No. 06-3157

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

RUDOLPH GEORGE "BUTCH" STANKO,

Defendant-Appellant.

Appeal from the United States District Court, District of Nebraska
The Honorable Joseph F. Bataillon, United States District Judge
D. Ct. No. 8:05CR93-JFB-FG3

BRIEF OF AMICUS CURIAE THE SECOND AMENDMENT FOUNDATION IN SUPPORT OF THE DEFENDANT AND URGING REVERSAL

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INTRODUCTION/INTEREST OF *AMICUS CURIAE*

The Second Amendment Foundation is a non-profit organization dedicated to promoting a better understanding about our Constitutional heritage to privately own and possess firearms. To that end, the Foundation carries on many educational and legal action programs designed to better inform the public about the gun control debate. It does not issue stock and has no stockholders.

The present brief is submitted in support of the Appellant's contention that the District Court erroneously interpreted 18 U.S.C. § 921(a)(20)(A) such that it did not encompass the Appellant's previous conviction for violations of the Federal Meat Inspection Act, 21 U.S.C. §§ 601-624, 661-680 ("FMIA"). The acts for which the Appellant was previously convicted are included in the 18 U.S.C. § 921(a)(20)(A) statutory exception to the definition in 18 U.S.C. § 922(g)(1). As such, the Appellant's FMIA violations did not prohibit him from possessing firearms or ammunition. A motion for leave of Court to file accompanies this brief.

STATEMENT OF JURISDICTION

The Grand Jury indicted the Defendant for violations of 18 U.S.C. § 922(g)(1), 18 U.S.C. § 922(a)(3), and 18 U.S.C. § 924(a)(1)(D). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. This appeal is taken from a final judgment of the district court disposing of all claims. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

This Court reviews the district court's interpretation of a statute *de novo*. *United States v. Millot*, 433 F.3d 1057, 1060 (8th Cir. 2006).

STATEMENT OF ISSUE

Whether the Appellant's violations of the Federal Meat Inspection Act, 21 U.S.C. §§ 601-624, 661-680, were "crime[s] punishable by imprisonment for a term exceeding one year" as defined by 18 U.S.C § 922(g)(1) or, rather, "Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" excluded from that definition by 18 U.S.C. § 921(a)(20)(A).

The most apposite cases regarding this issue are *Dreher v. United States*, 115 F.3d 330 (5th Cir. 1997), *Dreher v. United States*, 943 F.Supp. 680 (W.D. La. 1996), *United States v. McLemore*, 792 F.Supp. 96 (S.D. Ala. 1992), and *United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983).

STATEMENT OF THE CASE

In 1983, the Appellant, along with his company, Cattle King Packing Company, and its general sales manager, Gary Waderich, were convicted of seven violations of the FMIA. The Defendants were convicted of distributing adulterated meat products, circumventing the inspection of meat products returned to the plant required by federal law, and misbranding shipments of meat products with false production dates. 21 U.S.C. §§ 605, 610. They were also convicted of conspiracy to commit these offenses. 18 U.S.C. § 371. The conviction was upheld on appeal. *United States v. Cattle King Packing Co., Inc.*, 793 F.2d 232, 245 (10th Cir. 1986).

On February 24, 2006, more than twenty years later, the Appellant was charged with being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g). He was convicted of those offenses on April 21, 2006. The underlying felony, which precluded the Appellant from possessing firearms or ammunition, was the FMIA conviction.

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SUMMARY OF ARGUMENT

The District Court erred in concluding that the Defendant's violations of the FMIA were "crime[s] punishable by imprisonment for a term exceeding one year" as defined by 18 U.S.C § 922(g)(1) and not "Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" excluded from that definition by 18 U.S.C. § 921(a)(20)(A). The plain language, purpose, and legislative intent of the provisions of the FMIA the Appellant violated indicate that they should be included in the exception for "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" in 18 U.S.C. § 921(a)(20)(A). The Appellant's conviction should not have prohibited the Appellant from possessing firearms. 18 U.S.C. § 921(a)(20)(A). His conviction must therefore be reversed.

ARGUMENT

It is a crime for a person to possess a firearm or ammunition if he has been convicted of "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C § 922(g)(1). That definition, however, does not include "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A).

Very few cases have interpreted the 18 U.S.C. § 921(a)(20)(A) exception. Those that have demonstrate that it encompasses the Appellant's violations of the FMIA. "[O]ffenses pertaining to antitrust violations" is relatively clear, and inapplicable to the Appellant's offense, which did not involve a violation of the antitrust laws. The FMIA violations should be

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considered unfair trade practices though. "Although it is almost impossible to formulate an all-inclusive definition of 'unfair trade practice,' implicit in the term itself is the requirement that the practice adversely affect either competitors or consumers. Among the practices which may cause such an adverse effect are *the suppression of competition*, price discrimination, *deceptive advertising or labeling*, and the exploitations of child purchasers." *United States v. Meldish*, 722 F.2d 26, 27-28 (2d Cir. 1983) (citations omitted) (emphasis added).

The Appellant's violations clearly meet this definition. The Tenth Circuit divided the offenses into three categories: fraudulent distribution of adulterated meat, avoiding the required inspection of meat returned to the Cattle King plant, and misbranding of meat with false production dates. *Cattle King Packing Co.*, 793 F.2d at 235. "The principal effect of all the crimes committed was that Cattle King reaped great economic rewards. Selling meat which should have been condemned, misdating boxes so that meat could be stockpiled and thus produced more cheaply, all directly benefited Cattle King economically." *Id.* at 242. The economic benefit obviously was not derived by producing quality meat products for which consumers were willing to pay. It was derived by deceiving consumers and exploiting competitors by escaping market forces. The offenses involved the suppression of competition and deceptive labeling. They therefore fit *Meldish's* definition of "unfair trade practices . . . or other similar offenses relating to the regulation of business practices." 722 F.2d at 27-28.

> . . .[T]he purpose of the antitrust and other laws specifically mentioned in § 922(a)(20)(A) [sic] is to lay down a scheme of acceptable and unacceptable behavior by imposing direct restraints against certain business procedures, and requirements and regulations for the carrying out of a business enterprise. Such regulatory laws have the purpose of protecting the consumer while promoting appropriate competitive business and pricing practices.

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United States v. Kruckel, 1993 WL 765648, *16 (D.N.J. 1993). "A criminal violation of the antitrust or fair trade statutes . . . bespeaks a violation of duties owed to consumers and competitors." *Id.*

The Appellant's conviction clearly violated these duties. The Tenth Circuit expressly held that the crimes had "reaped great economic rewards" upon the Appellant. *Cattle King Packing Co.*, 793 F.2d at 242. Again, this could only have been done by exploiting consumers and competitors. Indeed, the legislative purpose of the FMIA was to impose and enforce the duties identified by *Kruckel*.

> . . . 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. Unwholesome, adulterated, or misbranded meat or meat food products impair effective regulation of meat and meat food products in interstate or foreign commerce, *are injurious to the public welfare*, *destroy markets* for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and *results in sundry losses to livestock producers* and processors of meat and meat food products, as well as *injury to consumers*. The unwholesome, adulterated, mislabeled, or deceptively packaged articles *can be sold at lower prices and compete unfairly* with the wholesome, not adulterated, and properly labeled and packaged articles, *to the detriment of consumers* and the public generally. It is hereby found that . . . regulation by the Secretary and cooperation by the States and other jurisdictions appropriate to prevent and eliminate *burdens upon [interstate or foreign] commerce, to effectively regulate such commerce*, and to *protect the health and welfare of consumers.*

21 U.S.C. §602 (emphasis added). This statement of legislative purpose mentions stopping anti-competitive forces in the marketplace more times that the Sherman Antitrust Act. *See* 15 U.S.C. § 1. The Appellant's FMIA violations were precisely the sorts of crimes *Kruckel* identified as fitting the 18 U.S.C. § 921(a)(20)(A) exception. *Kruckel*, 1993 WL 765648, *16.

In *United States v. McLemore*, 792 F.Supp. 96, 98 (S.D. Ala. 1992), the defendant was charged under Section 922(g) for possession a firearm having been convicted of the federal prohibition on odometer rollback in 15 U.S.C. §§ 1984 and 1990c(a) (repealed 1994). The

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United States had prosecuted McLemore under the odometer rollback statutes, not a fraud statute similar to that which Meldish violated. *Id.*

> The government must live with its decision to prosecute Mr. McLemore's odometer rollback activity as a Title 15 offense, rather than as Title 18 mail fraud or wire fraud offense. The fact is that Mr. McLemore was indicted and convicted of a Title 15 U.S.C. §§ 1984 and 1990c(a) offense, which is an "unfair trade practice" crime, and was not convicted of a mail fraud, wire fraud or any state fraud crime in regard to the odometer rollback activity.

Id. The court therefore held that the defendant's previous violation fit the Section 921(a)(20)(A) exception and "cannot serve as the underlying felony for an 18 U.S.C. § 922(g) crime." *Id.*

The crime in *McLemore* is analogous to the Appellant's. Although the facts of the *McLemore* case themselves did not necessarily indicate that the defendant had interfered with competition or exploited consumers, the mere conviction for violation of a statute that promotes competition and protects consumers was sufficient to make the offense "an unfair trade practice crime. *McLemore*, 792 F.Supp. at 98. Had the same acts been prosecuted under a fraud statute, the defendant's crime would have prohibited him from possessing firearms. *Id.*

The purpose of the federal prohibition on rolling back a vehicle's odometer was "[t]o promote competition among motor vehicle manufacturers in the design and production of safe motor vehicles having greater resistance to damage, and for other purposes." Pub. L. 92-513, 86 Stat. 947 (1972). The express purpose of the FMIA is to protect consumers and markets for wholesome, unadulterated meat products. 21 U.S.C. §602. Whether or not the specific facts of the Appellant's crimes defeated those purposes, the violation of a statute intended to protect consumers and competition constitutes "an unfair trade practice crime." *McLemore*, 792 F.Supp. at 98. The Appellant's previous crimes were therefore "Federal . . . offenses pertaining to . . . unfair trade practices . . . or other similar offenses relating to the regulation of business practices" excluded from the 18 U.S.C. § 922(g)(1) prohibition by 18 U.S.C. § 921(a)(20)(A).

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Dreher v. United States likewise held that "Section 921(a)(20)(A) excludes only those felons who have violated laws which seek to foster a competitive marketplace." 943 F.Supp. 680, 683 (W.D. La. 1996). The plaintiff in that case sought a declaratory judgment that his previous mail fraud offenses fit the Section 921(a)(20)(A) exception. "'Unfair trade practices,' sometimes referred to as 'unfair competition,' occurs when one entity passes off its products as those of another, thereby harming consumers and other businesses." *Id.* "The phrase 'other similar offenses relating to the regulation of business' must logically be interpreted as violations of laws which likewise seek to enhance competition and prevent injuries to consumers and businesses." *Id.*

There can be no question that Cattle King Packing Company's consumers and competitors were injured by its violations. The Appellant and his company escaped ordinary market forces and mandatory government inspections whose purpose was to enforce those forces upon participants in the market for meat products. Likewise, consumers relied upon the enforcement of government regulation of meat products to ensure their health and safety. By violating these laws, the Appellant injured competitors and consumers.

On appeal in the *Dreher* case, the Fifth Circuit affirmed the District Court's grant of summary judgment to the government. *Dreher v. United States*, 115 F.3d 330, 331 (5th Cir. 1997). It held that Dreher's billing for work and materials he had not provided did not fit the 18 U.S.C. § 921(a)(20)(A) exception because he had been convicted for mail fraud rather than an offense that fit the statutory exception. *Id.* at 332. The defendant had argued that the Court should consider the acts he committed, and not the statute under which he was charged, in determining whether the 18 U.S.C. § 921(a)(20)(A) exception encompassed his crimes. *Id.* Citing *McLemore*, the Court held that the defendant's "charged violation of law," as opposed to

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the facts of the crimes, was determinative. *Id.* The Court wrote that "[b]ecause [the plaintiff's] violations . . . in no way depend on whether they have an effect upon competition, they are not 'offenses' that are excluded from the § 921(a)(20) definition of 'crimes punishable by imprisonment for a term exceeding one year'" *Id.* at 332-33.

In this case, by contrast, an express purpose of the FMIA is to foster competition through "markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products" and prevent the "sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers" caused by "[u]nwholesome, adulterated, or misbranded meat or meat food products." 21 U.S.C. § 602. The Appellant was convicted of violating those statutes. His violations expressly "depend on whether they have an effect upon competition." *Dreher*, 115 F.3d at 332-33. The Appellant's "charged violation of law," *id.* at 332, constituted "unfair trade practices or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A). Therefore, they are "'offenses' that are excluded from the § 921(a)(20) definition of 'crimes punishable by imprisonment exceeding one year." *Dreher*, 115 F.3d at 332-33, *quoting* 18 U.S.C. § 921(g)(1).

In light of this precedent—the entire body of cases interpreting 18 U.S.C. § 921(a)(20)(A)—it is clear that the Appellant's FMIA conviction was encompassed by the statutory exception and did not prohibit him from possessing firearms or ammunition. State consumer protection statutes also inform this analysis. While there is no federal definition of "unfair trade practices," every state in the Circuit employs a statutory definition of unfair or deceptive trade practices.[1] For example, in Nebraska, where the Appellant's offenses occurred,

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[1] Ark. Code Ann. §§ 4-75-201, *et seq.* (2006); Iowa Code Ann. §§ 507B.4, 515A.13, 521E.8, 668.9 (2001); Mo. Ann. Stat. § 416.031 (2001); Minn. Stat. Ann. § 72A.20 (2005); Neb. Rev. Stat. § 87-302 (1969); N.D. Cent. Code

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> A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she: . . . (2) Causes likelihood of confusion or of misunderstanding as to the . . . approval[] or certification of goods or services; (3) Causes likelihood of confusion or of misunderstanding as to . . . certification by[] another; . . . (5) Represents that goods or services have . . . approval, characteristics, . . . or quantities that they do not have . . . ; (6) Represents that goods are original or new if they are deteriorated [or] reconditioned . . . ; (7) Represents that goods or services are of a particular standard, quality, or grade . . . if they are of another. . . .

Neb. Rev. Stat. §87-302(a).

The Appellant was convicted of distributing adulterated meat products by "reworking" spoiled and deteriorating meat products, repackaging them, and selling them as fresh. Under Nebraska law, this would have amounted to representing that goods have characteristics that they did not and representing that goods were of a particular standard, quality, or grade when they were of another. *Id.* The Appellant was also convicted of misbranding shipments of meat products with false production dates. Under Nebraska law, this would have amounted to representing that goods were new when he knew that they were deteriorated. *Id.* Finally, the Appellant was convicted of circumventing the inspection of meat products returned to the plant. Because the inspection was required by federal law, selling products returned to the plant would have amounted to causing likelihood of confusion or misunderstanding as to the approval or certification of goods and as to certification by another, namely the United States Department of Agriculture. *Id.*

The Appellant's FMIA violations would have violated five subsections of Nebraska's Uniform Deceptive Trade Practices Act. *Id.* They would therefore have constituted "unfair trade practices" as that term is defined by 18 U.S.C. § 921(a)(20)(A). Colorado, where the FMIA violations occurred, has enacted a similar version of the Uniform Act. Colo. Rev. Stat. Ann. § 6-

§§ 51-10-01, *et seq.* (1941); S.D. Codified Laws § 37-1-3.1 (1977). Iowa's unfair trade practices statute pertains only to insurance.

1-105(1) (2002). The Appellant's FMIA violations would also have violated that statute as well and amounted to "unfair trade practices" for the purposes of 18 U.S.C. § 921(a)(20)(A). *Id.* A number of other states have similar consumer protection statutes that expressly prohibit falsely labeling meat products. *See, e.g.*, Alaska Stat. § 45.50.471(a)(21), (b); N.M. Stat. Ann. § 25-3-15(2). Each of these provisions has been preempted by the FMIA. *Jones v. Rath Packing Co.*, 430 U.S. 519, 532 (1977), *reh'g denied*, 431 U.S. 925.

The FMIA was intended to protect consumers and competitors by ensuring the fitness of meat products and vitality of markets for them. 21 U.S.C. § 602. It exempts all personal, household, and employee meat production and processing that is not intended for commercial sale. 21 U.S.C. § 623(a). It does not include a private right of action. *Mario's Butcher Shop and Food Center, Inc. v. Armour and Co.*, 574 F.Supp. 653, 654 (N.D. Ill. 1983). The FMIA, along with the Packers & Stockyards Act, "undoubtedly vest the Secretary of Agriculture with plenary power to regulate the branding and labeling of meat food products and to forbid unfair trade practices in the sale thereof." *United Corp. v. Fed. Trade Comm'n*, 110 F.2d 473, 475 (4th Cir 1940).

The violation of the FMIA clearly implicates either the meat products sold or the markets for them, or, as in this case, both. The Appellant was convicted of selling rotten and adulterated meat, reselling meat that was returned to the plant without being inspected, and mislabeling meat products with inaccurate production dates. The effect of these acts as to allow the Appellant to avoid competition by disguising inferior and even dangerous meat products. The Appellant's acts constituted unfair trade practices. They were without question "other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A). The violations were therefore not "a crime punishable by imprisonment for a term exceeding one year" as defined by

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18 U.S.C § 922(g)(1) and did not prohibit the Appellant from possessing firearms or ammunition.

CONCLUSION

The Appellant's previous violations of the Federal Meat Inspection Act, 21 U.S.C. §§ 601-624, 661-680, were "Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A). As such, they were not "crime[s] punishable by imprisonment for a term exceeding one year" as defined by 18 U.S.C § 922(g)(1), and did not prohibit the Appellant from possessing firearms or ammunition. The Appellant's conviction should be reversed.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of *Amicus Curiae* The Second Amendment Foundation were served on

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by first-class mail, that a copy of the brief was submitted electronically to the Circuit Clerk with a copy sent to counsel listed above, and that file copies of the brief were dispatched to the Circuit Clerk by Federal Express courier this _____ day of November, 2006.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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