In the United States Court of Appeals for the Eighth Circuit

No. 06-1308

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

Appellants,

v.

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

Appellees.

Brief of *Amici Curiae* National Farmers Union, National Family Farm Coalition, American Corn Growers Association, Minnesota Farmers Union, Land Stewardship Project, North Dakota Farmers Union, Dakota Resource Council, South Dakota Farmers Union, Dakota Rural Action, Iowa Farmers Union, Iowa Citizens for Community Improvement, Missouri Farmers Union, Missouri Rural Crisis Center, Arkansas Farmers Union, Campaign for Family Farms, Western Organization of Resource Councils, Federation of Southern Cooperatives, Illinois Farmers Union, Illinois Stewardship Alliance, Indiana Farmers Union, Citizens Action Coalition of Indiana, Powder River Basin Resource Council, Kansas Farmers Union, Wisconsin Farmers Union, Ohio Farmers Union, Michigan Farmers Union, Pennsylvania Farmers Union, Rocky Mountain Farmers Union, Montana Farmers Union, Utah Farmers Union, Texas Farmers Union, Alaska Farmers Union, Oregon Farmers Union, Washington Farmers Union, and California Farmers Union in Support of Appellants and in Support of Reversal of the 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 *Amici Curiae* National Farmers Union, National Family Farm Coalition, American Corn Growers Association, Minnesota Farmers Union, Land Stewardship Project, North Dakota Farmers Union, Dakota Resource Council, South Dakota Farmers Union, Dakota Rural Action, Iowa Farmers Union, Iowa Citizens for Community Improvement, Missouri Farmers Union, Missouri Rural Crisis Center, Arkansas Farmers Union, Campaign for Family Farms, Western Organization of Resource Councils, Federation of Southern Cooperatives, Illinois Farmers Union, Illinois Stewardship Alliance, Indiana Farmers Union, Citizens Action Coalition of Indiana, Powder River Basin Resource Council, Kansas Farmers Union, Wisconsin Farmers Union, Ohio Farmers Union, Michigan Farmers Union, Pennsylvania Farmers Union, Rocky Mountain Farmers Union, Montana Farmers Union, Utah Farmers Union, Texas Farmers Union, Alaska Farmers Union, Oregon Farmers Union, Washington Farmers Union, and California Farmers Union is a publicly held corporation or is owned in any part by a publicly held corporation.

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Dated: April 3, 2006

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF IDENTITY OF *AMICI CURIAE*, THEIR INTERESTS IN THE CASE, AND SOURCE OF AUTHORITY 1

INTRODUCTION 3

ARGUMENT 6

I. INITIATIVE 300 IS DESIGNED TO CAPTURE THE BENEFITS OF A FAMILY FARM SYSTEM OF AGRICULTURE AND THIS PURPOSE IS NOT DISCRIMINATORY 6

A. Family Farming Is the Most Socially Desirable Ownership Structure for Agriculture. 8

B. Courts Have Consistently Recognized the Right of States to Regulate Farm Structures for the General Welfare of Rural Communities. 14

C. Federal Policy Acknowledges the Importance of Family Farms in Promoting the General Welfare of Rural Communities. 17

D. The District Court Erred in Failing to Recognize the Promotion of Family Farm Purpose of I-300. 18

II. INITIATIVE 300 TREATS IN-STATE AND OUT-OF-STATE FARMS EVENHANDEDLY AND IS NOT DISCRIMINATORY ON ITS FACE. 19

III. INITIATIVE 300 IS CONSTITUTIONAL UNDER EITHER DORMANT COMMERCE CLAUSE TEST. 23

A. The Benefits of I-300 to Rural Welfare Far Outweigh Any Incidental and De Minimis Impact on Interstate Commerce. 23

B. I-300 Is Narrowly Drafted to Accomplish a Legitimate and Compelling State Interest. 25

CONCLUSION 27

CERTIFICATE OF SERVICE 30

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 33

TABLE OF AUTHORITIES

Cases

Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997).....20

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986).....5

CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).....22, 23

Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842 (8th Cir. 2002).....16

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).....15

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).....22, 23

Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001).....16, 20

Jones v. Gale, 405 F. Supp. 2d 1066 (D. Neb. 2005).....5, 6, 19, 20

Maine v. Taylor, 477 U.S. 131 (1986).....26

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).....23

MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991).....7, 16, 19, 25, 27

New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988).....4, 5

New Orleans v. Dukes, 427 U.S. 297 (1976).....15

Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994).....20

Pig Pro Nonstock Coop. v. Moore, 568 N.W.2d 217 (Neb. 1997).....27

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).....5, 24

R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731 (8th Cir. 2002).....5

S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).....7

S. Union Co. v. Mo. Pub. Serv. Comm'n, 289 F.3d 503 (8th Cir. 2002).....21, 24

State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. 1988).....16

United Waste Sys. of Iowa, Inc. v. Wilson, 189 F.3d 762 (8th Cir. 1999).....24

Van Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997).....16

Wyoming v. Oklahoma, 502 U.S. 437 (1992).....26

Constitutional Provisions

Neb. Const. Art. XII, Sec. 8(1) 4

Neb. Const. Art. XII, Sec. 8(1)(A).....4

Statutes

Minn. Stat. § 500.24, subd. 1 14

Rules and Regulations

Federal Rule of Appellate Procedure 29.....3

USDA Departmental Regulation No. 9700-1 § 3 ("Small Farms Policy") (Sept. 8, 1999).....18

Other Authorities

Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners*, 29 Clearinghouse Rev. 1087 (April 1996).....12

Osha Gray Davidson, *Broken Heartland: The Rise of America's Rural Ghetto* (1990).....12

Walter Goldschmidt, *As You Sow: Three Studies in the Social Consequences of Agribusiness* (2d ed. 1978) 9, 10, 26

John E. Ikerd, *The Economic Impacts of Increased Contract Swine Production in Missouri: Another Viewpoint*, http://www.ssu.missouri.edu/faculty/jikerd/papers/con-hog.htm 12

Linda M. Lobao, *Industrialized Farming and Its Relationship to Community Well-Being: Report Prepared for the State of South Dakota, Office of Attorney General* (January 2000), http://www.agribusinessaccountability.org/pdfs//270_Industrialized%20Farming.pdf.....8, 10, 13

Linda M. Lobao, *Locality and Inequality: Farm and Industry Structure and Socioeconomic Conditions* (1990).....10, 25

Mark Lawrence, *Studying the Impacts of Industrial Confined Animal Feeding Operations:A Review of the Literature*, http://www.kerr center.com/publications/hogodorreview.pdf 12, 13

Thomas A. Lyson & Rick Welsh, *Agricultural Industrialization, Anticorporate Farming Laws, and Rural Community Welfare,* 37 Environment and Planning A:1479 (2005).....10, 11, 13, 14

Steve H. Murdock, et al., *Impacts of the Farm Financial Crisis of the 1980s on Resources and Poverty in Agriculturally Dependent Counties in the United States, in Rural Poverty: Special Causes and Policy Reforms* (Roders & Weiher eds., 1989).....13

David J. Peters, Technical Paper P-0702-1, *Revisiting the Goldschmidt Hypothesis:The Effect of Economic Structure on Socioeconomic Conditions in the Rural Midwest* (Mo. Econ. Research and Info. Ctr., 2002) 11, 13

Marty Strange, *Family Farming: A New Economic Vision* (1988) 8

USDA, *A Time to Act:A Report of the USDA National Commission on Small Farms* (1998) 17, 18

Rick Welsh & Thomas A. Lyson, *Anti-Corporate Farming Laws, The "Goldschmidt Hypothesis" and Rural Community Welfare,* http://www.askfarmerbrown.org/welshlyson.pdf 14, 25

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

Amici Curiae represent three national, four regional, and 28 state organizations all working to preserve and strengthen the family farm system of agriculture and promote the general welfare of rural communities across the nation. Of the 28 state organizations, ten represent members in states within the Eighth Circuit's jurisdiction. In addition, 12 of the state organizations represent family farmers and other concerned citizens from seven of the states that, like Nebraska, have corporate farming laws.[1] These 12 organizations advocate to preserve their states' restrictions on non-family-based corporate ownership and operation of farms and ranches.

Amici Curiae are all member-based organizations or coalitions of member-based organizations. Collectively, these groups represent well over a quarter million family farmers and tens of thousands of other members who seek to promote vital rural communities. These organizations and their members have advocated for many years for government policies that foster family farming as a means of promoting the general welfare of rural communities.

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[1] These organizations are Minnesota Farmers Union, Land Stewardship Project, North Dakota Farmers Union, Dakota Resource Council, South Dakota Farmers Union, Dakota Rural Action, Iowa Farmers Union, Iowa Citizens for Community Improvement, Missouri Farmers Union, Missouri Rural Crisis Center, Kansas Farmers Union, and Wisconsin Farmers Union.

As identified in detail in the Motion, *Amici Curiae* are: National Farmers Union, National Family Farm Coalition, American Corn Growers Association, Minnesota Farmers Union, Land Stewardship Project, North Dakota Farmers Union, Dakota Resource Council, South Dakota Farmers Union, Dakota Rural Action, Iowa Farmers Union, Iowa Citizens for Community Improvement, Missouri Farmers Union, Missouri Rural Crisis Center, Arkansas Farmers Union, Campaign for Family Farms, Western Organization of Resource Councils, Federation of Southern Cooperatives, Illinois Farmers Union, Illinois Stewardship Alliance, Indiana Farmers Union, Citizens Action Coalition of Indiana, Powder River Basin Resource Council, Kansas Farmers Union, Wisconsin Farmers Union, Ohio Farmers Union, Michigan Farmers Union, Pennsylvania Farmers Union, Rocky Mountain Farmers Union, Montana Farmers Union, Utah Farmers Union, Texas Farmers Union, Alaska Farmers Union, Oregon Farmers Union, Washington Farmers Union, and California Farmers Union.

Amici Curiae have an interest in this case because:

These organizations and their members believe in, depend on, and actively work to preserve a family farm system of agriculture in this country. The district court's decision to strike down the Nebraska constitutional provision that restricts non-family-based corporate farming undermines the family farm to the detriment of rural communities. If the district court's decision is not reversed, it may open a

floodgate to challenges to laws of other states that restrict non-family-based corporate ownership and operation of farms and ranches. *Amici Curiae* all support state laws regulating non-family-based corporate engagement in agriculture and therefore are concerned about the potential ramifications of the district court's decision if not overturned by this Court.

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

INTRODUCTION

Family-owned and -operated farms are the mainstay of rural communities. Studies show that these family farms generate real and measurable benefits for their communities. In contrast, academic and government studies consistently show that the health and well-being of rural communities decline as non-family-owned corporate entities take over farming operations: rural poverty increases, unemployment rates go up, and children's health and welfare suffer.

In an effort to capture and promote the social welfare benefits derived from family-owned and -operated farms, states and citizens have enacted laws and constitutional amendments that, to varying degrees, regulate or restrict non-family-owned corporations' ability to own farmland and engage in farming. Nebraska's constitutional amendment, known as "Initiative 300" or "I-300," is one such law. Passed in 1982 by 56 percent of the voting public, I-300 is precisely tailored to

capture the proven social, environmental, and economic benefits of family-owned and -operated farming, while reducing the adverse impacts associated with non-family-controlled industrial agriculture.

I-300 evenhandedly prohibits all limited liability entities from owning farm or ranch land, and from engaging in farming or ranching. Neb. Const. Art. XII, Sec. 8(1). I-300 provides an exception for family farm or ranch corporations "in which the majority of the voting stock is held by members of a family" and at least one family member "is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." *Id.* at Sec. 8(1)(A). Both in- and out-of-state family farm corporations may qualify for this exception. By emphasizing family ownership and direct family involvement in the farming operation, I-300 promotes Nebraska's important state interest in preserving for its rural communities the social welfare benefits that are associated with family farming.

The negative or dormant aspect of the Commerce Clause of the U.S. Constitution "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

Dormant Commerce Clause cases entail two tiers of analysis. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). In the first tier of analysis, the court determines whether the law is discriminatory by

looking to three indicators of discrimination against out-of-state interests: the law's purpose, facial language, and effect. *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 734 (8th Cir. 2002). If the law is found to be discriminatory, the court applies strict scrutiny to determine whether the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind.*, 486 U.S. at 278. If a state law has only indirect effects on interstate commerce and regulates evenhandedly, the second tier of analysis applies, and the law will be invalidated only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Brown-Forman*, 476 U.S. at 579.

In this case, the district court erroneously concluded that I-300 was enacted with a discriminatory purpose. *Jones v. Gale*, 405 F. Supp. 2d 1066, 1080 (D. Neb. 2005). The district court did so by failing to recognize that the true purpose of I-300 is to capture and promote the social, environmental, and economic benefits associated with a family-based structure of ownership and operation of farms and ranches. The district court also erroneously concluded that I-300 discriminates against out-of-state interests on its face. *Id.* at 1082. In doing so, the district court failed to recognize that I-300 does not prohibit the ownership of farm and ranch operations by out-of-state citizens, but rather withholds the benefit of a limited

liability shield from non-family-owned and -operated corporations—without regard to investors' residency or the place of incorporation. Having erroneously found that the law discriminated against out-of-state interests in its purpose and on its face, the district court applied the strict scrutiny test and erroneously held I-300 to be unconstitutional. *Id.* at 1083.

This Court should balance Nebraska's legitimate interest in maintaining the vitality and welfare of its rural communities with any incidental burdens I-300 places on interstate commerce. The language of I-300 is precisely drawn to achieve Nebraska's important governmental interest of promoting the welfare of the state's rural communities by preserving a family-owned and -operated structure of agricultural production. *Amici Curiae* urge this Court to recognize Nebraska's power to ensure the continued viability of family farms and the social benefits they bring to their rural communities, and to uphold the constitutionality of I-300.

ARGUMENT

I. INITIATIVE 300 IS DESIGNED TO CAPTURE THE BENEFITS OF A FAMILY FARM SYSTEM OF AGRICULTURE AND THIS PURPOSE IS NOT DISCRIMINATORY.

As this Court recognized when upholding the constitutionality of I-300 in the face of an Equal Protection Clause challenge, the purpose of I-300 is to "retain and promote family farm operations in Nebraska and . . . to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by

preventing the concentration of farmland in the hands of non-family corporations." *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991).[2]

That the state has an important and legitimate interest in promoting family farm operations is well supported by government and academic studies that demonstrate the broad range of social benefits associated with family-owned and -operated farms. These studies, in contrast, consistently show that the health and welfare of rural communities seriously decline as corporate owners—shielded from personal liability and physically removed from farming—take over farm operations.

States have a right to regulate to capture the social welfare benefits associated with a family farm structure of agriculture. Nebraska's I-300 is clearly intended to do just that without treating out-of-state interests any differently than their in-state counterparts. Therefore, I-300's purpose is not discriminatory, and strict scrutiny is not warranted.

[2] Because *MSM Farms, Inc.* has already decided the purpose of I-300, this Court's decision in *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), is not controlling in this case. I-300's purpose, as found by this Court, does not include any intent to discriminate against out-of-state interests, but merely to distinguish between family farms and non-family-owned corporations.

A. Family Farming Is the Most Socially Desirable Ownership Structure for Agriculture.

There is overwhelming evidence that family farms are the most socially desirable form of agriculture. The term "family farms," as it is used here, refers to farms that are owned and operated by a farm household. "Industrial farms," by contrast, are non-household-based production units characterized by absentee corporate ownership and a division of labor among owners, managers, and other hired labor.[3] *See, e.g.*, Marty Strange, *Family Farming: A New Economic Vision* 32-42 (1988).

In the 1940's, at the direction of the U.S. Senate, anthropologist Dr. Walter Goldschmidt undertook one of the earliest studies of the community impacts of family farms and industrial farms. Goldschmidt compared two rural California communities in which the structure and size of farms were different, but the total value of farm production was almost identical. Walter Goldschmidt, *As You Sow:*

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[3] Ownership structure is a key difference between family and industrial farms; however, the size of the farm is also often used as a proxy for distinguishing industrial farms from more traditional family farms. "When social scientists refer to 'industrialized' farms, they invariably are referring to both scale and organizational characteristics of the farm unit." Linda M. Lobao, *Industrialized Farming and Its Relationship to Community Well-Being: Report Prepared for the State of South Dakota, Office of Attorney General* 4 (January 2000), http://www.agribusinessaccountability.org/pdfs//270_Industrialized%20Farming.pdf (prepared for *South Dakota Farmers Bureau v. South Dakota* in the United States District Court for the District of South Dakota).

Three Studies in the Social Consequences of Agribusiness xxiv, 306-14 (2d ed. 1978). One community was characterized by large-scale farms extensively employing wage laborers while the other community was characterized by smaller family-owned and -operated farms. *Id.* at 279-82, 316-20.

Goldschmidt concluded from his research that residents of the community with larger, industrialized farms realized a lower standard of living and quality of life compared to the residents of the community with smaller family farms. *Id.* at 282-84. Residents of the community dominated by industrial farms had lower levels of income and educational attainment. *Id.* Further, the fiscal and political structure of the community was controlled by the owners of those industrial farms, who did not live in the community and cared little about the quality and diversity of public services. *Id.* In contrast, Goldschmidt concluded that a greater concentration of family farmers created an economic structure with more evenly distributed incomes and a larger middle class. *Id.* These communities also had more comprehensive and better quality public services because the family farmers lived and worked in the same community and took a strong interest in local government and the services it provided. *Id.*

These distinctions remain true today. In the 60 years since Goldschmidt first recognized the impact of farm ownership and operation structure on community well-being, academic and governmental research continues to consistently find

"detrimental effects of industrial farming on many indicators of community quality of life, particularly those involving the social fabric of communities." Lobao, *Industrialized Farming* at 22 (summarizing 38 studies of industrial farming and community well-being); *see also* Linda M. Lobao, *Locality and Inequality: Farm and Industry Structure and Socioeconomic Conditions* 53-75 (1990). In contrast, counties dominated by moderate-sized family farms "consistently have better socioeconomic well-being, including lower family poverty, higher median family income, lower unemployment, and lower infant mortality." Lobao, *Industrialized Farming* at 7.

Family farming also sustains a larger middle class, and by spreading out the benefits of numerous family-owned farms, communities "manifest broad-based control over productive assets and an increased economic independence of their citizens." Thomas A. Lyson & Rick Welsh, *Agricultural Industrialization, Anticorporate Farming Laws, and Rural Community Welfare*, 37 Environment and Planning A:1479, 1481 (2005). This "results in dispersed political power and an increased well-being of community residents." *Id.*

Greater concentrations of farm proprietorships—defined as unincorporated farms owned by an individual—also produce better health and socioeconomic conditions for children. David J. Peters, Technical Paper P-0702-1, *Revisiting the Goldschmidt Hypothesis: The Effect of Economic Structure on Socioeconomic*

Conditions in the Rural Midwest 17, 21, 24 (Mo. Econ. Research and Info. Ctr., 2002).[4] Children in counties dominated by more farm proprietorships, with fewer community members employed in industrial agriculture, measured better on four tested indicators—the percent of children enrolled in free and reduced price lunch programs, low birth weight infants, births to teen females, and the high school drop out rate.[5] *Id.* at 8.

Family farms also produce more employment than their industrial counterparts. One study revealed that large-scale hog farms displace about three times the number of independent hog farmers than they create in jobs. *See* John E. Ikerd, *The Economic Impacts of Increased Contract Swine Production in Missouri: Another Viewpoint*, http://www.ssu.missouri.edu/faculty/jikerd/ papers/con-hog.htm (last visited Mar. 30, 2006). Studies have also confirmed that

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[4] *Available at* http://www.missourifarmersunion.org/conf03/goldschmidt03.pdf.

[5] Interestingly, this Peters study determined that concentration of similar *non-farm* unincorporated businesses did not have the same impact, indicating "it is not proprietorships in general that matters, but that there is something unique about the economic activity of farming." *Id.* at 24. Peters explained this by pointing to other studies that have found that

> in farm families there is a high degree of overlap between business, leisure and family life that is not found in other types of family business. Farming also differs in that it is much more than an economic activity, but is a lifestyle rooted in certain values regarding the family and the land.

Id. In addition, intergenerational farm succession is an important goal in many farm families. *Id.*

smaller operations make a greater impact on the amount of purchases that are made from local suppliers than do larger enterprises. Mark Lawrence, *Studying the Impacts of Industrial Confined Animal Feeding Operations: A Review of the Literature*, 10, http://www.kerrcenter.com/publications/hogodorreview.pdf (last visited Mar. 30, 2006). Accordingly, rural development experts estimate that for every five to seven farms that go out of business, one business in the rural community closes. Osha Gray Davidson, *Broken Heartland: The Rise of America's Rural Ghetto* 57 (1990).

The loss of family farms inevitably leaves entire rural communities with lower overall incomes and an increase in poverty. *See generally* Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners*, 29 Clearinghouse Rev. 1087, 1089-91 (April 1996).[6] "[I]ndustrial farming leads to declines in local population, lower incomes and lower standards of living, lower numbers and quality of community services, lower community integration and greater psychological stress, and a less diverse

[6] *See also* Steve H. Murdock, et al., *Impacts of the Farm Financial Crisis of the 1980s on Resources and Poverty in Agriculturally Dependent Counties in the United States, in Rural Poverty: Special Causes and Policy Reforms* 87-89 (Roders & Weiher eds., 1989).

economic base and higher unemployment." Peters, *Revisiting the Goldschmidt Hypothesis* at 4; *see also* Lyson & Welsh, *Agricultural Industrialization* at 1481.[7]

States are therefore reasonably concerned with any transition away from a family-owned and -operated system of farming. Thus, states have enacted corporate farming laws "to discourage the development of a nonfamily-based corporate agriculture and to retain an agricultural industry that is dominated by family-owned, family-operated and family-controlled production units."[8] Lyson & Welsh, *Agricultural Industrialization* at 1483.

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[7] Other impacts noted by Lobao in her summary of studies assessing industrial farming include: increased crime, increased social conflict, loss of democratic decision-making as industrial interests dominate local politics, decline in the number of churches and local retail units, and environmental consequences including eco-system strains and increased environmental violations. Lobao, *Industrial Farming* at 15-16. Lobao also notes that, in locations near large industrial hog confinement structures, neighbors complain of health problems and declining property values. *Id.* at 16.

Large industrial farms can also cause significant environmental damage to a state's soil, water, and natural resources. In addition to the sheer consequences of their size, industrial corporate farms' liability shield, and the fact that their investors are not themselves living in the local environment, combine to make these entities even more risky to the environment. Although this brief will not exhaust the arguments about the environmental degradation caused by industrial farming, additional information on this issue can be found in Lawrence, *Studying the Impacts of Industrial Confined Animal Feeding Operations*.

[8] For example, the Minnesota legislature has explained its motivation for its corporate farm law as such:

> The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to

Studies also have shown that these laws are effective: A comparison of agriculture-dependent counties in states with corporate farming laws, such as Nebraska, to those without such laws, reveals that the tested counties in states with corporate farm laws have fewer families in poverty, lower unemployment, and a higher percentage of farms realizing cash gains. Rick Welsh & Thomas A. Lyson, *Anti-Corporate Farming Laws, The "Goldschmidt Hypothesis" and Rural Community Welfare*, 19-22, http://www.askfarmerbrown.org/welshlyson.pdf (last visited Mar. 30, 2006). Thus, state corporate farm laws are essential to ensuring that the community-wide benefits of a family-owned and -operated structure of agricultural production continue to be realized.

B. Courts Have Consistently Recognized the Right of States to Regulate Farm Structures for the General Welfare of Rural Communities.

States have significant interests in addressing the reductions in income levels, increased unemployment, and increased levels of poverty associated with a non-family-owned and -operated system of agricultural production since all of these factors result in lower state tax revenues and increase the state's burden to respond to its citizens living in adverse conditions. Similarly, degradation of the health and

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

Minn. Stat. § 500.24, subd. 1.

welfare of rural communities—and particularly of children in those communities—is undeniably a matter of important state interest.

Courts have consistently recognized that states have an important interest in regulating to protect the general welfare of their citizens and communities. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (recognizing state's authority to legislate for the public health, safety, morals, and general welfare of its citizens). Because of the state's vital interest in promoting the health and welfare of its citizens and communities, "[s]tates are accorded wide latitude in the regulation of their local economies under their police powers." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (Equal Protection case).

Courts have acknowledged that regulation of farming structure itself is an important and legitimate government interest. For example, this Court has already denied an Equal Protection challenge to I-300, holding:

> The people of Nebraska have made a reasonable judgment that *prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land*. It is not for the courts to second-guess the wisdom of this judgment.

MSM Farms, Inc., 927 F.2d at 335 (emphasis added); *see also Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 860 (8th Cir. 2002) (Contracts Clause case, recognizing that the state interest in "serving the farmer and rural communities in South Dakota" would be "unquestionably significant and legitimate"); *Van*

Kerssenbrock-Praschma v. Saunders, 121 F.3d 373, 378 (8th Cir. 1997) (Equal Protection case, describing "preserving the family farm system" as "a legitimate governmental purpose").

Similarly, the Supreme Court of Missouri, in an Equal Protection challenge to Missouri's restriction on corporate ownership of farmland, held:

> It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, *thereby protecting the welfare of its citizens comprising the traditional farming community*, and such statute is rationally related to a legitimate state interest.

State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 806 (Mo. 1988) (emphasis added).

Finally, this Court has recognized that the importance of a state's interest in the welfare of its farming communities is sufficient to withstand a dormant Commerce Clause challenge. In *Hampton Feedlot, Inc. v. Nixon*, this Court upheld against dormant Commerce Clause attack a Missouri price discrimination law that directly regulated the operation of Missouri's livestock markets, explaining:

> The Missouri legislature *has the authority to determine the course of its farming economy*, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harms and benefits to all stakeholders in creating its price discrimination law.

249 F.3d 814, 820 (8th Cir. 2001) (emphasis added).

C. Federal Policy Acknowledges the Importance of Family Farms in Promoting the General Welfare of Rural Communities.

The federal government has also recognized the importance of family farms to the general welfare of rural communities and to the overall health of our nation's economy. The United States Department of Agriculture (USDA) has adopted a vision of American agriculture that focuses on "farms with less than $250,000 gross receipts annually, *on which day-to-day labor and management are provided by the farmer and/or the farm family* that owns the production or owns, or leases, the productive assets." *A Time to Act: A Report of the USDA National Commission on Small Farms* 28 (1998).[9] As a shorthand, USDA refers to these farms as "small farms" but the requirement of direct and active management is essential:

> Small farms contribute more than farm production to our society. Small farms embody a diversity of ownership, cropping systems, landscapes, biological organization, culture, and traditions. Since the majority of farmland is managed by a large number of small farm operators, the responsible management of soil, water, and wildlife encompassed by these farms produces significant environmental benefits. Decentralized land ownership produces more equitable economic opportunity for people in rural communities, and offers self-employment and business management opportunities. Farms, particularly family farms, can be nurturing places for children to grow up and acquire the values of responsibility and hard work.

Id. at 8.

By internal regulation, USDA recognizes that these farms are:

> important to our Nation's economy, to the wise stewardship of our biological and natural resources, and to the leadership and social fabric of rural communities. Their economic contribution is important to the Nation and is especially critical to the thousands of rural communities where they pay taxes and to the thousands of business they support. . . .

USDA Departmental Regulation No. 9700-1 § 3 ("Small Farms Policy") (Sept. 8, 1999).[10] Indeed, USDA has done more than just acknowledge the importance of family-owned and -operated farms: USDA has actually implemented an official internal policy to develop and support programs focusing on the needs of these owner-operated small farms and to reflect this purpose in all of its service areas. *Id.* §§ 4(b), 5(c). Thus, USDA's position emphasizes the importance of the governmental interest in preserving family farms to secure the general welfare of rural communities—the very interest the citizens of Nebraska meant to further by passage of I-300.

D. The District Court Erred in Failing to Recognize the Promotion of Family Farm Purpose of I-300.

The district court was wrong when it held that I-300 was "conceived and born" with an intent to discriminate against out-of-state interests. *Jones*, 405 F. Supp. 2d at 1080. This Court has already found that the intent of I-300 was to "retain and promote family farm operations in Nebraska." *MSM Farms, Inc.*, 927 F.2d at 333.

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[9] *Available at* http://www.reeusda.gov/smallfarm/smlfrm1.pdf.

[10] *Available at* http://www.usda.gov/oce/smallfarm/sfpolicy.htm.

I-300 seeks to achieve this purpose without regard to the residency of non-family corporate owners.

The evidence the district court relied on to find discriminatory intent establishes, at best, that I-300 "discriminates" against *all* non-family farm corporations. The ballot title, for example, expresses the purpose of I-300 as "prohibiting ownership of Nebraska farm or ranch land by *any* corporation, *domestic or foreign*, which is not a Nebraska family farm corporation." (Aplt. App. v. I at 4 (emphasis added).) This is not the type of discrimination against out-of-state interests that offends the dormant Commerce Clause. To the contrary, I-300 recognizes the social welfare benefits of family-owned and -operated farms and is precisely designed to capture those particular benefits for the general welfare of Nebraska's rural communities.

II. INITIATIVE 300 TREATS IN-STATE AND OUT-OF-STATE FARMS EVENHANDEDLY AND IS NOT DISCRIMINATORY ON ITS FACE.

The district court erroneously decided that I-300 discriminates against out-of-state interests on its face. *Jones*, 405 F. Supp. 2d at 1082. This decision cannot be reconciled with the text of I-300 or with prior precedent of this Court and the Supreme Court. I-300 is blind to the citizenship of its regulated parties, and permits both in- and out-of-state citizens to own farmland and engage in farming as long as

they meet the same neutral criteria. Therefore, the district court's decision must be reversed.

For purposes of dormant Commerce Clause analysis, "'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Hampton Feedlot, Inc.*, 249 F.3d at 818 (*quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). Where an out-of-state corporation is treated the same as an in-state corporation, there is no discrimination under the dormant Commerce Clause. *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1386-87 (8th Cir. 1997).[11]

I-300 does not treat in- and out-of-state interests differently at all. I-300 treats all parties equally by prohibiting *all* limited liability entities from owning farmland

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[11] This Court, in *Ben Oehrleins*, elaborated:

> A Delaware corporation doing business in Minnesota could not argue that it is discriminated against by Minnesota laws that apply equally to all businesses operating in the state. South Dakota companies may chose not to locate operations in Minnesota because of [the law's effects], but this is not discrimination under the Commerce Clause. Like any other local market regulation, Ordinance 12 may or may not encourage companies from doing business in the state. But while this may be a relevant concern in forming economic policies, it is simply not the proper inquiry for considering discrimination under the Commerce Clause.

115 F.3d 1372, 1386-87; *accord S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002).

or engaging in farming—regardless of the place of incorporation and regardless of the investors' citizenship or residency.

The existence of an exception for family farm or ranch corporations does not make I-300 discriminatory. Both in- and out-of-state corporations may qualify for the family farm exception. 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 I-300 differentiates based on where the family farm corporation is incorporated, and nothing in I-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.

Moreover, I-300 applies equally to in-state residents and to entities incorporated in Nebraska. Nebraska corporations cannot engage in farming unless they too qualify as a family farm corporation, or meet one of the other neutral exceptions. Thus, a Nebraska corporation in which no member of the majority-owning family resides on or actively manages any portion of the corporate-owned farm could not own farmland or engage in farming in Nebraska. Indeed, the fact

that five of the six plaintiffs in this action are Nebraska residents underlines the conclusion that I-300 does not discriminate in favor of Nebraska residents.

"The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). Moreover, the Supreme Court has specifically "rejected the 'notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *CTS Corp. v. Dynamics Corp. of Am*., 481 U.S. 69, 93-94 (1987) (*quoting Exxon Corp.*, 437 U.S. at 127).

Thus, in *Exxon Corp.*, the Court held that Maryland's attempt to address problems resulting from vertical integration in the petroleum industry by prohibiting *all* petroleum producers and refiners from operating retail gas stations in Maryland was constitutional under the dormant Commerce Clause—even though there were no in-state producers or refiners and the burden of the prohibition fell solely on out-of-state companies. 437 U.S. at 125. On its face, the law treated out-of-state corporations the same as in-state corporations and was a

legitimate exercise of the state's authority to affect the structure of the retail gasoline market for the benefit of Maryland consumers. *Id.* at 126.[12]

Similarly, in this case, I-300 evenhandedly governs the structure of farm ownership in Nebraska. Nebraska prohibits *all* non-family farm corporations from owning and operating farms and ranches in the state. I-300 impacts both in- and out-of-state farm operations equally, and both in- and out-of-state citizens and corporations can qualify for the family farm exception. Thus, I-300 does not discriminate on its face, and strict scrutiny is not warranted.

III. INITIATIVE 300 IS CONSTITUTIONAL UNDER EITHER DORMANT COMMERCE CLAUSE TEST.

A. The Benefits of I-300 to Rural Welfare Far Outweigh Any Incidental and De Minimis Impact on Interstate Commerce.

Because I-300 is not discriminatory and is justified by a legitimate and recognized state interest, it is subject to the *Pike* balancing test. *Pike*, 397 U.S. at 142. Under this analysis, an evenhanded state regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the

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[12] *See also CTS Corp.*, 481 U.S. at 88 (upholding an Indiana corporate takeover law that applied to all hostile tender offers even though its application would often impact out-of-state shareholders and investors); *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 473-74 (1981) (rejecting a dormant Commerce Clause challenge to a Minnesota statute banning the sale of retail milk in plastic, nonrefillable containers because the statute "regulates evenhandedly" by prohibiting all milk retailers from selling such products even though affected plastic manufacturers were almost entirely out of state).

putative local benefits." *Id.*; *see also United Waste Sys. of Iowa, Inc. v. Wilson*, 189 F.3d 762, 767-68 (8th Cir. 1999). By disregarding I-300's neutral language and its evenhanded application, the district court failed to apply this proper test. Balancing the weight of Nebraska's legitimate interest in preserving the health and welfare of its rural communities, against what is an incidental burden on interstate commerce, reveals that I-300 is certainly constitutional.

Under the *Pike* balancing test, the plaintiffs must prove that an actual burden exists upon interstate commerce and that the burden outweighs any putative local benefit to Nebraska family farmers and rural communities. *See S. Union Co.*, 289 F.3d at 509. The burden in this case is slight at best. Out-of-state corporate interests can own and operate farms in Nebraska as long as they meet the same requirements that a Nebraska corporation must—that a member of the family owning a majority of the corporation reside on or provide the day-to-day labor or management on some portion of the corporate-owned farm. In addition, any individual or entity that maintains personal liability can farm or ranch in Nebraska regardless of citizenship or residency. Thus, the burden of I-300 on interstate commerce is, at most, de minimis.

In comparison, Nebraska's interest in maintaining the social, economic, and environmental health and welfare of its rural communities is significant. This Court has already determined that I-300 promotes Nebraska's interest in preventing

unrestricted corporate ownership of farm operations, and that I-300's supporters reasonably feared this type of absentee ownership "would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources." *MSM Farms, Inc.*, 927 F.2d at 333. In addition, studies consistently show that family farms are indeed better for rural communities, and that rural counties in states with corporate farm laws fare better in critical welfare measures. *E.g.*, Lobao, *Locality and Inequality* at 53-75; Welsh & Lyson, *Anti-Corporate Farming Laws*, at 19-22.

The benefits of reducing poverty, unemployment, and social discord, while improving civic participation and children's health, clearly outweigh any burden placed on non-family farm corporations seeking to farm in Nebraska. Therefore, I-300 is constitutional, and the district court decision to the contrary must be reversed.

B. I-300 Is Narrowly Drafted to Accomplish a Legitimate and Compelling State Interest.

Even if this Court were to find that I-300 discriminates against out-of-state interests, this constitutional provision should be upheld. Under a strict scrutiny analysis, the burden falls on Nebraska to justify I-300 "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Wyoming v.*

Oklahoma, 502 U.S. 437, 456 (1992) (internal quotations omitted). Strict scrutiny under this analysis need not be fatal. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 142-43, 146-48 (1986) (upholding patently discriminatory law because no nondiscriminatory means were available to preserve Maine's unique and fragile fisheries).

The integrity and legitimacy of Nebraska's interest in protecting the welfare of its rural communities has already been established. *See, supra,* Argument I.A-C. The local benefits of a family farm system of agriculture, in which farm operation decisions are made by individuals actively engaged in the farming way of life, are manifold. *See, e.g.*, Goldschmidt, *As You Sow* at 282-84.

Nebraska enacted I-300 to promote the proven benefits of family farms and to address the specific threats posed by absentee industrial control of farming operations. *See MSM Farms, Inc.*, 927 F.2d at 333.[13] The only way to capture the benefits associated with family ownership and operation is to directly support that form of ownership and operation, and the only way to prevent the particular ills associated with unrestricted corporate ownership is to require that owners either

[13] *See also Pig Pro Nonstock Coop. v. Moore*, 568 N.W.2d 217, 228 (Neb. 1997) ("It is precisely this type of absentee ownership and operation of farm and ranch land by a corporate entity which the plain language of [I-300] prohibits.").

reside on or actively manage the farm operation before the benefit of limited liability is bestowed.

This is exactly what I-300 does: Corporate ownership of farms is prohibited for all entities, except those entities that meet the neutral family farm corporation definition. Because family farm corporations with direct owner control do not pose the same threats as absentee-owned industrial farms, and instead provide significant community benefits, I-300 provides a narrow exception for family farm corporations in which a majority of the corporation is family-owned and a member of that family lives on or actively manages the farm.

I-300 is drafted as narrowly as possible to capture the social, economic, and environmental benefits associated with family farming and to prevent the harm to the social fabric of rural communities associated with non-family-based industrial farm ownership and operation. There is no other alternative by which Nebraska could regulate the ills associated with non-family-based absentee corporate ownership of farms while still promoting the well-being of its rural communities. Thus, I-300 must be a constitutional means by which Nebraska can achieve its legitimate and compelling interest in preserving the significant benefits of a family farm system of agriculture.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated: April 3, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2006, I served the foregoing Brief of *Amici Curiae* National Farmers Union, National Family Farm Coalition, American Corn Growers Association, Minnesota Farmers Union, Land Stewardship Project, North Dakota Farmers Union, Dakota Resource Council, South Dakota Farmers Union, Dakota Rural Action, Iowa Farmers Union, Iowa Citizens for Community Improvement, Missouri Farmers Union, Missouri Rural Crisis Center, Arkansas Farmers Union, Campaign for Family Farms, Western Organization of Resource Councils, Federation of Southern Cooperatives, Illinois Farmers Union, Illinois Stewardship Alliance, Indiana Farmers Union, Citizens Action Coalition of Indiana, Powder River Basin Resource Council, Kansas Farmers Union, Wisconsin Farmers Union, Ohio Farmers Union, Michigan Farmers Union, Pennsylvania Farmers Union, Rocky Mountain Farmers Union, Montana Farmers Union, Utah Farmers Union, Texas Farmers Union, Alaska Farmers Union, Oregon Farmers Union, Washington Farmers Union, and California Farmers Union by causing two copies to be mailed to:

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Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that the diskette containing Brief of *Amici Curiae* National Farmers Union, National Family Farm Coalition, American Corn Growers Association, Minnesota Farmers Union, Land Stewardship Project, North Dakota Farmers Union, Dakota Resource Council, South Dakota Farmers Union, Dakota Rural Action, Iowa Farmers Union, Iowa Citizens for Community Improvement, Missouri Farmers Union, Missouri Rural Crisis Center, Arkansas Farmers Union, Campaign for Family Farms, Western Organization of Resource Councils, Federation of Southern Cooperatives, Illinois Farmers Union, Illinois Stewardship Alliance, Indiana Farmers Union, Citizens Action Coalition of Indiana, Powder River Basin Resource Council, Kansas Farmers Union, Wisconsin Farmers Union, Ohio Farmers Union, Michigan Farmers Union, Pennsylvania Farmers Union, Rocky Mountain Farmers Union, Montana Farmers Union, Utah Farmers Union, Texas Farmers Union, Alaska Farmers Union, Oregon Farmers Union, Washington Farmers Union, and California Farmers Union was created using Microsoft Office Word XP, was scanned for viruses using Symantec AntiVirus™ Corporate Edition version 8.00.9374, and was found to be virus free.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,123 words, beginning with the Statement of Identity of *Amici Curiae* through the Conclusion, and including footnotes.
2. Pursuant to Eighth Circuit Rule 28A(c), 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word XP in Times New Roman style, font size 14.

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