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15-013
NO.
STATE OF NEBRASKA
OFFICIAL
OCT 16 2015
DEPT. OF JUSTICE

October 14, 2015

SUBJECT: Whether enactment of LB 176, which proposes to exempt pork packers from the prohibition against vertical integration of livestock production and packing in Neb. Rev. Stat. § 54-2604 (2010), is necessary to prevent a violation of the dormant Commerce Clause created by the current statute.

REQUESTED BY: Senator Ken Schilz
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Emily K. Rose, Assistant Attorney General

You have requested our opinion regarding whether Neb. Rev. Stat. § 54-2604 (2010), which prohibits the vertical integration of livestock production and packing, is vulnerable to a constitutional challenge under the dormant Commerce Clause similar to that which occurred in *Smithfield Foods, Inc. v. Miller*, 241 F.Supp.2d 978 (S.D. Iowa 2003). You also ask whether enactment of Legislative Bill 176 ("LB176"), which primarily seeks to exempt pork packers from the vertical integration prohibition in § 54-2604, is necessary to prevent a violation of the dormant Commerce Clause under the existing statute.

The dormant Commerce Clause of the United States Constitution prohibits states from "'enacting laws that discriminate against or unduly burden interstate commerce'" and it is well-settled that courts apply a two-tiered analysis in determining whether a statute violates the dormant Commerce Clause. *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1064-65 (8th Cir. 2004) (quoting *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003)); *See also Jones v. Gale*, 470 F.3d 1261, 1267-1270 (8th Cir. 2006). First, courts must consider whether the statute discriminates against interstate commerce. *Id.* Such discrimination has been defined as "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* (quoting *Hazeltine*, 340 F.3d at 593)). Courts also recognize that a statute discriminates against interstate commerce if it is discriminatory on its face, if it was adopted with a discriminatory purpose, or if it has a discriminatory effect. *Id.* If a statute is found to be discriminatory, it is subject to strict scrutiny, and is only upheld if there are "'no other means to advance a legitimate local interest.'" *Id.* (quoting *Hazeltine*, 340 F.3d at 593). Furthermore, courts

apply the second-tier of the dormant Commerce Clause analysis only if the statute is not discriminatory and merely incidentally affects interstate commerce. *Id.* Under this inquiry, a statute will be upheld "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In *Smithfield*, a group of pork packers challenged the constitutionality pursuant to the dormant Commerce Clause of Iowa Code § 9H.2 (hereinafter, "9H.2"). *Id.* 9H.2 prohibited beef and pork packers from directly or indirectly owning, operating, or controlling livestock production, ***but provided an express exemption for Iowa cooperatives***, foreign cooperatives that contracted with Iowa cooperatives, and foreign cooperatives that had an Iowa cooperative in its membership. *Id.* at 987. The District Court found that 9H.2's exemption facially discriminated against interstate commerce and stated that "[w]hen, as here, a statute clearly prohibits out-of-state entities from conducting business in a certain way, and then expressly exempts in-state entities from the very same prohibitions, there can be no mistake that such a regulatory scheme treats in-state and out-of-state interests differently." *Id.* at 990-91. Following the dormant Commerce Clause framework, the District Court determined that 9H.2 could not withstand strict scrutiny.[1]

Nebraska's general prohibition against the vertical integration of livestock production and packing under Neb. Rev. Stat. § 54-2604 can be distinguished from Iowa's 9.H2. Neb. Rev. Stat. § 54-2604 is part of the Competitive Livestock Markets Act ("Act"), Neb. Rev Stat. §§ 54-2601 *et. seq*, and provides that it is unlawful "...for a packer to directly or indirectly be engaged in the ownership, keeping, or feeding of livestock for the production of livestock or livestock products...." The term "packer" is defined as "... a person, or agent of such person, engaged in the business of slaughtering livestock in Nebraska in excess of one hundred fifty thousand animal units per year." Neb. Rev. Stat. § 54-2602 (5).

The prohibition against vertical integration under Neb. Rev. Stat. § 54-2604 does not discriminate against or unduly burden interstate commerce. Currently, the law prohibits ***Nebraska*** packers who process more than 150,000 animal units per year from practicing vertical integration. Out-of-state packers are not included in the definition of "packer" and are thus not precluded from practicing the vertical integration business model. As Neb. Rev. Stat. § 54-2604 does not prohibit out-of-state-entities from conducting business in a certain way, there is no burden on interstate commerce.

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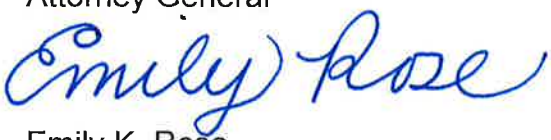
[1] *Smithfield* was appealed to the Eighth Circuit Court of Appeals. *Smithfield Foods, Inc., v. Miller*, 367 F.3d 1061 (8th Cir. 2004). During the appeal, 9H.2 was amended to remove the cooperative exemption that was found to be facially discriminatory. *Id.* at 1064. As a result, the Eighth Circuit found that based on the record before it, the Court could not determine whether the newly-amended 9.H2 discriminated against interstate commerce. *Id.* at 1065-66. The Court vacated that District Court's judgment and remanded for discovery to determine whether the newly-amended 9H.2 violated the dormant Commerce Clause. Subsequently, the parties reached settlement.

However, it should be noted that LB 176 would not fix any apparent or alleged liability under the dormant Commerce Clause due to Neb. Rev. Stat. § 54-2604's ban on vertical integration because LB 176 does not get rid of the ban altogether. LB 176 only carves out an exception to the ban, leaving cattle packers still subject to the ban.

We conclude that LB 176 is not necessary to prevent liability under the dormant Commerce Clause because Neb. Rev. Stat. § 54-2604, as written, does not prohibit out-of-state-entities from conducting business in a certain way, and therefore, there is no burden on interstate commerce.

Very truly yours,

DOUGLAS J. PETERSON
Attorney General



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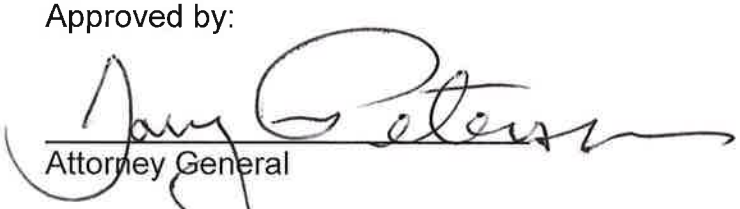

Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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