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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

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| 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' MOTION FOR SUMMARY JUDGMENT WITH BRIEF

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September 2, 2003

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**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WITH BRIEF**

Since this Court granted Plaintiffs' motion for temporary injunction, only one event of significance has occurred that might effect the Court's preliminary conclusions. That is the decision in *Dickerson v. Bailey*, 336 F.3d 388 ($5^{th}$ Cir. 2003) in which the Fifth Circuit struck down a Texas law that regulated the sale and importation into Texas of wine produced out-of-state. While that case involved discrimination between in -state and out-of-state producers, it reaffirmed the scope of the commerce clause and the lack of state power to impede interstate commerce.

Plaintiffs now move for summary judgment based on evidence already on file. Plaintiffs, in moving for the temporary injunction, prepared two declarations and four volumes of exhibits that comply with Northern District local rule requirements for summary judgment evidence submission. Rather than reproduce those volumes, this motion relies on documents already filed. Other documents that may be relevant to this motion are identified below, but not recopied, bound, numbered and resubmitted.

Plaintiffs request the Court grant summary judgment and enter a final judgment granting permanent injunctive relief prohibiting Defendant from prosecuting Plaintiffs under TEX. AGRICULTURE CODE, § 149.001 *et. seq.*, (Chapter 149), because (1) the statute 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province of the federal government, (3) illegally regulates interstate and foreign commerce, and (4) has been repealed expressly or by implication.

**SUPPORTING EVIDENCE**

Plaintiffs incorporate into this motion the discovery responses and stipulations on file. Copies have been provided to the Court.

1. Declaration of Dick Koehler, Attachment A to Plaintiffs' Motion for Temporary Injunction, filed Oct. 4, 2002.

2. Declaration of Manfred Ramault, Attachment B to Plaintiffs' Motion For Temporary Injunction, filed October 4, 2002.

3. Volume I: Appendix, Exhibits/Tabs 1-14, pages 1-228, filed October 4, 2002.

4. Volume II: Appendix, Exhibit/Tabs 15-19, pages 229-433, filed October 4, 2002.

5. Volume III: Appendix, Exhibits/Tabs 20-39, pages 434-594, filed October 4, 2002.

6. Volume IV:Appendix, Exhibits 40-46, pages 595-740, filed October 4, 2002.

7. Plaintiffs' Supplemental Notebook Exhibits, Exhibits/Tabs 59-68, filed March 31, 2003.

8. Supplement To Brief and Motion for Temporary Injunction and Request for Hearing, filed October 7, 2002, Doc. 16, Exhibits/Tabs 47-48.

9. Notice, with Letter from Attorney General, filed October 10, 2002. Doc. 17.

10. United States Department of Agriculture's Responses to Plaintiffs' Motion For Temporary Injunction and Motion to Dismiss, filed October 1, 2002 Doc. 22.

11. Exhibits A, B, C, attached to Tim Curry's Response to Plaintiffs' Motion for Temporary Injunction, filed October 1, 2002. Doc. 24.

12. Exhibits A and B attached to Answer of Tim Curry, Tarrant County Criminal District Attorney, filed October 16, 2002. Doc. 27.

13. Defendant Tim Curry, District Attorney, Tarrant County, Texas Exhibits List, Exhibits 49-52, pages 745-1055, filed December 9, 2002. Doc. 20.

14. Notice of Filing with declarations of Dick Koehler (October 3, 2002) and Manfred Ramault (October 3, 2002) filed December 10, 2002. Doc. 42.

15. Declaration of Karin Cagle with attachments, filed December 12, 2002. Doc. 45.

16. Affidavit of Ed Walton, attached to Response of Ed Waltom, Kaufman County District Attorney, To Plaintiffs' Motion for Leave to File Amended Complaint, filed February 10, 2003. Doc. 54.

17. Tim Curry's Supplemental Brief Regarding Repeal Issues in Support of Tim Curry's Response to Plaintiffs' Motion for Temporary Injunction, with attached Exhibits/Tabs 54-57, pages 1065-1084.

18. Exhibits A and B to Answer of Tim Curry, Tarrant County Criminal District Attorney to Plaintiffs' Amended Complaint, filed March 17, 2003. Doc. 63.

19. Plaintiffs' Response To (1) Defendant Curry's Advisory To Court on Pending Legislation, (2) Defendant Ed Walton's Motion to Dismiss, and (3) Amendments to Exhibits filed March 3, 2003, Doc. 70, with Tab D, Supplemental Declaration of Dick Koehler, Tab E, Supplemental Declaration of Manfred Ramault, and Tab F, Declaration of Ted Friend, Ph.D.

20. Stipulation With respect to Dallas Crown, Inc.'s Activities Within Tarrant County, filed July 14, 2003, Doc. 81, with Defendant Tim Curry's First Request for Admissions To Plaintiff Dallas Crown, Inc. Filed July 1, 2002, Doc.

## GROUNDS FOR MOTION

### 1. Jurisdiction

Jurisdiction is based on 28 U.S.C §1331, because this is a civil action arising under the Constitution, laws, and treaties of the United States. The Court has supplemental jurisdiction of the state law claim that Chapter 149 is repealed.

### 2. Background of the Case and Controversy

**2.1.** The issue is whether Texas can prohibit commercial activities that involve the purchase, transport, and sale of horsemeat for human consumption, where the purchasers are outside of Texas and the United States. There are only two processors of horsemeat for human consumption operating in the United States. Both are located in Texas – Beltex Corporation and Dallas Crown, Inc. Their product is processed in Texas, is transported in Texas, and is shipped to foreign destinations from Texas. Tabs A and B, ¶s 2.1.[1]

**2.2.** Horses and cattle, which had for centuries been raised and eaten in Europe, were first introduced into this continent about 500 years ago, with the Spanish conquests in central and south America. While horsemeat, like beef, poultry, and game has long been consumed in Europe, in the United States the human consumption of horsemeat is not popular enough to warrant commercial sales. Nonetheless, the presence of millions of horses on this continent has justified commercial processing of horsemeat for human consumption abroad, and, therefore, slaughterhouses have profitably operated since the advent of refrigeration and means to safely transport meat. Tab A, ¶ 2.2.

**2.3.** The Texas Meat Inspection Law was passed by the Texas 49th Legislative Session in 1945. Exhibit 3; 1 Apx. 31. This act delegated to the State Health Officer the authority to regulate the processing and sale of the edible meat of cattle, calf, sheep, swine, or goat. Its purpose was to "prohibit and prevent the sale of food for human consumption of meat from criminals . . . and to provide adequate and uniform regulations for inspection of meat and meat products intended for human consumption." Section 18 provided that "[i]t shall be unlawful to sell for food for human consumption meat from the carcasses of horses, dogs, mules, donkeys, cats or other animals not normally used for human food." The 51st Legislature in 1949 passed what is now Chapter 149, and expressly repealed Section 18 of the Act quoted above, as to horses, replacing that prohibition with a broader and more punitive prohibition. Exhibit 1; 1 Apx. 1-3. The original purpose of that Meat Inspection Act was to protect the public from unhealthy meat, but, as to horsemeat, the Legislature decided that healthy or not, people should not sell horsemeat to others because that was not the kind

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[1]References are to the declarations behind Tabs A and B of the Motion for Temporary Injunction and the four volume Appendix and its Exhibits.

of meat "normally used for human food."

**2.4.** In 2000, worldwide export of horsemeat from the twelve largest exporting countries was 131,963 metric tons. The United States exported 10,061 metric tons of processed meat, Mexico exported 2,159. Worldwide production of horses in 2000 was 672,109 metric tons, with Mexico being the second largest processor with 156,000 metric tons, and the United States having processed 20,500 metric tons of horses. In 2001, 11,940 metric tons of processed horsemeat was exported from the United States, worth more than $41 million. Exhibits 10 and 11; 1Apx. 139, 145.

**2.5.** In the United States there are only two horsemeat processors, the Plaintiffs, and they process approximately 50,000 horses a year for foreign sales. Approximately 90% of the horses they slaughter are purchased from owners in other states, and transported in interstate commerce to the processing plants. Horses sent for slaughter are typically older, neglected, displaced, or retired animals no longer useful for saddle, ranch, recreation, breeding or racing activities. These horses are often purchased by commercial horse-buyers at auctions for between $300 to $700, and are transported to slaughterhouses that are regulated by state and federal agencies. Those who purchase horses and transport them to slaughterhouses are subject to extensive federal regulation. 21 U.S.C. § 601 *et seq*. Tabs A and B, ¶s 2.7.

**2.6.** Like cattle, the horses are killed using humane methods, as required by the Humane Methods of Slaughter Act, 7 U.S.C. §1901, *et. seq.*, with United States Department of Agriculture (USDA) inspectors on site during all operating hours. 21 U.S.C. §603 *et. seq.* The Texas operations are subject to state supervision and regulation under TEX. AGRICULTURE CODE Ch. 148, which requires registration, the purchase of only marked or branded animals purchased with a bill of sale, with records kept as prescribed, and requires payment of a $2.00 fee to the Texas Agricultural Extension Service and $3.00 to a designated state agency "for each horse purchased for slaughter." Exhibit 7;

1 Apx. 128; Tabs and B, ¶s 2.7, Exhibits 12-14; 1 Apx. 146-228.

**2.7.** Irreparable injury will occur if Plaintiffs are prosecuted under Chapter 149. In addition to the sale of horsemeat for human consumption, most parts of the horse carcass are used for other purposes, including baseball covers, shoes, leather products, pharmaceuticals used in open heart surgery, violin bows, pet food, fertilizer, and food for zoo animals, some of which are endangered species dependent on horsemeat. Numerous organizations or persons will be irreparably injured if the Plaintiffs are not permitted to process horsemeat to be sold for human consumption. The Texas Animal Health Commission, an agency of the state, has technical representatives at both facilities to test for equine disease. The authority for this is found in the Texas Agriculture Code, Chapters 161 through 168. Specifically, surveillance is undertaken for "equine infectious anemia," an incurable disease caused by a virus and spread to animals by bitting flies. Laboratory tests are done on the horses, in order to monitor this condition. Any tests that prove positive are traced back to the herd of origin through the record keeping required by the state and federal governments, so that infected herds can be handled according to appropriate regulations.

**2.8.** Members of the Sheriffs' Association of Texas contact the meat processors in their efforts to recover stolen horses. The Texas and Southwestern Cattle Raisers Association has inspectors at the facilities pursuant to state legislation, their purpose being to inspect and try to apprehend stolen horses and to build a data base for prevention of horse theft. Beltex Corporation has served as coordinator in several USDA funded equine projects with the School of Veterinary Medicine of the University of California, Davis. These studies rely on samples, for various physiological studies examining basic immunological and stress mechanism and pathological processes. Texas A&M College of Veterinary Medicine is supplied equine reproduction tracts and feet for instruction to students in examination of abnormalities, nerve block procedures, and reproduction tracts for abnormalities and pregnancy determinations. Oklahoma State University has collected mare tracts utilized for teaching reproductive physiology and other equine courses. Tabs A and B, ¶s 2.9.; Exhibits 20-29; 2 Apx. 434-456. Horseshoeing schools are provided cadaver legs to be used by students to learn proper hoof preparation for the application of shoes as well as for dissection for the study of the anatomy of the hoof and leg. Central Nebraska Packing, Inc. relies upon horsemeat products for diets which it prepares and sells mainly for exotic animals housed in zoos throughout the United States. These animals require a nutritionally balanced diet, which closely resembles the diet they would receive in the wild. Among the customers purchasing horsemeat for their animals are the Dallas Zoo, Fort Worth Zoo, Houston Zoo, Austin Zoo, New York Zoological Society, Ziegfried & Roy, Denver Zoo, Miami Zoo, Baltimore Zoo, Ringling Brothers, Indianapolis Zoo, Little Rock Zoo, Oklahoma City Zoo, University of California, and many others. Edwards Life Sciences L.L.C. is a global leader in products and technologies to treat advanced cardiovascular disease and the leading heart valve company in the world. Its products are sold in 80 countries, and it uses equine pericardia for the manufacture of life saving products including the equine pericardial patch used in valve replacement, cardiopulmonary bypass, left-ventricular assist device implantation, and numerous other procedures.

**2.9.** Those who presently oppose the slaughter of horses for human consumption seek to protect the public solely from the possible offensiveness that might arise from foreigners eating horsemeat, which the Legislature long ago decreed meat was not normally consumed by humans. No legitimate health or safety issues are involved, because the industry is subject to the identical regulations and inspections procedures applicable to other types of meat that are sold for human consumption. But there are people who oppose, and who would prohibit, the slaughter of horses for sale for human consumption, and the vehicle they seek to employ is TEX. AGRIC. CODE Ch. 149, by prosecuting those who process horse meat intended for human consumption, and enjoining their businesses from operation. Tab A, ¶ 2.10.

**2.10.** On February 13, 2002, a Texas State Representative requested from the Texas Attorney General an opinion about the enforcability of Chapter 149. In March 2002, letters urging the Attorney General to uphold the provision were submitted by lawyers representing the Society for the Prevention of Cruelty to Animals of Texas, Inc., the Humane Society of the United States, the Humane Society of Greater Dallas, and other groups with concerns for animals and horses. No brief submitted to the Attorney General suggested horsemeat posed health hazards to those who consume it, or that horsemeat was deceptively marketed. In response, the Texas Department of Agriculture suggested to the Attorney General that Chapter 149 "was likely preempted by federal law" and that it was not authorized to enforce Chapter 149. On August 1, 2002, the Attorney General, in Opinion No. JC-0539, opined that Chapter 149 was not preempted by the federal Meat Inspection Act, 21 U.S.C. ch. 12, and that only county or criminal district attorneys could investigate and prosecute alleged violations of Chapter 149. Tab A, ¶s 2.10, 2.11; Exhibit 31; 3 Apx. 462.

## 3. The Defendant

Mr. Tim Curry is the elected District Attorney in Tarrant County, Texas, where Plaintiff Beltex Corporation operates its business. On August 29, 2002, Mr. Curry's Assistant Criminal District Attorney Richard Alpert wrote Beltex a letter, in which he requested Beltex representatives to contact him because two Texas legislators had contacted Mr. Curry's office about Chapter 149. The letter transmitted a copy of Chapter 149 and the Attorney General's Opinion. Beltex representatives met with representatives from Mr. Curry's office, and, as a result, believe investigation and prosecution to be imminent. Tab A, ¶3.1.; Exhibit 32; 3 Apx. 468. Injunctive relief will protect Plaintiffs from prosecutions denying them their federal rights to operate free of state regulation.

## 4. The Plaintiffs

**4.1.** Beltex Corporation is a Texas corporation, operating a meat processing plant in Fort Worth, Texas. Beltex has processed horsemeat for human consumption for 28 years, and all of the product for human consumption was exported from the United States. In the United States, Beltex sells its product to zoos, and by-products for other non-consumption purposes. It has paid hundreds of thousands of dollars in property taxes, and paid significant fees to agencies of the State. Beltex employs 90 people, had gross sales exceeding $30,000,000 in 2001, and processed more that 27,000 horses that year. Beltex pays more than $3,000,000 a year for transportation in interstate and foreign commerce. If Chapter 149 is enforceable, Beltex will cease its present operations in Texas. Tab A, ¶ 4.1.

**4.2.** Dallas Crown, Inc. is a Texas corporation, operating a meat processing plant in Kaufman, Texas. Dallas Crown, Inc. processes meat for human consumption and all of that product is exported from the United States. Part of the meat is shipped into and through Tarrant County. In the United States, Dallas Crown sells its product to zoos, and other by-products for non-consumption purposes. It has paid thousands of dollars in property taxes, and paid significant fees to agencies of the State of Texas. Dallas Crown employs 40 people, had gross sales exceeding $9,000,000 in 2001, and processed more than 13,000 horses that year. Dallas Crown pays more than $1,100,000 a year for transportation in interstate and foreign commerce. If Chapter 149 is enforceable, Dallas Crown will cease its present operations in Texas. Tab B, ¶ 4.

**4.3.** Empacadora de Carnes de Fresnillo, S.A. de C.V. is a corporation organized under the laws of Mexico, with meat processing operations in Fresnillo, in the state of Zacatecas, in north central Mexico. It is owned by Beltex. Empacadora de Carnes employs 90 people. In 2001 its sales in pesos exceeded $63,000,000, and it slaughtered in excess of 25,000 horses, while paying more than $1,500,000 (PESOS) in freight charges. Most of its product is distributed in foreign commerce. Processed horsemeat for export for human consumption is transported by container truck from Fresnillo to Laredo, Texas. It is placed in a bonded warehouse, where it passes through United States' customs. Beltex purchases the product, which is sold to foreign customers. The meat is transported to the port in Houston or to Dallas-Fort Worth Airport for international airfreight delivery. If Chapter 149 is enforceable, Empacadora de Carnes will not be able to transport its processed product through Texas, and will be denied access to an international port and airport. Texas Chapter 149 will impose a permanent embargo on its product entering or leaving Texas, subject the transporters to criminal liability, and will close, under the authority of Texas law alone, the 1200 mile border in Texas that separates Mexico from the United States. The effect of this Texas law is not to protect Texas residents from any food product or deceptive activity, because none of the product is sold to consumers in Texas, and all of it meets international standards for food intended for safe human consumption. Tab A, ¶ 4.3.

## 5. Real Parties of Interest

The State of Texas is a real party in interest as defined by Fed. R. Civ. P. 17. Because defendant in his official capacity is a representative of Texas, it is not necessary to make Texas a party under Fed. R. Civ. P. 19. Because the validity of a state statute is being challenged under federal law, a copy of the Complaint was sent to The Office of the Attorney General State of Texas, P.O. Box 12548, Austin Texas 78711-2548. The Attorney General declined to participate in this lawsuit.

## 6. Relief Requested

**6.1** Plaintiffs are under imminent threat of prosecution by the Defendant. The statute Defendant is relying on facially and in application violates the interstate and foreign commerce clauses of the United States Constitution, purports to ban a commercial activity subject to preeminent regulation by United States statutes and executive branch regulations, contravenes treaties and international agreements, and violates the Fifth Amendment. In light of the genuine threat of prosecution under the disputed state statute, federal declaratory relief is appropriate. *Steffel v. Thompson*, 415 U.S. 452, 475 (1974). To prevent irreparable injury and loss, Plaintiffs request a permanent injunction prohibiting enforcement of Chapter 149.

**6.2.** To avoid irreparable injury and loss, Plaintiffs seek a declaration of their rights and legal relations, as provided by 28 U.S.C. §2201. Specifically, Plaintiffs seek a federal court declaration that Chapter 149 is not enforceable against them because its application is preempted by the commerce clause, federal statutes and regulations or because it has been repealed.

## 7. The Commerce Clause

**7.1.** The Commerce Clause, U.S. Const. art. I, §8, grants Congress the authority to "regulate commerce with foreign nations, and among the several States." Chapter 149 unconstitutionally conflicts with this provision. States may not adopt laws that directly affect interstate and foreign commerce. *Camps Newfoundland/ Owatonna, Inc. v. Harrison*, 520 U.S. 564, 571 (1997). Congress sets the terms and conditions of interstate and foreign transportation of products, and has expressly recognized that "meat and meat food products" and such "animals" are within the realm of or "substantially affect" interstate and foreign commerce, and the states must act in conjunction with the federal government "to prevent and eliminate burdens upon such commerce. . .." 21 U.S.C. § 602. Texas, in its Health Code, has recognized this obligation. Chapter 149's prohibition of the slaughter of horses to obtain meat for human consumption impermissibly intrudes on Congress' explicit control over this area of commerce. The states are prohibited by the Constitution from implementing statutes or regulations that create a direct burden on interstate and foreign commerce. *Savage v. Jones*, 225 U.S. 501, 524 (1912).

**7.2.** The Commerce Clause of the United States Constitution gives the federal government the sole right to regulate commerce with foreign nations and among the states. U.S. Const. art. I, § 8, cl. 3. The federal government's authority to regulate the slaughterhouse industry under the Commerce Clause was settled in the 1890's. Chapter 149 is not enforceable because it contravenes a field preempted by Congress. Given the "substantial attention given by Congress to the subject . . . it would be particularly inappropriate to permit state regulation [or prohibition] of the subject." *South-Central Timber*, 467 U.S. at 101 (J. White writing for the plurality). Congress has so overwhelmingly regulated the transport and slaughter of horses for human consumption that the Texas law prohibiting such actions is clearly preempted.

**7.3.** While states have a limited area in which they can regulate activities affecting interstate and foreign commerce, Chapter 149 does not regulate Plaintiffs' commercial activities in interstate and foreign commerce – it forbids them entirely. It constitutes an internal trade barrier. Discriminatory or prohibitory regulation of interstate and foreign commerce is offensive to federal power and not within a state's police powers. *Hughes v. Oklahoma*, 441 U.S. 322, 329-30 (1979). Plaintiff Empacadora de Carnes cannot transport horsemeat in sealed containers from Mexico to Europe by passing into Texas, depriving it of two major ports of trade in which hundreds of millions of federal funds have been invested to encourage foreign commerce. Plaintiffs cannot transport horsemeat on interstate highway system in Texas, including Interstate Highways 45, 35, 20 and 10, between Dallas, Houston, Fort Worth, and Laredo, although the federal government spent hundreds of millions of dollars building these highways to encourage interstate and foreign commerce. Tab A, ¶s 7.1.-7.4.

**7.3.** Chapter 149 does not regulate commercial activities; it prohibits them, far exceeding the limitation on the powers of the states under U.S. Const. art. I, §8. Processing, possessing, or transporting healthy and USDA inspected horsemeat intended for sale for human consumption. is prohibited. By contrast, slaughtering a horses owned, intending to consume the meat or give it away, even if it may be unhealthy or has not been inspected, and even if those to whom it is given do not know it is horsemeat, is not prohibited by Chapter 149, because no sale is intended. There is no legitimate local public interest furthered by Chapter 149, except to protect some Texas residents from the possible offensiveness arising from knowing foreigners are eating horsemeat processed in Texas. State regulation of safety interests that are minimal do not warrant deference by the courts to state law. *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). Protecting people from offense to their person occasioned by the tastes of others, is too minimal a state concern to warrant the destruction of the employment and businesses of honest and law-abiding peoples– local, national, and foreign. "[T]te extent of the burden that will be tolerated . . . depends on the nature of the local interest involved . . . ." *Pike*, 397 U.S. at 142.

**7.4.** Chapter 149 bans exportation from any port in Texas of horsemeat intended to be sold for human consumption. The *Pike* balancing test also applies to foreign commerce, but state restrictions burdening foreign commerce are subject to an even more rigorous and searching scrutiny. *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 100 (1984). United States foreign policy requires that the federal government speak for the nation, providing one voice, not fifty. *Id.* Because Chapter 149 prohibits otherwise legal foreign commerce, it contravenes the foreign commerce clause provision. This so burdens foreign commerce that no legitimate state end can justify the ban.

**7.5.** Chapter 149's prohibition against transportation from foreign countries into Texas of horsemeat for human consumption is an embargo. An embargo constitutes the "most extreme burden on interstate [and foreign] commerce." *Hughes,* 441 U.S. at 355. The purpose of Chapter 149 is to prohibit the sale, possession, or transportation of horsemeat to be sold for human consumption anywhere in the world. It does not aim to protect Texas residents, to whom Plaintiffs sell no product. Plaintiffs could slaughter horses for the sale of horsemeat for animal consumption, in pet food or zoo food, and Chapter 149 would not be violated. Plaintiffs could give away the healthy horsemeat for human consumption. It is only the possession or transportation of horsemeat for sale for human consumption that is prohibited by Chapter 149. No legitimate state interest justifies Chapter 149. Any local interests served by Chapter 149 do not outweigh national interests.

## 8. Federal Statutory and Regulatory Preemption

**8.1.** Congress has preempted state law conflicting with the statutory and regulatory provisions embodied in federal law. Preemption by Congress may be either express or implied. Implied preemption can occur when Congress has so pervasively or completely preempted the field that no room for state law exists if the state law is in conflict with or burdens implementation of federal law or regulation. The conflict can occur if it is burdensome to comply with both the state and federal law, or if the state law acts as an obstacle to the purpose or objective of the federal law. *Greier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000).

**8.2.** Purchasing, handling, and transporting horses to the slaughterhouses (both of which are in Texas) is governed by federal law. Congress' preemption power is a fundamental principle of the Constitution. To determine if a federal acts preempt a state law, not only the actual provisions of the statute, but also the needs implied for accomplishment of the act are to be considered. *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000); *Savage v. Jones*, 225 U.S. 501, 533 (1912). The Commercial Transportation of Equine for Slaughter Act of 1996, 21 U.S.C. §601 *et. seq*., preempts the field of transporting horses to slaughterhouses, and delegates to the U.S. Department of Agriculture the authority to regulate this activity. Regulations have been promulgated in 9 C.F.R. §88.1 *et. seq.*, prescribing in detail record keeping requirements for purchases and the humane procedures for handling horses intended for transportation for slaughter. Chapter 149, by contrast, does not regulate transportation of horses for slaughter; it prohibits such transportation. Given that all horses processed for meat for human consumption are transported into, or from Texas, because the only two processing plants are in Texas, this defeats the Congressional purpose in 21 U.S.C. § 602. Exhibit 12; 1 Apx. 146; Tabs A and B, ¶s 8.1-8.3; Exhibit 13; 1 Apx. 149; Exhibit 16; 2 Apx. 232.

**8.3.** The Meat Inspection Act preempts the area of commerce to which Chapter 149 applies. The scope of the Meat Inspection Act is set forth at 21 U.S.C. § 602:

> 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 insuring 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 by this act are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the states and other jurisdictions as contemplated by this act are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

The Act includes provisions regarding examination of animals before slaughtering, humane methods of slaughter, post-mortem examination of carcases, and inspection of meat food products. 21 U.S.C. §§603, 604 and 606. Procedures, for the examination of animals before slaughter and humane methods of slaughter, expressly includes "horses, mules, and other equines." 21 U.S.C. § 603.

**8.4.** The express prohibition is not limited to inspection and labeling. The Meat Inspection Act, 21 U.S.C. §678, expressly prohibits states from imposing laws respecting "premises, facilities, and operations" covered by the Meat Inspection Act; and it expressly allows states to exercise concurrent jurisdiction with federal government if for "the purpose of preventing the distribution . . . of any such articles which are adulterated or misbranded and are outside of any such establishment." The express statutory preemption of state laws, combined with the express grant of limited state control demonstrates that federal law preempt Chapter 149, that prohibits an activity with in the purview of the federal government. *Armour v. Ball*, 468 F.2d 76, 85 (6th Cir. 1972), *cert. denied.*

**8.5.** Federal agricultural statutes regulate the slaughter of animals. 7 U.S.C. §1902 specifically concerns humane methods of slaughter and provides specific methods "in the case of cattle, calves, horses, mules, sheep, swine and other livestock." Exhibit 36; 3 Apx. 491.

**8.6.** Federal regulations govern the slaughter of animals for human consumption. 9 C.F.R. §301.2 provides a number of definitions relating to the Meat Inspection Act. Both the terms "livestock" and "meat" are defined to include "horse" or "equines" when also referring to "cattle, sheep, swine, or goats." The federal regulations contain provisions for inspection of slaughterhouses (Section 302.1), inspection of livestock offered for slaughter (Section 309.1), and humane methods of livestock slaughter (Part 313). The regulations apply to livestock pens, floors where livestock are kept, driveways and ramps, and the handling and herding of livestock. 9 C.F.R. §§313.2 and 313.2. Exhibit 36; 3 Apx. 491.

**8.7.** In 1921, Congress passed the Packers and Stockyards Act, 7 U.S.C. §181 *et seq.* The purpose of the Act was to secure the free and unburdened flow of livestock from the ranges in the West and Southwest to the stockyards and slaughterhouses, and then to their final destination. 7 U.S.C. §182 defines livestock to include "horses," while commerce includes all livestock products that will transit from a state after purchase to another state or foreign nation. 7 U.S.C. § 183. Deceptive practices by packers, processors, transporters, or sellers are prohibited. Exhibit 38; 3 Apx. 495.

**8.8.** At least seven states expressly authorize the sale of horse meat: Arizona, Ariz. Rev. Stat. Ann., Section 3.2122; Florida, Fla. Stat. Ann., Section 500.451; Georgia, Ga. Code Ann., Section 26-2-156; Minnesota, Minn. Stat. Ann., Section 31.621; New Jersey, N.J. Stat. Ann., Section 24:16B-38; Ohio, Ohio Rev. Code Ann., Section 919.06-.07; and Virginia Va. Code Ann., Section 3.1-884.24. Aside from Texas, only California appears to impose criminal penalties for slaughtering horses for human consumption. Cal. Penal Code, Section 598c.

**8.9.** Other federal laws expressly preempt Chapter 149's prohibition against the transport of horsemeat to be sold for human consumption. 49 U.S.C § 41713 expressly prohibits states from enacting or enforcing laws that relate to "a price, route, or service of an air carrier . . .." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992)(stating that 'relating to' in the statute goes beyond forbidding state regulation of rates, routes and services.) American Airlines ships the Plaintiffs' products from Dallas-Fort Worth International Airport to foreign countries under international trade agreements. Chapter 149 prohibits this service by the airline, against the express preemption by Congress. Under 49 U.S.C. 14501(b) states are expressly prohibited from enacting or enforcing any law that relates to the "intrastate services of any freight forwarder or broker. . . . or any motor carrier with respect to the transportation of property." Plaintiffs ship their products (property) by way of motor carriers by way of intrastate and interstate highways to ports or airports for transport to foreign countries. Plaintiffs' suppliers transport property through Texas, much of it from out of state using interstate and intrastate highways and motor carriers. Plaintiff, Empacadora de Carnes, ships property though Texas on intrastate highways using motor carriers. in accordance with treaty agreements. These acts by Plaintiffs, their suppliers, the transport companies, and the drivers are illegal under Chapter 149.

**9. Treaty and Trade Agreement Preemption**

**9.1.** United States Constitution art. VI provides that "This Constitution, and the Laws of the United

States . . . and all Treaties . . . shall be the supreme Law of the Land . . . ." Congress has plenary power to regulate foreign commerce. *Bd. Of Trustees v. U.S.*, 289 U.S. 48 (1933 ). When the President acts in concert with the authority of Congress to negotiate with foreign states, the President's authority is at its highest level. *Crosby,* 530 U.S. at 375. (Quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)(J. Jackson concurring)). Tab A, ¶9.2.; Exhibit 39; 3 Apx. 5711; Exhibit 40; 4 Apx. 595.

**9.2.** Effective August 1, 1999, the United States became a party to the "Agreement Between the United States of America and the European Community on Sanitary Measures to Protect Public and Animal Health in Trade in Live Animals and Animal Products." The purpose of the agreement is to facilitate trade in animal products between the United States and the members of the European Community. The agreement applies to animal products including fresh meat, including Equine meat products and red meat (equidae). The agreement provides that United States standards will be prescribed in 9 C.F.R. § 94 for horsemeat. 9 CFR § 94.15(a) provides that "[a]ny animal product . . . which would be eligible for entry into the United States, as specified in the regulations in this part, may transit through the United States for immediate export" if the specified conditions are met.

**9.3.** The Agreement between the United States and the European Community authorizes the establishment and recognition of health standards and inspection procedures only by federal authority in the United States, through agencies of the federal government. States cannot promulgate or enforce regulations contrary to those of the federal government. Plaintiffs comply with the regulations applicable to the safety and inspection of horsemeat shipped to Europe for human consumption. Texas cannot criminalize the exportation and transportation in interstate and foreign commerce of horsemeat intended for human consumption. Tab A, ¶ 9.2.; Tab B, ¶ 9.1.

**9.4.** The United States, Mexico, and Canada are parties to the North American Free Trade

Agreement (NAFTA). Tab A, ¶ 9.5.; Exhibit 43; 4 Apx. 671. NAFTA was adopted and implemented by the "North American Free Trade Implementation Act." 19 U.S.C.§ 3301 et seq. Exhibit 44; 4 Apx. 706. This Act requires the federal government to consult with the states and eliminate restrictions not compatible with NAFTA. 19 U.S.C. § 1312. It does not permit private litigants to enforce its provisions, but, should it choose, the Department of Agriculture has standing to enforce the provisions in this case. NAFTA imposes on the United States the obligation to improve access to markets by "elimination of import barriers to trade between them in agricultural goods," which includes horsemeat. Plaintiffs do not seek to invalidate Chapter 149 as inconsistent with NAFTA, which it is. Rather Chapter 149 is invalid under the foreign commerce clause, and NAFTA is the evidence that the area of foreign commerce between the United States and Mexico has been foreclosed to state regulation, and, particularly, embargo. Treaties and agreements are relevant to a question of preemption because they emphasize the "longstanding rule that the enactment of a uniform federal scheme displaces state law . . .." *U.S. v. Locke*, 529 U.S. 89, 103 (2000).

**9.5.** In compliance with federal regulations Empacadora de Carnes legally imports into the United States, its horsemeat product that is intended for human consumption. It is shipped to federally approved ports in Houston and at Dallas-Fort Worth International Airport, as provided by 9 C.F.R. §91.1-3. Chapter 149 cannot be enforced in this area of foreign commerce preempted by federal law. Tab A, ¶ 9.3; Exhibit 42; 4 Apx. 658.

"It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action." *Crosby*, 530 U.S. at 376. These treaties and agreements, all reflect that the federal government has preempted the field of foreign commerce involving Mexico, the European Community, and the United

States. Texas' embargo of foreign commerce between these countries by criminalizing the sale of horsemeat is preempted.

## 10. Chapter 149 Was Repealed

**10.1.** Chapter 149, passed in 1949, criminalized the possession, processing, or transportation of horsemeat intended to be sold for human consumption. The legislative history of Chapter 149 is summarized in Exhibit 2; 1 Apx. 4. The only discernable purpose for Chapter 149 was to prohibit sales of some meats that the Legislature concluded people do not normally eat. Exhibit 3; 1 Apx. 31. The 1949 version of Chapter 149 amended the Meat Inspection Law of 1945, which provided for Texas' State Health Officer inspection of meat products. The 1945 prohibition was a part of a health statute intended to protect people from adulterated or mislabeled food. What is now Chapter 149, passed in 1949, was part of the PENAL CODE until 1973, when it was transferred to the civil statutes. Exhibit 2; 1 Apx. 6. In 1991 it was transferred to the Agriculture Code as a part of a codification.

**10.2.** In 1969 the 61st Legislature expressly repealed the 1945 Meat Inspection Act, when it passed the TEXAS MEAT AND POULTRY INSPECTION ACT. Exhibit 4; 1 Apx. 38. The new 1969 Act differed significantly from the 1945 Act. In Section 1(c) "Meat brokers" included those selling horse meat. 1 Apx. 38. "Meat food product" included "any product capable of use as human food" and "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." Exhibit 4; 1 Apx. 39. Horsemeat was included in Section 11(g) and (h) as "capable of use as human food." Exhibit 4; 1 Apx. 39. The Act limited the Commissioner's inspection authority to "intrastate commerce" in Section 3. Exhibit 4; 11 Apx. 43. Throughout, horses are included as meat used for human food, as in Section 1, 3, 4, 5, 8, 9, 10, 12, 13, and 16. Exhibit 4; 1 Apx. 38-48. Finally, the Texas Health Commission was charged with cooperating with the Secretary of Agriculture of the

United States under the provisions of the Meat Inspection Act " in such a manner as will effectuate the purposes of this Act and said Federal Acts." 111 Apx. 50. The Texas Act, applicable only to intrastate commerce, recognized the preemptive effect of the federal act as to interstate commerce sales of meat for human consumption.

**10.3.** Criminal penalties were provided for violation of the 1969 Act. The Act, in Sec. 409, was made applicable to all establishments "regulated under the federal Meat Inspection Act" only to the extent provided in that Act. 1 Apx. 55. Section 413 provided "[t]his Act prevails over . . . any other Act to the extent of any conflict." Exhibit 4; 1 Apx. 55. Since the 1949 Act, then PENAL CODE §719(e), was in conflict with the new Act's classification of horsemeat as fit for human consumption and subject to the regulatory scheme of the Health Commissioner, it was repealed in 1969.

**10.4.** In 1989 the Legislature repealed the 1969 TEXAS MEAT AND POULTRY INSPECTION ACT, replacing it with the TEXAS HEALTH AND SAFETY CODE, in which Chapter 433 became the TEXAS MEAT AND POULTRY INSPECTION ACT, Exhibit 4. The purpose of the Act was to protect the public from unwholesome and mislabeled meat food products. It applied to meat from livestock, which §433.003(11) again defined to include "horsemeat." Section 433.007(a) provides "[t]his chapter prevails over any other law" while subpart (b) provides "[t]his chapter applies to a person, establishment, animal, or article regulated under the Federal Meat Inspection Act (21 U.S.C. Section 601 *et seq.*)," which means it applies to Plaintiffs, Beltex and Dallas Crown, to the extent permitted by federal law. Section 433.033 expressly permits the sale of horsemeat in intrastate commerce, so long as it is properly labeled as to the kind of animal, and passes inspection. Violation of Chapter 433 can result in administrative and criminal penalties. The TEXAS HEALTH AND SAFETY CODE expressly repeals what became Chapter 149.

**10.5.** Chapter 433, TEX. MEAT INSPECTION ACT, § 433.071 requires the Texas Department of Health to cooperate with the United States Department of Agriculture "[u]nder Section 301, Federal Meat Inspection Act (21 U.S.C. Section 601) . . . ." The agency is to cooperate to "achieve the purposes of this chapter and federal law . . . ." The regulations adopted by the Texas Department of Health, at 25 TAC § 221.1 *et seq.*, Exhibit 6, in § 221.11, "adopts by reference" thirty four sections of Title 9 of the Code of Federal Regulations. These regulations govern the Plaintiffs' Texas operations. Texas recognizes the preemptive effect of federal statutes and regulations in the area of processing meat for human consumption, with regard to safety and marketing.

**10.6.** One area of state interest is horse theft. In 1997 Texas adopted revisions to Chapter 148, TEXAS AGRICULTURAL CODE. Exhibit 7; 1 Apx. 128. The legislative history shows that this revision specifically contemplated Beltex and Dallas Crown, who, as horse slaughterers, were to be assessed $5.00 per horse for inspections, and would be required to file reports describing each horse with the County for public access. Exhibits 7, 8, and 9; 1 Apx. 128-138.

**10.7.** One can only conclude that Chapter 149 was repealed in 1969 by the TEXAS MEAT AND POULTRY INSPECTION ACT. The repeal of Chapter 149 is recognized by the 1991 HEALTH AND SAFETY CODE and by Chapter 148 TEXAS AGRICULTURAL CODE, the horse theft bill, which assessed a $5.00 charge on Beltex and Dallas Crown, and required them to report all horses received.

**10.8.** 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 relate 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 had 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.

**10.9.** If Chapter 149 is still a law, an incredible result follows. Plaintiffs' Texas operations are never operating without federal and state inspectors. A raid on the two plants could net five to seven federal and state employees who daily aid and abet Beltex and Dallas Crown in their endeavors to sell horsemeat for human consumption. Truck drivers could be arrested who are delivering horses. Airline pilots, cargo loaders, and administrative personnel could be arrested while possessing and transporting horsemeat to Europe or Japan. Customs agents of the United States could be arrested in Laredo, Houston, and Dallas-Fort Worth International Airport in possession of horsemeat, and as those who are aiding and abetting Plaintiffs in illegal activities. "Aiders" and "abetters" are as "guilty" as Dallas Crown and Beltex. TEX. PENAL CODE § 7.02. If Chapter 149 has not been repealed, then it is unenforcable under federal law, because those charged by Congress with enforcing its laws cannot be criminalized under State law when carrying out their duties. Therefore, if Chapter 149 has not been expressly repealed, or repealed by implication, it is unenforcable against the Plaintiffs and those who assist them, who are subject to the interstate and foreign commerce statutes of Congress and regulations of the Executive. Chapter 149, being in conflict with federal law, is preempted.

**10.10.** There is a jurisprudence that favors the search for original intent in statutory construction. Whatever the merits of that approach in other circumstances, nothing recommends it in this case.

Several legislative sessions, covering a half a century, made up of totally different members, have passed and repealed laws on this subject. Not totally unexpectedly, not all the loose ends got tied together. In the most recent legislative session, after this Court granted the temporary injunction, numerous statutory proposals were suggested or considered, from acknowledging repeal of or reaffirming Chapter 149, and all shades in between. In the end, nothing passed. This Court today, after two additional special sessions, should take judicial notice that Texas' elected state legislators do not speak with one voice. That does not change the peril faced by Plaintiffs whose adversaries — self-proclaimed animal rights activists — are vocal and organized, and will insist on prosecution if defendant is not enjoined. Doubts about its continuing validity should be resolved in favor of holding Chapter 149 has been repealed. People should not be prosecuted on statutes of dubious validity, when they have operated publicly for a third of a century without prosecution, and have been completely regulated by state and federal law and agencies. It should be inconceivable that two small businesses, that operate daily with at least a half-a-dozen federal and state regulations on premise, are violating the criminal laws of Texas.

Respectfully submitted,

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Certificate of Service

A copy of this Plaintiffs' Motion For Summary Judgment With Brief, was sent by first class mail to Assistant District Attorney, Ann Diamond on September 2, 2003.

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