IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EMPACADORA de CARNES de FRESNILLO, S.A. de C.V., BELTEX CORPORATION, and DALLAS CROWN, INC. Plaintiffs	§	
VS.	§	CIVIL ACTION NO. 4:02-CV-0804-Y
TIM CURRY, District Attorney, Tarrant County, Texas, et al. Defendants	§	

BRIEF IN SUPPORT OF
DEFENDANT TIM CURRY'S MOTION FOR SUMMARY JUDGMENT
And RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ANN DIAMOND
Chief, Litigation
Assistant Tarrant County
Criminal District Attorney
State Bar No. 05802400

ROBERT D. BROWDER
Assistant District Attorney
State Bar No. 03087975
401 W. Belknap Street, 9th Floor
Fort Worth, Texas 76196-0401
Tel. No. 817/884-1233; FAX: 817/884-1675

ATTORNEYS FOR DEFENDANT TIM CURRY
TARRANT COUNTY CRIMINAL
DISTRICT ATTORNEY

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TO THE HONORABLE TERRY MEANS, UNITED STATES DISTRICT JUDGE:

This Brief is filed on behalf of Tim Curry, the Criminal District Attorney of Tarrant County, Defendant, pursuant to Local Rules 56.3 and 56.5, in support of Defendant's Motion for Summary Judgment. To avoid duplication, this Brief also serves as the Brief in Support of Defendant's Response to Plaintiffs' Motion for Summary Judgment pursuant to Local Rules 56.4 and 56.5. Defendant Curry is entitled to judgment in this case against all Plaintiffs in all respects.

I. SUMMARY

This case is about horsemeat for human consumption, a product for which Plaintiffs have no domestic human consumption market, a substance that is so disfavored under Federal law that governmental officials may require that it be segregated from other meats, and the sole meat that the Federal government requires be marked with the equine-specific dreaded Green Ink lest anyone eat it by mistake.

Texas has criminalized the sale, possession, and transfer of such horsemeat.

Plaintiffs seek to prevent a State prosecution in Tarrant County, Texas, against them for their undisputed violations of the clear wording of a long-standing, non-discriminatory Texas penal statute, Texas Agriculture Code, Chapter 149,[1] ["Chapter 149" or "149"] prohibiting certain of their admitted for-export human-consumption horsemeat business activities in Texas. Tim Curry seeks Summary Judgment denying all relief sought by all Plaintiffs because Chapter 149 is in force and effect and is not precluded by or in conflict with Federal law. For all the reasons that Defendant Tim Curry is entitled to Summary Judgment, Plaintiffs are not entitled to Summary Judgment.

This is a States' Rights case. The challenged Texas law has not been expressly or specifically repealed, although the statute's predecessor bears a confusingly similar (but not identical) number to a statute that was repealed in 1969. There is no repeal by conflict; the current statutory provision and later-enacted legislation are to be read in harmony; such a reading is completely possible and it results in the continued viability of the horsemeat ban.

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[1] **Texas Agriculture Code**

§ 149.002. Sale or Possession of Horsemeat

A person commits an offense if:

(1) the person sells, offers for sale, or exhibits for sale horsemeat as food for human consumption; or

(2) the person possesses horsemeat with the intent to sell the horsemeat as food for human consumption.

§ 149.003. Transfer* of Horsemeat

A person commits an offense if the person:

(1) transfers horsemeat to a person who intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption; and

(2) knows or in the exercise of reasonable discretion should know that the person receiving the horsemeat intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption.

*Note: The transfer is of possession, not necessarily title; this is clear from Section 3 of the original 1949 wording "it shall be unlawful for any person to transfer the possession of horse meat..." before the 1991 non-substantive recodification. Acts, 51st Leg., R.S., 1949, pp. 78-79, ch. 45. Plaintiff's Exhibit 1, volume 1, page 1 ["P. Ex. 1, 1 Apx. 1A"].

This case ultimately turns on whether or not the Texas law at issue is preempted or precluded by Federal law. It is not.

The suggestion that perhaps this case can be disposed of on a finding of repeal alone is incorrect for two reasons.[2] The first reason is that the statute has not been repealed. The second reason is that the arguments for repeal are intrastate commerce arguments and relate to horsemeat sold for human consumption solely within Texas. Even if there was partial repeal based on later-enacted intrastate commerce State laws, this issue is not before the Court and is not applicable to the Plaintiffs, who export all their human-consumption horsemeat.[3] The severability provisions of Texas law would kick in[4], leaving the part of the statute that is applicable to Plaintiffs' interstate and foreign activities. It would still be necessary to reach the Federal preemption issues. The same Federal issues that must be decided in this lawsuit will be of interest to any other State that has or wishes to consider a statutory ban on horsemeat sales for human consumption.[5]

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[2] Although Plaintiffs retain their repeal argument, they say that the 1969 law they pointed to as the likely agent of repeal "is applicable only to intrastate commerce". Plaintiffs' Motion for Summary Judgment with Brief, paragraph 10.2, page 21. Indeed it was. Plaintiffs now cite Defendant's Repeal Issues Brief as a document on which they rely. Plaintiffs' Motion for Summary Judgment with Brief, item 17, page 3. Defendant Curry relies on it (as corrected), too. Filed and Numbered 60 and 61 on the Court's Docket. ["Docs. 60 and 61"], Defendant's Appendix, Exhibit 69, Defendant's Volume 2, pages 1125-58. ["D. Ex. 69, D2 Apx. 1125 – 58"]

[3] Plaintiffs' Amended Complaint, paras. 2.1, p. 2; 4.1-4.3, pp. 7-9. Doc. 4. Plaintiffs' Motion for Summary Judgment with Brief, paras. 2.1, p. 3, 4.1-4.3, pp. 9-10.

[4] The 1949 law contains a severability clause. Acts, 51st Leg., R.S., 1949, pp. 78-79, Sec. 8, ch. 45. P. Ex. 1, 1 Apx. 1A-1B. And, the Texas Code Construction Act provides for severability. Texas Gov't Code, § 311.032. D. Ex. 71, D2 Apx. 1173.

[5] "Prohibition of Horse Slaughter and Sale of Horsemeat for Human Consumption Act of 1998," California Penal Code § 598c ("Notwithstanding any other provision of law, it is unlawful for any person to possess, to import into or export from the state, or to sell, buy, give away, hold, or accept any horse with the intent of killing, or having another kill, that horse, if that person knows or should have known that any part of that horse will be used for human consumption."); Mississippi Meat, Meat-Food and Poultry Regulation and Inspection Law of 1960, Miss. Code. Ann. § 75-33-3 ("The term 'food unfit for human consumption' shall be construed to include the meat and meat-food products of horses and mules....."); Oklahoma Public Health Code, 63 Okl. St. Ann. § 1-1136 ("It shall be

Although the Federal Government could preclude the challenged Texas State law, it has not chosen to do so and the existing Texas law does not conflict with Federal law or improperly intrude into exclusive Federal territory. Accordingly, the 10th Amendment to the United States Constitution reserves the power to the States (or to the people) to deal with horsemeat for human consumption. There is no express or implied preemption, and the dormant commerce clause doctrine does not preclude this law because the law is non-discriminatory and any impact on interstate commerce is the sort of incidental impact that is not precluded by commerce clause jurisprudence. The Texas statute does not illegally regulate interstate or foreign transportation or commerce. The horsemeat law does not violate Due Process, the 5th Amendment, or Federal constitutional religious liberties. The potential legal impact on aiders and abettors does not impair the validity of the statute, and governmental meat inspectors are not in legal jeopardy. The Plaintiffs lack standing to assert any international trade or treaty claim in this case.

Texas is permitted to have and enforce the law at issue, Texas Agriculture Code, Chapter 149, specifically sections 149.002 and 149.003. P. Ex. 1, 1 Apx. 1. The former Texas Attorney General reviewed the law in 2002 and opined on August 7, 2002, that the Texas horsemeat ban is in force and effect. Op. Tex. Att'y Gen. No. JC-0539 (2002), P. Ex. 31, 3 Apx. 462-467. The instant lawsuit was filed by Plaintiffs on September 26, 2002. Doc. 1. In the now-concluded 2003 Regular Legislative Session, the Texas State Legislature considered altering the law to permit Plaintiffs' commercial horsemeat activities for export.[6] Following rigorous debate that

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unlawful for any person to sell, offer or exhibit for sale, or have in his possession with intent to sell, any quantity of horsemeat for human consumption."). D. Exs. 72-74, D2 Apx. 1175-86.

[6] H.B. 1324, 78th Leg., R.S., 2003 (not passed into law); Amendment 2 (not adopted), May 24, 2003, to S.B. 1413, 78th Leg., R.S., 2003 (passed into law without Amendment 2). Texas Legislature Online, http://www.capitol.state.tx.us/. Advisory to the Court by Tim Curry Regarding Pending Federal and State Legislation, Doc. 55.

occurred after this Court issued its preliminary injunction in this lawsuit, the Texas Legislature left the Chapter 149 horsemeat ban intact.

Texas, through the Tarrant County Criminal District Attorney and other prosecutors, is fully empowered to enforce Texas Agriculture Code, Chapter 149. Plaintiffs' parting suggestion that a non-prosecution injunction should issue if there is merely doubt about the validity of Chapter 149[7] and that it is inequitable to prosecute Plaintiffs' because they have such a long history of activities in contravention of Chapter 149 is contrary to law, contrary to principles applicable to the granting of an injunction, and contrary to the balance of powers in our three-branch system of government. If the law is valid, as Defendant argues, injunction is improper.

Plaintiffs, by their continued commercial horsemeat activities in defiance of Texas law, are each subject to its penal provisions, whether or not prosecutors have previously prosecuted these actors and whether or not they and others have previously been mistaken about the issue of Federal preemption.

II. JURISDICTION

This Court has Federal question jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction of the alleged State law issues. Plaintiffs may not sue to enjoin Defendant in Federal court for violations of purely State law. *Word of Faith World Outreach Center v. Morales,* 986 F.2d 962, 965 (5th Cir. 1993), *cert. denied,* 510 U.S. 823 (1993).

III. THE FACTS and THE PARTIES

The material facts in this lawsuit are not genuinely in dispute.

The critical facts are on file, contained in the "Stipulation [and Admissions attached thereto] with Regard to Dallas Crown, Inc., Activities within Tarrant County", D. Ex. 75, D2

[7] Plaintiffs' Motion for Summary Judgment with Brief, para 10.10, p. 24.

Apx. 1187-98, Doc. 81, and in the "Stipulation Regarding Empacadora de Carnes de Fresnillo, S.A. de C.V., and Beltex Corporation Activities Within Tarrant County". D. Ex. 76, D2 Apx. 1199-1203, Doc. 84. As the Stipulations and Admissions show, the previous dispute regarding standing of some of the Plaintiffs to sue this Defendant is resolved in favor of standing. Although no Plaintiff is entitled to the relief it seeks, each Plaintiff has standing in this action because it is reasonable for each Plaintiff to fear that it is in legal jeopardy should a Tarrant-based prosecution go forward. This Court should uphold Chapter 149 against every challenge attempted by Plaintiffs, and each Plaintiff should be bound by that holding.

A number of colorful facts are offered by Plaintiffs, such as the litany of non-human-food uses that exist for horsemeat and horse parts. Such assertions are ultimately irrelevant to the statutory construction issues before the Court. Each of the non-human consumption uses is legal and each by definition is outside the challenged statute. Neither Tim Curry nor any of his deputies will prosecute Plaintiffs under the challenged statute for supplying equine heart valves for open heart surgery, making shoes or baseballs, stringing violins, feeding endangered species, or attending farrier school. No threat to prosecute those who engage in these activities has been made or alleged, and these activities clearly do not violate Chapter 149. The extraneous baseball-and-violin type facts do show that even in the face of Chapter 149, there are several business options with regard to the allegedly spent horses they slaughter, options that do not violate Texas law.

Plaintiffs' assertion that "Chapter 149 does not regulate Plaintiffs' commercial activities in interstate and foreign commerce – it forbids them entirely", Plaintiffs' Motion for Summary Judgment with Brief, paragraph 7.3, page 12, is not precisely correct.[8] Of course the statute

[8] In support of their argument that discriminatory or prohibitory regulation of interstate and foreign commerce by

completely outlaws the sale and possession of horsemeat for human consumption; that is the function of the statute. But, it is not true that the entire horse products industry is in legal jeopardy because of this narrow statute. Plaintiffs may slaughter as many horses as they wish and transport them wherever they wish so long as the meat is not intended for sale for human consumption. It is clear from the wording of the statute that Plaintiffs could also transport *live* horses, even for out-of-state slaughter, into, through, and out of Texas without violating Chapter 149.[9]

Plaintiffs voice concern for the humane issues relating to the operation of their business. Their desire to present a humane face for their industry is understandable. One would hope that those who handle animals would always strive to do so humanely. But Plaintiffs' protestations in this regard do not join the issue. If an animal is slaughtered for illegal purposes, the activity is not legal merely because the animal's death is quick or efficient. If it is illegal to sell the meat of a horse, it does not excuse the illegal sale even if the horse died without unnecessary fear. If one cannot possess horsemeat for the purpose of commercially making it available for human consumption, the quality of the horse's last moments or the sanitary handling of its carcass do not excuse the illegal enterprise. This lawsuit is not about whether slaughter is or is not humane when performed in the specified manner. This lawsuit is not about whether or not the Plaintiffs

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states is not permitted, Plaintiffs cite to *Hughes v. Oklahoma*, 441 U.S. 322, 329-30 (1979). Unlike the Texas law on trial here, the law in *Hughes* was discriminatory: Oklahoma's statute permitted unlimited collection of minnows and had no limit on the use of the minnows within the State, but forbade commercial transportation of the minnows out of the State. It was discrimination that felled the Oklahoma minnow law, not any rule against regulating minnows. *But see Quaker Oats Co. v. City of New York, et al. & Hill Packing Co. v. Same, 68* N.E.2d 593 (N.Y. Ct. App. 1946) (horsemeat inspected by federal government could not be barred from coming into New York), *remittitur amended, Hill Packing Co. v. City of New York,* 69 N.W.2d 821 (N.Y. 1946), *affirmed,* 331 U.S. 787 (1947), *rehearing denied,* 331 U.S. 870 (1947). Empacadora's horsemeat is produced in Mexico, not the United States. And, the horsemeat produced by Beltex and Dallas Crown is currently slaughtered and inspected in Texas, not brought in as USDA-inspected meat from another State.

[9] Plaintiffs may ship live meat horses so long as the horses leave Texas alive and so long as they are not placed on a sea-going vessel. 46 App. U.S.C.A § 466c. D. Ex. 77, D2 Apx. 1204.

do or do not in fact treat the animals humanely. Indeed, because Federal statutes and regulations and State regulations consider captive bolt stunning to be a humane method of slaughter[10], Defendant Curry is precluded from arguing otherwise in the context of this lawsuit, regardless of the number of citizen letters on file expressing concern about these issues[11]. Because the humane issues are not and cannot be an issue in this narrow lawsuit, we assume for the sake of argument that the Texas Plaintiffs effectively apply the captive bolt. In the context of this lawsuit, it matters not. That is not the issue here, in this Court. The issue in this lawsuit is whether the Texas statute, Chapter 149, is in force and effect. It is.

The Defendant is the Tarrant County Criminal District Attorney, Tim Curry. Curry prosecutes criminal activity in Tarrant County, Texas. Plaintiffs seek to enjoin a Tarrant County prosecution of their admitted acts which they assert put them in legal jeopardy because they violate the clear wording of Chapter 149. Plaintiffs also seek a declaration of rights and responsibilities. Defendant opposes all of Plaintiffs' requested relief. Defendant Curry stands ready and willing to defend this Texas law, as is his duty and privilege.

The Texas Attorney General has deferred defense of the Texas statute to Curry. Notice, with Letter from Attorney General, filed October 10, 2002. Doc. 17.

Two previous parties have already been dismissed from this lawsuit on their respective motions: the Criminal District Attorney of Kaufman County (who filed a sworn declaration that

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[10] 7 U.S.C. § 1902 (a), P. Ex. 36, 3 Apx. 491; 9 C.F.R. § 313.15, P. Ex. 17, 2 Apx. 262; 25 T.A.C. § 221.11 (a)(12)(D), P. Ex. 6, 1 Apx. 97, 108.

[11] Many citizens have expressed humane concerns with the slaughter of horses; the citizens' letters were submitted to the Court for the cancelled Preliminary Injunction Hearing, and they are in a form acceptable for Summary Judgment evidence, since they were accompanied with a written stipulation on behalf of all parties as to their admissibility. Plaintiffs now cite the citizen letters submitted by Defendant as part of the supporting evidence on which they rely for their Motion for Summary Judgment. Plaintiffs' Motion for Summary Judgment with Brief, item 13, page 3. Accordingly, they should be received in evidence. D. Ex. 51, D1 Apx. 767-955Q.

he has no present intention to prosecute Dallas Crown)[12] and the United States Department of Agriculture (which did not consider that it was a necessary party to this lawsuit)[13].

All three Plaintiffs slaughter horses and sell the meat for human consumption.

All the horsemeat at issue in this lawsuit is exported from the United States and all the commercial human consumption takes place overseas. One Plaintiff (Beltex, a Texas corporation) operates a slaughter plant in Tarrant County, Texas. Another Plaintiff (Dallas Crown, a Texas corporation) is based in Kaufman County, Texas, but passes through Tarrant County in transporting its product to the airport. The third Plaintiff (Empacadora, a company incorporated in Mexico and in which Beltex owns a controlling interest) has no past or present direct contact with Tarrant County, although its product passes through Tarrant County after it has been sold and possession and control has shifted away from Empacadora. Empacadora stipulates that it solicits, encourages, directs, aids and/or attempts to aid others in the commercial horsemeat activities that result in human-consumption horsemeat coming though Tarrant County. Empacadora contemplates operating in Tarrant County in the future, in violation of the challenged law. Emapcadora/Beltex Stipulation, D. Ex. 76, D2 Apx. 1199-1203; Dallas Crown Admissions, D. Ex. 75, D2 Apx. 1187-98.

None of the Plaintiffs seek to challenge the 149.002(a) prohibition on the "exhibit for sale" of horsemeat within Texas, so that part of 149.002(a) is not challenged and is not disputed before this Court.

The remainder of 149.002 and 149.003 is in dispute before this Court.

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[12] Exhibit A to Defendant Kaufman County District Attorney Walton's Response to the Court's Order of March 24, March 31, 2003, Doc. No. 69; Amended Order Granting Ed Walton's Motion to Dismiss, May 29, 2003, Doc. No. 80.

[13] Order Granting USDA's Motion to Dismiss, March 31, 2003. Doc. No. 68.

Within Tarrant County, Beltex violates all of the disputed provisions of Texas Agriculture Code 149.002 and 149.003. D. Ex. 76, D2 Apx. 1199-1203.

Within Tarrant County, Dallas Crown violates the possession prohibition of 149.002(b) and also violates 149.003 (prohibiting transfer). D. Ex. 75, D2 Apx. 1187-98.

Each of the three Plaintiffs is responsible as a party[14] to acts that are barred by Chapter 149 yet occur within Tarrant County: each solicits, encourages, directs, aids, or attempt to aid others to perform acts that will result in commercial human-consumption horsemeat coming into Tarrant County. D. Exs. 75-76, D2 Apx. 1187-1203.

Plaintiffs' suggestion that their aiders and abettors are in legal jeopardy is correct, Plaintiffs' Motion for Summary Judgment with Brief, para. 10.9, p. 23, but their suggestion that the law threatens governmental officials carrying out their governmental duties is not.

Texas Penal Code art. 9.21 provides that governmental actors performing a public duty under a specific grant of authority are effectively immune from criminal prosecution when they carry out their public duty. Thus, State and Federal governmental inspectors and other officials acting in the course of public duty would not reasonably fear that they are at legal jeopardy.

As to others aiding Plaintiffs, the Plaintiffs assert that the reach of the Law of Parties leads to "an incredible result". It does not. It is the standard rule of law, by which all are bound, without favor or distinction.

As is clear from the admissions and stipulations on file, Docs. 81 and 84, each of the

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14 **Texas Penal Code art. 7.02**

(a) A person is criminally responsible for an offense committed by the conduct of another if: .....

(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;....

three Plaintiffs act within the prosecutorial jurisdiction of the Tarrant County Criminal District Attorney.[15]

[15] **Summary of Admitted or Stipulated Activities of Plaintiffs**

	Beltex, w/in past 2 years	Beltex, plans to do in future	Dallas Crown, w/in past 2 years	Dallas Crown, plans to do in future	Empacadora, w/in past 2 years	Empacadora, plans to do in future
Within Tarrant County, Sold/**Sells**/will sell horsemeat (as food for human consumption)[Ag.149.002(a)]	Yes*	Yes	No	No	No	No
Within Tarrant County, Offered/**offers for sale**/will offer for sale horsemeat (as food for human consumption) [Ag.149.002(a)]	Yes	Yes	No	No	No	No
Within Tarrant County, Possessed/**Possesses**/will possess **horsemeat with intent to sell** the horsemeat as food for human consumption [Ag.149.002(b)]	Yes	Yes	Yes	Yes	No	Yes
Within Tarrant County, Transferred/**Transfers**/will transfer (the transfer being of possession and taking place within Tarrant County) **horsemeat** to a person who intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption, and knows or in the exercise of reasonable discretion should know that the person receiving the horsemeat intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption. [Ag.149.003]	Yes	Yes	Yes	Yes	No	Yes
Outside Tarrant County, **solicits, encourages, directs, aids, or attempts to aid** others to perform acts that will result in horsemeat coming into or through Tarrant County. [Texas Penal Code 7.02 (a)(2) w/ Ag. 149]	Yes	Yes	Yes	Yes	Yes	Yes

[*"Yes" indicates standing since it indicates a reasonable legal basis for Tarrant-based prosecution. The "exhibit for sale" prohibition is not included in the chart because Plaintiffs are not challenging that prohibition. All human consumption after sale is, at all times within the past two years and at all times into the future, outside of the United States (save and except the sole event of the 2002 Fear Factor offal issue - not considered a dispositive issue). Live horses are not considered horsemeat under Chapter 149.]

IV. ARGUMENTS AND AUTHORITIES

A. Summary Judgment is Proper.

All the material facts in this lawsuit are either admitted (by Dallas Crown) or stipulated (by all other parties). Emapcadora/Beltex Stipulation, D. Ex. 76, D2 Apx.1199-1203; Dallas Crown Admissions, D. Ex. 75, D2 Apx. 1187-98. A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. Rule 56(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247 (1986). There are no genuine issues of material fact. Defendant is entitled to judgment as a matter of law because Chapter 149 of the Texas Agriculture Code is still in force and effect and it is valid under all applicable law.

Neither side to the litigation makes any bones about the critical facts. Plaintiffs each slaughter horses and sell the meat for human consumption that occurs in other countries. They also each aid others to do so. Each has admitted or stipulated to a first-person or party connection to ongoing activities that violate the statute within Tarrant County.

Plaintiffs intend to continue and possibly expand their activities. Defendant stands firm in defense of the Texas law that criminalizes Plaintiffs' activities.

No one is shying away from the facts or from the fight.

B. Horsemeat Is Disfavored Under Federal And State Law.

As Plaintiffs put it, the 1949 law which eventually became Chapter 149 was passed because "as to horsemeat, the Legislature decided that healthy or not, people should not sell horsemeat to others because that was not the kind of meat 'normally used for human food'." Plaintiffs' Motion for Summary Judgment with Brief, para. 2.3, pp. 4-5. That's true. There was and is good reason for this sentiment: the 1949 law was enacted shortly after the 1945 law that

had forbidden the sale of meat from "horses, dogs, mules, donkeys, cats, or other animals not normally used for human food".[16] Consider the list: dogs and cats and equines -- animals that humans often take as pets, companions, or work partners in a way that is not and cannot be true of cattle, sheep, or goats.

While the issues of consumer fraud[17], horse theft[18], and health were no doubt contemporary to the Legislators who took this issue up in the 1940's, whether or not humans can safely eat unadulterated horsemeat is not the issue guiding the public interest in the continued existence of Chapter 149. Defendant cannot in good conscience contest Plaintiffs' assertion that under current production procedures horsemeat can be as healthy as beef. All meat poses risk if not handled properly. Whether horses (with their possible West Nile virus, trichinosis, and potentially toxic chemicals)[19] pose more or less risk to meat-consuming humans than cattle (with their potential for mad cow disease)[20] and whether eating either animal is an unacceptable health risk is the kind of issue to be sorted out by Congress, health agencies, and State legislatures, not

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[16] Acts, 49th Leg., R.S., 1945, pp. 554-558, ch. 339, Sec. 18. P. Ex. 4, 1 Apx. 32, 36.

[17] Horsemeat prosecutions in Texas in the 1940's and 1950's appear to have been for passing horsemeat as beef, although some of the case records are less than clear. *See Neill v. State*, 229 S.W.2d 361 (Tex. Crim. App. – 1950), *reversed*, 232 S.W.2d 722; *Phillips v. State*, 229 S.W.2d 364 (Tex. Crim. App. – 1950), *affirmed*, 229 S.W.2d 365; *Gordy v. State*, 264 S.W.2d 103 (Tex. Crim. App. – 1953), *affirmed*, 268 S.W.2d 126.

[18] As long as horses have been owned by people there have almost certainly been horse thieves. Defendant does not suggest that Plaintiffs knowingly take stolen horses. Defendant is aware that both the Sheriffs' Association and the Texas-funded horse theft educators find the Texas slaughter plants to be cooperative in horse theft recovery efforts. Nevertheless, the Texas Legislature determined in 1997 that it was necessary to fund a horse theft education program, paid for by the horse slaughter plants, and to put brand inspectors at each plant. Texas Agriculture Code, Chapter 148, P. Ex. 7, 1 Apx. 128-131; legislative history for H.B. 2396, 75th Leg., R.S., 1997, P. Exs. 8 & 9, 1 Apx. 132-138.

[19] Unlike cattle, in this country horses are not raised specifically for human food. Slaughter horses may have previously engaged in saddle, ranch, recreation, breeding, or racing activities, as Plaintiffs point out. Because horses are not raised with the intention that they be eaten by humans, drugs and chemicals used on or near the horse may be incompatible with human consumption. A nagging issue, to be sure, but not one that is before this Court.

[20] As far as is known to Defendant, no cases of Mad Cow disease have ever been found in the United States.

by this Court. Certainly horsemeat is not naturally inedible by humans. But, the fact that humans can eat horsemeat does not mean that every State must be forced to permit within its borders the industry that supplies that commodity. Dogs and cats and equines hold a special place in our culture – a status that stretches back in time and across the West. That special status remains strong today. We eat cattle but not dogs, poultry but not cats, sheep but not horses. We do not treat all species the same, and our jurisprudence does not now demand (and has never demanded) that we do so.[21]

Plaintiffs suggest that because persons in other nations consume horsemeat American revulsion at or abhorrence of the practice [Plaintiffs refer to this as "possible offensiveness". Plaintiffs' Motion for Summary Judgment with Brief, para 2.9, p. 7] does not support a law that effectively bans human-consumption horsemeat from a State. The reverse is true. When the people of this Nation or of a State desire to outlaw a practice or substance, they can do so.[22] This is especially true when, as here, there is one rule for everybody.

The laws express the sense of this Nation's people as a whole, or of the people of a State, be it to prohibit an abhorrent practice or to protect a favored animal. The horsemeat law does both: it prohibits a disfavored practice and also favors horses.[23]

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[21] The minority of the strictest vegetarians ["vegans"] aside, the suggestion that all animal species must be treated exactly the same would be considered by an overwhelming majority of American people to be an unworkable idea. Most people in this country eat meat and use animal products. One need not pursue the salvation of all meat animals to argue the validity of a State law that directs that horses (or dogs, or cats) will not be meat animals.

[22] "A State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." *Hughes v. Superior Court*, 339 US 460, 468 (1950). Questions as to the wisdom, justice, policy or expediency of a State are for the legislature alone, not for the Courts. *California State Auto Ass'n Inter-Ins. Bureau v. Maloney*, 341 US 105, 110 (1950).

[23] Plaintiffs swear they will shutter their businesses if they cannot slaughter horses for human consumption. They cannot also be heard to say that the law will not have an impact on the amount of horse slaughter within Texas. Declaration of Dick Koehler, Attachment A, and Declaration of Manfred Ramault, Attachment B, to Plaintiffs' Motion for Temporary Injunction, October 4, 2002, Doc. 8.

Texas is not alone in favoring certain animals. Even the Federal government does so: a Federal law prohibits certain dog and cat products, despite the "tastes" (to borrow a term from the Plaintiffs) of those in other countries. Dog and Cat Protection Act of 2000, 19 U.S.C. § 1308 (b) (prohibiting import of items made with dog or cat fur).[24] One of the reasons for the law is that "[t]he trade of dog and cat fur products is ethically and aesthetically abhorrent to United States citizens." 19 U.S.C. § 1308, Notes, Finding No. 7. 442. D. Ex. 78, D2 Apx. 1206. In another law, the Federal government has recognized the powerful symbolism of horses within our Nation as one basis for legislation. In the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331. Congress found these animals "living symbols of the historic and pioneer spirit of the West." 16 U.S.C. § 1331. D. Ex. 79, D2 Apx. 1213. As reasons for legislation, abhorrence of an act that inappropriately uses animals and recognition of the special place of horses in our Nation are good enough for Congress, and they are good enough for Texas.

Plaintiffs' protestations that the offensiveness of people[25] eating horses drives the Texas horsemeat ban merely buttress Defendant's arguments that the law is within the power of the State to make. Abhorrence of a practice can and often does lead to the criminalization of that practice. Many if not most penal laws in Texas and elsewhere grow from public sentiment that something is going on that must be stopped because it is disfavored or even abhorrent. This penal

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[24] One can imagine the public outrage if a dog or cat slaughterhouse tried to open for business in Texas. The same would be true of a primate slaughterhouse. The States have Rights to stop slaughter of their favored animals.

[25] Contrary to Plaintiffs' implication that the offensiveness or abhorrence is necessarily some form of nationalistic bigotry against the French, Belgians, and members of other cultures, it is not. The law applies to everyone within Texas as well as to anyone anywhere who would eat horsemeat that is produced in or trafficked through Texas. The Texas law embodies a legislative policy decision that Texas does not want to be part of the human-consumption horse slaughter industry, regardless of who would eat the horsemeat. Texas understands that people in other countries see horses differently than we do and that they eat horsemeat. We respect their cultures and acknowledge their right to their own food habits but we decline to be their butcher. Similarly, we hope they respect us despite practices in our country that other nations strongly disapprove and outlaw.

law is no different.

Horsehide may be used to cover baseballs, but horsemeat is unlikely to be mentioned in the same breath as the Fourth of July and apple pie. A Senior Judge of this District has aptly described horsemeat as "a decidedly unromantic commodity". *Air France v. Owens*, 689 F.Supp. 663, 663-664 (N.D. TX. 1988), *affirmed*, 845 F.2d 544 (5th Cir. 1988). [The Judge went on to acknowledge that he had been advised by a litigant "that horsemeat is considered a delicacy to its devotees in France". *Id.*]

Whatever others in the world may think of horses and horsemeat, equine meat is disfavored by United States law, to put it mildly. Federal authorities may demand that horsemeat be produced "in establishments separate from those in which cattle, sheep, swine, or goats are slaughtered or their carcasses, parts thereof, meat or meat food products are prepared". 21 U.S.C. § 619, D. Ex. 83, D2 Apx. 1251. *Compare* Texas Health & Safety Code § 433.033, P. Ex. 5, 1 Apx. 77. To punctuate the point that horsemeat is not to be confused with the flesh of any other animal, slaughtered horses are subject to the Green Ink Rule: horsemeat and equine meat that is bound for interstate commerce is required by Federal regulations to be stamped with a distinctive color inspection ink by the USDA. Carcasses and meat from cattle, sheep, swine, and goats may be ink branded in any color ink but green; ONLY green ink may be used on horsemeat or equine meat[26]. 9 C.F.R. § 316.5, D. Ex. 80, D2 Apx. 1215, 1217; 25 T.A.C. § 221.11(a)(15), P. Ex. 6, 1 Apx. 97, 108. The legal stigma that attaches to horsemeat does not apply to cattle, sheep, swine, or goats, or any other animal slaughtered for meat. Horses are different, both in our hearts and in our law books.

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[26] Federal regulations make a distinction between "horse-meat" (the meat from horses and ponies) and "equine meat" (the meat from mules and all other non-horse equines). 9 C.F.R. § 312.3, D. Ex. 80, D2 Apx. 1215. As far as Chapter 149 has always been considered, "horsemeat" includes the meat or flesh of the equine genus. P. Ex. 1, 1 Apx. 1A.

What happens when Federal law does not forbid something outright but disfavors it? States should be and are permitted to step in and prohibit the disfavored thing. An example can be found in the USDA Comments issued in connection with the final action on the regulations enacted regarding the Commercial Transportation of Equines to Slaughter Act, 7 U.S.C. § 1901 note, P. Ex. 12, 1 Apx. 146, et seq. Federal law is phasing out double-deck horse trailers for the use of transporting horses to slaughter. Findings have been made about the inappropriateness of these trailers in the transportation of horses to slaughter. Comments, Animal and Plant Health Inspection Service, USDA, Commercial Transportation of Equines to Slaughter, 66 FR 63588-63617, at 63593-4, Sec. 88.3(b), (December 7, 2001) (to be codified at 9 C.F.R., pts. 70 & 88), 2001 WL 1555116 (F.R.) D. Ex. 81, D2 Apx. 1218-49. These trailers are disfavored. However, Federal law, in a nod to businesses that may have expensive trucks they have not completely amortized, fixes the effective date of the new Federal ban on double-deck trailers for horse transport at five years from the regulations' effective date of February 5, 2002. *Id.* Does this Federal grace period for the disfavored double-deck trailers preempt the States' ability to prohibit the use of double-deck trailers for the transportation of horses to slaughter? No, it does not. USDA comments published at the time of the Final Rule setting out the regulations for the Commercial Transportation of Equines to Slaughter explain:

> States may promulgate and enforce similar or even more stringent regulations to ensure the humane transport of equines to slaughtering facilities. State or local laws that are more stringent than the regulations will not necessarily conflict with the regulations. For example, *the regulations would not preempt existing States' bans on transporting equines in double-deck trailers because double-deck trailers are not required by our regulations.* The drivers of conveyances will be responsible for complying with any State laws that prohibit the use in a State of double-deck trailers for the transportation of equines to slaughter. *State and local laws and regulations would be "in conflict" with the regulations established by this rule only if they made compliance with this rule impossible,* just as some commentators suggested. (*emphasis added*) Comments, Animal and Plant Health Inspection Service, USDA, Commercial Transportation of Equines to

Slaughter, 66 FR 63588-63617, at 63593-4, Sec. 88.3(b), (December 7, 2001) (to be codified at 9 C.F.R., pts. 70 & 88), 2001 WL 1555116 (F.R.). D. Ex. 81, D2 Apx. 1223.

The Federal transport regulations specifically permit States to have regulations that are consistent or more stringent. 9 C.F.R. 88.2(a). P. Ex. 13, 1 Apx. 149, 150. The Federal meat laws do not have this exact language. But, Federal meat law provides that State law must be "at least equal to" the Federal law in some respects. *See* 21 U.S.C. § 661(a), D. Ex. 85, D2 Apx. 1255 (meat inspection, ante mortem, post mortem, re-inspection and sanitation must be "at least equal" to federal requirements). The USDA double-deck trailer Comments specifically point out that requiring a more stringent or burdensome standard is not necessarily considered to be "in conflict". The reasoning of the USDA Comment is instructive: regulations are not "in conflict" if one can comply with both sets of rules, Federal and State. Since the Federal government merely permits the double-deck trailers but does not demand them, Federal authorities consider that it is not a conflict if a State prohibits them. D. Ex. 81, D2 Apx. at 1223. It is easy to comply with both laws: don't drive a double-deck trailer in any of these United States that prohibit them. Similarly, it is easy to comply with the meat inspection and packing laws that mention horsemeat and with the Texas horsemeat ban: don't possess, sell, offer to sell, or transfer horsemeat within Texas for human consumption. Mere Federal non-prohibition is not enough; actors must also mind State law, complying with the laws that are most strict. Only when one cannot comply with both may one claim that the laws conflict.

There is no real compliance problem for Plaintiffs. They want to choose the more liberal law, not comply with the more strict law.

The law is not a smorgasbord.

Plaintiffs can easily comply with all Federal and State laws by complying with Chapter 149. They are required to do so.

C. Chapter 149 Has Not Been Repealed.

The argument that the law has somehow been repealed[27] within Texas is in error. An assertion of express/specific repeal cannot stand, as it depends on a misreading of the similar (but not identical) article numbering of statutes passed some years apart. The repeal by conflict argument falls short as well, due to an absence of irreconcilable conflict in the Texas laws. There is a presumption that multiple laws on the same subject can be harmonized. *Credit Exchange of Dallas, Inc., v. Bell*, 427 S.W.2d 674, 676 (Tex. App. – Dallas1968). The statutory provision at issue and later legislation are to be read in harmony; such a reading is workable and results in the continued viability of the horsemeat ban.

Chapter 149 Has Not Been Expressly/Specifically Repealed.

Plaintiffs allege express/specific repeal but cannot quote statutory language that repeals the challenged statute by name or number. They cannot do this for one simple reason: it has not happened.

A quick reading of the language in the 1969 law[28], which has itself now been repealed,

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[27] Some Texas legal resources divide express repeal into two types: express specific repeal and express general repeal. 67 Tex. Jur. 3d § 61-65. Express specific repeal is repeal that identifies the statute by number, whereas express general repeal is language that repeals all laws in conflict with a new statute without specifying the repealed laws by name or number. There is also the concept of repeal by necessary implication, more commonly called implied or implicit repeal, which occurs even in the absence of repeal language when a later statute conflicts irreconcilably with a prior statute. *Id.*; Texas Gov't Code § 311.025. D. Ex. 71, D2 Apx. 1171. Because express general repeal and repeal by necessary implication both require that the laws be in conflict (meaning inconsistent and incapable of standing together) for there to be a repeal and because later cases blur the distinction between express general repeal and repeal by necessary implication, this Brief divides the repeal concept into two parts rather than three: express/specific repeal and repeal by conflict.

[28] Acts, 61st Leg., R.S., 1969, pp. 337-355, ch. 123. P. Ex. 4, 1 Apx. 37-56. (art. 4476-7).

easily permits the mistaken belief that the 1949 precursor[29] to today's Texas Agriculture Code Chapter 149 horsemeat law was expressly repealed by number. Careful examination shows otherwise.

Plaintiffs anchor their specific/express repeal argument on their statement that "The 1949 version of Chapter 149 amended the Meat Inspection Law of 1945, which provided for Texas' State Health Officer inspection of meat products." Plaintiff's Motion for Summary Judgment with Brief, para. 10.1, p. 20. The implication throughout Plaintiffs' specific repeal argument is that the 1949[30] law became part of the 1945 Meat Inspection Law[31] and that thereafter when the 1945 law was repealed in 1969, the repeal took with it the 1949 law. That is incorrect; it was art. 4476-3, not 4476-3a, that was specifically repealed in 1969. The law relevant to this dispute is not the lineal progeny of art. 4476-3 and the 1949 law was not amended into the 1945 law that was repealed.

The only relevant amendatory impact of the detailed 1949 horsemeat ban law on the 1945 law was that Section 18 repealed the inadequate equine meat part of Penal Code 719d (which had been part of the general horse/dog/mule/donkey/cat meat ban) to the extent of any conflict; the 1949 law did not otherwise amend either the health part or the penal part of the 1945 law.[32] The 1949 law did not become part of the repealed 1945 law; the 1949 law stood separately, before and after the 1969 repeal of the 1945 law.

Texas sometimes numbers its statutes oddly in order to place those with similar subject

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[29] Acts, 51st Leg., R.S., 1949, pp. 78-79, ch. 45. P. Ex. 1, 1 Apx. 1A—1B.

[30] P. Ex. 1, 1 Apx. 1A-1B.

[31] Acts, 49th Leg., R.S., 1945, pp. 554-558, ch. 339. P. Ex. 3, 1 Apx. 31.

[32] P. Ex. 1, 1 Apx. 1A-1B.

matters near one another. Art. 4476-3a was not a subpart of art. 4476-3. The current law isn't on the books by mistake. It was never repealed.[33]

Because similar topics in Texas laws are often placed near each other in statutory and code numbering schemes, it is not surprising that the 1945 meat inspection provisions were labeled 4476-3, twenty-five years later the 1969 Meat & Poultry Inspection Law was labeled 4476-7, and four years later still the 1973 horsemeat ban language was moved from Penal Code 719e (not 719d) and labeled 4476-3a (not 4476-3). Likewise, it is not surprising that the 1945 criminal horse/dog/mule/donkey/cat meat prohibition was placed at Penal Code 719d and the 1949 detailed horsemeat ban was later placed at 719e.

Proximity is just proximity.

Penal Code 719d is not the same as Penal Code 719e. R.C.S. 4476-3 is not the same as R.C.S. 4476-3a. Repealing 719d did not repeal 719e. Repealing 4476-3 in 1969 did not specifically repeal the law that became 4476-3a in 1973. It could not. They are not the same.

Chapter 149 Has Not Been Repealed by Conflict.

Plaintiffs suggest a phantom conflict. No conflict exists, just multiple laws that mention

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[33] In 1969 the 61st Texas Legislature passed the Texas Meat and Poultry Inspection Act (art. 4476-7) which expressly and specifically repealed the 1945 Meat Inspection Act (the 1945 Meat Inspection Law at 4476-3, *not* the 1949 horsemeat ban in Penal Code 719e).

The 1945 law had been split into two parts: the meat inspection provisions in Sections 1-14 and 20 became art. 4476-3 of the Revised Civil Statutes. The 1945 penal provisions banning the meat of horses, dogs, mules, donkeys and cats, Section 15-19, were placed in article 719d of the Penal Code. The 1969 Texas Meat & Poultry Inspection Law expressly repealed "Chapter 339, Acts of the 49th Legislature, 1945, as amended (Article 4476-3, Vernon's Texas Civil Statutes)".

The precursor to Chapter 149 was not enacted in 1945 and it was *never* in Article 4476-3 and was not the non-4476-3 part of Chapter 339, Acts of the 49th Legislature, 1945: that 'other' part of repealed Chapter 339 was located in article 719d of the Penal Code. The precursor to Chapter 149 was *never* in 719d of the Penal Code or in art. 4476-3. The precursor law to Chapter 149 could not have been specifically repealed by the 1969 law because it was never in the law that was specifically repealed, regardless of whether the 1969 law is read to repeal only 4476-3 or whether it is read to repeal all of Chapter 339, Acts of the 49th Legislature, 1945, as amended. The precursor law – the 1949 detailed horsemeat ban – was never in either of the repealed statutes. D. Ex. 69, D2 Apx. 1125-58.

horses and/or horsemeat. That is certainly nothing new or unique; multiple laws on related matters are harmonized every day. Chapter 149 stands if it is read properly in conjunction with other laws, as it should be.

Repeal by implication is disfavored. *Jackson v. Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996), *quoting Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Repeal by implication does not exist unless "provisions in the two acts are in irreconcilable conflict". *Jackson v. Stinnnett*, 102 F.3d at 136. Chapter 149 is not in irreconcilable conflict with any other after-enacted Texas law. As stated in *Lorenzo Textile Mills, Inc. v. Bullock*, 566 S.W.2d 107, 110 (Tex. Civ. App. – Austin 1978, writ ref'd n.r.e):

> The basic rules of construction where implied repeal is the problem were stated in 1914 by the Supreme Court in Cole v. State, 106 Tex. 472, 170 S.W. 1036, 1037 (1914): "Though they (the two statutes) may seem to be repugnant, if it is possible to fairly reconcile them, such is the duty of the court. A construction will be sought which harmonizes them and leaves both in concurrent operation, rather than destroys one of them. If the later statute reasonably admits of a construction which will allow effect to the older law and still leave an ample field for its own operation, a total repugnance cannot be said to exist, and therefore an implied repeal does not result, since in such case both may stand and perform a distinct office. Especially will this construction be adopted where the older law is particular and expressed in negative terms, and the later statute is general in its nature. In such instances that to which the older law distinctly applied its negative provisions will be regarded as excepted from the operation of the more general statute. These are but the familiar rules of construction to be applied where the implied repeal of a law is involved."

The general express repeal language at Section 413 of the 1969 law only repealed "any other Act to the extent of any conflict". P. Ex. 4, 1 Apx. 37, 54. The 1989 law, Texas Health & Safety Code, Chapter 433, has general repealer language that the law prevails over any other law "to the extent of any conflict" Texas Health & Safety Code § 433.007 (a). P. Ex. 5, 1 Apx.67.

There is no irreconcilable conflict between Chapter 433 (or the 1969 predecessor) and Chapter 149 (or its predecessors) because both laws can be complied with. *See Dehart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994) (Federal law regulating maintenance of certain

dangerous animals held not in conflict with local law outlawing the same activity, as it was not impossible to comply with both laws; regulation of animals part of the States' historic police powers). If Plaintiffs comply with Chapter 149, they will never violate either the repealed 1969 law nor the 1989 enactment, Health & Safety Code, Chapter 433. The way one complies with multiple laws is to only do a regulated act where that act is lawful – simple enough. The prohibition in the repealed 1969 Texas Meat and Poultry Inspection Act (P. Ex. 4, 1 Apx. 37-56) forbade improperly marked or labeled meat; that Act was not a grant of authority to slaughter horses. It always would have been a simple matter to have complied with both Acts: if no horses were slaughtered for human consumption, there would be none mislabeled. Similar reasoning applies as to the 1989 law.

The older (1949's predecessor to Chapter 149) law is more specific and negative – no sales of horsemeat for human consumption – than the laws Plaintiffs suggest as possible repealers. The 1969 and 1989 State meat laws are more general, setting out broadly how Texas plans to cooperate with the Federal government with regard to meat intended for our Nation's food supply. By the reasoning of *Lorenzo Textile Mills, Inc. v. Bullock*, 566 S.W.2d at 110, the older, specific negative language of Chapter 149 carves out an exception to the Health & Safety Code, if such a carving is necessary to allow the two laws to continue in existence. Horses cannot be slaughtered for human consumption for so long as Chapter 149 is in effect, even though Texas has considered and determined how it would handle the issues relating to horsemeat production if the day ever comes when such is lawful within the State. That day has not yet come.

Further, the conflict repeal argument misses the mark because it attempts to use a combination of intrastate commerce laws as the instrument of repeal for what Plaintiffs allege is

their involvement solely in interstate commerce. As such, the hefty reliance that their repeal by conflict arguments necessarily place on the 1969 and 1989 Texas intrastate meat inspection laws is misplaced. That reliance is fatal to an assertion of repeal by conflict since the severability clause of the challenged statute would save the statute except for any part necessarily repealed. [34]

Plaintiffs, in their Motion for Summary Judgment with Brief, 10.2, p. 21, assert that the 1969 law that "The Texas Act, applicable only to intrastate commerce[35], recognized the preemptive effect of the Federal act as to interstate commerce sales of meat for human consumption." Recognizing a preemptive effect is a far cry from repeal. Defendant agrees that the 1969 Texas law related only to intrastate commerce.

The Fact That Horsemeat Is Edible By Humans Is Not Dispositive.

The seamless cooperation between the Federal and local entities to ensure that if a meat product is lawful it is inspected to a proper standard is a laudable goal, and Chapter 433 accomplishes that. But, the Chapter accomplishes that without giving up Texas's sovereignty. Nowhere does Chapter 433 decree that it will permit horse slaughter for human consumption, it merely sets out how it would go about treating equine meat if the day ever came when that was processed lawfully in Texas.

The Texas Meat and Poultry Inspection Act, Texas Health & Safety Code § 433.002, and FMIA, 21 U.S.C. § 602, are both explicitly concerned with meat in this *Nation's* food supply.[36] This cannot apply to Plaintiffs, none of whom intend their product for human consumption

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[34] *See* footnote 4.

[35] Plaintiffs cannot claim in one breath to be engaging in *interstate* commerce and therefore protected under the federal *interstate* commerce laws but in another to be protected under a Texas law that applied solely to *intrastate* commerce.

[36] Side by side comparison chart of Federal and Texas meat inspection statute policy sections. D. Ex. 82, D2 Apx. 1250.

within the United States. Not a single horsemeat steak is sold by the Plaintiffs for human consumption in this country. Contributors to this Nation's meat supply? Not these Plaintiffs.

Plaintiffs also say that "Since the 1949 Act, then Penal Code § 719(e), was in conflict with the new Act's classification of horsemeat as fit for human consumption and subject to the regulatory scheme of the Health Commissioner, it was repealed in 1969." Plaintiffs' Motion for Summary Judgment with Brief, para. 10.3 p. 21. That is not exactly the language or the import of the statute.[37] The 1969 law did not say that horsemeat was fit for human consumption. At bottom, all the relevant part of the law says is that horses are "not naturally inedible by humans". We knew that.[38] That's why there is Chapter 149. If horses were naturally inedible by humans, nature and not law would effectively regulate their consumption by humans. The 1969 law nowhere strikes down Chapter 149 or 719e.

The 1969 law and the 1989 law do mention horses. But the 1969 law and Chapter 433 of the Health & Safety Code do not stand for the proposition that Texas has decided that horses and the flesh of all other animals listed in Chapter 433 that are not naturally inedible by humans are necessarily permitted to be slaughtered and trafficked in and through Texas for human consumption. To the contrary, such a construction would render useless an important part of Chapter 433 (and similar language in the repealed 1969 law[39]):

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[37] Rather, there is a convoluted set of definitions that include horses as livestock, 433.003(11), that divides animal flesh into "meat food products", 433.003(13) and "inedible animal products", 433.003(7) [which is anything that is not a meat food product, 433.003(13)]. Meat food products, in turn, are products "capable of use as human food", unless excepted from the definition, 433.003(13), and products are "capable of use as human food" so long as they are either "not naturally inedible by humans" or denatured or otherwise identified to deter its use as food, 433.003 (2). P. Ex. 5, 1 Apx. 57.

[38] *Norman G. Jenson v. United States, Inc.*, (Cust. Ct. – 1961) 46 Cust. Ct. 177, 1961 WL 9257.

[39] The 1969 law had very similar language. 1969 law at Sec. 201, P. Ex. 4, 1 Apx. 48. Compare to 21 U.S.C. § 641. D. Ex. 84, D2 Apx. 1253.

Texas Health & Safety Code
§ 433.029. Articles Not Intended for Human Consumption

(a) Under this subchapter, the commissioner may not inspect an establishment for the slaughter of livestock or the preparation of carcasses, parts of carcasses, or products of livestock if the articles are not intended for use as human food. Before offered for sale or transportation in intrastate commerce, those articles, unless naturally inedible by humans, shall be denatured or identified as provided by rule of the commissioner to deter their use for human food.

(b) A person may not buy, sell, transport, offer for sale or transportation, or receive for transportation in intrastate commerce a carcass, part of a carcass, meat, or a meat food product that is not intended for use as human food unless the article is naturally inedible by humans, denatured, or identified as required by rule of the commissioner.

Why would these Texas laws, public health laws that provide for inspection for meat that is "not naturally inedible by humans" need a specific exception prohibiting inspection of meat "not intended for use as human food"? That is no mystery: there exist some meats, horsemeat included, that "are not naturally inedible by humans" but which, by Texas law or other circumstance "are not intended for use as human food". Horses are eaten in other countries. As Plaintiffs admit, horses are not normally eaten in the United States. Texans do not intend for their horses to be used as human food, whether in Texas or anywhere else. Op. Tex. Att'y Gen. No. JC-0539 (2002). P. Ex. 31, 3 Apx. 462-467. Chapter 149 of the Texas Agriculture Code criminalizes the commercial production and possession of horsemeat intended for human consumption. Thus the law dictates that horses, although not naturally inedible, "are not intended for use as human food".

Chapter 149 of the Agriculture Code does not conflict with Chapter 433 of the Health & Safety Code; it meshes with it to produce a logical result. That harmonized result acknowledges that while horses are not naturally inedible by humans, they are not to be inspected by Texas as if they will be consumed by humans because they are not intended for meat for human

consumption. Since none of the commercial horsemeat produced in Texas can be for human consumption because of the operation of Chapter 149 of the Agriculture Code, the Health & Safety Code at § 433.029 specifies that Chapter 433 inspections will not occur for horsemeat.

Texas State agency inspection of meat in Chapter 433 applies, by its terms, only to meat and meat food products that will be traveling solely in intrastate commerce. See Texas Health & Safety Code §§ 433.021(a), 433.022(a), 433.024(a), 433.025(a), 433.026(a), 433.030(a), 433.031(a), 433.032(a), 433.033, 433.034(a), and 433.035(a), all of which specify that the law applies to intrastate commerce. P. Ex. 4, 1 Apx. 57. As Plaintiffs acknowledge, Chapter 433's purpose is to protect the public from unwholesome meat and mislabeled meat food products. This case is not about whether horsemeat is unwholesome or mislabeled; it is about whether it is legal. May Texas outlaw sales of horsemeat for human consumption even if the meat can be or is healthy? It can and it has.

Slaughter Fees Do Not Repeal Chapter 149 By Conflict.

Texas Agriculture Code Chapter 148 imposes a fee on the slaughter of horses, but it does not grant authority to slaughter horses for sale for human consumption. It is easy to comply with both Chapter 148 and Chapter 149: if no horses are slaughtered, no slaughter fee is due.

Assessing a tax or fee to an illegal activity or substance does not legitimize the activity. Texas bans other substances that it taxes.[40] "The motives that move Congress to impose a tax are no concern of the court." *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir.) *cert. denied,* 409 U.S. 868 (1972) (tax on transfer of destructive devices including Molotov cocktails). Chapter 148 is not evidence against the validity of Chapter 149.

[40] Texas has a Controlled Substances Tax, Texas Tax Code Chapter 159. "The fact that the Controlled Substances Tax might serve law-enforcement purposes does not necessarily invalidate it as a tax." *Jackson v. Sharp*, 846 S.W.2d 144, 146 (Tex. App. – Austin, 1993).

Chapter 149 Has Not Been Treated as Repealed.

It is true that both Federal and State agricultural authorities have long treated Chapter 149 as if it had been preempted. The USDA asserted preemption by the Federal Meat Inspection Act in its Response to the Plaintiffs' Motion for Temporary Injunction and Motion to Dismiss, page 4, Doc. 22. And, the Texas Attorney General's ruling acknowledges that the Texas Department of Agriculture had recently taken a preemption position with the State lawmaker who sought the Attorney General's opinion. Op. Tex. Att'y Gen. No. JC-0539 (2002). P. Ex. 31, 1 Apx. 462-467. They were mistaken. *Id.* (finding no preemption).

Bureaucrats aside, Chapter 149 was not treated by lawmakers as if it was repealed; the law has remained on the books.[41]

Even after the 1969 law, the horsemeat ban was not treated as if it was repealed. It was moved in 1973 from the Penal Code to 4476-3a R.C.S., codified in 1991 in Chapter 149, reviewed by the Attorney General in 2002, and reviewed by the Legislature in 2003, all with the same result: the law remains on the books.

D. Federal Law Does Not Invalidate Chapter 149.

Plaintiffs list a number of sister-States that have passed legislation either banning or legalizing horsemeat. Plaintiffs' Motion for Summary Judgment with Brief, para. 8.8, pp. 16-17. State legislatures have not refrained from legislating on this issue; there are States that have laws to permit horsemeat and States that have laws to forbid it.[42] The litany and lack of unanimity supports a critical point of Defendant's: States remain free to pass laws in this area, since State

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[41] In Texas, repeal of a repealing statute does not revive the statute that was repealed. Texas Gov't Code, § 311.030, D. Ex. 71, D2 Apx. 1172; Texas Gov't Code, § 312.007, D. Ex. 70, D2 Apx. 1161. However, repeal of a federal law that preempted a State statute revives the preempted State statute. *Houston & T.C.R. Co. v. Bright*, 156 S.W. 304, 307 (Tex. Civ. App — Galveston 1913, writ ref'd n.r.e.).

[42] *See* footnote 5.

laws legalizing or banning horsemeat have not been Federally preempted. States continue to have at least some ability to regulate activities that affect commerce. Defendant contends that Chapter 149 falls squarely and comfortably within the zone of permissible State control, since it offends no Federal interest.

Whether there has been preemption is determined by looking to see if it is possible to comply with all the Federal and State laws at once, whether complying with one makes compliance with the other impossible, and whether the State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Fla. Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). It is quite possible to comply with Chapter 149 and with all the Federal laws cited by Plaintiffs. If no horses are slaughtered, no law is violated. That resulting circumstance – no Texas horsemeat – could not possibly infringe on the Federal purposes of having proper labels on meat, requiring slaughterers to meet inspection standards, requiring proper bonds, or ensuring proper payment.

Chapter 149 Is Not Invalidated By the 'Dormant Commerce Clause'.

The concept underlying assertions of a 'negative' or 'dormant commerce clause' is that since the United States Congress "has the power to regulate commerce among the states, then the states lack the power to impede this interstate commerce with their own regulations." *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003). Dormant commerce clause jurisprudence thus takes the silence of Congress and, in limited circumstances, construes that silence as a limitation on States' powers. As stated in *Dickerson* at 395-6:

> More recently, the Supreme Court stated that "[t]his 'negative' aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." .....
>
> The Supreme Court has adopted a "two- tiered approach to analyzing state economic regulations under the Commerce Clause."....This approach entails classifying state

> statutes into one of two categories: A state statute may (1) facially discriminate against out- of-state economic interests, or (2) regulate evenhandedly and thereby evince only an indirect burden on interstate commerce. Stated differently, courts ask whether the state statute under review reflects a "discriminatory purpose" or merely a "discriminatory effect." Although the Supreme Court has acknowledged that there is no "clear line" of separation between these two classes of statutes in close cases, the threshold determination is significant if only because it establishes the constitutional standard of review. *Internal citations omitted.*

See, also, C & A Carbone, Inc., v. Clarkstown, 511 U.S. 383 (1994); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-627 (1978)(may not discriminate against articles of commerce coming from out-of-state unless there is some reason, apart from their origin, to treat them differently).

"This 'negative' aspect of the Commerce Clause prohibits economic protectionism - that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma,* 502 U.S. 437, 454 (1992) (quoting *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-74, (1988)).

The Texas law at issue does not have either a discriminatory purpose nor a discriminatory effect. It does not engage in economic protectionism. The law both facially and in practice has no harsher an impact on out-of-state business than on in-state business. This is not like the recent 5th Circuit *Dickerson* wine case in which Texas wineries operated within the State and sold directly to consumers but out-of-state wineries were prohibited from directly selling to consumers. There is one set of rules here, not two. Indeed, joining forces on the Plaintiffs' side of this lawsuit are in-state and out-of-state (foreign) horse slaughterhouses. They stand arm-in-arm because the challenged law sees them as equals, applies the same rules, and metes out the same requirements both facially and in practice. The law is not discriminatory on its face; accordingly, it is not per se invalid. That leaves the deferential balancing test of *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). Chapter 149 is outside the Dormant Commerce Clause;

it is not protectionist and it does not have any discriminatory impact at all on out-of-state commerce. No commercial interest may have horsemeat in Texas for human consumption. Still, even if the deferential balancing test of *Pike* is triggered, the Texas horsemeat ban statute wins out. Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. In outlawing horse slaughter for human consumption, Texas codifies its preference for horses and its citizens' disfavor of the human consumption of horsemeat. It offers protection to horses and horse owners alike from theft by removing one possible market for stolen horses.[43] It further protects horses because, as Plaintiffs point out, the reality is that if they cannot slaughter for human consumption it is not worth their while to slaughter horses at all and they will close their Texas operations. Any incidental impact on out-of-state interests is not excessive, as Texas cannot stop horse slaughter for human consumption by any less stringent alternative means. The statute leaves open every possible reason for slaughter other than for human consumption, and entrepreneurs are free to see if they can find a market for horse parts other than for human consumption. The statute is thus narrowly drawn.

Clearly Chapter 149 is not designed to achieve economic goals. Its enforcement will shut down two Texas businesses that Plaintiffs show generate tax income and local jobs. Plaintiffs'

[43]Since Texas Agriculture Code, Chapter 148, was aimed at horse theft and placed horse brand inspectors at each horse slaughterhouse, one can assume two things: Texas Legislators knew about the horse slaughterhouses, and they thought that stolen horses either were going there or might end up there. P. Ex. 8 & 9, 1 Apx. 132-138. If they knew about the slaughterhouses, that does not mean they affirmatively intended to legalize them. It could be that the fee was like the marijuana tax, although the legislative history does not suggest that the Legislators enacting Chapter 148 at that time thought horse slaughter was illegal in Texas. More likely, they either did not have Chapter 149 in mind or were of the incorrect belief, then shared by USDA and the Texas Department of Agriculture, that federal law not only permitted the plants to exist but preempted a State law like Chapter 149. Longstanding or public error does not make what is not into what is so.

Motion for Summary Judgment with Brief, paras. 4.1 and 4.2, p. 9. The shutdown will not advantage Texas interests at the expense of out-of-state interests. Courts considering Commerce Clause challenges are tolerant of State laws that are not designed to achieve economic benefits at the expense of out-of-state interests but rather to advance social welfare, safety, or other non-economic goals.

Police powers extends beyond health, safety, and morals; when there is a reasonable basis for legislation to protect the social,[44] as distinguished from the economic, welfare of a community, it is not for the Court to deny the exercise of the States' sovereign power. *Breard v. Alexandria,* 341 U.S. 622, 640 (1951).

Further, the Commerce Clause does not have the general effect of forbidding penal statutes just because the activity impacts or relates to commerce. Defining criminal offenses (and the statute at issue in this case is a penal statute) occurring in the State is primarily the province of the State. *U.S. v. Lopez,* 514 U.S. 549, 560 (1995).

Dormant commerce clause jurisprudence has its critics, and rightly so. As Justice Scalia put it, in his concurring judgment in *Itel Containers Int'l Corp. v. Huddleston,* 507 U.S. 60, 78 (1993):

> I have previously recorded my view that the Commerce Clause contains no "negative" component, no self-operative prohibition upon the States' regulation of commerce. "The historical record provides no grounds for reading the Commerce Clause to be other than what it says - an authorization for Congress to regulate commerce." *Internal citations omitted.*

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[44] "In the case at bar to state the evils sought to be guarded against by the state is to answer the question of whether the law is or is not reasonable. It was the manifest and imperative duty of the law-making power of this state to regulate the sale of canned horse meat, to insure that dog food labeled 'with gravy' be not mistakenly eaten by human beings. Although it may not be a judicial function for this court to say so, we think it not inappropriate to add that in our opinion it would be a good idea to have all canned horse meat for animals plainly labeled: 'Unfit for Human Use' – so plainly labeled that the harried housewife, thinking to cut down the high cost of living, be put on notice that dog food is not for human beings." *Lewis Food Co. v. State Dept. of Public Health*, 243 P.2d 802, 804 (Cal. App. 2d Dist., 1952).

Justice Thomas has expressed similar concerns:

> "[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application," *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 610 (1997) (Thomas, J., dissenting), and consequently cannot serve as a basis for striking down a state statute. *Hillside Dairy, Inc., v. Lyons,* 123 S.Ct. 2142, 2148 (2003) (Thomas, J., dissenting).

Federal Law Does Not Preempt Chapter 149.

Preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our Federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). "[P]reemption is not to be lightly presumed." *California Federal Savings & Loan v. Guerra*, 479 U.S. 272, 281 (1987). There is a presumption against preemption of the field. *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir. – 1992), *citing Jones v. Rath Packing Co.*, (1977) 430 U.S. 519, 525. Although there is a natural conceptual distinction between production as local and commerce as the interstate flow of the finished goods, the legal distinction between production and actual movement in commerce is no longer recognized as decisive in current commerce clause jurisprudence as it was in earlier history; production that substantially affects interstate commerce may be regulated by Congress if the "interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce." *United States v. Lopez,* 514 U.S. 549, 554 (1995). Congress could choose to regulate horse slaughter for interstate commerce. It could ban it, as it is considering in the introduced HR857[45]. Or, it could require that it be permitted within each State. Thus far, it has done neither.

Plaintiffs cannot point to specific statutory language in the Packers and Stockyards Act, 7 U.S.C § 181 et seq., the Humane Methods of Livestock Slaughter Act, 7 U.S.C § 1901 et seq.,

[45] Advisory to the Court by Tim Curry Regarding Pending Federal and State Legislation, Doc. 55.

the Federal Meat Inspection Act, ["FMIA"] 21 U.S.C. § 601 et seq., or any other law that expressly preempts the Texas horsemeat law for the same reason they cannot point to a specific repealing State law: there is no such law.

Chapter 149 has not been expressly preempted and it is not preempted by conflict or occupation of the field. Especially where the field is traditionally one that the States regulate, Plaintiffs "bear the considerable burden of overcoming the 'starting presumption that Congress does not intend to supplant state law.'" *See De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 814 (1997) *quoting New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 654 (1995). Traditionally, regulation of food is a field which has been reserved to the States, as a part of their police power. *See Rubenstein & Sons Produce, Inc. v. State,* 272 S.W.2d 613, 616 (Tex. Civ. App. – Dallas 1954, writ ref'd n.r.e.); *North Am. Cold Storage Co, v. City of Chicago,* 211 U.S. 306, 315 (1908). States thus have the right under their police power to legislate with regard to the slaughter and sale of animals for human consumption.[46]

To be sure, Federal laws do speak to preemption of certain limited activities relating to stockyards, livestock, and meat. However, the Federal government has not sought to preempt the field[47] to prevent States from having meat laws or animal laws.

The Packers and Stockyards Act of 1921, 7 U.S.C. § 181, 182, P. Ex. 38, 2 Apx. 495, 498-500, includes as commerce livestock and meat sent from one State or country to another. But, that Act has an express preemption clause, 7 U.S.C. § 228c, D. Ex. 86, D2 Apx. 1261, that applies only to bonding and payment. Bonding and payment are not in issue here. The Packers &

[46] *State v. Double Seven Corporation*, 219 P.2d 776, 779, (Az. 1950) (Arizona horsemeat regulations).

[47] For their field preemption argument, Plaintiffs cite to *South-Central Timber Development, Inc., v. Wunnicke*, 467 U.S. 82, 100, 100-1 (1982), a case that found it "peculiarly inappropriate" for the States to regulate timber.

Stockyards Act does not preempt the entire field of meat law or even of packing and stockyard law. *Mahon v. Stowers,* 416 U.S. 100 (1974).

The FMIA has an express preemption clause as to those narrow activities that the Federal government chose to preempt: inspection and labeling. 21 U.S.C. § 678. D. Ex. 87, D2 Apx. 1263. The FMIA does not discourage continued activity of the States; it acknowledges the continued important role of the States and their cooperation. 21 U.S.C. § 602. P. Ex. 16, 2 Apx. 241. Congress did not intend that FMIA preempt the entire field of horsemeat. "Far from intending to preempt the entire field of meat inspection, Congress actually designed the Act to 'protect the consuming pubic from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective.'" *Chicago-Midwest Meat Ass'n v. City of Evanston,* 589 F.2d 278, 282 (7th Cir. 1978), *cert. denied,* 442 U.S. 946 (1979). Prohibition by a State of the slaughter of horses for human consumption in no way interferes with FMIA efforts regarding inspection[48] or labeling, nor forces or causes the introduction of unwholesome, adulterated, improperly marked, labeled or packaged foods into the Nation's food supply. To the contrary, if no horses are slaughtered, there is no need for inspection or labeling and there is no possibility of unwholesome or mislabeled horsemeat entering the Nation's food supply. *See Fla. Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963). Accordingly, no Federal interest is offended by Texas' enforcement of Chapter 149.

The inclusion of express preemption clauses as to inspection and labeling (and bonding

[48] The federal government inspects horsemeat that is intended for export pursuant to 21 U.S.C. § 615, previously 21 U.S.C. § 96, repealed. Originally, this was the Federal Horsemeat Act of 1919, 41 Stat. 241, 66th Congress, 21 U.S.C. § 96, repealed by Pub. L. 90-201, Sec. 18, Dec. 1967, 81 Stat. 600, note at 21 U.S.C. § 601. *See also* 21 U.S.C. § 619. These are all marking and inspection laws and they do not force the States to permit slaughter or trafficking in horsemeat.

and payment) and the absence of any express preemption clause as to which animals may be slaughtered for human consumption is strong evidence that preemption was not intended except for inspection, labeling, bonding, and payment. *See generally, Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (Scalia, J., concurring in part and dissenting in part). The mere existence of express preemption clauses indicate that Congress does not consider the entire meat field preempted; Congress staked out the meat territory it desired, leaving the rest to the States.

Another law cited by Plaintiffs, the Federal Humane Methods of Slaughter Act, 7 U.S.C. § 1901 *et seq.*, P. Ex. 15, 2 Apx. 229-231, sets out how those animals that it covers must be slaughtered; it does not purport to require that every covered species be permitted to be slaughtered in every State in the Union. And, the Federal Commercial Transportation of Equine for Slaughter Act, located at 7 U.S.C. § 1901 note (P. Ex. 12, 1 Apx. 146-148), regulates how horses destined for slaughter must be treated, but does not mandate that States permit horse slaughter.

Plaintiffs argue that Congress has the power, embodied in the Commerce Clause, to regulate interstate and foreign commerce. Indeed, it does have that authority. But Plaintiffs do not offer, and Defendant does not find, a single Federal or international law that requires *every* State (or, in this case, Texas) to permit *every* product (or, in this case, horsemeat for human consumption) to be produced in or to enter into its borders merely because the product could lawfully be produced in or lawfully enter another of the States. The logical result of Plaintiffs' contrary argument would be to require all the States to permit every product that any State permits. This 'tail wagging the dog' approach to Legislation would eviscerate the hallowed concept of the Sovereignty of the several States. Merely because a substance is lawful in another country and one other State, all of the other 49 States would be required to permit the product to

both be produced and to be possessed within their borders. This would cast aside the considered legislation of 49 States at any and every whim of any one State. That cannot be the law.

Federal Transportation Laws Do Not Preempt Chapter 149.

Laws banning a product or activity do not run afoul of transportation law.[49] They are not unlawful embargos or trade barriers. If Texas wishes to ban trade in marijuana, can it not ban someone in Texas from growing it and possessing it? Of course it can. The person cannot claim to be exempt from Texas law because they intend to load bales of the forbidden substance onto a federally regulated airplane or drive it in a truck along the NAFTA highway.[50] By forbidding a person from possessing illegal substances or committing other prohibited acts, even if the actor intended to use a commercial airplane or truck, the State is not interfering with the route or schedule of the airlines or truck industry. The airplane is free to fly wherever Federal law permits it. The truck may drive where the law permits. One simply cannot load a bale of marijuana or a side of horsemeat onto a plane in Texas, or drive a truck through the State with marijuana, horsemeat, or other prohibited substances. Federal airplanes and Federal highways are not sanctuaries or free zones for law breakers, and Federal law never intended them to be.

Due Process and 5th Amendment Issues Do Not Invalidate Chapter 149.

Plaintiffs suggest that this Court should prejudge that their rights to Due Process and against self-incrimination would necessarily be violated if a criminal case proceeded against them. Plaintiffs' Motion for Summary Judgment with Brief, para. 10.10, p. 24. They apparently

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[49] The very idea implies a truly useful tool for criminals seeking a quick get-away: take your contraband and get on an airplane or on a truck heading along the NAFTA highway. The States can't touch you. [Disclaimer to readers: that is not legal advice. It won't work.]

[50] Plaintiffs cite to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). *Morales* held that the Airline Deregulation Act of 1978, 49 U.S.C. § 1301 et seq., preempts States from prohibiting allegedly deceptive fare advertisements, hardly a case on all fours.

base this at least in part on the longevity of their ongoing activity and on the required slaughter reports that only one of the Plaintiffs, Beltex, even bothers to file.[51] The fact that Texas outlaws commercial horsemeat activities for human consumption does not violate Due Process. *See Hughes v. Superior Court*, 339 U.S. at 568. The 5th Amendment is not implicated by a non-custodial business reporting requirement on Plaintiff corporations. These corporations cannot claim the right. Plaintiffs have already publicly set out how they each act in contravention to the statute in order to carry their burden to show standing to bring this lawsuit.

Claims under the 5th Amendment and Due Process claims within the context of a prosecution are made on a case by case basis. No criminal case has yet been filed, and there is no reason to believe that prosecution would proceed in a manner that violates any rights of Plaintiffs.

E. International Trade and Treaty Issues Do Not Invalidate Chapter 149.

On the international front, Texas treats everyone similarly. It has no barriers to foreign interests that do not apply within Texas and to all within the United States. Chapter 149 is not an unlawful embargo and it is not contrary to international law. Non-discrimination, not the entire lack of any local standards, is the hallmark of international trade and treaty law. *See* NAFTA, Articles 754.1 and 754.4 P. Ex. 43, 4 Apx. 677-678. There is no dual standard; business interests from Mexico are welcome in Texas, so long as they comply with Texas law while they are here. That Texas law prohibits the presence of some items within our borders that are lawful in other States is not an international issue. There are activities that are lawful and even encouraged in some States but banned and criminalized in others. A person arriving in Texas

[51] Empacadora is not required to file the Chapter 148 slaughter reports, since it does not slaughter within Texas. Dallas Crown is located in Kaufman County, Texas, and does not slaughter in Tarrant County.

must abide by Texas law while in Texas. Surely they expect no less. A foreign traveler may no more legally transport horsemeat within Texas than they may engage in prostitution or casino gambling or possession of other illegal substances. If that is not acceptable to the traveler, that same international traveler may instead land in other parts of the country more compatible with his or her behavioral and/or possessory preferences. The laws of the Sovereign States reflect the culture and values of the several States. As a country, we celebrate the diverse traditions of the different States and steadfastly protect the Rights of States to have local laws that reflect their local priorities. States have Rights to their separate identities, and they have Rights to expect all present within their borders to obey their local laws. Plaintiffs suggest that if a product or activity is lawful anywhere in the Nation, and perhaps anywhere in the world, Texas is powerless to stop it within our borders. Horse feathers!

Plaintiffs state that they do not seek to invalidate Chapter 149 under NAFTA. Indeed:

> "No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the [NAFTA] agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid." 19 U.S.C. § 3312 (b)(2). P. Ex. 44, 4 Apx. 713-714.

Plaintiffs gamely attempt to argue indirectly what they are prohibited from arguing directly: they say that NAFTA shows that the Federal government has preempted the area of horsemeat by entering treaties and trade agreements.[52] Since NAFTA permits its parties to maintain laws necessary for human or animal health[53], including those that are more stringent

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[52] As Plaintiffs set out, private parties cannot enforce NAFTA, but the USDA could. The USDA declined Plaintiffs' express 'invitation' to join this lawsuit. The USDA asserted its position on preemption and promptly withdrew from this lawsuit. Doc. 22. The United States government could, if it thought NAFTA was implicated by a Chapter 149 prosecution, "consult with the states and eliminate restrictions not compatible with NAFTA." 19 U.S.C. § 3313(b). P. Ex. 44, 4 Apx. 713. This has not occurred.

[53] Obviously, slaughtering a horse impairs the horse's health.

than an international standard, there is not some international standard at issue. The issue devolves to whether there is a national standard. That in turn brings the argument back to whether the Federal government has preempted the law. As set out above, it has not.

Defendant acknowledges the existence of the 1999 European Union Agreement ["EU Agreement"] referenced in paragraph 9.2 of the Amended Complaint.[54] The EU Agreement shows that it was published on April 21, 1998 and that thereafter, on July 20, 1999, the two parties completed their internal ratification procedures and signed the document. D. Ex. 88, D2 Apx. 1264, 1289. Thus, if this Agreement is the inspiration for the preemptive authority Plaintiffs claim, the preemptive change in law must have occurred prior to July 20, 1999. No such change occurred.

Defendant notes that the horsemeat originating at Beltex and Dallas Crown does not appear to be even arguably within the EU Agreement or the related Federal regulations. Neither is Empacadora's: Mexico is not a member of the European Union.[55]

Nothing in the EU Agreement requires the Federal government to be the sole enactor of relevant law, except to the specific extent set out in the Agreement. Nothing in the EU Agreement prohibits State laws such as Chapter 149. The EU Agreement provides that USDA

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[54] The EU Agreement can be found on Westlaw as OJ 1998 L118/3. D. Ex. 88, D2 Apx. 1253-92. [Defendant understands that in the context of international agreements such as this, the reference to "sanitary" refers to public and animal health issues.]

[55] Plaintiffs cite to 9 C.F.R. § 94.15, P. Ex. 39, 3 Apx. 592-594, which relates to Rinderpest, Foot and Mouth Disease, Fowl Pest, Exotic Newcastle Disease, African Swine Fever, Classical Swine Fever, & Bovine Spongiform Encephalopathy. They cite the section because 9 C.F.R. § 94 is referenced in the EU Agreement to which neither Mexico nor Empacadora are parties. Assuming, nevertheless, that there is some argument for applicability of 9 C.F.R. § 94, the concept of "immediate export", as defined in 9 C.F.R. § 94.0, P. Ex. 40, 4 Apx. 595-6, requires the shortest practicable time between arrival of incoming and departure of outgoing couriers. Meat not otherwise eligible for entry into the US may come in under 9 C.F.R. § 94.15(e)(3), P. Ex. 39, 3 Apx. 594, for immediate export when "such transit is limited to the maritime or airport port of arrival only, with no overland movement outside the airport terminal or dock area of the maritime port." Empacadora's importation into Laredo by truck, followed by the NAFTA highway excursion across Texas to DFW International Airport, does not qualify.

is responsible for various categories of activity, but it does not say that USDA must demand that each State permit horse slaughter or horsemeat transfer. The international agreements entered by the United States and the EU provide only that a pathway exist through the United States for EU products eligible for entry. Neither NAFTA nor the EU Agreement require that everyone and every law in every part of the United States give way to some sort of sacrosanct choice by Plaintiffs of route into or through the United States. Empacadora is free to import into Arizona, Florida, Georgia, Minnesota, New Jersey, Ohio, and/or Virginia, and probably numerous other States. Empacadora must comply with local laws as it does so. It cannot excessively speed along highways, it cannot drive on the sidewalks, it cannot drive through schoolyards or cemeteries or hospitals or libraries or through sealed military bases. In short, it must route itself along a legal route. If that route excludes some places, even whole States, that does not mean that the United States is in any violation of any of its treaty obligations. Texas law does not ban horsemeat from the United States, it merely routes the horsemeat along a different route, one that excludes Texas.

Treaties and international agreements do not require Texas to produce or permit any product within its borders merely because those products are lawful in the land of a trading partner.

F. Chapter 149 Does Not Run Afoul of Federal Constitutional Protections of Religion.

In Plaintiffs' earlier filings, they assert a religious protection argument.[56] Plaintiffs' slaughter plants are not a religion and they are not entitled to the protection of a religious view.

Horses represent the spirit of the West[57] and invoke the symbolism of majesty and mythology. They are magnificent creatures, the equivalent of music and poetry come to life. It is

[56] Amended Complaint, Part 11, p. 19. Doc. 58.

[57] D. Ex. 79, D2 Apx. 1213.

a harsh and jarring contrast to consider that in other parts of the world people think of them as slabs of meat wrapped in butcher paper. But, slaughtering horses is not a religious act on any Plaintiffs' part and the commercial slaughter activity of Plaintiffs is not protected by the First Amendment or any other part of the United States Constitution.

The First Amendment protects *religion*; Plaintiffs' slaughter activity is a horse of a different color. A law that is neutral and of general applicability is not barred by the Free Exercise Clause.[58]

Plaintiffs are not asserting that they slaughter horses to honor their deity or because horse slaughter or the sale of horsemeat for human consumption has some religious significance. Plaintiffs make no such allegation, and there is not a scintilla of evidence to suggest it. Indeed, as to Plaintiffs, this is purely a commercial matter, the regular course of business of three multi-million dollar corporations. It is business profit, not the worship of the majestic horse or the satiation of some horse-blood demanding deity, that is pursued here. That some people who refrain from some meats or other foods do so because of deeply held religious or moral beliefs (which Defendant admits) is wholly irrelevant to this lawsuit. The fact that some people abstain from eating pork for religious reasons does not elevate pig farming, which is certainly considered a lawful and honorable profession in Texas, to the status of a First Amendment protected religious activity. Likewise, commercial horse slaughtering is not a First Amendment protected activity. Texas legislators in 1945 or 1949 or were not acting out of religious bigotry and the Legislative record is devoid of any indication that any Legislator was aware of or hostile to any religiously motivated horse slaughterhouses.

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[58] If the law discriminated against the slaughter because it was undertaken for religious reasons, it would be a different matter. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 546 (1993) (cannot stop adherents of Santeria religion from animal sacrifices that are part of their religion while at the same time permitting the animals to be slaughtered and eaten for food).

Plaintiffs' argument that Chapter 149 is repugnant to the First Amendment because it discourages tolerance of others is simply not correct. One can be 'tolerant' of the fact that people in other countries eat horses or dogs or cats or mules or donkeys or perhaps, for the exceedingly 'tolerant', even primates without requiring that every State in the Union take part in supplying those preferences (or, as Plaintiffs word it, "tastes").

Plaintiffs' argument, taken to its logical conclusion, is that if anyone in another culture wants a product, no matter how abhorrent to the majority of the people of Texas, the Texas Legislature is powerless to prohibit that product's production or presence in Texas. That is not the law. That cannot be the law.

G. Plaintiffs' Evidence Should be Limited.

Defendant renews his objection to all parts of Plaintiffs' proffered declaration testimony from Dick Koehler and Manfred Remault about what the law is or should be to the extent that it is offered for the purpose of trying to prove what the law is or should be. Plaintiffs' Motion for Summary Judgment with Brief, Items 1, 2, & 19, pp. 2-3. Discerning the law is the province of the Court, not a proper subject of testimony. Policy issues about what the law should be are the province of the Legislature. Defendant does not object to permitting the Plaintiffs' proffered testimony for the limited purpose of explaining Plaintiffs' pre-JC-0539 understanding, however misguided, although that is ultimately irrelevant to the injunction issue.

V. INCORPORATION OF EXHIBITS.

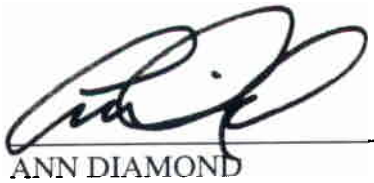
All items in Defendant's Appendix are incorporated by reference into Defendant's Motion and Response.

Conclusion

For the reasons set out above and in the prior filings and submissions by Defendant,

Defendant is entitled to Summary Judgment against all the Plaintiffs in all respects. For the same reasons, Plaintiffs are not entitled to Judgment as to any claim.

Respectfully submitted,



ANN DIAMOND
Chief, Litigation
Assistant Tarrant County
Criminal District Attorney
State Bar No. 05802400

ROBERT D. BROWDER
Assistant District Attorney
State Bar No. 03087975
401 W. Belknap Street, 9th Floor
Fort Worth, Texas 76196-0401
Tel. No. 817/884-1233; FAX: 817/884-1675

ATTORNEYS FOR DEFENDANT TIM CURRY
TARRANT COUNTY CRIMINAL
DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Defendant's Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, Brief in Support, and Appendix was served on this date in compliance with the provisions of Rule 5, FED. R. CIV. P. on:

R. DAVID BROILES
Attorney at Law
100 N. Forest Park Blvd., Suite 220
Fort Worth, TX 76102

HAND DELIVERY

ANN DIAMOND

9/22/03
Date Signed