No. 05-11499

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EMPACADORA DE CARNES DE FRESNILLO, S.A. DE C.V.,
BELTEX CORPORATION, AND DALLAS CROWN, INC.,

Plaintiffs-Appellees,

v.

TIM CURRY,
DISTRICT ATTORNEY OF TARRANT COUNTY, TEXAS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMICUS CURIAE BRIEF OF THE HUMANE SOCIETY OF THE UNITED STATES IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL OF DISTRICT COURT'S RULING

Of Counsel:

Rebecca G. Judd
Member of Maryland Bar
Jonathan R. Lovvorn
D.C. Bar No. 461163
The Humane Society of the United States
2100 L Street, NW
Washington, DC 20037
Telephone: (202) 676-2333
Facsimile: (202) 778-6132

Counsel of Record for Amicus:

Mary Ellen Roy (#14388)
Phelps Dunbar LLP
365 Canal Street, Suite 2000
New Orleans, LA 70130
Telephone: (504) 566-1311
Facsimile: (504) 568-9130

STATEMENT OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 29, 28 U.S.C. § 29, and with consent of all parties, The Humane Society of the United States ("The HSUS") submits this brief as *amicus curiae* to address the district court's decision to permanently enjoin the State of Texas from prosecuting Plaintiffs-Appellees Empacadora De Carnes De Fresnillo, SA DE CV, Beltex Corporation, and Dallas Crown, Inc. ("the horse slaughterhouses") for violating Chapter 149 of the Texas Agriculture Code ("Chapter 149"), which prohibits the sale, possession, and transfer of horsemeat for human consumption. The district court granted summary judgment to the horse slaughterhouses, holding that Chapter 149 (1) has been repealed by conflict with section 433.033 of the Texas Health and Safety Code ("section 433.033"), (2) is preempted by the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 et seq., and (3) violates the dormant Commerce Clause of the United States Constitution. The HSUS seeks to participate by amicus because the district court's decision misapprehends Texas state law, limits state authority to enact laws for the protection of horses and other companion animals in the absence of federal regulation, and elevates the dormant Commerce Clause to an absolute bar on any state laws that have an incidental effect on commerce.

The HSUS is the nation's largest animal protection organization with more than nine and a half million members and constituents in the United States. Since

its inception in 1953, The HSUS and its members have been actively involved in equine protection initiatives. Nearly 300 members and constituents reside in Kaufman, Texas, home to the Dallas Crown, Inc. slaughter plant, and over 15,000 members and constituents reside in Fort Worth, Texas, home to the Beltex Corporation slaughter plant. Some of these members suffer from reduced property values, the pervasive stench emanating from these plants, and the horror of seeing and hearing horses being trucked to and unloaded at the slaughterhouses for slaughter.

The HSUS, along with the National Show Horse Registry, the National Thoroughbred Racing Association, and Churchill Downs, as well as numerous horse welfare and humane organizations across the country, oppose the slaughter of horses for human food because it is especially cruel and inhumane. Each year, the three horse slaughterhouses in the United States kill and process tens of thousands of American horses for human consumption in foreign countries. In 2005 alone, 91,757 horses met this fate. See USDA, National Agricultural Statistics Service, at http://www.nass.usda.gov:8080/QuickStats/indexbysubject.jsp?Pass_group=Livestock+%26+Animals. Most horses destined for slaughter are sold at livestock auctions or sales. Horses are then shipped, frequently for long distances, in a manner that often fails to accommodate their unique temperaments and physical requirements. See 151 CONG. REC. S10,219 (daily ed. Sept. 20,

2005). Frightened horses and ponies are sometimes crammed together and transported to slaughter in double-decker trucks designed for cattle and pigs. The truck ceilings are often so low that some horses are unable to hold their heads in a normal position. Slippery floor surfaces lead to falls and, occasionally, trampling. As a result, some horses arrive at the slaughterhouse with their backs broken or other serious injuries. See id.

Horses of virtually all ages and breeds are slaughtered, including unsuccessful, yet healthy, race horses, surplus riding school and camp horses, wild horses, and foals from mares whose urine is collected for the production of hormone replacement therapy drugs. See id. at S10,218 (daily ed. Sept. 20, 2005) (remarks of Senator Ensign). Under federal law, horses and other animals are supposed to be rendered unconscious prior to slaughter, see 7 U.S.C. § 1902(a), usually with a device called a captive bolt gun, which propels a metal rod through a horse's skull and into the brain. But due to horses' natural agility and flight instinct, some horses are not properly positioned in the kill chute and are improperly stunned. Thus, some horses may be conscious when they are hoisted by a rear leg to have their throats cut, resulting in extreme suffering. See 151 CONG. REC. S10,220 (daily ed. June 8, 2005) (remarks of Senator Robert Byrd, describing how the "[i]mproper use of stunning equipment at the slaughterhouse

can result in the animal having to endure repeated blows to [the] head, meaning that horses sometimes remain conscious throughout the slaughter process").

The HSUS also believes this process is particularly cruel for wild horses, who are not used to being handled by humans, and whose resistance to handling and transport is even greater than it is for domesticated horses sent to slaughter. Yet, the Bureau of Land Management's ("BLM") own records show that at least 2,500 wild American horses were sent to slaughter between 1999 and 2005. Pursuant to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq., the BLM rounds up wild horses on federal public lands in ten western states and puts them up for private adoption. Id. § 1333(b)(2)(B). Frequently, however, adopters sell the horses to middlemen immediately after obtaining title, and the horses are shipped and killed at the slaughter plants, often within a matter of days.

Due to the inherently inhumane nature of horse slaughter, The HSUS and its members, along with the American public and the U.S. Congress,[1] overwhelmingly support an end to horse slaughter for human consumption. Accordingly, The HSUS and its members and constituents have a substantial

[1] Last year, the U.S. Congress passed an Amendment to the FY 2006 Agriculture Appropriations Act banning the practice of horse slaughter by defunding federal inspections of the three horse slaughterhouses. See Agricultural Appropriations Act of 2006, Pub. L. No. 109-96, § 794 (2005). That measure was signed into law on November 10, 2005. Unfortunately, the USDA has refused to implement that law. As Appellants point out, a separate action challenging that decision is currently pending in the District Court for the District of Columbia.

interest in reversal of the district court's ruling invalidating the State of Texas's decision to ban the slaughter of horses for human consumption.

SUMMARY OF THE ARGUMENT

Contrary to the district court's findings, Chapter 149 of the Texas Agriculture Code (prohibiting the sale, possession, and transfer of horsemeat for human consumption) has not been repealed, expressly or implicitly, by any Texas law. Nor does it conflict with federal food inspection laws in violation of the Supremacy Clause, or violate the dormant Commerce Clause. The district court's ruling not only misconstrues the applicable law and federal Constitutional principles, it also jeopardizes the State of Texas's sovereign authority to protect the health of its people and to legislate for the protection of animals. Accordingly, the district court's decision warrants reversal by this Court.

ARGUMENT

I. The District Court Erred In Finding That Chapter 149 Has Been Repealed.

As pointed out by the Appellants, not more than four years ago, the Attorney General of Texas examined Chapter 149 of the Texas Criminal Code and issued a formal opinion that it is a current and effective law of the State of Texas and, thus, applicable to the horse slaughtering operations at issue in this case. See Op. Tex. Att'y Gen. No. JC-0539 (2002). Nevertheless, the federal district court disagreed and concluded that Chapter 149 has been repealed. This conclusion cannot be

reconciled with either the relevant statutory language or the applicable rules of statutory construction.

A cardinal rule of statutory construction is that "repeals by implication are not favored." Jackson v. Stinnett, 102 F.3d 132, 135 (5th Cir. 1996) (quoting Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987)). As this Court explained in Jackson, there is only one exception to this rule: "Where provisions in the two acts are in *irreconcilable conflict*, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." 102 F.3d at 136 (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)) (emphasis added); see also United States v. Wilson, 306 F.3d 231, 236 (5th Cir. 2002) (reiterating "the general disfavor with which we view implicit amendment or repeal of statutes").

Moreover, to hold that one statute has created an implied exemption from another statute, a court must conclude that there is an affirmative showing of intent to repeal. Thus, as this Court has made clear, "[i]n the absence of an *affirmative showing* of the intent to repeal [an earlier statute], [the earlier statute] is deemed repealed only if there exists a positive repugnancy which cannot be reconciled." Interstate Commerce Comm'n v. Southern Railway Co., 543 F.2d 534, 539 (5th Cir. 1976) (emphasis added).

In this case, the district court found that a conflict existed between chapter 149 of the Texas Agriculture Code and section 433.033 of the Texas Health and Safety Code, because the latter provision requires that "a meat food product of a horse" moving in intrastate commerce be "conspicuously marked or labeled." Empacadora v. Curry, No.CIV.A.4:02CV804-Y, 2005 WL 2074884, at *5 (N.D. Tex. Aug. 25, 2005). However, the court did not explain how a provision in the Health and Safety Code including the word "horse" among a list of types of meat that must be labeled for intrastate commerce somehow creates an "irreconcilable" conflict with Chapter 149's ban on the same horsemeat for human consumption. Nor did the court point to any "affirmative showing of intent" in section 433.033 to repeal Chapter 149. Instead, the court simply assumed that there was such an irreconcilable conflict from a simple redundancy in the heath and safety code—*i.e.*, the inclusion of the word "horse" despite a previous state law banning the sale of horsemeat.

The district court's confusion seems to arise out of its finding that section 433.033 "*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" and, thus, conflicts with Chapter 149. Id. (emphasis added). In fact, section 433.033 grants no such right to sell horsemeat. Rather, the provision is prohibitory, and states that

"[a] person may *not* sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, a carcass, part of a carcass, meat, or a meat food product of a horse, mule, or other equine unless the article is plainly and conspicuously marked or labeled." TEX. HEALTH & SAFETY CODE ANN. § 433.033 (emphasis added).

Thus, the "conflict" identified by the district court is based on a plain misreading of the applicable statutory text. *Nothing in section 433.033 requires that horsemeat be permitted to be sold for human consumption*. Thus, compliance with both section 433.033 and Chapter 149 is not impossible, as both laws can be complied with by simply not slaughtering horses for human consumption. See Dehart v. Town of Austin, 39 F.3d 718, 722 (7th Cir. 1994) (even though a federal law regulated the maintenance of certain dangerous animals, a state law which prohibited the same activities was found to not conflict with the federal law because it was *not* "physically impossible to comply with both").

The district court not only created a mountain out of a legislative mole hill, but also disregarded long standing precedents of this Court making clear that "[t]wo statutes on the same subject are not irreconcilable if they are capable of co-existence." Southern Railway Co., 543 F.2d at 539. For example, in Interstate Commerce Commission v. Southern Railway Company, the Commission argued that Congress impliedly repealed the 1910 Hobbs Act granting the Attorney

General specific power over actions to enforce orders of the Commission, 28 U.S.C. §§ 2321-2323, when it enacted the 1970 Interstate Commerce Act, 49 U.S.C. § 16(12), authorizing the "Commission or any party injured thereby, or the United States, by its Attorney General" to apply for enforcement of any order issued by it. 543 F.2d 534, 538 (5th Cir. 1976) (arguing that the section 16(12)'s use of the word "or" gives it explicit standing to institute an enforcement action). This Court rejected this argument, finding an "absence of an affirmative showing of the intent to repeal 28 U.S.C. §§ 2321-2323." Id. at 539 ("language in section 16(12) is [not] *sufficiently concrete* to act as an exception") (emphasis added).

Similarly, in Goolsby v. Blumenthal, defendants argued that the 1972 Revenue Sharing Act, 31 U.S.C. § 1221 et seq., was impliedly exempted from the 1970 Uniform Relocation Assistance Act, 42 U.S.C. § 4601 et seq. 581 F.2d 455 (5th Cir. 1978). The Court also rejected this argument, reasoning:

> [Defendants] fall short of establishing an affirmative intent to repeal URA, or an irreconcilable conflict between URA and the Revenue Sharing Act. *After reviewing the express terms of the acts in question, the structure of the acts, and the relevant legislative and administrative materials,* we cannot conclude that the Revenue Sharing Act created an implied exemption from URA.
>
> * * *
>
> If Congress intended, by enacting the Revenue Sharing Act, to allow the states to avoid obligations such as those imposed by URA, *it did not express that intention in a meaningful and discernible manner. Until such time as the intent to remove such requirements is more clearly*

> *expressed, we are compelled to hold that no implied exemption was intended*, and that URA is applicable to projects whether the only federal involvement is the presence of revenue sharing funds.

Id. at 462-63 (emphasis added).

Likewise, the Supreme Court has made clear that "Courts are not at liberty to pick and choose among congressional enactments." Morton v. Mancari, 417 U.S. 535, 550 (1974). Rather, "when two statutes are capable of co-existence, it is the duty of the courts, absent a *clearly expressed congressional intention* to the contrary, to regard each as effective." Id. (emphasis added). In this case, the Court need do no more to regard both these statutes as effective than to overlook a simple redundancy in section 433.033.[2] See Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006) (the legislature "does not, one might say, hide elephants in mouseholes").

II. Chapter 149 Is Not Preempted By The FMIA.

The district court also held that Chapter 149 "is an attempt by Texas to regulate the premises, facilities, and operations of Plaintiff's slaughterhouses," and is thus preempted by section 678 of the FMIA. Empacadora, 2005 WL 2074884, at *10. However, the district court's finding in this regard is clearly erroneous. As

[2] Moreover, in 1973, the Texas Legislative Council reviewed all Penal Code articles to determine whether any were repealed, impliedly or expressly, before assigning them a new Civil Statute classification. See 63rd Legis., Act of May 24, 1973, ch. 399, § 5, 1973 Tex. Gen. Laws 883, 996a, 996c n.1-5, 7, 8, and 12 (noting in footnotes "where the Council felt explanatory comments might be helpful," such as indicating whether certain articles were "repealed" or "probably impliedly repealed"). In the line item of the table assigning article 719e of the Penal Code, the original 1949 predecessor of Chapter 149, as article 4476-3a of the Civil Statutes, the Legislative Council made no such notation of a repeal or an implied repeal. Id. at 996c.

a threshold matter, the court's finding is impossible to reconcile with the court's finding elsewhere in the opinion that Chapter 149 "only prohibits the possession, sale, and transport of horsemeat for human consumption." Id. at *7. Indeed, the district court goes on to state—in direct contradiction to its finding that Chapter 149 impermissibly attempts to "regulate the premises, facilities, and operations of Plaintiff's slaughterhouses"—that "[a] person can legally slaughter horses in Texas and eat the meat himself or give it away to others in Texas." Id. Certainly, the statute either regulates slaughter facilities or it does not.

Moreover, in addition to this irreconcilable conflict in the opinion, the Supreme Court has explained, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state law." Medtronic v. Lohr, 518 U.S. 470, 485 (1996). Accordingly, when dealing with an area "traditionally occupied by the States," a state law will not be preempted unless it is "*the clear and manifest purpose of Congress" to prohibit state regulation in that area*. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citations omitted) (emphasis added).

In this case, there can be no dispute that Texas is legislating in an area "traditionally occupied by the States." Id. Indeed, "[t]he regulation of animals has long been recognized as part of the historic police power of the States," as part of the States' "authority to provide for the public health, safety, and morals." Dehart,

39 F.3d at 722 (citations omitted); see also Nat'l Audubon Soc'y v. Davis, 144 F. Supp. 2d 1160, 1174 (N.D. Cal. 2000) (discussing "state's legitimate interest in the protection of animal life").

Because Texas is legislating in an area traditionally occupied by the states, the FMIA must clearly and manifestly prohibit the State's regulation of the sale, possession, and transfer of horsemeat for human consumption. However, the FMIA contains no such explicit preemptive provisions. To the contrary, the FMIA only provides that states may not impose different requirements "with respect to premises, facilities and operations," or with respect to "labeling, packaging, or ingredient requirements." 21 U.S.C. § 678.

As the district court itself pointed out, Chapter 149 falls into neither of these categories. In the words of the district court, "Chapter 149 of the Texas Agriculture Code (and the two challenged sections within 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." Empacadora, 2005 WL 2074884, at *7 (emphasis added). It does not impose requirements on facilities, and it does not set marking, labeling, packaging, or ingredient requirements. Instead, it simply bans the sale of horsemeat.

Accordingly, since Chapter 149 regulates neither slaughter facilities nor labeling, Chapter 149 is *not* preempted by the FMIA. See Armour & Co. v. Ball, 468 F.2d 76, 84 (6th Cir. 1972) (Congress permits state action "with respect to any other matters regulated under" the FMIA) (emphasis added); see also Am. Meat Inst. v. Ball, 520 F. Supp. 929, 934 (W.D. Mich. 1981) ("Congress never intended to cut the states off from legislating on all subjects relating to the health, life and safety of its citizens."); Chicago-Midwest Meat Ass'n v. City of Evanston, 589 F.2d 278, 282 (7th Cir. 1978) (finding that Congress did not "intend[] to preempt the entire field of meat inspection," and upholding municipal ordinances which authorize the inspection of meat delivery vehicles).[3]

III. Chapter 149 Does Not Violate the Dormant Commerce Clause.

The district court's holding that Chapter 149 violates the dormant Commerce Clause cannot be sustained. The statute does not in any way discriminate against out-of-state meat sellers or single out interstate commerce for regulation—the types of laws that are usually invalidated under the dormant Commerce Clause. See Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (holding that a state may not ban importation of solid waste for disposal while allowing disposal of in-state solid waste). Rather, the statute imposes a flat ban on

[3] Ironically, the very provision of the Health and Safety Code that the district court found to have repealed Chapter 149 may in fact be preempted by this provision of the FMIA, since—unlike Chapter 149—the provisions of section 433.033 do constitute "labeling, packaging, or ingredient requirement[s]."

trade in the meat from certain companion animals that the People of Texas have determined to be a threat to the health, morals, and property of the State's citizenry.

As this Court explained in Dehart, "where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 39 F.3d at 723. Here, Chapter 149 serves legitimate public interests and has no impact on interstate commerce at all, because there is no U.S. market for horsemeat for human consumption.

Moreover, Chapter 149's impact on international commerce is insignificant, because the sale of horsemeat plays an extremely small role in the overall amount of commerce in meat products for export. For example, in 2003, nearly forty-one *million* metric tons of meat from traditional livestock were produced in the United States, from which over five *million* metric tons were exported. See USDA, National Agricultural Statistics Service, at http://www.usda.gov/nass/pubs/agr05/acro05.htm; see also USDA, Foreign Agricultural Service, at http://www.fas.usda.gov/ustrade/USTExFatus.asp?QI= (accounting for beef, pork, veal, lamb, and poultry) (emphasis added). Yet, in the same year, less than nine *thousand* metric tons of *horsemeat* were exported, representing less than one-

quarter of one percent of total meat exports. Id. (emphasis added). As the Ninth Circuit explained in rejecting a similar challenge to a state law regulating the possession of animals, "[e]vidence that interstate and foreign commerce is in some way affected is not enough to meet [plaintiffs'] burden" to show that the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1014-15 (9th Cir. 1994). Accordingly, the district court's ruling that Chapter 149 violates the dormant Commerce Clause also should be reversed.[4]

CONCLUSION

For the foregoing reasons, the district court's Order and Judgment should be reversed, and summary judgment should be rendered for Appellant.

[4] Moreover, the district court's finding that the impacts of Chapter 149 outweigh the benefits erroneously equates the alleged financial impacts of Chapter 149 on commercial activity within Texas (which have no bearing on a Commerce Clause claim) with impacts on the actual "interstate marketplace"—which are the only kind of impacts that are relevant to show that the law has "clearly excessive" effects on interstate commerce. See Exxon Corp. v. Maryland, 437 U.S. 117, 127-28 (1978); Pacific Northwest Venison, 20 F.3d at 1015-16. In effect, the district court concluded that the Texas Legislature has made a poor policy decision because of Chapter 149's purported financial burdens on Texas slaughterhouses. However, such concerns do not constitute burdens on the "interstate marketplace" but, rather, are only the private, incidental, and wholly in-state economic effects that the People of Texas determined were justified by the public benefits generated by Chapter 149.

Respectfully submitted,

Of Counsel:

Rebecca G. Judd
Member of Maryland Bar
Jonathan R. Lovvorn
D.C. Bar No. 461163
The Humane Society of the United States
2100 L Street, NW
Washington, DC 20037
Telephone: (202) 676-2333
Facsimile: (202) 778-6132

Counsel of Record for Amicus:

Mary Ellen Roy (#14388)
Phelps Dunbar LLP
365 Canal Street, Suite 2000
New Orleans, LA 70130
Telephone: (504) 566-1311
Facsimile: (504) 568-9130

ATTORNEYS FOR
THE HUMANE SOCIETY OF
THE UNITED STATES