No. 06-1308

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JIM JONES; TERRENCE M. SCHUMACHER, SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Respondents.

vs.

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF AND APPENDIX OF *AMICI CURIAE* STATES OF MINNESOTA, IOWA, MISSOURI, NORTH DAKOTA AND WEST VIRGINIA IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

MIKE HATCH, Attorney General
State of Minnesota

THOMAS K. OVERTON
Assistant Attorney General
Minnesota Atty. Reg. 0083355

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2128
(651) 296-0985 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR STATE OF MINNESOTA

Amicus Curiae:

TOM MILLER
Attorney General of Iowa
Hoover State Office Building
1305 Walnut Street
Des Moines, IA 50319
(515) 281-5191

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

WAYNE STENEHJEM
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismark, ND 58505-0040
(701) 328-2210

DARRELL V. MCGRAW, JR.
Attorney General of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This *amici curiae* brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure by the States of Minnesota, Iowa, Missouri, North Dakota and West Virginia in support of the Defendants John Gale and Jon Bruning in their respective capacities of Secretary of State and Attorney General of the State of Nebraska.

The District Court for the District of Nebraska ruled that the Nebraska anti-corporate farming law known as "Initiative 300," adopted in 1982 by Nebraska voters as Article XII, § 8 of their state constitution, is unconstitutional under the dormant Commerce Clause. *Jones v. Gale*, 405 F. Supp. 2d 1066, 1078-1083 (D. Neb. 2005). In addition, the district court held that because the disabilities of the two individual plaintiffs prevent them from satisfying all the requirements to incorporate as family farmers under Initiative 300, Nebraska's entire anti-corporate farming law is invalid under the Americans With Disabilities Act (42 U.S.C.A. § 12131, et seq.) (hereinafter "ADA") and the Supremacy Clause of the United States Constitution. *Jones* 405 F. Supp. 2d at 1087.

The *amici curiae* States respectfully urge that the decision of the district court be reversed. The court's decision adversely impacts the inherent ability of agricultural states to protect family farms, rural economies and society, and the environment. The decision could have a detrimental impact on other similar state

statutes[1] that limit corporate farming, such as Minnesota's own "Corporate Farm Law," Minnesota Statutes section 500.24 (2004).[2] It also calls into question the general ability of the States to regulate business forms and activity. Accordingly, the *amici curiae* States have a strong interest in ensuring that limitations on corporate farming are upheld and that the ADA is not employed to invalidate entire constitutional provisions, but rather to obtain reasonable accommodations to specific needs.

ARGUMENT

I. LEGITIMATE, NON-DISCRIMINATORY STATE INTERESTS SUPPORT STATE LAWS PROHIBITING CORPORATE FARMING.

Agricultural states have a long history of supporting family farms. As early as 1973, the Minnesota legislature adopted statutory provisions prohibiting farming by business organizations within the state of Minnesota. *See* 1973 Minn. Laws ch. 427, § 1. The purpose of Minnesota's Corporate Farm Law is set forth in the preamble of the current statute:

> The [Minnesota] legislature finds that it is in the interest of the state to encourage and protect the family farm as a basic economic unit, to ensure it as the most socially desirable mode of agricultural

[1] *See*, e.g., Iowa Code ch. 9H; Kan. Stat. Ann. § 17-5901 et seq.; Mo. Ann. Stat. § 350.015; N.D. Cent. Code § 10-06.1-02; Okla. Const. Art. XXII, § 2; S.D. Codified Laws ch. 47-9A; Wis. Stat. Ann. § 182.001.

[2] This statute is attached to the petition at A1-A13 for the Court's convenience.

> production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

Minn. Stat. § 500.24, subd. 1 (2004). Minnesota law prohibits most business organizations from participating in farming within the state:

> No corporation, limited liability company, pension or investment fund, trust or limited partnership, shall engage in farming; nor shall any corporation, limited liability company, pension or investment fund, trust or legal partnership, directly or indirectly, own, acquire, or otherwise obtain any interest, in agricultural land other than a bona fide encumbrance taken for purposes of security. This subdivision does not apply to [specifically defined "family farm" or "authorized" corporations].

Minn. Stat. § 500.24, subd. 3 (2004). The Office of the Minnesota Attorney General is directed by statute to enforce this statutory prohibition where there is "reason to believe that a corporation, limited partnership, limited liability company, trust, or pension or investment fund is violating [the Corporate Farm Law]." *Id.* at subd. 5. Consequently, the State of Minnesota has a strong interest in ensuring that similar limitations on corporate farming that have been enacted in other states are upheld.

The concern with the takeover of family farms by corporations and its impact on a state is well-founded. The effects of corporate farming include larger operations, indifferent absentee ownership, monopolistic power, and economic, social and environmental degradation. *See* U.S. Dept. of Agric., Nat'l Comm'n on Small Farms, A Time to Act: A Report of the USDA National Commission on

Small Farms (1998) 9, 22 (hereinafter USDA Comm'n on Small Farms); Richard F. Prim, *Minnesota's Anti-corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 Hamline L. Rev. 431, 442 (1995). Studies have shown that independent family farms contribute significantly more towards a healthy rural economy than do corporate farms. *See* Rick Welsh and Thomas A. Lyson, *Anti-Corporate Farming Laws, the "Goldschmidt Hypothesis," and Rural Community Welfare* (2002) at 11 (Appendix at A-14). In addition, research indicates that as the number of independent family farms declines, the quality of rural life declines, available community services decrease, and the number of schools, churches, and other primary social institutions are reduced. *See* James B. Wadley, *Small Farms: The USDA, Rural Communities, and Urban Pressures*, 21 WASHBURN L. J. 478, 497 (1982). Further, cultural amenities, independent business establishments, and self-employment opportunities also decline. *Id.* A comparison of a family farm community with an agribusiness town led one expert to conclude:

> Whether we focus on economic, social, or political factors, the traditional virtues of our society are better served in the family farm community than in the agribusiness town. Incomes were on the average higher though more people were supported; business enterprises were both more numerous and more profitable; there were more social amenities such as parks, paved streets, and sewers; there were more schools, clubs, and churches; there were more local

> newspapers and formal institutions for local political decision-making. The crucial difference is that in the family farm community, most of the population was self-employed; in the other, two-thirds were agricultural workers.

Family Farm Antitrust Act of 1979: Hearings on S. 334 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 68 (1979) (statement of Walter Goldschmidt), *cited in, Id.* at 499-500.[3]

The foregoing is reiterated in more graphic detail by the United States Department of Agriculture Commission on Small Farms:

> "As farm size and absentee ownership increase, social conditions in the local community deteriorate. We have found depressed median family incomes, high levels of poverty, low education levels, social and economic inequality between ethnic groups, etc. … associated with land and capital concentration in agriculture.… Communities that are surrounded by farms that are larger than can be operated by a family unit have a bi-modal income distribution, with a few wealthy elites, a majority of poor laborers, and virtually no middle class. The absence of a middle class at the community level has a serious negative effect on both the quality and quantity of social and commercial service, public education, local governments, etc."

[3] Additionally, experience in states allowing large corporate farming operations demonstrates that states have reason to be concerned with adverse environmental harm associated with such operations, including waste spills and water pollution. *See* Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. REV. 835, 848-50 (1996) (discussing the environmental harm experienced in Missouri and North Carolina resulting from large corporate hog farming operations).

> Owner-operated farm structures offer individual self-employment and business management opportunities …. [They] are more likely to have a stake in the well-being of the community and the well-being of its citizens. In turn, local land owners are more likely to be held accountable for any negative actions that harm the community.

USDA Comm'n on Small Farms at 13 (quoting in part Dean MacCannel, Agribusiness and the Small Community, Background Paper to Technology, Public Policy and the Changing Structure of American Agriculture, Office of Technology Assessment, U.S. Congress, Washington DC. 1983.)

It is because of this impact that agricultural states have enacted laws limiting, in various ways, the role of corporate farming within their states. Such laws have been acknowledged to be within the states' regulatory power. *See, e.g., Hampton Feedlot Inc. v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001) ("The Missouri legislature has the authority to determine the course of its farming economy …."); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805 (Mo. 1988) ("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 …."). State anti-corporate farming laws have consistently withstood challenges under the Equal Protection Clause, based on findings that such laws are rationally related to a state's legitimate interest in preventing corporate domination of farmland at the expense of independent family farms.

See, e.g., Asbury Hosp. v. Cass County, 326 U.S. 207, 214, 66 S. Ct. 61, 65 (1945) ("We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership."); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (agreeing that a policy seeking to retain and promote family farm operations and avoid the threats of unrestricted corporate ownership of farmland by preventing the concentration of farmland in non-family corporations is a legitimate state interest under the equal protection clause); *Lehndorff Geneva, Inc*., 744 S.W.2d at 806 ("The statute is rationally related to a legitimate state interest in that it prevents the aggregation of farmland in large corporations to the competitive exclusion of traditional farming entities.").

Moreover, Congress has expressly recognized the importance of preserving family farms. Codified in the Agriculture and Food Act is the congressional statement of policy supporting the maintenance of the family farm system of agriculture:

> Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive production of adequate supplies of food and fiber. *Congress further believes that any significant expansion of nonfamily*

owned large-scale corporate farming enterprises will be detrimental to the national welfare.

7 U.S.C.A. § 2266(a) (1999) (emphasis added).

Limitations on corporate farming laws are not only supported by a long history of judicial and legislative recognition as to their legitimate purposes but also have had the effect of furthering those purposes. Specifically, the Welsh and Lyson study found that farming communities in states with anti-corporate farming laws have lower relative poverty levels, lower levels of unemployment, and higher percentages of farms reporting cash gains, than do farming communities in states without such laws. Welsh and Lyson, *supra*, at 11.

States like Minnesota must continue to have the ability to limit corporate farming so that rural Minnesota remains a family farm society and does not become a society of corporate oligarchs and poor laborers.

II. THE DISTRICT COURT'S COMMERCE CLAUSE ANALYSIS FAILED TO PROPERLY CONSIDER THE IMPORTANT POLICIES OF INITIATIVE 300.

The Commerce Clause, although phrased as an affirmative grant of regulatory power to Congress, "has long been understood to have a 'negative' aspect that denies States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349 (1994). The analysis to determine whether a state law violates this negative aspect of the Commerce

Clause is well established. The first step is to determine whether the challenged law "'regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce.'" *Id*. 511 U.S. at 99, 114 S. Ct. at 1350 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736 (1979)). A nondiscriminatory law that has only incidental effects on interstate commerce will be upheld unless "'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id*. (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970)). If the law discriminates against interstate commerce, the law will be sustained only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, ___, 125 S.Ct. 1885, 1905 (2005) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278, 108 S.Ct. 1803, 1810 (1988)); *see also South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596 (8th Cir. 2003) ("no other method by which to advance their legitimate local interests").

While the foregoing dichotomy is simply stated, "there is no clear line separating these categories. 'In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.'" *C & A Carbone, Inc. v. Town of Clarkstown* 511 U.S. 383, 402, 114 S. Ct. 1677, 1688 (1994) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476

U.S. 573, 579, 106 S. Ct. 2080, 2084 (1986)). Such critical consideration of both aspects of the law mitigates against usurpation by the federal courts of both the Congressional power to regulate commerce and the States' reserved powers under the Tenth Amendment.

In this case, the district court concluded that Initiative 300 discriminates against interstate commerce and applied the "strictest scrutiny" test. 405 F. Supp. 2d at 1082. While the *amici curiae* States do not agree with the district court's conclusion and use of the strictest scrutiny test, this brief addresses the district court's further, and critical, error of failing to properly apply the strictest scrutiny test.

In applying the strictest scrutiny test, the district court did not adequately consider the significant agricultural and societal issues that Initiative 300 addresses and that are discussed in Part I of this brief. As noted above, under either the strictest scrutiny test or the burdens test 'the critical consideration is the overall effect of the statute on *both* local and interstate activity.'" *C & A Carbone, Inc. v. Town of Clarkstown* 511 U.S. 383, 402, 114 S. Ct. 1677, 1688 (1994) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579, 106 S. Ct. 2080, 2084 (1986)) (emphasis added). This requires the district court to fully consider Initiative 300's effect. It did not.

The district court suggested that speculative environmental laws, liability insurance, and resident manages could substitute for the personal ownership, personal involvement, the personal concern for one's own children, and the personal stake in the community that derive from family farms and extend to future generations. Had the district court adequately considered the weighty and complex societal concerns at the heart of state anti-corporate farming laws, it could not have concluded, as it did, that a hypothetical hodgepodge of laws directed at mere symptoms of corporate farming could effectively address all the problems that Initiative 300 did by treating the root cause.

The district court's failure to adequately consider the effect of Initiative 300 caused it to incorrectly conclude that the law violates the dormant Commerce Clause.

III. THE ADA DOES NOT REQUIRE THE INVALIDATION OF INITIATIVE 300.

The district court held that the disabilities of the two individual plaintiffs prevented them from satisfying all the requirements to incorporate as family farmers under Initiative 300, and therefore, Nebraska's entire anti-corporate farming law is invalid under the ADA and the Supremacy Clause of the United States Constitution. *Jones*, 405 F. Supp. 2d at 1087.

The *amici curiae* States have a number of concerns regarding the district court's application of the ADA to the facts of this case. Of particular concern is

the remedy imposed by the court. That remedy disregards the fact that the ADA provides for a "reasonable accommodation" for disabilities in state programs, not for the total invalidation of a state constitutional provision and its application to those without disabilities. 42 U.S.C.A. §§ 12131, *et seq.* (2005); 29 C.F.R. §§ 1630, et seq. and 28 C.F.R. pt. 35. Moreover, the district court's remedy disregards the principles of federalism and comity by declaring a state constitutional provision invalid when other available remedies can completely cure the perceived problem and preserve the Nebraska constitution. *See Cupolo v. Bay Area Rapid Transit*, 5 F.Supp.2d 1078, 1085 (N.D. Cal. 1997) (court must be mindful of principles of federalism and comity when fashioning remedy against a state, citing *Rizzo v. Goode*, 423 U.S. 362, 380, 96 S. Ct. 598, 608 (1976); injunction to enforce federal constitutional or statutory law against state agency must be narrowly tailored, citing *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995)).

Injunctive relief is available under the ADA. Consistent with the ADA and federalism, such relief is limited to providing "reasonable accommodations." *Dufresne v. Veneman* 114 F.3d 952, 954 (9th Cir. 1997) (citing *Alexander v. Choate,* 469 U.S. 287, 301, 105 S. Ct. 712, 720 (1985). An ADA remedy imposed by the district court in this case must be similarly limited.

CONCLUSION

The district court's decision in this case fails to properly apply established dormant Commerce Clause jurisprudence and policy and thus deprives Nebraska of its sovereign power to regulate for the public good. It also improperly employs the ADA to invalidate a state constitutional provision rather that obtain a reasonable accommodation. The decision of the district court should therefore be reversed.

Dated: April 7, 2006.

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

THOMAS K. OVERTON
Assistant Attorney General
Minnesota Atty. Reg. 0083355

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2128
(651) 296-0687 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR STATE OF MINNESOTA

TABLE OF CONTENTS OF APPENDIX

Page