Brief of Amicus Curiae National Farmers Union, et al., In Support of Intervenors-Defendants-Appellants Petition for Rehearing *En Banc*

by

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BRIEF OF AMICUS CURIAE NATIONAL FARMERS UNION, ET AL., IN SUPPORT OF INTERVENORS-DEFENDANTS-APPELLANTS PETITION FOR REHEARING *EN BANC*

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

As identified in the Motion, the Proposed *Amici Curiae* are as follows: National Farmers Union, Minnesota Farmers Union, South Dakota Farmers Union, Iowa Farmers Union, North Dakota Farmers Union, Land Stewardship Project, Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Illinois Stewardship Alliance, Citizens Action Coalition of Indiana, Campaign for Family Farms, and Western Organization of Resources Councils (collectively, "Proposed *Amici Curiae*").

Proposed *Amici Curiae* have an interest in this case because these organizations and their thousands of members believe in preserving the family farm system of agriculture. The three-judge panel's decision striking down under the dormant Commerce Clause the State of South Dakota's Amendment E that restricts corporations from farming or having an interest in farmland (with certain exceptions) is incorrect as a matter of law and is inconsistent with Supreme Court and Eighth Circuit precedent. It also presents an issue of exceptional importance to the citizens of states in the Eighth Circuit and elsewhere. Proposed *Amici Curiae* believe that allowing corporations to enter into farming and eventually control agriculture in South Dakota and potentially in other states would undermine family farms and the rural communities they support. Proposed *Amici Curiae* have advocated for many years to preserve and strengthen the family farm system of agriculture. The Proposed *Amici Curiae* have sought to enact and protect state laws that support family farmers and therefore have an interest in seeking that the full Eighth Circuit Court of Appeals review *en banc* and reverse the decision of the panel of this Court.

The source of authority for filing this Brief is Federal Rule of Appellate Procedure 29 and Proposed *Amici Curiae's* interest in this case as set forth herein.

INTRODUCTION

On August 19, 2003, a three-judge panel ruled that South Dakota's constitutional amendment ("Amendment E") prohibiting limited liability corporations from owning agricultural land or engaging in farming in South Dakota was unconstitutional under the dormant Commerce Clause. In so ruling, the panel disregarded established rules of statutory construction, basing its decision on selected statements of proponents of the Amendment E initiative and referendum. In addition, the panel backed into the wrong test for dormant Commerce Clause challenges by using the selective legislative history to apply a heightened standard of scrutiny for a constitutional amendment that is neither discriminatory on its face nor in effect.

If allowed to stand, the decision establishes a test that is at odds with Supreme Court and Eighth Circuit authority. Eight other Midwestern states have

laws similar to the South Dakota provision struck down by the panel. These laws were passed in response to the states' justifiable concerns with the takeover of family farms by corporations and the effect the loss of family farms has on the well being of rural communities. The panel's decision could have a devastating effect on family farmers and the rural communities they support.

Proposed *Amici Curiae* respectfully request this Court to grant the Petition for Rehearing *En Banc* of Intervenor Defendants because the decision of the panel presents a question of exceptional importance to thousands of family farmers, their rural communities, and the citizens of the states in the Eighth Circuit.

ARGUMENT

I. THE PANEL IGNORED WELL-ESTABLISHED PRECEDENT BY IMPROPERLY CONSIDERING STATEMENTS BY DRAFTERS RATHER THAN THE TEXT OF AMENDMENT E

The panel looked at the statements and motives of select drafters of Amendment E to find a discriminatory purpose rather than following established precedent for determining legislative intent. The panel did not analyze the actual text of Amendment E that South Dakota voters approved, but instead looked at meeting notes of the drafters, after-the-fact testimony of the drafters, and, according to the court's reading of the record, the lack of economic studies by the drafters that would conclusively show that Amendment E would benefit South Dakota family farmers. Slip Op. at 19-21. The panel noted that while it did not have available evidence of the intentions of South Dakota citizens who voted for Amendment E, it did "have evidence of the intent of individuals who drafted the amendment that went before voters." Slip Op. at 21. Based on that inadmissible evidence, the panel concluded: "It is clear that those individuals had a discriminatory purpose." *Ibid.*

However, the Supreme Court and this Court have repeatedly held that, in interpreting the purpose of laws, courts are not to go beyond the language of the law itself if the language is clear. As the Supreme Court stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). The Eighth Circuit has emphasized this principle, holding that when "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Northern States Power Co. v. United States,* 73 F.3d 764, 766 (8th Cir. 1996); *see also United States v. Vig*, 167 F.3d 443, 448 (8th Cir. 1999) ("Unless exceptional circumstances dictate otherwise, when the terms of a statute are unambiguous, judicial inquiry is complete."); *Security Bank*

Minnesota v. Commissioner, 994 F.2d 432, 436 (8th Cir. 1993) ("As in all cases of statutory interpretation, we must start with the text of the statute.").

The reason the text of the amendment is the best way to determine intent is the inherent unreliability of the type of evidence that this Court utilized in the instant case. As a leading treatise on statutory interpretation states, in the legislative arena, "[r]eferences to the motives of legislators in enacting a law are uniformly disregarded for interpretative purposes except as expressed in the statute itself." Sutherland Statutory Construction, Vol. 2A, § 48.17 at 481 (6th ed. 2000). To extract the purpose of Amendment E from a select number of drafters who may have diverse reasons for participating in a democratic process is improper. *See e.g., American Meat Institute v. Barnett*, 64 F. Supp. 2d 906, 916 (D.S.D. 1999) ("Extrinsic evidence of legislative intent is not admissible.").

The South Dakota Supreme Court likewise has noted that, in analyzing a state constitutional amendment:

> Views of individuals involved with the legislative process as to intent have not received the same recognition from this Court. We held such individual testimony of no assistance in *State v. Bushfield*, 8 N.W.2d 1, 3 (1943) for two reasons: (1) it is the intent of the legislative body that is sought, not the intent of the individual members who may have diverse reasons for or against a proposition and (2) it is "universally held" that "evidence of a . . . draftsman of a statute is not a competent aid to a court in construing a statute."

Cummings v. Mickelson, 495 N.W.2d 493, 499 n.7 (S.D. 1993). The panel in this case did not even stop to look at the actual text of Amendment E but mistakenly proceeded directly to consider the motivations and knowledge of some of the drafters of the text.

In evaluating the purpose of Amendment E, the panel relied on *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995), which considered the pamphlet accompanying a state referendum in a dormant Commerce Clause challenge. Slip Op. at 17. As noted in *SDDS*, that pamphlet was required by South Dakota law and was deemed "part of the legislative history of these initiated and referred measures." *SDDS*, 47 F.3d at 266. Similarly, the "pro" and "con" statements submitted regarding Amendment E are part of the pamphlet and therefore are mere legislative history. *See* Sutherland Statutory Construction, Vol. 2A, § 48.19 at 487-88 (6th ed. 2000) (pamphlets are considered legislative history and subject to rules of statutory construction). As shown above, however, courts are first supposed to consider the text of the law before considering the legislative history.

Using this flawed analysis, this Court completely disregarded the actual text of Amendment E,[1] which states in part: "No corporation or syndicate may

1. It should also be noted that the panel did not analyze the "con" statement which included the claim that Amendment E: "does not clearly distinguish between South Dakota farmers and out-of-state-based farmers and ranchers." Plaintiff's Exhibit 19, T 634. If Amendment E did distinguish on this basis, then it may have violated the dormant Commerce Clause. In fact, instead of harming out-of-state

acquire, otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." Article XVII, § 21. The plain meaning of this text is that no corporation, regardless of whether they are incorporated in South Dakota, Minnesota, or Delaware, may obtain an interest in farmland or engage in farming.

II. THE PANEL APPLIED THE WRONG TEST FOR DORMANT COMMERCE CLAUSE CHALLENGES

A. DISCRIMINATORY PURPOSE ALONE DOES NOT TRIGGER STRICT SCRUTINY

The panel also erred when it viewed Amendment E using "strict scrutiny" based solely on its flawed finding of discriminatory intent. Because Amendment E is not discriminatory on its face or in effect, the court should have applied the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970).

While the panel initially set forth the correct analysis for analyzing a challenge to a state statute under the dormant Commerce Clause, it applied the test incorrectly. The panel correctly noted that dormant Commerce Clause challenges are subject to a two-tiered analysis. First, the court determines if the statute discriminates against interstate commerce. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). If the challenged statute discriminates against interstate commerce "either on its face or in practical effect," it burdens interstate commerce directly and is subject to strict scrutiny. *Maine v. Taylor*, 477 U.S. 131 (1986); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995).

The panel also correctly noted, "If the law is not discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'" Slip Op. at 16, *quoting Pike*, 397 U.S. at 142.

The panel erred, however, by interposing an additional definition of "discrimination" that triggers "first tier" or strict scrutiny, and by using that definition to invalidate Amendment E. Citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), the panel said that if a law "has a discriminatory purpose," that is an "indicator of discrimination against out-of-state interests," thus triggering strict scrutiny. Slip Op. at 16-17. Neither *Bacchus* nor applicable Supreme Court or Eighth Circuit cases have actually applied a strict scrutiny standard based solely on a "discriminatory purpose." The panel thus erroneously held that "discriminatory purpose" alone triggers strict scrutiny.

The panel's approach puts the cart before the horse. The test established by the Supreme Court and applied in this Circuit is that, in order to save

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corporations, the "Con" authors were concerned about the impacts Amendment E would have on South Dakota farmers: "Amendment E bans many business structures currently used by South Dakota farmers. . ." *Ibid.*

discriminating statute under the strict scrutiny standard, a state must show "that the statute serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not be served as well by nondiscriminatory means." *Cotto Waxo*, 46 F.3d at 790, *citing Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The inquiry into the purpose of the legislation accordingly comes *after* the finding that the statute discriminates on its face or in effect; discriminatory purpose is not a stand-alone basis for applying strict scrutiny in the first place.

Bacchus involved a dormant Commerce Clause challenge to Hawaii's liquor tax, which exempted certain liquors produced only in Hawaii. On appeal to the United States Supreme Court, the state did not dispute that the statute discriminated on its face; instead, the state argued that it had been enacted not to engage in "economic protectionism," but to advance a legitimate state interest, and the Court therefore should apply a lower standard of scrutiny than the strict scrutiny standard established in *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981). The Court rejected the state's argument and applied the strict scrutiny standard, citing the clearly discriminatory language, and additionally noting the legislation could not be saved since its undisputed purpose was to aid Hawaii's industry. *Bacchus,* 468 U.S. at 271. *Bacchus* therefore does not stand for the proposition that the panel cites it for — *i.e.,* that an otherwise nondiscriminatory statute is subject to strict scrutiny under the Commerce Clause simply because there is some evidence of a discriminatory purpose. The Court in *Bacchus* only looked to the statute's purpose *after* it found the statute discriminated on its face, and then it was only to determine whether the state had satisfied its burden when reviewing the discriminatory statute under a strict scrutiny standard. *Ibid.*

The panel also cited *SDDS,* in which this Court applied strict scrutiny to invalidate another referendum measure under the Commerce Clause. The referendum at issue in *SDDS* in fact had a discriminatory effect on out-of-state interests, and the court found it was enacted with a discriminatory purpose. *SDDS,* 47 F.3d at 270-71. The *SDDS* decision, however, confusingly stated that discriminatory purpose alone can trigger strict scrutiny, relying on cases that applied a strict scrutiny standard. *Id.* at 268. As in *Bacchus*, however, the courts in those cases found the statutes in question to either discriminate on their face (*see Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342-43 (1992) ("The Act's additional fee facially discriminates against hazardous waste generated in the United States other than Alabama")) or to discriminate in effect. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (statute had the "practical effect" of discriminating against Washington apple growers and dealers while leaving North Carolina apple producers unaffected); *Waste Sys. Corp. v. County of Martin,* 985 F.2d 1381, 1386-87 (8th Cir. 1992) (ordinance discriminated on its face and in effect). *SDDS* therefore is misleading by implying that strict scrutiny can be triggered either by a finding of discriminatory effect *or* by a finding of discriminatory purpose. *SDDS,* 47 F.3d at 268. None of the cases relied on by *SDDS* actually applied a strict scrutiny

standard solely because of a finding of discriminatory purpose; rather, the purpose of the legislation at issue in those cases was discussed *after* a finding that the legislation in fact discriminated on its face or in effect, in order to determine whether or not the statute satisfied strict scrutiny.

The panel in the instant case therefore erred by asserting that a finding of discriminatory purpose itself triggers strict scrutiny and by finding Amendment E unconstitutional under that test. In addition to that standard being based on a mistaken interpretation of Supreme Court precedent, it also makes no sense. If a statute *in fact* does not discriminate — either on its face or in effect — then there is no point in looking at motive or intent. Legislation often may be supported by proponents whose individual motivation may not comport with the motives of those who ultimately pass it. This is also especially true in the case of an initiative or referendum. But the motivation of individual proponents should be relevant—if ever—only if there is discrimination in the first place. The incorrect standard used by the panel puts the cart before the horse.

B. AMENDMENT E IS FACIALLY NEUTRAL AND DOES NOT DISCRIMINATE IN EFFECT AND IS CONSTITUTIONAL

Amendment E does not discriminate on its face or in effect: it forbids all limited liability corporations –regardless of where they are located — from owning agricultural land or engaging in farming. "For purposes of the dormant Commerce Clause, 'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000) (*quoting Oregon Waste Sys.*, 511 U.S. at 99). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (upholding an Indiana corporate takeover law that applied to all hostile tender offers even though its application would fall most often on out-of-state companies); *see also United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d 762, 767 (8th Cir. 1999) ("If taken to an extreme, every state regulation would have some minimal effect on interstate commerce.").

Amendment E is similar to other legislation found to be nondiscriminatory. In *Minnesota v. Clover Leaf Creamery,* the Supreme Court rejected a dormant Commerce Clause challenge, finding that a Minnesota state statute banning the sale of retail milk in plastic, nonrefillable containers in order to conserve Minnesota's natural resources "regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State." 449 U.S. at 471-72.

Similarly, in *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), this Court held that being an out-of-state

corporation that is treated the same as an in-state corporation is not discrimination under the Commerce Clause:

> 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 chose 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, Ordinance 12 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. *Cf. CTS Corp.*, 481 U.S. at 93-94 (*quoting Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) ("We have rejected the 'notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market."). Plaintiffs' analysis would render virtually all local economic regulations "discriminatory" and subject them to "per se" invalidation. This would vastly expand the implications of the dormant Commerce Clause, and we decline to follow such a course.

Id. at 1386-87.

Accordingly, applying the correct legal standard — the "second tier" of the *Pike v. Bruce Church* balancing test — it is clear that Amendment E is constitutional. Such legislation is clearly an exercise of the state's right to "determine the course of its farming economy." *See Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001). As the court below correctly held, "'It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such statute is rationally related to a legitimate state interest.'" *South Dakota Farm Bureau v. Hazeltine,* 202 F. Supp. 2d 1020, 1049 (D.S.D. 2002), *quoting State ex rel Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 801 (Mo. 1988) (*citing Asbury Hospital v. Cass*, 326 U.S. 207, 214-215 (1945) and *Omaha National Bank v. Spire*, 389 N.W.2d 269, 283 (Neb. 1986)).

If the Eighth Circuit does not rehear the instant case *en banc* and reverse the panel's error, the Eighth Circuit standard in dormant Commerce Clause challenges will be if there is any evidence of discriminatory purpose, regardless of whether the legislation *in fact* discriminates on its face or in its effect, courts should review the legislation with a strict scrutiny standard. This standard is inconsistent with Supreme Court and Eighth Circuit precedent and should be reconsidered *en banc*.

CONCLUSION

For the foregoing reasons, Proposed *Amici Curiae* respectfully request that this Court grant petitioners' request for rehearing *en banc* and reverse the panel's decision.