Case 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,

Plaintiffs/Appellees,

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,

Defendants/Appellants.

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

BRIEF OF APPELLEES

PREPARED AND SUBMITTED BY:

Thomas H. Dahlk (#15371)
L. Steven Grasz (#19050)
Mike Degan (#20372)
Rebecca B. Gregory (#22901)
BLACKWELL SANDERS PEPER MARTIN LLP
1620 Dodge Street, Suite 2100
Omaha, Nebraska 68102
Telephone: (402) 964-5000

and

David A. Jarecke (#20088)
CROSBY GUENZEL LLP
134 S. 13th Street, Suite 400
Lincoln, NE 68508-1981
Telephone: (402) 434-7300
Attorneys for JIM JONES, TERRENCE M. SCHUMACHER; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK, III, Plaintiffs/Appellees

Stephen D. Mossman (#19859)
Mattson, Ricketts, Davies, Stewart, and Calkins
134 S. 13th Street, #1200
Lincoln, NE 68508
Telephone: (402) 475-8433
Attorney for SHAD DAHLGREN

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This appeal concerns the validity of Nebraska's constitutional provision, known as "Initiative 300," that generally bans all corporations other than certain "family farm corporations" from engaging in farming or ranching in Nebraska and from obtaining an interest in real estate used for farming or ranching in Nebraska.

The United States District Court for the District of Nebraska held the challenged provision invalid, as it violates the dormant Commerce Clause of the United States Constitution as well as the Americans With Disabilities Act (the "ADA"). Specifically, the district Court found the provision was adopted with a discriminatory purpose and that it facially discriminates against interstate commerce by treating out-of-state economic interests less favorably than in-state economic interests. The Court also found the provision discriminates against two of the Plaintiffs due to their disabilities, in violation of the ADA.

As the case presents no novel issues in this circuit, the Appellees request oral argument in the amount of 15 minutes.

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1(b) the Appellees submit the following corporate disclosure statement: 1. The Appellees are individuals and have no parent corporation. 2. The Appellees issue no stock.

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STATEMENT OF JURISDICTION

This action arose under the Constitution and laws of the United States. The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202. (App. Vol. I at 3, ¶ 12). This Court granted Appellants permission to appeal pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF ISSUES

1. Whether the District Court correctly held that Initiative 300 violates the Commerce Clause of the Constitution of the United States because it was adopted with a discriminatory purpose.

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

Smithfield Foods, Inc. v. Miller, 367 F.3d 1061 (8th Cir. 2004).

2. Whether the District Court correctly held that Initiative 300 violates the Commerce Clause because it discriminates against interstate commerce on its face.

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

Smithfield Foods, Inc. v. Miller, 367 F.3d 1061 (8th Cir. 2004).

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992).

Hall v. Progress Pig, Inc. 259 Neb. 407, 610 N.W.2d 420 (2000).

3. Whether the District Court correctly held that Initiative 300 violates The Americans With Disabilities Act.

42 U.S.C. § 12132.

Hall v. Progress Pig, Inc. 259 Neb. 407, 610 N.W.2d 420 (2000).

4. Whether the District Court correctly held that Plaintiffs had standing to assert their Commerce Clause claim.

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

Clinton v. City of New York, 524 U.S. 417 (1998).

5. Whether the District Court correctly held that Plaintiffs Dahlgren and Ehler had standing to assert their ADA claim.

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001).

6. Whether the District Court correctly held the unconstitutional provisions of Initiative 300 are not severable from the remainder.

Jaksha v. State, 241 Neb. 106, 486 N.W.2d 858 (1992).

Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Hall v. Progress Pig, Inc., 259 Neb. 407, 610 N.W.2d 420 (2000).

STATEMENT OF THE CASE

On December 15, 2005, the United States District Court for the District of Nebraska entered an order granting the Plaintiffs' motion for summary judgment with respect to Counts I, IV, and V of the Plaintiffs' Complaint. The Court found that article XII, § 8 of the Nebraska Constitution, known as Initiative 300, violates the dormant Commerce Clause of the U.S. Constitution as well as the Americans With Disabilities Act. (App. Vol. VIII, p. 1997-1998) The District Court

concluded that its order involved a controlling question of law, and an immediate appeal could be made in the discretion of this Court if filed within the requisite time. Had no appeal been taken, the District Court stated it was prepared to enter a permanent injunction enjoining the Defendants from enforcing Initiative 300.

On December 27, 2005, the Defendants filed a Petition For Permission to Appeal. On January 9, 2006, the Appellees notified the Court they did not object to the appeal. On January 24, 2006, the Court entered an Order granting the Appellants' Petition for Permission to Appeal pursuant to 28 U.S.C. § 1292(b).

STATE OF FACTS

Initiative 300

1. Article XII, § 8 of the Nebraska Constitution is commonly known as "Initiative 300" due to its origination as Initiative Measure 300. (App. Vol. I, p. 1 at ¶ 2; p. 17 at ¶ 2).

2. Initiative 300 provides, in part; "No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching." (App. Vol. I, p. 1 at ¶ 3; p. 17 at ¶ 3).

3. "Initiative 300" originated as a constitutional amendment proposed through the initiative petition process. It appeared as a ballot question on the 1982 general election ballot. (App. Vol. I, p. 3 at ¶ 14; p. 19-20 at ¶ 14).

4. In accordance with Nebraska law, a "ballot title" was prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State. (App. Vol. I, p. 3 at ¶ 15; p. 20 at ¶ 15).

5. As defined by Nebraska law, the purpose of a ballot title is to "express the purpose of the measure" in up to one hundred words. (App. Vol. I, p. 4 at ¶ 16; p. 20 at ¶ 16).

6. The ballot title submitted to Nebraska voters with regard to Initiative 300 stated, in part, as follows: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . . ?" (App. Vol. III, p. 685).

7. In accordance with Nebraska law, an "explanatory statement" for Initiative 300 was also prepared by the Attorney General for placement on the official ballot, in italics, immediately preceding the ballot title. (App. Vol. I, p. 4 at ¶ 18; p. 20 at ¶ 18).

8. The purpose of an explanatory statement under Nebraska law is to "explain the effect of a vote for and against the measure." (App. Vol. I, p. 4 at ¶ 19; p. 20 at ¶ 19).

9. The explanatory statement presented to Nebraska voters for Initiative 300 stated: "A vote FOR will create a constitutional prohibition against further

purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." (App. Vol. I, p. 4 at ¶ 20; p. 20 at ¶ 20).

10. In accordance with Nebraska law, the Secretary of State caused the ballot title and the text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election. (App. Vol. I, p. 4 at ¶ 21; p. 20 at ¶ 21).

11. Nebraska's current requirement for publication of informational pamphlets regarding initiated amendments had not been enacted at the time Initiative 300 was proposed. (App. Vol. I, p. 4 at ¶ 22; p. 20 at ¶ 22).

12. At the time of Initiative 300's adoption in 1982, as today, Nebraska law provided a statutory process for any person who is dissatisfied with the ballot title provided by the Attorney General under which such person may challenge the ballot title by filing a petition in the district court asking for a different title. (App. Vol. I, p. 4-5 at ¶ 23: p. 20 at ¶ 23).

13. No challenge to the Initiative 300 ballot title was filed in the district court asking for a different title. (App. Vol. I, p. 5 at ¶ 24; p. 20-21 at ¶ 24).

14. Initiative 300 was adopted by Nebraska voters, and it became part of the Nebraska Constitution upon issuance of a proclamation by the Governor on November 29, 1982. (App. Vol. I, p. 5 at ¶ 25; p. 21 at ¶ 25).

15. Initiative 300, with certain exceptions, prohibits corporations, limited partnerships, limited liability partnerships, partnerships with corporate members and similar business entities from owning Nebraska farm or ranch land or engaging in farming or ranching in the state of Nebraska. Initiative 300 defines farming and ranching as "the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping or feeding of animals for the production of livestock or livestock products." (App. Vol. VIII, p. 1965-66); Neb. Const. art. XII, § 8.

16. Exemptions from Initiative 300's prohibitions concerning farming and ranching are provided to certain types of business entities including "family farm or ranch corporations," non-profit corporations, and Nebraska Indian tribal corporations. (App. Vol. VIII, p. 1965-66); Neb. Const. art. XII, § 8.

17. Those entities which are not completely exempted from Initiative 300 are provided a number of exceptions to the ban on owning farm land or engaging in farming or ranching. These include exceptions for poultry production, alfalfa production on land leased by alfalfa processors, seed production, nursery plant production, sod production, research and experimental farming, holding of land for

non-farm use for up to five years, custom spraying, custom fertilizing, custom harvesting, livestock futures contracts, livestock purchased for slaughter, and livestock purchased and resold within two weeks. (App. Vol. VIII, p. 1965); Neb. Const. art. XII, § 8.

18. An exemption from the farming ban is also provided for a fifty year period for a "family farm corporation" which ceases to meet the criteria for qualification as a family farm corporation. The exemption requires that majority ownership remain within the family, and the corporation may not increase its landholdings. A "grandfather" clause is also provided for land that was being used for farming by a corporation or syndicate as of the date of enactment of Initiative 300, provided that such land is held in continuous ownership by the same corporation or syndicate. (App. Vol. VIII, p. 1965); Neb. Const. art. XII, § 8.

Plaintiff Jones

19. Plaintiff Jim Jones ("Jones") resides in rural Eddyville, Nebraska. Jones has been actively engaged in farming and ranching for over forty years. Jones is also a former Nebraska State Senator. Jones began his career as a farmer/rancher through forming a corporation with an older, established farmer. (App. Vol. III, p. 458-459 at ¶¶ 2-3, 5-6).

20. During Jones' tenure as a Nebraska State Senator, he introduced and supported state legislation in the Nebraska Legislature which sought to amend

Nebraska state law in order to provide increased opportunities for young Nebraskans wishing to begin a career in farming and ranching in Nebraska. (App. Vol. III, p. 459-460 at ¶¶ 4, 8).

21. Jones was able to get started in farming and ranching by entering into an agreement with an unrelated older farmer and rancher whereby, under the terms of this agreement, the older farmer received fifty percent of the revenues generated. He provided the labor and the older farmer provided the land and livestock. (App. Vol. III, p. 458-459 at ¶¶ 3, 5).

22. In 1977, Jones formed a corporation with the older farmer and entered into an agreement wherein he could purchase stock in the corporation each year, up to a maximum of forty-eight percent of the ownership, so long as the older farmer/shareholder was living. In 1994, he purchased the remaining balance of the corporation shares on contract. This corporation qualifies as a "grandfathered" corporation under Initiative 300 as land that was being used for farming or ranching by a corporation as of the date of the enactment of Initiative 300 and being held in continuous ownership by the same corporation (App. Vol. III, p. 458-459 at ¶¶ 3, 6).

23. In 1988, Jones' son, Gordon Jones, wanted to begin a career in farming and ranching in Nebraska by entering into a similar arrangement with an older established farmer. However, the enforcement of Initiative 300 by the

Defendants prevented his son from forming a similar corporation with a non-relative. As a result, the land owned by the older established farmer and that his son wanted to work was sold and his son was denied the opportunity to start his own farming and ranching operation. In addition, Initiative 300 prevented Jones from incorporating his grandfathered farm corporation with his son's prohibited corporation and from working and contracting with his son in separate personal and corporate format because his son was unable to form his own corporation under Initiative 300. (App. Vol. III, p. 459-460 at ¶ 7).

Plaintiff Schumacher

24. Plaintiff Terrence Schumacher, a Colorado resident, owns an interest in Nebraska farmland located in the Nebraska counties of Boone, Butler, Knox, Pierce and Platte, some of which was originally purchased by his father, Matthew Schumacher. Neither he nor any of his relatives reside on the farmland located in Nebraska. He does not live close enough to his farmland to perform the day to day labor and management of the farmland. (App. Vol. III, p. 473 at ¶¶ 2, 4).

25. Schumacher desires to transfer his farmland to a limited liability entity to take advantage of favorable estate planning tools and to limit his exposure to personal liability, including tort liability. Initiative 300 prevents him from doing so. (App. Vol. III, p. 474-476 at ¶¶ 5-7, 9, 12).

26. As a result of Initiative 300, Schumacher is unable to transfer ownership of his farmland as he sees fit. He is also limited in his ability to pool assets and resources with his relatives that also own Nebraska farmland into a single operating unit in order to more efficiently manage the fiscal and operational aspects of his farmland, including, for instance, the ability to borrow money, purchase inputs and enter into contracts for marketing of farm products. These limitations prevent him from competing in the national agriculture market on a level playing field with other farmers in states where laws like Initiative 300 are not in effect. (App. Vol. III, p. 474-476 at ¶¶ 8, 11).

Plaintiff Dahlgren

27. Plaintiff Shad Dahlgren owns a minority interest in a family farm corporation, Dahlgren Cattle Company, which operates a cattle feedlot located near Bertrand, in Phelps County, Nebraska. (App. Vol. III, p. 485 at ¶ 2).

28. Dahlgren was involved in an automobile accident at the age of 16. As a result of the accident, he is a paraplegic and is confined to the use of a wheelchair. (App. Vol. III, p. 485-486 at ¶¶ 3-6).

29. Due to his disability, Dahlgren is not able to perform the actual physical day-to-day labor necessary to operate a farm or ranch. (App. Vol. III, p. 486 at ¶ 7).

30. Dahlgren lives in the City of Lincoln in order to be near his primary personal physician. (App. Vol. III, p. 487 at ¶ 16).

31. Initiative 300 prohibits Dahlgren from becoming a majority owner of Dahlgren Cattle Company. (App. Vol. III, p. 486 at ¶¶ 8-10).

32. Dahlgren is interested in purchasing a row crop farm (a farm producing corn, soybeans and sorghum) in Eastern Nebraska through use of a limited liability company. (App. Vol. III, p. 486-487 at ¶¶ 12, 15).

33. Initiative 300 prevents Dahlgren from purchasing a Nebraska farm through use of a limited liability company. (App. Vol. III, p. 487 at ¶¶ 14-15).

Plaintiff Rickertsen

34. Plaintiff Harold G. Rickertsen ("Rickertsen") resides in rural St. Paul, Nebraska. (App. Vol. III, p. 463).

35. Upon retiring from farming and ranching in Nebraska, Rickertsen desired to form a corporation with a young farmer, not related to him, who wanted to enter into farming and ranching. Rickertsen intended to transfer an interest in his real and personal farm and ranch assets to a young farmer through a corporate entity structure. The day-to-day labor required to operate the farm and ranch was to be provided by the young farmer while Rickertsen provided oversight and management. He wished to use a corporate entity to allow the young farmer to take an ownership interest while at the same time maintaining his controlling

interest in the farm and protecting the personal assets of his family with the limited liability protections afforded shareholders of corporations. (App. Vol. III, p. 466 at ¶ 9).

36. Plaintiff Rickertsen previously served as a Board Member for Farm Credit Services of America and its predecessor organizations. Farm Credit Services is a cooperative lender that is part of the Farm Credit System and provides loans to farmers and ranchers in the states of Iowa, Nebraska, South Dakota and Wyoming. During his tenure as a Board member, Rickertsen became familiar with the factors considered by Farm Credit Services when making loans to farmers in other states. In states such as Iowa that do not have laws similar to Initiative 300, Farm Credit Services considered the income from hog feeding contracts the farmer had with corporations, resulting in increased borrowing ability by the farmer. As a Farm Credit Services Board member, he observed that livestock feeders had more contracting options and more favorable contracts, which resulted in significantly greater lending activity and borrowing demand by livestock feeders in Iowa than from livestock feeders in Nebraska. These corporations would not be exempt if Iowa had a law similar to Initiative 300, nor would they be exempt under Initiative 300 if the same corporations attempted to enter into similar contracts with Nebraska farmers. (App. Vol. III, p. 464-465 at ¶ 6).

Plaintiff Ehlers

37. Plaintiff Todd Ehler's family currently owns a diversified farm feeding livestock and producing feed grains in Cuming County located near Bancroft, Nebraska, which has been owned and operated by his family for three generations. His father, who is currently 72 years old, has raised cattle on the Ehlers' farm his entire working career. He is retiring and has discontinued feeding livestock. Throughout Ehler's working career, he has contributed to the management and, until 2000, periodically provided labor to the operation his family farm. (App. Vol. III, p. 479 at ¶ 3).

38. Ehler suffers from Castleman's Disease and POEM's Syndrome. These conditions at various times have resulted in severe loss of balance and strength resulting in his disability from every day normal functions, including walking and the ability to grasp things with his hands. (App. Vol. III, p. 480 at ¶¶ 4-6).

39. Due to his disability Ehler is not able to perform the actual physical day-to-day labor necessary to operate his family's farm upon retirement of his father. (App. Vol. III, p. 480 at ¶ 8).

40. Ehler desires to maintain ownership of the family farm upon his father's retirement and has considered forming a limited liability entity with a neighboring farmer in order to continue feeding livestock and growing of grains.

Under his intended arrangement, he would provide the management and marketing while the neighboring farmer would provide the day-to-day labor for the care and feeding of livestock and producing the grains. (App. Vol. III, p. 480-481 at ¶ 9).

41. Initiative 300 prevents Ehler from implementing his plan and preserving his family farm. (App. Vol. III, p. 481 at ¶¶ 10-14).

Plaintiff Beck

42. Plaintiff Robert Beck is a cattle rancher who owns a commercial cattle feeding operation located in Buffalo County, Nebraska. He provides the daily care and feeding for the cattle owned by his customers, many of whom live outside of Nebraska. (App. Vol. III, p. 468 at ¶ 2).

43. Similar to Jones and Rickertsen, Beck desires to gradually transfer ownership of his operation to his unrelated employees using a corporate format. (App. Vol. III, p. 471 at ¶ 10).

Defendants

44. Defendant John Gale ("Secretary of State") is the Secretary of State of the State of Nebraska. He is charged with the duty, in his official capacity, to "monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations." (App. Vol. I, p. 2 at ¶ 10; p. 18-19 at ¶ 10).

45. Defendant Jon Bruning ("Attorney General") is the Attorney General of the State of Nebraska. The Attorney General has the responsibility, in his official capacity, to "commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of [Initiative 300]" if the Attorney General has reason to believe that a corporation or syndicate is violating Initiative 300. (App. Vol. I, p. 2-3 at ¶ 11; p. 19 at ¶ 11).

Impact of Initiative 300 on Plaintiffs

46. As a result of the enforcement of Initiative 300 by the Defendants, Jones, Beck, and Rickertsen have suffered reduced borrowing power and their financial strength in the national livestock market has been stunted. They are prevented from providing corporate feeding contracts as collateral for operational loans. (App. Vol. III, p. 461 at ¶ 13); (App. Vol. III, p. 469 at ¶ 5); (App. Vol. III, p. 465 at ¶ 7).

47. The Plaintiffs' farm and ranch land has diminished in value because potential purchasers, such as non-exempt corporations, are prohibited from purchasing their land, thereby artificially restricting the number of buyers. (App. Vol. III, p. 460-461 at ¶ 11); (App. Vol. III, p. 467 at ¶ 12); (App. Vol. III, p. 471 at ¶ 11).

48. The Plaintiffs have been prohibited from gaining full and unfettered access to the national real estate and agricultural markets. (App. Vol. III, p. 461 at ¶ 14); (App. Vol. III, p. 467 at ¶ 13); (App. Vol. III, p. 469-471 at 6, 9, 11).

49. Initiative 300 has precluded Jones, Rickertsen, and Beck from assisting younger farmers in their efforts to establish a career in farming and ranching in Nebraska. (App. Vol. III, p. 460-461 at ¶¶ 9, 15); (App. Vol. III, p. 466 at ¶¶ 10-11); (App. Vol. III, p. 471 at ¶ 10).

50. Jones, Rickertsen, Beck, and Dahlgren own livestock feeding operations. (App. Vol. III, p. 458 at ¶ 2); (App. Vol. III, p. 463 at ¶ 2); (App. Vol. III, p. 468 at ¶ 2); (App. Vol. III, p. 463 at ¶ 2).

51. Initiative 300 prevents Jones, Rickertsen, and Beck in their individual capacities from contracting with non-qualifying out-of-state corporate entities for the purpose of raising and feeding livestock for slaughter, causing them to suffer personal financial loss. (App. Vol. III, p. 494-495 at n. 15, 16); (App. Vol. III, p. 460-462 at ¶¶ 10, 12, 14, 16); (App. Vol. III, p. 468-471 at 3-4, 6-9, 11); (App. Vol. III, p. 463 at ¶ 3).

52. The national trends demonstrate that an increasing number of cattle ranching operations are electing to incorporate. As the number of the cattle owned by limited liability entities increases, a growing percentage of the national cattle market is prohibited from being fed in Nebraska, reducing Nebraska ranchers'

competitiveness and ability to gain new customers. (App. Vol. III, p. 468-471 at ¶¶ 3-4, 6-9) (App. Vol. III, p. 464 at ¶ 4)

53. The national livestock market relies on equity investment from third parties through the ownership of livestock fed in commercial feedlots. Non-qualified limited liability entities that provide equity in the form of ownership of livestock are prohibited from having their cattle fed at Nebraska feedlots. This has harmed Jones, Beck, and Rickertsen by reducing their access to capital and preventing them from entering into joint ventures and/or pooling resources with out-of-state limited liability entities. (App. Vol. III, p. 494-495 at n. 15, 16); (App. Vol. III, p. 461-462 at ¶¶ 12-13); (App. Vol. III, p. 470-471 at ¶¶ 7, 9-16); (App. Vol. III, p. 464-465 at ¶¶ 4-7).

54. The Plaintiffs' personal fiscal and estate planning activities have been impeded, frustrated and prohibited by Initiative 300. (App. Vol. III, p. 461-462 at ¶¶ 13, 15, 17); (App. Vol. III, p. 467 at ¶¶ 14-15) (App. Vol. III, p. 471 at ¶ 10); (App. Vol. III, p. 474-475 at ¶¶ 7-9); (App. Vol. III, p. 481 at ¶¶ 12-14); (App. Vol. III, p. 487 at ¶ 18).

55. As a result of the restrictions placed on commerce by Initiative 300, the Plaintiffs have suffered economic harm. (App. Vol. III, p. 462 at ¶ 19); (App. Vol. III, p. 468-471 at ¶¶ 3, 11-12); (App. Vol. III, p. 465 at ¶ 8); (App. Vol. III, p.

475-476 at ¶ 10-12); (App. Vol. III, p. 481 at ¶ 12-14); (App. Vol. III p. 487 at ¶ 18).

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo, applying the same standard as the district court. *Pecoraro v. Diocese of Rapid City*, 435 F.3d 870, 872-73 (8th Cir. 2006). A district court's grant of summary judgment will be affirmed "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits …, demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1064 (8th Cir. 2004) (*quoting* Fed. R. Civ. P. 56(c)).

SUMMARY OF ARGUMENT

Like South Dakota's Amendment E, which was previously invalidated by this Court, Nebraska's restriction on ownership of agricultural real estate and livestock, known as "Initiative 300," imposes unconstitutional burdens on interstate commerce, in violation of the United States Constitution's Commerce Clause. The provision also burdens the rights of persons with disabilities, in violation of the Americans With Disabilities Act ("ADA").

A state law that discriminates against interstate commerce is "per se invalid" unless its defenders can demonstrate that they have no other means to advance a

legitimate local interest. Discrimination against out-of-state interests is found where evidence demonstrates the law was adopted with a discriminatory purpose or where the provision is discriminatory on its face.

The plain language of Initiative 300 is discriminatory against interstate commerce on its face. In addition, the historical background and sequence of events leading to Initiative 300's adoption, including the official ballot title and the official explanatory statement presented to each Nebraska voter to explain its purpose, as well as the statements of its drafters, all evidence an intent to discriminate against interstate commerce. Consequently, Initiative 300 is invalid per se, as the State of Nebraska has other means to advance its legitimate local interests.

Initiative 300 also violates the rights of Plaintiffs Ehler and Dahlgren under the ADA, as they are unable to qualify for the "family farm exception" solely due to their disabilities. Ehler and Dahlgren are physically unable to perform the day-to-day farm labor necessary to meet the law's requirements. As a result, Initiative 300 conflicts with the ADA and is invalid under the Supremacy Clause.

ARGUMENT

I. INITIATIVE 300 VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

A. The Dormant Commerce Clause Prohibits States from Enacting Laws that Discriminate Against Interstate Commerce.

Like South Dakota's Amendment E, invalidated by this Court in *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (hereafter "*Hazeltine III*"),[1] Nebraska's "Initiative 300" violates the dormant Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, Cl. 3, as it unconstitutionally restricts the free flow of commerce both into and out of the State of Nebraska.[2] The dormant Commerce Clause "prohibits States from 'enact[ing] laws that discriminate against or unduly burden interstate commerce.'" *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1064 (8th Cir. 2004) (*quoting Hazeltine III*, 340 F.3d 583 (8th Cir. 2003)). *See also IESI AR Corporation v. Northwest*

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1 For purposes of this brief, Plaintiffs/Appellees will refer to the *Hazeltine* decisions in chronological order. Thus, the district court's opinion reported at 197 F.R.D. 673, (D.S.D. 2000) will be referred to as *Hazeltine I*; the district court's opinion reported at 202 F. Supp. 2d 1020, 1028 (D.S.D. 2002) as *Hazeltine II*; and the Eighth Circuit's opinion reported at 340 F.3d 583 (8th Cir. 2003) as *Hazeltine III*. As the State repeatedly cites to district court opinions from *Hazeltine*, it is worth noting that *Hazeltine III* is the controlling decision on the issues before the Court.

2 A key Initiative 300 supporter called Amendment E a "clone" of Initiative 300. (App. Vol. IV, p. 798). *See also South Dakota Farm Bureau v. Hazeltine*, 202 F. Supp. 2d 1020, 1028-33 (D.S.D. 2002) (providing a section by section comparison between Initiative 300 and Amendment E).

Arkansas Regional Solid Waste Mmgt. Dist., 433 F.3d 600, 604 (8th Cir. 2006). According to the United States Supreme Court, the vision of the Framers of the Commerce Clause was that "every farmer shall be encouraged to produce by the certainty that he will have free access to every market in the Nation."[3] *Hazeltine III*, 340 F.3d at 593 (*quoting H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539, 69 S.Ct. 657 (1949)).

B. State Laws May Not Discriminate Against Interstate Commerce On Their Face, And Must Not Be Adopted With a Discriminatory Purpose.

When a State law is challenged on dormant Commerce Clause grounds, the courts in this Circuit utilize a "two-tiered analysis." *IESI Corp.*, 433 F.3d at 604; *Smithfield*, 367 F.2d at 1065; *Hazeltine III*, 340 F.3d at 593. "First, the court

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[3] The Supreme Court has also explained:

> The few simple words of the Commerce Clause--"The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . -- reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation. The Commerce Clause has accordingly been interpreted by [the Supreme] Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.

Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

considers whether the challenged law discriminates against interstate commerce." *Id*.

Discrimination against interstate commerce means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Hazeltine III*, 340 F.3d at 593; *Smithfield*, 367 F.3d at 1065. A state law that is discriminatory in this way is "per se invalid" unless the defendants can "demonstrate under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest.'" *Hazeltine III*, 340 F.3d at 593 (*quoting C & A Carbonne, Inc. v. Clarkstown*, 511 U.S. 383, 392, 114 S. Ct. 1677 (1994)).

This Court utilizes three "indicators of discrimination against out-of-state interests." *Smithfield*, 367 F.3d at 1065; *Hazeltine III*, 340 F.3d at 593. First, discrimination "can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose," *Hazeltine III*, 340 F.3d at 589, or was "adopted with a discriminatory purpose." *Smithfield*, 367 F.3d at 1065. Second, the law "could facially discriminate against out of state interests." *Hazeltine III*, 340 F.3d at 593. Finally, "even if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the laws could have a discriminatory effect." *Id*. This brief will discuss the first indicator, discriminatory purpose, and the second indicator, facial discrimination. The third factor of first tier analysis (discriminatory effect) and the second tier of Commerce Clause

analysis (weighing of burdens) are fact intensive, and the parties stipulated in the court below they were not appropriate for disposition by summary judgment. (App. Vol. VIII, p. 2035)

C. Discriminatory Purpose May Be Determined From Both Direct and Indirect Evidence Beyond the Face of the Challenged Amendment.

The Appellants (hereafter the "State") argue this Court may look only to the language of Initiative 300 itself in order to determine whether Initiative 300 was adopted with a discriminatory purpose. However, under Eighth Circuit precedent it is clear that in the context of a Federal Commerce Clause challenge, the Court may look to evidence beyond the text of the amendment. Specifically, the Court may "look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose." *Smithfield*, 367 F.3d at 1065; *Hazeltine III*, 340 F.3d at 593-594. Relevant evidence includes "(1) statements by lawmakers; (2) the sequence of events leading up to the statute's adoption; (3) the statute's historical background; and (4) the state's use of highly ineffective means to promote the legitimate interest asserted by the state." *Smithfield*, 367 F.3d at 1065. *See also MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332-33 & n.4 (8th Cir. 1991) (equal protection analysis, referring to the language of the petition and affidavits of supporters).

In discussing the types of evidence which plaintiffs "can look to" to show discriminatory purpose under the Commerce Clause, this Court has stated "the most obvious would be direct evidence that the drafters of [the initiated amendment] or the populace that voted for [the amendment] intended to discriminate against out-of-state businesses." *Hazeltine III*, 340 F.3d at 593. In *Hazeltine III*, the Court discussed examples of such "direct" evidence, including a "pro-con" statement compiled by the Secretary of State and disseminated to voters prior to an election, and notes from drafting meetings of an initiative petition. *Id*. at 594.

"Indirect" evidence of discriminatory purpose may include "irregularities in the drafting process." *Id*. It may also include the historical background of the provision, as well as the sequence of events leading to its adoption, as noted above. *Smithfield*, 367 F.3d at 1065.

As is clear from the Court's discussion in *Hazeltine III*, the State's position regarding admissible evidence is contrary to governing precedent. The State's position, if utilized, would also render the distinction between the "facial" prong and the discriminatory "purpose" prong of Commerce Clause analysis meaningless in this action, as the two would merge and render the purpose prong superfluous.

The State's argument regarding relevant evidence concerning purpose is not new or untested. This Court has carefully considered and rejected it: "In

concluding that Amendment E was motivated by a discriminatory purpose, we are cognizant of the argument that discerning the purpose of a constitutional provision is an impossible exercise." *Hazeltine III*, 340 F.3d at 596. Rejecting this argument, the Court stated, "We do, however, have evidence of the intent of individuals who drafted the amendment that went before the voters. It is clear that those individuals had a discriminatory purpose." *Id*. The Court went on to state that "although the Supreme Court has not laid out a specific test for determining discriminatory purpose we are guided by precedent in selecting the types of evidence on which we have relied to reach our conclusion." *Id*. (citing cases relying on historical background, sequence of events leading to a challenged provision, a referendum pamphlet and statements by drafters of a statute).

The State has attempted to avoid this precedent by citing to *MSM Farms, Inc.*, 927 F.2d at 333. The State asserts, in this regard, that this Court may only determine the purpose of Initiative 300 by looking "to the language of Initiative 300 itself." (Brief of Appellants at 57). The authority cited by the State, however, fails to support its own contention. Specifically, the Eighth Circuit in *MSM Farms* cited the affidavits of supporters, including Neil Oxton. *Id*. at 333.

Thus, in determining whether Initiative 300 was adopted with a discriminatory purpose, for purposes of dormant Commerce Clause analysis, this Court may consider both direct and indirect evidence. This evidence may include

statements of the amendment's drafters, its historical background and the sequence of events leading to its adoption. *Id*.

D. Initiative 300 Was Adopted With a Discriminatory Purpose.

The District Court held that Initiative 300 was adopted with a discriminatory purpose. (App. Vol. VIII, p. 1982). The Court concluded, "The ballet title and the language of Initiative 300 alone are persuasive evidence that Initiative 300 had a discriminatory purpose." *Id*. Specifically, "The ballot title and the language of Initiative 300 defining limited-liability-entity exemptions for family farms and ranches, clearly indicate that people living and working in Nebraska, and their families, will be given favored treatment." *Id*.

Applying the same substantive law to the same types of direct and indirect evidence reviewed by this Court in *Hazeltine III*, there can be no conclusion other than that Initiative 300 was "motivated by a discriminatory purpose" and that the Court "must strike it down as unconstitutional unless the Defendants can demonstrate that they have no other method by which to advance their legitimate local interests." *Hazeltine III*, 340 F.3d at 596.

1. The Official Ballot Title For Initiative 300 and The Official Explanatory Statement Presented to Nebraska Voters Provide Direct Evidence of Discriminatory Purpose.

The official ballot title for Initiative 300, as well as the official explanatory statement presented to each Nebraska voter to explain the purpose of Initiative 300,

are both discriminatory against interstate commerce on their face. Individually, as well as collectively, the ballot title and the explanatory statement constitute direct evidence of discriminatory purpose.

It is undisputed that pursuant to Nebraska law, a "ballot title" was prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State. The purpose of a ballot title under Nebraska law is to "express the purpose of the measure" in up to one hundred words. The ballot title submitted to Nebraska voters with regard to Initiative 300 stated as follows: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation. . . . . ?" (*emphasis added*) (App. Vol. III, p. 685). *See Pig Pro Nonstock Coop. v. Moore*, 253 Neb. 72, 83, 568 N.W.2d 217, 224 (1997) (quoting the ballot title).

In accordance with Nebraska law, an explanatory statement for Initiative 300 was also prepared by the Attorney General for placement on the official ballot, in italics, immediately preceding the ballot title. The purpose of an explanatory statement under Nebraska law is to "explain the effect of a vote for and against the measure." The explanatory statement presented to Nebraska voters for Initiative 300 stated:

> A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch

> lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land.

Id. (*emphasis added*). (App. Vol. III, p. 685); (App. Vol. I, p. 4 at ¶ 20; p. 20 at ¶ 20). *See Pig Pro*, 253 Neb. at 83, 568 N.W.2d at 224 (quoting the explanatory statement).

In accordance with Nebraska law, the Secretary of State caused the ballot title and text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election. (App. Vol. I, p. 4 at ¶ 21; p. 20 at ¶ 21). Although Nebraska law provides a statutory process for any person who is dissatisfied with the ballot title under which such person may challenge the ballot title by filing a petition in the district court, no legal challenge was filed to the ballot title for Initiative 300. (App. Vol. I, p. 4-5 at ¶¶ 23-24; p. 20-21 at ¶¶ 23-24).

Significantly, there is no dispute as to the accuracy of these facts or as to the admissibility or relevance of this evidence. Indeed, the Nebraska Supreme Court has expressly held that both the ballot title and the explanatory statement for Initiative 300 constitute pertinent "historical facts" that may be used to interpret the amendment. *Pig Pro*, 253 Neb. at 82-83, 568 N.W.2d at 224.

As is evident from the plain language of the ballot title for Initiative 300 and the plain language of the official explanatory statement for Initiative 300, voters

were informed that the purpose of Initiative 300 was to prohibit "ownership of Nebraska farm or ranch land by any corporation . . . which is not a Nebraska family farm corporation. . . .," and that the amendment would prohibit "further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation." (*emphasis added*) It is undisputed that this language appeared on each ballot and in every legal notice and sample ballot published for voters prior to the election. (App. Vol. I, p. at 21; p. 20 at ¶ 21). It is also undisputed that neither the petition sponsors or any other person disputed or objected to this description of the purpose of the amendment. (App. Vol. I, p. 4-5 at ¶¶ 23-24; p. 20-21 at ¶¶ 23-24).

Like the "pro con" pamphlet examined by the Court in *Hazeltine III*, this ballot language is sufficient, in and of itself, to establish a discriminatory purpose underlying Initiative 300. (App. Vol. VIII, p. 1982). The ballot title and explanatory statement are official explanations of the amendment's purpose, and provide direct evidence which is admissible to show intent both under Eighth Circuit Commerce Clause jurisprudence and Nebraska state law. *See Hazeltine III*, 340 F.3d at 594. *See also SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995). In SDDS, the court invalidated a South Dakota referendum under the dormant Commerce Clause. In conducting its "discriminatory purpose" review under the first tier of Commerce Clause analysis, the court concluded that a "state-

sponsored pamphlet that accompanied the referendum" provided "ample evidence of a discriminatory purpose to trigger strict scrutiny." *Id.*

Thus, undisputed evidence shows Initiative 300 was adopted with a discriminatory purpose: prohibiting corporations other than certain Nebraska family farm corporations from buying farm and ranch land in Nebraska. As such, the Amendment must be subjected to "the strictest scrutiny" and can be upheld "only if" the Defendants can establish the State of Nebraska has "no other means to advance a legitimate local interest." *Smithfield*, 367 F.3d at 1065. (See Section I. F., *infra*, at 55-58, for this analysis).

2. The Historical Background and Sequence of Events Leading to Initiative 300's Adoption, as Well as the Statements of its Drafters and the Advertising Utilized to Promote Its Adoption, All Evidence an Intent to Prohibit Out-of-State Corporations From Owning Nebraska Farm Land.

As shown above, the historical background and sequence of events leading to Initiative 300's adoption are sources of relevant and admissible evidence which this Court may review to determine whether the amendment was adopted with a discriminatory purpose for purposes of Commerce Clause analysis. *Smithfield*, 367 F.3d at 1065.

This section will set forth a documented history of Initiative 300, citing to the sworn testimony of its drafters as well as authenticated contemporaneous documents and records.

As shown in Exhibits 8 and 9 (deposition transcripts) (App. Vol. III, p. 498-541), the chief originators of Initiative 300 were Mr. Neil Oxton and Mr. Bill Burrows. Both men are still Nebraska residents, and each has provided sworn testimony in this case regarding the inception, drafting and promotion to voters of Initiative 300. These witnesses also authenticated and/or confirmed historical records concerning the inception, drafting and promotion of Initiative 300 to Nebraska voters in 1982.

Mr. Bill Burrows of Adams, Nebraska served as a member of the Nebraska Legislature prior to and during the inception of Initiative 300. (App. Vol. III, p. 529 at 8:1-9). He was a candidate for Governor of Nebraska the same year that Initiative 300 was on the ballot. (App. Vol. III, p. 529 at 8:10-12) During his tenure as a state senator he was associated most prominently with his annual effort to restrict corporate ownership of Nebraska farmland. (App. Vol. III, p. 530 at 9:5 – 10:1).

Senator Burrows' 1981 legislation, LB 184, failed to be adopted by the Nebraska Legislature, as did every similar bill since 1975. (App. Vol. III, p. 530 at 10:8-12:21) However, after the Legislature adjourned its 1981 session, Prudential Insurance Co. of New Jersey began making highly publicized purchases of large tracts of Nebraska farm and ranch land. (App. Vol. III, p. 531 at 13:7-14:8). Alarmed by this development, a committee of the Legislature convened a public

hearing on December 11, 1981 to explore restrictions on such purchases. (App. Vol. III, p. 531 at 14:10-8:25). Prudential Insurance Co. testified at the hearing. *Id*.

Later, in his capacity as a candidate for Governor, Burrows issued a statewide press release on or about January 13, 1982, urging voters to join with the Nebraska Farmers Union in an initiative petition drive to ban corporate ownership of agricultural land "in response to the recent acquisition by Prudential Insurance Company of over 19,000 acres of farmland in northern Nebraska." (App. Vol. III, p. 533 at 21:17-25:8). Dozens of newspaper articles carrying such headlines as "Burrows urges protest against Prudential buy" appeared in papers across the state. (App. Vol. III, p. 533 at 21:17-25:8).

At about this same time, in January of 1981, Burrows began working with Mr. Neil Oxton of the Nebraska Farmers Union in the drafting of the initiative petition which would later become designated as Initiative 300. Burrows' LB 184 from the 1981 legislative session was used as the starting point for the petition. (App. Vol. III, p. 534 at 26:10-28:16); (App. Vol. III, p. 516 at 68: 2-21).

Mr. Neil Oxton was the president of the Nebraska Farmers Union ("NFU") from 1977 to 1985. (App. Vol. III, p. 501 at 9:12-14; 10:17-22). He was the individual who originated the idea of using an initiative petition drive to enact constitutional restrictions on corporate ownership of farmland in Nebraska. (App.

Vol. III, p. 501 at 12:11-13:17). So extensive was his work on the petition effort that Oxton is recognized as the "father of Initiative 300." (App. Vol. III, p. 501 at 11:8-12:6).

During December of 1981, following highly publicized purchases of additional Nebraska farm and ranch land by Prudential Insurance Company of New Jersey, Oxton and NFU became engaged in a public dispute with Prudential over these land purchases. In the course of the dispute Oxton issued a press release, and also publicly released copies of his correspondence with Prudential. (App. Vol. III, p. 503 at 17:5-24:22).

Under Oxton's leadership, delegates to the December 1981 NFU annual meeting then adopted a resolution committing NFU to sponsor a proposed amendment to the Nebraska Constitution restricting corporate ownership of farm land. (App. Vol. III, p. 504 at 22:8-20; p. 505 at 25:13-21). This proposal would later become known as Initiative 300.

Beginning in January of 1982, Oxton led the drafting of the petition language for Initiative 300. (App. Vol. III, p. 506 at 32:1-5; 30: 22-24) During this time Oxton also began a series of public speaking engagements and radio broadcasts supporting the petition. (App. Vol. III, p. 505 at 25:22-27:12). Without apparent exception, these speeches, radio broadcasts and resulting news articles featured Prudential Insurance Company of New Jersey, its purchases of Nebraska

farmland, and Prudential's stated intention to purchase more land. (App. Vol. III, p. 505 at 26:3-27:12); (App. Vol. III, p. 506 at 32:13-34:7); (App. Vol. III, p. 507 at 36: 5-20).

Oxton testified that, with regard to Initiative 300, "Prudential was our lead for publicity and so forth." (App. Vol. III, p. 507 at 34:24-25). Oxton also testified that the Prudential land purchases in 1981 and early 1982 were "a blessing in disguise for [the petition sponsors]." (App. Vol. III, p. 507 at 36:5-13). Dozens of news articles featured the Prudential controversy as the Initiative 300 petition language was being drafted and revised. (App. Vol. III, p. 507 at 36: 5-20).

The initiative petition campaign was publicly kicked off by Oxton on February 17, 1982. (App. Vol. III, p. 508 at 38:6-39:3). Once again, Prudential Insurance Co. was the target of Oxton's remarks: "The acquisition by Prudential Insurance Company of 34,000 acres of Nebraska farmland points the need for this amendment, as does the upswing in investment in agricultural land by outside investors." (App. Vol. III, p. 508-509 at 40:4-41:9). (*See also* App. Vol. III, p. 629, referencing Prudential's land purchases). Circulation of the petitions then ensued in the spring of 1982. (App. Vol. III, p. 509 at 41:24-42:11).

On or about June 26, 1982, Oxton's group issued a press release announcing they had obtained sufficient petition signatures to place the initiative on the ballot. (App. Vol. III, p. 509 at 43:17- 44:2), and on August 12, 1982, Nebraska Attorney

General Paul Douglas' office notified Secretary of State Allen Beermann of the language that would appear on the ballot for Initiative 300. (App. Vol. III, p. 516 at 71:6-24 - 72:11).

Prudential Insurance Company remained at the center of the Initiative 300 campaign until election day. Prudential continued to be referenced in virtually every speech, pamphlet and news release by proponents of the petition. (App. Vol. III, p. 508 at 37:14 - 38:5) Oxton testified this tactic was utilized as a means of convincing "city and town people [of] the value of passing Initiative 300." (App. Vol. III, p. 508 at 38:3-5).

During the ensuing campaign to promote adoption of Initiative 300, NFU published suggested outlines for "letters to the editor" urging support for Initiative 300. This outline urged supporters to reference Prudential's land purchases in their letters. (App. Vol. III, p. 510 at 45:9 - 46:17).

The paid advertising in support of Initiative 300 also referenced Prudential's land purchases. (App. Vol. III, p. 511 at 49:5 - 51:23). Significantly, "out-of-state corporations" were the target of the only television ad produced by supporters of Initiative 300. A videotape of this ad is part of the record and is included in the Joint Appendix. The conclusion of each TV ad stated as follows: "Let's send a message to those rich out-of-state corporations. Our land's not for sale, and neither is our vote. Vote for Initiative 300." (emphasis added). The protectionist nature

of this ad is self-evident. *See Hazeltine III*, 340 F.3d at 593-94 (finding the "protectionist rhetoric" of a voter pamphlet to be direct evidence that the drafters of South Dakota's Amendment E intended to discriminate against out-of-state business).

The focus on Prudential persisted in debate presentations and press conferences up through election day in November 1982. (App. Vol. III, p. 512-513 at 53:8 – 57:1; 60: 4-19). ("they [Prudential] were the ones we shot at").

The NFU, of which Oxton was president, was the primary sponsor of Initiative 300. (App. Vol. III, p. 516 at 69:19-22). A closely associated group, the "Committee to Preserve the Family Farm" (also headed by Oxton) supported the petition effort as well. Both groups were aware of the ballot language drafted by the Attorney General's Office for Initiative 300, and even published the language in their monthly magazine. (App. Vol. III, p. 516 at 70:2-19). The ballot language for Initiative 300, which was presented to every Nebraska voter on their ballot stated the amendment would prohibit "further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation." (App. Vol. III. P. 516 at 71:17-23). Neither group made any objection or protest to the ballot language. (App. Vol. III, p. 516 at 71:17 - 72:9).

The intent to restrict non-Nebraska corporations, expressly stated in the ballot title and explanatory statement, is consistent with the documented history

and purpose of the initiated petition. Both Oxton (who was the originator, chief drafter, promoter, and the acknowledged "father" of Initiative 300), and the NFU were clearly aiming at out of state corporations. From start to finish they intentionally directed their campaign against "out of state" corporations, including Prudential Insurance Co. of New Jersey.

The evidence submitted by the State itself reveals the discriminatory purpose behind Initiative 300. (*See* App. Vol. V, p. 1027) (statement about profits being sent "to their corporate headquarters out-of-state" and "Prudential and the other out-of-state corporations."); (App. Vol. VIII, p. 1919) (statement by Oxton about "stopping the flood of corporate dollars that have entered our state to buy our farmland."); (App. Vol. VIII, p. 1945); (App. Vol. VIII, p. 1959) (voter information pamphlet stating "A vote for Amendment 300 is a vote to: . . . keep the wealth that flows from Nebraska soil in Nebraska, rather than being channeled out-of-state.").

Thus, the evidence, in the form of official ballot language, public statements to the voters by the petition's sponsors, voter pamphlets, and television advertising, all establish that Initiative 300 was "adopted with a discriminatory purpose." *Smithfield*, 367 F.3d at 1065.

The State does not dispute the evidence showing that out-of-state corporations, and especially Prudential Insurance Company of New Jersey, were

the public targets of the sponsors of Initiative 300. (Brief of Appellants at 60, 62). Instead, it claims some of the individuals performing drafting work on the initiative had a broader purpose: "The animus directed towards Prudential Insurance Company was based not on the fact that Prudential was an out-of-state insurance company, but that it was a large non-family farm corporation purchasing substantial tracts of farmland." (Brief of Appellants at 62). However, this profession of retrospective intent of selected supporters of the amendment is irrelevant in light of the public voice of the petition campaign, as shown above.

Additionally, the contemporaneous public statements of the amendment's supporters differ from their recent declarations. (App. Vol. IV, p. 950) (Omaha World Herald article dated 6-22-82 quoting Drey Samuelson as saying Initiative 300 would prohibit outside investors from skimming profits from Nebraska and sending them to distant corporate headquarters). *See Hazeltine III*, 340 F.3d at 594 (pamphlet stating that without the passage of Amendment E, "Desperately needed profits will be skimmed out of local economics and into the pockets of distant corporations.").

The State cannot simply wish away and ignore the protectionist rhetoric of the historical record. *See Hazeltine III*, 340 F.3d at 593-94. Declarations to the contrary 23 years after-the-fact should be viewed with a healthy degree of skepticism.

Thus, the historical background, sequence of events, and statements of the amendment's drafters all show that Initiative 300 was adopted with a discriminatory purpose: prohibiting "out-of-state" corporations from buying farmland in Nebraska. As such, the Amendment must be subjected to "the strictest scrutiny" and can be upheld "only if" the State can establish the State of Nebraska has "no other means to advance a legitimate local interest." *Smithfield,* 367 F.3d at 1065.

3. Contemporaneous Legislative History and News Accounts Regarding the Adoption of Initiative 300 Establish that it was Motivated and Adopted with a Discriminatory Purpose.

The sworn testimony of the drafters and originators of Initiative 300, discussed in detail above, evidences a discriminatory purpose underlying its creation, promotion, and adoption. This testimony is consistent with additional historical and operative facts surrounding the adoption of Initiative 300 demonstrating its intent was discriminatory in nature under the Commerce Clause.

The legislative history of Initiative 300's predecessor legislation is one example. As confirmed by the deposition testimony of Messrs. Burrows and Oxton, LB 184, a 1981 legislative bill introduced by Burrows to statutorily ban corporate farming, served as the starting point for the drafters of Initiative 300. (App. Vol. III, p. 515-516 at 68:22 - 69:2). (*See also* App. Vol. IV, p. 946) (Lincoln Journal article titled "*Battle Lines Drawn on Proposed Family Farm*

Amendment" dated 10/04/1982).[4]; (App. Vol. IV, p. 947) (Lincoln Star article titled "*Farm Act Contenders Outline Positions*" dated 10/11/1982.).

The Court can find evidence of the discriminatory intent behind Initiative 300 by looking at the legislative history of LB 184. The sentiment of its sponsors and supporters was captured in committee testimony before the Agriculture and Environment Committee and in the floor debate of the Nebraska Legislature during the 1981 legislative session. The public debate surrounding LB 184 the year before Initiative 300's adoption sheds a revealing light on the protectionist economic motivation harbored by the supporters of Initiative 300. (*See, e.g.* App. Vol. IV, p. 805-942) (LB 184 Committee Testimony before the Agriculture and Environment Committee dated 03/05/1981, p. 48).

When explaining LB 184 to his colleagues during floor debate, Sen. Burrows stated that:

> Now as the national corporations, . . . have more profits in the oil industry, the lenders, and the potential to buy massive amounts of farmland, we become the prime hunting ground out of the Midwest for the purchase of

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[4] These news articles were admissible to demonstrate the intent of the drafters and the protectionist rhetoric placed before the public during the campaign for Initiative 300. They were also admissible under Fed. R. Evid. 803(16) as statements in "ancient documents." (App. Vol. IV, p. 943 & 950); *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) *See Ammons v. Dade City*, 594 F. Supp. 1274 (D. Fla. 1984) (articles were admissible based on the ancient documents exception to the hearsay rule).

> large corporations, for the purchase of farmland by large corporations… I think you are going to have to make the choice on your vote of whether you think it is okay for the multinationals that do have the money and the power in this country to come in and own the land, take the profits out of the state . . . .

(App. Vol. IV, p. 805-942) (LB 184 Floor Debate Testimony dated 05/05/1981, p. 4557; *Id*. at pp. 4559-60).

These statements by Sen. Burrows and the other supporters of LB 184 before the Agriculture and Environment Committee and on the floor of the Nebraska Legislature laid the foundation for the creation, promotion, and adoption of Initiative 300 only one year later.

Contemporaneous news accounts also demonstrate the protectionist rhetoric placed before the public during the campaign for Initiative 300: During a public debate with an opponent of Initiative 300, George Burrows, when discussing his unsuccessful legislative attempts to pass anti-corporate legislation, was quoted as saying that Initiative 300 appeared to be the only recourse, unless "you want Prudential and other big corporations to come in and perpetually own agriculture in Nebraska." (App. Vol. IV, 949) (Omaha World-Herald article titled "*Debaters Call Initiative 300 Flawed, Needed*" dated 10/13/1982).

Drey Samuelson, writing on behalf of the NFU, the chief sponsor of Initiative 300, was quoted as saying the effect of "our constitutional amendment … on Nebraska agriculture if it should be placed on the ballot and be favored by a

majority of our state's voters" would be to prohibit outside investors from skimming profits from Nebraska to distant corporations. Samuelson was further quoted as stating that Initiative 300 was needed because:

> Large corporate farms send the profit they make from farming to the corporate headquarters for redistribution to the stockholders. Except to the extent that these stockholders live in Nebraska, certainly no large percentage, this money is lost to Nebraska, and its loss will be felt in Omaha just as its loss will be felt in Hastings.

(App. Vol. IV, p. 955) (Omaha World Herald article titled "*Family Farms Help Bind Social Fabric*" dated 06/22/1982).

Not only was Prudential a target for supporters of Initiative 300, but William Foxley of Foxley Herd Co., a Colorado cattle feeder with operations in Nebraska, was also a frequent target of the Committee to Preserve the Family Farm. (App. Vol. IV, p. 945) (Lincoln Journal article titled "*3-County Operation Mortgaged for $6.5 million from Land Bank*" dated 04/10/1982).

The protectionist motive evidenced in the legislative history of LB 184 (1981) and in the contemporaneous articles discussed above is legally significant. In *Hazeltine III*, the "pro" statement in a "pro-con" brochure compiled by South Dakota's Secretary of State and disseminated to South Dakota voters prior to the referendum on Amendment E warned that "without the passage of Amendment E, '[d]esperately needed profits will be skimmed out of local economies and into the

pockets of distant corporations." *Hazeltine III*, 340 F.3d at 594 (*quoting* Constitutional Amendment E: Attorney General Explanation). The "pro" statement further warned that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations." *Id*. This Court interpreted the "pro" statement to be "brimming with protectionist rhetoric" and found it to be direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state business. *Id*. at 593-94.

The drafters and supporters of Amendment E did not reinvent the wheel when they presented Amendment E to the voters of South Dakota in 1998. Rather, they borrowed a page from Nebraska, not only in drafting the language of Amendment E from Initiative 300, but also in the way that they waged their public campaign for Amendment E. The ominous warning that "[d]separately needed profits will be skimmed out of local economies and into the pockets of distant corporations" resonated with the voters of South Dakota. This tactic was effectively used sixteen years prior in Nebraska by Oxton, Burrows, and other key movers behind Initiative 300 to influence and convince the voters of Nebraska to "keep outsiders" from "encroaching upon" Nebraska family farms and environmental resources. The public statements and testimony made by the

drafters and supporters of Initiative 300 prior to and contemporaneous with its passage in 1982 are evidence that Initiative 300 was "brimming with protectionist rhetoric" when it was adopted by the voters of Nebraska.

It is well-settled in Commerce Clause jurisprudence that "the central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures [between the states] the Constitution was designed to prevent." *Ben Oehrleins and Sons and Daughter, Inc v. Hennepin County*, 115 F.3d 1372, 1385 (8th Cir. 1997) (*quoting C & A Carbonne, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)). The impetus behind the introduction of LB 184 during the 1981 legislative session, and the rationale underlying the adoption of Initiative 300, was, according to its supporters, to "catch-up" with our Midwestern sister states that had already adopted family farm acts and to "close the barn door" to outside investors.

Thus, the object of Initiative 300 was, and is, local economic protectionism. This Court removed South Dakota's economic barrier because its purpose was to interfere with interstate commerce. The Court should do the same in this case, and tear down the wall that is Initiative 300, an economic barrier that surrounds Nebraska and that directly interferes with the free flow of commerce between the states.

E. Initiative 300 Discriminates Against Interstate Commerce on Its Face.

The second "indictor" of discrimination against interstate commerce, as set forth by this Court, is facial discrimination. Under this Court's dormant Commerce Clause analysis, discrimination against interstate commerce may be determined from provisions which, on their face, favor in-state business and disfavor out-of-sate business. Under the plain language of Initiative 300, a corporation desiring to qualify as a "family farm corporation" must have at least one stockholder residing on or actively engaged in the day-to-day labor and management of the farm or ranch. Consequently, the district court held Initiative 300 discriminates on its face against out-of-state interests. (App. Vol. VIII, p. 1984, 1986).

This facial restriction has very real and direct consequences for interstate commerce. For example, corporations desiring to engage in the ownership and feeding of cattle by placing them in feedlots in Nebraska face restrictions under Initiative 300 on their ability to do business that they do not face in other states. (App. Vol. III, p. 464-465 at ¶¶ 3, 6-7; p. 468-471 at ¶¶ 3-4, 6-9, 11). It is undisputed that individuals desiring to engage in the feeding of cattle, as a corporate entity, may not do so in Nebraska, as owners, unless they qualify as a family farm corporation under Initiative 300. (App. Vol. III, p. 494 at n. 15). It is further undisputed that Nebraska cattle feeders (such as Plaintiff Beck) are

prohibited by Initiative 300 from engaging in business with corporations from other states by providing custom feeding services (feeding cattle owned by others) because such corporations may not own cattle in Nebraska feedlots under the plain language of Initiative 300. (App. Vol. III, p. 494-495 at n. 16).

1. Initiative 300 Does Not Regulate Evenhandedly.

The State argues that since all non-family farm corporations are subjected to the restrictions of Initiative 300, the amendment is neutral on its face. Specifically, the State argues that Initiative 300 does not discriminate against interstate commerce because it burdens some Nebraska residents along with non-residents. The rationale for this being that some people from other states could, at least in theory, commute daily from a neighboring state such as Kansas, while some Nebraska residents could not meet the day to day labor requirement due to living too far from the farm. Theoretical scenarios, however, do not alter the fact that Initiative 300 does not, on its face, regulate "even-handedly."

The fact that some Nebraska residents may be burdened along with non-residents (due to their distance from a particular farm operation), does not save Initiative 300 from invalidation under the dormant Commerce Clause. The State's argument disregards a whole line of Supreme Court precedent holding that mere avoidance of overtly discriminatory language against non-residents does not save a provision from facial invalidity where it operates, by its plain terms, to disfavor

out-of-state business. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 112 S. Ct. 2019 (1992), the Supreme Court considered, and rejected, an argument similar to the State's, citing instances where the Court had invalidated laws discriminating against interstate commerce even where some in-state residents were also burdened. *Id*. at 361, 112 S. Ct. at 2025. The Court noted that "In *Brimmer v. Rebman*, 138 U.S. 78, 11 S. Ct. 213 (1891), we reviewed the constitutionality of a Virginia statute that imposed special inspection fees on meat slaughtered more than 100 miles from the place of sale. We concluded that the statute violated the Commerce Clause even though it burdened Virginia producers as well as the Illinois litigant before the Court." *Id*. They also noted that in *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S. Ct. 295 (1951), the Court invalidated a Madison, Wisconsin city ordinance that "made it unlawful to sell milk as pasteurized unless it was processed at a plant 'within a radius of five miles from the central square of Madison." *Id*. at 361, 112 S. Ct at 2025 (*quoting Dean Milk*, 340 U.S. at 350). In *Dean Milk* the Court held that although "the ordinance also discriminated against all Wisconsin producers whose facilities were more than five miles from the center of the city" this did "not mitigate its burden on interstate commerce," *id*. at 362-363, since the regulation, "in practical effect excluded from distribution in Madison wholesale milk produced and pasteurized in Illinois." *Id*. at 362.

As evidenced by the *Gratiot* opinion, the regulatory scheme must be reviewed beyond superficial neutrality. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994). Mere avoidance of overtly discriminatory language against non-residents does not save a provision from facial invalidity where it operates, by its plain terms, to disfavor out-of-state businesses. In *Camps Newfound/Owatonna v. Harrison, Main*, 520 U.S. 564, 117 S. Ct. 1590 (1997), a real estate tax exemption provision was challenged under the dormant Commerce Clause and found to be facially discriminatory against interstate commerce. *Id*. at 576, 117 S. Ct. at 1598. Although the statute did not expressly prohibit Maine camps from providing services to nonresidents, the Court found it was nonetheless invalid on its face. In language applicable to the present case, the Supreme Court stated, "We have consistently . . . held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *Id*. (*quoting New England Power Co. v. New Hampshire*, 455 U.S. 331, 335, 102 S. Ct. 1099, 1100 (1922)) (*emphasis added*); *Accord Philadelphia v. New Jersey*, 437 U.S. 617, 627, 98 S. Ct. 2531, 2537 (1978) (a state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders.").

Thus, a statute need not "involve a total prohibition" to be discriminatory on its face against nonresidents. *Id*. at 578, 117 S. Ct. at 1599. As the U.S. Supreme Court has held, where a statute, on its face, "provides a strong incentive" to discriminate against nonresidents, it is facially discriminatory. *Id*. ("we held the statute facially discriminatory, in part because it 'tended to discourage corporations from plying their trades in interstate commerce.'") (*quoting Fulton Corp. v. Faulkner*, 516 U.S. 325, 333, 116 S. Ct. 848, 855 (1996)). (See App. Vol. VIII, p. 1985).

2. The Family Farm Exception Facially Discriminates Against Out-of-State Corporations.

The State's primary defense of Initiative 300 in its brief is predicated on a heretofore unknown loophole they claim exists for family farm corporations from other states. The State (echoed by their amici) argues that Initiative 300 is not discriminatory against out-of-state interests because it makes no distinction between Nebraska family farm corporations and family farm corporations from other states. This argument is stated repeatedly in the State's brief and in the briefs of their amici:

> Nowhere is it required, in order to qualify for the Family Farm Exception, that the majority shareholder or his family members must reside on or be actively engaged in the day-to-day labor and management of a Nebraska farm. (Brief of Appellants at 53) (*emphasis in original*). . . . The requirements of Initiative 300 apply equally to residents and nonresidents of Nebraska and the Family Farm Exception provides an exception for family farm or ranch

> corporations, regardless of where that farm is located. (Brief of Appellants at 54) (*emphasis in original*). . . . . [T]he Family Farm Exception does not unduly burden interstate commerce as it does not discriminate against a corporation on its status of being an out-of-state corporation, but instead on its status of being a non-family farm corporation. Therefore, Initiative 300 on its face, does not violate the Commerce Clause. . . . (Brief of Appellants at 54). . . . Nothing requires that the majority shareholder or their family members reside on or provide the day-to-day labor and management of the Nebraska farm or ranch in order to qualify for the Family Farm Exception." (Brief of Appellants at 59-60) (*emphasis in original*). . . . The qualifying provision allows all family farm corporations to own farmland in Nebraska, regardless of where the corporation is incorporated. (Brief of Appellants at 60).

(*See also* Brief of Amici Curiae R-CALF, et al. at 6) ("a compliant family farm corporation in California . . . can buy Nebraska land, and operate it as part of its farm."). This newly-crafted interpretation of Initiative 300 cannot overcome two stubborn obstacles: the law and the facts.

The State's proposed reading of the Family Farm Exception to Initiative 300 is untenable for several reasons: 1) the plain language of the Amendment precludes the proposed interpretation; 2) the proposed interpretation contradicts the ballot language presented to voters; 3) the proposed interpretation is inconsistent with the Nebraska Supreme Court's reading of the same Amendment.[5]

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[5] The Court may also take judicial notice of the brief filed by the State in *Hazeltine III*. (Case No. 02-2366) ("Two effective ways of tying owners to the land are to require residence or day-to-day labor.").

a. The State's Proposed Reading of the Family Farm Exception to Initiative 300 is Inconsistent with a Plain Reading of its Terms.

In ascertaining the intent of a constitutional provision from its language, the words must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense. *See Pig Pro Nonstock Co-op. v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). A court may not supply any supposed omission, or add words to or take words from the provision as framed. *Id*. It must be construed as a whole, and no part will be rejected as meaningless or surplusage, if it can be avoided. If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by the layperson. *Id*. The State's interpretation of the Family Farm Exception violates these basic tenants of constitutional construction, as it attempts to read the provision out of context, and as if the provision was unrelated to the rest of the amendment.

Initiative 300 provides, in relevant part as follows:

> "No corporation . . . shall acquire . . . an interest . . . in any title to real estate used for farming or ranching **in this state**, or engage in farming or ranching.
>
> . . .
>
> These restrictions shall not apply to (A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a

> family . . . at least one of whom is a person **residing on** or actively engaged in the day to day labor and management of **the** farm or ranch. . . .

Neb. Const. art. XII, § 8 (*emphasis added*).

The Amendment, then, by its plain terms, imposes restrictions on farm ownership and operation "in this state [Nebraska]." When the amendment requires a family farm corporation member to reside on or be actively engaged in the day to day labor of "the farm" in order to be exempt from the prohibition on corporate ownership of farm land, it clearly means "the farm" in Nebraska, not in New Jersey or California. Despite this, the State and its amici are attempting to morph the language from "the farm" to "any farm."[6] The plain language of the amendment does not allow this construction, as is clear from even a cursory look at the terms. (See Websters New Dictionary of the English Language, 2001) (definition of "the" – 1: "that in particular") (definition of "any" – 1: "one chosen at random"). Thus, the State's attempt to salvage the family farm exception with this new interpretation of Initiative 300 is simply what it appears to be: a desperate attempt to re-write the provision. The Family Farm Exception imposes a facial

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[6] In arguing against the facial invalidity of the amendment, the State also relies on the opinion of the trial court in *Hazeltine* on this issue. (Brief of Appellants at 52). However, on appeal this Court decided the matter on the discriminatory purpose issue, and did not reach the question of facial discrimination. Thus, the trial court's opinion is of no precedential value on this issue.

disadvantage on residents of other states and it should be invalidated. *Camps Newfound/Owatonna*, 520 U.S. at 578, 117 S. Ct. at 1599.

b. The State's Proposed Reading of the Family Farm Corporation Exception is Inconsistent With the Ballot Language Presented to Nebraska Voters.

It is undisputed that the ballot language submitted to Nebraska's voters for Initiative 300 specifically stated the Amendment's purpose was to prohibit further purchases of agricultural land "by any corporation . . . other than a Nebraska family farm corporation." (*emphasis added*) See Section I.D.1., *supra*, at 26-30.

c. The State's Proposed Reading of the Family Farm Corporation Exception is Inconsistent With the Nebraska Supreme Court's Interpretation of the Provision.

The State's proposed reading of the Family Farm Exception, under which out-of-state family farm corporations could allegedly qualify to own and operate farms or ranches in Nebraska without having a family member reside in Nebraska and without being engaged in the farm labor on a day to day basis in Nebraska, is inconsistent with the Nebraska Supreme Court's interpretation of the same provision. *See Pig Pro Nonstock Cooperative v. Moore*, 253 Neb. at 91, 568 N.W.2d at 220 ("the plain language of Article XII § 8" prohibits "absentee ownership and operation of farm and ranch land by a corporate entity."). *See also id*. at 91, 568 N.W.2d at 228 ("It is precisely this type of absentee ownership and operation of farm and ranch land by a corporate entity which the plain language of

article XII, § 8, prohibits.") (*emphasis added*). *Accord Hall v. Progress Pig, Inc.*, 259 Neb. 407, 417 610 N.W.2d 420, 429 (2000) ("If the management and labor activities can be performed by a shareholder who does not reside on the farm or ranch, then absentee ownership and management is possible. It is the absentee ownership and operation of farm and ranch land by a corporate entity which the plan language of article XII, § 8, prohibits") (*emphasis added*); (*quoting Pig Pro,* 253 Neb. at 91, 568 N.W.2d at 228); *Id*. ("Article XII, § 8 requires that the shareholder must be on the farm or ranch, either by residing on the site or being actively engaged in the day-to-day labor and management.") (*emphasis added*).

Therefore, the State's argument, that a family farm corporation in another state can qualify for the family farm exemption, is baseless in light of the Nebraska Supreme Court's clear statement that the provision requires residency "on the site." This Court cannot seriously be expected to interpret "on the site" as encompassing a lettuce farm in California or a cranberry bog in Massachusetts.

Initiative 300 intentionally (and expressly) gives advantages to residents over non-residents, and favors those able to work in Nebraska on a daily basis over those who cannot. It does not take any great imagination to envision the Commerce Clause challenges (and injunctions) that would ensue if a state enacted a constitutional amendment dictating that only Nebraska residents, or those able to work in Nebraska or on a daily basis, could engage in the practice of law, own a

grocery store, obtain a legal interest in a natural gas well, or buy a business in Nebraska. When put in these terms, it is clear Initiative 300 discriminates against interstate commerce on its face. Accordingly, the decision of the District Court should be affirmed.

F. The State Of Nebraska Has Other Means to Advance Legitimate Local Interests.

As Initiative 300 is discriminatory both on its face and in its purpose, as shown above, it must be subjected to "the strictest scrutiny" and can be upheld "only if" the State can establish the State of Nebraska has "no other means to advance a legitimate local interest." *Smithfield*, 367 F.3d at 1065. In this regard, the District Court held, "The Defendants . . . have not met their burden of proving that Initiative 300 is the exclusive means of advancing legitimate local interests." (App. Vol. VIII, p. 1988).

The State argues that "even if Initiative 300 is discriminatory it should be upheld as the State has no other means to advance a legitimate local interest." (Brief of Appellants at 67) They identify these "local interests" as preventing absentee land ownership, presenting negative effects on the social and economic culture of rural Nebraska, and preventing poor stewardship of the state's land, water and natural resources. *Id*. at 67-68 The State admits that the third enumerated interest (stewardship of natural resources) can be addressed through other means. *Id*. at 69. However, it asserts that prevention of absentee land

ownership, and the prevention of negative effects on the social and economic culture of rural Nebraska can be addressed in no other way than through Initiative 300. *Id.*

The State's argument concerning prevention of absentee ownership of land is contradicted by their interpretation of the family farm exception, under which they claim out-of-state corporations may own farmland and/or engage in farming or livestock operations without residing in Nebraska or performing daily labor in Nebraska. Furthermore, the State fails to show why land use and environmental regulations would not address problems associated with absentee ownership.

That leaves only the contention that "the negative effects of corporate ownership of land on the social and economic culture of rural Nebraska can only be prevented by drafting the statute in such manner as to prohibit all corporations from owning farmland in Nebraska, which is exactly the prohibition found in Initiative 300." (Brief of Appellants at 70). The State, however, does not address why no other means is available to address these effects.

Instead, the State merely emphasizes the importance of the asserted local interests. However, as in *Hazeltine*, the legitimacy of the State's interests is not at issue. *Hazeltine III*, 340 F.3d at 597. As explained by this Court, "[t]he focus of this test of the 'strictest scrutiny,' however, does not concern the strength of the interest advanced by the challenged law. Rather, the question is whether

reasonable non-discriminatory alternatives exist to advance the interests.' *Hazeltine III*, 340 F.3d at 597. As the Court in *Hazeltine* stated, the record "contains no evidence that suggests, evaluates, or critiques alternate solutions." *Id*. (discussing alternative policies). As in *Hazeltine*, the State "ha[s] not satisfied their burden of showing that non-discriminatory alternatives would not advance [those] interests . . . ." *Hazeltine III*, 340 F.3d at 597.

To the extent Nebraska has a legitimate interest in addressing environmental, economic or land use concerns that it has asserted as interests underlying the challenged provision, the State has not established, and cannot establish, that it has "no other means" to advance such interests. Environmental regulation, land use regulation, and non discriminatory social or economic policies of various forms have not been shown to be ineffective or unavailable. In fact, Nebraska has adopted some such provision in recent years. *See*, *e.g.*, the Livestock Waste Management Act, Neb. Rev. Stat. § 54-2416-2435.[7]

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[7] While neither space nor considerations of legal relevance allow a response to each assertion made in the numerous amicus briefs, the Plaintiffs are compelled to respond to the assertions contained in the brief of the Sierra Club. According to the Sierra Club, "'[I]n the mid-1970's Nebraskans saw the fragile Sandhills area, located in the northwestern corner of the state, destroyed by corporation owners. . . ." (Brief of Amicus Curiae Sierra Club at 2). This brief also alleges "the developments by the corporate farms in the Sandhills region destroyed the land itself and prevented any further sustainable agriculture production." *Id*. at 3. The undersigned counsel for the Plaintiffs, a native of a farm/ranch in the Nebraska Panhandle, assures

Consequently, the challenged provision, being discriminatory against interstate commerce on its face, and having been adopted with a discriminatory purpose, in invalid per se under the dormant Commerce Clause.

II. THE COMMERCE CLAUSE CLAIM WAS APPROPRIATELY ADJUDICATED BY SUMMARY JUDGMENT.

The district court appropriately adjudicated the Commerce Clause claim by summary judgment. This is particularly appropriate since a state law that discriminates against interstate commerce is "per se invalid" unless its defenders can "demonstrate under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest." *Hazeltine III*, 340 F.3d at 593. The district court below stated, "When it is apparent from the language of a statute, or a state constitutional amendment, that its effect is to burden out-of-state economic interests and benefit in-state economic interests, the party challenging it should not be required to bear the burden of an evidentiary hearing to prove the obvious." (App. Vol. VIII, p. 1986).

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the Court that: 1) The Sandhills are not found in the "northwestern corner" of Nebraska, and 2) The Sandhills were not destroyed in the 1970's. The Court may take judicial notice of the fact that the Sandhills cover one-fourth of Nebraska (19,600 square miles) and stretch 265 miles across. (*See* http://nebraskapartners.fws.gov/ne4.htm). Approximately eighty-five percent (85%) of the Sandhills remain in native grass. (See http://www.nationalgeographic.com/wildworld/profiles/terrestrial/na/na0809.html) The remainder is primarily in other agricultural use (farmland).

The State argues the District Court's order granting summary judgment was improper, pointing to affidavits of supporters of the amendment purporting to attest to other, non-discriminatory purposes for the Amendment. However, this Court's analysis in *Hazeltine III* does not require a plaintiff to prove a discriminatory purpose to the exclusion of any other purpose or motivation. In fact, this Court stated, in discussing the first tier of dormant Commerce Clause analysis, that "discrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose," *Hazeltine III*, 340 F.3d at 593 (*emphasis added*).

The formulation of this judicial test, as well as its application in *Hazeltine*, makes it obvious that a challenged provision may serve some "legitimate local interest" while at the same time having been adopted with a discriminatory purpose in violation of the Commerce Clause. *Hazeltine III*, 340 F.3d at 593. Contrary to the argument of the State, evidence that legitimate local interests are served by a challenged provision does not negate evidence of discrimination against interstate commerce. *See Hazeltine III*, 340 F.3d at 593-96 (discussing evidence of discriminatory purpose, as well evidence of environmental and economic concerns, and concluding "the intent behind Amendment E was to restrict in-state farming by out-of-state corporations, . . . in order to protect perceived local interests.").

Unlike rational basis analysis, under which any legitimate purpose will generally save a provision, the Supreme Court applies "strictest scrutiny" to a provision "motivated by a discriminatory purpose" under the test for Commerce Clause compliance. *Hazeltine III*, 340 F.3d at 597 (*citing Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 101, 114 S. Ct. 1345 1351, (1994)). Thus, even though the proponents of South Dakota's Amendment E presented evidence purporting to show legitimate economic and environmental purposes for the amendment, the provision was still unconstitutional. *Id*. Such evidence, like the declarations submitted by the State purporting to show personal, private motivations of selected supporters of the amendment, is irrelevant to whether Initiative 300 was adopted to serve a discriminatory purpose. Moreover, such evidence fails to rebut Plaintiffs' evidence demonstrating that the Amendment was promoted with protectionist rhetoric, and was presented to Nebraska voters with facially discriminatory ballot language. *See Smithfield Foods*, 367 F.3d at 1065. In other words, the testimony of promoters who now profess to have had non-discriminatory motives—motives that were not evident in the public voice of the petition campaign at the time the Initiative was enacted—fails to rebut the fact that the Initiative was promoted to the public as serving protectionist ends.

Applying *Hazeltine* to the record facts, the determination of whether Initiative 300 was adopted with a discriminatory purpose under the Commerce

Clause was a question that was appropriately decided by the District Court as a matter of law. In fact, the parties had jointly expressed agreement to the Court that the issue was appropriate for summary judgment adjudication. (App. Vol. VIII, p. 1969). *Hazeltine* and the unrebutted facts before this Court mandate invalidation of the Initiative as a matter of law.

III. INITIATIVE 300 VIOLATES THE AMERICANS WITH DISABILITIES ACT.

A. The ADA Did Not Abrogate the State's Sovereign Immunity.

The State argues on appeal that the District Court lacked jurisdiction to hear Dahlgren and Ehler's Americans With Disabilities Act ("ADA") claim due to the State's sovereign immunity. As the District Court noted, this Court has clearly held that prospective injunctive relief against state officials under the ADA is proper. *See Randolph v. Rogers*, 253 F.3d 342, 347-348 (8th Cir. 2001); *Gibson v. Ark. Dep't of Corr.*, 265 F.3d 718, 722 (8th Cir. 2001); *Grey v. Wilburn*, 270 F.3d 607, 609 (8th Cir. 2001). Thus, the State is asking this Court to plow old ground.

For the first time, the State claims that even though the Eighth Circuit has held that prospective injunctive relief is proper, it was unconstitutional for Congress to abrogate the States' sovereign immunity under the ADA. This issue was not pled in the State's Answer as an affirmative defense. (*See* App. Vol. I, p. 28-29). Further, the State never asked the District Court to certify this question to the United States' Attorney General as required by 28 U.S.C. § 2404 and Fed. R.

Civ. P. 24(c). *See Max M. v. New Trier High School District*, 859 F.2d 1297, 1300 (7th Cir. 1988)("We decline to consider constitutional arguments that are offered undigested.").

Finally, the U.S. Supreme Court recently vacated and remanded this Court's decision in *Bill M. v. Nebraska Department of Health and Human Services*, 408 F.3d 1096 (2004), in light of its holding in *United States v. Georgia, et al.*, ____ U.S.____, 126 S. Ct. 877, (2006). In *Bill M.*, this Court relied on *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) to hold that extension of Title II of the ADA to the states was not a proper exercise of Congress' power unless it had been superseded by the U.S. Supreme Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004). Finding that Title II abrogation in that case had not been superseded by *Lane*, this Court dismissed the case seeking home and community-based Medicaid-funded services.

In *Bill M.*, 408 F.3d 1096, in contrast to the present case, this Court noted that the United States had intervened to defend the statutory abrogation. In *United States v. Georgia*, 126 S. Ct. 877, the U.S. Supreme Court concluded that Title II validly abrogates state sovereign immunity creating a private right for damages for conduct that violates the Fourteenth Amendment. Thus, the Supreme Court has recently limited rather than extended state sovereign immunity under the ADA. The claim at issue is simply for prospective injunctive relief (not money damages

or Medicaid funded services) and as this Court has clearly held, Congress has validly abrogated the State's sovereign immunity.

B. Initiative 300 Violates The ADA and Must Be Struck Down.

1. Overview of the ADA Claim.

The ADA, Title II, provides in pertinent 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. The ADA defines public entity to include "[A]ny State or local government; [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131. The State has admitted that they are public entities under 42 U.S.C. § 12131 of the ADA and are responsible for administering and enforcing Initiative 300. (App. Vol. III, p. 493 at no. 11, 12).

In adopting the ADA, Congress set forth a broad goal of "providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999). Under the ADA, Congress found that, "Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position

of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." *Id.*; 42 U.S.C. § 12101(a)(7).

In *Bay Area*, 179 F.3d 725, the Ninth Circuit, in referencing the language in 42 U.S.C. § 12101(a)(7), held, "This sweeping language -- most noticeably Congress's analogizing the plight of the disabled to that of 'discrete and insular minorities' like racial minorities, -- strongly suggest that § 12132 should not be construed to allow the creation of spheres in which public entities may discriminate on the basis of an individual's disability." *Id*. at 731 (internal citations omitted.).

The provisions of Title II of the ADA dealing with public services are also quite clear. 42 U.S.C. § 12131 defines a qualified individual with a disability as:

> [A]n individual with a disability who, with or without reasonable modification to rules, policies, or practices, with the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or their participation in programs or activities provided by a public entity.

The elements of a Title II claim follow simply from the Act as follows:

1. That the plaintiff is or represents the interests of "a qualified individual with a disability";

2. That such individual was either excluded from participation in or denied the benefits of some public entity service, programs, or activities or was otherwise discriminated against; and
3. That such exclusion, denial of benefits or discrimination was by reason of the plaintiff's disability.

Heather K. by Anita K. v. City of Mallard, 946 F. Supp. 1373, 1383 (N.D. Iowa 1996); *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001).

A public entity must make its services, programs, or activities "readily accessible" to disabled individuals. *See* 28 C.F.R. § 35.150 ("A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."). Against this backdrop, it is clear the District Court correctly found that Initiative 300 violates the ADA.

2. Ehler and Dahlgren are Qualified Individuals with a Disability under the ADA and are Impacted by Initiative 300.

The State argues at length, without any case support, that Plaintiffs Ehler and Dahlgren are not "qualified individuals with a disability" under the ADA. The record proves otherwise.

Plaintiff Todd Ehler's family currently owns a diversified farm feeding livestock and producing feed grains in Cuming County located near Bancroft, Nebraska, which has been owned and operated by his family for three generations. His father, who is currently 72 years old, has raised cattle on the farm his entire

working career. He is retiring and has discontinued feeding livestock. Throughout Ehler's working career, he has contributed to the management and, until 2000, periodically provided labor to the operation his family farm (App. Vol. I at 149, ¶ 3).

Ehler suffers from Castleman's Disease and POEM's Syndrome. These conditions at various times have resulted in severe loss of balance and strength resulting in his disability from every day normal functions, including walking and the ability to grasp things with his hands. (App. Vol. I p. 150 at ¶¶ 4-6). Due to his disability Ehler is not able to perform the actual physical day-to-day labor necessary to operate his family's farm upon retirement of his father. (App. Vol. I, p. 480 at ¶ 8).

Ehler desires to maintain ownership of the family farm upon his father's retirement and has considered forming a limited liability entity with a neighboring farmer in order to continue feeding livestock and growing of grains. Under his intended arrangement, he would provide the management and marketing while the neighboring farmer would provide the day-to-day labor for the care and feeding of livestock and producing the grains. (App. Vol. III, p. 150-151 at ¶ 9).

Initiative 300 prevents Ehler from implementing his plan and preserving his family farm. (App. Vol. III, p. 151 at ¶¶ 10-14).

Plaintiff Shad Dahlgren owns a minority interest in a family farm corporation, Dahlgren Cattle Company, which operates a cattle feedlot located near Bertrand, in Phelps County, Nebraska. (App. Vol. III, p. 155 at ¶ 2). Dahlgren was involved in an automobile accident at the age of 16. As a result of the accident, he is a paraplegic and is confined to the use of a wheelchair. (App. Vol. III, p. 155-156 at ¶¶ 3-6).

Due to his disability, Dahlgren is not able to perform the actual physical day-to-day labor necessary to operate a farm or ranch. (App. Vol. III, p. 156 at ¶ 7). Dahlgren lives in the City of Lincoln in order to be near his primary personal physician. (App. Vol. III, p. 157 at ¶ 16).

Initiative 300 prohibits Dahlgren from becoming a majority owner of Dahlgren Cattle Company. (App. Vol. III, p. 156 at ¶¶ 8-10). Dahlgren is interested in purchasing a row crop farm (a farm producing corn, soybeans and sorghum) in Eastern Nebraska through use of a limited liability company. (App. Vol. III, p. 156-157 at ¶¶ 12, 15). Initiative 300 prevents Dahlgren from purchasing a Nebraska farm through use of a limited liability company. (App. Vol. III, p. 157 at ¶¶ 14-15).

As the District Court found:

> An individual is considered disabled under the ADA if he or she (1) suffers from a physical or mental impairment, that (2) affects a major life activity; and (3) the effect is substantial. *Bragdon v. Abbott,* 524 U.S. 624, 631

> (1998). The impairment's impact must also be "permanent or long-term." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002). "Major life activities" include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii); 24 C.F.R. § 100.201(b).

(App. Vol. VIII, p. 1993 n.17). The District Court concluded, "Dahlgren and Ehler, therefore, cannot work on farms or at feedlots due to their physical disabilities, and they cannot live on their farms without sacrificing their health and/or livelihoods." (App. Vol. VIII, p. 1994).

3. Initiative 300 Requires Day-to-Day Labor.

In *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000), the Nebraska Supreme Court was asked to examine the constitutional provision "actively engaged in the day to day labor and management of the farm or ranch." Neb. Const. art. XII, § 8.

Ultimately, the Court framed the issue as whether Zahn, the sole shareholder of Progress Pig, was actively engaged in the day-to-day labor and management of the farm as required by article XII, § 8(1)(A). The Court held:

> In the context of article XII, § 8, the phrase "day-to-day labor and management" refers to those activities that occur as a routine part of the farm or ranch operation. "Day-to-day" is defined as "occurring each day; daily." Webster's Encyclopedic Unabridged Dictionary of the English Language 370 (1989). "Actively" means

> "constantly engaged." Webster's Encyclopedic Unabridged Dictionary of the English Language at 15.
>
> Webster's Encyclopedic Unabridged Dictionary of the English Language at 798 defines labor as "work, esp. of a hard or fatiguing kind; toil." Historically, the term "labor" has been associated with physical activity. See *Walsh v. International Fidelity Insurance Co.*, 55 Misc. 2d 565, 285 N.Y.S.2d 327 (1967). *In American Surety Co. of New York v. Stuart*, 151 S.W.2d 886, 887 (Tex. App. 1941), the court noted: "In legal significance labor implies toil; exertion producing weariness; manual exertion of a toilsome nature." This would imply that labor involves physical activity which would be necessary in the day-to-day workings of the farm or ranch. Management is the "act or manner of managing." Webster's Encyclopedic Unabridged Dictionary of the English Language at 870. To manage means to "take charge or care of." Webster's Encyclopedic Unabridged Dictionary of the English Language at 869.
>
> The terms "labor" and "management," as they would commonly be interpreted, would encompass all the activities pertaining to a farm or ranch. Use of the terms "labor" and "management" in conjunction is meant to include all the activities that must be done in the operation of the particular farm or ranch. Thus, to be actively engaged in the day-to-day labor and management of the farm or ranch requires that such person be involved on a daily or routine basis in all aspects of the farm or ranch activities, be it labor or management. Labor would encompass the physical chores attendant to the farm, and management would encompass the mental and business activities of the operation.

Id. at 414-415.

The Court further found that this interpretation is consistent with the requirement that a shareholder either reside on the property or be actively engaged

in the day-to-day labor and management of the farm. *Id*. at 415. Thus, there can be no argument that Initiative 300, as interpreted by the Nebraska Supreme Court, does require actual physical day-to-day labor on the part of the two disabled Plaintiffs in order to pursue their farming objectives. This requirement collides directly with the ADA.

As the District Court held:

> The facially-neutral standards in Initiative 300 have a disparate impact on Dahlgren and Ehler, due to their disabilities. Specifically, Initiative 300 denies Dahlgren and Ehler the benefits of owning agricultural property in limited liability companies, as a result of their disabilities. Non-disabled farm owners who can live on their farms or engage in daily physical labor on their farms are not so precluded.

(App. Vol. VIII, p. 1994).

4. The State Cannot Make Modifications or Accommodate Dahlgren or Ehler Under the ADA.

a. The State Cannot Make Modifications to Initiative 300.

The State misunderstands the regulation promulgated under the ADA with respect to modifications. 28 C.F.R. 35.130(b)(7) does provide that, "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." The

Supreme Court held in *Olmstead v. Zimmering*, 527 U.S. 581, 603 (1995), "The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamental alteration' of the State's services and programs."

However, the proposals the State sets forth on pages 74 through 77 of their Brief are simply not modifications by a public entity as defined in the ADA. All these suggested modifications are merely unfounded and irrelevant suggestions of John K. Hansen not substantiated by any evidence which has any foundation. (*See* App. Vol. V, p. 978-980 at ¶¶ 73-83; p. 1074 – App. Vol. VI, p. 1675). The fundamental problem with Initiative 300 and its inherent conflict with the ADA is that it is in the Nebraska Constitution. Neither the Attorney General nor the Secretary of State of the State of Nebraska could provide a modification to disabled farmers even if they were so inclined. Hansen's suggestions otherwise simply are not modifications as understood in ADA parlance. The District Court agreed with the Plaintiffs' argument, holding:

> If this were a case brought under the ADA to challenge a rule, policy or practice, one might inquire whether the Plaintiffs had requested "reasonable modifications" to accommodate their disabilities under 42 U.S. C. § 12131 (2). A reasonable accommodation of the Plaintiffs' disabilities might be to require that they lease their property to a qualified person, or employ such a person to reside on the property to perform day-to-day labor and management. Because it is not a mere policy or practice that is challenged, however, but a provision in the

> Nebraska Constitution, it is fruitless for the Plaintiffs to request an accommodation that the Defendants cannot grant.

(App. Vol. VIII, p. 1995).

The Nebraska Supreme Court clearly requires day-to-day labor (or physical residence) which Dahlgren and Ehler cannot perform in order to comply with its provisions. The State of Nebraska as a public entity has not and cannot provide reasonable modifications to Dahlgren or Ehler or any other individual with a disability. This clearly makes Dahlgren and Ehler qualified individuals with a disability with no hope of reasonable modifications.

b. The State Cannot Accommodate Dahlgren and Ehler Under Initiative 300.

The State argues in the present case that the language of Initiative 300 creates several reasonable accommodations in order to enable disabled Plaintiffs to qualify for the Family Farm Exception. (Brief of State Appellants, p. 79-82).

The State cannot accommodate Dahlgren and Ehler under the ADA. It is unclear from where the term "accommodation" comes in the State's Brief since it is found nowhere in the statutory scheme under Title II of the ADA or any regulations promulgated thereunder. The term "reasonable accommodations" is found in Title I of the ADA in the employment context. *See* 42 U.S.C. § 12111(9) and 42 U.S.C. § 12112(b)(5)(A-B). Nowhere is the term "accommodation" used in Title II of the ADA.

The suggested corporate formations set forth by the State in its Brief are simply not reasonable accommodations. As the District Court found, the State cannot make reasonable accommodations to disabled individuals since Initiative 300 is contained in the Nebraska Constitution.

5. Initiative 300 Is A Per Se Violation Of The ADA.

Article XII, Section 8(1)(A) of the Nebraska Constitution specifically requires that the disabled plaintiffs at issue perform day-to-day labor. *See Progress Pig*, 259 Neb. at 414, 610 N.W.2d at 428. Thus, Ehler and Dahlgren have presented uncontroverted facts (which the State has not and cannot contest) that: (1) that they are qualified individuals with a disability; (2) that they have been excluded from participation in or denied the benefits of the services, programs, or activities of the State of Nebraska or otherwise been discriminated against by the State of Nebraska; (3) solely by reason of their disabilities.

The State is left with little choice but to argue there may be modifications or accommodations under the ADA since the *Progress Pig* case makes Initiative 300 a per se violation of the ADA that cannot stand. No other provision of the Nebraska Constitution or statute requires day-to-day labor to receive services or participate in activities provided by the State of Nebraska.

An illustrative circuit case to the case at issue is *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999).

In that case, the City of Antioch adopted an emergency zoning ordinance prohibiting the operation of methadone clinics within 500 feet of residential areas. A plaintiff who operated a methadone clinic filed a lawsuit under the ADA, the Rehabilitation Act and 42 U.S.C. § 1983 for violations of the Supremacy, Due Process and Equal Protection Clauses of the U.S. Constitution. The Circuit Court reviewed the district court's denial of a temporary injunction.

The Court found that § 12132 of the ADA constitutes a general prohibition against discrimination by public entities. *Id*. at 731. The Court then held that the ADA applies to zoning because zoning is a "normal function of a governmental entity." *Id*. The Court found that the reasonable modification test does not apply because the ordinance at issue was discriminatory on its face. *Id*. at 733. The court held that, "The only possible modification of a facially discriminatory law that would avoid discrimination on the basis of disability would be the actual removal of the portion of law that discriminates on the basis of disability. *Id*. at 734.

The Court in *Bay Area* found that the reasonable modification's test is not required for all suits under Title II laws, holding that, "The breadth of the ADA's purposes and text reveals that localities remain free to distinguish between land uses to effectuate the public interest - they just must refrain from making distinctions based on what Congress has determined to be inappropriate

considerations." *Id*. at 735. The Court found the ordinance at issue, like Initiative 300, to be a per se violation of § 12132.

In the case at issue, it is simply impossible to reconcile the breadth and text of the ADA with the Nebraska Supreme Court's interpretation of Initiative 300 that day-to-day labor is required to meet the family farm exception. The fact that Initiative 300 was placed in the Nebraska Constitution means that the State Defendants cannot make any reasonable modifications, and "accommodations" is simply not a defense to a Title II ADA claim.

6. The Supremacy Clause Dictates That Initiative 300 Must Yield to the ADA.

In *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), the Supreme Court dealt with the issue of federal preemption. The Court held, "Where a state statute conflicts with, or frustrates, federal law, the former must give way. U.S. Constitution Article VI, Clause 2; *Maryland v. Louisiana*, 451 U.S. 725, 746." *CSX Transportation*, 507 U.S. at 663. *Accord In Re Derailment Cases*, 416 F.3d 787 (8th Cir. 2005); S*outh Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998).

In *CSX Transportation*, 507 U.S. at 664, the Court further held that evidence of preemptive purpose is sought in the text and structure of the statute at issue. It is clear that the breadth and scope of the ADA preempts any state law to the contrary, including Initiative 300. Congress adopted a "clear and comprehensive

national mandate" to eliminate discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). The fact that Congress adopted Title II specifically to deal with discrimination by public entities, including states, shows that the ADA must prevail and that Initiative 300 must fall. The District Court correctly held, "Because Initiative 300 conflicts with the ADA and stands as an obstacle to the accomplishment of Congress's purposes in enacting the ADA, Initiative 300 is invalid under the Supremacy Clause of the United States Constitution." (App. Vol. VIII, p. 1995) (striking down Initiative 300 and awarding attorneys' fees). *See also Hazeltine II*, 202 F. Supp.2d 1020 (D.S.D. 2002) (striking down South Dakota's similar amendment on the basis of the ADA).

The District Court's conclusion, amply supported by uncontroverted evidence on summary judgment, must be affirmed on appeal.

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THE PLAINTIFFS HAVE STANDING TO CHALLENGE INITIATIVE 300.

This Court's holding in *Hazeltine III* demonstrates the Plaintiffs herein have standing to challenge Initiative 300 under the Commerce Clause. Furthermore, a review of the record evidence establishes that Plaintiffs have suffered actual and concrete injuries.

The State's allegation that Plaintiffs lack the requisite standing ignores the plain language of Eighth Circuit precedent and misapplies the tenants of standing

under the Commerce Clause. The State attempts to narrow the scope of standing under Article III is erroneous and, if taken literally, would limit eligible plaintiffs only to those persons or entities who are in violation of Initiative 300.

A. The Plaintiffs Have Suffered Injuries as a Result of Initiative 300.

To have standing, a "plaintiff must have suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, the injury must be traceable to the defendant's challenged action. Third, it must be "likely" rather than "speculative" that a favorable decision will redress the injury." *Hazeltine III*, 340 F.3d at 591 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130 (1992)).

The Plaintiffs meet all three requirements. As a result of Initiative 300, each and every Plaintiff has suffered an injury-in-fact. For example, they have been precluded from engaging in business with out-of-state corporate entities and have been prohibited from gaining full access to the real estate, grain, and livestock market on the national level. (App. Vol. III, p. 460-462 at ¶¶ 10-19; p. 464, 465, 467 at ¶¶ 3-8, 12-15; p. 468-471 at ¶¶ 2-12; p. 474-475 at ¶ 8; p. 480-481 at ¶¶ 9-11; p. 487 at ¶¶ 14-15). Finally, Plaintiffs' injuries can be redressed by a decision holding Initiative 300 unconstitutional, thereby clearing the way for unfettered access to national markets.

"Prudential limitations," as opposed to the Article III limitations recited above, normally prohibit a third party from asserting "rights or legal interests of others in order to obtain relief from injury themselves." See *Hazeltine III*, 340 F.3d at 591. Under the Commerce Clause, however, "cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." *Hazeltine III*, 340 F.3d at 592 (*quoting Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999)). Rather, standing extends to those persons with whom the limited liability entities would ordinarily transact business absent the prohibition. In *Hazeltine III*, the Court found that standing existed for both corporations and individuals that were prohibited from entering into contracts with limited liability entities. *See Hazeltine III*, 340 F.3d at 592. As a result of Initiative 300, the Plaintiffs have been precluded from entering into such contracts. (App. Vol. III, p. 494-495 at no. 15, 16) (App. Vol. III, p. 460-462 at ¶¶ 10-18; p. 468-471 at ¶¶ 3-9, 11; p. 464-467 at ¶¶ 3-15). Accordingly, there can be no question Plaintiffs possess the requisite standing because they can demonstrate Initiative 300 prevents them from transacting business with limited liability entities engaged in farming and ranching in other states. (App. Vol. III, p. 460-462 at ¶¶ 10-18; p. 468-471 at ¶¶ 3-12; p. 464-465, 467 at ¶¶ 3-8, 12-15).

As noted above, the State argues that the Plaintiffs do not have standing under the "broader Commerce Clause requirements" by narrowly reading *Hazeltine III* to require the Plaintiffs to be actively soliciting or engaging in substantial business with out-of-state corporations. However, a clear reading of *Hazeltine III* shows that it does not stand for the proposition advanced by the State.

In *Hazeltine*, both corporations and individuals asserted that Amendment E to the South Dakota Constitution violated the dormant Commerce Clause. Amendment E was substantially identical to Initiative 300. In fact, Initiative 300 served as a blueprint for Amendment E. *See Hazeltine II*, 202 F. Supp. 2d 1020, 1027 (D.S.D. 2002). Prior to finding that Amendment E violated the dormant Commerce Clause, this Court addressed the plaintiffs' standing. The Court found that two South Dakota corporations and two South Dakota individuals had standing to assert the challenge because they were engaged in substantial business with out-of-state corporations affected by Amendment E. The Court explained that the plaintiffs were ranchers engaged in livestock feeding and that Amendment E would prohibit them from feeding livestock owned by third-parties, thereby disrupting and harming their business. *Id*. at 588. In sum, the Court recognized that while Amendment E affected out-of-state corporate entities, the injury flowed directly to the South Dakota farmers/ranchers.

Like the *Hazeltine* plaintiffs, Nebraska ranchers/farmers have been prevented from feeding cattle owned by non-exempt corporate entities because of Initiative 300. (App. Vol. III, p. 494-495 at n. 15, 16). In addition, like South Dakota farmers/ranchers, Plaintiffs have been directly injured by the ban placed on corporate livestock feeding contracts. (App. Vol. III, p. 468-471 at ¶¶ 3-12; p. 460-462 at ¶¶ 10-14, 16-19; p. 464-465, 467 at ¶¶ 3-18, 13).

The State would require the Plaintiffs to violate the provisions of Initiative 300 and contract with out-of-state limited liability companies to create standing. The State effectively argues that Plaintiffs must conspire to break the law to establish standing. However, Courts have long held that a plaintiff need not break the law in order to have Article III standing. *See, e.g. Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 821 (5th Cir. 1979).

Additionally, the State's argument ignores the fact that Nebraska farmers/ranchers and limited liability entities have actually been barred from pursuing business relationships. In *Hazeltine*, Amendment E had not yet foreclosed business opportunities, while in the case at bar, Initiative 300 has foreclosed these same opportunities for years. Unlike the *Hazeltine* plaintiffs, Plaintiffs here have suffered and continue to suffer "actual harm." (App. Vol. III, p. 468-471 at ¶¶ 3-12; p. 459-462 at ¶¶ 7, 9-19; p. 474-476 at ¶¶ 7-8, 10, 12; p. 464-467 at ¶¶ 3-15; p. 480-482 at ¶¶ 9-10, 12, 14, 16-17; p. 487 at ¶¶ 14-15). The

States' standing analysis is contrary to established case law. *See Lujan*, 504 U.S. at 560 (stating that injury may be actual or imminent to satisfy standing).

It is important to note that in *Hazeltine III* the Court compared the injury-in-fact suffered by the South Dakota plaintiffs to even broader examples of injuries giving rise to standing. For example, the Court relied upon case law from the United States Court of Appeals for the District of Columbia for the proposition that denial or loss of a business opportunity satisfies the injury requirement for Article III standing. *Hazeltine III*, 340 F.3d at 592 (citing *Lepelletier v. FDIC*, 164 F.3d 37, 42 (D.C. Cir. 1999)).

In *Lepelletier*, the FDIC unsuccessfully argued that the plaintiff's alleged injury, the denial of an opportunity to develop a business relationship, was insufficient to satisfy Article III standing requirements. The FDIC asserted that the plaintiff was required to have existing contracts that were impaired by the defendant's actions to establish an injury-in-fact. *Id*. at 42. This failed argument is identical to the one made by the State in support of their motion for summary judgment. The *Lepelletier* Court held that "a plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit . . . even though the plaintiff may not be able to show that it was certain to receive the benefit had it been accorded the lost opportunity." *Lepelletier*, 164 F.3d at 42. *See also Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct.

555 (1977) (certainty of success in seeking to exploit a denied opportunity is not required for injury sufficient to satisfy Article III standing).

In sum, this Court has embraced the view that, for standing purposes, a party can show sufficient injury based upon state action negatively effecting more than just existing business relationships. In addition to lost business opportunities, the Court recognized that plaintiffs whose borrowing power, financial strength, and fiscal planning have been reduced or disrupted as a result of state protectionist policies also have standing. *See Hazeltine III*, 340 F.3d at 592 (*citing Clinton v. City of New York*, 524 U.S. 417, 431 (1998)) (concluding party had shown sufficient injury because defendant's action had a negative effect on party's "borrowing power, financial strength, and fiscal planning"). This Court has also noted that an injury-in-fact occurs where plaintiffs are denied access to the market. *See id*. (*citing Ben Oehrleins*, 115 F.3d at 1379). Moreover, this Court clarified that the lost business opportunities, negative affects, or denials may be actual or imminent. *See id*. (*citing Lujan*, 504 U.S. at 560).

This Court in *Hazeltine III*, applied the standing approach utilized in *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999). *See Hazeltine III*, 340 F.3d at 592. Hence, a brief look at *Houlton* is in order.

In *Houlton*, one of the co-plaintiffs satisfied both the constitutional requirements and the prudential considerations for standing based on the

following: (1) the plaintiff, a waste services provider, lost customers; (2) the plaintiff's injury could be traced directly to the town's new ordinance requiring that all residents use a single waste management provider (*i.e.* not plaintiff); and (3) the plaintiff's injury could be adequately redressed by equitable relief and/or damages against the town. *Houlton*, 175 F.3d at 183. The First Circuit aptly stated: "As a classic plaintiff asserting his own economic interests under the Commerce Clause – a constitutional provision specifically targeted to protect those interests – [plaintiff] avoids any concerns relative either to *jus tertii* or to the zone of interests requirement." *Id*. (internal citations omitted). The *Houlton* Court noted that the plaintiff's standing was not eliminated because he failed to allege that he hauled garbage out-of-state or planned to do so. The First Circuit opined that, "an in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing to challenge that law." *Id*. (*citing General Motors Corp. v. Tracy*, 519 U.S. 278, 286, 117 S. Ct. 811, (1997)) (*emphasis added*). The reasoning articulated by the *Houlton* Court applies equally to the present case: Plaintiffs need not prove they are actively engaged in interstate activities to gain standing, rather they must demonstrate that they have suffered harm as a result of a scheme that discriminates against interstate commerce.

This Court's standing analysis in *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), provides further evidence that the Plaintiffs have standing to challenge the continued enforcement of Initiative 300. In *Ben Oehrleins*, 115 F.3d at 1379, both waste-generators and waste haulers-processors challenged a county ordinance prohibiting haulers from delivering designated waste to non-designated waste facilities. *See id*. The Court held that the various waste haulers-processors had standing under the Commerce Clause to challenge the county ordinance, but that the waste-generators did not. The waste-generators, the Court clarified, are the end-line consumers.

The courts are hesitant to find standing for "end-line consumers." The Court noted in a footnote in *Ben Oehrleins* that "[w]e are mindful that granting standing to consumers bearing passed-on costs in commerce cases would have serious repercussions…."*Id*. at 1382, n. 9. In contrast, the Plaintiffs here are not end-line consumers.

The *Ben Oehrleins* Court found that the haulers subject to the ordinance suffered an actual or imminent injury in fact because the haulers who wished to participate in the market for the county's waste were prohibited from gaining access to the waste. *Id*. The Court further found the waste haulers' injuries directly traceable to the county's enactment and enforcement of the discriminatory ordinance. *Id*. The Court also concluded that a decision holding the ordinance

unconstitutional would redress the plaintiffs' injuries, both by clearing the way for recovery of damages and by enjoining further enforcement of the ordinance by the county. *Id*. The *Ben Oehrleins* Court did not find any prudential barriers to standing for the waste haulers directly affected by the county ordinance. *Id*. *See also General Motors Corp. v. Tracy*, 519 U.S. 278, 286, 117 S. Ct. 811 (1997) (holding that plaintiff had standing, even though it was an in-state firm and the discrimination of which it complained of was based on the out-of-state situs of its suppliers, causing financial injury to the plaintiff).

The Court found, however, that the second set of plaintiffs, the "waste generators" (*i.e.*, the end-line consumers), did not have standing due to prudential limitations. *Id*. at 1380-81. The Court so found even though the consumers suffered a cognizable Article III injury-in-fact as the result of the indirect economic injury of having to pay for the passed-on costs incurred by the waste processors-haulers (the directly regulated party). *Id*.

In the instant case the Plaintiffs are more comparable to the waste hauler-processor plaintiffs that had standing, rather than the waste-generator (end-line consumers) plaintiffs that did not. The Plaintiffs, unlike the waste-generator plaintiffs listed above, are not mere consumers in the national agriculture market; rather, they are active participants in the market and are directly regulated by Initiative 300. (App. Vol. III, p. 468-471 at ¶¶ 3-12; p. 459-462 at ¶¶ 7, 9-19; p.

474-476 at ¶¶ 6-12; p. 464-467 at ¶¶ 3-15; p. 485-487 at ¶¶ 2, 7-18; p. 480-482 at ¶¶ 9-10, 12, 14, 16-17). The Plaintiffs, furthermore, do not suffer mere "passed-on costs" of Initiative 300. Instead, the Plaintiffs are prohibited from accessing national agricultural, livestock, and real estate markets, merely because their farms and ranches are located within the borders of Nebraska. *Id*. The *Ben Oehrleins* Court found that the waste haulers-processors had standing because they were denied participation in a market in which they competed and were prohibited from accessing a product essential to their businesses. The Plaintiffs are on equal, if not better, footing than the plaintiffs found to have standing in *Ben Oehrliens*. They are seeking to protect their own rights to unfettered access to the agriculture market and to engage in business with limited liability companies residing both inside and outside of Nebraska. In sum, Plaintiffs seek to challenge the trade barriers constructed by Initiative 300.

The Plaintiffs have established that they have suffered, and continue to suffer, actual and imminent injuries-in-fact as a result of the enforcement of Initiative 300 by the State. The Plaintiffs all claim that enforcement of Initiative 300 by the State causes irreparable harm to these Plaintiffs.(App. Vol. I, p. 8 at ¶ 38), and they adequately pled the requisite standing under Article III.

Plaintiffs Jones, Rickertsen, and Beck have all established that the enforcement of Initiative 300 has prohibited out-of-state corporate entities from

contracting with them in order to raise and feed livestock for slaughter because the out-of-state interests would be engaging in "farming or ranching" in direct violation of Section 8(1) of Article XII of Nebraska's state constitution, and they do not qualify for the "family farm corporation" exemption found under § 8(1)(A). (App. Vol. III, p. 494-495 at no.15, 16) (App. Vol. III, p. 460-462 at ¶¶ 10-14, 16-18; p. 468-471 at ¶ 3-12; p. 464-465, 467 at ¶¶ 3-8, 12-15). Jones, Rickertsen, and Beck have suffered reduced incomes as a result of Initiative 300's prohibition against non-exempt entities from contracting with them. (App. Vol. III, p. 460-462 at ¶¶ 10-19; p. 464-465, 467 at ¶¶ 3-8, 12-15; p. 468-471 at ¶¶ 3-12).

Furthermore, Rickertsen, as an individual owner, and Jones, as an individual both own ranch land and have shown that Initiative 300 has diminished the value of the land because potential purchasers or suitors of the land are non-exempt corporations. The non-exempt corporations would have paid the highest market price available, however, these non-exempt corporations cannot acquire the land under of Initiative 300. (App. Vol. III, p. 460-461 at ¶ 11; p. 466-467 at ¶¶ 9-15). Jones, Rickertsen, and Beck have all lost the opportunity to do substantial business with out-of-state corporate interests that are barred by Initiative 300 and have all suffered actual losses of business as a result of Initiative 300. (App. Vol. III, p. 460-462 at ¶¶ 10-19; p. 464-467 at ¶¶ 3-15; p. 468-471 at ¶¶ 3-12). Jones, Rickertsen, and Beck's borrowing power and financial strength in the national

cattle market have all been negatively affected by Initiative 300. (App. Vol. III, p. 461 at ¶ 13; p. 464-465 at ¶¶ 6-7; p. 469-471 at ¶¶ 5-6, 9). Furthermore, all the Plaintiffs have been denied various business opportunities because of Initiative 300. (App. Vol. III, p. 459-462 at ¶¶ 7, 9-18; p. 464-467 at ¶¶ 3-15; p. 468-471 at ¶¶ 3-12; p. 474-475 at ¶¶ 5-8; p. 486-487 at ¶¶ 8-18) (denial of business opportunity to become a majority shareholder/owner in the family farm corporation; denial of purchase of row crop farm); (App. Vol. III, p. 480-482 at ¶¶ 9-10, 12, 14, 16-17) (denial of business opportunity to become a majority shareholder/owner in his family farm corporation). In sum, the Plaintiffs have been prohibited from gaining full access to the real estate, grain, and livestock market on the national level as a result of Initiative 300. (App. Vol. III, p. 460-462 at ¶¶ 10-18; p. 464-467 at ¶¶ 3-15; p. 468-471 at ¶¶ 3-12; p. 474-475 at ¶ 8; p. 486-487 at ¶¶ 8, 10, 15) (denial of market access to own real estate as a majority shareholder/owner in the family farm corporation); (App. Vol. III, p. 481 at ¶¶ 11-14) (denial of market access to own real estate as a majority shareholder/owner in his family farm corporation).

Initiative 300 inhibits the vision of the Framers of the U.S. Constitution that "every farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *Hazeltine III*, 340 F.3d at 593 (*quoting H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). There can be no

question that Initiative 300 has and will continue to cause Plaintiffs cognizable harm. A decision holding Initiative 300 unconstitutional will redress the plaintiffs' injuries, both by enjoining further enforcement of the ordinance by the county and clearing the way for unfettered access to national markets.

B. Individuals Have Standing To Challenge Initiative 300.

As a final matter, the Plaintiffs are compelled to address the State's argument that Initiative 300 does not apply to individuals, but only to corporations and syndicates. The State's "corporation vs. individual" argument does not take into account controlling state and federal case law. In addition, the State fails to recognize that Initiative 300 prohibits Plaintiffs from entering into livestock feeding contracts with limited liability entities, selling their farm and ranch land to limited liability entities, and from obtaining a majority shareholder interest in limited liability entities organized to farm/ranch in Nebraska. These are personal injuries for both those plaintiffs who do not have an interest in a corporation (*i.e.* Schumacher, Ehler, and Beck) and those plaintiffs who do own interests in corporations (*i.e.* Jones, and Dahlgren).

The State cites to the trial court's order in *South Dakota Farm Bureau, Inc v. Hazeltine*, 197 F.R.D. 673, (D.S.D. 2000) ("*Hazeltine I*"), for the incorrect proposition that Initiative 300 only applies to corporations and syndicates. However, the notion that Amendment E applied only to corporations and not to

individuals was quickly dispelled by this Court's holding in *Hazeltine III*. Therein, the Court determined two individual plaintiffs engaged in unincorporated livestock feeding businesses in South Dakota, Tesch and Aeschlimann, had standing to challenge Amendment E. *Hazeltine III*, 340 F.3d at 588, 592. The Court held that the unincorporated business status of these South Dakota individual plaintiffs did not preclude them from suffering an injury-in-fact. *Id*.

In the present case, Plaintiffs have supplied evidence that the enforcement of Initiative 300 harms them in their individual capacity because it limits their ability to own and use agricultural land in a limited liability format. Furthermore, Plaintiffs Jones, Schumacher, Dahlgren, and Ehler have shown a "distinct injury" from that of the entities in which they own, or could potentially own, an interest. The State ignores the fact that because Schumacher, Dahlgren, and Ehler are unable either to live on the farm or provide the day-to-day labor and management, they are precluded from utilizing a corporation to operate their entities. As such, they will always be personally liable for the debts, obligations, contract, and possible torts of their businesses simply because of their state of residence or their physical disability. The standing of these Plaintiffs is clearly proper.

Finally, any doubt that Initiative 300 applies to and directly regulates the Plaintiffs as individuals is quickly removed by the Nebraska Supreme Court's interpretation of Initiative 300. In construing Initiative 300, the Nebraska Supreme

Court expressly held that: "the language of article XII, § 8, read as a whole, reflects an intent to prohibit individuals…from forming and utilizing a corporation to own and operate farm or ranch land for their personal economic gain…." *Pig Pro Nonstock Cooperative v. Moore*, 253 Neb. at 84, 568 N.W. 2d at 225. (*emphasis added*). This holding directly contradicts the State's argument that Initiative 300 harms only corporations. As is demonstrated above, Initiative 300 permeates the personal and business decision-making process of both individuals and limited liability entities. Accordingly, the State cannot claim that Plaintiffs lack standing simply because they are individuals.

C. Plaintiffs Dahlgren and Ehler Have Standing to Bring ADA Claims.

The State asserts that Plaintiffs Dahlgren and Ehler do not possess the requisite standing to bring their ADA claims and that their ADA claims are not ripe for review. Specifically, the State argues that Dahlgren and Ehler have not suffered an injury-in-fact, the first prong of the three-pronged standing test that has been previously discussed. While Dahlgren and Ehler incorporate the Article III standing analysis briefed above, an additional response to these specific allegations is warranted.

The State contends that Dahlgren's claim under the ADA should be dismissed for lack of standing because he may own a majority of the voting stock of the corporation so long as another member of his family continues to live at the

farm or is actively engaged in the day to day labor and management of the corporation. The State claims that his injury therefore is not concrete or particularized and it is not actual or imminent. (Brief of Appellants at 40-41).

The State's argument is misplaced for several reasons. First, if Dahlgren wanted to take over the farm operation by becoming the majority owner of voting stock and his relatives ceased to work on the farm, he could not do so because he cannot engage in the daily operation of the farm or live at the farm due to his disability. (App. Vol. III, p. 486-487 at ¶¶ 7, 16). Again, the State's argument suggests that he would have to first violate Initiative 300 in order for him to have standing. However, such a narrow view of the standing requirement should not be considered by the Court. *See Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001) ("In ADA cases, courts have held that a plaintiff lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future discrimination by the defendant"). Further, Dahlgren has indicated that he has made several attempts to purchase farmland in eastern Nebraska and operate these farms in corporate form. (App. Vol. III, p. 486-487 at ¶¶ 12-13, 15). He is unable to do so, however, without violating the Family Farm Exception of Initiative 300 because he is unable to live on the farm or perform the day-to-day labor necessary in a typical farming operation. (App. Vol. III, p. 486-487 at ¶¶ 7, 16). These potential farming operations are also not subject to any other exemptions, such as

for producing poultry or alfalfa. (App. Vol. III, p. 487 at ¶ 19). For these reasons, Dahlgren has suffered, and continues to suffer, an actual injury and thus has the requisite standing to bring an ADA claim.

The State also argues that Ehler has no standing to bring an ADA claim because he also has not suffered an injury-in-fact. The State contends that Ehler's claim is merely conjectural or hypothetical because he has yet to enter into a business relationship with his neighbor. Once again, the State's argument would prevent Ehler from asserting a claim until he actually enters into a relationship that directly violates Initiative 300, something that need not be done to establish standing.

V. THE DISTRICT COURT CORRECTLY FOUND THAT INITIATIVE 300 DEPRIVES THE PLAINTIFFS OF RIGHTS GUARANTEED UNDER THE U.S. CONSTITUTION IN VIOLATION OF 42 U.S.C. § 1983.

Plaintiffs' fourth count was brought pursuant to 42 U.S.C. §§ 1983 and 1988, against the Secretary of State and Attorney General in their official capacities. It seeks a declaration that Initiative 300 deprives the Plaintiffs rights guaranteed by the United States Constitution, and seeks prospective injunctive relief restraining the enforcement of Initiative 300.

The Commerce Clause confers rights, privileges, or immunities within the meaning of 42 U.S.C. § 1983. Accordingly, because the District Court found that Initiative 300 violates the Commerce Clause, it also appropriately found the

Plaintiffs were entitled to judgment and injunctive relief against the State, and to attorneys fees under 42 U.S.C. § 1988. (App. Vol. VIII, p. 1998). This finding of the district court should be affirmed.

VI. INITIATIVE 300 MUST BE STRUCK DOWN IN ITS ENTIRETY AS THE UNCONSTITUTIONAL PROVISIONS ARE NOT SEVERABLE.

Whether one provision of a statute or constitutional amendment is severable from the remainder is a question of state law. *Cellco Partnership v. Hatch*, 431 F.3d 1077, 1083 (8th Cir. 2005). As noted by the district court, the "Nebraska Supreme Court [uses] a five-part test to determine whether an unconstitutional portion of a statute can be severed to preserve the valid portions." (App. Vol. VIII, p. 1996) (*emphasis in the original*). The court considers:

> (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.

Jaksha v. State, 241 Neb. 106, 486 N.W. 2d 858, 873 (1992). In addition, the district court correctly noted that "[w]here an initiative for an amendment to the state constitution is concerned, . . . the Nebraska Supreme Court has said that the constitutional parts of the initiative 'may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the

remaining amendments. Where the expressed . . . intent is not severable, the inducement cannot be anything less than entire." (App. Vol. VIII, p. 1996) (*citing Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68, 79-80 (1996). Because the unconstitutional portion of Initiative 300 was a major inducement to the passage of the amendment, the district court correctly found that the remaining portions of Initiative 300 could not be saved. Consequently, the district court appropriately held that Initiative 300 is unconstitutional in its entirety.

A. Initiative 300 Cannot be Interpreted in a Way to Avoid Constitutional Questions or Violation of the ADA.

Nebraska Supreme Court precedent precludes the Court from interpreting Initiative 300 in a manner consistent with the U.S. Constitution. The Nebraska Supreme Court has ruled that Initiative 300 requires a member of the family which owns the majority of the voting stock of a family farm corporation, to either live on or perform the day-to-day labor and management of the farm. *See Progress Pig,* 259 Neb. at 414, 610 N.W.2d at 428. In fact, the Nebraska Supreme Court has held that a majority shareholder that lived a mere three miles from his farm operation and who provided significant oversight of the farm operations, but not the day-to-day labor (*i.e.* feeding the hogs), did not qualify for the Family Farm Exception. *Id*. As is described above, these requirements discriminate against out-of-state corporations and interstate commerce.

Inexplicably, the State asserts that the district court should have disregarded the ruling of the highest court of Nebraska on a matter of state law and instead should have interpreted Initiative 300 to allow "a corporation, in which the majority shareholders lived or worked on their farm or ranch in Colorado, to qualify for the Family Farm Exception even if the shareholders were not actively engaged in the day to day labor and management of the farm or ranch land in Nebraska." (Brief of Appellants at 84) However, it is well settled that, "It is not the place of the federal courts . . . to reexamine state court determinations of state law questions. '[Rather, they are] ... bound to accept the interpretation of state law by the highest court of the State. To do otherwise, exceeds the bounds of federal court authority.'" *Hillside Enterprises, Inc. v. Continental Carlisle, Inc.*, 147 F.3d 732, n.4 (8th Cir. 1998) (*quoting Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976)). Accordingly, because the Nebraska Supreme Court has ruled that a majority shareholder that lives only a mere three miles from his farming operation cannot qualify for the Family Farm exception, neither the district court nor this Court was/is to able adopt the interpretation advanced by the State to avoid constitutional questions under the Commerce Clause.

In addition, the Nebraska Supreme Court's ruling in *Progress Pig*, prevents an interpretation of the Family Farm Exception that is consistent with the ADA and

the Supremacy Clause. In *Progress Pig*, the Court defined Initiative 300's day-to-day labor requirement to require "physical activity" and "work, especially of a hard or fatiguing kind" and "toil; exertion producing weariness; manual exertion of a toilsome nature." *Hall v. Progress Pig, Inc.*, 259 Neb. at 414-415, 610 N.W.2d at 428. As found by the district court, neither Plaintiff Dahlgren nor Ehler can perform the daily physical labor required under the Nebraska Supreme Court's ruling. (App. VIII, p. 1993). (*See also* App. Vol. III, p. 480, 485-86). Moreover, Dahlgren cannot live on a farm or at a feedlot due to his need for access to medical care. (App. Vol. VIII, p. 1993-1994; App. Vol. III, p. 487). Similarly, Ehler's disability prevents him from living on the farm because to do so would force him to forgo engaging in productive labor at his current employment that accommodates his disability and provides him with medical benefits. (App. Vol. VIII p. 1994; App. Vol. III, p. 480). Therefore, the District Court correctly found "Dahlgren and Ehler, . . . therefore, cannot work on farms or at feedlots due to their physical disabilities, and they cannot live on their farms without sacrificing their health and/or their livelihoods." (App. Vol. VIII, p. 1994). In sum, the evidence presented in this case and the decisions of the Nebraska Supreme Court prevent this Court from interpreting the Family Farm Exception in a manner consistent with the ADA and the Supremacy Clause.

For the reasons stated above, the definition of a family-farm corporation, as one where the majority shareholders either reside on or provide the day to day labor and management of the farm, precludes an interpretation of Initiative 300 consistent with either the Commerce Clause or the ADA.

B. The Offending Provisions of Initiative 300 Are Not Severable.

The District Court correctly found that the offending provisions of Initiative 300 cannot be severed from the remaining portions. First, Initiative 300 does not contain a severance clause. Second, the record demonstrates that the residency and day-to-day-labor-and-management provisions of the Family Farm Exception were clearly an inducement to the passage of Initiative 300 and that severing these provisions from Initiative 300 would do violence to the intent of the voters (*See e.g.* App. Vol. III, p. 629-30). The District Court concluded that, "based on the record before the Court, it appears that those provisions were an inducement to the passage of Initiative 300 and that it would do violence to the intent of the voters to sever those provisions." (App. Vol. VIII, p. 1997). Indeed, without the exception, thousands of family farm corporations would be in violation of the law. With a more broadly-worded exception (with the residence and labor requirement stricken), the absentee owner prevention objective would be thwarted. Therefore, it is disingenuous for State Appellants to contend the Family Farm Exception was not an integral part of the Initiative or that to remove this provision would not

frustrate the intent of the voters. Throughout this proceeding the State has argued that one of the purposes of the Initiative was to prevent absentee ownership of farms and ranches. (*See e.g.* Brief of Appellants at 67). In fact, the State argues that "the only way to prevent tenant ownership of farmland is to require that owners of the land either reside on or be actively engaged in the day-to-day labor and management of the land." *Id*. at 69-70. As a consequence, the State cannot successfully argue that the residence and day-to-day labor requirements were not a major inducement to the passage of Initiative 300 or that severing these portions would not frustrate the intent of the voters. *Progress Pig*, 259 Neb. at 414, 610 N.W.2d at 428.

As explained by the district court: "[w]here an initiative for an amendment to the state constitution is concerned . . . the constitutional parts of the initiative 'may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the remaining amendments." (App. Vol. VIII, p. 1996) (*citing Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68, 79-80 (1996)). Because the residence and day-to-day labor requirements were a major inducement to the passage of the act, and severance would do violence to the intent of the voters, the district court correctly held that Initiative 300 must be declared unconstitutional in its entirety.

VII. THE STATE'S EVIDENTIARY OBJECTIONS ARE NOT GROUNDS FOR REVERSAL.

The District Court considered and resolved the hundreds of objections made by both parties to the evidence proffered. While the Court did not rule separately on each and every objection, it explained that:

> [I did] not consider materials in the evidentiary record that are irrelevant to the issues presented in the parties' motions, nor [did I] consider materials that lack proper foundation, consist of inadmissible hearsay, present conclusions of law, or purport to offer expert testimony. The evidentiary materials specifically cited within this Memorandum and Order are material that I find unobjectionable for the purpose for which they are offered, and that support a finding of fact about which there is no genuine dispute.

(App. Vol. VIII, p. 1969).

Due to space limitations, Plaintiffs will not address the State's objections point by point. Such analysis is unnecessary as even if the district court's reliance on a specific piece of evidence was error, such error is not grounds for reversal, as it was harmless. *Cf. Harper v. United States*, 143 F.2d 795, 803 (8th Cir. 1944) ("Where an action at law is tried before a court, error in receiving evidence over objection is ordinarily regarded as harmless and not grounds for reversal.").

The State's argument regarding its evidentiary objections does not surmount the high standard of review: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court ... is ground for ... vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the

court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Fed. R. Civ. Pro. 61. *See also* 28 U.S.C. § 21111 (stating errors or defects which do not affect the substantial rights of the parties should be disregarded); Fed. R. Evid. 103(a)(1) (stating error may not be predicated on a ruling admitting or excluding evidence unless a substantial right is affected). "Consistent with this standard, . . . the district court [enjoys] 'wide discretion in admitting and excluding evidence, and its decision will not be disturbed unless there is a clear and prejudicial abuse of discretion.'" *McPheeters v. Black & Veatch Corp.*, 427 F.3d 1095, 1100-01 (8th Cir. 2005).

The evidence submitted by Plaintiffs was admissible and not unduly prejudicial to the State. Furthermore, admission of the evidence was harmless in light of all of the other evidence, especially since the district court concluded that "[t]he ballot title and the language of Initiative 300 alone are persuasive evidence that Initiative 300 had a discriminatory purpose." (App. Vol. VIII, p. 1982).

CONCLUSION

This case presents few, if any, issues not present when this Court decided *Hazeltine III* four years ago. Yet, the State, and especially their amici, seek to convince the Court that if the district court is affirmed, life as we know it in Nebraska will end. However, alarmist rhetoric cannot change the law or the facts.

The State cannot change the language of Initiative 300, the Commerce Clause, the ADA, the ballot language submitted to the voters, or any other historical facts showing the discriminatory purpose of Initiative 300. Neither after-the-fact rationalizing, nor newly-minted interpretations regarding absentee ownership by out-of-state farming corporations can save Initiative 300 from its protectionist origins or its discriminatory provisions.

WHEREFORE, the Plaintiffs/Appellees respectfully request this Court affirm the order of the District Court granting summary judgment in favor of the Plaintiffs on Counts, I, IV, and V of their Complaint; and enter an order finding Initiative 300 to be invalid in its entirety under the Commerce Clause of the United States Constitution and the Americans With Disabilities Act. Plaintiffs also request a permanent injunction be entered prohibiting enforcement of Initiative 300 by the State, as well as other appropriate relief, including an award of attorneys' fees under 42 U.S.C. §§ 1988 and 12205.

DATED this 18th day of May, 2006.

Respectfully submitted,

JIM JONES, TERRENCE M. SCHUMACHER; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK, III, Plaintiffs/Appellees

By: _____

Thomas H. Dahlk (#15371)
L. Steven Grasz (#19050)
Mike Degan (#20372)
Rebecca B. Gregory (#22901)
BLACKWELL SANDERS PEPER MARTIN
1620 Dodge Street, Suite 2100
Omaha, NE 68102
Telephone: (402) 964-5000
Fax: (402) 964-5050

David A. Jarecke (#20088)
CROSBY GUENZEL LLP
134 S. 13th Street, Suite 400
Lincoln, NE 68508-1981
Telephone: (402) 434-7300
Facsimile: (402) 434-7303

and

SHAD DAHLGREN, Plaintiff/Appellee

By:

Stephen D. Mossman (#19859)
MATTSON, RICKETTS, DAVIES, STEWART, AND CALKINS
134 S. 13th Street, #1200
Lincoln, NE 68508
Telephone: (402) 475-8433
Facsimile: (402) 475-0105

CERTIFICATE OF COMPLIANCE

Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that the diskette containing the Brief of Appellees was created using Word 2002 was scanned for viruses using the McAfee Security version 8.0.0 and was found to be virus free.

Dated this 18th day of May, 2006.

_____

L. Steven Grasz

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's Order modifying the number of words allowed as it contains a total of 24,545 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) as it has been prepared in a proportionally spaced typeface using Microsoft Office XP Professional in Times New Roman type style, font size 14.

Dated this 18th day of May, 2006.

_____

L. Steven Grasz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copies of the above and foregoing document was served by United States mail, first class postage prepaid on the 18th day of May, 2006, upon the following:

Justin D. Lavene
Katherine J. Spohn
David D. Cookson
Assistant Attorneys General
2155 State Capitol Building
P.O. Box 98920
Lincoln, NE 68509-8920

_____
L. Steven Grasz