TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:
H.B. NO. 1611, H.D. 2, S.D. 1, RELATING TO LABELING OF MEAT AND FISH PRODUCTS.

BEFORE THE:
SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Thursday, April 2, 2009 **TIME:** 10:00 AM

LOCATION: State Capitol, Room 229

TESTIFIER(S): Mark J. Bennett, Attorney General
or Wade H. Hargrove III, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General provides these comments regarding a possible constitutional problem in this measure, and a typographical error.

This bill proposes changes to the statutory requirements for labeling meat and fish products. Section 1 of this bill adds a new section to chapter 328, Hawaii Revised Statutes (HRS), that would require fish products, when gas-treated to approximate the appearance of freshness, to be labeled as having been gas-treated for that purpose. Section 2 amends the definition of "misbranded" in section 159-3, HRS, that would require a similar label for meat products that are gas-treated to approximate the appearance of freshness. Last, section 3 amends the wording of the penalty in section 328-29(a), HRS. The Department of the Attorney General is concerned that section 2 of this bill may be unconstitutional and subject to preemption by federal law, specifically the Federal Meat Inspection Act.

The Supremacy Clause, declaring the laws of the United States supreme to those of the individual states, and the Commerce Clause, which gives Congress the authority to regulate interstate commerce, mandate that when state law is inconsistent with federal law, the state statute or regulation at issue is invalid and unconstitutional. The

federal government's role in the regulation of the production, packaging, and labeling of meat products in interstate commerce is very well established. The Federal Meat Inspection Act of 1907 (FMIA), later amended by the Wholesome Meat Act of 1967, provides federal labeling requirements for meat products in section 7 (21 U.S.C.A. §607). Section 408 provides for the preemption of state meat labeling laws (21 U.S.C.A. §678). The preemption language found in section 408, actions taken by the federal Food and Drug Administration (FDA) and the decision in Jones v. Rath Packing Co., 430 U.S. 519 (1977), suggest that this measure, if challenged on constitutional grounds, may be struck down.

FMIA section 7 requires the Secretaries of the federal Departments of Health and Human Services and of Agriculture to collaborate in the development of standards for labels and containers. These comprehensive meat product standards have been promulgated by the United States Department of Agriculture (USDA) and appear in 9 C.F.R. part 317. The nature of these regulations is such that it could be argued that any state law on this same subject matter would be preempted simply as a result of the completeness of the federal scheme. Removing, however, any ambiguity as to the congressional intent to preempt state efforts to regulate in the field of meat labeling, section 408 of FMIA provides that "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter . . . ." Thus, this provision of the FMIA expressly prohibits the very type of regulation proposed by section 2 of this measure.

In addition to the unambiguous language of section 408, the FMIA also addresses "packaging, or ingredient requirements." The FDA, which works in concert with the Food Safety and Inspection Service (FSIS) of the USDA to develop meat labeling standards pursuant to 21 U.S.C.A.

§607(c), has accepted the gas-treatment of meat with carbon monoxide as "generally recognized as safe" or "GRAS." This serves as a federal certification of gas-treatment as a "safe and suitable ingredient used in the production of meat and poultry product" (21 C.F.R. §184.1240). Thus, the FDA has specifically addressed gas-treatment and, in consultation with the FSIS, decided against regulating this common practice of the meat packing industry. The FDA's decision not to regulate in this area further supports our concern that a state law requiring labels where meat is gas-treated will be deemed preempted by the FMIA.

Finally, the United States Supreme Court in Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305 (1977), found that California statutes and regulations prescribing labels with specific weight and measures on packages of, in this case, bacon, were preempted by federal law. The Jones court found the preemption provision of the FMIA, referring to section 408 of the FMIA, 21 U.S.C. §678, so clear and convincing that the "explicit pre-emption provision dictates the result in the controversy between Jones and Rath." Jones at 532, 1313. Furthermore, an attempt by Jones, the Director of the Department of Weights and Measures of the County of Riverside, to avoid this result by arguing that the California law was something other than a "labeling requirement" as defined in section 408 was flatly rejected by the court. Id.

Based on the foregoing analysis of the preemption language of section 408 of the FMIA, recent FDA action on gas-treatment and the decision in Jones v. Rath Packaging Co., section 2 of this measure relating to the labeling of meat products, if challenged, is likely to be found unconstitutional and in violation of the Supremacy and Commerce Clauses of the United States Constitution.

Additionally, please note the typographical error in section 3 on page 6, line 2, of this measure. The reference to section "28-6" should be a reference to section "328-6".