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RE: Minnow laws and the Commerce Clause (NSGLC-18-04-01)

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Dear Doug:

In 2017, Legislation was proposed in both the Minnesota Senate and House to allow the import of golden shiners from certified baitfish farmers in Arkansas. Although the legislation did not pass, the legislature required the Minnesota Department of Natural Resources (DNR) to submit a report regarding potential risks of importing golden shiner minnows into Minnesota. The DNR's Risk Report concluded that importation of the Arkansas golden shiners would increase the risk of introduction of invasive species or pathogens to Minnesota waters and suggested the state not allow the import of any baitfish into the state. If the state did allow import, the Risk Report identified risk management strategies, including: strengthening the chain of custody; quarantining and testing golden shiners; and developing HACCP plans for the fish.

In 2004, the National Sea Grant Law Center responded to Minnesota Sea Grant's questions regarding the ban on baitfish import in Minnesota.¹ Recently, the NSGLC has been asked to consider the legal implications of allowing the import of golden shiners from a state that has a certification program designed to reduce risk. If the state allows the import of these baitfish, could it legally prohibit other

¹ Josh Clemons, *Minnow Laws and the Commerce Clause*, NATIONAL SEA GRANT LAW CENTER (May 18, 2004), available at <http://nsglc.olemiss.edu/Advisory/Gunderson.pdf>

species from the same or similar certified program without violating the Commerce Clause? The 2004 memo has been updated below with this analysis.

Commerce Clause

The Commerce Clause invests Congress with the power to regulate commerce “among the several States.”² The negative implication of the Commerce Clause is that states do *not* have the power to regulate interstate commerce because Congress’ power in that arena is exclusive.³ States are generally barred from regulating even when Congress has not regulated. This negative aspect of the Commerce Clause is commonly referred to as the “dormant Commerce Clause,” and it is the primary restriction on the power of states to enact laws and regulations that would normally be within their legislative powers but that impermissibly burden interstate commerce.

Under the U.S. Supreme Court’s dormant Commerce Clause decisions, a state statute that facially discriminates against interstate commerce is unconstitutional unless the state is able to show that two conditions are met: (1) the statute serves a legitimate state purpose, and (2) the purpose is one that cannot be served as well by available nondiscriminatory means.⁴

In *Maine v. Taylor* the Court applied this rule and upheld a Maine statute that completely banned the importation of live baitfish into the state. The legitimate purpose served by the ban was protection against two ecological threats: “First, Maine’s population of wild fish... would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine’s aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways.”⁵ Maine was able to satisfy the second necessary condition by showing at trial that there was no scientifically accepted method of inspecting shipments of live baitfish for parasites or commingled species.⁶ The “abstract possibility” of the development of nondiscriminatory testing procedures is not necessarily a nondiscriminatory alternative.⁷ The Court noted “if and when such procedures are developed, Maine no longer may be able to justify its import ban. The State need not join in those efforts, however, and it need not pretend they already have succeeded.”⁸ Following *Maine v. Taylor*, the Supreme Court has upheld the two-step dormant Commerce Clause test.⁹

It is important to note that each court case involves a unique set of facts presented by the litigating parties. Because courts decide cases based on facts specific to the situation at hand, the court’s factual findings influence the case’s outcome – making them outcome determinative. The facts of each case

² U.S. Const. art. I, § 8, cl. 3.

³ The underlying rationale is that the Constitution’s framers sought to avoid the economic balkanization and commercial warfare – figurative and literal – among the states that would almost inevitably result if states were allowed to freely regulate trade to their own advantage. *See generally H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949) (discussing history and philosophy of the commerce clause).

⁴ *Maine v. Taylor*, 477 U.S. 131, 140 (1986).

⁵ *Id.* at 141 (internal citations and footnotes omitted).

⁶ *Id.* at 141-42.

⁷ *Id.* at 147.

⁸ *Id.*

⁹ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

are different, and can affect different outcomes, regardless of whether the questions of law are largely the same. For example, the court’s decision in *Maine v. Taylor* was partially based on a factual finding by the court there was no scientifically accepted method of inspecting shipments of live baitfish for parasites or comingled species available at the time. Had the court found such a method was available, the court’s decision could have been quite different.

Minnesota’s Minnow Ban

Minnesota Statutes § 97C.515 makes it illegal to bring live minnows into the state, with three exceptions: (1) a person may transport minnows through the state with a permit,¹⁰ (2) a person may import dead minnows for feeding hatchery or aquatic farm fish,¹¹ (3) a person with a private fish hatchery license may import minnows from other states for export, with a special permit.¹² There is no exception for importing live minnows to use as bait, so the general prohibition applies. The exception that allowed importation of live minnows for aquarium use was repealed in 2008.¹³ The exception that allowed live minnow importation for feeding hatchery and aquatic farm fish was also repealed in 2008.¹⁴ Only dead minnows may be imported for that purpose. There is no prohibition on the sale or use for bait, or for feed for hatchery or aquatic farm fish, of live minnows from Minnesota. On its face, the Minnesota statute discriminates against commerce in out-of-state live minnows; this situation implicates the dormant Commerce Clause.

Minnesota’s proposed ban on the importation of baitfish but for Arkansas-certified golden shiners likely constitutes a legitimate state purpose, thus avoiding one dormant Commerce Clause problem. Minnesota has an ecological interest in keeping non-native pathogens and invasive species out of its waters and away from native fish populations—similar to Maine in *Maine v. Taylor*. However, a problem remains with Minnesota’s current question: could the state’s interest in keeping its waters pathogen and invasive species-free be served by nondiscriminatory means? In other words, could invasive species, parasites, and pathogens be kept out of Minnesota just as effectively while other species of baitfish from the same or a similar certification program are allowed in? The answer to this question depends largely on whether there is a scientifically accepted method of inspecting shipments of live baitfish for invasive species, parasites, and pathogens. The fact that there was no such method for baitfish in the 1980s is essential to the holding in *Maine v. Taylor*. If such a method is currently available to Minnesota, as the Department of Natural Resources’ recent Risk Report suggests, then the ban may be unconstitutional.¹⁵

The DNR’s Risk Report identifies several procedures Minnesota could take to reduce the risk to its waters from unwanted pathogens associated with imported minnows.¹⁶ The Risk Report does not state whether these are “scientifically accepted” testing methods, but in many cases notes that the certain testing methods may reduce the risk if protocols are followed and the testing is accurate. A court examining Minnesota’s ban would conduct a factual finding to determine whether these are

¹⁰ Minn. Stat. § 97C.515, subd. 2.

¹¹ *Id.* subd. 4.

¹² *Id.* subd. 5.

¹³ 2008 Minn. Sess. Law Serv. Ch. 307 (S.F. 3576) (West).

¹⁴ *Id.*

¹⁵ The state has no obligation to develop an inspection method if none exists, though. *See Maine v. Taylor*, 477 U.S. at 147.

¹⁶ *Minnow Importation Risk Report: Assessing the risk of importing golden shiners into Minnesota from Arkansas*, MINNESOTA DEPARTMENT OF NATURAL RESOURCES 5 (Feb. 14, 2018) [hereinafter *Risk Report*].

scientifically accepted methods of inspecting shipments of live baitfish for parasites or comingled species. There is no case law in Minnesota that provides guidance as to what a court might deem “scientifically accepted”; however, a court may consider such things as whether the methodology was published in the peer review literature, adopted by federal or other state agencies, or endorsed as an industry standard by a private certification body.

The Risk Report, for example, suggests offloading minnows into a Minnesota holding facility where they could be additionally graded, observed, and *inspected* for necessary hand removal of unwanted species.¹⁷ Furthermore, the Risk Report mentions the possibility of testing for specific pathogens—especially those not certified by the Arkansas program—while holding in Minnesota prior to distribution.¹⁸ Although the suggested procedures were contemplated with only golden shiner importation from Arkansas in mind, the existence of these procedures—if scientifically acceptable—may indicate to a court that Minnesota does, in fact, have valid methods of inspecting shipments of live baitfish available to it. If the state can feasibly undertake such measures when importing golden shiners from Arkansas, it may be possible for it to do so with other baitfish species and baitfish from states with similar inspection programs.

Even if such a method is not currently available (meaning that the state’s interest could not adequately be served by nondiscriminatory means), the ban is not necessarily constitutional. State laws that burden interstate commerce rarely survive constitutional attack; *Maine v. Taylor* is unusual in that respect, and the result in that case depended on some unusual facts that may differ from the situation in Minnesota. First, as noted above, there was no acceptable inspection method available to Maine at the time. Also as noted above, this may or may not be the case in Minnesota in 2018. Second, Maine was able to show that there were specific parasites of concern that were common to out-of-state baitfish but uncommon in native baitfish, and that its fisheries were “unique and unusually fragile.”¹⁹ This showing helped convince the Court that the discrimination was not arbitrary. In much the same way, Minnesota should be prepared to show that there are specific species, parasites, or pathogens that are common in baitfish shipments from, for example, Wisconsin, but uncommon in Minnesota waters. In addition, Minnesota should be able to show that these organisms are not likely to be transported into the state in other ways, such as in legal shipments of other types of fish. Singling out baitfish shipments not containing golden shiners from Arkansas for prohibition when the noxious organisms legally enter the state in other ways would strongly indicate unconstitutional protectionist intent behind the ban.²⁰

The findings contained in the Minnesota Department of Natural Resources’ Risk Report could pose a problem in this regard. The DNR’s Risk Report indicates that legally importing golden shiners from Arkansas increases the risk of unwanted pathogens and invasive species being introduced to Minnesota.²¹ In particular, the Risk Report identified that the risk of importing one organism—ovarian

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 477 U.S. at 141, 151. The Court cites the Minnesota statute in a footnote to this discussion as an example of other states’ partial bans on baitfish importation, but does not remark on its validity. 477 U.S. at 151, n. 22.

²⁰ The plaintiff in *Maine v. Taylor* apparently argued that this was the case with the Maine baitfish ban, and it appears the lower appeals court agreed. However, the appeals court decided the case on other grounds and the Supreme Court notes the issue only in passing. 477 U.S. at 144. The outcome might have been different if this issue had been the decisive one at the appeals court level, because it indicates that the baitfish prohibition discriminated arbitrarily for protectionist reasons.

²¹ *Risk Report* at 3.

parasite—in golden shiners from Arkansas is high.²² The Risk Report notes that there are no known methods to mitigate the risk of this parasite, and while it has been identified in Minnesota bait shops, it has not yet been confirmed in wild golden shiner populations in Minnesota.²³ So, while a wholesale ban on farmed baitfish may help prevent this parasite from entering state waters and infecting native populations, the Arkansas-certified golden shiners may be infested with ovarian parasite, despite measures taken either in Arkansas or Minnesota. Furthermore, the Risk Report recognizes that minnows imported from Arkansas cannot be considered “pathogen-free” or “invasive-species-free” as the certification program does not account for some species of great concern in Minnesota, such as black carp and grass carp.²⁴ If legislation passed allowing the importation of golden shiners from Arkansas, this deficiency in Arkansas’ certification program reveals a route through which invasive species could infiltrate Minnesota waters, despite the state’s ban on every other source of imported baitfish. However, if Minnesota can show that the risk of importing noxious organisms is much greater in other species and/or baitfish certified under similar programs, such a showing may help provide a legitimate ecological rationale Minnesota’s proposed ban. However, barring such a showing, these conclusions indicate that, if Minnesota were to legalize importation of golden shiners from Arkansas, it could open itself up to allegations that its ban of other baitfish is arbitrary and unconstitutionally protectionist.

In summary, the answers to your questions depend on whether the ban has a legitimate state purpose that cannot be served by nondiscriminatory means. To answer that question, I think it would be helpful to answer the following (non-exclusive) list of questions:

1. Is there a scientifically accepted method of inspecting shipments of live baitfish for invasive species, parasites, and pathogens available to Minnesota?²⁵ If a court makes a factual finding that there is a scientifically accepted method available, Minnesota may be obligated to use it rather than discriminating against interstate commerce in baitfish.
2. Are the noxious organisms uncommon in Minnesota waters? The Risk Report seems to indicate this is so, and that fact would likely support Minnesota’s ecological rationale.
3. Are species other than golden shiners more likely to introduce invasive species or pathogens to Minnesota waters? If so, that fact would likely support Minnesota’s ecological rationale.
4. Are baitfish other than those certified by Arkansas’ program more likely to introduce invasive species or pathogens to Minnesota waters? If so, that fact would likely support Minnesota’s ecological rationale. On the other hand, if the Arkansas golden shiners are just as likely to introduce invasive species, it would undermine the rationale.
5. Is there reason for the state to believe that noxious organisms in golden shiner baitfish shipments that legally enter the state from Arkansas will not enter state waters? If not, that fact would indicate that it is arbitrary for the state to allow Arkansas golden shiners to cross state lines but not other species of baitfish or fish from similar certification programs.²⁶

²² *Id.* at 4.

²³ *Id.*

²⁴ *Id.*

²⁵ If such a method is available but is prohibitively expensive, further legal questions might arise which the Law Center would be happy to research for you.

²⁶ *See, Risk Report* at 4. (Identifying five organisms known to travel with golden shiners that are classified as high risk due to their risk of reintroduction, establishment, and/or their severe environmental impacts.)

Many states require permits for importation of baitfish or any fish that is deemed non-native, which would include baitfish. Some of these states also require health certifications or inspections, while other states only require an inspection at the state government's discretion. Additionally, several states also bar species from being imported at all by either implementing an outright ban or by issuing a list of approved baitfish, meaning that anything outside of that list is banned from being imported as baitfish.

I hope this letter is useful to you. If there are any additional issues on this topic that you would like the Sea Grant Law Center to research for you, or if there is any other topic you would like us to research, please feel free to ask. Thank you for bringing your question to the Sea Grant Law Center.

Sincerely,

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