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, ROBERT E. BECK, III,

Plaintiffs/Appellees,

vs.

JOHN GALE, in his official capacity as Secretary of State of Nebraska,
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 AMICI CURIAE NEBRASKA BANKERS ASSOCIATION, INC., NEBRASKA CHAMBER OF COMMERCE AND INDUSTRY, INC. THE NEBRASKA REALTORS ® ASSOCIATION, AND THE SOUTH DAKOTA FARM BUREAU, INC. IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMATION OF JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, none of the Amici Curiae, Nebraska Bankers Association, Inc., Nebraska Chamber of Commerce and Industry, Inc., The Nebraska REALTORS® Association, and the South Dakota Farm Bureau, Inc. are a publicly held corporation or are owned in any part by a publicly held corporation.

Dated: _____ _____
Attorney for Amici Curiae

Dated: _____ _____
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STATEMENT OF IDENTITY OF AMICI CURIAE, THEIR INTERESTS IN THE CASE, AND SOURCE OF AUTHORITY

The Amici Curiae are four statewide industry organizations that have a significant legal interest in the issues addressed, and the outcome of this appeal. The issues involved in this appeal concern not only the parties and amici, but are also of significant public interest and of paramount importance to the state of Nebraska.

Nebraska Bankers Association, Inc. is a non-profit trade association, representing 254 of the 255 commercial banks and 10 of the 16 savings and loans of Nebraska. The association constantly monitors the banking scene, watchful for new ideas and approaches to help Nebraska's financial institutions respond to an ever-changing environment. Priorities include legislative representation, education, industry promotion and public relations, and other services designed to meet the needs of Nebraska's banks and savings and loan institutions.

The Nebraska Chamber of Commerce & Industry, Inc. is a statewide organization comprised of 1,313 businesses, 53 local chambers of commerce and 75 trade associations. The State Chamber is organized as a nonprofit corporation to promote the general welfare of the State of Nebraska; to advance the private free enterprise system; to support business activities of its constituents; to improve, develop and promote existing and new businesses or new

business opportunities and the employment such businesses provide; to improve the general quality of life in the State of Nebraska; and, in general, to act in a nonpartisan and cooperative manner for the betterment of commerce and industry in Nebraska.

The Nebraska REALTORS® Association was established in 1917 and currently serves 4,300 members across the state of Nebraska. The vision for the Association is to play a vital role in keeping the firms and agents in business and to become the true voice for real estate in Nebraska. The purpose is to provide and promote programs and services which will improve the members' ability to conduct business successfully with integrity, competency, and without undue regulatory restraint; promote public confidence in REALTORS®; promote the extension and preservation of the right to own, use and transfer real property; and promote an economic climate conducive to development and growth throughout Nebraska.

The South Dakota Farm Bureau is a nonprofit corporation incorporated in the State of South Dakota. Its members include South Dakota farmers and ranchers who produce nearly every agricultural commodity produced commercially in South Dakota. South Dakota Farm Bureau, through its members, has a significant legal interest in the issues addressed in, and the outcome, of this appeal.

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

INTRODUCTION

This case involves a challenge to the Nebraska state constitutional amendment that prohibits, subject to specified exceptions, the use of corporate or "limited liability" business structures by farmers and ranchers for ownership of real estate or the operation of farm and ranch activities ("Initiative 300") in the State of Nebraska. The District Court declared Initiative 300 to be unconstitutional, in part, because it violates the dormant Commerce Clause. Amici urge this Court to uphold the District Court ruling by following the precedent established by this Court in *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003).

ARGUMENT

I. INTERSTATE COMMERCE IS AN IMPORTANT PART OF THE NATIONAL MARKETPLACE THAT THE DORMANT COMMERCE CLAUSE IS DESIGNED TO PROTECT.

Neb. Const. Art. XII, §8 (otherwise known as and hereinafter referred to as "Initiative 300"), was passed by the voters of Nebraska on November 2, 1982. Initiative 300 generally bans all corporations other than Nebraska "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.

This is a case about discriminatory state regulation of the ownership of agricultural land in Nebraska that is embedded within the Nebraska State Constitution. It is a case about the viability of interstate commerce as such relates

to the ownership of agricultural land and the activity of farming and ranching within the United States. Interstate commerce, whatever challenges it may pose to entrenched anti-corporate farming and ranching interests manifests the national common-marketplace that the Framers of the United States Constitution sought to promote and which the Commerce Clause serves. Amici urge the Court to affirm the crucial role of the dormant Commerce Clause in preventing local protectionism from undermining that national common-marketplace.

The Commerce Clause of the U.S. Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, §8, cl. 3. When drafting the Commerce Clause, the Framers of the Constitution recognized the importance that a national "common market" would offer for the nation as a whole and the benefits it would bring to consumers, businesses and individual states. See, *The Federalist* No. 42 (James Madison); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *available at http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces18.html*. Although the Framers could not have imagined the mechanical, technological and biological advances that have led to modern day farming and ranching operations nor the transition of a labor-intense industry to a capital-intense industry, they could imagine – and worked to establish – open, nondiscriminatory national markets. As the United States Supreme Court recognized in *H.P. Hood & Sons, Inc. v. Du*

Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 665 (1949), access to a national market is a strong incentive for economically productive activities, and a powerful check on state protectionism:

> Our system, fostered by the Commerce Clause, is that *every farmer* and every craftsman *shall be encouraged to produce by the certainty that he will have free access to every market in the Nation*. . . Likewise, every consumer may look to the free competition of every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. (Emphasis supplied.)

Id. at 539, 69 S.Ct. at 665

While the United States Congress has the authority to exercise its affirmative Commerce Clause powers to prevent discriminatory state regulation, it cannot possibly keep track of or act to repel the constant pressure for anti-competitive state regulation, whether by state statute or constitutional amendment. When Congress has not addressed particular subjects by legislation, "these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623, 98 S. Ct. 2531, 2535 (1978). *Accord*, *Raymond Motor Transp. V. Rice*, 434 U.S. 429, 440, 98 S.Ct. 787, 793 (1978). Thus, the United States Supreme Court has stated that the affirmative grant of power to Congress contained in the Commerce Clause also encompasses a "negative" or "dormant" aspect that prohibits states from engaging in economic protectionism, *i.e.*, imposing

"regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-274, 108 S.Ct. 1803, 1807 (1988). *See also*, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359,112 S.Ct. 2019, 2023 (1992); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 328, 109 S.Ct 2491, 2495 (1989). "The dormant Commerce Clause operates as the structural bulwark and guardian of the national market-place against the natural tendencies of local interests to capture the machinery of state government to advantage themselves and burden their distant, widely-dispersed competitors. This Court has made clear that, even where Congress has not chosen to act, the Commerce Clause operates to prevent the kind of economic Balkanization that would result from unchecked state discrimination against interstate commerce." (See *Amici Curiae Brief of American Homeowners Alliance et al.,* in support of respondents at page 12, filed in *Granholm v. Heald,* 544 U.S. 460,125 S.Ct. 1885 (2005).

In *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571-572, 117 S.Ct. 1590, 1595-1596 (1997), the Court wrote:

> During the first years of our history as an independent confederation, the National Government lacked the power to regulate commerce among the States. Because each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents, what Justice Johnson characterized as a "conflict of commercial regulations, destructive to the harmony of the States" ensued. See, *Gibbons v. Ogden,* 22 U.S. 1, 9 Wheat 1, 224 (1824) (opinion concurring in judgment). In his view, this "was the

> immediate cause that led to the forming of a [constitutional] convention." *Ibid.* "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Id*. at 231. . . . "In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515 [(1945)]; *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050 [(1946)]. *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S.Ct. 274, 276 (1946).

The Court further elaborated that "[t]he history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination . . . would invite significant inroads on our 'national solidarity'" (internal citation omitted). *Id*. at 595, 117 S.Ct. at 1608. See *also, e.g.,Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359, 112 S.Ct. 2019, 2023 (1992) ("As we have long recognized, the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'") (internal citation omitted); *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731 (1979).

As the United States Supreme Court noted in *Granholm v. Heald,* 544 U.S. 460, 467; 125 S.Ct. 1885, 1895 (2005):

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic

> interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.,* 511 U.S. 93, 99, 114 S.Ct. 1345 (1994). See also *New Energy Co. of Ind.* v. *Limbach,* 486 U.S. 269, 274; 108 S.Ct. 1803 (1988). This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 539, 69 S.Ct. 657 (1949). States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect[s] 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." *Hughes* v. *Oklahoma,* 441 U.S. 322, 325-326, 99 S.Ct. 1727 (1979).

The rationale behind the dormant Commerce Clause is not purely economic. The United States Supreme Court does not view economic protectionism—the desire to strengthen the local economy at the expense of out-of-state competition—as a legitimate state end. States must offer other rationales, such as the pursuit of health and safety objectives, to support any regulation that affects interstate commerce. *See*, 15 C.J.S. *Commerce* § 9 (2005). The Commerce Clause serves to rein in the natural tendency to parochialism in local policymaking and provides incentives for policymakers to consider broader public concerns. Like the Privileges and Immunities Clause, U.S. Const. art. IV, §2, cl. 1, the Commerce Clause refuses to countenance local protectionism, but reinforces the structural integrity of the Union created by the United States Constitution, another reason why its goals have long been considered the “object riding over every other in the

adoption of the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat 1, 224, 231 (1824) (Johnson, J., concurring).

A. A State Constitutional Provision That Discriminates Against Interstate Commerce Is Per Se Invalid Under The Dormant Commerce Clause.

Initiative 300's discrimination against owners of agricultural land offends deeply rooted Commerce Clause principles. The incorporation of the Commerce Clause into the United States Constitution reflected the Founders' acknowledgement that states could become captive to local interests to the detriment of the nation as a whole. See, *The Federalist* No. 7 (Alexander Hamilton). In recognition of this core principle, the Court has held that statutes that discriminate against interstate commerce in purpose or effect are virtually *per se* invalid. See*, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535 (1978). "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 the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 1682 (1994) (citing *The Federalist* No. 22, at 143-145 (C. Rossiter ed. 1961); *Vices of the Political System of the United States*, *in 2 Writings of James Madison* 362-363 (G. Hunt ed., 1901). "The evil of

protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 626, 98 S.Ct. 2531, 2536-2537 (1978).

If a state statute treats in-state and out-of-state actors differently in a way that favors the in-state interests and disfavors out-of-state interests, that regulation is discriminatory for dormant Commerce Clause purposes. See *Oregon Waste Sys., Inc. v. Dep't of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 1350 (1994).

The unfavorable treatment of out-of-state interests within the provisions of Initiative 300 was highlighted in the case of *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 415-417, 610 N.W.2d 420, 428-429 (2000), in which the Nebraska Supreme Court held that Progress Pig, Inc. was in violation of I-300 because the principal owner, Zahn (the sole shareholder of a family farm corporation), neither resided on the farm nor was actively engaged in the day-to-day labor **and** management of the farm. Progress Pig, Inc. argued that Zahn's ongoing performance of labor and management activities included administration, finance, personnel, nutrition/feeding, genetics, herd health, operations, maintenance and marketing, all of which constituted "day-to-day labor and management" under Neb. Const. Article XII, §8 (A). The Nebraska Supreme Court disagreed, noting that:

> . . . 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 . . . we conclude that most, if not all, of Zahn's activities were involved in the management end of the operation and that the amount of labor performed by Zahn in direct relationship to the hog-raising activities was minimal.

Id. at 415-417, 610 N.W. 2d at 428-429.

The Nebraska Supreme Court provided guidance in *Progress Pig* regarding the applicability of the "day-to-day labor and management" requirements of Initiative 300 to a specific case. The Court noted that how the day-to-day labor and management requirements may apply to a specific case is dependent upon the type of farm or ranch operation (*e.g.*, a grain farm will have different labor and management requirements than a livestock farm and a hog farm will have different day-to-day labor and management requirements than a ranch with cattle on pasture). In other words, the "output or product of the farm" dictates the day-to-day labor and management requirements on the farm or the ranch.

In recognizing that the day-to-day labor and management requirements of Initiative 300 may vary from "farm to farm" and from "operation to operation," the Nebraska Supreme Court further highlights the impediments to or the impossibility of compliance with such day-to-day labor and management requirements by distant out-of-state family farm or ranch corporations. It is this differential treatment that

discriminates against out-of-state interests in violation of the dormant Commerce Clause.

The District Court ruled correctly in striking down Nebraska's facial discrimination against out-of-state interests by determining that the challenged law discriminates against interstate commerce (*i.e.*, *per se* rule of invalidity).

II. INITIATIVE 300 DISCRIMINATES AGAINST INTERSTATE COMMERCE ON ITS FACE.

A. The Appellants' Proposed Revisionist Interpretation of the Family Farm Exception to Initiative 300 is Inconsistent with the Plain Meaning of Its Provisions.

One exception to Initiative 300 is for "family farm or ranch corporations." Neb. Const. Article XII, §8 (1)(A) in defining "a family farm or ranch corporation," provides in part:

> "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, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, 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…." *(emphasis supplied)*.

Based on this constitutional definition, Appellants urge this Court to abandon prior precedent relating to the interpretation and enforcement of Initiative 300. Appellants further suggest that this Court redraft Initiative 300 by reinterpretation, to allow an out-of-state family farm or ranch corporation having at

least one member of the family residing on or actively engaged in the day-to-day labor and management of any farm or ranch, irrespective of where such farm or ranch is located, to qualify as a "family farm or ranch corporation" in Nebraska notwithstanding the corporation's failure to satisfy the Constitutional residency or day-to-day labor and management requirements with respect to its ownership of, Nebraska agricultural land.

Amici National Farmers Union, *et al.*, make the novel argument in support of Appellants that:

> The family farm exception requires only that a member of the family that owns a majority of the family farm corporation reside on or actively engage in the day-to-day labor and management of the corporate-owned farm. Nothing in Initiative 300 differentiates based on where the family farm corporation is incorporated, and nothing in Initiative 300 requires that a family member reside on or actively manage the farm in Nebraska. Thus, a family farm corporation with multi-state holdings could qualify as a Nebraska family farm corporation, even if (1) it is incorporated in Iowa and (2) a member of the family that owns a majority of the corporation lives or works on part of the corporate-owned farm in Colorado. (emphasis added).

(See *Brief of Amici National Farmers Union,* et al., at page 21.)

The Nebraska Supreme Court has provided both precedent and specific guidance regarding the manner in which the provisions of the State Constitution, specifically those of Article XII, § 8, are to be interpreted that refutes the novel position advocated by the Appellants. Indeed, the creative reconstruction of the Constitution that the Appellants advance is simply untenable. It must be rejected

because it is inconsistent with (1) the plain language of the Nebraska Constitution and (2) the interpretation of the Nebraska Constitution that the Appellants themselves advanced prior to this appeal.

In *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000), the Court provided:

> 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. Pig Pro Nonstock Co-Op v. Moore, 253 Neb. 72, 568 N.W.2d 217 (1997). The court may not supply any supposed omission, or add words to or take words from the provision as framed. 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 it the meaning that obviously would be accepted and understood by the lay person.

Hall v. Progress Pig, Inc., 259 Neb. 407, 414, 610 N.W.2d 420, 427.

As such, every word and phrase of the Constitution is relevant and has specific meaning.

The Nebraska Supreme Court has further held that in construing constitutional provisions, "[c]ourts may not apply what they deem unwise omissions, nor add words which substantially add or take from the Constitution as framed." *Mekota v. State Board of Equalization*, 146 Neb. 370, 377-78, 19 N.W.2d 633, 638 (1945). "Moreover, constitutional provisions are not open to construction as a matter of course, construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision

is not clear and that construction is necessary." *State ex rel. Spire v. Conway*, 236 Neb. 766, 774-775, 472 N.W.2d 403, 408-09 (1991).

Finally, in considering the meaning of a constitutional provision, the Nebraska Supreme Court has said, "it is proper to consider the evil and mischief attempted to be remedied, the object sought to be accomplished, and the scope of the remedy its terms imply, and to give it such an interpretation as appears best calculated to effectuate the design of the Constitution." *State ex rel. School District of Scottsbluff v. Ellis*, 168 Neb. 166, 171, 95 N.W.2d 538, 541 (1959).

Amici submit that it was clearly the intent of Initiative 300 to outlaw certain types of corporate or "limited liability" structured ownership of farmland located in Nebraska in order to discourage absentee ownership. This is the "evil and mischief attempted to be remedied" by the provisions of Initiative 300 and as set forth in the *State ex rel. School District of Scottsbluff v. Ellis* decision. *Id.* at 171, 95 N.W. 2d at 541.

Applying the principles relating to constitutional interpretation set forth above to the meaning of the phrase, "the farm or ranch" (emphasis added). Amici believe that this phrase, examined word by word and given its plain and ordinary meaning, refers to specific agricultural land located in Nebraska.

Amici urge the Court to carefully examine the phrase, "the farm or ranch" (emphasis added). It is of particular significance, in ascertaining the intent of the

constitutional provision, that the drafters of Initiative 300 employed the phrase, "the farm." The *Merriam Webster Dictionary, 50th Anniversary Edition* (1997) defines the word "the" as meaning, "that in particular." *Id.* at 748. The same dictionary defines the word, "a" as meaning "unspecified or unidentified." *Id.* at 19. More precisely, the Webster's dictionary edition that was current at the time Initiative 300 was drafted and voted upon by the people of Nebraska, defines "the" as "a function word to indicate that a following noun or noun equivalent refers to someone or something previously mentioned or clearly understood from the context or the situation." *Webster's Third International Dictionary, Unabridged* 2368 (1981). Webster's dictionary also recognizes, within the definition of "the", that the word may be "used as a function word before a plural noun denoting a group to indicate reference to the group as a whole" citing, as examples, "the Greeks" and "the newspapers". *Id.* at 2369.

See also *Black's Law Dictionary* 1477 (6th Ed. 1990) wherein "The" is defined as "an article which particularizes the subject spoken of. In construing statute, definite article 'the' particularizes the subject which it precedes and is a word of limitation as opposed to indefinite or generalizing force 'a' or 'an.' *Brooks v. Zabka*, 168 Colo. 265, 450 P.2d 653, 655 (1969)."

Had the drafters of Initiative 300 (and the voters approving the same) intended for "residency" on out-of-state farmland or "day-to-day management and

labor" activities performed on out-of-state farmland to satisfy the requirements of Initiative 300, they would have referred to these requirements occurring on "a farm" or on "any farm" rather than on "the farm." In the alternative, the drafters could have referred to these requirements as having to occur on "a farm, wherever located" rather than on "the farm." As another alternative, the drafters could have inserted the plural form of the phrase "farm or ranch" to read "farms or ranches" in order to reach the reinterpretation desired by the Appellants. Instead, the drafters of Initiative 300 chose to utilize the definite article "the" in order to particularize, specify and identify the Nebraska farm or ranch.

The Appellants' newly-contrived interpretation of the family farm exception cannot be justified as a "plain meaning" interpretation of the Constitution. Because the word "the" immediately precedes the phrase "farm or ranch," accepted canons of grammar and construction require that it be read to modify "farm or ranch" in the singular and not in the plural. It is obvious that the phrase, "the farm or ranch," does not refer to a collection or a combination of farms or ranches across the nation. Inserting, by implication, the implicit plural form of farm or ranch or the words, "a" or "any" in place of "the" is simply asking the Court to redraft the family farm or ranch corporation definition in the Nebraska Constitutional Amendment as a last gasp effort to salvage Initiative 300.

Even if the Court were inclined to graft onto the Nebraska Constitution an interpretation created out of whole cloth and after the fact, the interpretation Appellants have offered hardly comports with any recognizable definition of the word "the" or the common understanding of the phrase "the farm or ranch."

Furthermore, in *State Farm v. Old Republic*, 466 Mich. 142, 644 N.W.2d 715 (2002), the distinction between references to the articles, "the" and "a" was clearly recognized. In this case, when examining a statute, the Court held that it must look to the words of the statute and "give effect to every word, phrase, and clause." *Id.* at 146, 644 N.W.2d at 717. In addition, "undefined statutory terms must be given their plain and ordinary meaning." *Id.* at 146, 644 N.W.2d at 717. Thus, when the indefinite article "a" is used in a statute instead of the definite article "the", the Court stated that it must "presume that the Legislature understood the distinct meanings of these terms," and interpret them accordingly. *Id.* at 148, 644 N.W.2d at 718.

Citing *Robinson v. City of Detroit*, 462 Mich. 439, 461-462, 613 N.W.2d 307, 318-319 (2000), the Court in *State Farm* held that:

> (1) common English usage, (2) the rules of statutory construction enacted by our legislature, and (3) the assumption of legislator competence and comprehension that all courts should apply to acts of the legislature, make clear that a difference exists between the indefinite article "a" and the definite article "the." We presume that the legislature understood the distinct meanings of these terms. We are not free to conflate their meanings.

Id. at 466 Mich. at 148, 644 N.W.2d at 718.

The court went on to note, "If the Legislature had intended to use the definite article 'the' instead of the indefinite article 'a,' it could have simply changed the construction of the sentence." *Id.* at 466 Mich. at 148, 644 N.W.2d at 718.

The *State Farm* Court concluded:

> It is not the role of the judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret – not to re-write – the law. . . . Not only does our interpretation of the statute comport with the plain language of the text, but it is also consistent with the Legislative intent that may reasonably be inferred from the text, . . .

Id. at 466 Mich. 142, 149, 644 N.W.2d 715, 719.

The argument forwarded by the Appellants requires that use of the definite article "the" as an adjective before the phrase "farm or ranch" be construed in the same manner as if an indefinite article, such as "a" or "any" had been utilized. This argument is inconsistent with the plain meaning of the phrase, as well as common usage of English grammar.

Usage of a definite article means that "the" refers to some specific thing as contrasted with "a" or "any" which does not refer to one specific noun that it modifies. By contrast, an indefinite article does not refer to a particular noun as "the" does, but simply refers to the noun that it modifies in a broad sense. Thus, if

one says "the farm" third parties know the farm to which is being referred, as opposed to "a farm" which is general and does not make reference to any specific farm.

Further support for making a distinction between definite and indefinite articles is found in *BP America Production v. Madsen*, 2002 WY 135, 53 P.3d 1088 (2002), which explored the distinction between use of the words, "a" and "the." The Court noted:

> From High School English class, we know that the word "a" is an indefinite article, while the word "the" is a definite article. … Simply put, it is the difference between "bring me a book" and "bring me the book." In the first instance, any book will do; in the second instance, a particular book is expected."

Id. at 2002 Wyoming 135, ¶ 7, 53 P.3d 1088, 1091.

Applying the rules of construction and common definitions to the constitutional language at issue, the Court should be assured that Initiative 300 refers to and is intended to require residence on or day-to-day labor and management conducted upon the "particular" farm, and not on just "a" or "any" farm.

The qualification of a family farm or ranch corporation is therefore, to be judged on the facts surrounding and the merits relating to each "farm" owned or operated by a corporation. The appropriate inquiry must be, "Have the

requirements of 'residency' or 'day-to-day labor and management' been met with regard to each farm or ranch?"

The foregoing factors, taken in conjunction, lead to the inescapable conclusion that the phrase "the farm or ranch" requires the "residency" or "day-to-day labor and management" components of Initiative 300 to be satisfied in connection with farm or ranch activities conducted in, or agricultural land located in, Nebraska.

III. APPELLANTS' CONSTRUCTION IS INCONSISTENT WITH THE INTERPRETATION OF THE NEBRASKA CONSTITUTION THAT THE APPELLANTS THEMSELVES ADVANCED PRIOR TO THIS APPEAL.

Under the Appellants' newly proffered interpretation of the Family Farm Exception, the exception does not provide "common-sensical" relief from Initiative 300's prohibitions; rather, it provides "nonsensical" relief and leads to absurd results. The South Dakota Supreme Court has previously made it clear that it "will not construe a constitutional provision to arrive at a strained, impractical or absurd result." *State of South Dakota v. Allision*, 2000 SD 21, ¶13, 607 N.W.2d 1, 5. See also *Brim v. South Dakota Bd. of Pardons and Paroles*, 1997 SD 48, ¶17, 563 N.W.2d 812, 816 (1997). Any interpretation that the people of Nebraska intended to authorize the "residency" and "day-to-day labor and management" requirements to be complied with merely by meeting such requirements on out-of-state real

estate is a construction of Initiative 300 that arrives at a "strained, impractical [and] absurd result." *State of South Dakota v. Allision*, *supra* at 5. Amici submit that it was clearly the intent of the drafters of Initiative 300 to require family involvement, be it by residency or day-to-day labor and management, in any corporate farming or ranching activities conducted **in** Nebraska.

Appellants' theoretical reconstruction of the family farm or ranch corporation definition has been conveniently developed to address the exigencies of the pending litigation. Appellants' never before unveiled reinterpretation of Initiative 300 is directly contrary to the construction of the Constitution advanced by the Nebraska Attorney General in actions previously brought by the State for the enforcement of Initiative 300, as well as in recent proceedings involving the constitutionality of South Dakota's Amendment E.

In various venues, the Nebraska Attorney General has submitted arguments in support of Initiative 300 that run counter to the notion that a corporation can qualify as a "family farm corporation" by virtue of its ownership of, or labor and management activities conducted on, out-of-state agricultural land.

In *Stenberg v. Christensen Family Farms, Inc.*, *a Minnesota corporation*, (Case number: C100-393G, Madison County District Court, 2001) the Nebraska Attorney General brought a lawsuit relating to the enforcement of Initiative 300 against an out-of-state corporation. The Attorney General sought a declaratory

judgment and injunctive relief against an out-of-state corporation (Christensen Family Farms, Inc.) alleged to own agricultural real estate and to have been engaged in farming or ranching activities in Cedar **and** Knox county Nebraska. In his petition in the Madison County proceeding, the Attorney General described Nebraska real estate alleged to have been owned by the out-of-state corporation and described the farming operations in which the out-of-state corporation was engaged in the State of Nebraska (See paragraph 7 of the Petition in *Stenberg v. Christensen Family Farms, Inc.*). In his prayer for relief, the Attorney General asked the Court to "find and adjudge that no Christensen Farm's majority interest holder resides upon Christensen Farm's Cedar **and** Knox County, Nebraska agricultural real estate, nor does a Christensen Farm's majority shareholder actively engage in day-to-day labor and management of their Cedar **and** Knox County, Nebraska operations." (emphasis supplied) (See, Prayer for Relief of the Petition in *Stenberg v. Christensen Family Farms, Inc.*)

Conspicuously absent from the Attorney General's petition and prayer for relief is any mention of whether or not the Minnesota corporation "qualified" as a "family farm corporation" in connection with its ownership of agricultural land or its farm activities in the state of Minnesota.

Similarly, in an enforcement action relating to Initiative 300 brought against Premium Farms, LLC, in the District Court of Antelope County, Nebraska, the

Nebraska Attorney General alleged the Nebraska limited liability company to be in violation of the provisions of Initiative 300 because no Premium Farms family members resided on or were engaged in the day-to-day labor and management of twenty separately described tracts of farm real estate located in four counties in Nebraska. (See paragraph 7 of the Petition for Declaratory Judgment and Injunctive Relief filed in *Stenberg v. Nebraska Premium Pork, LLC, a Nebraska Limited Liability Company, et al.*, CI 9941, Antelope County District Court, Nebraska (1999).

With the Nebraska Attorney General having staked out the position in prior enforcement actions that a Nebraska corporation must satisfy the residency or day-to-day management and labor requirements on each and every farm located in Nebraska, it seems folly for the Appellants to suggest that an out-of-state corporation, by satisfying the residency or day-to-day labor and management requirements on an out-of-state farm, will be deemed to be in compliance with the provisions of Initiative 300, without also satisfying these criteria on <u>each</u> Nebraska farm.

It is obvious that the legal jeopardy to which Initiative 300 has been exposed by the pending litigation has only now, some 23 years after its inception, given rise to the novel notion forwarded by the Appellants (and supporting Amici to the

Appellants) that a corporation may satisfy the "residency" or "labor and management" activities through its farming operations in any jurisdiction.

To advocate that provisions of Initiative 300 were designed to open Nebraska's borders to absentee corporate ownership of Nebraska farm land is misplaced and incongruous with the intent of Initiative 300.

IV. APPELLANTS' CONSTRUCTION RUNS COUNTER TO THE AVOWED PURPOSES AND RATIONALE UNDERLYING INITIATIVE 300.

The Appellants cite the problems of "absentee owners of land" as well as "increased tenant operation" and "rural depopulation" in support of upholding the constitutionality of Initiative 300. (See Appellants' Brief, pages 68-69) Yet these are the very outcomes that will result if an out-of-state corporation is allowed to qualify as a "family farm corporation" by virtue of its ownership of, or labor and management activities conducted on, out-of-state agricultural land. An out-of-state corporation owning Nebraska farm land without having a family member either reside upon the Nebraska farm or be engaged in the day to day labor and management on the Nebraska farm will clearly result in absentee ownership of farm land in Nebraska. The Nebraska Supreme Court agrees with the Appellants' assertion that Initiative 300 was designed to address the problems of "absentee owners of land." In *Pig Pro Non-Stock Cooperative v. Moore*, 253 Neb. 72, at 91, 568 N.W.2d 217, at 228 (1997), the Court held, "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."

The Nebraska Attorney General recently opined regarding the policy reasons underlying Initiative 300 in a brief filed in proceedings challenging Amendment E. In the brief filed in the case of *South Dakota Farm Bureau v. Hazeltine* 340 F.3d 583 (8th Cir. 2003), the Attorney General noted that "Family farms are more likely to transact their business locally, maintain stable farms, be involved in their community, promote better health for the residents and lower the incidents of crime." (See Attorney General Brief filed in *South Dakota Farm Bureau v. Hazeltine,* page 2). Even if all of these rationales are taken as fact, allowing absentee out-of-state corporations to "qualify" as Nebraska family farm corporations by virtue of their ownership of out-or-state agricultural land or farming activities conducted thereon would destroy the rationale of Initiative 300. The result of these perceived positive attributes would accrue entirely to the benefit of states other than Nebraska. It would be highly suspect to argue that the voters of Nebraska, in approving Initiative 300, envisioned the merits of family farm ownership accruing solely to the benefit of other states as forming the basis for placing restrictions on corporate ownership of agricultural real estate in Nebraska.

In the same brief, addressing the applicability of the ADA to South Dakota's Amendment E, the Attorney General suggested that "Amendment E

'discriminates' against certain farmers based on distance from the farm." (See Attorney General brief in *South Dakota Farm Bureau v. Hazeltine*, page 19, citing *Knettel v. South Dakota,* 6th Jud. Cir. Civ. 99-45, which held "Amendment E was passed in order to protect family farms and the environment and to maximize the rural way of life.") The Attorney General surmised as follows:

> In the judgment of South Dakota voters, the best way to achieve such goals was to connect farm owners to the land, which necessarily requires eliminating distance between farm and owner. Two effective ways of tying owners to the land are to require residence or day-to-day labor.

(*Id*. at 19) (emphasis added).

The drafters of Initiative 300 cemented the need to "connect farm owners to the land" by requiring the stricter standard of day-to-day labor and management of the farm or ranch within the Initiative 300 family farm or ranch corporation exception.

In *Christensen Family Farms*, the Attorney General recited in his petition the fact that no family member that was a majority shareholder of Christensen Family Farms either resided on or were engaged in the day-to-day labor and management activities on the Knox **and** Cedar County agricultural real estate. The fact that the Attorney General has previously indicated that the residency and day-to-day labor and management requirements must be satisfied on each Nebraska

farm lends further credence to the relevance of the specific utilization of the phrase, "the farm," under Initiative 300.

In the aftermath of the *Progress Pig, Inc.* decision interpreting the day-to-day labor and management requirements of Initiative 300, J. David Aiken, Ag Law Specialist for the University of Nebraska-Lincoln Department of Agricultural Economics, reviewed its impact. In an article published in the *Cooperative Extension Cornhusker Economics* September 5, 2001 edition, Mr. Aiken posed the following hypothetical case:

> Example 3: Older farmer owns three farms: A, B and C. Older farmer lives on Farm A. Farm B is across the road from Farm A, while Farm C is four miles away. In the past, older farmer provided all of the labor for all three farms until 2000, but now he only drives a grain truck during harvest. The rest of the labor is provided by unrelated employees. Older farmer makes all the management decisions and directs the activities of the employees.
>
> Which of the three farms could old farmer include in a family farm corporation? Older farmer could incorporate Farm A because he resides there. Older farmer *might* be able to also incorporate Farm B as it is contiguous to Farm A and arguably is a single farm divided by a public road. Older farmer *could not* incorporate Farm C because he does not live there and does not provide daily labor, even though he provides daily management.

The foregoing analysis by Mr. Aiken is correct. It supports the common understanding and plain meaning rules of statutory and constitutional construction and interpretation. It further highlights the fact that the "residency" or "day-to-day labor and management" requirements of Initiative 300 must be satisfied with respect to <u>each</u> farm owned or operated in corporate form. If <u>each</u> farm in

Nebraska must comport with the requisite "residence" or "day-to-day labor and management" requirements by family members in order to qualify as a "family farm or ranch corporation," it can hardly be argued that satisfying these requirements in connection with any farm owned or operated in another state can somehow be "bootstrapped" into qualifying an out-of-state corporation as a "family farm or ranch corporation" as to all of its Nebraska farms, without also satisfying the "residency" or "day-to-day labor and management" requirements in connection with each farm in Nebraska.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court uphold the District Court ruling declaring Initiative 300 to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that the diskette containing the Brief of Amici Curiae was created using Microsoft Word and was scanned for viruses using the CA Inoculate Antivirus and was found to be virus free.

Dated this 25th day of May, 2006.

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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 6,985 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 Word in Times New Roman type style, font size 14.

Dated this 25th day of May, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2006, two copies of the above and foregoing brief of *Amici Curiae* Nebraska Bankers Association, Inc., Nebraska Chamber of Commerce and Industry, Inc. the Nebraska REALTORS ® Association, and the South Dakota Farm Bureau, Inc. in support of Appellees and in support of affirmation of judgment below, were served by United States mail, first class postage prepaid, upon the following:

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