against interstate commerce. In *South Central Bell*, discussed previously, Alabama's franchise tax scheme was invalidated because its effect was to impose on foreign corporations a tax burden five times heavier than that imposed on domestic corporations. 526 U.S. at 169. The Supreme Court also struck down the tax-subsidy scheme in *West Lynn Creamery*, noting that "the purpose and effect of the [regulatory scheme is] to divert market share to [in-state] dairy farmers. This diversion necessarily injures the dairy farmers in neighboring States." 512 U.S. at 203. Amendment E has a similar effect on interstate commerce as it imposes extra burdens on out-of-state

farmers while at the same time diverting market share to in-state farmers.

In *Hunt*, the Supreme Court struck down North Carolina's regulatory scheme because of its discriminatory effect on out-of-state apple producers. 432 U.S. at 352-53. One discriminatory effect of the state's scheme was to raise the cost of doing business in North Carolina for out-of-state producers, while leaving the costs the same for in-state producers. *Id.* at 350-51. Similarly, Amendment E imposes increased costs on out-of-state farmers doing business in South Dakota. Out-of-state farmers engaging in business in South Dakota face increased tax burdens, increased financing costs and unlimited liability exposure. In-state farmers are immune from these increased costs because of the family farm exception in Section 22(1) of Amendment E, and therefore, their costs of doing business remain the same.[1]

North Carolina's regulatory scheme also stripped away the competitive advantage that out-of-state producers had earned. *Hunt*, 432 U.S. at 351. The Washington state apple industry had built a competitive advantage through a stringent inspection and labeling process. When the North Carolina regulation required all apples to use the USDA labels, it stripped the Washington apple industry of that competitive advantage. In the same way, Amendment E has stripped away all of the competitive advantages of limited liability that out-of-state farmers had earned through incorporation in their respective states.

Finally, North Carolina's scheme had a leveling effect, "which insidiously operate[d] to the advantage of local apple producers." *Id.* Amendment E also attempts to level the local agricultural market against the competitive advantages enjoyed by out-of-state corporations. This is accomplished by allowing in-state farmers to take advantage of the limited liability format and all its economic benefits, through the family farm exception, while denying that benefit to out-of-state farmers. Such an effect provides "the very sort of protection against competing out of state products that the Commerce Clause was designed to prohibit." *Id.* Despite the District Court's conclusion to the contrary, Amendment E has the insidious effect of discriminating against interstate commerce. Therefore, based on the applicable United States Supreme Court precedent, Amendment E should be declared unconstitutional.

4. Summary

Analogous cases, where states have attempted to provide a benefit to a segment of its population to the detriment of interstate commerce, are legion and almost uniformly reach the same result. Whether a state is attempting to protect its dairies from out-of-state competition in *West Lynn Creamery,* attempting to protect its apple growers from out-of-state competition in *Hunt*, attempting to protect its businesses from out-of-state competition in *South Central Bell*, attempting to prevent the import of out-of-state waste in *SDDS,* or in this case,

1. Again, it must be noted that the fact that not all in-state farmers can take advantage of the family farm exception does not excuse the discriminatory effect that no out-of-state farmer can employ that exception to obtain limited liability. *See C & A Carbonne*, 511 U.S. at 408.

attempting to protect family farms from competition by out-of-state corporations, such actions clearly discriminate against interstate commerce and have been resoundingly invalidated. As stated by the Supreme Court, "[t]he essential vice in laws of this sort is that " out-of-state interests "are deprived of access to local demand for their services." *C&A Carbonne*, 511 U.S. at 392. When boiled down to its essence, Amendment E, through the family farm exception, provides in-state farmers the ability to operate as a limited liability entity, while denying that benefit to out-of-state farmers. Because out-of-state farmers are denied this benefit, market forces dictate that they forego business opportunities in South Dakota, which necessarily grants those opportunities to local interests. Amendment E is a clear attempt to protect in-state interests against out-of-state competition. According to applicable Supreme Court precedent, this is precisely the economic protectionism that the Commerce Clause prohibits. *See Hunt*, 432 U.S. at 351. Therefore, Amendment E should be disposed of the same way the protectionist attempts were dealt with in *Hunt, South Central Bell, C&A Carbonne, West Lynn Creamery* and *SDDS*: it should be declared unconstitutional.

5. Amendment E fails the strict scrutiny standard.

Because Amendment E discriminates against interstate commerce, the State bears the burden of showing *both* that Amendment is necessary for compelling reasons *and* that Amendment E is the least restrictive alternative available to accomplish those reasons. The district court erred in concluding that the protection of South Dakota's family farmers is a compelling interest. Such a conclusion is cast into serious doubt by the Supreme Court's decisions in *West Lynn Creamery, South Central Bell, C&A Carbonne* and *Hunt*, which all note that the protection or preservation of a local industry is never a compelling interest. The District Court also erred in not even examining whether Amendment E was the *only* available alternative to protect South Dakota's farmers. As noted in Appellants' brief on this issue and discussed *infra*, numerous options are available to South Dakota, which do not impose a burden on interstate commerce. Therefore, Amendment E fails the strict scrutiny standard and is unconstitutional.

B. Amendment E imposes an undue burden on Interstate Commerce

In its memorandum decision, the District Court held that Amendment E imposes an undue burden on interstate commerce based on the effect it has on the utility industry. While Farm Bureau agrees with the District Court that Amendment E improperly burdens the utility industry, Amendment E also imposes an undue burden on agricultural interstate commerce and should be invalidated on those grounds as well.

Under the "undue burden" test, the State regulation will be declared unconstitutional if the burden imposed on interstate commerce, no matter how incidental that burden may be, "is clearly excessive in relation to the putative

local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Pursuant to the *Pike* test, the burden on interstate commerce and the local benefits must be examined in relation to each other; specifically, "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." *Id.* This analysis requires this Court to consider (i) the extent of the burden on interstate commerce, (ii) the weight to be given to the interest allegedly promoted by the regulation, (iii) and the availability of alternative means to achieve the State's interest. *See id.* As noted by the Supreme Court, "the burden falls on the state to justify [the regulation] *both* in terms of the local benefits flowing from the statute *and* the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353 (emphasis added).

1. Amendment E severely burdens interstate commerce.

As shown at trial, the effect that Amendment E has had and continues to have on interstate commerce is significant. Ron Wheeler, head of the Governor's Office of Economic Development for South Dakota, testified that Amendment E has suppressed and continues to suppress the flow of interstate commerce. (T 737, 739, 745). Wheeler was aware of at least twenty (20) large projects that had been delayed or cancelled because of Amendment E, including a $100 million wind energy project. (T 741-43, Ex. 131 6). Plaintiffs John Haverhals, Ivan Sjovall, and Bill Aeschlimann, and thousands of other South Dakota farmers who feed livestock owned by other parties, including out-of-state limited liability entities, have lost significant business because of Amendment E, and will be forced out of business completely if Amendment E is enforced. (T 164, 173, 134, 192, 196). Out-of-state producers have cancelled their contracts with Plaintiff Don Tesch because of Amendment E. (T 184). According to Mike Held, Administrative Director of the South Dakota Farm Bureau Federation, Amendment E has restricted the flow of capital into South Dakota, and has severely limited the amount of start up capital and additional financing available to farmers. (T 24, 27). In addition, as the District Court recognized, the cost of utilities, and the flow of power across state lines, will be greatly impacted by Amendment E. *Hazeltine*, 202 F. Supp. 2d at 1050. Dr. Luther Tweeten, an Iowa farm boy turned internationally prominent agricultural economist, testified on behalf of the Plaintiffs that Amendment E obstructs and virtually eliminates the practice of "production contracts" in South Dakota, whereby livestock is transferred between various producers, often across state lines, at various stages of development. (T 537). According to Dr. Tweeten, Amendment E will also have a negative impact on some aspects of vertical coordination, which Dr. Tweeten described as "the synchronization of the stages in the food marketing chain." (T 541). Because vertical coordination involves the national agricultural market, Amendment E disrupts not only the agricultural economy in South Dakota, but also the entire nation. (T 543). As shown at trial, Amendment E has had a serious and severe impact on the plaintiffs and the

members of Farm Bureau and has significantly decreased the flow of agricultural commerce into and out of South Dakota.

Critically, among the people who have been, or will be, precluded from entry into the South Dakota market are Farm Bureau members. Those members are restricted or prohibited from entering into various common business transactions with South Dakota farmers because of Amendment E. Many Farm Bureau members employ some variety of a limited liability entity to obtain the economic benefits associated with those entities and remain competitive in today's market. Those members are severely limited in the types of business relationship into which they may engage with South Dakota farmers; specifically, custom feeding and production contracts are virtually prohibited. Farm Bureau supports the ability of all their members to engage in any beneficial business transactions available to its members free of restriction by governmental regulation. Because Amendment E unduly restricts that ability and thereby decreases the number of business transactions between South Dakota farmers and out-of-state farmers, as well as the accompanying volume of agricultural products and capital flowing into and out of South Dakota.

These effects, when considered together, demonstrate that Amendment E, on its own, has a negative impact on interstate commerce. Yet, this Court must also consider the aggregate effect on interstate commerce if multiple jurisdictions were to adopt similar regulations. *See Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992). "The practical effect of [Amendment E] must be evaluated not only by considering the consequences of the statute itself, but also by considering . . . . what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* If every state attempted to limit the use of the limited liability entity to in-state "family farmers" as Amendment E does, the interstate flow of livestock and agricultural products "could be substantially diminished or impaired, if not crippled." *Id.* at 1072. Such an environment would essentially erect a wall around each state's agricultural market, which would severely impact Farm Bureau members. Amendment E is the latest and most draconian effort to date by a State to prohibit "corporate farming," and if it (and the regulations which will follow in other states) is allowed to remain in effect, the agricultural industry will be faced with the very "type of balkanization the [Commerce] Clause is primarily intended to prevent." *Id.* Whether Amendment E is viewed in isolation, or if the aggregate effect of Amendment E and similar regulations are considered, interstate commerce is severely impacted.

2. The State's local purposes are not legitimate and are not furthered by Amendment E.

Because of the severe negative impact on interstate commerce, the State bears the burden of advancing legitimate local purposes that will counteract the negative impact on interstate commerce. *See Hunt*, 432 U.S. at 353 (noting that "the burden falls on the state to justify [the regulation] . . . . in terms of the local benefits flowing from the statute."). To carry its burden, the State argues that the

promotion and protection of South Dakota agriculture and the family farms are a legitimate local purpose. State's Appellate Brief at 21. However, the Supreme Court's opinion of such protectionism is clear: "Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *West Lynn Creamery*, 512 U.S. at 205; *see South Central Bell*, 526 U.S. at 169 (invalidating regulatory scheme that protected local businesses); *Hunt*, 432 U.S. at 352-53 (invalidating regulatory scheme that protected local apple producers).

However, even if this Court determines that protection of local farmers is a legitimate state purpose, the benefits provided to local farmers by Amendment E are negligible when compared to the burden imposed on interstate commerce. As shown at trial, Amendment E has damaged and continues to damage the very people it was intended to protect. Plaintiffs Sjovall, Haverhals, Tesch, and Brost (as well as the thousands of South Dakota farmers in similar situations) have all lost a significant amount of business because of Amendment E. Without limited liability protection, farmers have had difficulty obtaining financing. In addition, thousands of estate plans have been thrown into upheaval, which will result in unanticipated and unnecessary estate taxes being imposed on the very family farmers Amendment E purports to protect. Many family farmers who do not qualify for the "family farm" exception, including Plaintiff Brost, will be forced to divest property to comply with Amendment E, which actions will impose significant capital gain and ordinary income tax burdens on family farmers. As noted by this Court in *SDDS*, it is "somewhat suspect" when "the means used to achieve the state's 'ostensible . . . . purpose' were relatively ineffective." 47 F.3d at 268-69 (citing *Hunt*, 432 U.S. at 352). If South Dakota's purpose was in fact to protect the family farmers, it has failed miserably.

The State's only justification for Amendment E came from Dr. Labao, a sociologist who testified about the "harm" caused to rural communities by industrialized farming. However, Dr. Labao spoke only in broad terms of "industrialized farming," and never connected the alleged harm to any particular business entity. (T 482-83). Ironically, Dr. Labao testified that in the region of the country including South Dakota, "industrialized farming is actually related to better economic conditions" for family farms, and that in areas such as South Dakota, "small farming units impoverish localities . . . ." (T 503-04).

The Intervenors also attempted to justify the burden Amendment E places on interstate commerce by alleging that Amendment E would protect South Dakota's environment by preventing spills from large manure lagoons. Neither the State nor the Intervenors produced any evidence regarding this alleged benefit, and it should therefore be rejected as illusory. Neither the State nor the Intervenors could point to specific benefits that were provided to South Dakota's farmers by Amendment E, other than shielding them from interstate competitive forces. Based on the evidence produced at trial, the State simply did not satisfy its burden to show that Amendment E advances any legitimate local interests.

3. The State failed to carry its burden that less restrictive means were unavailable.

Amendment E negatively affects interstate commerce and the family farms it was allegedly intended to protect. Second, Amendment E provides few, if any, of the intended local benefits it was meant to provide. Third, the State has utterly failed to fulfill its burden of showing that no less restrictive alternatives were available to protect South Dakota's family farms and environment. *See Hunt*, 432 U.S. at 353 (noting that "the burden falls on the state to [prove] . . . . the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."). Neither the State nor the Intervenors presented any evidence on this issue, which omission is a fatal flaw.

Common sense dictates that there are, of course, multiple such alternatives available to South Dakota. The State could allocate a portion of its property or sales tax to fund programs, provide loans or subsidies that would support family farms and rural communities. The State could provide relief from property or sales tax to family farmers. The problem with these alternatives is that they would have to be funded by the State itself, likely through increased taxes, which obviously have "political consequences." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1071 (8th Cir. 2000). The State could also consider other regulatory or taxation options. Finally, the State could expand or increase enforcement of its antitrust statutes. *See* S.D.C.L. 37-1-1 *et seq.* It is easy, albeit unconstitutional, to attack unrepresented corporate outsiders, who cannot assert their rights at the South Dakota ballot box, as the source of South Dakota's ills. However, the fact that South Dakota does not have the political will to help its family farmers by legitimate means does not excuse the fact that several alternatives exist which do not burden interstate commerce.

The Intervenors also attempt to justify Amendment E's burden on interstate commerce by its alleged ability to protect the South Dakota environment. Setting aside for the moment the fact that neither the State nor the Intervenors presented any evidence that Amendment E did in fact protect the environment, multiple legitimate alternatives exist by which to protect South Dakota's environment. At the time Amendment E was enacted, South Dakota law provided an extensive environmental permit program. *See* S.D.C.L. Title 34A. In addition, general nuisance law protects individuals from the noise and odor often mistakenly associated with out-of-state corporations. S.D.C.L. 21-10-1 *et seq.* Counties and local municipalities regulate environmental concerns through zoning ordinances. Neither the State nor the Intervenors produced any evidence at trial that these alternative means were unavailable or are any less effective at protecting South Dakota's environment than the alleged benefits of Amendment E. Even if those alternatives were ineffective, the legislature or applicable governing body need only modify those restrictions to adequately protect South Dakota's environment. There are multiple alternatives available to South Dakota that do not burden interstate commerce to the extent Amendment E does.

4. Conclusion.

The state bears the burden to justify both the local benefits of Amendment E and the unavailability of other nondiscriminatory alternatives. *See Hunt*, 432 U.S. at 353. Because of the heavy burden that Amendment E places on interstate commerce, the State's burden in this case is especially onerous. The record demonstrates negligible local benefits, if any, to counteract the burden it places on interstate commerce. In addition, there are a multitude of less restrictive, non-discriminatory burdens available to protect the environment, family farms and rural communities. The State has failed to carry its burden on both elements and therefore the burden imposed on interstate commerce by Amendment E is clearly excessive in relation to the few, if any, local benefits that it provides. Amendment E constitutes an undue burden on interstate commerce and is therefore unconstitutional.

II. AMENDMENT E IS PREEMPTED BY THE AMERICANS WITH DISABILITIES ACT.

The District Court held that Amendment E was preempted by the Americans with Disabilities Act (ADA), relying on the doctrine of preemption by conflict. *See Hazeltine*, 202 F. Supp. 2d at 1042-43. Preemptive conflict exists whenever the application of the federal law is impossible because of the state law, *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when the state law "frustrates the purpose" of the federal law. *See Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 478 (1984). Amendment E makes the application of the ADA impossible and frustrates the purpose of the ADA, therefore, it is preempted by the ADA and is invalid.

The provision of limited liability benefits is a service, program or activity provided by the state. The court in *Innovative Health Systems, v. City of White Plains*, 117 F.3d 37, 45 (2d. Cir. 1997), concluded that the ADA applied to zoning ordinances and noted that the language of § 12132 is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of context." Courts have generally interpreted the phrase "services, programs or activities" broadly. In *Heather K. v. City of Mallard, Ia.*, 946 F. Supp. 1373, 1387 (N.D.Ia. 1996), the court determined that the regulation of open burning was an "activity" under Title II of the ADA. Likewise, in *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D.Utah 1993), the court concluded that the ADA preempted a state law regulating marriage of disabled persons. The narrow definition of "services, programs or activities" urged by the State and Intervenors is contrary to persuasive case law and contrary to the purpose of the ADA that no individual be denied the benefits provided by a public entity.

South Dakota now provides the benefit of limited liability only to farmers who (i) live on the farm or (ii) engage in the day-to-day labor and management of the farm. Under the family farm exception, "[d]ay-to-day labor and management shall require *both* daily or routine substantial physical exertion *and*

administration." S.D.Const. Art XVII, Section 22(1) (emphasis added). Plaintiffs Holben and Brost do not reside on the farms they own; therefore they are only able to obtain the limited liability benefit conferred by the state if they can engage in daily substantial physical exertion. However, that option is unavailable to both Holben and Brost because each suffers from a heart condition, which constitutes a disability under the ADA. *See Hazeltine*, 202 F. Supp. 2d at 1039-40. Therefore, the substantial physical exertion requirement precludes disabled farmers like Holben and Brost who do not live on the farms they own, and deprives them of a benefit offered by the State of South Dakota.

The substantial physical exertion requirement further violates the ADA because it is highly likely that disabled farmers will not live on their farms. Because of their disabilities, disabled farmers often need to live away from their farms to be closer to needed medical treatment and other services. In addition, Amendment E thwarts disabled farmers' estate planning, as gifting shares of a limited liability entity is a common tool used to transfer ownership of their farms to the next generation, while minimizing estate tax implications. Amendment E also prohibits those disabled farmers from continuing to reap the benefits of their farms through leasing, hired hands or other similar arrangements. Holben and Brost are merely examples of the many disabilities suffered by the farming population in South Dakota and nationwide. The average age of farmers nationwide, and especially in South Dakota, has risen much faster than the general population. As that trend continues, the number of disabled farmers, whether residing in or outside South Dakota, will grow exponentially. Consequentially, the number of farmers that are denied the benefit of limited liability entities because of their disability will parallel that growth.

Amendment E grants use of the limited liability entity to farmers that either live on the farm or engage in substantial physical exertion on that farm. Disabled farmers are unable to engage in substantial physical exertion and often are not able to live on their farm. Those disabled persons are denied the benefit of limited liability entities that is offered by the State of South Dakota to non-disabled persons. The express purpose of the ADA is that no disabled individual be "denied the benefits of the services, programs or activities of a public entity." § 12132. Because Amendment E frustrates that purpose and prevents the application of the ADA, it conflicts with the ADA and is therefore preempted by the ADA.

CONCLUSION

The drafters of Amendment E and the people of South Dakota may have had good intentions when Amendment E was drafted and approved. However, Amendment E is a constitutional train wreck. Amendment E discriminates against interstate commerce through its text, purpose and effect. The burdens it imposes on interstate commerce are severe and clearly exceed any benefits to the farmers of South Dakota that the State was able to prove. The State has failed to show any legitimate local benefits provided by Amendment E. In addition, the

State has utterly failed to prove that less restrictive alternatives were not available to protect South Dakota's farmers. Finally, Amendment E is preempted by the ADA as Amendment E provides benefits to non-disabled farmers of which disabled farmers are unable to take advantage. No amount of good intentions can cure these constitutional defects.

Therefore, the American Farm Bureau Federation, Alabama Farm Bureau Federation, Arkansas Farm Bureau Federation, Kansas Farm Bureau Federation, Kentucky Farm Bureau Federation, Minnesota Farm Bureau Federation, North Dakota Farm Bureau Federation, and Utah Farm Bureau Federation urge this Court to affirm the District Court's judgment that Amendment E is unconstitutional and unenforceable.