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., ET AL.	§	
	§	
VS.	§	CIVIL ACTION NO. 4:02-CV-804-Y
	§	
TIM CURRY, District Attorney, Tarrant County, Texas.	§	

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court are two motions for summary judgment: (1) Plaintiffs'[1] motion [doc. # 85-1], filed September 2, 2003, and (2) Defendant Tim Curry's motion [doc. # 86-1], filed September 22. Having carefully considered the motions, responses, and replies, the Court concludes that Plaintiffs' motion for summary judgment should be GRANTED and Defendant's motion for summary judgment should be DENIED.

Plaintiffs operate horse slaughterhouses in Texas that process the resulting horsemeat, much of it for human consumption abroad. They filed a complaint on September 26, 2002, seeking to enjoin Defendants Tim Curry, district attorney of Tarrant County, Texas, and Ed Walton, district attorney of Kaufman County, Texas,[2] from enforcing chapter 149 of the Texas Agriculture Code. TEX. AGRIC. CODE ANN. §§ 149.001-.007 (Vernon 2004). The Court, in an order dated April 21, 2003, partially granted Plaintiffs' motion for a preliminary injunction, enjoining Defendant Curry from enforcing chapter 149 of the Texas Agriculture Code against Plaintiffs. Plaintiffs, in their

[1]The plaintiffs in this suit are: (1) Beltex Corporation, a meat processing plant in Fort Worth, Texas that has processed horsemeat for human consumption for 28 years; (2) Dallas Crown, Inc., a meat processing plant in Kaufman, Texas that processes horsemeat for human consumption; and (3) Empacadora de Carnes de Frenillo, S.A. de C.V., a Mexican corporation owned by Beltex Corporation that processes horsemeat for human consumption and exports it though Texas for international delivery.

[2]Ed Walton was dismissed from this suit on May 29, 2003.

motion for summary judgment, argue that they are entitled to a permanent injunction prohibiting Defendant from prosecuting them under chapter 149 because the statute "(1) . . . conflicts with federal law that preempts state law, (2) unconstitutionally prohibits an activity within the regulatory and legislative province of the federal government, (3) illegally regulates interstate and foreign commerce, and (4) has been repealed expressly or by implication." (Pls.' Mot. for Summ. J. at 2.) Defendant, on the other hand, argues that he is entitled to summary judgment and the preliminary injunction should be dissolved because chapter 149 has not been repealed, is not preeempted, and does not illegally regulate interstate commerce.

I. HISTORICAL BACKGROUND OF CHAPTER 149

Beltex Corporation and Dallas Crown, which are both located in Texas, are the only two processors of horsemeat for human consumption operating in the United States. (*Id.* at 3-4.) According to the plaintiffs, "approximately 90% of the horses that [Beltex Corporation and Dallas Crown] slaughter are purchased from owners in other states, and transported in interstate commerce to the processing plants." (*Id.* at 5.) In addition, Empacadora exports horsemeat for human consumption through Texas to be sold to foreign countries. Chapter 149 of the Texas Agriculture Code, however, prohibits the sale of horsemeat for human consumption in Texas. Specifically, section 149.002 states:

> 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.

TEX. AGRIC. CODE ANN. § 149.002 (Vernon 2004). Furthermore, section 149.003 states:

> 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.

Id. § 149.003.

The genealogy of chapter 149 is complex and convoluted. In 1945, the Meat Inspection Law was enacted by the 49th Texas legislature with the passage of House Bill ("H.B.") 38. Section 18 of H.B. 38 stated: "It shall be unlawful to sell for food for human consumption meat from the carcass of horses, dogs, mules, donkeys, cats, or other animals not normally used for human food." Act of June 4, 1945, 49th Leg., R.S., ch. 339, § 18, 1945 Tex. Gen. Laws 554, 558. (Pls.' App. at 36.) The purpose of H.B. 38 was to "prohibit and prevent the sale of food for human consumption of meat from animals where said animals suffer from diseases communicable to human beings, and to provide adequate and uniform regulations for inspection of meat and meat products intended for human consumption, thereby protecting the public health." *Id.* at ch. 339, § 2, 1945 Tex. Gen. Laws 554, 554. (Pls.' App. at 32.)

Thereafter, in 1949, the 51st Texas Legislature passed H.B. 17, which eventually became codified into chapter 149. (Pls.' App. at 1A-1B.) H.B. 17 expressly repealed section 18 of the 1945 Meat Inspection Law to the extent of any conflict and replaced it with a broader and more punitive prohibition that stated:

> Sec. 2: It shall be unlawful for any person to sell, offer or exhibit for sale, or have in his possession with intent to sell as food for human consumption, any quantity of horse meat.
>
> Sec. 3: It shall be unlawful for any person to transfer the possession of any horse meat to any other person when the person so transferring knows, or in the exercise of a reasonable discretion should have known, that the person receiving the horse meat intends to sell it, offer it for sale, exhibit it for sale or keep it in his possession with intent to sell it as food for human consumption.

Act of Feb. 24, 1949, 51st Leg., R.S., ch. 45, §§ 2, 3, 7, 1949 Tex. Gen. Laws 78, 78-79. (Pls.' App. at 1A-1B.) H.B. 17 was placed in the Penal Code and numbered as article 719e.[3] In 1973, the Texas Penal Code was revised and article 719e was transferred to the civil statutes as article 4476-3a. In 1991, article 4476-3a was codified, without substantive change, into chapter 149 of the Agriculture Code. Act of Mar. 25, 1991, 72nd Leg., R.S., ch. 16, § 2.01(a), 1991 Tex. Gen. Laws 244, 245-48. (Pls.' App. at 6.)

The 1945 Meat Inspection Law, stripped of its prohibition of selling horsemeat for human consumption, was expressly repealed in 1969 by the Texas Meat and Poultry Inspection Act ("the 1969 Act"). Act of Apr. 22, 1969, 61st Leg., R.S., ch. 123, § 412, 1969 Tex. Gen. Laws 337, 354. (Pls.' App. at 38.) But section 12 of the 1969 Act contained a new regulation of the handling of equine meat:

> No person, firm, or corporation shall sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, any carcasses of horses, mules, or other equines or parts of such carcasses, or the meat or meat food products[4] thereof, **unless** they are plainly and conspicuously marked or labeled

---

[3]The Court is unclear whether H.B. 17 was actually numbered as Article 916e, as indicted by Plaintiffs, or as Article 719e, as indicated by Defendant and the Texas attorney general, but will assume the attorney general is correct. (*Compare* Pls.' App. at 6 *with* Pls.' App. at 16 *and* Def.'s Mot. for Summ. J. at 21.) Op. Tex. Att'y Gen. No. JC-0539 (2002).

[4]The term "meat food product" was defined as

> any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, goats, poultry, domestic rabbits, and domesticated game birds, excepting products which contain meat or other portions of such carcasses only in a relatively small proportion or historically have not been considered by consumers as products of the meat food industry, and which are exempted from definition as a meat food product by the commissioner under such conditions as it may prescribe to assure that the meat or other portions of such carcasses

> or otherwise identified as required by regulations prescribed by the commissioner to show the kinds of animals from which they were derived. When required by the commissioner with respect to establishments at which inspection is maintained under this title, such animals and their carcasses, parts thereof, meat, and meat food products shall be prepared in establishments separate from those in which cattle, sheep, goats, poultry, domestic rabbits, and domesticated game birds are slaughtered or their carcasses, parts thereof, meat, or meat food products are prepared.

Id. at ch. 123, § 12, 1969 Tex. Gen. Laws 337, 346 (emphasis supplied). (Pls.' App. at 47.) In addition, the 1969 Act charged the Texas Health Commission with cooperating with the Secretary of Agriculture of the United States "in such a manner as will effectuate the purposes of this Act and said Federal Acts." *Id.* at ch. 123, § 301(a), 1969 Tex. Gen. Laws 337, 349. (Pls.' App. at 50.) The 1969 Act also set out criminal penalties for its violation. Furthermore, section 413 stated, "This Act prevails over the Texas Food, Drug and Cosmetic Act (Article 4476-5, Vernon's Texas Civil Statutes) and any other Act to the extent of any conflict." *Id.* at ch. 123, § 413, 1969 Tex. Gen. Laws 337, 354. (Pls.' App. at 55.)

In 1989, the Texas legislature revised and codified the 1969 Act, placing it in the Texas Health and Safety Code as chapter 433. The policy behind chapter 433 was to protect the public from unwholesome and mislabeled meat food products. As to horsemeat, section 433.033 states:

> A person may not sell, transport, offer for sale or transportation, or receive

---

> contained in such product are not adulterated and that such products are not represented as meat food products. **This term as applied to food products of equines shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, goats, poultry, domestic rabbits, and domesticated game birds**.

Act of Apr. 22, 1969, 61st Leg., R.S., ch. 123, § 1(g), 1969 Tex. Gen. Laws 337, 338. (Pls.' App. at 39.) In addition, the term "capable of use as human food" was defied as applying "to any livestock or poultry carcass, or part or product of a carcass, unless it is denatured or otherwise identified as required by regulations prescribed by the commissioner to deter its use as human food, or it is naturally inedible by humans." *Id.* at ch. 123, § 1(h), 1969 Tex. Gen. Laws 337, 338. (Pls.' App. at 39.)

> for transportation in intrastate commerce, a carcass, part of a carcass, meat, or a meat food product[5] of a horse, mule, or other equine **unless** the article is plainly and conspicuously marked or labeled or otherwise identified, as required by rule of the commissioner, to show the kind of animal from which the article was derived. The commissioner may require an establishment at which inspection is maintained under this chapter to prepare those articles in an establishment separate from one in which livestock other than equines is slaughtered or carcasses, parts of carcasses, meat, or meat food products of livestock other than equines are prepared.

TEX. HEALTH & SAFETY CODE ANN. § 433.033 (Vernon 2001) (emphasis supplied). Section 433.007(a) states that "[t]his chapter prevails over any other law, including Chapter 431 (Texas Food, Drug, and Cosmetic Act), to the extent of any conflict." *Id.* § 433.007(a).

In 1997, Texas adopted revisions to chapter 148 of the Texas Agriculture Code, which contain provisions relating to the slaughtering of livestock. Specifically, the Texas Legislature passed H.B. 2396, known as the "Horse Theft Bill," which required slaughterers to pay $5.00 in fees for each horse purchased for slaughter and to report all horses received. TEX. AGRIC. CODE ANN. § 148.029. (Pls.' App. at 128-38.) The legislative history of H.B. 2396 states:

> CSHB 2396 would allow horse owners to fight the growing problem of

---

[5]A "meat food product" is defined as:

> [A] product that is **capable of use as human food** and that is made in whole or part from meat or other portion of the carcass of livestock, except a product that:
>
> > (A) contains meat or other portions of the carcass only in a relatively small proportion or that historically has not been considered by consumers as a product of the meat food industry; and
> >
> > (B) is exempted from the definition of meat food product by the commissioner under conditions that the commissioner prescribes to assure that the meat or other portions of the carcass contained in the product are unadulterated and that the product is not represented as a meat food product.

TEX. HEALTH & SAFETY CODE ANN. § 433.003(13) (Vernon Supp. 2004-05) (emphasis supplied).

> horse theft, by mandating inspections of horse slaughtering facilities, training law enforcement agencies about horse theft, and promoting the use of horse identification marks. Many of the horses stolen in Texas are family pets, whose owners have a deep emotional attachment to them. It is estimated that there are hundreds of horses stolen annually in the state.
>
> . . . Requiring all horses in Texas to be branded would not solve the problem because currently even branded horses are slaughtered without question at the two horsemeat plants in Texas. The two plants are located in Kaufman, approximately 35 miles east of Dallas and Fort Worth . . . .
>
> . . . .
>
> Most horses in Texas are stolen for meat. **The two horse meat packing companies in Texas ship meat for human consumption, mostly to Europe**. It is only right that these slaughterers should pay the fees to clean up their industry and pay for inspections to make sure that plants are not rendering stolen horseflesh.

(Pls.' App. at 136-37 (emphasis supplied).)

II. WAS CHAPTER 149 REPEALED BY CONFLICT?

Plaintiffs argue that chapter 149 was repealed by the 1969 Act and that this repeal was recognized by chapter 433 of the Texas Health & Safety Code and by the Horse Theft Bill. (Pls.' Mot. for Summ. J. at 22.) Plaintiffs further state:

> There is a plausible explanation why Chapter 149 is "still on the books." Texas does not publish its statutes; this is left to West Publishing Company. In 1945, the prohibition against the sale of horsemeat fell under "Health," not "Agriculture." Then, the statutes were printed under alphabetical headings, not in a code format. Health statutes related to protection of people, while agriculture statutes protect animals. In 1949, a revision to a 1945 health statute was put in the penal code, separated from its initial context under health. In 1969, when the original 1945 Meat Inspection Act was repealed, the prohibition against selling horsemeat was "alone" in the Penal Code. Had it not been moved to the Penal Code, it would be certain that it was repealed. It was not until 1973 that the prohibition was moved from the Penal Code back to the Civil Statutes as Article 4476-3a, even though Article 4476-3 has been expressly repealed in 1969. This "hang-along" needed to be put in a Code when Texas began codification in the 1980s. Someone decided to put it in the Agricultural Code, even though it was not to protect animals, and had started out in the health laws. It should have been dropped from the books because of the 1969 and 1991 repeals, but oversights happen. What is now Chapter 149 of the Agriculture Code has been repealed, and

appears there by mistake.

(*Id.* at 22-23.)

Defendant, on the other hand, argues that chapter 149 has not been repealed, stating:

> 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 the act is lawful--simple enough. The prohibition in the repealed 1969 Texas Meat and Poultry Inspection Act . . . 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 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 as long as Chapter 149 is in effect, even though Texas law 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.

(Def.'s Br. in Supp. of Mot. for Summ. J. at 22-23.)

Statutes may be repealed expressly or by implication. Repeals by implication are not favored. *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Jackson v. Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996). An exception to this axiom is that if provisions in the two acts are in irreconcilable conflict, the later act constitutes an implied repeal of the earlier

one to the extent of the conflict. *Jackson*, 102 F.3d at 135.

In this case, there is a conflict between chapter 149 of the Texas Agriculture Code and section 433.033 of the Texas Health and Safety Code. Chapter 149, which was originally passed in 1949, specifically forbids Plaintiffs from selling, offering for sale, or possessing horsemeat with the intent to sell it for human consumption. In addition, chapter 149 forbids a person from transferring horsemeat to a person who intends to sell the horsemeat for human consumption. However, section 433.033 of the Texas Health & Safety Code, which was originally passed 20 years later, specifically permits a person to sell, transport, offer for sale or transportation, or receive for transportation horsemeat for human consumption as long as the meat is plainly and conspicuously marked or labeled. Because it is impossible to reconcile chapter 149 with section 433.033, the Court concludes that chapter 149 has been repealed by conflict with section 433.033.

Defendant argues that the Texas legislature did not mean to legalize the slaughtering of horses for human consumption with the passage of section 433.033 and its predecessors, claiming that the Texas legislature passed them just in case slaughtering horsemeat for human consumption ever became legal. In addition, Defendant claims that there is no conflict because a person can comply with both laws by not slaughtering horses for human consumption: "[I]f no horses were slaughtered for human consumption, there would be none mislabeled." (Def.'s Br. in Supp. of Mot. for Summ. J. at 23.) However, the Court finds such arguments unpersuasive. To begin with, it is obvious that the Texas legislature, at least by 1997, was aware that Plaintiffs were slaughtering horsemeat for human consumption when they passed the Horse Theft Bill and did not believe that such actions were illegal. In addition, if a person complies with section 433.033, which specifically states that he can sell, transport, or offer for sale or transportation or receive for transportation horsemeat for human consumption as long as he labels the meat properly, then he will definitely

be violating the prohibition against such activity contained in chapter 149. Further, Defendant's argument that the Texas legislature passed the 1969 and 1989 Acts regulating Plaintiffs' activities just in case they became legal is specious. As noted by Plaintiffs, "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." (Pls.' Mot. for Summ. J. at 23.)

III. DOES CHAPTER 149 VIOLATE THE DORMANT COMMERCE CLAUSE?

The Commerce Clause of the Constitution of the United States of America grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Courts have interpreted the language of this provision as having a negative aspect embedded in the language, designated the dormant Commerce Clause, that implicitly establishes a national free market and restricts state and local governments from impeding the free flow of goods from one state to another.[6] *Wyoming v. Oklahoma*, 502 U.S. 437, 469-70 (1992); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). The dormant commerce clause does not affect state or local regulations that are directly authorized by Congress, but only the states' authority to regulate in areas in which Congress has not affirmatively acted. *Houlton*, 175 F.3d at 184.

If a state enacts a law that improperly favors in-state commercial interests over those from out-of-state entities, the Court will declare such a protectionist law unconstitutional under the dormant commerce clause "unless the discrimination is demonstrably justified by a valid factor

[6]"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*, 502 U.S. 437, 454 (1992) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

unrelated to economic protectionism."[7] *Id.* at 184; s*ee also Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005). But if the Court finds that the statute does not discriminate on its face, but regulates even-handedly and only indirectly affects interstate commerce, the Court then applies a balancing test to determine its constitutionality and upholds the statute unless it places a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Houlton*, 175 F.3d at 189; *see also Granholm*, 125 S. Ct. at 1905. The United States Supreme Court has established a framework for analyzing statutes that do not discriminate on their face:

> Where the statute regulates even-handedly 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens.[8]

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted).

Based on the foregoing, the threshold question is whether the challenged statute discriminates on its face against interstate commerce or in favor of local businesses and is therefore per se invalid, in contrast to regulating commerce even-handedly with only incidental effects on interstate commerce. In this case, chapter 149 of the Texas Agriculture Code does not facially

---

[7]Thus, local statutes that facially discriminate against interstate trade are subject to an almost per se rule of invalidity and are routinely struck down because "local economic protectionism is incompatible with the maintenance of a single economic unit." *Homier Distrib. Co., Inc. v. City of Albany*, 681 N.E.2d 390, 393 (N.Y. 1997); *see also Granholm*, 125 S. Ct. at 1897.

[8]"It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

discriminate against interstate commerce in favor of in-state interests. Instead, it applies even-handedly to both in-state and out-of-state interests by prohibiting all persons in Texas from processing, possessing, or transporting horsemeat intended for human consumption. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-71 (1981) (holding Minnesota statute that forbade the retail sale of milk in nonreturnable plastic containers, but allowed the sale in nonreturnable paper containers, was applied even-handedly).

Because the Texas statutes are applied even-handedly, the issue becomes whether the burden on interstate commerce is clearly excessive in relation to the local benefits. Defendant argues that the purpose of the statutes is to codify Texas's "preference for horses and its citizens' disfavor of the human consumption of horsemeat" and that the statute "offers protection to horses and horse owners alike from theft by removing one possible market for stolen horses." (Def.'s Br. in Supp. of Motion for Summ. J. at 31.) Plaintiffs, on the other hand, argue that there is no legitimate local public interest furthered by these statutes, except to protect the sensibilities of some Texas residents who are offended upon learning that foreigners are eating horsemeat processed in Texas. (Pls.' Mot. for Summ. J. at 13.)

After reviewing the parties' arguments and the relevant case law, the Court concludes that chapter 149 burdens interstate commerce by prohibiting the sale, possession, or transportation of horsemeat intended for human consumption. Not only are Texans prohibited from possessing or selling such horsemeat, but neither can any person in any other state or in any foreign country possess or sell it in Texas or even transport it through the state. This is so regardless of where the horse was slaughtered. Thus, the meat from a horse slaughtered in Artesia, New Mexico, for example, cannot legally be transported to DFW airport in north Texas and flown to any domestic or foreign market. The sale of horsemeat for human consumption is legal in the majority of the

states in this country.

Again, these statutes burden interstate commerce. Because they do, the next question is whether the burden is clearly excessive in relation to the local benefits. "[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

Defendant claims that any burden on interstate commerce is justified because Texas has a legitimate interest in "criminalizing offensive conduct." (Def.'s Reply at 6.) He further argues that any burden on interstate commerce is outweighed by Texas's interest in preserving horses and preventing the human consumption of horsemeat. Finally, he claims that the statutes are narrowly drawn to prevent the slaughter of horses for human consumption and that, as previously noted, they limit the market for stolen horses. (Def.'s Br. in Supp. of Mot. for Summ. J. at 31.) But if the putative local benefits of these laws is to preserve horses, prevent the human consumption of horsemeat, and prevent horse theft, and assuming that preventing the consumption of Texas horse flesh by all humans everywhere is a legitimate local purpose, the Court concludes that such purposes are not furthered by the statutes. Chapter 149 of the Texas Agriculture Code (and the two challenged sections within it) does not actually prevent the human consumption of horsemeat. Instead it only prohibits the possession, sale, and transport of horsemeat for human consumption. A person can legally slaughter horses in Texas and eat the meat himself or give it away to others in Texas for their consumption and not be in violation of the statutes. In addition, horses can be, and are, slaughtered in Texas and elsewhere and their meat can be, and is, sold for purposes other than human consumption without violating chapter 149. Again, assuming without deciding the legitimacy of the purported local purposes of chapter 149, it does very little, if anything, to preserve horses, prohibit human consumption of horsemeat, or prevent horse theft. It does, however, make

criminals of persons involved in interstate commerce—whether Texans, other Americans, or foreigners—if they sell possess, or transport in Texas what is a legal product almost everywhere else. This is a significant, perhaps even severe, burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Houlton*, 175 F.3d at 184, 189.

Even if these statutes were effective in achieving the purposes Defendant suggests, given its significant burden on interstate commerce the Court would be obliged to make a final inquiry: can the purposes of chapter 149 be promoted as well with a lesser impact on interstate commerce? Answering is not a difficult task because the Texas legislature has already answered in part.

Defendant posits that the prevention of horse theft is one of the three bases for chapter 149. But the Texas legislature, perhaps not realizing that chapter 149 had not been repealed or believing it preempted by federal law, enacted the Horse Theft Bill in 1997, requiring slaughterers to pay a fee for each horse bought for slaughter and to account for all horses received. As discussed above, the legislative history of the bill reveals that the legislature was aware Texas horse slaughterers were shipping meat for human consumption. Clearly, Texas has shown that the prevention of horse theft can be accomplished by less drastic means than by criminalizing the possession and sale of horseflesh intended for human consumption.

Defendant also advances chapter 149 as a codification of Texas's preference for horses and its disfavor of human consumption of horsemeat. Assuming this is so, there must be myriad ways Texas can exalt the beloved equine that is such a storied part of its rich western tradition. It could, and does, support equine research at its agricultural universities. *See, e.g.*, TEX. EDUC. CODE ANN. §§ 88.521-.5232, 88.5245-.527 (Vernon 2002), § 88.524 (Vernon Supp. 2004-05). It could, and does, encourage the humane treatment of horses. *See, e.g.*, TEX. PENAL CODE ANN. § 42.09 (Vernon Supp. 2004-05); TEX. HEALTH & SAFETY CODE ANN. §§ 821.001-.004 (Vernon 2003), §§

821.021-.025 (Vernon Supp. 2004-05). It could, and does, regulate and license veterinary care for equines. *See, e.g.,* TEX. OCC. CODE ANN. §§ 801.001-.507 (Vernon 2004). It could and does, legalize parimutuel betting on horse races. *See, e.g.*, TEX. REV. CIV. STATE. ANN. art. 179e (Vernon Supp. 2004-05). The fact that Texas does all these things and more provides ample evidence that Texas is able to "preserve horses" without severely or even significantly burdening interstate commerce.

Even Texas's alleged disdain for human consumption of horsemeat can be accommodated without making criminals of those who facilitate it. Education of consumers can be accomplished through Texas's numerous education outlets. Preferences for other meats, poultry, and fish can also be encouraged.

Finally, although Defendant claims that the purpose of chapter 149 is not to protect the health and welfare of Texans,[9] the Court will assume this purpose anyway given that the expressed purpose of the 1945 Meat Inspection Law, from which chapter 149 is derived, was to protect the public health. Even so, the Texas legislature has already demonstrated that such a purpose can be achieved with a lesser impact on interstate commerce. As discussed above, chapter 433 of the Health and Safety Code contains numerous provisions designed to protect the public from unwholesome and mislabeled meat food products.

Chapter 149's burden on interstate commerce significantly outweighs the minimal role it has in preserving horses, preventing the human consumption of horsemeat, preventing the theft of horses, and protecting the public health. And the purposes of chapter 149, assuming Defendant and

---

[9]The Court finds Defendant's statement interesting given that the express purpose of the 1945 Meat Inspection Law was to protect the public health. The very preamble of the Act states that it is "[a]n Act providing for the protection of the public health." Act of June 4, 1945, 49th Leg., R.S., ch. 339, 1945 Tex. Gen. Laws 554, 554. (Pls.' App. at 32.)

the Court have correctly identified them, can be promoted as well with a lesser impact on commerce and are not patently unworkable. *Grahnhom*, 125 S. Ct. at 1907. Accordingly, the Court concludes that they violate the dormant commerce clause of the United States Constitution.

IV. ARE SECTIONS 149.002 AND 149.003 PREEMPTED BY FEDERAL LAW?

The preemption doctrine is derived from the Supremacy Clause of the United States Constitution and requires the Court to examine congressional intent. *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152 (1982). Preemption may be either expressly stated in the statute itself or implicitly contained in its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 529 (1977). If the statute does not contain explicit preemptive language, congressional intent to displace state law may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Even if Congress has not totally supplanted a state law, the state law is voided to the extent that it directly conflicts with federal law. *De la Cuesta*, 458 U.S. at 153. This type of conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). It also arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Gonzales v. Raich*, 125 S. Ct. 2195, 2212-13 (2005).

Plaintiffs argue that sections 149.002 and 149.003 are preempted by various provisions of

federal law. After reviewing the relevant case law, statutory law, and the parties' arguments, the Court agrees. Specifically, the federal Meat Inspection Act allows for and regulates the slaughter of horses for human consumption.[10] Section 602 of the Meat Inspection Act, which governs its scope, states:

> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged . . . . It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce and substantially affect such commerce, and that regulation by the Secretary and cooperation by the states and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C. § 602. Furthermore, § 678 of the Act states:

> Requirements within the scope of this chapter with respect to **premises, facilities and operations of any establishment at which inspection** is provided under subchapter I of this chapter, which are **in addition to, or different** than those made under this chapter may **not** be imposed by any State . . ., except that any such jurisdiction may impose recordkeeping and other requirements within the scope of

---

[10]*See, e.g.*, 21 U.S.C. § 601 (defining "meat food product" as "any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats" and stating that this term as applied to food products of equines shall have a comparable meaning); 21 U.S.C. § 603 (requiring "examination and inspection of all . . . horses, mules, and other equines before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce"); 21 U.S.C. § 604 (requiring "post mortem examination and inspection of the carcasses and parts thereof of all . . . horses, mules, and other equines to be prepared at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State . . . as articles of commerce which are capable of use as human food"); 21 U.S.C. § 606 (requiring "an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment"); 21 U.S.C. § 607 (prescribing labeling, marking, and container requirements for "any meat or meat food product prepared for commerce"); 21 U.S.C. § 615 (requiring a "careful inspection of the carcasses and parts thereof of all . . . horses, mules, and other equines, the meat of which . . . is intended and offered for export to any foreign country").

> section 642 of this title, if consistent therewith, with respect to any such establishment. **Marking, labeling, packaging, or ingredient requirements in addition to, or different than,** those made under the chapter may **not** be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, 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, after their entry into the United States. This chapter shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

21 U.S.C. § 678 (emphasis supplied).

In Texas, sections 149.002 and 149.003 provide criminal penalties for anyone, including slaughterhouses, who sells, possesses, or transfers horsemeat intended for human consumption. The original purpose behind these sections, as noted above, was to protect the public health. The purpose of the federal Meat Inspection Act is also to protect the public health, and it specifically states that it preempts any state laws that regulate the premises, facilities, or operations of slaughterhouses. Preventing slaughterhouses, such as Plaintiffs, from selling or possessing horsemeat for human consumption or transferring such meat to others who intend to sell it for human consumption is an attempt by Texas to regulate the premises, facilities, and operations of Plaintiffs' slaughterhouses. Consequently, sections 149.002 and 149.003 are preempted by the federal Meat Inspection Act. *See Mario's Butcher Shop & Food Ctr., Inc. v. Armour & Co.*, 574 F. Supp. 653, 655 (N.D. Ill. 1983) (holding, under § 678 of the Meat Inspection Act, that "a state is clearly authorized to enact laws aimed at protecting the health and well being of its citizenry, but . . . such laws may not impose different or additional affirmative requirements upon the product").

V. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment [doc. # 85-1] is

GRANTED. Defendant is hereby PERMANENTLY ENJOINED from prosecuting Plaintiffs for violating chapter 149 of the Texas Agriculture Code.

Defendant's Motion for Summary Judgment [doc. # 86-1] is DENIED.

SIGNED August 25, 2005.

TRM/ah

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE