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Brief of the State of Nebraska as Amicus Curiae in Support of Defendants – Appellants for Reversal

by

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BRIEF OF THE STATE OF NEBRASKA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS - APPELLANTS FOR REVERSAL

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INTEREST OF AMICUS CURIAE

The Amicus State of Nebraska, represented by the Nebraska Attorney General, is a state with an interest in the decision in this matter for several reasons. FRAP 29(a). The District Court elected to make legal declarations of the meaning of Neb. Const. art. XII, § 8 provisions without affording the State of Nebraska the opportunity to appear and argue regarding those determinations. The District Court's analysis of provisions of S.D. Const. art. XVII, §§ 21 to 24 (hereinafter "Amendment E") may affect, and possibly be asserted to overturn, the provisions of Neb. Const. art. XII, § 8 (hereinafter "Initiative 300"). The District Court's decision may be relied upon to restrict what types of limited liability entities the Nebraska Attorney General may allege violate Initiative 300. Lastly, the District Court's analysis may render meaningless the initiative decision of the voters of Nebraska to promote family-farm based agriculture.

STATEMENT OF FACTS

Amicus State concurs with the Defendant's statement of facts, but additionally points out specific facts herein. The economic health of South Dakota is dependent upon South Dakota's agricultural economy. Plnt. Ex. 19, T 634. A majority of South Dakota voters reasonably believed they would be promoting family farm-based production agriculture as opposed to non-family farm corporate agriculture by voting for Amendment E, which was adopted on November 16, 1998. *Id.* South Dakota voters could reasonably believe agribusiness corporations tend to consolidate profits and control of agricultural production, to the harm of independent farmers. Intervenors Ex. 501, 502, T 231-234, Ex. 14, T 241, T 854. South Dakota voters have been exposed to arguments relating to agribusiness corporations and consolidation. T 798-800. South Dakota citizens wish to apply liability to those persons who may harm the environment with livestock waste. T 275, Plnt. Ex. 19, T 634. Family farms are more likely to transact their business locally, maintain stable families, be involved in their community, promote better health for the residents and lower the incidence of crime. T 452-454, 464-465, 467, 475-476, T 835-836, 845, 859. Industrialized farming is more likely to cause the opposite effects for its residents. T 450, 464, 475-476. Family farms are less likely to degrade their environment than are persons or entities who do not reside near the land. T 225-226, T 476.South Dakota voters had the opportunity to weigh the pros and cons of approving Amendment E. Plnt. Ex. 19, T 634.

Several proponents of Nebraska's Initiative 300 were involved in the drafting of Amendment E, hence it contains similar, if not identical, provisions to Initiative 300. T 222, 230, 245. Nebraska was not a party in this matter, nor was it asked to be a party. The court in this matter analyzed and interpreted provisions of Amendment E and Initiative 300. The court ruled on the meaning of these provisions. The Court determined that cooperatives are not corporations and are not restricted by Amendment E. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1031, 1038-1039 (2002). The Court determined

living and testamentary trusts are also "business trusts" under Amendment E. *Id.* at 1035 to 1036. The Court determined Initiative 300 does not apply to livestock which were purchased for slaughter, regardless of the anticipated date of slaughter. *Id.* at 1037.

Plaintiff Farm Bureau represents family farmers and corporations. T 39-40, 50. Farm Bureau admits new members who are involved in agriculture, regardless of disability. T 20. Plaintiff Frank Brost, an attorney, is the owner of four separate ranching entities. T 61-62, 63-64, 72. Mr. Brost performs supervisory, planning and financing activities for his ranching entities, including physical checks of the property and livestock. T 66, 106-107. Mr. Brost does not live upon his ranch. T 104. Mr. Brost alleges that he cannot do physical labor. T 66, 76. Mr. Brost has persons who work for him on the ranch. T 66, 105. Plaintiff Marston Holben, an accountant, lives most of the year in Arizona, spending a few months in South Dakota. T 254, 249. Mr. Holben is the owner of Spear H Ranch, LLC in trust, with said LLC owning South Dakota ranch land. T 250-252. Mr. Holben performs physical review of the LLC's livestock, on horseback or all terrain vehicles. T 259. Mr. Holben manages the LLC's transactions. T 258.

Otter Tail Power Company, Montana Dakota Utilities Company and Northwestern Public Service Company own Big Stone power plant in South Dakota. T 284. These companies expect to acquire transmission right-of-way easements over South Dakota farm and ranch land. T 289. Mr. Mark Rolfes and Mr. Robert Krava, Otter Tail managers, testified that increased costs for easements were expected after Amendment E. T 281, 289-290, 323, 326. Mr. Krava, Otter Tail's Land Management division manager, was not aware of Otter Tail actually offering to purchase any easements since Amendment E's enactment. T 325-326. Ms. Burnadeen Brutlag, Otter Tail's regulatory manager, stated none of the Otter Tail employees calculated the actual increased costs to electrical ratepayers since Amendment E's enactment. T 307, 317. Otter Tail's alleged double to triple costs are based upon assumptions that landowners could not use nor cross easement property under Amendment E. T 326-330. The purchase price for an easement is alleged by Otter Tail to be two to three times the fair market value of the property. T 326-328. According to Otter Tail's expert, there would be no excess economic loss to Otter Tail if Amendment E were found not to apply to the agricultural land between the utility towers, since farming would be able to continue between the towers. T 605-606. The Plaintiffs requested declaratory and injunctive relief on constitutional issues in their Amended Complaint.

SUMMARY OF ARGUMENT

The District Court issued declaratory judgment on Amendment E's provisions on issues not raised by the pleadings, an erroneous finding of pre-emption of Amendment E by the Americans with Disabilities Act (hereinafter "ADA") and an erroneous dormant commerce clause determination. The Court

construed Amendment E language which is either similar to or the same as Nebraska's Initiative 300 language, but failed to provide Nebraska an opportunity to appear to protect its substantial interest in interpreting its own Constitution. The Court findings on the legal meaning of cooperatives, business trusts and livestock purchased for slaughter are not clearly dicta, and are likely unnecessary for the Court's decision, especially as to cooperatives. These findings are also clearly in error and their construction unsolicited by any party.

The ADA's restrictions were erroneously determined to conflict, and thence pre-empt, applications of Amendment E's family farm restrictions. The Court issued an advisory opinion upon a claim no longer alleged, upon little or no evidence even applicable to any claimed disability, and failed to recognize there was no actual violation of Amendment E by the allegedly impaired Plaintiffs. The scant evidence does not support a finding of a disability under ADA. The Court prejudicially ignores the regulatory scheme and case law precedent for ADA, and incorrectly applies severability doctrines, assuming ADA is somehow implicated.

After correctly finding Amendment E did not directly discriminate under the dormant commerce clause, the Court relied upon speculative evidence to erroneously determine utilities suffered an undue burden under Amendment E. The Court correctly found the South Dakota voters had compelling interests in protecting family farms, supporting its decision that Amendment E did not discriminate against nor unduly burden out-of-state farmers, but the Court proceeds to ignore these compelling interests in erroneously finding Amendment E burdened utilities to a degree violating the Commerce Clause. The Court's legal determinations should be reversed and Amendment E should be found to be constitutional, not pre-empted by the ADA and either its restrictions aren't applicable to cooperatives, or a finding that said issue is not fairly raised by the pleadings.

ARGUMENT

I. THE DISTRICT COURT ERRED BY INTERPRETING LANGUAGE IN SOUTH DAKOTA'S AND NEBRASKA'S CONSTITUTIONS WITHOUT PROPER REPRESENTATION FOR NEBRASKA'S INTERESTS, WHICH SIMULTANEOUSLY INVOLVED AN IMPROPER ADVISORY OPINION ON PROVISIONS NOT AT ISSUE.

A. The District Court erred by analyzing Neb. Const. art. XII, § 8 ("Initiative 300") without requiring representation for Nebraska's interests.

This court must review the District's Court's failure to join the State of Nebraska as prejudicial error. *Fetzer v. Cities Service Oil Co.*, 572 F.2d 1250, 1254 (C.A.Ark. 1978). "When necessary, [ ] a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmens Bank & Trust Co. v. Patterson* , 390 U.S. 102, 111, 88 S.Ct. 733, 738-739 (U.S.Pa.

1968). The District Court determined that Initiative 300 does not apply to cooperatives. *South Dakota Farm Bureau, Inc.* at 1031, 1033, 1038 & 1039. The Court further opined that business trusts and livestock purchased for slaughter are not subject to Initiative 300 restrictions. *South Dakota Farm Bureau, Inc.* at 1028, 1029, 1033, 1034& 1036. The State of Nebraska was not a party, nor was it represented in this matter. Neb. Rev. Stat. § 84-202. The State of Nebraska has the right to defend and litigate the meaning of its laws. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1495 (D.C.Cir. 1995). The Court of Appeals can raise indispensibility of the State's claim sua sponte. *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 772 n. 6 (D.C.Cir. 1986). The District Court erroneously failed to recognize that construction of Nebraska's constitution without Nebraska's interests being represented in the litigation prejudiced Nebraska's enforcement of its law.

The District Court erroneously issued a declaratory judgment regarding South Dakota and Nebraska constitutional provisions, for which an actual controversy did not exist. The Court's improper advisory opinion interpreted the legal meaning of both South Dakota's and Nebraska's constitutional provisions on "business trusts", "cooperatives" and "livestock purchased for slaughter", which the Plaintiffs didn't even request.

The Plaintiffs Amended Complaint does not request a construction of Amendment E provisions on cooperatives, business trusts, nor livestock purchased for slaughter. In fact, Amicus cannot locate the words "business trust" nor "cooperative"in the Plaintiffs Amended Complaint or briefs. Declaratory judgment should not be used unless there is an actual case or controversy, to avoid issuing an advisory opinion. *Barnes v. Kansas City Office of Federal Bureau of Investigation*, 185 F.2d 409, 411 (8th Cir. 1950). Plaintiffs, lacking a claimed adverse effect in their complaint or briefs, and having no evidence in the record of probable enforcement by the Defendant officials, fail to present an actual controversy to the District Court. *Garcia v. Brownell*, 236 F.2d 356, 358 (9th Cir. 1956), *cert. denied*, 362 U.S. 963, 80 S.Ct. 880 (1960). This court should determine, after reviewing the record, that there was no controversy regarding "business trusts", "cooperatives" nor "livestock purchased for slaughter" amendment provisions. *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 855 (Fed. Cir. 1999).

The Court clearly erred by issuing declaratory judgment on the meaning of "cooperatives" without an actual controversy before it, and said judgment is an improper advisory opinion. *Brown v. Ramsey*, 185 F.2d 225, 227 (8th Cir. 1951). Its opinion on "business trusts" and "livestock sold for slaughter" may be interpreted as dicta or a judgment. However, Courts should avoid opining on constitutional language not at issue. In declining to examine numerous issues not clearly before the court, the 9th Circuit stated: "Were we to attempt to respond in like measure, we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 (9th Cir. 1985).

If the Court's opinion is considered authoritative, the construction of

"business trusts" to apply to all trusts is clearly wrong. "Business trust" is a legal term, clearly distinguishable from living or testamentary trusts. "Business trusts and Massachusetts Business Trusts are synonymous definitions of an unincorporated association which operates similarly to a corporation." Black's Law Dictionary 974 (6th ed. 1999). A Missouri Court describes the distinction, by citing 2 Bogert, Trusts and Trustees, § 291, which contrasts the gift or transfer intent of a regular trust to the profit-making capital combination of a business trust. *Plymouth Securities Company v. Johnson,* 335 S.W.2d 142, 149 (1960); *see also Inside Scoop, Inc. v. Curry*, 755 F.Supp. 426, 429 (D.D.C. 1989) ("A business trust differs from a conventional trust in the manner of its creation and in its purpose").

Further, the Court's failure to presume that all words in a constitutional amendment should be given meaning, and should be interpreted as a whole, results in it foregoing a meaningful and logical construction of "business trust". *Boise Cascade Corp. v. U.S. E.P.A.* 942 F.2d 1427, 1432 (C.A.9,1991), *See also Kifer v. Liberty Mut. Ins. Co.* 777 F.2d 1325, 1332 (C.A.8 (Ark.),1985). The South Dakota voters could have well understood that "business trusts" operate much like a corporation, rather than like living or testamentary trusts. Courts have found them analagous in many respects. *Carey v. U. S. Industries, Inc.*, 414 F.Supp. 794, 795 (D.C.Ill. 1976) (citing *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 359, 56 S.Ct. 289, 296 (1935)); *see also Home Lumber Co. v. Hopkins*, 190 P. 601, 604-605 (Kan. 1920). The Court's erroneous reading of SDCL 47-14A-1, which deletes the word "business" from the provision, also ignores the statutes clear indication that common law business trusts and Massachusetts trusts are its focus. South Dakota voters likely did not intend to prohibit ownership of agricultural property by all trusts in South Dakota, but rather intended to restrict business trusts, which are similar to corporations.

II. THE DISTRICT COURT ERRED BY DECLARING THAT ART. XVII, §§ 21 TO 24 OF SOUTH DAKOTA'S CONSTITUTION ("AMENDMENT E"), AND NEBRASKA'S INITIATIVE 300 BY IMPLICATION, DO NOT APPLY THEIR RESPECTIVE AGRICULTURAL PROPERTY RESTRICTIONS ON CORPORATIONS TO COOPERATIVES.

The Court of Appeals reviews questions of constitutional interpretation *de novo* on the record. *U.S. v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002). Since the District Court legally misinterpreted the scope of the limitation on corporations in Amendment E, the Court's determination should reversed. Nebraska's Supreme Court clearly interprets "corporations" to include cooperative corporations. *Pig Pro Nonstock Co-op. v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). The District Court determined Amendment E, and by implication Initiative 300, do not include cooperatives in their corporation restrictions, clearly ignoring Nebraska's prior interpretation. The Court ignores a canon of statutory construction in failing to use the same construction on the "borrowed" Nebraska "corporation" language. *Shannon v. U.S.*, 512 U.S. 573, 582, 114 S.Ct. 2419, 2426 fn. 8 (1994). The Court should have adopted the meaning given to

the terms of Nebraska law by a Nebraska court. *Id.*

Cooperatives are formed as corporations, not partnerships or associations. All 8th Circuit states clearly allow cooperatives to file articles of incorporation, register themselves with the Secretary of State, have a registered office and agent, and issue stock, just like a regular corporation. Neb. Rev. Stat. §§ 21-1301, 21-1302 (2001); *see also* Ark. Code Ann. §§ 2-2-119, 4-26-101; Iowa Code §§ 501.102, 501.202 (1999); Minn. Stat. §§ 308A.005, 308A.201 (1997), 308A.131 (1998); Mo. Rev. Stat. §§ 357.010, 357.020 (2001); N.D. Cent. Code §§ 10-15-03 (1987), 10-15-05 (1999); S.D. Codified Laws Ann. §§ 47-15-3 (1965), 47-15-4 (1992), 47-15-27 through 47-15-39 (1965). Profits may be distributed by patronage, rather than by percentage ownership, which does not having any bearing on the status of the cooperative entity. If the District Court stated a lease was not a contract, but something else, the appellate could would find that ruling legally wrong. The District Court's decision here is legally wrong, in addition to being an advisory opinion, and should be reversed.

III. THE DISTRICT COURT ERRED BY RULING ON PLAINTIFFS' ADA CLAIM, WHICH WAS NOT AT ISSUE BEFORE THE COURT; IN THE ALTERNATIVE, THE ADA CLAIM FAILS ON ITS MERITS BECAUSE PLAINTIFFS WERE NOT DISABLED, THE ADA DOES NOT DISCRIMINATE AGAINST THEM BECAUSE OF ALLEGED DISABILITIES, AND THE DISTRICT COURT DID NOT PROPERLY APPLY AMENDMENT E'S "TEMPORARY NON-COMPLIANCE" PROVISION.

The District Court's decision on the ADA claim should be dismissed or vacated and remanded for trial since it was dismissed before trial and therefore not an issue before the court, and Plaintiffs did not re-allege the claim nor make any relevant offers of proof after the District Court rescinded its dismissal of the claim.

The Court of Appeals reviews claims of constitutional error and issues of statutory construction *de novo. United States v. Allen*, 247 F.3d 741, 757 (8th Cir. 2001). Plaintiffs' original Complaint included the allegation that Amendment E violated Title II of the ADA. [Plaintiff's Complaint for Injunctive and Declaratory Relief, at 28.] In a pre-trial order, the District Court dismissed this claim for lack of subject matter jurisdiction, based on *Alsbrook v. City of Mamuelle*, 189 F.3d 999 (8th. Cir. 1999). [9/13/2001 Order, at 12.] Subsequently, the Plaintiffs filed an Amended Complaint, omitting the ADA claim. Shortly after trial, the District Court notified both parties that *Alsbrook v. City of Mamuelle* had recently been overruled by the 8th Circuit Court of Appeals in *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001) and *Gibson v. Arkansas Dept. of Correction*, 265 F.3d 718 (8th Cir. 2001). *Id.* [12/13/2001 Memorandum Letter.] The court stated that under *Grey* and *Gibson*, subject matter jurisdiction now exists to entertain an ADA claim for prospective, injunctive relief against South Dakota, and that "[c]ounsel should keep this in mind as [they] submit further arguments." *Id.* Subsequently, plaintiffs failed to re-allege or brief the existence of factual evidence in the record on the ADA claim, much less argue

the merits of the non-existent claim.

An Amended Complaint supercedes an original Complaint and renders the original Complaint without legal effect. *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000). Plaintiffs' Amended Complaint did not contain an ADA claim; therefore, the ADA was not an issue before the court at trial. Plaintiffs did not present any offers of proof in relation thereto. However, the court claims Plaintiffs' testimony on equal protection and commerce clause claims amount to an offer of proof on ADA issues. *South Dakota Farm Bureau, Inc.* at 1039. This renders incomprehensible and disingenuous the District Court's declaration that plaintiffs submitted ADA offers of proof at trial, since such was not an issue before the court under the Amended Complaint. *Id.* Further, plaintiffs' failure to pursue an ADA claim *in any way* after the District Court's December 13, 2001 letter surely constitutes a waiver of this claim.

In short, the District Court's letter which allowed the ADA claim to erroneously go forward procedurally, despite the pleadings of the parties, later expanded into a validation of the claim on its merits, without any discussion or cross examination of relevant evidence in between.

The ADA claim fails on its merits because Plaintiffs are not disabled as defined under the ADA, and Amendment E does not discriminate against Plaintiffs based upon their disabilities.

This Court's review under the clear error standard should result in a "definite and firm conviction that a mistake has been committed." *Willis v. Henderson*, 262 F.3d 801, 808 (8th Cir. 2001). Assuming *arguendo* that the District Court overlooks these problems and renders *post hoc* plaintiffs' testimony as evidence of a disability, even though it obviously was not intended to be such, the ADA claim still fails on its merits.

Title II of the ADA states, in part:

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

42 U.S.C. § 12132.

To state a prima facie claim under Title II, a plaintiff must show: (1) he is a person with a disability as defined by statute; (2) he is otherwise qualified for the benefit in question; and (3) he was excluded from the benefit due to discrimination based upon the disability. *Randolph v. Rodgers*, F.3d 850, 858 (8th Cir. 1999). Plaintiffs' ADA claim fails because they cannot satisfy the first and third elements of the *Randolph* test.

First, Plaintiffs are not disabled as required by statute, and thus do not invoke the ADA. Under § 12132, an individual has a "disability" if he has "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; (C) regarded as having such an impairment." Under 28 C.F.R. § 35.104, "substantially limits" means "unable to perform a major life activity that the average person in the general population can perform or significantly restricted

as to condition, manner, or duration of such performance as compared with a member of the general population." *Id.* Examples of major life activities include self-care, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* Plaintiffs Brost and Holben must allege they are disabled because they are substantially limited in performing strenuous manual labor on their farms, which constitutes work—i.e. a major life activity—under the ADA. Gleaning from the scant evidence on the record, and testimony that both were able to do some physical labor, neither Brost nor Holben are disabled under ADA Title II.

When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). Assuming Brost and Holben were unable to perform strenuous day-to-day labor on their farms, such inability to perform this single job falls short of the requirement of being unable to perform a broad class of jobs, as required by the ADA. Indeed, Brost is an attorney, and Holben is an accountant. Surely the versatile skills developed by the training of each individual in their professions have enabled them to pursue a wide range of employment. Simply because one cannot pursue the "job of their dreams" does not make them disabled under the ADA.

The trial record is utterly devoid of any substantive proof of the plaintiffs' alleged disabilities, as required by the ADA. All that exists is vague, highly generalized personal testimony by each plaintiff. Brost testified that he had surgery and chest and arm pain within the past month, and thus was unable to make the trial. T 58. Such testimony was not proffered as proof of an ADA disability, but rather a response to an introductory question as to why he was not present for trial. *Id.* For all intents and purposes, Brost's physical condition may have been a temporary condition stemming from his surgery, which would not constitute a "substantial limitation" under Title II. *See* 29 C.F.R. § 1630.2(j)(2) ("To determine whether an individual is substantially limited in a major life activity, a court should consider the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or expected long-term impact of the impairment"). Of course, neither party's attorney delved any deeper, since the ADA claim was not a trial issue. Holben admitted during cross-examination that he actually performed such physical activity as riding on his All-Terrain-Vehicle or a horse to examine the health of his cattle. T 259. These facts contradict a finding that he is "substantially limited" in performing day-to-day labor on the farm.

In addition, Amendment E does not discriminate against Plaintiffs because of their alleged disabilities. Rather, Amendment E "discriminates" against certain farmers based on *distance* from the farm. According to a South Dakota state court, Amendment E was passed in order to protect family farms and the environment, and to maintain the rural way of life. *Knittel v. South Dakota*, S.D.

Sixth Judicial Circuit, Civ. 99-45. In the judgement of South Dakota voters, the best way to achieve such goals was to connect farm owners to the land, which necessarily requires eliminating distance between farm and owner. Two effective ways of tying owners to the land are to require residence or day-to-day labor. Thus, Brost's and Holben's difficulty is not that they are disabled, but that they live away from their farms.

The Court erred by not properly applying Amendment E's "temporary non-compliance" provision, after misinterpreting Plaintiff's temporary impairment to be a violation of Amendment E.

The District Court erroneously failed to recognize that Mr. Brost's entities were family farms, and were within the safe harbor of S.D. Const. art. XVII, §§ 23. Despite no evidence of South Dakota enforcing the law against Brost's entities, the District Court believed that even a temporary impairment forces divestment of corporate or syndicate-held agricultural property. T 869. Mr. Brost's impairments, assuming *arguendo* they constitute disabilities, could be temporary. The scant facts available indicate most of the Brost companies, if not all, likely qualified as "family farms" after the 1998 passage of Amendment E, since Mr. Brosts labors likely would fit "the day-to-day labor" requirements of Amendment E.T 58, 68, 106. If the entities were "family farms" before Mr. Brost became temporarily disabled, they would have 20 years to become compliant again under S.D. Const. art. XVII, §§ 23.

The District Court, much like its cooperative determinations, does not have a justiciable issue before it relating to Mr. Brost's supposed impairment. If South Dakota didn't believe Mr. Brost's entities were violating Amendment E (since they were "family farms"), there was no present controversy before the District Court. *Garcia v. Brownell*, 236 F.2d 356, 358 (9th Cir. 1956), *cert. denied*, 362 U.S. 963, 80 S.Ct. 880 (1960). The Court's opinion, resting on uncertain future facts relating to the Brost entities, and lacking an actual controversy, constitutes an improper advisory opinion. *Brown v. Ramsey*, 185 F.2d 225, 227 (8th Cir. 1951). The court cannot rely upon what may happen 20 years from now to the ownership, stockholders or Mr. Brost in determining that there is a current controversy surrounding the application of the ADA to Amendment E's requirements. The Court clearly erred in ignoring the "safe harbor" set out in S.D. Const. art. XVII, §§ 23, as it applies to Brost's entities and then further erred by determining Mr. Brost presented a justiciable controversy before the Court.

IV. THE DISTRICT COURT ERRED BY HOLDING THAT AMENDMENT E VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE THE AMENDMENT DOES NOT DIRECTLY DISCRIMINATE AGAINST INTERSTATE COMMERCE, NOR FAIL THE *PIKE* TEST BY IMPOSING AN ACTUAL BURDEN ON INTERSTATE COMMERCE THAT IS "CLEARLY EXCESSIVE" TO THE AMENDMENT'S PUTATIVE LOCAL BENEFITS.

A. Defendants need not introduce bolstering proof that Amendment E is constitutional until Plaintiffs satisfy their heavy burden of overcoming a presumption of constitutionality.

All statutes are presumed constitutional and the heavy burden of proving otherwise rests with the challenger of the statute. *South Carolina State Highway Dept. v. Barnwell*, 303 U.S. 177, 58 S.Ct. 510 (1938); *Nat'l Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co.*, 337 U.S. 582, 604, 69 S.Ct. 1173, 1183 (1949); *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 55 S.Ct. 538 (1935). The only time any burden shifts to the state is when the statute affirmatively or directly discriminates against interstate commerce, which Amendment E does not. *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447 (1986). Further, Defendant need not show the absence of a less burdensome alternative to Amendment E in order to prove constitutionality, unless Plaintiffs satisfy their heavy burden of proving a statute directly discriminates against interstate commerce. *Cotto Waxo v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995).

B. The District Court was correct in determining that Amendment E does not directly discriminate on its face, or in its purpose or effect.

When a state statute's constitutionality is challenged under the Dormant Commerce Clause, the court must determine whether the statute discriminates against interstate commerce directly and/or indirectly. *United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d 762, 765-67 (8th Cir. 1999). A state law may not directly discriminate against interstate commerce on its face, or in its purpose or effect. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1383 (8th Cir. 1997). The District Court correctly determined that Amendment E does not directly discriminate in any of these fashions.

First, the District Court correctly concluded that Amendment E does not discriminate on its face, because corporate or syndicate farmers both inside *and* outside South Dakota cannot own real estate used for farming. *South Dakota Farm Bureau, Inc.* at 1046 - 1047. Thus, whether incorporated within South Dakota or not, corporate or syndicate farmers are treated the same. Further, Amendment E has no extraterritorial reach, since it does not require out-of-state commerce to be conducted according to in-state terms. *Id.*; *see also Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995). Second, the District Court also correctly concluded that the expressed purpose of Amendment E (e.g. to retain family farms and to prevent limited liability companies from gaining control of

the food supply) is not discriminatory, since it applies to both in-state and out-of-state entities also. *Id.* Third, the District Court correctly concluded that Amendment E is not discriminatory in its effect. *Id.* "Negatively affecting interstate commerce is not the same as discriminating against interstate commerce." *Cotto Waxo*, 46 F.3d at 794. Amendment E may prevent out-of-state limited liability entities from raising livestock in South Dakota, but it does not prevent them from doing so elsewhere. In short, this "raising the costs" of doing business in South Dakota does not represent unconstitutional discrimination.

Plaintiffs have previously admitted that Amendment E does not directly discriminate against interstate commerce. In the "Pro-Con Statement" regarding Amendment E, under "Con – Constitutional Amendment E" it reads "[t]he language of Amendment E *does not* clearly distinguish between South Dakota farmers and out-of-state-based farmers and ranchers." Plaintiff's Exhibit 19, T 634 (emphasis added). This "con" statement was submitted to the Secretary of State by none other than Plaintiff Frank Brost. *Id.* The Plaintiffs continue this argument in the trial in this matter. T 852.

C. The District Court erred by determining that Amendment E fails the Pike test because its alleged burden on interstate commerce was proven by mere opportunistic speculation that when properly mitigated, does not "clearly exceed" Amendment E's straightforward putative benefits.

Any potential Dormant Commerce Clause violation would occur because Amendment E *indirectly* discriminates against interstate commerce. When a "statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is *clearly excessive in relation to the putative local benefits*." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970) (emphasis added). The *Pike* balancing test does not involve determining whether a less restrictive statutory alternative would accomplish similar ends. *United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d at 767. Appellants theorize less restrictive statutory alternatives to Amendment E, but such is only required under a "direct discrimination" inquiry, and therefore it is irrelevant here. *Id.* at 768; *see also Cotto Waxo Co. v. Williams*, 46 F.3d at 793.

The putative state benefits of Amendment E, as determined by a South Dakota Circuit Court, include protecting family farms and the environment, and maintaining the rural way of life. *See Knittel v. South Dakota*, S.D. Sixth Judicial Circuit, Civ. 99-45. According to the District Court below, these benefits represent a compelling state interest:

> The evidence presented in court, the court's knowledge of the economic hardships endured by family farmers in competing with large 'other players' in agriculture, and the evidence of fears of spoilation of the environment by entities in which the owners are sheltered from personal responsibility all show not only a legitimate state interest but a compelling state interest.

South Dakota Farm Bureau, Inc. at 1048.

In light of this factual finding, in order to violate the Dormant Commerce Clause under *Pike*, Amendment E's burden on interstate commerce must "clearly exceed" this compelling state interest.

In discussing Amendment E's alleged burden on interstate commerce, the District Court speculated that Amendment E would greatly increase the costs of utility, pipeline, and railroad companies needing corridors for interstate transmission or transport. *Id.* at 1050. The court's finding of any clearly excessive burdens on interstate commerce hinged on the fact that Amendment E prohibited corporations or syndicates from obtaining easements for these corridors, and that such prohibitions would force the entities to purchase the real estate, causing "greatly increased costs" therefore concluding "interstate commerce would be greatly affected." *Id.*

In *Ben Oehrleins*, this court stated the following:

> [Plaintiff's] theory also assumes that an out-of-state concern that permanently locates an operation within the state is still an 'out-of-state' entity that can complain that a law that even-handedly restricts a local market is 'discriminatory.' . . . A Delaware corporation doing business in Minnesota could not argue that it is discriminated against by Minnesota laws that apply equally to all businesses operating in the state. South Dakota companies may choose not to locate operations in Minnesota because of comparatively high state taxes that apply to all businesses, but this is not discrimination under the Commerce Clause. Like any other local market regulation, [the statute] may or may not encourage companies from doing business in the state. But while this may be a relevant concern in forming economic policies, it is simply not the proper inquiry for considering discrimination under the Commerce Clause.

Supra. at 1386-87.

The situation in the case at hand parallels that described above. In-state *and* out-of-state corporations or syndicates alike may not own an interest in real estate used for farming, since both in-state and out-of-state entities are subject to this same burden.

At trial, Plaintiffs claimed that post-Amendment E, the price of constructing transmission lines through South Dakota would be drastically increased, since Amendment E would force utility companies to buy "corridor land" because the legislation forbids them from having an easement on agricultural land. Plaintiffs alleged that purchasing such land would cost two to three times the price of obtaining an easement, which represents an undue burden on interstate commerce that clearly exceeded the statute's putative local effects.

The evidence used to support the 200-300% number was vague and questionable in nature. Bernadeen Brutlag, regulatory services manager for Plaintiff Otter Tail's rate design and administration, testified that despite her company's claim that buying agricultural land for transmission corridors would supposedly pose an undue burden to their company, she had not been asked to perform a calculation to determine the amount of such an increase. T 317. She also testified that to her knowledge, no one at Otter Tail had performed such a

calculation. *Id.* Robert Krava, manager of the Land Management Department for Otter Tail, also testified regarding the increased costs of acquiring easements, post-Amendment E. T 323-343. When asked how he arrived at said figure, Krava "predicted" that the costs of obtaining an easement would double or triple, for the reason a farmer could not farm nor even cross the strip of easement property. T 341. It is clear that plaintiffs' witnesses seek to pile assumption upon assumption not established by the evidence, in order to finally arrive at a sum total that amounts to a "clearly excessive" burden on interstate commerce. However, the assumptions could just as easily cut the other way, and other mitigating factors exist that decrease plaintiffs' inflated estimate.

First, it is unclear whether plaintiffs' cost estimate was based upon purchase of an easement, or acquiring the property by condemnation. T 328. Assuming Mr. Krava's assertion the Plaintiff utilities would have to take fee title to the land, rather than an easement upon it, the structure payments paid the land owner for each pole in the right of way would no longer be paid to land owners, since the utility companies would now own the land. Second, assuming the land was purchased in fee, there is no evidence that utilities would not grant easements across their corridors, since use of these rights-of-way pose little threat or disadvantage to them. Alternatively, if only an easement is granted by the land owner, it seems likely the owner will retain a right of passage across the land. Mr. Krava's speculation on no crossing of utility corridors by farmers in his testimony is not supported by the likelihood that reasonable utility companies would grant easements or access to parcels "split-up" on farms, thereby reducing farmers incentive to hold out for higher-than-fair-market-value prices. Third, the "hold-out" price of 200-300% of fair-market-value for an easement, or purchase in fee, is wholly arbitrary, speculative, and without tangible support.

To allow plaintiffs to satisfy their substantial burden with mere speculation on prospective actions by utilities confuses the roles of the parties involved. *See Mittlieder v. Chicago & N.W. Ry. Co.*, 413 F.2d 77, 83 (8th Cir. 1969) (stating that speculation is generally inadmissible). While *defendants* merely need to assert *putative* local benefits of the legislation, *plaintiffs* are required to assert *actual* burdens to interstate commerce. *See Hertz Corp. v. City of New York*, 1 F.3d 121, 132 (2nd Cir. 1993); *Designs in Medicine, Inc. v. Xomed, Inc.*, 522 F.Supp. 1054, 1059 (E.D.Wis. 1981). The court should note that the Plaintiff utilities did not actually acquire any right-of-way easements during the nearly four years Amendment E was enacted further calling into doubt any self-induced lack of actually known damages upon the utility. T 325. The plaintiff utilities lack of actual cost figures is a burden that's self-inflicted. Their reliance on speculative cost assumptions, which are mitigated by the relevant factors above, hardly represent an actual burden that clearly exceeds the compelling putative state interests, as required under *Pike.* Further, Amicus asserts it is very likely other utilities in South Dakota *did* acquire rights-of-way after the enactment of Amendment E, and the Plaintiff utilities either ignored the actual costs of these easements or purchases, or could not find a utility with a post-Amendment E easement who would testify to a double or triple cost for

easements or purchase.

V. THE DISTRICT COURT ERRED BY CONSTRUING AMENDMENT E TO PRECLUDE CORPORATIONS FROM OBTAINING LIMITED-USE LAND GRANTS, SUCH AS EASEMENTS.

An easement is a servitude on land. S.D. Codified Laws Ann. § 43-13-2 (1999). The South Dakota Supreme Court has stated that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." *Knight v. Madison*, 2001 S.D. 120, ¶ 4, 634 N.W.2d 541, 542 (2001). It has also stated that an easement is "an interest in the land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." *Id.*

In *Musch v. H-D Electric Cooperative, Inc.*, 460 N.W.2d 149, 154 (S.D. 1990), the South Dakota Supreme Court examined a utility easement and recognized that its use was limited to the use specified in its grant, with the remaining rights-to-use existing with the grantor. Thus, utility easements are a legal interest limited to the use specified by their easement: the placement of poles and wires for transmission purposes. Obviously, farming and agriculture cannot be performed in the small place allotted for pole bases, nor on electronic wires. Accordingly, this utility easement is not an interest contemplated by Amendment E, and therefore outside of the "interest . . .in real estate used for farming". S.D. Const. art. XVII, § 21.

CONCLUSION

South Dakota's Amendment E should be properly construed to describe cooperatives as corporations, then properly exempt the described cooperatives, reversing the District Court's interpretation. Amendment E's provisions should further be construed to apply only to business trusts and not all trusts by reversing the District Court's interpretation. The District Court's conclusions amounting to advisory opinions should be reversed. Amendment E should be found to be consistent with the ADA, since a violation of the ADA was not alleged, there was no actual controversy and since Plaintiffs do not meet the definition of disability under the ADA, thereby reversing the District Court. The District Court should be reversed on its determination that Amendment E violates the dormant commerce clause, since the putative benefits clearly outweigh any speculative burdens Plaintiffs asserted. This Court should reverse the decision of the lower court in its entirety and dismiss the Amended Complaint.