UNITED STATES DISTRICT COURT
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.	§	NO. 4-02CV0804-Y
TIM CURRY, District Attorney, Tarrant County, Texas and BILL CONRADT, District Attorney, Kaufman County, Texas, Defendants	§	
AND	§	
UNITED STATES DEPARTMENT OF AGRICULTURE, Party Needed for Just Adjudication.	§	

PLAINTIFFS' REPLY TO DEFENDANT TIM CURRY'S OPPOSITION TO TEMPORARY INJUNCTION OCTOBER 15, 2002

This reply follows numerically the responsive brief filed by Tim Curry.

1. This reply is timely filed, as ordered by the Court. It addresses only Tim Curry's response.

2. The authorities and factual allegations establish jurisdiction, which is not contested.

3. Plaintiff Empacadora has standing. It sells horsemeat intended for human consumption to Beltex. Its product is transported to Tarrant County and shipped from Dallas-Fort Worth International Airport. If Tim Curry prosecutes Beltex, American Airlines, or U.S.D.A. officials, it will harm Empacadora.

4. Federal issues predominate in this dispute, so declaratory judgement in federal court is proper.

5. Mr. Curry agrees nothing prohibits this federal court from issuing temporary injunctive relief.

6. The parties concur that this motion can be decided on the affidavits and exhibits.

7. Mr. Curry correctly states, but misapplies, the standard for temporary injunctive relief. Plaintiffs are likely to prevail on the merits. Defendant fails to present a legitimate state interest furthered by Chapter 149, or suggest anyone will suffer any harm if Chapter 149 is not enforced before this lawsuit is resolved. Public interests weigh in the favor of issuing the injunction, because a business should not be shut down by a prosecutor who for 30 years has not prosecuted under the statute. Defendant fails to demonstrate that Texans will suffer any harm if prosecution is delayed; whereas Beltex demonstrated that approximately 100 people could suffer actual, irreparable harm if the temporary injunction is not issued.

8. The issue is whether Chapter 149 is enforceable. The United States Department of Agriculture (U.S.D.A.) filed a brief asserting Chapter 149, "which bans the sale of horsemeat for human consumption, is preempted by federal law." U.S.D.A. Response at 1.[1]

9. Section 678 of the Federal Meat Inspection Act (FMIA) expressly preempts Chapter 149. Beltex is a U.S.D.A. regulated slaughterhouse. Its meat products include those derived from bison, wild boar, ostriches, and horses. (Exhibit 47). Section 678 provides:

---

[1]Plaintiffs' response to the U.S.D.A.'s motion to dismiss is due November 3, 2002, and this Reply does not address that motion.

> Requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which [federal] inspection is provided . . . which are in addition to, or different than, those made under this Act may not be imposed by any state . . . .
>
> * * * *
>
> Marking, labeling, packaging or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any state . . . .

Texas permits Beltex, under U.S.D.A. requirements, to slaughter bison, wild boar, ostriches, and horses, and package each type of meat in individual vacuum sealed packages. In the shipping department, Chapter 149 requires that horsemeat, in effect, be labeled "not for human consumption." The meat can only be sold for animal consumption. Why? How can this not be "in addition to, or different than" U.S.D.A. requirements that insure horsemeat is properly labeled and fit for human consumption?

Chapter 149 imposes "ingredient requirements" on Beltex that are in "addition to, or different than" those under federal law. Chapter 149 permits Beltex to slaughter bison, wild boar, ostriches, and horses in its U.S.D.A. regulated slaughter house. But when Beltex sells its products, Texas requires that Beltex not sell the U.S.D.A. approved meat if the ingredient in the package is horsemeat. State law regulates "in addition to, or different than" federal law, and is preempted.

Federal law need not "mandate that States permit horse slaughter" (Curry Brief at 6) in order for it to preempt state law. It is enough that Congress expressly prohibits States from passing laws "in addition to, or different than" 21 U.S.C. §601 *et seq*. There is no presumption against preemption applicable here. In *New York v. F.E.R.C.*, 122 S.Ct. 1012, 1023 (2002), the Court stated that it does not recognize the presumption against preemption when the case "concern[s] the scope of the Federal Government's authority to displace state action."

10. Mr. Curry's assertion, that the express preemption clause in the FMIA relates only to the "narrow activities" of "inspection and labeling," misreads FMIA, and ignores Texas' legislative recognition of FMIA's scope. For example, the TEXAS MEAT AND POULTRY INSPECTION ACT, (TMPIA), TEX. HEALTH CODE Ch. 433, Exhibit 3, 1 APX. 58-96, sets Texas policy on "unwholesome, adulterated, or misbranded meat or meat

food products" that might "injure the public welfare," cause losses to "processors of meat," injure consumers, or "compete unfairly." The Health Code §433.001 *et seq.* tracks FMIA requirements for animals and meat products that are sold intrastate only. "Livestock" includes "horses" and "equine products." (§433.033(11)) Texas requires that horsemeat transported for sale for human consumption in intrastate commerce be "plainly and conspicuously marked or labeled . . . to show the kind of animal from which the article was derived." (§433.033)

The TMPIA requires the Texas Department of Health to cooperate with the U.S.D.A. to ensure Texas "requirements will be at least equal to those imposed under the [FMIA]." (§433.071) The Texas Legislature recognizes that the FMIA preempts state regulation of the processing and sale of meat. Texas regulations can be equal to federal regulations, but not exceed them. The idea that "regulation of food is a field which has been reserved to the States," Curry Brief at 7, has not been correct for a century. States play no important role in this sphere of food processing.[2]

Defendant cites two cases supporting its assertion that regulation of food is a traditional area of state control. In *Rubenstein & Sons Produce, Inc. v. State*, 272 S.W.2d 613 (Tex. Civ. App.–Dallas 1954), the state sought to destroy " adulterated, salmonella laden, spoiled eggs." *North Am. Cold Storage v. Chicago*, 211 U.S. 306 (1908),concerned the city's attempt to seize and destroy putrid and diseased chickens. Both cases concern a state's right to quarantine or destroy unsafe food products that could be sold to an unsuspecting public. Even the one prosecution under Chapter 149 falls under this category. In *Gordy v. State*, 160 Tex. Crim. 201, 268 S.W.2d 126 (1953), the defendant mixed horsemeat with beef (adulteration) and sold it mislabeled as hamburger. That prosecution was before the 1969 Act which regulated horsemeat sales. Mr. Curry does not contend Chapter 149 protects Texans from dangerous products. If Beltex sells adulterated

---

[2]Mr. Curry fails to address the express preemption provisions in the Airline Deregulation Act and the Intrastate Highway Act, which also prevent Texas from prohibiting the transfer of horsemeat for human consumption. Under both acts, states are expressly prohibited from regulating services, routes and rates of transportation. 49 U.S.C. §41713(b)(1), *and see Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000)(dissent by J. O'Connor from denial of certiorari); 49 U.S.C. §14501.

or mislabeled meat in Texas, Mr. Curry can prosecute under TEX. HEALTH & SAFETY CODE §43.081, without violating a temporary injunction that prohibits prosecution under Chapter 149.[3] Exhibit 5; 1 Apx. 88.

11. The issue is not whether federal law preempts "the entire field of horsemeat . . . ." Curry Brief at 7. The issue is whether Chapter 149 goes beyond, is in addition to, or conflicts with those areas of activity Congress has addressed. The test proposed by Mr. Curry, seeing "if it is possible to comply with all the federal and state laws at once, or whether complying with one makes compliance with the other impossible," simply is not the right test. Even if it were, the conflict is apparent – Congress permits the interstate sale of horsemeat for human consumption. Texas prohibits it. Applying his test, Mr. Curry says that if one does nothing with horsemeat, one has complied with both federal and state law. Mr. Curry's position is that even though Congress permits and regulates an activity in interstate commerce, states can prohibit it entirely. Can Mr. Curry provide an example?[4] Plaintiffs' position is less sweeping. Where Congress permits, authorizes, and regulates a commercial activity in interstate commerce, States may not prohibit those activities, but can regulate them, so long as the state regulation does not conflict with federal policy.

Congress has so pervasively occupied the field of meat production for human consumption as to remove any question of preemption. *See South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 101 (1984); *Armour & Co. v. Ball*, 468 F.2d. 76 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1973). Mr. Curry argues that because the Federal Government has not chosen to occupy the "entire field" of animal slaughter, transport, and inspection, that Chapter 149's validity is determined by asking whether compliance with both state and federal laws is possible. He concludes it is, because Beltex can cease operations as a reasonable

---

[3]Mr. Curry's argument, that the absence of an express prohibition against a state determining the type of animal that may not be slaughtered is strong evidence that federal preemption is limited to labeling and inspection , ignores the express federal grant to states to control specified, and limited areas of health and safety, and the Supreme Court's admonition in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), that express preemptions should be read broadly.

[4]Alcoholic beverages don't count. U.S. Const. art. XXI, repealing prohibition, permits state laws to govern transporting and possessing intoxication liquors, a constitutional exception to the Commerce Clause.

means of complying with both sets of laws. This was not the holding in *Fla. Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), relied on by Defendant. In that case, Florida avocado growers could comply with both the federal minimum standard and California's specific requirement by simply allowing the fruit to ripen a little longer before picking. Chapter 149 does not impose a higher standard than a federal standard that protects Texas consumers – it imposes a total prohibition. Compliance with Texas law makes it impossible for Plaintiffs to engage in interstate and foreign commerce.

Mr. Curry's argument against field preemption cites another inapposite case, *Chicago-Midwest Meat Ass'n v. Evanston*, 589 F.2d 278 (7th Cir. 1978), *cert. denied*, 442 U.S. 946 (1979). In *Chicago-Midwest*, the state sought to inspect meat delivery trucks and the Court upheld that law. The local law did not conflict with FMIA's express prohibition against state laws concerning "premises, facilities, and operations" and was within the express exception to preemption concerning inspections for the "purpose of preventing . . adulterated [meat] . . . outside of such an establishment [covered by the Act]." *Id.* at 282-84.

Mr. Curry misunderstands the Dormant Commerce Clause argument. It is the discrimination against interstate and foreign itself that receives scrutiny, not solely state actions protecting local interests at the expense of foreign commerce interests. *Maine v. Taylor*, 477 U.S. 131, 137-38 (1986). "All objects of interstate [and foreign] trade merit Commerce Clause protection." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Congress identified slaughter animals and meat products as articles of interstate commerce. Chapter 149 erects a barrier to the sale of horsemeat for human consumption, and, as an act of protectionism, is *per se* invalid under the Commerce Clause.

On its face, Chapter 149 discriminates in favor of other Texas meat products to the detriment of Texas horsemeat processors. Mr. Curry seems to think Beltex must prove that the legislative motive behind Chapter 149 was to discriminate against horsemeat in favor of some other product. Plaintiffs' only clue as to the motive behind Chapter 149 is its 1945 predecessor, which banned sale of meat not ordinarily consumed by humans.

Mr. Curry cannot contend the Texas ban on the sale of horsemeat survives commerce clause scrutiny because the law "serves a legitimate local purpose" that "could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138. He fails to even suggest a legitimate local interest furthered by Chapter 149. And none is apparent.

12. To say the Federal Meat Inspection Act does not preempt state law because Plaintiffs sell their product abroad has significant implication. Were Plaintiffs to make that argument, to avoid the onerous but necessary regulatory requirements of the FMIA, surely they would be laughed out of court. The issue is safety and honesty in food processing in intrastate, interstate, and foreign commerce. To not recognize these as paramount national concerns is to be oblivious to the world around us, from the billions of dollars lost in England because of beef contamination with mad-cow disease to the refusal by some to permit genetically altered corn into their countries though sorely in need of food. Plaintiffs' apprehensions about being prosecuted by a District Attorney, who does not even defend Chapter 149 as serving any purpose, reasonably causes concern as to whether it is wise to entrust him with the prosecutorial discretion he sees as of paramount public importance.

13. Texas plays an important role in Plaintiffs' businesses. That is why Plaintiffs work with state agencies and universities to further the health and welfare of horses. Every day Beltex receives horses. Beltex provides facilities and pays Texas $5.00 per horse for inspections to prevent horse theft. No one wants to kill another person's pet. Beltex works to avoid this. If Mr. Curry has an interest in this goal, which we do not doubt, he has authority to search out and prosecute horse thieves. We serve common interests under state law. But that does not mean a state law can prohibit an activity authorized by federal law to be carried out in interstate and foreign commerce.

14. The Texas Meat and Poultry Inspection Act authorizes the sale of properly inspected and labeled horsemeat in intrastate commerce, but it, like the other states' statutes that address the subject, takes a back seat to federal law in this area. Texas could not, under the guise of regulating intrastate commerce, permit

the sale of any meat product not subject to U.S.D.A. inspection and labeling. All meat legally sold in the United States must meet U.S.D.A. standards. Texas cannot permit lower requirements, or impose higher ones. Federal regulation prevails.

15. If Mr. Curry says Chapter 149 does not apply to live horses traveling through Texas, even though they are going to slaughter, we will not argue otherwise. We accept that the buyers and truckers who deliver horses to Beltex are not criminals.

16. Plaintiffs do not claim this is a "traditional" commerce clause case. Chapter 149 has no apparent purpose. Plaintiffs cannot say the State seeks to protect anyone, only that it seeks to deny Plaintiffs' right to engage in legal commerce. Defendant fails to state a legitimate state interest justifying such an infringement.

17. Mr. Curry turns Plaintiffs' foreign commerce argument into a discrimination claim. The issue is not whether Empacadora is treated like everyone else. The issue is whether Texas can prohibit Empacadora from selling horsemeat intended for human consumption in Texas. Making Empacadora a plaintiff illustrates that Chapter 149 does not prohibit the slaughter of horses where the meat is intended for human consumption. As to Empacadora, the slaughter of horses for human consumption happens in Mexico. What Chapter 149 prohibits is shipping the meat to ports or airports in Texas for export from the United States. Chapter 149 is aimed only at stopping one commercial activity. If Beltex moved to New Mexico, shipping processed horsemeat to D/FW for export would be prohibited by Chapter 149. What local interest is served? How can Congress' power over foreign commerce not prevail over Chapter 149? Texas cannot pick and chose what can or cannot be imported or exported into the United States across Texas' borders. One can hardly imagine the chaos that would result were it otherwise.

Mr. Curry asserts there "are activities that are lawful and even encouraged in some States but banned and criminalized in others." Curry Brief at 11. His examples are prostitution, casino gambling, and possession of illegal substances. But can Mr. Curry provide an example where it is legal under federal and state law in, say, New Mexico, to manufacture and sell a product in that state, where Texas can prohibit that product from

being transported through or out of Texas? Plaintiffs narrowly contend that when it comes to meat products people eat, Congress expressly prohibits states from passing laws in addition to, or different than, federal law. When it comes to meat – all of it has been declared by Congress to be in interstate commerce, and Plaintiffs' products, in fact, are in interstate commerce.

18. Mr. Curry points out that NAFTA "permits its parties to maintain laws necessary for human or animal health . . . ." Curry Brief at 12. Texas is not a party to NAFTA. The United States is. It has adopted a national standard on health, safety, and sale of meat, recognized by Texas in the TMPIA. Mr. Curry does not argue Chapter 149 has anything to do with health. How is health promoted by Chapter 149?[5]

19. Mr. Curry should focus on what this case is about – a commercial activity regulated from A to Z by the federal government. No one suggests Texas cannot prohibit activities in Texas that other states permit within their boundaries. As for Mr. Curry's example where Rhode Island enacts a law "legalizing Product Z," we think it significant that no real example is articulated. Rhode Island's statutes do not extend beyond its borders, anymore than Texas' do. The tough question is whether Rhode Island or Texas can pass a law prohibiting a commercial product, and thereby require all those in possession of the commercial product to drive around the state. Can Texas or Rhode Island require international cargo or travelers to fly out of airports other than D/FW or ones in Texas? Plaintiffs think not.

20. Plaintiffs, in their initial brief, offered an explanation why Chapter 149 was still on the books, though the Legislature in 1969 intended its repeal. The 1969 Meat Inspection Act subjected those who sell horsemeat in Texas to state law on health and labeling. So does the 1989 Act. Mr. Curry makes Legislators look foolish prescribing labels for the sale of horsemeat, while he argues it is a crime to sell horsemeat. Can these be consistent? Could Mr. Curry offer some explanation why, during his lengthy tenure, he never sought to

---

[5]Mr. Curry asserts that no federal authority has asked the Texas prosecutors not to prosecute. We do not know whether this was true when written. But the U.S.D.A. in its brief expressly asserts Chapter 149 conflicts with federal law and is preempted. U.S.D.A. Brief at 4. Surely this is at least suggestive that D.O.J. and U.S.D.A. officials think prosecution by Mr. Curry would be improvident.

prosecute Beltex, and now it is a matter of urgency?

Mr. Curry should address the 1969 Meat Inspection Act provision that states "[t]his Act prevails over . . . any other act to the extent of any conflict." Section 413, Exhibit 4; 1 Apx. 55. The 1969 Act expressly states in Section 11(g) that "as applied to food products of equines" the meaning is "comparable to that provided . . . with respect to cattle, sheep, swine, goats," etc. 1 Apx. 39. The 1969 Act, in its purpose and terms, preempts and repeals the 1949 Act, because they conflict. *See Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364 (Tex. App. – Beaumont 2001).

21. Defendant Curry argues that there is no conflict between what is presently Chapter 149 and Chapter 433 of the TMPIA. Again, he says, both can be complied with. Beltex, he asserts, will not violate Chapter 433 if it closes down because of Chapter 149. But the Legislature in Chapter 433 gave Beltex permission to sell horsemeat, so long as it was so labeled and meets U.S.D.A. requirements. Why pass Chapter 433 if selling horsemeat is illegal?

22. Mr. Curry suggests that the Legislature in 1989 and 1997 had a mistaken belief that Chapter 149 was repealed when passing Chapter 433 of the Health Code and Chapter 148 of the Agriculture Code. There can be no dispute that the two Legislative Sessions did not think selling horsemeat for human consumption was illegal – indeed, Beltex and Dallas Crown were discussed. The issue is whether the Legislators were mistaken. To suggest they would have benefitted from the Attorney General's August 2002 opinion is questionable. The Attorney General did not address the issue of repeal. Indeed, he addressed only a very narrow issue – the preemptive effect of 21 U.S.C. §601, *et seq*. Since the Attorney General has expressly refused to defend his opinion, there is little reason to accord it much respect.

23. Plaintiffs are concerned about prosecution of those with whom they work and on whom they depend. Mr. Curry asserts they are "effectively immune from criminal prosecution" under TEX. PENAL CODE §9.21. Curry Brief at 15. That provision allows a defendant in a criminal prosecution to attempt to persuade the trier that he or she "reasonably believes the conduct is required or authorized by law, by the judgment or order of

a competent court or other governmental tribunal, or in the execution of legal process." It says nothing about government employees, and would apply as well to Beltex. And though a court or tribunal is supposed to be involved, apparently working for (or with) the U.S.D.A. will permit the defense. Plaintiffs accept the defense in its broadest application, because they reasonably believe their activities are legal, and they will rely on §9.21, if prosecuted, as well as PENAL CODE §8.03 (mistake of law).

The issue is the threat of prosecution of U.S.D.A. employees. And Mr. Curry has not said he cannot or will not prosecute federal employees who are on premises and assist Beltex. Mr. Curry asserts these people "would not reasonably fear that they are at legal jeopardy." Curry Brief at 15. He needs to say "they should have no fear," because he will not – now or ever – prosecute them. The governmental employees are as subject to impermissible prosecution as are the Plaintiffs, and a temporary injunction is required.

24. As Mr. Curry acknowledges, Plaintiffs face irreparable harm from prosecution, whether or not they are correct about the law. Curry Brief at 16. If wrongfully charged, their federal rights will be forfeited or violated based on the "discretion" of a prosecutor, who recently decided, after 30 years, that any delay in prosecution is untenable.

25. The irreparable injury Plaintiffs will suffer absent a temporary injunction is clearly stated.

26. The Court must balance the public interests against Plaintiffs' private interests before issuing an injunction. Prosecuting Plaintiffs hurts them and others. Enjoining prosecution for a few months hurts no one. Mr. Curry, lacking a public good fostered by Chapter 149, asserts the public has an interest in the "official power of his office," and says he will be injured by a temporary injunction because he will be "precluded from exercising prosecutorial powers" to have the law enforced. Curry Brief at 17-18. Mr. Curry has not prosecuted under Chapter 149 in his 30 years in office. A few more months will hurt no one.

27. State prosecution under dubious statutes implicating significant federal interests violates the public interest–local, national, and, in this case, international. That a D.A. in Tarrant County must wait is a matter of minuscule consequence.

28. We trust the Court will recognize the purpose of the offered evidence.

Respectfully submitted,

David Broiles
State Bar No.03054500
1619 Pennsylvania Avenue
Fort Worth, Texas 76104
(817)335-3311
(817) 335-7733 fax

Of Counsel:

John Linebarger
State Bar No. 12387500
Fort Worth Club Tower
777 Taylor, Penthouse I-C
Fort Worth, Texas 76102-4196
(817) 810-9000
(817) 336-4889 Fax

Loe Warren Rosenfield
Kaitcer & Hibbs, P.C.
4420 West Vickery Blvd.
Fort Worth, Texas 76185
(817) 377-0060
(817) 377-1120

Certificate of Service

A copy of this Reply has been faxed and mailed to Ann Diamond and S. Cass Weiland, on October 15, 2002.

David Broiles