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March 22, 1996

The Honorable Paul Newman
Arizona House of Representatives
Arizona State Capitol
1700 West Washington
Phoenix, AZ 85007

Re: I96-004 (R96-005)

Dear Representative Newman:

Pursuant to S.B. 1401 (1995 Ariz. Sess. Laws, Ch. 94, § 2), you have requested our opinion as to the legality of A.R.S. § 49-409. We conclude that A.R.S. § 49-409 is invalid because it is preempted by federal law.

Background

In 1995, the Arizona Legislature passed and the Governor approved H.B. 2236, thus enacting A.R.S. § 49-409, which provides as follows:

- A. Notwithstanding any other law, a person may possess, use, manufacture, purchase, install, transport or sell chlorofluorocarbons.
- B. The possession, use, manufacture, purchase, installation, transportation or sale of chlorofluorocarbons does not subject any person, this state or any political subdivision of this state to any penalty, fine, retaliatory action or other punitive measure.

1995 Ariz. Sess. Laws, Ch. 74, § 1.

On its face, A.R.S. § 49-409 simply declares state policy permitting the possession,

use, manufacture, installation, transportation, and sale of chlorofluorocarbons ("CFC"). CFC is an inert gas which had been used routinely as a refrigerant, cleaning solvent, and aerosol propellant and in the manufacture of plastic foams. WEBSTER'S NEW INT'L DICTIONARY 66a (3d ed. 1993). CFC compounds are commonly referred to by their trademark name, Freon.

Analysis

"[S]tates have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people." *Esanaba & Lake Michigan Transp. #6 Co. v. City of Chicago*, 107 U.S. 678, 683 (1883). Until the late 1930's, the United States Supreme Court had considered matters such as the manufacture and sale of products to not be a part of interstate commerce subject to congressional regulation. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). However, beginning with the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court expanded the interpretation of Congress' power under the Constitution's Commerce Clause¹ to include matters which substantially affect interstate commerce. For a discussion of this doctrinal evolution, see *United States v. Lopez*, 115 S. Ct. 1624, 1626-30 (1995). See generally Anthony B. Ching, *Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 Loy. L.A. L. Rev. 99, 102-23 (1995).

Modern Commerce Clause jurisprudence makes it clear that while Congress may legislate in matters that were considered state prerogatives in the early days, states may continue to regulate such matters unless preempted by federal law. See *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 143-47 (1963) (analyzing whether Supremacy Clause applied to state law that overlapped federal regulation). Cf. *Carey v. Population Servs.*, 431 U.S. 678, 685-90 (1977) (setting forth "compelling state interest" standard to be used to determine constitutionality of state regulation).

To control and abate air pollution and the depletion of the stratospheric ozone, Congress has enacted comprehensive legislation regulating the phasing out of the production of CFC throughout the United States. See 42 U.S.C. §§ 7671, *et seq.* Additionally, the United States has entered into a multinational treaty, the Montreal Protocol, ratified by the Senate in 1988, that provides for the phasing out of the manufacture and use of CFC throughout the world. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 10, 100th Cong., 1st Sess. (1987).

¹United States Constitution article I, § 8, cl. 3 provides that "The Congress shall have Power -- To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

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The Supremacy Clause of the Constitution² dictates that Arizona must follow federal law concerning matters delegated to the federal government by the Constitution.³ In such case, it is well-established that “[i]f a state measure conflicts with a federal requirement, the state provision must give way.” *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824)). Thus, A.R.S. § 49-409 (which authorizes the use and production of CFC) is preempted by the supreme federal law (which bans the use and production of CFC).

As the United States Supreme Court observed in holding that federal law preempted and thus invalidated an otherwise valid state statute:

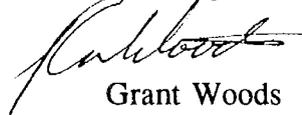
Where, as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that “This Constitution and Laws of the United States . . . made in pursuance thereof . . . shall be the supreme Law of the Land. . . .”

Case v. Bowles, 327 U.S. 92, 102 (1946).

Conclusion

Federal law preempts A.R.S. § 49-409, thus rendering it invalid.

Sincerely,



Grant Woods
Attorney General

²United States Constitution article VI, § 2 provides as follows: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.”

³Article II, § 2 of the Arizona Constitution recognizes the supremacy of the federal Constitution: “The constitution of the United States is the supreme law of the land.”