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An Agricultural Law Research Article

Appellees and Cross-Appellants's Brief

by

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APPELLEES AND CROSS-APPELLANTS' BRIEF

MARSTON HOLBEN, SPEAR H RANCH, INC., MARSTON and MARION HOLBEN FAMILY TRUST

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Corporate Disclosure Statement

Spear H Ranch, Inc. (properly known as Spear H Ranch, L.L.C.) is a limited liability corporation. No publicly traded company owns ten percent or more of its stock.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

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

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

STATEMENT OF THE ISSUES

ISSUE 1. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS IMPLIEDLY PREEMPTED BY TITLE II OF THE AMERICANS WITH DISABILITY ACT?

Grier v. American Honda Motor Co., 529 U.S. 861 (2000)

Crosby v. National Trade Council, 530 U.S. 363 (2000)

Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board, 467 U.S. 461 (1984)

ISSUE 2. WHETHER THE SOUTH DAKOTA CORPORATE FARMING BAN IS CONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE DOCTRINE?

South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999).

SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995), *cert. denied*, 523 U.S. 1118 (1998).

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988).

STANDARD OF REVIEW

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

This Court typically reviews a district court's factual findings for clear error. Friends of the Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 885 (8th Cir. 1997).

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

STATEMENT OF THE CASE

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

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

The State Defendants ("the State") filed their Answer on July 28, 1999. On October 21, 1999, the State filed a Motion to Dismiss on the basis of sovereign immunity and U.S. Const. amend. 11. App. 43-45. The State also sought to dismiss claims relating to the Privileges and Immunities clause and to the ADA. App. 44. A hearing was scheduled.

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

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

A hearing and oral argument on the various motions was held on January 18, 2000. The District Court orally ordered that: (1) the Utilities' motion to join as Plaintiffs was granted (Doc. 66, Transcript of Oral Argument at 51, 53), (2) the State of South Dakota be dismissed as a party (*Id.* at 5), and (3) the ADA claim would be dismissed on Eleventh Amendment grounds (*Id.* at 6). He took other issues under advisement, including the request to dismiss State Defendants Barnett and Hazeltine. (*Id.* at 47, 54.) (Hereinafter, this will be referred to as the "January Order".)

In light of the Court's January Order, Challengers revised the Motion to File First Amended Complaint. App. 119-22. Among other things, the Plaintiffs amended their Complaint to delete the ADA claim which had been dismissed in the January Order and to add the Marston and Marian Holben Trust and the Utilities as Plaintiffs. App. 119-22.

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

The State and the Intervenors subsequently filed motions for partial summary judgment. In a Memorandum Opinion dated February 1, 2001, the District Court denied these motions. Add. 10. One of the State's rejected arguments was the argument that the SDFB did not have standing as an association. Add. 2.

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

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

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

On May 17, 2002, the District Court filed its Opinion and Final Order ("the Final Order"). App. 236-276, reported at *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002). It first held that cooperatives are not subject to the Corporate Farming Ban. App. 259. Second, it found that the Corporate Farming Ban was preempted by the ADA. App. 265. Third, it held

that the Corporate Farming Ban was unconstitutional under the dormant commerce clause even when considered only in light of the claims made by Utilities Challengers. App. 275. The Judgment was filed on May 17, 2002. App. 277.

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

STATEMENT OF FACTS

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

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

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

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

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

Challengers presented, through expert economic testimony, evidence that the CFB burdened interstate commerce in the livestock and electric power production and transmission industries. (Trial Transcript at 536, 537, 616) The State and the Intervenors did not present any economic expert testimony at all.

SUMMARY OF ARGUMENTS

THE PREEMPTION ISSUE

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

The District Court found, as a fact, that Challengers Holben and Brost have, for purposes of the ADA, disabilities (heart conditions). Because of their disabilities, Holben and Brost cannot perform the "daily or routine substantial physical exertion" required for the Family Farm exception and, therefore, are denied that option to satisfy the criteria of S.D. Const. art. XVII, § 22(1). By denying disabled persons such as Holben and Brost access to the Family Farm exception, the CFB conflicts with Title II of the ADA. Because the CFB conflicts with the ADA, the CFB is preempted by the ADA.

THE DORMANT COMMERCE CLAUSE ISSUE

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

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

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

A state regulatory scheme that discriminates regarding interstate commerce must be tested against the "virtually *per se*" standard which is a version of strict

scrutiny. The District Court did not properly apply the standard. First, the District Court never examined the availability of less drastic means by which the State might achieve its objectives. Second, the District Court erred in concluding that the State's interests in protecting certain "rural lifestyles" and "communities" was a compelling state interest.

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

ARGUMENTS

ISSUE I. THE CORPORATE FARMING BAN IS IMPLIEDLY PREEMPTED BY TITLE II OF THE ADA.

In its Final Order, the District Court held that the CFB was preempted by Title II of the ADA. The Challengers urge that this holding be affirmed.

Under the Supremacy Clause, the congressional exercise of its plenary powers permits it to preempt state law. The Supremacy Clause commands that federal laws "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl.2.[2] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001); *Jones v. Vilsack*, 272 F.3d 1030, 1033 (8th Cir. 2001).

Pursuant to the Supremacy Clause, Congress may preempt state action by implication, even when Congress has not expressly preempted a particular area. Thus, Congress preempts by implication when the Court determines, from the depth and breadth of the congressional scheme, that Congress has occupied a particular legislative field. *See, e.g., Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 478 (1984).

Congress also preempts state action by implication when the state law conflicts with a congressional enactment. *See Grier v. American Honda Motor Co.*, 529 U.S. 861, 869-874 (2000). In this case, the District Court relied on the preemption by conflict doctrine. App. 264-265.

In the doctrine of "conflict" preemption, as the District Court recognized, App. 264, there are two types of "conflict". Preemptive conflict occurs when the state law makes the application of federal law "impossible". *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Grier*, 529 U.S. at

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2. The Intervenors have argued that the preemption doctrine does not apply because the CFB is found in the State constitution. A simple reading of the text of the Supremacy Clause should dispose of that contention. Just because a conflicting state law is found in its state constitution does not immunize that law from the Supremacy Clause. *Cf., Cooper v. Aaron*, 358 U.S. 1, 9 (1958).

886. Preemptive conflict also occurs when the state action "frustrates the purpose" of the federal law. *See Michigan Canners*, 467 U.S. at 478; *Crosby v. National Trade Council*, 530 U.S. 363, 373 (2000). Either type of conflict is a sufficient basis for preemption. *See Michigan Canners*, 467 U.S. at 470, n.10.

This Court should affirm the District Court both because of CFB's Family Farm exception frustrates the purpose of the ADA and because the exclusionary structure of the Family Farm exception makes it impossible to comply simultaneously with both state and federal law.

A. *Title II of the ADA Applies to All State Government "Activities".*

The preemption analysis starts with the language of the statute. See *Lorillard*, 533 U.S. at 542. Congress used exceptionally broad language in Title II of the ADA. Under § 12131(1)(A), Congress made the ADA applicable to "public entities", defining them as "any State or local government".

The State of South Dakota, of course, is a "public entity" for purposes of the ADA. There can be no doubt that the CFB, including the Family Farm exception of §22(1), is an action by a covered public entity.

B. *The CFB is a "Service, Program Or Activity" of a Public Entity Because It Confers "Benefits" on Certain Farmers and Ranchers.*

In § 12132 of the ADA, Congress declared:

> Subject to the provisions of this subchapter, 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* . . . . (emphasis added).

The District Court held that the CFB was one of the "services, programs or activities of a public entity." App. 262. This holding should be affirmed, for the reasons below.

1. The Family Farm Exception Confers Economic "Benefits" To Eligible Farmers.

Analysis of this issue starts with the reason why the State has the § 22(1) Family Farm exception in the CFB. The obvious purpose of § 22(1) is to permit certain farmers to have the "benefits" of a corporate business structure while generally prohibiting other farmers from having these economic advantages.

What are the benefits conferred by § 22(1)? The two main advantages are: (1) favorable treatment under federal tax laws, and (2) favorable treatment in terms of limiting liability. These are obviously significant economic advantages. Under the CFB, the State as a public entity provides these economic "benefits" to those farmers or ranchers eligible for § 22(1). Thus, Title II applies to these "benefits".[3]

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3. Despite the argument by Intervenors, there can be no doubt that Title II applies to the CFB. Imagine if the State had declared that only men could be "family farmers". Under these circumstances,

The CFB involves, therefore, certain "benefits" conferred by a public entity. The only remaining issue is whether these benefits flow from the "services, programs, activities" of the State.

2. The CFB is a "Service, Program or Activity" of the State.

The District Court held that the CFB was a covered "service, program or activity." App. 262. The State and the Intervenors contest this holding. The District Court primarily analogized the CFB's regulatory program to a "zoning" program. The District Court properly cited to Innovative *Health Systems v. City of White Plains*, 117 F.3d 37 (2d.Cir. 1997). There, the Court of Appeals for the Second Circuit held that the ADA applied to the "zoning decisions [by the defendant City] because making such decisions is a normal function of a governmental entity." *Id.*, at 44. *Accord. Tsombandisis v. City of West Haven*, 180 F.Supp.2d 262, 283 (D.Conn., 2001). This analogy was proper, and this Court should affirm the District Court on this ground.

For additional support of the District Court, Challenger Holben contends that, based on textual, precedential and policy analysis, the District Court's decision was proper,.

a. The Text of Section 12132 Supports the District Court.

The text of §12132 is expansive. The phrase "services, programs or activities" uses sweepingly generic terms. It is also stated in the conjunctive. This evidences a Congressional intent to have the ADA provision have broad application; as one Circuit has reasoned, the § 12132 language is intended as a "catch-all phase that prohibits all discrimination by a public entity, regardless of context . . . ." *Innovative Health Systems*, 117 F.3d at 45. Congress chose this broad language to "avoid the very type of hair-splitting arguments" advanced here by the Intervenors. Id.

Besides the text of § 12132, the federal government's administrative regulations are consistent with a broad interpretation. According to the CFR, Title II " . . . applies to all services, programs and activities provided or made available by public entities . . . ." 28 CFR pt. 35, §35.102(a) (2001).

b. The Precedent Supports the District Court Regarding This Issue.

This Circuit's decisions are supportive of Challengers' position. This Court has held that a "meeting" held at a county courthouse was a "service" covered by Title II. *See Layton v. Elder*, 143 F.3d 461, 472-73 (8th Cir., 1998). If Title II would apply to meetings, then it must apply to the services regulated by the CFB.

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women would have been denied significant economic benefits. For the same reason, the CFB is impacting the distribution of significant economic benefits by discriminating against disabled persons (who do not reside on and who cannot perform the required day-to-day "substantial physical exertion").

The precedent regarding this issue is persuasive. For example, the Northern District of Iowa held that a City's "regulation of open burning" is an "activity" covered by Title II. *Heather K. v. City of Mallard, Ia.*, 946 F.Supp. 1373, 1387 (N.D.Ia., 1996). If Title II applies to the regulation of leaf burning, it certainly would apply to the regulation of business structures used by ranchers and farmers.

In another persuasive decision, the State of Utah prohibited certain disabled persons from being married. The Court, in *T.E.P. v. Leavitt*, 840 F.Supp. 110, 111 (D.Utah, 1993), held that the state law regulating marriage was preempted by Title II. If Title II would apply to a state's laws regulating such an important matter as marriage, it must apply to a state's laws regulating business structures used in agriculture.

In general, the courts examining these issues have not been kind to governmental "hair-splitting". For example, the opportunity to participate in a public hospital's "Lamaze class" was a covered "service". *See Bravin v. Mount Sinai Medical Center*, 186 F.R.D. 293, 304-05 (S.D.N.Y., 1999). If the opportunity to participate in a Lamaze class is covered by Title II, then the opportunity to participate in the Family Farm exception is a covered program or activity.

c. *Section 22(1) is Analogous to a Licensing Scheme.*

The CFB's Family Farm exception may also be analogized to a licensing scheme. Licensing criteria for the Bar Exam, for example, is a program covered by Title II. *See Clark v. Virginia Board of Bar Examiners*, 880 F.Supp. 430, 442 (E.D.Va, 1995). In this case, only certain farmers get the "family farm license": only those who either reside on the farm or perform the day-to-day substantial physical exertion. Thus, if the CFB would be analogized as a licensing scheme, Title II still applies because the opportunity to get the license is denied to those with certain disabilities.

3. Conclusion.

In sum, the State of South Dakota is a "public entity". The CFB regulatory scheme is a "service, program or activity" provided by the State. Accordingly, Title II applies to the CFB and the Family Farm exception.

C. *The Family Farm Exception Criteria Limit Access To The "Benefits" Of The State Program.*

1. The Family Farm Exception Has A "Substantial Physical Exertion" Requirement.

In order to "participate" in the Family Farm exception, there are *only* two ways an individual farmer or rancher may satisfy the § 22(1) criteria. For

someone like Holben to achieve this Family Farm status, a rancher must either (1) reside on the ranch or (2) "be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require *both* daily or routine substantial physical exertion and administration." CFB, § 22(1) (emphasis added).

As the District Court found, neither Holben nor Brost reside on their respective ranches. App. 260-261. Brost lives in a metropolitan area, over one hundred miles away from this ranch. Holben resides in Arizona. Thus, in order to satisfy the § 22(1) criteria, Holben and Brost have only one option—to satisfy the "daily or routine substantial physical exertion" option. § 22(1).

2. As Ranchers, Holben and Brost Have Only One Option To Satisfy The Family Farm Exception.

With respect to persons with disabilities such as Holben and Brost, access to the CFB's Family Farm exception is significantly limited. While most farmers have two options to qualify for the Family Farm exception, farmers with physical disabilities like Holben and Brost are restricted to only one option. Since they have only the one option to secure the benefits of the program, Holben and Brost are precluded from participating in the State's program on an equal footing with other ranchers who do not reside on the ranch. App. 263.

D. Challengers Holben and Brost Have Disabilities Limiting Their Access To The "Benefits" Of the CFB

After hearing five days of evidence, the District Court made its Findings of Fact. These included the Court's Findings that Challengers Holben and Brost suffered from heart conditions which, for purposes of the ADA, constituted "disabilities." App. 260-216. The State and Intervenors now contest these Findings of Fact. The standard of review would be the clear error standard.

1. The District Court's Findings Are Supported By Substantial Evidence.

The District Court heard the evidence of the respective medical conditions of Holben and Brost. (Trial Transcript at 76, 259.) Indeed, Challenger Brost's disability prohibited him from attending the trial, and he had to testify by a video hookup. App. 260. Both Brost and Holben suffer from serious medical conditions (heart diseases), which preclude them from performing "substantial physical exertion" on their ranches. *See* 28 CFR pt. 35, §35.104 (2001).

2. Under The Clear Error Standard, The District Court's Findings Should Be Affirmed.

The State appears to argue that the District Court's conclusion that Holben and Brost are disabled is flawed because the record is somehow not complete. But, if the State wanted to complete a record, the State could have moved for a new trial to complete, or to clarify, the record. The record has sufficient

evidence of Holben's and Brost's disabilities, and this Court should uphold the District Court findings in this regard. There was no error.

E. The ADA Conflicts With The "Substantial Physical Exertion" Criteria of The Family Farm Exception.

It is congressional policy, expressed in § 12132 of the ADA, to eliminate discrimination by public entities in their delivery of services, programs or activities. As the District Court found, when South Dakota imposed the day-to-day "substantial physical exertion" requirement on farmers as the eligibility criterion for the Family Farm exception, the CFB had the effect of excluding farmers with certain disabilities from access to the benefits of the Family Farm exception. App. 264. This exclusionary effect also requires, under these circumstances, federal preemption.

In this case, Congress has articulated, in the ADA, the national policy that public entities will not exclude persons with disabilities from the provision of "services, programs or activities". *See* ADA, § 12132. When South Dakota limits the options for disabled farmers to qualify for the economic benefits of the Family Farm exception, South Dakota excludes disabled persons and thereby interferes with the Congressional intent. The CFB empowers the State to exclude disabled persons from the Family Farm exception when that is "precisely what the federal act forbids [the State] to do." *Michigan Canners*, 467 U.S. at 477-478. This frustration of congressional intent is a conflict, and this Court should hold that the CFB is preempted.

F. Because The "Substantial Physical Exertion" Criterion Conflicts With The ADA, The Family Farm Exception Is Preempted.

1. The "Substantial Physical Exertion" Requirement Frustrates Congressional Objectives.

This exclusionary effect of the CFB obviously frustrates one of the congressional objectives of the ADA. This frustration of congressional intent constitutes a conflict. In the face of such a conflict, the state law (CFB) is preempted. *See Crosby*, 530 U.S. at 373.

The *Crosby* decision is a close parallel to the present case. In Crosby, Congress had established policies with respect to the country of Myanmar (Burma). *See* 530 U.S. at 368. These policies were designed to enhance Myanmar's progress to democratization. In contrast, the State of Massachusetts passed legislation that economically sanctioned any company doing business with Myanmar. The State obviously discouraged companies from doing business while federal policies sought to encourage appropriate business with Myanmar. *Id.* at 377. Thus, the Supreme Court unanimously determined that the state law was preempted because it frustrated the congressional policies. *Id.* at 381.

2. The "Substantial Physical Exertion" Requirement Actually Conflicts With Congressional Objectives.

The CFB also stands in "actual conflict" with the ADA. As the District Court properly determined, because of this conflict, the CFB is preempted. *See* App. 264-265. The ADA's requirements of expanding access are mutually exclusive of the Family Farm exception's requirement of "substantial physical exertion". It is, therefore, impossible for the State to enforce its law (the CFB) and still comply with the ADA.

Because of this impossibility, the CFB presents a conflict with the ADA. When such a conflict exists, the federal law is supreme. Art VI, cl.2.

The District Court's conflict preemption holding should, for both reasons, be affirmed.

G.The State's "Procedural" Argument is Fatally Flawed.

The State and Intervenors contend, in their Briefs to this Court, that the District Court erred because, somehow, the Challengers "waived" their claim under the ADA. For the reasons below, this argument is flawed. Since this waiver argument is essentially an argument based on alleged facts, the standard of review would be clear error. To the extent the argument is addressed at the District Court's discretionary rulings, the standard would be abuse of discretion. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1062 (8th Cir. 1997).

1. The Procedural Burden, If Any, Actually Rests on the State.

In its oral ruling in January 2000, the Court granted the State's motion and dismissed the ADA claim. App. 140. The District Court relied on its understanding of the Eighth Circuit's precedent.

Then, in its December 12, 2001 Order, the Court reversed its prior order and reinstated the ADA claim. By reinstating the ADA claim, this was a ruling adverse to the State. In December 2001, the State could have moved to reconsider the Court's decision. But, the State did not take the available step to protect its position.

In May 2002, the Court's Final Order made findings of fact about the disabilities of Holben and Brost. The District Court used its authority, under Fed. R. Civ. P. 15(b), to conform the pleadings (the reinstated ADA claim) to the proof at trial. Specifically, the District Court added Holben and Brost as Plaintiffs under the reinstated ADA claim. The District Court certainly had, especially in a court trial, this authority. *See* Fed. R. Civ. P. 15(b); Kim, 123 F.3d at 1062. After conforming the pleadings to the proof, the District Court then concluded that the ADA preempted the Corporate Farming Ban. All of these rulings in the May 2002 Order were, again, adverse to the State.

Upon receipt of the May 2002 Final Order, the State could have sought, pursuant to Fed. R. Civ. P. 59(a), a new trial to reexamine the evidence. Rule 59(a)(2) seems to provide a remedy for the "dilemma" faced by the State. The

Rule states:

> On a motion for a new trial in an action tried without a jury [like this action], the Court may open the judgment if one has been entered, *take additional testimony*, amend findings of fact and conclusions of law or *make new findings and conclusions*, and direct entry of a new judgment (emphasis added).

Thus, in May 2002, the State could have introduced, through Rule 59(a), evidence on the nature of the disabilities, or the State could have registered its "objections" to the evidence upon which the District Court relied. The State, however, did not make any motion for new trial or other reconsideration. Once again, the State did not avail itself of an available procedural approach.[4]

The State's procedural options, moreover, were not exhausted. Even after the Judgment was entered, the State could have sought relief, under Fed. R. Civ. P. 60(b), from the claimed errors in the Judgment. But, again, the State did not avail itself of this procedural remedy.

The sequence of events reveals that the State and Intervenors did not utilize the available procedural options. These options would have afforded the District Court, as the fact finder, a chance to reopen the record or to reexamine its factual findings. But, the State chose to pursue an appeal and to deny the District Court any chance to rectify the alleged errors.

The core of the argument by the State and Intervenors seems to be a complaint about the District Court's decision to conform the pleadings to the evidence at trial by its decision to add disabled ranchers Holben and Brost as plaintiffs to the ADA claim. App. 259. Challengers contend that, under Fed. R. Civ. P. 15(b), the District Court had the authority. Indeed, this Court has encouraged the use of Rule 15(b), stating that conforming the pleadings to the evidence under Rule 15(b) can be done "at any time, even after judgment". *See Kim*, 123 F.3d at 1042. Here, of course, the District Court performed the conforming action before the Judgment was filed.

As the *Kim* Court explained, Rule 15(b) amendments are allowed as long as the adversely affected party has "actual notice of the unpleaded issue and have been given an adequate opportunity to cure any surprise resulting from the change." *Id.*, at 1063. Here, the State had actual notice of the ADA claim; indeed, the State had filed motions to dismiss it. The State also argued against the ADA claim in its Post-Trial Brief. See Appellants' Brief at 3. Moreover, the State and Intervenors had an "adequate opportunity to cure and surprise" through available motions for new trial or relief from the judgment.

In sum, the Challengers were the prevailing party on each decision regarding the ADA claim. Hence, the burden to take action rested on the State and the Intervenors who lost each decision. Under these factual circumstances, here was no "waiver" by the Challengers.

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4. Instead, the State filed a notice of appeal even before a Final Judgment was entered.

2. Conclusion

The Challengers, of course, contend that there were no procedural errors by the District Court. The preemption issue was properly before the District Court. The Challengers contend, alternatively, that the State's "procedural" argument should be rejected because the State did not afford the District Court a proper opportunity to cure any alleged defects. The District Court's May 2002 Final Order should be affirmed.

H. The Challengers Had Standing To Assert The ADA's Preemptive Effect.

Finally, the State questions the standing of the South Dakota Farm Bureau (the "SDFB") to bring the ADA preemption claim. This argument ignores the authority of the District Court, under the Fed. R. Civ. P. 15(b), to conform the pleadings to the evidence at trial. Here, the District Court added Brost and Holben as Plaintiffs to the ADA claim. App. 259. The District Court's holding on the preemption issue was based on Holben and Brost.

The State also complains about the SDFB's associational standing. The District Court took judicial notice that the SDFB has many members who have disabilities.[5] App. 260. Thus, the SDFB satisfies the associational standing inquiry.

Alternatively, Challengers contend that, since Brost and Holben are disabled and are members of the SDFB, the SDFB has standing to represent them. Indeed, the District Court determined as much in its Summary Judgment Order. Add. at 6.

In sum, even if the SDFB lacked associational standing, the individual ranchers Holben and Brost certainly have standing. Thus, under the District Court's Orders of December 12 (2001) and May 17 (2002), the reconfigured ADA claim survives and supports the District Court's conclusion that Title II of the ADA preempts the Family Farm exception of the CFB.

1. Conclusion.

In conclusion, this Court should affirm the District Court and hold that Title II of the ADA conflicts with, and therefore preempts, § 22(1) of the Corporate Farming Ban. Alternatively, if this Court would reverse, this Court should remand to the District Court with instructions to reopen the trial and hear further evidence on these issues.

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5 In its Brief, the State complains about the District Court's finding of fact through judicial notice. App. 260.. It is precisely this type of complaint that could be reexamined by a Rule 59(a) motion for new trial. Challengers, of course, do not concede that the District Court made any error in its use of judicial notice, or otherwise.

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

For purposes of this issue, Challenger Holben respectfully joins the arguments in the briefs filed by the Appellees/Cross-Appellants South Dakota Farm Bureau, et. al., and the Appellees Utilities in this matter. Holben urges that this Court affirm the District Court on the District Court's holding that the CFB violates the dormant commerce clause.

CONCLUSION

Appellee/Cross-Appellant Holben joins with the other Challengers to urge that this Court affirm the District Court's ruling that the ADA preempts the Corporate Farming Ban. Holben also urges that this Court affirm, and affirm on other grounds, the District Court's ruling that the Corporate Farming Ban unconstitutionally violates the dormant commerce clause.