

MEASURING BRIEF

STATE OF FLORIDINA COURT OF APPEALS
DIVISION THREE

Cr. No. 08-1028

THE PEOPLE

Respondent/Cross-Appellant

v.

JEFFREY WILLIAMS

Appellant/Cross-Respondent

ON APPEAL FROM JUDGMENT OF
THE STATE OF FLORIDINA DISTRICT COURT
FOR THE DISTRICT OF STINSONIA

BRIEF FOR RESPONDENT/CROSS-APPELLANT

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STATEMENT OF ISSUES

1. Did Congress intend the term “animals” in the Twenty-Eight Hour Law to exclude chickens and apply only to quadruped livestock?
2. Under the Supremacy Clause of the U.S. Constitution, does Florida have the right to stop cruel transportation conditions for livestock when federal law puts an upper time limit on continuous confinement?

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction to hear the State’s cross-appeal under Rule 1028 of the Florida Rules of Criminal Procedure. Florida law provides jurisdiction for this court to hear appeals from criminal convictions. *See Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (affirming that Federal Constitution imposes on states no obligation to provide appellate review of criminal convictions; however, where state provides first appeals as of right, state must appoint counsel to represent indigent defendants). The standard of review on the first question presented, which turns solely on an interpretation of a federal statute, is de novo. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392 (2nd Cir. 2008) (“We review questions of the interpretation and constitutionality of a federal statute de novo.”); *Muller v. Costello*, 187 F.3d 298 (2nd Cir. 1999). The standard of review on the second question presented is de novo. *Drake v. Laboratory Corp. of Am. Holdings*, 458 F.3d 48, 56 (2nd Cir. 2006) (“Preemption is a conclusion of law, and we therefore review it de novo”).

STATEMENT OF FACTS

In 2008, Jeffrey Williams was stopped by a Florida Highway Patrol officer while driving his tractor-trailer. *Florida v. Williams*, Cr. No. 08-1028 at 2 (D. Stinsonia Nov. 11, 2008). His taillight was out. *Id.* Mr. Williams had approximately 10,000 chickens in his trailer.

Some were dead. Some couldn't stand. Some were alive and standing on top of the others. None were given any food, water or ventilation during their trip. *Id.*

The chickens are "spent." They can no longer lay eggs and have no normal market value. Mr. Williams sells these chickens to the USDA for school lunch programs. *Id.* Mr. Williams gets the spent ones for free. It is cheaper for an egg farm to give them away than to otherwise dispose of them. *Id.* at 1. Chickens can be an environmental hazard when they are thrown away as industrial trash and egg farms are subject to fines. *Id.* at 2.

Mr. Williams was arrested for 45 counts of animal cruelty in violation of Florida's Cruelty to Animals Law, 8 FRS § 621 (a)–(d). *Id.* In his defense, Mr. Williams claims that Florida's law is preempted by the federal Twenty-Eight Hour Law. That law generally prohibits livestock from being confined in transit for more than 28 hours. Mr. Williams claims his practice is "humane" because his trips last no more than 24 hours.

Mr. Williams was convicted on November 11, 2008. This appeal follows.

ARGUMENT

This court must uphold the defendant's conviction under Florida's Cruelty to Animals Law, 8 FRS § 621(a)–(d) (2008).¹ The defendant improperly relies on the defense that the federal Twenty-Eight Hour Law, 49 U.S.C. § 80502 (2006),² preempts Florida's Cruelty to Animals

¹ Florida's statute provides that "'Animal cruelty' is committed by every person who directly or indirectly causes any animal to be (a) overdriven, overworked, tortured, or tormented; (b) deprived of necessary sustenance, drink, shelter or protection from the weather; (c) denied of adequate exercise, room to lie down, or room to spread limbs, or (d) abused." 8 FRS § 621(a)–(d) (2008). The statute further defines "animal" as "all living creatures, including birds, regardless of their function or use by humans." *Id.* § 620(1).

² The federal Twenty-Eight Hour Law, in relevant part, provides:

(a) Confinement.-- (1) Except as provided in this section, [a transporter] transporting animals [within the United States] may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.

(2) Sheep may be confined for an additional 8 consecutive hours without being unloaded when the 28-hour period of confinement ends at night. Animals may be confined for--

law. This reliance is improper for two reasons. First, The Twenty-Eight Hour Law does not apply to chickens, and therefore does not preempt application of Florida's law to the defendant's actions here. This court should reverse the district court's ruling that the Twenty-Eight Hour Law applies to chickens. Further, even if the federal law applied to chickens, the Twenty-Eight Hour Law does not otherwise preempt Florida's Cruelty to Animals Law. The defendant failed to meet his burden to show preemption, and his conviction must stand.

I. THE TERM ANIMALS AS USED IN THE TWENTY-EIGHT HOUR RULE EXCLUDES CHICKENS AND OTHER BIRDS.

This court should reverse the district court's ruling that the federal Twenty-Eight Hour Law applies to chickens. The plain meaning of "animals" as used in the Twenty-Eight Hour Law is patently ambiguous. But applying traditional statutory construction methodology eliminates this ambiguity and demonstrates congressional intent to exclude chickens from the term "animals" as used in the federal statute. This legislative intent is evident from the legislative history, historical background and statutory purpose, and canons of statutory construction,

(A) more than 28 hours when the animals cannot be unloaded because of [unanticipated accidental causes]; and

(B) 36 consecutive hours when the owner or person having custody of animals being transported requests [a written extension] to 36 hours.

(3) Time spent in loading and unloading animals is not included as part of a period of confinement under this subsection.

(b) Unloading, feeding, watering, and rest.--Animals being transported shall be unloaded in a humane way into pens equipped for feeding, water, and rest for at least 5 consecutive hours. [The owner should feed the animals but if the owner doesn't, the transporter or trustee--]

(1) shall feed and water the animals at the reasonable expense of the owner or person having custody, except that the owner or shipper may provide food;

(2) has a lien on the animals for providing food, care, and custody that may be collected at the destination in the same way that a transportation charge is collected; and

(3) is not liable for detaining the animals for a reasonable period to comply with subsection (a) of this section.

including rules for interpreting statutes *in pari materia* and *ejusdem generis*. Taken together, this evidence supports the State’s assertion that the term “animals” in the Twenty-Eight Hour Law excludes chickens.

A. As Used in the Twenty-Eight Hour Law, the Plain Meaning of the Term “Animals” is Ambiguous As to Whether it Includes Chicken or Other Birds.

The meaning of the term “animals” as used within the federal Twenty-Eight Hour Law is ambiguous, and therefore this court must review the statute de novo to determine whether Congress intended the term “animals” to include chicken for purposes of the statute. To resolve the ambiguity, the court should rely on federal statutory construction methodology.

The statute’s ambiguity arises from the text of the statute, and from the common understanding of the term “animals” in the context of animal transport. First, the statute refers to “animals” generally eighteen times. *See* 49 U.S. C. § 80502. But the statute refers to only one type of animal, a “sheep,” when it provides extra time between rests in sheep transport. *Id.* § 80502(2). The specific reference to sheep raises the issue of whether Congress, by referring to a sheep, intended to limit the broader term “animals” to only those animals similar to sheep. Similarly, the reference to pens within the rail context raises additional ambiguities.³

These ambiguities require this court to determine whether Congress intended the term “animals” to have a more limited meaning for purposes of the statute. In so doing, this court should use federal statutory interpretation methodology because courts generally apply the methodology of the jurisdiction in which the statute was adopted in interpreting the statute. *See*

³ Specifically, subsection (a)(1) provides “Except as provided in this section, a rail carrier, express carrier, or common carrier (except by air or water), a receiver, trustee, or lessee of one of those carriers, or an owner or master of a vessel transporting animals...may not confine animals . . . [without rest].” *Id.* § 80502(a)(1). Subsection (b) refers to similar transporter language, and provides “Animals being transported shall be unloaded in a humane way into pens equipped for feeding, water, and rest for at least 5 . . . hours” This context creates a second ambiguity, because only certain animals can be transported by rail, and only certain animals can be confined in pens (certain birds, for example, cannot, because a pen could not confine a bird that could fly over the height of the pen).

Nike, Inc. v. McCarthy, 379 F.3d 576 (9th Cir. 2004) (holding that in the absence of a controlling interpretation of a statute statutory provision by the Oregon Supreme Court, the Ninth Circuit must construe the term as it believes the Oregon Supreme Court would); *see also Planned Parenthood of the Blue Ridge c. Camblos*, 155 F.3d 352, 382–84 (4th Cr. 1998); *but see Northwest Airlines, Inc. v. DOR*, 293 Wis.2d 202, 223 (2006) (“we employ the same methodology to interpret a federal statute as we do when we interpret a state statute”). Under guidance from the United States Supreme Court, when interpreting a federal statute, courts “must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). If the statute remains ambiguous, courts may then look to plain language, structure, purpose, and legislative history. *See Tafari v. Hues*, 473 F.3d 440 (2nd Cir. 2007) (employing all these methods of interpretation).

B. Traditional Methods of Statutory Interpretation Eliminate Any Ambiguity and Demonstrate that the Term “Animals” in the Twenty-Eight Hour Law Excludes Chickens.

Looking to plain language, structure, purpose, and legislative history surrounding the Twenty-Eight Hour Law demonstrates plainly that Congress intended to exclude chickens from the term “animals” in that Act. Early case law recognized this ambiguity in earlier text of the statute⁴ without resolving it. *See United States v. Louisville & N. R. Co.*, 18 Fed. 480, 482 (D. Tenn. 1883) (stating “Cattle and other quadrupeds used for food appear to be the primary objects of protection by congress from long confinement without food or water . . . [t]he term ‘other animals’ is also employed in the statute, which would include, of course, mules and horses,”

⁴ Congress adopted the first version of the Twenty-Eight Hour Law in 1873. It provided in relevant part: “No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals . . . shall confine the same for a longer period than twenty-eight consecutive hours, without unloading . . . for a period of at least five consecutive hours. . .” Rev. St. U.S. § 4386 (1873, amended 1906).

intimating that the law is limited to quadrupeds); *C. & O. Ry. Co. v. American Ex. Bk.*, 23 S.E. 935, 937 (Va. 1896) (pointing out that the term “animals” should cover any animal that might suffer in the same way cattle, hogs and sheep suffer when stuffed into a rail car); *see also The Twenty-Eight-Hour Law As Construed In Penal Actions—Part I*, 86 Cent. 23, 25 (1918) (noting both interpretations). While few, if any, other courts have interpreted this federal law, over the past century, states with animal cruelty laws that reference, but do not define the term “animals” remain divided as to whether the term includes chickens or birds. However, the rationales of courts excluding birds and chickens is persuasive. In *State ex rel. Miller v. Claiborne*, 211 Kan. 264, 267–68 (Kan. 1973), the court held that the “statute providing punishment for ‘instigating fights between animals whereby one may attack, bite, wound or worry another’ evinced no clear intent on the part of the Legislature to include gamecock fighting in the term ‘any animal’ as used therein.” Expanding the term to cock fighting would violate due process. *Id.* The court reasoned that in the common everyday experience of mankind chickens are seldom thought of as animals; rather, they are birds, with avian characteristics, in contrast to beasts of the field.” *Id.*; *but see State v. Cleve*, 980 P.2d 23, 25 (N.M. 1999) (holding state statute applied to domesticated animals and wild animals previously reduced to captivity, but not wild game animals).

1. Legislative History Demonstrates Congressional Intent to Exclude Chicken From the Term “Animal” in the Twenty-Eight Hour Law.

The legislative history surrounding the Twenty-Eight Hour law provides no conclusive intent regarding the meaning of “animals,” but it does strongly indicate congressional concern regarding sheep and cattle. Although Congress referred to “animals,” “livestock,” and “cattle” nearly interchangeably, neither the House nor the Senate mentioned poultry, chickens, or any non-quadruped when discussing the original 1873 legislation and the 1906 amendments. *See, e.g., Cong. Globe*, 42nd Cong., 2d Sess. 4227-28 (1872); 40 Cong. Rec. 8310, 8310–28 (1906);

Committee on Interstate and Foreign Commerce, House of Representatives (Jan. 23, 1906). The Senate, in particular, discussed the 1906 amendments in detail as they applied to cattle, but only mentioned one other animal, sheep, one time during the Senate floor debate. 40 Cong. Rec. 8310, 8310–28 (1906). These comments support the State’s assertion on appeal that Congress intended to exclude chicken from the term “animals.” By contrast, the revision notes to the 1994 amendments, which amend subsection (a)(1) by replacing the words “cattle, sheep, swine, or other animals” with “animals,” state the change was made merely to eliminate unnecessary words. *See* 49 U.S.C. § 80502 (2006) (Revision Notes and Legislative Reports).

2. Historical Conditions Demonstrate Congress Did Not Intend the Term “Animals” to Include Chickens under the Twenty-Eight Hour Law.

The nature of the poultry and cattle industries in the late nineteenth century support the State’s interpretation of the Twenty-Eight hour law. Congress did not intend “animals” in its 1873 law to include chicken because at that time only four-legged animals that grazed in the west, and not poultry, were shipped by rail. *See* U.S. Dept. of Agriculture, *Report of the Commissioner of Agriculture for the Year 1870*, 250–54 (1871). In fact, the report’s description of the problems associated with rail transport, and its suggestions for solutions, do not mention fowl of any kind, despite lengthy descriptions elsewhere in the report regarding hens, turkeys, geese, and ducks. *Id.* at 329–46, 535, 543.

During the second half of the nineteenth century, the poultry industry looked vastly different than it does today. Edward Lotterman, *Why No One Mourns the Loss of the Family Chicken Farm* (hereinafter *Family Chicken Farm*), Fedgazette 1, 1(Federal Reserve Bank of Minneapolis, April 1998); *available at*: http://www.minneapolisfed.org/publications_papers/issue.cfm?id=91. Most farms kept chickens or other fowl for subsistence meat and egg production. *Id.* Poultry farming was not a “major

business enterprise,” due in part to the lack of refrigeration or rapid transportation. *Id.* The lack of refrigerated transport meant only large cities benefitted from specialized chicken farms on their periphery; other areas relied on small-scale, localized production. *Id.*

The 1875 design of the first refrigerated rail car by G.H. Hammond supported transport of fresh meat, making it possible to ship eggs and poultry by rail. Elizabeth Boyle, Ph.D. and Rodolfo Estrada, Development of the U.S. Meat Industry 1 (Nov. 1994), *available at*: www.asi.ksu.edu/DesktopModules/ViewDocument.aspx?DocumentID=4265. This technical development, which occurred two years after the passage of the initial 1873 Twenty-Eight Hour Law, shifted egg and poultry production to a business enterprise in which farmers sold their surplus poultry to local merchants, who in turn sold it to larger firms. *Family Chicken Farm* at 1. But even as late as the Great Depression, poultry and egg businesses “generally were very secondary to other farm enterprises such as corn, wheat, milk, beef or pork.” *Family Chicken Farm* at 1; *see also* Darian M. Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals* (hereinafter *Corporate Ownership of Animals*), 70 LCPR 89, 93 (Winter 2007) (describing chicken farming through the early 1900s as largely a family affair devoid of profit motive, with each family caring for an average of twenty-three chickens; followed by a shift towards industrial chicken farming in the 1920s).

This historical account of the poultry industry contrasts greatly with that of the cattle and sheep industries. Poultry was largely locally produced, even though “[a]t times, old hens could also be crated and sold in town to be shipped off for processing somewhere else,” *Family Chicken Farm*, at 1. But by 1870, on the other hand, major eastern cities already imported cattle for four million people by rail, and three-quarters of this beef traveled 1,000 to 1,200 miles. *See* U.S. Dept. of Agriculture, *Report of the Commissioner of Agriculture for the Year 1870*, 250

(1871). Whereas chickens traveled in small crates, the United States Department of Agriculture (USDA) reported in 1870 that cattle, hogs, sheep, and horses arrived by the rail car load, were offloaded by chute to “pens,” or little yards that would hold a carload.⁵ *Id.*

The Commissioner of Agriculture reported on the state of the nation’s agricultural industries, published two years prior to the passage of the Twenty-Eight Hour law. The report described the problem:

The abuses on-these cattle trains have arrested the attention of public-spirited men and humanitarians, and much has been urged in journals and before the Society for the Prevention of Cruelty to Animals, but with so little effect that meat in the markets of the great eastern cities has not materially improved either in quality, wholesomeness, or cheapness. When a beef is driven up a chute and forced into a cattle car, his worry begins, he is jammed against other beeves, he is alarmed and irritated, sometimes his temper is soured, and he begins to gore right and left in the hope of fighting his way to freedom. . . . [A] thousand miles' ride takes 100 to 500 pounds of flesh from an animal; and he is in a jaded, sore, and feverish state when the butcher's mallet puts an end to his long misery.

Id. at 251. Importantly, the Commissioner’s report reflects the concerns that eventually led to the Twenty-Eight hour law’s passage. The report describes how cattle “are jammed against each other, and . . . dashed against the sides of the car with such force that a large bruise will be found . . . and the meat looks yellow and livid, and is quite unfit for food.” *Id.* Stockyards provided muddy, foul, or frozen water; dry hay, and no covered sheds; and “filthy and unwholesome pens.” *Id.* at 252. Cattle exposed to extreme conditions could be seen “lying at full length on the floor with their tongues lolling out of their mouths.” *Id.*

The report goes on to describe legislation proposed to address this problem by “[stopping to] let the animals have rest and pasturage two or three times on their way from Chicago to the sea board cities.” *Id.* at 251. In 1873, Congress passed a version of this recommended legislation

⁵ The pens at the Chicago stockyard, for example, could “easily contain at a time 25,000 head of cattle, 100,000 hogs, 50,000 sheep and 350 horses in stalls.” U.S. Dept. of Agriculture, *Report of the Commissioner of Agriculture for the Year 1870*, 250 (1871).

when it adopted the Twenty-Eight Hour law. Importantly, the report discusses poor conditions affecting four-legged animals but *never includes poultry or chicken* in its descriptions of the stockyards' unfit conditions.⁶ Instead, the report describes the problem in the context of travel from the western grazing industry along the railroads, to eastern consumers.

The whole subject of the meat supplies of this continent, the grazing interest, the drovers' trade, its relations to railroads, and the butchering and sale of meats have received very little of the attention of law-makers or of organizing talent in any form. . . . [T]raffic is guided solely by immediate self interest; it is incapable of far-sighted wisdom; it is blind to the essential and permanent good of the greatest number. There are two steps which . . . we venture to urge upon the attention of Congress.

1. The, appointment of a commission to examine into the subject of the *transportation of live animals*, to ferret out its abuses, and suggest modes by which those abuses and the mischief they create may be mitigate or wholly removed.
2. The offering of a special prize of honor to the inventor who will perfect and carry into practice the best method for the transportation of dressed meats over long distances and at all seasons.

Id. at 254 (emphasis added). Although the report makes suggestions for solutions that address “transportation of live *animals*,” this reference follows a detailed and lengthy discussion of the problems arising from the long distance transport of cattle, hogs, sheep and horses. *Id.* at 249–54.

Because at the time of the report's publication, chickens were transported only short distances and did not suffer from the same problems, the solution for “animals” that the Commissioner urged on Congress did not include or contemplate a definition that included chicken.⁷ Poultry production remained localized and small-scale until at least the 1920s. *See Corporate Ownership of Animals*, 70 LCPR 89, 93 (Winter 2007). Because only grazing

⁶ *See id.* at 252 (reporting that “cattle slaughtered for the consumption of the city are . . . in a feverish condition, and consequently unfit for human food . . . the sheep and lambs confined in [the sheep houses] are always overcrowded . . . badly treated and over-driven, and when put on the scales are packed so closely as to be unable to stand. Hogs receive the grossest treatment, and their pens are very filthy.”).

⁷ Instead, the Commissioner concluded his recommendation by describing the problem as “a subject of national importance, and one demanding deliberate investigation, and such general legislation as may be required to give efficiency to practical reforms in cattle transportation and meat supply.” *Id.* at 254.

animals, and not poultry or any fowl, presented health problems at the time Congress passed the 1873 Twenty-Eight Hour law and its 1906 amendments, Congress did not intend its use of the term “animals” to include chicken or any birds raised for meat.

3. Contemporaneous Statutes Suggest Congress Intended the Term “Animals” to Exclude Birds

Congress’s use of the word “animal” in other statutes indicates intent to exclude all birds, including chickens, from the Twenty-Eight Hour law. As a general rule of statutory construction, identical or similar words in related statutes or statutes with the same purpose should be read *in pari materia* to mean the same thing. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 355, n. 2 (2005); *McFarland v. Scott*, 512 U.S. 849, 858 (1994). In addition, “it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.” *Reiche v. Smythe*, 80 U.S. 162, 165 (1871). Under this rule of statutory construction, the Twenty-Eight Hour law’s reference to animals must similarly be read to exclude chickens because Congress consistently used “animal” to exclude chickens in both contemporaneous statutes *in pari materia*, and in modern statutes that it enacted closer in time to the Twenty-Eight Hour law’s 1994 amendments.

The Twenty-Eight Hour Law shares the same purpose as an 1892 amendment to a statute Congress entitled “An act for the prevention of cruelty to children or animals in the District of Columbia.” (hereinafter *The D.C. Animal Cruelty Act*) 27 Stat. 60, 60–61 (June 25, 1892). Although unlike the Twenty-Eight Hour Law, the Act only applied to the District of Columbia, Congress passed this statute to prevent animal cruelty, and therefore this court should read the statute *in pari materia* with the Twenty-Eight Hour Law’s 1906 amendments. *The D.C. Animal Cruelty Act* imposed a fine, imprisonment, or both upon anyone who owned or possessed a

disabled animal but left it in public after receiving notice of its disability. 27 Stat. 60, 60 § 4. The Act amended an earlier animal cruelty act adopted in 1871, several years prior to the original Twenty-Eight Hour Act. *See id.* § 3. *The D.C. Animal Cruelty Act* defined animal broadly: “That in this act the word ‘animals’ or ‘animal’ shall be held to include all living and sentient creatures (human beings excepted).” *Id.*

Yet a later section in the same act makes clear that even this broad definition of “animal” did not include birds. Section 6, which makes cockfighting a misdemeanor, imposes penalties for engaging any fight between cocks, fowls, *or other birds*, or dogs, bulls, bears, *or other animals*, premeditated by any persons owning or having custody of such *birds or animals*.” *Id.* § 6 (emphasis added). This language specifically lists birds even after the statute earlier defines animals to include “all living . . . creatures,” and goes further to impose this penalty on the custodian of *birds or animals*. The distinction in the language makes clear that even when defined very broadly, Congress intended to distinguish between animals and birds. Read *in pari materia* with the Twenty-Eight Hour Law, particularly given the historic background indicating that Congress passed the Twenty-Eight Hour Law at time when farmers did not transport poultry by train, this language indicates congressional intent to exclude chickens from the statute.

Congress also intended to exclude poultry from two related modern statutes, The Humane Methods Slaughter Act (HMSA), 7 U.S.C. §§ 1901–1906 (2006), and the Federal Meat Inspection Act of 1907 (FMIA), 21 U.S.C. §§ 601–613, 615–625, 641–645, 661, 671–679, 679a, 680, 683 (2006). The HMSA addresses the humane treatment of animals, and the FMIA protects the “health and welfare of consumers.” 21 U.S.C. § 602. In 1978, Congress amended both statutes by eliminating the HMSA’s enforcement provision, but providing for the HMSA’s enforcement through the FMIA, while at the same time requiring the USDA to ensure that

animals covered by the FMIA are also slaughtered in accordance with the HMSA of 1958. Pub.L. No. 95-445, 92 Stat. 1069 (Oct. 10, 1978); 21 U.S.C. § 676. Although Congress passed these statutes after it passed the Twenty-Eight Hour law (and its 1906 amendments), the 1978 HMSA and FMIA amendments indicate continued congressional intent to exclude chickens from the term “animals” even in modern statutes addressing the humane treatment of animals.

The HMSA provides that “[n]o method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane.” *Id.* § 1902. However, the HMSA provides that “in the case of cattle, calves, horses, mules, sheep, swine, and *other livestock, all animals* are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.” *Id.* § 1902(a) (emphasis added). Courts should read the HMSA *in pari materia* with the Twenty-Eight Hour law and the Act to Prevent Animal Cruelty in Washington, D.C., because Congress passed the HMSA for the purpose of “prevent[ing] needless suffering” of livestock. *See id.* § 1901 (listing this purpose among several in Congress’ findings and declaration of policy).

Recently, interests supporting the humane treatment of poultry brought an action against the USDA challenging the USDA's interpretive rule that excluding chickens and turkeys from the HMSA. *Levine v. Conner*, 540 F. Supp. 2d 1113 (N.D. Cal. 2008). However, the district court ruled that “livestock” within meaning of the HMSA did not include poultry. *Id.* at 1121. Instead, the court looked to plain language, legislative history, and canons of statutory construction⁸ to find support for the defendant’s argument that Congress intended to limit livestock to “other quadrupeds traditionally considered to be livestock.” *Id.* at 1120.

⁸ The *Conner* court relied in part on the traditional canon of statutory construction *ejusdem generis*, which provides that “where general words follow an enumeration of specific items, the general words are read as applying to other

Levine v. Conner is relevant here for two reasons. First, the case addresses the HMSA, a statute that uses the term “all animals” in reference to cases of “cattle, calves, horses, mules, sheep, swine, and *other livestock*.” 7 U.S.C. § 1902(a) (emphasis added). By ruling that “other livestock” excludes poultry, the *Conner* court necessarily determined that as used in the act, the phrase “all animals” also excludes poultry. This demonstrates that even as recently as 1978, when Congress adopted its latest amendments to the HMSA and the FMIA, it intended to distinguish between poultry (or birds), and animals, meaning livestock defined as “other quadrupeds traditionally considered to be livestock.” *See Conner*, 540 F. Supp. 2d at 1120.

Second, the *Conner* court’s analysis confirmed that the plain language of the term “livestock” itself is ambiguous, but that both traditionally and in modern times, the term refers to “quadrupeds” such as cattle, hogs, sheep, horses and mules. *Id.* at 1117–20. This ruling validates an important logical inference that indicates a congressional intent to exclude chickens from the Twenty-Eight Hour law. Livestock traditionally includes only quadrupeds, and at the time Congress passed the Twenty-Eight Hour Law only quadrupeds suffered in train transport. *See id.*, *See* U.S. Dept. of Agriculture, *Report of the Commissioner of Agriculture for the Year 1870*, 250 (1871). Therefore, it is logical to infer that as previously discussed, when Congress in its hearings on the Twenty-Eight Hour law referred to livestock, animals, cattle, and sheep, but not poultry, it intended to exclude poultry from the term “animal” in the law.

In conclusion, the plain meaning of “animal” as used in the Twenty-Eight Hour Law is ambiguous, but traditional evidence used in statutory construction supports the State’s assertion that Congress intended to exclude chickens. If the law does not cover chickens, it cannot preempt

items akin to those specifically enumerated.” *Conner*, 540 F. Supp. 2d 1113, 1120 (N.D. Cal. 2008). Applying this rule to the HMSA’s phrase “in the case of cattle, calves, horses, mules, sheep, swine, and other livestock,” the court ruled that “livestock” was a generic term following a list of specific terms and therefore the term livestock includes “quadrupeds” but not poultry because it only included items akin to the specific terms preceding it in the statute.

Floridina's Cruelty to Animals Law. Therefore, this court must uphold the defendant's conviction for Cruelty to Animals.

II. THE FEDERAL TWENTY-EIGHT HOUR LAW DOES NOT PREEMPT FLORIDINA'S ANIMAL CRUELTY LAW.

Even if chickens are animals within the meaning of the Twenty-Eight Hour Law, Appellant's conviction must be upheld. The Twenty-Eight Hour Law does not preempt Floridina's Animal Cruelty Law. Respondent State of Floridina asks this court to uphold the trial court's ruling.

There are four types of preemption: express, field, conflict, and obstacle. Preemption is a conclusion of law and is reviewed *de novo*. *Drake v. Laboratory Corp. of Am. Holdings*, 458 F.3d 48, 56 (2nd Cir. 2006).

A. The Twenty-Eight Hour Law Does Not Expressly Preempt Floridina's Animal Cruelty Law Because It Does Not Address the States.

Congress has the power to make its law exclusive. When it does, state law is void. U.S. Const., Art. VI, cl. 2. When Congress makes its intent clear on the face of a statute, preemption is express. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Here, the Twenty-Eight Hour Law does not address the states. It does not forbid them from policing animal transportation or cruelty nor outline a limited role for them to play in those areas. 49 U.S.C. § 80502. The present Act was passed as a codification bill, H.R. 1758, 103rd Cong. § 80502 (July 12, 1994), and it preserves in whole the substance of its predecessor. H. Rpt. 103-180 (July 15, 1993). That Act was equally silent. 45 U.S.C. §§ 71-74, *repealed by* P.L. 103-272 (1996). As such, the Twenty-Eight Hour Law does not expressly preempt Floridina's Animal Cruelty Law.

B. The Twenty-Eight Hour Law Does Not Preempt the Field of Florida's Animal Cruelty Law.

When Congress does not express its intent to preempt state law, a court may still infer that it intended to exclude the states from an entire field of regulation. That is the case when “[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left *no room* for the States to supplement it.” *Rice v. Santa Fe Elevator Corp*, 331 U.S. 218, 230 (1947) (emphasis added). However, that inquiry does not take place in a vacuum. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). It must always be assumed that Congress does not intend to displace the States’ traditional police power, especially in an area that they have traditionally occupied. *Id.* In other words, “[i]f the statute’s terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.” *Fla. East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001), quoting, *Gade v. Natl Solid Waste Mgt.*, 505 U.S. 88, 116-117 (1992) (Souter, J., dissenting).

This presumption serves in part to assure that the courts do not unnecessarily upset the “federal-state balance in the prosecution of crimes.” *Jones v. U.S.*, 529 U.S. 848, 849 (2000); quoting, *U.S. v. Bass*, 404 U.S. 336, 350 (1971). Congress’ intent must be “clear and manifest.” *Rice*, 331 U.S. at 230. Here, it is not.

1. Florida’s Law is Entitled to a Presumption Against Field Preemption Because Animal Cruelty is a Traditional Area of State Police Power.

Florida’s law is entitled to the strongest presumption against preemption. The States’ traditional police power is “defined as the authority to provide for the public health, safety, and morals....” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). Regulation of animals has long been within that authority. See e.g. *Nicchia v. N.Y.*, 254 U.S. 228 (1920) (dog licensing); *Reid v. Colo.*, 187 U.S. 137 (1902) (prohibition of diseased cattle). Moreover, the States’ police

power is not limited to protecting animals that reside within their borders. Since the early 20th Century states have been permitted to regulate in-state behavior that adversely affects animals elsewhere. *See e.g. Silz v. Hesterberg*, 21 U.S. 31 (1908) (prohibiting possession of game birds during off season, despite that they came from another state). Further, since the 19th Century the States have played a pervasive role in regulating animal cruelty. *See generally* David Favre and Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 Det. C. L. Rev. 1 (Spring 1993) (collecting statutes and cases).

Further, animal cruelty is a particularly distressing local problem. It corrupts public morals. *Animal Legal Defense Fund Bos., Inc. v. Provimi Veal Corp.*, 626 F.Supp. 278, 280 (D.Mass. 1986). As such, anti-cruelty laws combat “acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts.” *Id.* Florida has a duty to protect the public morals and so it has a profound need to regulate animal cruelty wherever it is known. It is entitled to a strong presumption against preemption.

The presumption is not upset merely because Florida's law touches interstate commerce. There are some areas of regulation where the federal interest is so dominant that there must be a presumption in favor of preemption. *Rice*, 331 U.S. at 230. Those areas require a uniform national posture. *See e.g. Hines v. Davidowitz*, 312 U.S. 52 (1941) (naturalization); *Crosby v. Natl Foreign Trade Council*, 530 U.S. 363 (2000) (foreign policy). Commerce, however, is not one of them. *Huron Portland Cement Co. v. Det.*, 362 U.S. 440 (1960).

In *Huron*, ship carriers challenged a city ordinance prohibiting them from running boilers at harbor. They claimed the ordinance was preempted: boilers were expressly permitted under federal law. Because the ordinance was aimed solely at abating air pollution, with the States'

traditional police power, and it regulated everyone in an even-handed way, it only touched commerce incidentally. No preemption was presumed. *Huron*, 362 U.S. at 443-444. As the Court later explained, *Huron* stands for the proposition that “federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.” *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

Here, Florida’s Animal Cruelty Law does not target interstate commerce. It regulates cruelty, commercial or not. Further, Appellant has given no reason why the interstate transport of animals is a subject that simply cannot tolerate any state regulation.

2. The Twenty-Eight Hour Law is Not Pervasive Enough to Overcome that Presumption Because it Leaves Ample Room for Supplementation.

Despite that Florida is entitled to a strong presumption against preemption, the Twenty-Eight Hour Law may oust state law if it is sufficiently pervasive. However, no such inference is reasonable if federal law leaves “ample room” for state law. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991). Here, the Twenty-Eight-Hour Law leaves a lot.

In *Mortier*, plaintiff challenged a Wisconsin permit regime that regulated the application of pesticides. Those pesticides were regulated by the Federal Insecticide, Fungicide, and Rodenticide Act and, for that reason, plaintiff claimed that federal law preempted. Section 136v(a) of FIFRA provided that “States may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act.” *Id.* at 602. The Court had to decide what that meant. The 6th Circuit and the District of Maryland had held, and *Amici* argued, FIFRA was sufficiently comprehensive that it impliedly preempted the field of pesticide

regulation. *Id.* at 612. As such, that section was argued to be a grant of regulatory authority against an implied backdrop of total preemption.

The Court rejected the premise. While FIFRA is comprehensive, and it addresses numerous aspects of pesticide control “in considerable detail,” it ultimately leaves substantial portions of that field vacant. *Id.* Decisively for the Court, FIFRA does not establish a permit regime for applying pesticides. *Id.*

The Court contrasted that omission with the regulatory thoroughness characteristic of field preemption. It is not the case that pesticides can be sprayed “only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.” *Id.* at 614, quoting, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 634 (1973) (internal quotes omitted). In *Burbank*, the Court held that the Federal Aviation Act impliedly preempted an air traffic curfew that abated noise. Despite that the curfew was within the state’s traditional police power, the federal law preempted. Airplanes can “move only by federal permission” and “[t]he moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.” *Burbank*, 411 U.S. at 624 (internal quotes omitted). Under *Mortier*, that is the standard for field preemption.

Here, Florida’s law targets cruel conditions while animals are moving in transit. The Twenty-Eight Hour Law does not address that at all, except to reward transit conditions that provide food, water and enough room to rest by exempting them from the Act. 49 U.S.C. § 80502 (c). For example, the Act does not decide what animals, healthy or sick, can endure interstate travel.

The Act is powerless to prevent crippled or dead livestock from being transported, alongside healthy stock or not. *Meeks, Boren & Miller Co. v. Cleveland Humane Socy.*, 22 Ohio

Dec. 517 (Ohio Com. Pleas 1912). In *Meeks*, the court noted that dead and live animals are transported together, “the offensive condition of the dead animal and the foul odor therefrom may sometimes cause sickness in live animals confined in the same car.” *Id.* The Act does not address that sort of cruelty.

Likewise, the Act does not prevent a carrier like appellant from suffocating and smothering his stock with lack of air and cramped conditions. He can move his hens without federal permission and Florida has filled a significant gap left by the Act.

To support his claim of field preemption Defendant relied below on *People v. Southern Pacific Co.*, 208 Cal. App. 2d 745 (1962). There, the District Court of Appeal of California held that the Twenty-Eight Hour Law impliedly preempted a statute that forbade cruelty to animals in general. That court was impressed by the “detailed care with which the federal act was framed...,” including the hours allowed for confinement, the interval for rest breaks, and the exclusively federal sanction. *Id.* at 751-752. Without explanation, *Southern Pacific* also found that the “natural operation” of the Act was to assure humane treatment. *Id.* at 752. In light of that detailed care the court found it “ineluctable” that Congress intended to occupy the entire field of cruelty in livestock transportation. *Id.*

That reasoning is without support. The Twenty-Eight Hour Law exhibits care in its detail. No inferences of preemption may be drawn, however, from the fact that Congress has legislated narrowly, choosing to “circumscribe its regulation and to occupy a limited field.” *Huron Portland Cement Co. v. Det.*, 362 U.S. 440, 443 (1960), quoting, *Savage v. Jones*, 225 U.S. 501, 533 (1912). That is, even with field preemption, Congress’ intent to preempt cannot be inferred unless the court can find some “actual conflict” with state law. *Id.* As such, it remains that field preemption must be anchored in the pervasiveness, the “volume and complexity,” of

federal regulation. *Hillsborough Co. Fla. V. Automated Medical Laboratories*, 471 U.S. 707, 718 (1985). Specificity and care have never been the test.

C. Floridina’s Cruelty To Animals Law Does Not Conflict With the Twenty-Eight Hour Law or Stand as an Obstacle to It.

In the absence of either express or field preemption, state law is invalid where it “actually conflicts” with federal law. *Hillsborough*, 471 U.S. at 713. Conflict preemption arises where state and federal law are contradictory. Obstacle preemption arises when state law stands in the way of the “accomplishment and execution of the full purposes and objectives of Congress.” *Hines*, 312 U.S. at 67. Neither type obtains.

1. The Twenty-Eight Hour Law Does Not Conflict With Floridina’s Law Because Defendant Can Comply With Both.

Conflict preemption involves an extremely narrow inquiry; whether it is “impossible for a private party to comply with both state and federal requirements....” *English v. General Electric Co.*, 496 U.S. 72, 80 (1990). Compliance must be a “physical impossibility”. *Avocado Growers*, 373 U.S. at 142-243 (emphasis added).

Here, no law keeps Appellant from giving his hens better conditions while they are moving. He cannot make a case for conflict preemption.

2. Floridina’s Law is not an Obstacle to the Twenty-Eight Hour Law Because. Congress Did Not Intend to Protect Carriers Like Appellant and has Clearly Expressed its Intent not to Preempt State Law.

State law is impliedly preempted when it is an obstacle to federal law. State law is an obstacle when it interferes with the purpose or objective of federal law and where it frustrates, in a practical way, the intended effects of federal law. *Crosby*, 530 U.S. at 373. The purpose of federal law is determined by its text and structure, and the history of the federal statute is also relevant, including prior versions and amendments. *See e.g. Geier v. American Honda Motor*

Co., Inc., 529 U.S. 861, 875 (2000) (looking to prior versions and amendments of motor vehicle regulation to determine its purpose). The intended effect of a statute is ultimately judged by “the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). However, the reviewing court must respect the role of the states as independent sovereigns and assume that Congress does not cavalierly preempt stat law. *Medtronic*, 518 U.S. at 485.

Here, while the Twenty-Eight Hour Law was addressed to animal cruelty in general, its intent was much narrower. The purpose of the Twenty-Eight Hour Law was to “prevent cruelty to animals while in transit.” 34 Stat. 607 (1906). The Act also served to “prevent injury to the public health from [the live-stocks’] sale for food when made ill by hunger, thirst, or exhaustion.” *Hogg v. Louisville & Nashville R.R. Co.*, 33 Ga. App. 773, 776 (1925) (citations omitted). Those purposes, however, were purely aspirational. The stated “intent” of the Act was much narrower: to prevent only the continuous confinement of livestock in interstate travel. 45 U.S.C. §71; *see Balt. & Ohio S.W. R.R. Co. v. U.S.*, 220 U.S. 94, 106 (1911). In line with its narrow intent, the Act does not preempt common law tort claims when a carrier neglects his care. *Hogg*, 33 Ga. App. at 776-777 (collecting cases). The disparity between the Act’s purpose and ultimate intent frustrates the inference that Congress ousted every measure of animal cruelty but its own.

The Act’s language of purpose, contrasted by its language of intent, has been excised. P.L. 103-272 (1994); 49 U.S.C. 80502. Congress deemed it “unnecessary.” H. Rpt. 103-180. However, when the Act was amended to its current form Congress intended absolutely no change in the substance of the law, and intended for all prior judicial interpretations to be

unaffected. *Id.* Instead of presuming that that amendment would change the meaning of the statute, Congress acted with the desire and belief that the courts would assume the opposite. *Id.* (collecting authorities). Congress has not indicated that Act's intent remains more than narrow.

Further, the Act's structure reveals that its effect was not to protect carriers like Appellant. The Act's dominant dynamic is that it compromises its prohibition on long hours only when checked by the owner's self interest, and then only to a limited extent. *U.S. v. Oregon R. & Nav. Co.*, 163 F. 640, 641 (D. Or. 1908). It does not protect those whose interests are divorced from their to their stock's wellbeing.

When the Act was amended in 1906, Congress' purpose was to toll the original Act's absolute time limit where its forced schedule had proven cruel. When proper unloading pens could not be found, the amendment would allow livestock to be confined for longer than twenty-eight hours, but not more than thirty-six. Sen. Rpt. 59-975 at 2 (Feb. 14, 1906). The owner or her agent was to be a sufficient judge, as injury to her stock would damage her pocketbook. 40 Cong. Rec. S3768 (March 14, 1906) (remarks of Senator Warren, Committee on Agriculture and Forestry, reporting on the bill). Congress presumed that abuse in transit would result in lost pounds, reducing the animal's value. *Id.* In that way, the stock's owner would always bear the cost for any abuse on the road.

Congress' trust in the owner was viewed as enabling more humane handling of livestock through more orderly shipment and without unnecessary delay. Sen. Rpt. 59-975 at 1. The 1906 amendment guarded that trust by protecting the owner's interest. It prevented the rail carriers from obtaining the owner's unknowing consent to allow her stock to be confined beyond necessity. The owner could extend confinement to thirty-six hours, as in the original Act, but

only by a written instrument separate from the bill of lading. *Id.* at 3. Congress sought to protect a natural market check on animal cruelty and to exploit it to that end.

Congress could not then have intended to privilege owners like Appellant from any charge of abuse. His chickens lose little value to him when they are brutalized. They are a profit to him even when many die in transit. Indeed, they are valuable because they are a waste. The USDA doesn't stand any better. To it the chickens are fungible. Neither has internalized the costs of animal cruelty in the way that a Cattle rancher must, who pays for every pound grown and lost.

Given its care in 1906 to balance animal welfare only against those who have a strong incentive to care for their stock, it is implausible that Congress intended to protect those who have none. *See Medtronic*, 518 U.S. at 487 (finding that appellant's statutory construction had the "perverse effect of granting complete liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order to "provide for more safety and effectiveness. . ."). That would be the effect of Appellant's reading.

The original Act's passage, however, indicates a clear intent not to preempt state law. There, in dissenters in the floor debates contended that the Act would be unconstitutional under the Commerce Clause. *Cong. Globe*, 42nd Cong., 2nd Sess. 4226–4237 (1872). There, Senator Casserly from California expressed his view that the Act would further be unconstitutional because it would infringe upon the States' police power, expressing his concern that "when two powers come in conflict, the lesser must give way." *Id.* at 4229. Mr. Casserly didn't vote for the bill. *Id.* at 4237. On the same point, however, Senator Frelinghuysen from the Committee on Agriculture, to whom the bill was referred, *Sen. J.*, 42nd Cong., 2nd Sess. 591 (1872), expressed his view that the States' police power would remain unaffected. Because the Act would marshal

only federal resources, the Senate was “just brought to the question whether it is wise to pass this act. . . .” Cong. Globe, 42nd Cong., 2nd Sess. at 4227. Whether it was true then that preemption may hang on who enforces the law, Mr. Frelinghuysen clearly expressed the Committee’s belief that the Act would not displace the States’ police power. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 475 (1921) (Finding that committee reports are an exposition of legislative intent where statute is ambiguous and this extends to supplemental statements by committeemen in course of bill passage), *superseded by statute, Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987). No report since has expressed a desire, intent, or need to change that view.

CONCLUSION

For the foregoing reasons, Respondent State of Florida asks this court to uphold Appellant’s conviction.

CERTIFICATION

We hereby certify that our brief is the product solely of the undersigned and that the undersigned have not received outside assistance of any kind in connection with the preparation of the brief.

Date: Jan. 5, 2009

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