STATE OF FLORIDINA
COURT OF APPEALS
DIVISION THREE

THE PEOPLE, Respondent/Cross-Appellant, v. JEFFREY WILLIAMS, Appellant/Cross-Respondent.	Cr. No. 08-1028 BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Does the term "animals" in the Twenty-Eight Hour Law include chickens?
2. Does the Supremacy Clause of the U.S. Constitution bar Williams' conviction under the Floridina anti-cruelty statute because the state anti-cruelty law is preempted by the federal Twenty-Eight Hour Law?

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SUMMARY OF ARGUMENT

The trial court erred as a matter of law in concluding that the word "animal" in the Twenty-Eight Hour Law includes chickens, yet the trial court correctly concluded that the Twenty-Eight Hour Law does not preempt the Floridina anti-cruelty statute.

The People of the State of Floridina ask this Court of Appeals to reverse in part and affirm in part the decision issued by the trial court. Because the trial court's error in interpreting the federal law's use of "animal" would introduce confusion in the law by creating inconsistent definitions among the federal humane-treatment laws, this part of the decision should be reversed. This court should affirm the rest of the decision, which provides that the Twenty-Eight Hour Law does not preempt the Floridina anti-cruelty statute. Rejecting the preemption challenge is the key to avoid eviscerating the only authority the State has to hold Appellant accountable for his cruelty to the hens in his custody. Federal law imposes no obligations regarding the hens' welfare. Allowing Appellant and others in Floridina to escape their responsibilities under the anti-cruelty statute would be repugnant to the public health, welfare and morals, thus subverting state legislative authority in an area of traditional state concern. Moreover, the immediate impact of a preemption finding would be felt by the millions of animals that Floridina lawmakers have determined deserve a minimum level of benevolence from their caretakers: food, water, a modicum of space, and prevention of needless suffering.

STATEMENT OF THE CASE

Jeffrey Williams appeals and the People of the State of Floridina cross-appeal from a judgment of the State of Floridina District of Stinsonia Court, following Williams' convictions on forty-five counts of cruelty to animals under facts stipulated to by both parties. Mem. Op. at 2. All forty-five counts derive from conditions found on Williams' tractor-trailer truck by a

Floridina Highway Patrol officer who stopped Williams when one of his taillights was out. *Id*. Williams had forced approximately ten thousand hens into his truck, which he routinely does for his business of collecting "spent hens" for free from factory farms and selling them to the United States Department of Agriculture ("USDA") for use in school-lunch programs. Mem. Op. at 1. Williams denies the hens food, water, ventilation, or any kind of care whatsoever, and approximately fifteen percent of the hens die during the trips. Mem. Op. at 2. Williams leaves the dead hens packed in with the live ones during the entire trip, which lasts up to twenty-four hours. *Id*. Accordingly, the trial court found Williams guilty of directly or indirectly causing the hens to be (1) tortured or tormented; (2) deprived of necessary sustenance and water; (3) denied adequate room to move around, lie down, or spread limbs; and (4) abused, in contravention of the Floridina Cruelty to Animals Law, 8 FRS sections 621(a)–(d). Mem. Op. at 11.

The Twenty-Eight Hour Law provides the applicable statutory language in its provisions for interstate transporters to unload most types of animals for feed, water and rest every twenty-eight hours, which is the maximum duration for confinement in a vehicle or vessel that the law allows (some exceptions exist but are not relevant to this case). *See* 49 U.S.C. § 80502 (2006). The statute does not define the word "animals." *Id.*

Both parties agree that, because he had transported the hens in his custody for only twenty-four hours, Appellant's mistreatment of the hens did not violate the Twenty-Eight Hour Law. Both parties also agree that, if the state statute is valid, Williams is liable for forty-five counts under the Floridina Cruelty to Animals Law, 8 FRS section 621. Mem. Op. at 2. The Floridina statute defines "animal" as any living creature, including birds. 8 FRS § 620(1) (2008). Cruelty to animals under the statute includes torturing, tormenting, depriving of necessary sustenance, drink, or shelter, and denying adequate exercise, room to lie down or to spread limbs. 8 FRS §

621 (2008).

In this appeal, this Court must determine whether the judgment below properly determined that (1) chickens are "animals" within the meaning of the Twenty-Eight Hour Law, 49 U.S.C. section 80502 ("Twenty-Eight Hour Law") and (2) that the Twenty-Eight Hour Law does not preempt Floridina's anti-cruelty statute. With regard to the first question presented, the People of the State of Floridina ask this Court to reconsider the trial court's decision that the Twenty-Eight Hour Law includes chickens within its scope. For the reasons set forth in the first part below, the Twenty-Eight Hour Law does not impose any requirements on the care of chickens, and therefore that portion of the judgment below should be reversed. With regard to the second question presented, Appellant argues that the Twenty-Eight Hour Law invalidates the Floridina Cruelty to Animals Law under the constitutional doctrine of preemption. For the reasons set forth in the second part below, the Twenty-Eight Hour Law does not preempt the Floridina Cruelty to Animals Law. Accordingly, Williams convictions for all forty-five counts of animal cruelty should be affirmed.

STANDARD OF REVIEW

The question of the meaning of the statute is a question of inferring Congress' intent. This case essentially poses questions of statutory construction and legislative intent; as such it requires *de novo* review using the statutory language as a starting point for analysis. *See United States v. Figueroa*, 165 F.3d 111, 114 (2d Cir. 1998). The second question is also a constitutional one requiring the same standard of review.

ARGUMENT

I. THE TWENTY-EIGHT HOUR LAW DOES NOT EXTEND TO CHICKENS

The ambiguity of the statutory language in defining whether it extends to chickens demands recourse to other aids to determine the meaning of the statute, including its context, purpose, internal consistency, and logic in relation to other federal statutes.

A. Courts Consider Context When Interpreting "Animals" Because of the Word's Intrinsic Ambiguity

Appellant contends that the word "animals" in the Twenty-Eight Hour Law is a plain and unambiguous term, precluding any need to look to other aids to construction. He concedes, however, that Congress supplied no definition of the term. If the statute supplied an unambiguous meaning, there would be no need to look beyond the language of the statute. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). The word "animals," however, in legal language, has an ambiguous meaning, both now and historically.

A brief survey of dictionary definitions demonstrates that the word, in itself, provides no definitive answer to whether chickens qualify as animals in the statute or not. The opinion in the judgment below quoted one definition from the Webster's Unabridged Dictionary that includes "any living thing" except for plants. *See* Mem. Op. at 4. This definition, coextensive with the taxonomy's kingdom of *Animalia*, would include everything from humans to microorganisms too small to be seen by the naked eye, such as mites and plankton. Webster's also defines "animal" as "any creature except a human being." *Webster's Third New Int'l Dictionary of the English Language, Unabridged* 85 (1993). Webster's contains another definition for the word, however, that excludes birds: "a mammal as distinguished from a bird, reptile, or other nonmammal." *Id.* The Cambridge International Dictionary of English (which includes

American usage according to the foreword on page viii) specifies that "[a]nimal often means an animal with four legs." *Cambridge Int'l Dictionary of English* 45 (1995). Likewise, the Oxford Dictionary notes that common parlance often restricts the word to "quadrupeds." *Compact Edition of the Oxford English Dictionary* 333 (1985).

Legal definitions of "animal" are no less confusing. Many different legal interpretations of the term have emerged, almost always falling short of anything so vast as the kingdom of *Animalia*. *See, e.g.*, *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994) (discussing a federal agency definition of "animal" that excludes birds, rats, and mice under the Federal Laboratory Animal Welfare Act, which states that "'animal' means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal as the Secretary may determine . . ."); *State ex rel. Miller v. Claiborne*, 505 P.2d 732, 734–735 (Kan. 1973) (following the meaning employed "in the common everyday experience of mankind [where] chickens are seldom thought of as animals; rather they are birds, with avian characteristics, in contrast to beasts of the field," and finding that the state's animal cruelty statutes traditionally apply to four-legged animals, "especially beasts of the field and beasts of burden"); *Tate v. Ogg*, 195 S.E. 496, 499 (Va. 1938) ("Viewed in its broad sense, the word 'animal,' in the language of the law, is used in contra-distinction to a human being, and signifies an inferior living creature, generally having the power of self-motion."); *Black's Law Dictionary* 96 (8th Ed. 2004) (defining "animal" as all non-human creatures). On the whole, chickens are excluded as often as not from the legal definition of "animals."

This array of conflicting definitions confirms the ambiguity of the word in a manner that recalls a recent federal court observation regarding the ambiguity of the word "livestock" in another federal statute: "The precise metes and bounds of the category . . . are not given. The

category of animals could thus be limited to a narrow group of quadrupeds like cattle and other bovine creatures or alternatively, it could be all encompassing . . . ." *Levine v. Conner*, 540 F. Supp. 2d 1113, 1116 (N.D. Cal. 2008). Contrary to Appellant's contentions, the word absent context fails to elucidate whether Congress intended to include chickens or not in this particular law. This fact is highlighted by Congress' widely varying uses of the word in other statutes. Some use the all-encompassing definition, as in 7 U.S.C. section 136(d) (2006) (defining animal as "all vertebrate and invertebrate species, including but not limited to man and other mammals, birds, fish, and shellfish" in the regulation of environmental pesticide control) and 7 U.S.C. section 8302(1) (2006) (defining "animal" as "any member of the animal kingdom (except a human)"). Still, many others separate out "animals" on the one side and "poultry" on the other in contradistinction. *See, e.g.*, 7 U.S.C. § 391 (2006) (establishing the Department of Agriculture Bureau of Animal Industry and its duty to "report upon the condition of domestic *animals and live poultry*," indicating a view of "animals" as not including "poultry"); 7 U.S.C. § 3804(a)(1) (2006) (stating the agency goal "to prevent the introduction or dissemination of any infectious or communicable disease of *animals or poultry*"); 7 U.S.C. §§ 3901–3902 (2006) (repeatedly discussing "domestic *animals, poultry*, and wildlife" and "*animals and birds*") (emphasis added in all quotations). The variety of Congress' own usage of the word only continues to undercut Appellant's argument that the word enjoys any clear, unequivocal meaning.

Because there is, in effect, no definitive ordinary or legal meaning to the word "animal" divorced from the word's context, courts show prudence in taking the context of the law into account when determining whether any particular species falls within its scope. *See Levine*, 540 F. Supp. 2d at 1117 ("In sum, the plain meaning of the word livestock is ambiguous. The court now turns to other indicators of Congressional intent to determine whether Congress intended to

exclude poultry when it used the term livestock."); *People of P. R. v. Shell Co.*, 302 U.S. 253, 258 (1937) ("Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.").

B. <u>The Context, Purpose, and Circumstances of the Twenty-Eight Hour Law Point to the Exclusion of Chickens</u>

The Twenty-Eight Hour Law was reenacted in nearly identical forms several times since 1873, but its 1906 title was particularly revelatory of its primary purpose: "The act to prevent cruelty to animals while in transit." *Baltimore & Ohio Sw. R.R. Co. v. United States*, 220 U.S. 94, 94, 103 (1911). Courts have repeatedly reaffirmed humane treatment as the primary purpose of the Twenty-Eight Hour Law. *See, e.g.*, *id.* at 106 (asserting that the statute "was not primarily intended for the benefit of the owners," but rather the welfare of the animals "in custody for transit . . ."); *United States v. Pere Marquette R.R. Co.*, 171 F. 586, 588 (C.C.W.D.N.Y. 1909) (ruling against an owner's ability to issue a blanket request for all future shipments to lengthen the period of confinement without food, water and rest, stating, "The act is a humane act, intended to prevent cruelty to animals; and the act also has in view the protection of the interests of the owners of the animals and of the public, in preventing their health and condition being injured in transit."); *Chesapeake & Ohio Ry. Co. v. Am. Exch. Bank*, 23 S.E. 935, 937 (Va. 1896) (refuting the notion that the Twenty-Eight Hour Law intended to protect consumers' health, but rather to "prevent cruelty and injury to animals that were shipped long distances"); *Hogg v. Louisville & N. R.R. Co.*, 127 S.E. 830, 831–32 (Ga. Ct. App. 1925) ("Its primary purpose, as its

title imports, is to require humane treatment for animals while being transported, and to prevent injury to the public health from their sale for food when made ill by hunger, thirst, or exhaustion.”).

Humane treatment as the intent comprising the law aids in interpreting the context in which we are to understand the word “animals” because other federal laws for the humane treatment of animals generally exclude birds. In federal and state law alike, humane-treatment statutes have not traditionally directed any efforts at setting minimum standards for the care of birds. In contrast, federal legislators, and society in general, have traditionally felt strongly about the humane treatment of horses, for example, thus justifying the *Chesapeake* court in including them within the law’s scope. *See Chesapeake*, 23 S.E. at 937. It is crucial to bear in mind that the law was originally enacted 136 years ago, and historically there was little to no concern regarding the treatment of chickens and other non-mammals, with nothing said in this law’s legislative history in the interim that would justify interpreting it as extending to farmed birds. To this day, most people would agree that horses, cattle, sheep or swine need the “rest” from confinement and travel that is provided for by the Twenty-Eight Hour Law but would not accord the same concern for chickens. Interpreting the Twenty-Eight Hour Law as excluding chickens also accords with analysis by lawmakers, agencies and courts of other federal laws dealing with the humane treatment of animals: not a single federal law addresses the welfare of chickens. *Notice on the Treatment of Poultry before Slaughter*, 70 Fed. Reg. 56624, 56624 (Sept. 28, 2005).

The context, intent and circumstances of this law make clear that the Appellant’s broad, catchall reading would lead to results contrary to Congress’ purposes. A sensible definition of “animal” for science would produce absurd results in this area of the law. Indeed, requiring unloading for feeding, water and rest for many animals under this definition, such as humans,

fish, or fleas, would be laughable. The wiser course is to attribute Congress' purposes here to mammalian quadrupeds, a course confirmed by application of the canons of construction to the statutory language.

C. The Statute's Internal Consistency Confirms the Intent to Exclude Chickens

Noscitur a sociis, the notion that a word is known by the company it keeps, points us to the language of the statute as a whole. The argument in Appellant's Brief that there would be no difficulty in applying to chickens the law's provisions for unloading into "pens equipped for feeding, water, and rest for at least 5 consecutive hours" or, alternatively, transporting "in a vehicle or vessel in which the animals have food, water, space, and an opportunity for rest" would be correct if that were the end of the story. There is much more to consider, however, and all of it points in the direction of excluding chickens.

In 1994, Congress revised the Twenty-Eight Hour Law, which had been on the books for well over one hundred years. The law as originally enacted included a list of animals to aid in statutory construction: "cattle, sheep, swine, or other animals." *Chesapeake*, 23 S.E. 935, 936 (Va. 1896). Under principles of *esjudem generis*, whereby "other animals" takes its meaning from the listed examples, this list suggested that Congress intended to limit the scope to quadrupeds such as goats, donkeys, and horses. The revised and recodified law dropped the examples of animals, stating simply that transporters "may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest." 49 U.S.C. § 80502(1) (2006).

The congressional record is devoid of any debate or comments on this change, beyond the general introduction to the bill, which declares its objective: "To revise, codify, and enact *without substantive change* certain general and permanent laws, related to transportation, as

subtitles II, III, and V-X of title 49, United States Code, 'Transportation', and to make other *technical improvements* in the Code." H.R. 1758, 103d Cong. (1994) (enacted) (emphasis added). If, as the trial court suggests, the list's elimination indicated that Congress was confirming an all-encompassing definition (*see* Mem. Op. at 6), then one would expect to find some sign in the legislative history that Congress contemplated this enormous expansion in the law's scope. *See Levine v. Conner*, 540 F. Supp. 2d 1113, 1116 n.4 (2008) (noting that the large numbers of farmed birds, as much as 98% of animals slaughtered, makes it unlikely "that Congress would decline to explicitly list the vast majority of a statute when specifically listing some beneficiaries"). Indeed, without so much as a word of warning to transporters, the statute would suddenly cover billions of individuals not previously covered by the beasts-of-the-field and beasts-of-burden interpretations of the law. It is contrary to common sense to read a substantial and far-reaching policy change into an amendment unless Congress explicitly stated, either in the statute or in the congressional record, that such was its intent. Interpreting this as a substantial change is particularly inappropriate given the bill's express objective to make "technical improvements" "without substantive change." H.R. 1758, 103d Cong. (1994) (enacted).

Had Congress wished to include such a common agricultural livestock as fowl, it would have been a simple matter to so indicate. Indicating that the scope extended beyond mammals would have involved merely extending the list featured in the original law by including an example of fowl. *Esjudem generis*, in that case, would dictate an expansion of "other animals" beyond quadrupeds to include chickens, geese, turkeys, ducks, and other farmed birds. Congress' choice to instead remove the list altogether should not be read as having the same effect. Had an actual substantive change been Congress' intent, it would have been much more clearly conveyed by

simply adding "chickens" or some other farmed-bird species to the list instead of removing the list altogether.

Much more likely is that the change signified no difference whatsoever from accepted judicial interpretations of the statute. Long ago, the notion existed that the list of examples signified inclusion only of four-legged animals intended for food; yet courts recognized that four-legged "beasts of burden," such as horses and mules, also qualified as animals under the statute. *Chesapeake*, 23 S.E. 935, 937 (Va. 1896). As Congress intended no substantive change, and as courts have never included birds within this statute's scope, it is much more likely that Congress merely wanted to effect a technical improvement that helps clarify coverage of horses and other mammalian quadrupeds, in accord with longstanding judicial precedent. Horses and mules satisfy any of the definitions above of "animals" when that designation is not expressly limited to certain types of animals. The same cannot be said for chickens.

D. Protecting Chickens in Transit from Standard Industry Practices on Farms Would Be Arbitrary and Illogical

No federal law concerns itself with the confinement of approximately 294 million egg-laying hens in battery cages where they lack the room to walk or spread their wings. *See* Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 Animal L. 133, 143 (2006). No federal law interferes with currently common industry practices such as the forced molting of hens to shock them, through starvation for up to fourteen days, into a new cycle of egg-laying. *2006 Legislative Review*, 13 Animal L. 299, 310 (2007); *2001 Legislative Review*, 8 Animal L. 259, 279 (2002). Nor does any federal law address the manner in which 8.89 billion chickens slaughtered yearly, such as whether legs and wings get broken or whether they die scalded while fully conscious,

despite protections for other types of livestock to prevent "needless suffering" under the Humane Methods of Slaughter Act, 7 U.S.C. sections 1901–1907. *See Notice on the Treatment of Poultry before Slaughter*, 70 Fed. Reg. 56624, 56624–25 (Sept. 28, 2005) (noting that "there is no specific federal humane handling and slaughter statute for poultry" and recommending voluntary compliance with certain industry guidelines).

Given this current state of affairs, it would be astonishing to find that, 136 years ago, federal legislators were so solicitous of chickens' welfare that they intended chickens travel in comfort. This would be particularly inconsistent given that they chose not meddle with chickens' conditions of confinement while stationary on *terra firma*. Surely federal law protects—or fails to protect—all chickens equally. All of the provisions of the Twenty-Eight Hour Law would require conditions that differ significantly from the rest of the chickens' lives on farms, providing them with space to walk, eat, and drink for five hours every twenty-eight hours even though farm chickens who never have the opportunity to travel would never in their lifetimes enjoy such treatment. Prohibiting for traveling chickens protracted confinement in densely packed cages where they cannot walk or see the light of day would be illogical given that this is standard industry practice when chickens are on farms. Similarly arbitrary in drawing distinctions between farm chickens and chickens traveling interstate would be concern over withdrawal of their feed and their needless suffering given that these, also, are normal industry-approved aspects of intensive farming. Such arbitrariness could only be conceived of on ridiculous grounds that no one would dare attribute to Congress—i.e. that traveling chickens should enjoy a five-star vacation whenever they travel to compensate for the miserable conditions they normally endure, or that as their short lifetime of confinement on death row comes to a close, they deserve a final meal, some space, and some rest before arrival at the

slaughterhouse. Here, the absurd-results rule applies, counseling this Court to give effect to the least absurd of the two readings possible in an ambiguous statute. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510–11 (1989) (majority opinion) (holding that a federal rule of evidence "can't mean what it says" where a literal reading would compel an irrational result); *Maples v. Dep't of Soc. Servs.*, 11 S.W.3d 869, 873 (Mo. Ct. App. 2000) ("The law favors a construction that harmonizes with reason, gives effect to the legislature's intent, and tends to avoid absurd results.").

As mentioned above, it would also be astonishing to find that Congress, as recently as 1994, effected such a major policy change by including farmed birds without so much as a whisper about it in the legislative history. The clear-statement rule, which assumes that Congress would not be vague or ambiguous in making a major policy change, steers this Court toward a narrow reading of the statute, excluding chickens from its scope.

E. Congress Has the Right to Exclude Chickens from the Law's Scope

Congress has the prerogative to guarantee a heightened standard of treatment for certain species while not protecting others. This is especially true for species, like chickens, that would require standards specific to them in proportion to industry standards while not in transit. Although reasons are not needed, there are several reasons why Congress would consider it prudent to restrict standards to certain species. For example, Congress can test a law's effectiveness by choosing a small group to apply it to. In this case, the small group coincides with those species that elicit the strongest feelings in the public, thereby justifying their higher priority. There is also always the federal government's concern of overreaching into areas of state sovereignty and unnecessarily preempting state laws. Finally, as only interstate transportation is subject to the Twenty-Eight Hour Law, Congress would naturally prefer not to

unduly burden interstate commerce with excessive regulation that intrastate commerce does not have to contend with. Leaving farmed birds under the regulatory care of states, which can more nimbly respond to their conditions and enforce their standards, reduces the risk of discrimination against interstate commerce.

Therefore, Congress' silence on standards for fowl in the Twenty-Eight Hour Law should not translate to automatic inclusion of the species. This Court should not impose on transporters standards designed specifically for large four-legged mammals. *See* 9 C.F.R. § 89 (2008) (setting forth under the Twenty-Eight Hour Law detailed sustaining rations for cattle, horses, mules, sheep, and swine).

Furthermore, interpreting the statute as imposing blanket standards on a completely dissimilar species would introduce a definition of "animal" that departs from other federal humane-treatment laws. By not applying the Twenty-Eight Hour Law to Appellant's transportation of spent hens, this Court will preserve the present relatively consistent interpretation of the federal laws that provide for humane treatment, excluding chickens across the board. Just as Congress has the prerogative to prioritize certain species, Congress may always choose later to extend national standards to chickens as well.

II. THE TWENTY-EIGHT HOUR LAW DOES NOT PREEMPT THE FLORIDINA ANTI-CRUELTY STATUTE

Appellant, as the party claiming preemption, has failed to meet his burden of proving preemption. Article VI, clause 2, of the Federal Constitution provides that the laws of the United States "shall be the supreme Law of the Land" notwithstanding any state laws to the contrary. Accordingly, any state law not in harmony with federal laws is preempted and therefore invalid.

To meet his burden in asserting that the Floridina anti-cruelty statute is unconstitutional under the Supremacy Clause, Appellant must overcome the presumption that states' historic police powers remain intact unless Congress had "the clear and manifest purpose" of superseding those powers. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Evidence of that purpose may only exist in one of four ways: (1) express preemption, which occurs when Congress states expressly that a law preempts state or local laws on the subject; (2) field preemption, which exists when Congress has blanketed the field of law by enacting a pervasive statutory and regulatory scheme suggesting an intent to preempt state or local laws on the subject; (3) conflict preemption, which occurs when complying with both the federal and state laws is physically impossible; or (4) obstacle preemption, which exists when the state law would work as an obstacle to the Congress' purposes and policies. *See, e.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (summarizing the types of preemption and finding obstacle preemption present in a state law involving foreign relations). Where there is doubt as to plausible readings of the law, courts "have a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 554 U.S. 431, 449 (2005).

As the trial court correctly surmised and Appellant concedes, express preemption is not at issue in the Twenty-Eight Hour Law because Congress never stated any intent to supplant state and local laws on the subject. Mem. Op. at 8. Appellant persists, however, in presenting arguments concerning the three remaining types of preemption. Throughout its reflection on the remaining types of preemption, the Court should keep in mind that statutory construction generally favors interpretation that avoids abrogating state sovereignty. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 475 (1996), in

discussing "the structure and limitations of federalism" vis-a-vis the State's interest in ensuring the health and welfare).

A. Numerous Gaps in the Field Belie Appellant's Claim of Field Preemption

When Congress has so completely blanketed a particular field with laws and regulations the 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). When Congress is acting in an area traditionally reserved to the states, the Court begins with the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id*. That is, even if federal law places restrictions or regulations on an activity, so long as Congress has not attempted to preclude state regulation of the same activity and the two different schemes can be harmonized, no field preemption will be found and the state law will operate *pari passu* with the federal law. It is essential to recognize that a finding of field preemption is a finding that Congress intended to prevent "*any and every* state law application in a particular area," even those state laws that complement rather than vitiate federal policy and practice. Mem. Op. at 9 (emphasis in original).

Crucially, when this Court has found field preemption, it has looked to see whether Congress has indicated, either by the structure of the legislation or by its history, that the field is of paramount federal concern. In *Rice*, for example, the Court found persuasive the fact that the original version of the statute in question expressly left to the states regulatory authority over warehouses and Congress, finding that the variance in application was too chaotic and disorderly, saw fit to eliminate that provision. *Rice*, 331 U.S. at 222-224. This elimination evinced Congress' intent to bar any and all state regulation over federal warehouse contracts.

See also Campbell v. Hussey, 368 U.S. 297, 299 (1961) (Congress found that "the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein"); *Egelhoff v. Eglehoff ex rel. Breiner*, 532 U.S. 141, 146-147 (2001) (in finding preemption over claims "relating to" ERISA, the Court noted Congress' express intent to have "nationally uniform plan administration").

Conversely, in *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), this Court declined to find that a federal standard for ripeness of avocados preempted a differing, though non-contradictory California standard. Although California required a more stringent standard that federal regulations demanded, the area of avocado ripeness was not one of compelling national character and had historically been left to state regulation. *Id*. at 143-145. Without a statement by Congress that it sought some degree of uniformity in the national sale and marketing of avocados, this Court would not impute one. "[W]e are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. We search in vain for such a mandate." *Id*. at 146. With no statement hinting at a desire by Congress to prospectively preempt all state laws in the statute or its history, "[t]he most plausible inference from the legislative scheme is that the Congress contemplated that state power to enact such regulations should remain unimpaired." *Id*. at 152.

Congress has certainly not so blanketed the field of humane treatment of farm animals nor the field of transportation of farm animals so as to raise field preemption as a challenge to the law. As the USDA itself recognized, "there is no specific federal humane handling and slaughter statute for poultry." *Notice on the Treatment of Poultry before Slaughter*, 70 Fed. Reg. 56624, 56624 (Sept. 28, 2005). The total lack of federal regulation of what amounts to billions of birds

used for food production shows that Congress had no intentions of completely occupying the field of farm animal welfare during transit.

Accordingly, this Court should not deem persuasive the contrary conclusion found in *People v. S. Pac. Co.*, 208 Cal. App. 2d 745, 751–52 (1962). That decision, which is not binding on this Court, contemplated the treatment of cattle, not chickens, and so did not fully appreciate the enormousness of the gaps in the Twenty-Eight Hour Law. *See id.* The California Court of Appeals reasoned that because Congress spelled out the details of the transporter's duty to care for the cattle as well as the civil penalties and the courts of jurisdiction, the law precluded prosecution under California's anti-cruelty statute of a railroad carrier for the prolonged confinement of 41 cattle without food or water. *See id.* As we have seen, however, the Twenty-Eight Hour Law is not as detailed as the decision claimed: while the statute provides certain details of duration (specifying, for example, twenty-eight hours, thirty-six hours, and five hours in its various provisions), 49 U.S.C. § 80502 (2006), and federal regulations associated with the statute specify details such as the amount of feed for each type of farm animal, it fails to set forth any standards whatsoever for the humane treatment of birds. *See* 9 C.F.R. § 89 (2008) (setting forth, for instance, different sustaining rations for cattle, horses, mules, sheep, and swine, and their respective sub-groups).

It should therefore be obvious that Congress left plenty of room for states to supplement the Twenty-Eight Hour Law in ways that accord with Congress' policies and purposes. The law's absolute silence on fowl indicates Congress' intent to leave considerations regarding their treatment while transported in interstate commerce to the states to regulate as they decide appropriate. The field is completely devoid of any federal regulation as far as these billions of chickens are concerned.

The same is true of the Humane Slaughter Act: since it does not regulate the slaughter of poultry, many states have introduced their own regulations. *See* Paige Tomaselli, *International Comparative Animal Cruelty Laws* at n.70–71 and accompanying text, Animal Legal & Historical Center (2003), *available at* http://www.animallaw.info/articles/ddusicacl.htm#70 (suggesting that state regulation can offer more effective enforcement). It is implausible to argue that a complete absence of laws on Congress' behalf should preempt any and every attempt by a state to fill the interstices. Analogously, the Twenty-Hour Law should also allow states to supplement its wide and substantial gaps with appropriate legislation.

Not only is there no reason why the Twenty-Eight Hour Law *should* encompass the full extent of carrier's duties to animals, but it also has *always* been supplemented by additional state and common-law duties. For years, defendants have tried the argument that carriers have no other duties to shipped animals, and for years, courts across the nation have found that additional duties can apply such as common-law negligence in civil suits and criminal liability under state penal codes. In short, the Twenty-Eight Hour Law does not amount to an authorization to confine animals for twenty-eight hours without food, water or rest. *See, e.g.*, *Hogg v. Louisville & N. R. Co.*, 127 S.E. 830, 832 (Ga. 1925) ("The 28-hour law, while prescribing fixed duties to live stock, 'is not a grant of privilege to the carrier authorizing it to confine the stock for the period of time therein mentioned, irrespective of the question of negligence in so doing. The question of negligence as to such confinement is still left as at common law, notwithstanding the statute.'") (quoting 4 Ruling Case Law 451); *Durrett v. Chicago, Rock Island & Pac. Ry. Co.*, 146 P. 962, 963 (N.M. 1915) (refuting defendant's argument that compliance with the statute relieved the carrier of any duties toward cattle that had been confined for almost twenty-eight hours).

Common-law duties that have traditionally supplemented the Twenty-Eight Hour Law include providing suitable facilities for feeding, watering and resting; furnishing wholesome food and water, and providing suitable cars. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Allen*, 88 P. 966, 967 (Kan. 1907) (requiring safe pens for feeding and watering cattle); *Kime v. S. Ry. Co.*, 76 S.E. 509, 511–12 (N.C. 1912) (finding the carrier at fault for negligence in not providing proper ventilation in the car when, as a result, healthy transported horses were in a condition "so shocking that we wonder why the ordinary dictates of humanity did not induce a different course on the part of the carrier, without regard to the question of legal duty"). These cases constitute further persuasive authority weighing against preemption because they demonstrate that states may, without posing any conflict, impose a higher standard than the federal one. *See, e.g.*, *Galloway v. Erie R.R. Co.*, 95 N.Y.S. 17 (N.Y. App. Div. 1905) (holding a carrier of cattle from one part of New York to another part of the same state liable for criminal cruelty in confining them thirty-five hours in view of the state's penal-code requirement of unloading for rest, water and feeding *every ten hours*); *Paul*, 373 U.S. at 146-147. States' efforts to codify what *Kime* terms "the ordinary dictates of humanity" in the transporting of animals provides key support to federal efforts to do the same, especially given the difficulties of federal officers in enforcing more stringent standards. Finding preemption in this case would rupture, with far-reaching harmful consequences, the longstanding balance achieved in these other courts' holdings.

B. <u>Applications of the Federal and State Laws Do Not Conflict</u>

It is difficult to imagine circumstances in which the Twenty-Eight Hour Law could preclude a state law by means of conflict preemption. The Twenty-Eight Hour Law establishes that which may be regarded as negligence per se. *Atchison, Topeka & Santa Fe Ry. Co v. Hill*, 171 S.W. 1028, 1030 (Tex. Civ. App. 1914). Setting a higher threshold for negligence under the civil code

does not pose any conflict because complying with the state law complements compliance with the federal law. If the Floridina statute prohibited carriers from unloading them for feeding, water and rest on trips longer than twenty-eight hours could it be physically impossible to comply with both laws. Alternatively, if the Twenty-Eight Hour Law amounted to an authorization for transporters to deny food, water, space and rest for periods of less than twenty-eight hours, then the Floridina statute would also make compliance impossible. Neither of these imagined cases could be further from the case here; thus conflict preemption does not exist.

Indeed, conflict preemption did not even exist in the case of a dealer in wild and exotic animals, licensed under the Animal Welfare Act, 7 U.S.C. sections 2131–2157, by the U.S. Department of Agriculture, in the face of an ordinance banning wild or dangerous animals. *DeHart v. Town of Austin, Ind.*, 39 F.3d 718 (1994). Appellant's Brief argues that *DeHart* is distinguishable because the Animal Welfare Act "expressly contemplates state and local regulation of animals," whereas the Twenty-Eight Hour Law does not expressly provide for complementing state and local regulation. *Id.* at 722. Appellant fails to note, however, that the Animal Welfare Act did not expressly contemplate a local regulation that would amount to a total prohibition of that which the Animal Welfare Act expressly permitted. Accordingly, the court analyzed all the preemption tests in arriving at its holding that the Animal Welfare Act does not preempt an ordinance banning wild or dangerous animals. *Id.* at 722. The finding is analogous to that in *Paul*, above, and that in the trial court in the present case. Mem. Op. at 8. So long as Congress has not clearly stated an intent to prevent states from supplementing federal law the several states are free to do so under their general police powers.

C. Application of the State Statute Furthers the Policies Underlying the Federal Statute

Likewise, the state statute is not susceptible to challenges regarding obstacle preemption. Of all the Twenty-Eight Hour Law's various purposes—protecting animals from inhumane treatment, protecting owners from damage to their animals, and protecting consumers of those animals destined for food from unhealthy conditions that could result in food-borne illnesses—none would be frustrated in the least by the coexistence of these two laws. Both laws have the effect of promoting the health, safety, welfare and morality in mutually supportive ways.

In 1873, the Forty-Second Congress also sought to protect consumers from ills associated with slaughtering animals sickened by inhumane shipping practices. Long-distance live animal transport enables diseases to spread quickly and over large areas, circumventing natural barriers that would normally slow the spread of illness and making it more difficult to trace diseases to their source. Never before has long-distance animal transport been such a threat to public health, due to the highly contagious nature of some livestock and poultry diseases and increased susceptibility to infection due to stress-impaired immune function.

By holding transporters of poultry to higher standards of care for the shipping of their livestock, Floridina furthers the purpose of the Twenty-Eight Hour Law instead of opposing it. By requiring more humane methods of transporting animals, Floridina law not only ensures that the animals will be treated with a minimum level of concern but will be more effective in blocking the spread of pestilence from animals to humans since the birds will be less likely to have become ill from privation. Without the supplement, there would be no regulation of poultry transportation at all: if Congress intended a uniform national system of poultry transportation human treatment guidelines, then it would have announced such a desire in statute, not silence.

Appellant's Brief, however, argues that interstate commerce is a highly regulated field, particularly in the areas of agriculture and transportation. Appellant invokes a Dormant Commerce Clause analysis in contending that the Twenty-Eight Hour Law attempts primarily to establish uniformity by imposing national standards that are free from state regulatory discrimination. This claim is inconsistent with the repeated findings of courts that the primary purpose of the Twenty-Hour Law is the humane treatment of livestock with a secondary purpose of preventing the spread of disease. As discussed below, however, this challenge is raised for the first time on appeal and should be dismissed.

D. The Consequences of Finding Preemption Would Produce an Absurd Incongruency Between Chickens in Transit and Chickens at the Farm

Congress' silence with respect to fowl in the Twenty-Eight Hour Law cannot be construed to mean that Congress thereby authorizes cruel treatment of fowl. There is no evidence in the legislative history of the statute indicating that Congress intended to preclude states' imposing higher standards on the humane treatment of animals during transit, nor that Congress intended to authorize inhumane treatment of chickens. On the contrary, by not placing national standards on the treatment of farmed birds in transit, Congress allows states to exercise their sovereign police powers on a state-by-state basis.

If this Court were to find preemption, an illogical difference between those birds traveling in intrastate commerce and those in interstate commerce would result. This would complicate the work of law enforcement in an area that is already challenging to enforce: for instance, an officer would need to ascertain from the truck driver where the truck had traveled from and where it would likely travel to. Any driver wishing to escape from the state's anti-cruelty laws could simply assert that the animals were destined for a place across state lines or arrange for bills of

lading that so indicate. Although such conduct would be fraudulent, the possibility highlights the absurdity of the laws applying only to travel occurring wholly within the state—no other law would be analogously inconsistent in its enforcement. The alternative would be to restrict the state's right to regulate intrastate transit. Either way, finding preemption would eviscerate the Floridina anti-cruelty statute as it applies to the transportation of chickens since there is no federal law regulating the transport of poultry..

E. Appellant's Dormant Commerce Clause and Takings Clause Challenges Are Raised for the First Time on Appeal and Should Thus Be Dismissed

Appellant further challenges in his brief that the Floridina anti-cruelty statute violates dormant commerce clause doctrine and should be found unconstitutional as a an impermissible interference with interstate commerce; alternatively, he also argues that the regulations deprive of him of so much of his property interest in the birds as to amount to a taking and he is thus due due compensation under the Takings Clause. Both of these arguments are raised for the first time on appeal and were either not presented at trial or not preserved in the record. They should therefore be dismissed as untimely.

CONCLUSION

The Twenty-Eight Hour Law is doubly limited: not only does it not apply to birds, it does not seek to stand as the only law regulating the transportation of livestock; indeed, it does not seek to regulate the transportation of poultry at all. Finding that the law obliges nothing more than compliance with the Twenty-Eight Hour Law would relieve Appellant, and many other shippers of animals, of any duties whatsoever during their protracted trips lasting up to twenty-eight hours, since Appellant's trips never last more than twenty-four hours and he only ships poultry. It would be unjust to allow such criminal cruelty, shocking to the conscience, especially when

Congress never suggested that its minimum threshold does not amount to the only legal duty toward shipped animals. The Twenty-Eight Hour law is silent on what constitutes an "animal" and the term is variegated and ambiguous in federal law. Legislative history and analogous federal laws and regulations demonstrate that poultry was never intended to be subject to the Twenty-Eight Hour Law. Since Congress gave no evidence of an intent to prevent even complementary state regulation, this court should defer to the presumption that state legislation is valid and permissible and find that the Twenty-Hour Law does not preempt the Floridina anti-cruelty statute.

For all of the above reasons, we, the People of the State of Floridina, respectfully pray this court grant our relief and overturn the the trial court's finding on whether birds fall under the Twenty-Eight Hour Act and uphold the trial court's finding that the Twenty-Eight Hour Act does not preempt the Floridina Cruelty to Animals Law.

Submitted this day, the fifth of January, 2009

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