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 Defendant	§	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION

TO THE HONORABLE COURT:

Plaintiffs file the following brief in response and reply to the outstanding motions for summary judgment in the above styled case.

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I. The Purpose of Chapter 149

A. "States' Rights": Them's Fightin' Words, Colonel

In a righteous tone, Defendant Curry asserts: "This is a States' Rights case." Curry Brief at 2. It is hard to imagine a more emotive phrase in United States history than "states' rights." The bad ideas and evil actions justified in the name of states' rights are worth enumerating; by contrast, public indignation against horse-slaughter plants looks petty.

In the 19th Century, states' rights was a code phrase for the right to own slaves. If horse slaughter is repugnant to some people, owning, buying, and selling people ranks up there with the most odious practice humans ever institutionalized. Our Constitution still reflects that those of African descent are counted as three-fifths of a person, because slave states wanted to protect the states' right to enforce slave ownership. The first time Congress passed a law that threatened the slave states' right to continue the "peculiar situation," the Missouri Compromise, it was declared unconstitutional in the *Dred Scott* case, a decision renown for its historical recitation that the founding

fathers considered those of African descent so low on the scale of living creatures that they were ranked little higher than horses.

The Civil War — 700,000 dead — many southerners still will tell you, was about states' rights. What rights? The right of the seceding states to protect slavery. After three constitutional amendments abolished the states' right to protect slave ownership, freed blacks had to live under *Plessy v. Ferguson's* declaration that states still had a right to pass laws segregating people on the basis of color. Why? Blacks mixing with whites was repugnant and repulsive to whites. State courts enforced deed restrictions to "keep blacks out" and anti-miscegenation laws protected white girls from vilification by blacks. The first court decision counsel ever read, published by the Dallas White Citizens' Council in a little pamphlet, was *Borders v. Rippy*, 184 F.Supp. 402 (N.D. Tex. 1960), a defense of states' rights and segregation. [1] Legal enforcement, by state law, of the prejudice of whites against blacks, was accepted for the first half of the 20th Century.

The first trial counsel ever sat through was *U.S. v. Guest*, 383 U.S. 745 (1966), a federal prosecution under the Civil Rights Act against six Ku Klux Klan members who killed a Washington D.C. Army Reservist and Board of Education Trustee who was traveling through our town in Georgia. As one involved in the civil rights movement in Georgia from 1963 through 1966, counsel came to have an aversion — indeed strong sense of disgust — about "states' rights" as a code phrase for "we ought to be able to enact our own biases and feelings into the law and impose our views on others." *U.S. v. Guest* held otherwise. States' rights were trumped by federal rights. That is what preemption does. It was a dominant theme in federal court litigation in the last half of the 20th Century.

In summarizing his states' rights position, Mr. Curry states:

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[1]A copy is at Plaintiffs' Appendix Tab 69. It is an opinion we all should read. It proves attitudes change.

> "Plaintiffs suggest that because persons in other nations consume horsemeat American revulsion at or abhorrence of the practice . . . does not support a law that effectively bans human-consumption [of] 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." Curry Brief at 14.

Defendant cites *Hughes v. Sup. Ct. of Calif. for Contra Costa County*, 339 U.S. 460 (1950) for this proposition. In the opinion, written by Justice Frankfurter, the Court affirmed a contempt judgment issued under an injunction the state court had entered prohibiting picketing of a Mr. Lucky store in a black neighborhood. The picketers discouraged black shoppers from patronizing the store until the number of black clerks proportionally equaled the proportion of blacks in the neighborhood, i.e. private affirmative action. No legislation was challenged or even involved. The trial court, sitting in equity, condemned "the evil of picketing to bring about proportional hiring." *Id.* at 469. The California Supreme Court affirmed, opining that "picketing to promote discrimination" would be an "unlawful objective." *Id.* at 466. The Supreme Court agreed.

The case has no relevance to the interstate commerce issues involved here. Mr. Curry cites it as authority that states can pass laws that serve the purpose of enforcing the community prejudices then in vogue. In 1950, private protests to obtain jobs for blacks was disfavored. Indeed, affirmative action is still a contentious issue, about which reasonable people disagree. Especially when the government sanctions it. *See Grutter v. Ballinger,* 123 S.Ct. 2325 (2003). But *Hughes* also illustrates how attitudes change. My first criminal trial resulted in swift convictions of my clients for picketing a city housing director's residence to protest his failure to enforce the housing code in black neighborhoods. *State v. Anonymous*, 274 A.2d 897 (Conn. Cir.Ct. 1971). The eight minutes the jury deliberated resolved a dispute about who would get to be foreman. But, reflecting a change of attitudes, the appellate court reversed on First Amendment grounds. Private picketing to change racial attitudes was constitutionally protected.

How much attitudes change in a matter of decades, looking back at the *Hughes* decision in 1950, is evidenced by the fact that in Tarrant County, county employees have a choice of holidays to take off — Martin Luther King Day or Ceasar Chavez Day. Both men achieved fame and acclaim as leaders of boycotts, Dr. King in Alabama against segregated buses, Mr. Chavez nationwide, against grocery stores that sold California grapes grown by employers the United Farm Workers were on strike against.

The point is this. If, as Mr. Curry contends, Chapter 149 has at its purpose criminalizing conduct that offends public sentiment, bias, or prejudice, then Chapter 149, which totally bans a commercial activity in interstate commerce, cannot pass constitutional scrutiny under dormant Commerce Clause jurisprudence. On the other hand, if Texas's ban on interstate commerce in horsemeat, an article approved and inspected by the federal government, is to protect the health of the public under the state's police powers, Chapter 149 is preempted; Chapter 149 conflicts with federal law.

B. Mr. Curry's Search for Purpose

To withstand a preemption challenge under the Commerce Clause, Chapter 149 must serve a purpose so important to Texas' local interest that it overrides the constitutional guarantee of free commerce between states and other nations. Mr. Curry defends Chapter 149 under a states' rights argument in which he claims that Texas criminalizes a commercial activity because some Texans find it offensive, abhorrent, revolting or repulsive. Curry contends:

> "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." Curry Brief at 13.
>
> * * * *
>
> "[W]hether or not humans can safely eat unadulterated horsemeat is not the issue guiding the public interest in the continued existence of Chapter 149." Curry Brief at 13.

* * * *

"Dogs and cats and equines hold a special place in our culture — a status that stretches back in time and across the West." Curry Brief at 14.

* * * *

"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." Curry Brief at 15, fn 24.

* * * *

"In outlawing horse slaughter for human consumption, Texas codifies its preference for horses and its citizens' disfavor of the human consumption of horsemeat." Curry Brief at 31.

The reason for these statements by Mr. Curry, we assume, is his recognition that as a constitutional matter, if Texas is going to prohibit interstate and foreign commerce, then there must be some good reason for the State's prohibition. Mr. Curry cites *DeHart v. Town of Austin*, 39 F.3d 718, 723 (7th Cir. 1994), as an example of a ban on animals that withstood a constitutional challenge. The town banned wild animals from being housed in the city's limits. The Seventh Circuit recognized that any local regulation that has an effect on interstate commerce must "effectuate a local public interest, and its effect on interstate commerce [must be] only incidental . . . ." *Id.* According to Mr. Curry, Chapter 149 prohibits activities that Texans find offensive. Chapter 149, Mr. Curry asserts, "prohibits a disfavored practice and also favors horses."

Is this really what Chapter 149 is about? There is no evidence supporting Mr. Curry's view about this as the purpose of Chapter 149. Indeed, if prohibiting a disfavored practice and favoring horses were the purposes behind Chapter 149, it certainly fails to achieve them. Consider these features of Chapter 149 that are inconsistent with Mr. Curry's statement of the local interests furthered by Chapter 149.

1. Mr. Curry asserts that the public would be outraged "if a dog or cat slaughterhouse tried to open for business in Texas." Two observations. First, Beltex has been slaughtering horses in Texas for decades without public outrage. Second, if Beltex and Dallas Crown did stop slaughtering horses, and started slaughtering dogs, cats, and primates, regardless of the public outrage, their operations would not be illegal under Chapter 149. Mr. Curry cites no Texas law prohibiting slaughter houses for dogs, cats, or primates. Indeed, federal law prohibits the slaughter of dogs, cats, and primates for human food, by leaving them out of the approved list of food that the U.S.D.A. will inspect and approve for sale as food for human consumption.[2] Dogs, cats, and primates could not be slaughtered for human food in Texas because they are not a part of the definition of "livestock," though "horses" are included. *See*, H.B. 1836, Agriculture Code, Section 1.03(3), effective September 1, 2003. (P. Apx. Tab 70)

2. The 1945 Texas act prohibited the slaughter of dogs, cats, monkeys, donkeys, and horses for human food, but all the animals except horses were dropped from the prohibition in1949. If Chapter 149 was intended to protect animals that are pets, as Mr. Curry believes, why would the legislature drop dogs and cats from the protected group? Pigs, lambs, goats, turkeys, cows, calves, steers, snakes, fish, chickens, turtles, and frogs are pets to some people, but to others they are food. Chapter 149 only prohibits commercial activities in horsemeat for human food. Texas does not prohibit the slaughter of pets. Tens of thousands of pets are killed each year by humane societies and animal control units. Many animals that some people keep as pets are killed by others for food. The

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The Animal Welfare Act covers the humane transport and treatment of dogs, cats, monkeys, and other animals used for research, exhibition, or pets. 7 U.S.C. §2131 *et seq.* (P. Apx. Tab 71) "[H]orses not used for research purposes . . ." are specifically excluded from protection under the act. 7 U.S.C. §2131(g). Under federal law, horses are livestock, not pets, and are covered under 21 U.S.C. § 601 *et seq.* and other federal legislation.

purpose of Chapter 149 is not to protect animals that are sometimes pets. Nor does it prohibit eating pets. It prohibits processing and transporting horsemeat to be sold for human food.

3. Texans, as Mr. Curry sees it, are repulsed by the slaughter of horses for food. Chapter 149 does not prohibit slaughtering horses, or even selling horsemeat for food. Both Beltex and Dallas Crown slaughter horses and sell the meat as food for other animals. Apparently, Texans do not abhor killing horses for food, as long as their own pets or other animals eat it. In Texas, it is all right to slaughter horses if cats and tigers eat the meat, but not all right if humans buy the meat to eat. Chapter 149 does not have as its purpose prohibiting slaughtering horses, selling the meat, or eating horsemeat, as long as non-humans eat the horsemeat or people don't pay for it if they eat it. People can eat horsemeat only if they get it free. Dog or cat owners have to pay.

4. Chapter 149 does not have as its purpose protecting the sensibilities of those who see horses as pets and abhor their slaughter for human food. Under Chapter 149 it is perfectly legal for Beltex and Dallas Crown to slaughter horses and for people to eat the meat. Human consumption of horsemeat is not prohibited by Chapter 149. Slaughtering horses is legal. Only the sale of horsemeat for human consumption is prohibited.

The fact that Chapter 149 does not further the goals Mr. Curry posits is a good indication he has misunderstood the perceived evil the law was intended to correct. More on that below. Even if this unsupported view of the purpose of the law is accepted, it does not justify the State's total ban on a commercial activity sanctioned by federal law, where the bans effect is only on interstate and foreign commerce.

C. Criminalizing Conduct Some Find Abhorrent or Disgusting

If Chapter 149 is intended to criminalize an activity Texans find offensive, serious constitutional questions arise. States can prohibit the sale of unhealthy and mislabeled food. This

is an exercise of police power, though it is circumscribed by any potentially conflicting federal legislation or regulation. But, Mr. Curry asserts, without qualification:

> "The laws express the sense of this Nation's people as a whole, or of the people of the State, be it to prohibit an abhorrent practice or protect a favored animal. The horsemeat law does both: it prohibits a disfavored practice and also favors horses." Curry Brief at 14.

This goes too far. Turning to a hot-button issue of the 21st Century, consider the recent Supreme Court decision in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), which struck down Texas' sodomy law.

> The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principals to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. . . . "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southwestern Pa. v. Casey*, 505 U.S. 833, 850, 120 L. Ed. 2nd 674, 112 S.Ct. 2791 (1992)

Id. at 2480. Adopting Justice Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), the Court concluded that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice . . . ." *Id.* at 2484.

In another Texas case, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Supreme Court invalidated an ordinance that would deny building permits for homes for the mentally retarded, noting that "the city may not avoid the strictures of the clause, by deferring to the wishes or objections of some fraction of the body politic." Id. at 428. Quoting *Palmore v. Sidoti*, 466 U.S.429, 433 (1984), the court reiterated: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Chapter 149 is unconstitutional if it is intended to codify the bias or prejudice of some, because that end never justifies state action banning interstate and foreign commerce in products the

federal government assures the safety of and stamps with the U.S.D.A. seal of approval. Again, Mr. Curry is wrong when he asserts:

> "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." Curry Brief at 27.

The Commerce cause "limits the power of the States to erect barriers against interstate trade." *Lewis v. Investments Managers, Inc.*, 447 U.S. 27, 35 (1980). Texas's total ban on horsemeat as food is a burden on interstate commerce "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). If the purpose for Chapter 149 is to enforce public prejudice and sensibility, its sweep is an unconstitutionally broad infringement on interstate and foreign commerce in violation of the Commerce Clause.

II. The Dormant Commerce Clause

A. Chapter 149 Is *Per Se* Invalid Because it Facially Discriminates Against Interstate and Foreign Commerce.

Defendant misses the point of the Dormant Commerce Clause. The Commerce Clause does not prohibit only economic protectionism. It is the discrimination against interstate and foreign commerce itself that receives scrutiny, not solely state actions protecting local interests at the expense of foreign interests. *Maine v. Taylor*, 477 U.S. 131, 137-38 (1986). "[T]he Clause protects the interstate market, not just particular interstate firms, from **prohibitive** or burdensome regulations." *Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978)(emphasis added). And restrictions that impose burdens on foreign commerce receive stricter scrutiny than those affecting only commerce between the states. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

There is no question that Chapter 149 restricts foreign commerce. Beltex and Dallas Crown sell their horsemeat for human consumption only to foreign markets. Empacadora, a Mexican corporation, imports its product through Texas solely for the purpose of export to foreign markets.

Furthermore, because of the "substantial attention given by Congress to the subject . . . it would be particularly inappropriate to permit state regulation of the subject." *Id.* at 100-101. That Texas prohibits federally regulated commerce equally within the state and from outside the state does not remove the ban from Commerce Clause scrutiny. Chapter 149 prohibits interstate and foreign commerce in an area where Congress has adopted substantial legislation; this prohibition makes the statute facially discriminatory and *per se* invalid. *Camps Newfound/Owatonna, Inc. v. Maine*, 520 U.S. 564, 574 (1997).

Per se invalidation for facial discrimination against interstate and foreign commerce can be overcome when a state seeks to protect the public health and safety. *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). Quarantine laws that prevent the importation of diseased animals or contaminated food products are generally upheld. *Id.* at 628. Instructive in this case is the Court's commerce clause analysis in *Asbell v. Kansas*, where the Court affirmed Kansas' power to subject a person to criminal penalties who fails to abide by the state's inspection and quarantine requirements for cattle not subject to immediate slaughter. 209 U.S. 251 (1908). The Court noted that before it could dispose of the case and affirm the state's power it must consider "whether there was, at the time of the offense, any legislation of Congress conflicting with the state law. If such legislation were in existence, the state law, so far as it affected interstate commerce[,] would be compelled to yield to its superior authority." *Id.* at 257. *Asbell* was decided before the 1921 Packers and Stockyards Act. Current federal laws define horses as livestock, regulate how they may be transported to slaughter, regulate how they are slaughtered, require inspections of the meat and the facilities, and establish agreements with the foreign nations to maintain certain standards at the horse slaughter plants. Plaintiffs' indisputably interstate and foreign commercial activities fall under the realm of the federal government, and are protected by the Commerce Clause from Texas's conflicting legislation.

Chapter 149 prohibits foreign commerce, not just burdens it, and it does so in conflict with federal laws. Chapter 149 is *per se* invalid, and it offers no justification in the area of public health and safety to save it.

B. Chapter 149 Violates the Commerce Clause Because No Legitimate State Interest Warrants the Excessive Burden the Statute Places on Interstate and Foreign Commerce.

Even if the statute does not constitute a facial *per se* violation of the Commerce Clause because it regulates evenhandedly, as Defendant contends, it is still invalid. A facially nondiscriminatory regulation will be upheld if (1) it is supported by a legitimate state interest; and (2) the burden on interstate commerce is only incidental; unless (3) the burden on commerce is excessive in comparison to the local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The greater the burden on interstate commerce, the greater the local interest must be for the regulation to survive. The burden does not become acceptable merely because the state claims that there is no less stringent means, as Mr. Curry claims. Curry Brief at 31. The court "independently identifies the character of the interests and judges for itself whether alternatives would be adequate." *Exxon v. Maryland*, 437 U.S. at 136-37.

Chapter 149's burdens on interstate and foreign commerce are significant. Plaintiffs shipped over 10,000 metric tons of processed horsemeat out of the country last year. Last year the value of the horsemeat shipped by Plaintiffs was worth more than $41 million. (P. Apx. Tabs10 and 11) This does not take into consideration the commerce involved in the purchase and transportation of horses, or the ground and air shipment after processing. (P. Apx. Tabs 29 and 47) Defendant admits that local interests will be adversely effected. Curry Brief at 31. Furthermore, the beneficial by-products of Plaintiffs' operations contribute to the economy and the community. (P. Apx. 20-29, 67, and 68)

Defendant fails to meet its burdens under Commerce Clause analysis to (1) assert legitimate local interests and (2) to show that no less intrusive alternatives means are available. State regulation of safety interests are given great weight, but **illusory or minimal interests** do not warrant deference by the courts. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-53. (1977) (emphasis added). Defendant's asserted local benefits are minimal and illusory.

The local interests asserted by Tim Curry do not include public safety, an area where local regulation typically prevails. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970). The original purpose of the statute probably was to protect the public from adulterated meat. *See,* Opinion of Tex. Atty. Gen.(P.Apx. Tab 2, pp. 24-25) And the few cases concurrent with the implementation of Chapter 149 show that prosecutions under the statute concerned food safety and adulteration. *See, Gordy v. State*, 268 S.W.2d 126 (Tex. Crim. App. 1953); and *Neill v. State,* 232 S.W.2d 722 (Tex. Crim. App. 1950). No legislative record indicating the actual purpose of Chapter 149 is available. (D. Apx.Tab 2, pp. 4-30) Any public safety concerns originally intended to be protected by the statute are no longer of purely local concern because Plaintiffs do not sell their product to Texans, and extensive federal regulation ensures food safety, prohibits adulteration, and regulates Plaintiffs' activities.

Defendant asserts one legitimate reason under which Texas could prohibit commercial horse slaughter– prevention of horse theft. But the Texas Legislature has already dealt with that problem in a manner that poses less imposition on interstate commerce. Texas Agricultural Code Chapter 148 requires the horse slaughterer to pay a fee that pays for brand inspectors to work at the plant, inspect all horses arriving at the plant, and assure that no stolen horses are slaughtered. (P.Apx.7)

Defendant's assertion, that "citizen's disfavor . . . the human consumption of horsemeat," is not a legitimate concern. First, Plaintiffs do not sell their product for consumption within Texas or

the United States, so local interests are not served by the prohibition. Second, the law does not actually prevent or prohibit human consumption of horsemeat– only the sale of horsemeat for human consumption. Even if it can be considered a legitimate local interest, it is covered by labeling and slaughter requirements imposed by both Congress (interstate horsemeat) and the Texas Legislature (intrastate horsemeat) that enable citizens who do not wish to consume horsemeat to readily identify it as such and not eat it. Food safety and prevention of adulteration are legitimate areas of local concern which have been dealt with by legislation with less impact on interstate and foreign commerce than Chapter 149's total prohibition.

Again it is questionable if "preference for horses"[3] is a legitimate local interest (and it is doubtful that was the purpose behind the statute). When Texas, in 1997, instituted new provisions in Chapter 148 of the Texas Agricultural Code, it did not display a "preference for horses" only a preference for deterring horse theft. (P.Apx.8) But even if "preference for horses" is a legitimate local interest, Chapter 149 does little to further the cause and has a great impact on interstate commerce. It does nothing to prevent slaughter for nonhuman consumption purposes, and its enforcement will result in the closure of two Texas businesses and force foreign goods to circumnavigate Texas for export. Not a suitable balance under the *Pike* balancing test.

Defendant argues that a state's police powers extend beyond the protection of health, safety, and morals to the protection of "social welfare," and cites to *Breard v. Alexandria*, 341 U.S. 622 (1951), in support of this proposition. *Breard* might be applicable to this case if Plaintiffs went door-to-door soliciting. But Plaintiffs do not go into Texas neighborhoods, knock on doors, and sell their products or buy horses for slaughter. *Breard* involved the rights of magazine salesmen to solicit door-to- door versus the right of the local community to regulate that activity. Other methods were

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[3] What Defendant means by "preference" is not entirely clear because "preference" necessarily implies a comparison . Is it a preference for horses over cattle? Over people? What?

available to salesmen. There was no advantage given to local magazine salesmen over foreign salesmen, and so the community's interest in privacy and safety prevailed. *Id.* at 637-38. Plaintiffs here do not disturb the privacy, tranquility, or quiet of neighborhoods. *Id.* at 640. That some citizens, and from Defendant's letters in evidence most not local to Texas,[4] are disturbed by Plaintiffs' activities is not a sufficient local concern to warrant shutting down two law abiding businesses. The tranquility of the employees and many interstate and foreign businesses that benefit from Plaintiffs' operations should prevail in the balance.

Defendant also argues that Chapter 149 has a legitimate local purpose in protecting horses from slaughter, but then in the same paragraph asserts that Plaintiffs are only prohibited from sale for human consumption and are free to slaughter horses for other nonhuman-consumption purposes. Curry Brief at 31. This is illogical, and therefore cannot be a legitimate local interest.

Defendant has failed to assert a legitimate local interest that cannot be (or has not been) protected in a manner less intrusive on interstate and foreign commerce.

C. Disfavored or Not, *Stare Decisis* Compels Application of the Dormant Commerce Clause.

That the Dormant Commerce Clause is "disfavored, and rightly so," is not the law. True, Justices Scalia and Thomas believe that "the Commerce Clause contains no 'negative component, no self-operative prohibition upon the States' regulation of commerce." *Intel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78 (1993). And sometimes Chief Justice Renquist joins them. *Camps Newfound/Owatonna,* 520 U.S. at 595. Justice Thomas bases his objection in part on "Our Federalism." *Id.* at 611-12. Both Justices Thomas and Scalia are considered to be strong advocates for limitations on federal power, so their opposition to the dormant Commerce Clause is not

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[4] Only 13% (23 out of 177) of the letters voicing opposition to Plaintiffs' activities , which Tim Curry produced to Plaintiffs through November of 2002, were from residents of Texas. (P. Apx.Tab 72 and see D.Apx. Tab 51)

surprising. But as Justice Scalia recognizes, *stare decisis* requires that he enforce the dormant Commerce Clause. *Intel Containers*, 507 U.S. at 78. Justice Scalia identified two circumstances when he must find a law unconstitutional under the dormant Commerce Clause – when (1) a state law "facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court." *Id.* at 78-79. Both *Camps Newfound* and *Intel Containers* concerned a state's discretion to tax — property and sales taxes respectively. And Justice Scalia opined that finding a constitutional violation in these cases went too far into traditional state powers. *Camps Newfound*, 520 U.S. at 595; and *Intel Containers*, 507 U.S. at 80. These two cases would be relevant if Plaintiffs Beltex and Dallas Crown had challenged Texas's implementation of the brand inspection fee under Texas Agriculture Code Chapter 148. But they have not.

Justice Scalia's criteria for finding a state law unconstitutional is not limited to discrimination against out of state commerce over in state interests, but it is the discrimination against interstate commerce itself that infirms a statute. Chapter 149 facially prohibits interstate and foreign commerce. It does not protect public safety. It acts in an area where Congress has regulated heavily. Even Justice Scalia might find it unconstitutional. Academic musings aside, what those Justices not in the majority "disfavor" is not the law.

III. Express Preemption

Mr. Curry's approach to express preemption is reflected in this quote:

> Congress could choose to regulate horse slaughter for interstate commerce. It could ban it, as it is considering in the introduced HR 857. Or, it could require that it be permitted within each State. Thus far, it has done neither. Curry Brief at 33

Neither? There are three options mentioned. Congress does not ban horsemeat. But it unquestionably regulates horse slaughter for interstate commerce. And in one Act alone, the Meat Inspection Act, one can only conclude that Congress prohibits the States from legislating

inconsistently with federal law in the area of meat for food. Recognizing this, Mr. Curry asserts the "FMIA has an express preemption clause as to those narrow activities that the federal government chose to preempt: inspection and labeling," and he asserts that Chapter 149 does not interfere with federal inspection or labeling, because "if no horses are slaughtered, there is no need for inspection or labeling . . . ." Curry Brief at 34-35.

This makes short shrift of a rather broad preemption clause. 21 U.S.C. §678 is worthy of full quotation:

> Requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act [21 USCS §§ 601 et seq.], which are in addition to, or different than those made under this Act may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 202 of this Act '21 USCS § 642], if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under title I of this Act [21 USCS §§ 601 et. seq.], but any State or Territory of the District of Columbia may, consistent with the requirements under this Act, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said title [21 USCS §§ 601 et. seq.], for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, or, in the case of imported articles which are not at such establishment, after their entry into the United States. This Act shall not preclude any State or Territory or the District of Columbia from making requirement [requirements] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act.

This provision prohibits Texas from imposing requirements on Beltex and Dallas Crown, both establishments where U.S.D.A. inspection is carried out under the Act, that are different from those in the Act. More specifically, "ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirement . . . of this Act." Beltex and Dallas Crown process horsemeat and package it for sale as human food. Chapter 149 prohibits what

federal law allows. The U.S.D.A. stamps horsemeat as approved for human food, and plaintiffs package it as such, Texas requires either that the meat be repackaged and labeled "not for human consumption," or those in the plants are subject to prosecution under Texas law. This is a requirement "in addition to, or different than, those made under this Act [and] may not be imposed by any state . . .." *Id. See, Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)(California labeling different than FMIA and was preempted); *and Armour &Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972) *cert. denied*, *Ball v. Armour & Co.*, 411 U.S. 981 (1973)(Michigan's protein requirement for sausage higher than FMIA and was preempted).

Mr. Curry's employs a word game to get around the obvious conflict between Chapter 149 and the express preemption in federal legislation prohibiting state regulation that interferes with these federally regulated meat processors. Mr. Curry asserts that if federal law requires green ink on horsemeat, while Texas law prohibits production of horsemeat, the plaintiffs can comply with both laws. If you have no horsemeat, then that complies with Texas law and does not conflict with the federal law requiring green ink. You can comply with both. Consider these quotes from Curry's brief:

> "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." [5] Curry Brief at 18.

* * * *

[5] Unlike the MIA, the Commercial Transport of Equine Act referred to here by Mr. Curry specifically permits states to impose more strict requirements than those promulgated under the Act. 9 C.F.R. §88.2(a). Had Congress not specifically granted the states this option, stricter standards imposed by any state would subject it to dormant commerce clause challenges. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (Iowa's ban on 65-foot double trailer trucks violated dormant commerce clause).

"Only when one cannot comply with both may one claim that the laws conflict." Curry Brief at 18.

* * * *

"Plaintiffs can easily comply with all Federal and State laws by complying with Chapter 149. They are required to do so." Curry Brief at 18.

* * * *

"The way one complies with multiple laws is to only do a regulated act where that act is lawful — simple enough." Curry Brief at 23.

* * * *

"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." Curry Brief at 29.

The consequences of this position are as far reaching as the position is nonsense. Here is how it is nonsense. Federal law requires horsemeat for human consumption to be inspected by the U.S.D.A. Mr. Curry suggests that one way to "comply" with this federal requirement is to possess no horsemeat, thereby complying with both laws. Think of it; almost everyone in Texas is now complying with the Federal Meat Inspection Act because they have no horsemeat. The Court, while reading this, is complying with Chapter 149 and the Federal Meat Inspection Act. Mr. Curry's word-game makes nonsense of the word "compliance." It equates "compliance" with "does not violate either law." But that is not the conflict § 628 prohibits. Because § 628 preempts inconsistent state law, the question is whether in complying with federal law, any state laws are violated. If they are, state law is preempted.

If meat processors comply with federal law, but in the process violate state law, the state law is preempted. That is what happened to Michigan's heightened protein requirement in *Armour v. Ball, supra.* By Mr. Curry's reasoning, Armour could have complied with the federal and state law

by meeting the higher Michigan standard. But that is not the law. Armour's product was federally inspected, approved, and conformed to MIA requirements. The "preemption ordained by Congress" was "clear and complete." *Id.* at 85. Armour could sell its sausage in Michigan without fear of criminal penalty.

Federal law authorizes U.S.D.A. inspectors, in Texas, to inspect and authorize the sale of properly labeled horsemeat for people to eat. The federal inspectors, Beltex, and Dallas Crown cannot do their jobs and comply with federal law, if Texas prohibits them from possessing horsemeat intended to sell as human food. Where federal law specifies the legal requirements a food product must meet in order to be fit for human consumption, a state cannot completely ban or prohibit the product that is legal under federal law. It makes no sense to assert one is complying with the federal Meat Inspection Act when one is asleep, just because one possesses no meat at all. Complying with Chapter 149 makes it impossible to comply with federal law. Even if Beltex's and Dallas Crown's meat is legal to sell under federal law, it is not legal to sell under Texas law. That is a conflict. And federal law prevails.

The Fifth Circuit recently addressed this issue of conflict between Texas law and federal regulation in a banking case. *Well Fargo Bank of Texas v. James*, 321 F.3d 488 (5th Cir. 2003). The Court summarized the law on conflicts between state and federal law that gives rise to preemption:

> A conflict between state and federal law may be deemed "irreconcilable" where the state law mandates or places irresistible pressure on the subject of the regulation to violate federal law, *Rice v Norman Williams Co.*, 458 U.S 654, 659-662, 102 S.Ct. 3294, 73 L.Ed 2d 1042 (1982), where compliance with both regulations is physically impossible, *Pacific Gas & Electric Cod. v. State Energy Resources Conversation & Dev. Comm'n*, 461 U.S. 190,204,103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), where the state regulation frustrates or hectors the overall purpose of the federal scheme, *City of Morgan City v. South Louisiana Elec. Co-op.*, 31 F.3d 319, 322 (5th Cir.1994), or where the federal scheme expressly authorizes an activity which the state scheme disallows. *Barnett Bank of Marion County, v. Nelson,* 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996).

Id. at 491 fn3. Relying on *Barnett Bank, supra,* the court held that where a state statute interferes with a power that a regulated entity is "authorized to exercise, the state statute irreconcilably conflicts with the federal statute and is preempted by operation of the Supremacy Clause." *Id.* at 491-92.

Plaintiffs have not been able to think of an example of a product that must be federally inspected and approved before sale where a state can ban it from crossing or being within its borders. Possibly, in his reply brief, Mr. Curry will provide this Court with some examples of federally authorized commercial products Texas or other states have banned without violating the interstate Commerce Clause. Mr. Curry's position is that even though a product is legal in all other states, and inspected and approved by federal employees under federal law, Texas can ban it from Texas. Presumably, were Texans suddenly to have an aversion to medicine, the legislature could ban the manufacture, possession, and transportation of FDA approved drugs in Texas. *See, McDermott v. Wisconsin*, 228 U.S. 115 (1913). Are these examples? We await Mr. Curry's reply brief.

Mr. Curry poses the opposite question to plaintiffs. He asks, if plaintiffs' view is adopted, then is there any product a state could prohibit from passing through its borders if the product was legal in other states? This position is reflected in these statements from his brief:

> "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." Curry Brief at 37.
>
> * * * *
>
> "Plaintiffs suggest that if a product or activity is lawful anywhere in the Nation, and perhaps in the world, Texas is powerless to stop it within our borders. Horse feathers!" Curry Brief at 39.

The only examples Mr. Curry gives, transporting marijuana and "prohibited substances," are inapposite. Federal law prohibits transporting marijuana between the states. By definition, the same applies to "prohibited substances." Mr. Curry does not provide an actual example of a commercial product legal in some states that is prohibited from passing through or being in Texas, where the

Commerce Clause is not violated. Nor can plaintiffs. The closest example of a ban by one state against another state's products could be in the area of alcohol. But the 21st Amendment, repealing prohibition, permits state regulation of alcohol sales without violating the Commerce Clause. Hence, there are dry precincts in Texas. The Texas Motor Speedway, next to I-35, is such an area. Could Texas ban the transportation of wine from California on I-35 through this dry precinct in north Fort Worth? Surely not.

The only other example we thought of was gambling devices. It is a crime in Texas to own, manufacture, transfer or possess gambling devices. TEX. PENAL CODE §47.06. (D. Apx.73) But under that same provision, it is not a crime to possess and transport gambling devices "for the sole purpose of shipping it to another jurisdiction where possession or use of the device . . . was legal." *Id.* at §47.06(f). At least this permits a truckload of slot machines from Nevada to travel through Texas to Mexico. But the allowance is not really at Texas's discretion. In 15 U.S.C. §1172, Congress made transport of gambling devices illegal, unless the state consents to allow transport. (D. Apx.74) Interstate commerce — Congress controls. Congress has not given such discretion to the states in the area of horsemeat traveling in interstate and foreign commerce. Chapter 149 is preempted.

IV. The Repeal Issue

Though Beltex and Dallas Crown have paid their taxes in Texas, paid all fees the legislature imposes, complied with efforts to reduce horse theft, and been good citizens, in 2002 a previously unknown law was "discovered" that bans a practice that Texas legislatures sanction and regulate in other laws. If Chapter 149 is the law, then the legislature has acted inconsistently with its continued validity in passing laws that regulate intrastate horsemeat sales and processing, and assess $ 5.00 fees for State inspectors at each plant to inspect horses to prevent theft.

Mr. Curry adopts a novel position in addressing this legislative inconsistency of regulating an activity it supposedly bans. In discussing legislation passed after 1949, that explicitly regulates intrastate horsemeat processing, he contends:

> "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." Curry Brief at 24.
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> * * * *
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> "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. 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." Curry Brief at 25.
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> "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." Curry Brief at 27.

Addressing the legislative record that specifically discusses Dallas Crown and Beltex as horse slaughter plants that should pay $5.00 a horse for inspection under Texas law, which appears inconsistent with the view that Chapter 149 bans horse slaughter, Mr. Curry says:

> "If they [the legislators] 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 the 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." Curry Brief at 31, fn. 43.[6]

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[6] Analogizing the horse-brand inspection fee paid by Beltex and Dallas Crown to the marijuana tax would only work if the federal government participated with the marijuana grower or seller on a daily basis to assure that the marijuana was safe and of high quality, and the State made sure that the marijuana was not stolen and tested it for pests for the benefit of all marijuana growers and owners across the state.

In blaming the proverbial villains in all governments, Mr. Curry digs the wayward with: "Bureaucrats aside, Chapter 149 was not treated by lawmakers as if it was repealed; the law has remained on the books." Curry Brief at 28. Of course, that those of African decent count only as three-fifths of a person still remains in the Constitution, printed in "the books," nevertheless, it has been repealed. "Being in the book" does not equate with "has not been repealed. *See,* U.S. Const. art. I, §2, cl.3.

Mr. Curry's argument, that the Texas legislatures over the past forty years have passed laws regulating the plaintiffs' activities, just in case what plaintiffs have been doing ever becomes legal, is shear fabrication. There is no evidence that Texas legislators, with prescient wisdom, planned ahead and already have in place a complete statutory and regulatory scheme to protect the public when this law is declared unconstitutional or repealed. The idea that all these legislative sessions passed laws regulating the plaintiffs' activities just in case they became legal defies belief. The Court can take judicial notice that the Texas legislative branch is not a leader in "plan ahead" legislation, and is not so idle that it has nothing better to do every other year for five months than pass laws that regulate activities that are, at the time, criminal.

Some candor is called for. Plaintiffs have already admitted they were completely unaware of Chapter 149 until Mr. Curry wrote Beltex in August 2002. Mr. Curry, we reasonably infer, and his staff of 100 lawyers, were equally unaware of Chapter 149. Nor have Texas legislators thought Chapter 149 was still "on the books." They were unaware of it until August 2002, when the Attorney General, then a candidate for the Senate, refused to address the questions this Court must decide, and who, when suit was filed challenging his opinion, declined to join the fray.

This case is not as convoluted as Mr. Curry makes it. Chapter 149 was passed in 1949 to protect the public from some unscrupulous meat sellers' practice of mixing horsemeat and beef for hamburger. Start with the 1945 act. It prohibited the sale of meat not normally eaten by Texans —

horses, donkeys, monkeys, dogs and cats. In 1949, this prohibition was applied only to horses. In 1945 and 1949, probably there was a problem to solve. Shortly after the war, some folks were selling horsemeat without informing the consumer, passing it off as beef. This was wrong. *See Gordy v. State*, 264 S.W.2d 103 (Tex. Crim. App. 1953). People who would gag on horsemeat if they knew that was what they were eating should not unknowingly be fed horsemeat, any more than Jews and Muslims should have pork-fat secretly used to cook their french-fries, while being told it is corn-oil. Hindus should not be sold beef egg rolls when they order pork or vegetarian egg rolls. Laws prohibiting trickery and adulterated products fall within a state's police powers. But such laws must be narrowly drawn. One cannot make truckloads of pork bypass New York simply because Jews don't eat pork, anymore than Texans can prohibit horsemeat being transported within the state just because it is going to be sold as human food, especially when the meat conforms with federal labeling requirements and is stamped with green ink — a color Mr. Curry apparently finds more dreadful than blue ink or red ink.

That selling horsemeat without proper identification was a problem in the late 1940s is illustrated in *Quaker Oats Co. V. City of New York*, 295 N.Y. 527 (Ct. App. N.Y. 1946). New York City's 1943 ordinance regulated transporting improperly colored horsemeat for animal food into the city. The Plaintiffs challenged the ordinance on constitutional grounds. The court concluded "the city forbids to interstate commerce what the government has authorized." *Id.* at 536. The ordinance as applied to one plaintiff was preempted by federal law "in that the State condemned what the government permitted . . . ." *Id.* at 535. In 1946, precedent existed that a ban on horsemeat violated federal law and the Supremacy Clause. To state the probable purpose of Chapter 149 is to describe why it is unconstitutional. Texas cannot prohibit transporting horsemeat for sale for food if it is properly labeled and inspected under federal law as fit for human consumption. Chapter 149 prohibits precisely what federal law permits — preparing, processing and transporting wholesome

horsemeat that is properly inspected and labeled under federal law to be sold as food for people. Chapter 149 prohibits the very activity federal law not only permits but sanctions. That is why, in 1969, when the Texas Meat Inspection Act was passed, it repealed all prior laws, and permitted intrastate sale of properly labeled horsemeat.

V. Treaties and Legal Foreign Trade Are Not Within the Province of the States

Chapter 149 is not invalid because of NAFTA, but because it is preempted by the federal Meat Inspection Act and is an unconstitutional violation of the foreign and interstate Commerce Clause. Whether Texas wants to act as a port for legitimate foreign trade sanctioned by the federal government is not within its discretion. *See, Cosby v. Nat'l Foreign Trade Council*, 530 U.S. 363. Equating horsemeat with gambling, prostitution, and illegal drugs holds no more weight in the foreign trade sphere than it does in the preemption argument. Federal laws make those activities illegal. Various harms surround participation in those activities. No harm has been shown to emanate from trade in federally inspected horsemeat.

VI. No First Amendment Argument Here

America is a nation of secular laws. We do not prohibit the slaughter and consumption of animals– such as cows (Hindu beliefs), swine (Hebrew beliefs), or horses (PETA beliefs)– for religious reasons. Of course, neither do we force the consumption of any food on those that might find that consumption abhorrent. Children and vegetables excluded.

Without health and safety concerns, which are absent from the purposes Tim Curry assigns Chapter 149, imprinting a "spirit of the West"[7] prohibition on the slaughter of horses for sale for

[7] Mr. Curry cites the Wild Free-Roaming Horses and Burros Act for the "spirit of the West." Curry Brief at 41. But it is interesting to note that Beltex and Dallas Crown have arrangements with the Federal government through the Bureau of Land Management to protect the wild animals. (D. Apx. 64 and 66) The plants will not slaughter a federally protected wild horse without proper documentation.

human consumption resembles a reverse image of the local Florida ordinance directed at prohibiting Santeria churches from conducting ritual sacrifices. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In that case, Hialeah allowed the slaughter for human consumption of chickens and goats within city limits, but the city attempted to prohibit Santeria churches from slaughtering the same animals in religious rituals. *Id.* Through Chapter 149, Mr. Curry, for seemingly spiritual reasons, attempts to prohibit the slaughter of horses only when the meat is sold for human consumption, but not if the horse is slaughtered for other purposes. The first prohibition violates the First Amendment; the second prohibition makes no sense.

Plaintiffs are not asserting any First Amendment protections here. They need no further constitutional protections than the Supremacy and Commerce Clauses provide.

VII. Conclusion

Chapter 149 of the Texas Agriculture Code is unconstitutional under the dormant Commerce Clause, is preempted by federal law, and has been repealed by subsequent Texas laws. Plaintiffs' Motion for Summary Judgment should be granted and Defendant Tim Curry permanently enjoined from prosecuting under Chapter 149.

Respectfully submitted,

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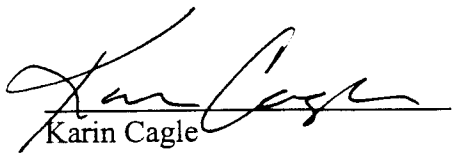
Certificate of Service

A true and correct copy of this brief and supplemental appendix was served on counsel for Defendant Tim Curry, Ann Diamond, via hand-delivery on December 1, 2003.



Karin Cagle