No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Stevens' conviction under 18 U.S.C. § 48 based exclusively on the content of his films violates the Free Speech Clause of the First Amendment.

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STATEMENT OF THE CASE

1. In 1999, Congress enacted 18 U.S.C. § 48, which makes it a federal felony, punishable by up to five years of imprisonment, to "knowingly create[], sell[], or possess[] a depiction of animal cruelty," if done "with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. § 48(a) (2006).

The statute defines "depiction of animal cruelty" as "any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," as long as the act depicted "is illegal under Federal law" or under any "law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1).

Section 48 excepts from its criminal prohibition a "depiction" that "has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b).

"[T]o ensure that the Act does not chill protected speech," the President's signing statement explained that he would "broadly construe the Act's exception" and would "interpret * * * the Act [to] prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex." Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324.

2. Robert Stevens is a sixty-eight-year-old published author and documentary producer whose work focuses on the history, unique traits, and assets of the breed of dog commonly known as Pit Bulls. Stevens operated a business out of his home in rural southern Virginia called "Dogs of Velvet and Steel," which sold informational materials and equipment for the safe handling and care of Pit Bulls. Resp. C.A. Br. 6. His book, DOGS OF VELVET AND STEEL: PIT BULLDOGS: A MANUAL FOR OWNERS (1983), has been purchased and marketed by Amazon.com, Borders, and Barnes & Noble. Gov't Exh. 6A, B, & C; J.A. 134. Stevens has also published articles about the beneficial uses of Pit Bulls. C.A. App. 791-797. Other than the conviction vacated by the Third Circuit, Stevens has no criminal record. *Id. at* 720.

Stevens has long opposed dogfighting, advocating in his book that "pit fighting should remain illegal." VELVET AND STEEL, *supra* at 464; J.A. 135. His mission is for "the Pit Bull to be recognized, not as an outlaw, but a respected canine." VELVET AND STEEL, *supra* at 466. His work seeks to educate the public about the beneficial uses of Pit Bulls for "the legal activities described in this book – obedience, tracking [and hunting], weight-pulling, and the ultimate challenge, Schutzhund [protection]," and about "how to breed, condition, and train this unique animal" for those tasks. *Ibid*. (Preface) & 465; *see id*. at 497.

Stevens has also made five films about Pit Bulls. *Pit Protection* is the "[f]irst video ever made on training and conditioning Pit Bull dogs for obedience and protection," and *The $100 Keep* is "[t]he first

video ever on conditioning the Pit Bull." Gov't Exh. 7.[1]

As relevant here, Stevens' film, *Catch Dogs and Country Living* ("*Catch Dogs*"), "shows footage of hunting excursions in which pit bulls were used to catch wild boar, as well as footage of pit bulls being trained to perform the function of catching and subduing hogs or boars." Pet. App. 3a. Throughout the film and its "accompanying literature," *ibid.*, Stevens describes the serious dangers associated with boar hunting, the correct way to train a dog safely to catch prey, how many dogs to use, and how to "throw and tie a hog." Video: *Catch Dogs* 07:08-07:12; Gov't Exh. 7; C.A. App. 706 (explaining "how tough these wild hogs are"). He shows footage both of well-trained dogs performing properly, *Catch Dogs* at 45:29-31 ("This is where you want a catch dog to be."), and poorly trained dogs and hunters making errors, *id.* at 47:56-47:59 ("This segment shows you what you don't want."); *id.* at 35:26-35:54 (discussing improper use of a breaking stick to release dogs from prey). Such training is critical, Stevens explains, because, "[w]here we hunt, the people depend on the swamp for survival[,] they grow produce and eat the meat and fish." C.A. App. 709.

Near the beginning of the hour-long film is a three minute excerpt of a Pit Bull fight from Japan, where such fighting is legal, to show "the difference between a dogfight and catching stock." *Catch Dogs*

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[1] Stevens marketed his films and book from his website, pitbullife.com. Gov't Exh. 7. On one occasion, Stevens also advertised his films in *Sporting Dog Journal*. Pet. App. 3a.

at 02:26-02:37; Resp. C.A. Br. 7; Pet. App. 31a-32a. A one-minute segment later confirmed the point by showing the error made when a fighting Pit Bull in Mexico mistakenly caught a hog, with Stevens explaining that a fighting dog needs to be "retrain[ed]" before working as a catch dog. *Catch Dogs* at 47:56-48:58.

In *Pick-A-Winna: A Pit Bull Documentary* ("*Winna*"), Stevens compiled footage filmed by others documenting modern-day pit fights in Japan and fights in the United States from the 1960s and 1970s. Pet. App. 3a; J.A. 135. The accompanying literature explained that, while Stevens "do[es] not promote, encourage, or in any way condone dog fighting," such images demonstrate "what made our breed the courageous and intelligent breed that it is." J.A. 135. Thus, the film clips are "to be viewed in an historical perspective" and "in no way promote[] dog fighting." Video: *Winna* 02:48-03:02. Instead, "this video is about that which distinguishes our breed." *Id.* at 02:08-02:13; *id.* at 1:10:37-1:10:42 ("I hope you enjoyed that documentary on the historical aspect of our breed."). In addition, the "pamphlet and the video * * * [are] designed to provide the reader/viewer with a documentary about what historical pit dog fighting is – and is not" because "[t]here are many misconceptions" about it. C.A. App. 688; *see id.* at 691-698 (essay on the rules of historic dogfighting). "I am again, not condoning dog fighting – I am informing the readers what it really is," *id.* at 688, "for those who have no idea what the foundation of our breed, what makes our dogs what they are – and what they are not," *id.* at 698.

The film also teaches that "[a] Pit Bull is generally very sweet in temperament," C.A. App. 689, "has a more affectionate personality with humans than almost any breed of dog," and "ha[s] a bravery and intelligence * * * that is unparalleled in any other breed," *id*. at 690. The accompanying pamphlet concludes with Stevens describing how his dog could track lost people, hunt wild boar, and provide fully controlled home protection, all of which "you CANNOT get any other breed of dog to do." *Ibid.* "So – again – I do not match dogs, but I love the breed and I just explained why." *Ibid.*

Finally, in *Japan Pit Fights* ("*Japan Fights*") and its accompanying pamphlet, J.A. 140-146, Stevens documented three Pit Bull fights in Japan and explained how, in his view, pit fighting in Japan is conducted more humanely than in the United States, with no gambling, and "quality veterinarians that attend to each dog immediately following each match." J.A. 140. Stevens explains that, while fighting is legal in Japan, "my concentration is in the more modern utility of our breed: the show ring, weight pulling, home protection training, [and the] love of my life, catch dogs." Video: *Japan Fights* 01:47:28-01:47:48.

3. In March 2004, the government indicted Stevens on three counts of violating 18 U.S.C. § 48, based on his sale of *Catch Dogs*, *Winna* and *Japan Fights*. Pet. App. 4a. The district court denied Stevens' motion to dismiss the indictment on First Amendment grounds. Pet. App. 64a-75a.

At trial, the government did not "contend[] in any sense that he is actually fighting dogs," but instead that "he's selling items, including the videos,

which are of interest to dogfighters." C.A. App. 419; *see id.* at 437 ("The government makes no claim in this case that Mr. Stevens himself is personally fighting pit bull dogs."). Nor did the government contend that Stevens was present when any of the dogfighting scenes in his films were recorded. *Id.* at 673. Instead, according to the government, "the major issue in this case" is whether "these videos have serious * * * value," *id.* at 417, and to that end, the government focused on Stevens' decision "to put [certain scenes] in the videotape," *id.* at 673, to "cho[o]se the length of that scene," *ibid.*, and whether "there [is] any educational value beyond the first four to five seconds of" the *Catch Dogs* scene showing an erroneous catch, *id.* at 588-589; *see also id.* at 614.

Stevens presented expert testimony that each of the films has serious value. Dr. I. Lehr Brisbin, a fellow of the American Association for the Advancement of Science and a Senior Ecologist and Adjunct Professor at the University of Georgia, testified that he would use *Winna* as a teaching tool on Pit Bull behavior in animal-behavior classes at the University of Georgia and "to educate the public, legislative, city councils, [and] animal control officers." J.A. 110. With respect to *Japan Fights*, Dr. Brisbin testified that the film contains "serious educational value" for students of animal behavior. J.A. 111-112. Dr. Brisbin described how watching the dogfight exposes physiological traits in the dogs and suggests an "inner enzyme system of physiology" that is unique to the Pit Bull breed. *Ibid.* With respect to *Catch Dogs*, Dr. Brisbin testified that "Stevens is alone * * * in a very lonely field of those people who are telling people who own pit bulls [that] [y]ou have a responsibility to do things right, to not

get the dog hurt, try not to get the pig hurt and do things with control and training." J.A. 112. He also explained that "catching pigs with dogs is not only the most effective, but essentially the * * * most humane way to remove pigs from certain environmentally sensitive areas." C.A. App. 576.

Michael Riddle, a recognized expert in large-game hunting, C.A. App. 599-600, testified that Pit Bulls are commonly used as "catch dogs" on hunts to capture boars safely so that hunters can humanely kill the large game. J.A. 119-120. In his view, the video *Catch Dogs* was "very educational" because it "[s]hows a lot of what to do, but shows what not to do, and both are equally important in order to be an educated, learned individual when you get into the sport of hunting." J.A. 121. With respect to the brief dogfight scene, Riddle explained that "it falls into the history of the breed" and "it's best to know the history of the breed and know the animal and what his talent is." J.A. 122.

Glen Bui, acting Vice-President of the American Canine Foundation, an organization working to "end[] animal cruelty," Bui Dep. at 13:19-20, testified that Stevens' films were "extremely educational" and had serious historical value because they document how dogfighting occurred in the United States before it became illegal. *Id.* at 13:23-24. Bui also testified that the films contain educational value for law enforcement officials who regularly work with or encounter Pit Bulls. *Ibid.* He further attested that *Japan Fights* and *Winna* are valuable documentaries of the history of dog fighting and its cultural role in Japan. *Id.* at 13:32-34.

The government countered with the testimony of John Parker, of the Virginia Pork Industry Board, who saw no value in *Catch Dogs* because "I'm trying to think what value it would be to show a man doing a wrong thing. We like to show people doing a right thing." C.A. App. 555. He added that he "d[id]n't know of any educational value" that a film documenting the slaughterhouse process would have, adding "[i]t certainly would hurt the industry as far as our image is concerned." J.A. 103-104. A law enforcement agent trained by the Humane Society saw no value in the dogfighting images because they were "accurate[] dogfighting" depictions from decades earlier, C.A. App. 491, 495, and he concluded that *Catch Dogs* was valueless because a single one-minute scene in an hour-long movie went too long, J.A. 73-74. A veterinarian saw no value in either Stevens' images or in pictures of Spanish bullfights. J.A. 87; C.A. App. 519.

The jury was then instructed that, to convict, it must find that each "depiction[] as a whole" has "no serious scientific, educational or historic value." J.A. 132. The jury was further instructed, with the agreement of the government but over Stevens' objection, J.A. 133; C.A. App. 646, 650, that "serious" means "significant and of great import." J.A. 132.

The jury then convicted Stevens on all three counts, and he was sentenced to 37 months of imprisonment to be followed by three years of supervised release. Pet. App. 4a.

4. a. On appeal, the United States Court of Appeals for the Third Circuit, sitting *en banc*, held that Section 48 is an unconstitutional content-based

prohibition on speech that violates the First Amendment. Pet. App. 1a-63a.

The court first rejected the government's argument that depictions of animal cruelty are a category of speech that falls completely "outside First Amendment protection," like child pornography. Pet. App. 8a. The court found no compelling interest in banning speech to compensate for the "under-enforcement of state animal cruelty laws." *Id*. at 19a-20a. The court explained that, while marketing and broadcasting the images of child pornography compound the harm to child victims, animals suffer no additional harm attributable to the depiction itself. *Id*. at 23a.

With respect to the government's argument that the ban would "dry[]-up-the-market" for dogfighting, the court explained that "there is no empirical evidence in the record to confirm that the theory is valid." Pet. App. 23a. Evidence showed, instead, that revenue from gambling and spectators is "the primary economic motive" for dogfighting contests. *Id*. at 24a & n.10 (citing Humane Society fact sheet); J.A. 61.

In addition, the court concluded that Section 48 "potentially covers a great deal of constitutionally protected speech." Pet. App. 26a, 33a n.16. Excising speech of "serious" value from the statutory prohibition did not suffice, the court explained, because the First Amendment "does not require speech to have serious value," noting the "great spectrum between speech utterly without social value and high value speech." *Id*. at 26a. "[I]f the mere appendage of an exceptions clause serves to constitutionalize § 48," the court explained, "it is

difficult to imagine what category of speech the Government could not regulate through similar statutory engineering." *Ibid.*

b. Having concluded that the speech enjoys First Amendment protection, the court held that Section 48's broad prohibition on depictions could not survive strict scrutiny. The court reiterated that the ban on speech, as opposed to the ban on the underlying acts of cruelty, does not advance a compelling governmental interest. Pet. App. 29a. The court also explained that Section 48 underinclusive, because it permits a broad swath of animal cruelty images as long as they are for personal use and not for "commercial gain," and Section 48 is overinclusive because it bans depictions of acts that are lawful in the jurisdiction where they are recorded. *Id.* at 29a-31a.

Finally, with respect to overbreadth, the court stated that the "Government is too quick to conclude that a reading of the statute that covers a wide variety of ostensibly technical violations like hunting and fishing will not lead to prosecutions," because "the plain language of the statute" encompasses images of "hunt[ing] or fish[ing] out of season" and "a bullfight in Spain." Pet. App. 33a n.16. If that image has value, but not "serious" value, "then this violator only has prosecutorial discretion to fall back on." *Ibid.* Because they are facing "up to five years in prison," the court concluded, speakers should not have to "depend on prosecutorial discretion for a statute that sweeps this widely." *Ibid.*

c. The three-judge dissent argued that the statute passed strict scrutiny because "[o]ur nation's aversion to animal cruelty is deep-seated," Pet. App.

39a, and such acts are "a form of antisocial behavior," *id*. at 42a. In so contending, however, the dissent acknowledged that "sometimes the line between cruelty to animals and acceptable use of animals may be fine," *id*. at 44a n.21, and stressed that the conduct covered by Section 48 is not "of the same order as the reprehensible behavior implicit in child abuse," *id*. at 50a n.24.

SUMMARY OF ARGUMENT

This case is not about dogfighting or animal cruelty. The government and Stevens stand together opposing that. The question here is more fundamental: whether the government can send an individual to jail for up to five years just for making films – films that are not obscene, pornographic, inflammatory, defamatory, or even untruthful. They are controversial. But that is supposed to invigorate, not contract, the First Amendment's protection.

The Solicitor General insists, however, that, for a subject as topical as the humane treatment of animals, Congress has the power to rollback the First Amendment's protection based on nothing more than a legislative weighing of the speech's pros and cons. But the notion that Congress can suddenly strip a broad swath of never-before-regulated speech of First Amendment protection and send its creators to federal prison, based on nothing more than an *ad hoc* balancing of the "expressive value" of the speech against its "societal costs" is entirely alien to constitutional jurisprudence and a dangerous threat to liberty.

That is just the beginning of this statute's problems. Neither the government nor its amici can

really believe the foundational premise on which their constitutional arguments rest: that images of animals being intentionally wounded or killed are *categorically* valueless and harmful. One need look no further than the websites of the government's animal-rights amici, which use such images to inform, educate, and raise funds. Documentaries and photographs depicting far more gruesome dogfights, the clubbing of baby seals, and animal mistreatment at slaughterhouses, race tracks, circuses, bullfighting rings, and research laboratories have fueled the animal rights movement, supported legislation, and prompted vigorous public debate. Similar images pervade our media, from Hemingway to hunting videos, from *Charge of the Light Brigade* to *Conan, the Barbarian,* and from the reports of investigative journalists to the work of independent documentary makers.

The government's only answer is to assure that prosecutors and juries will inevitably agree that depictions like *Conan, the Barbarian* have "serious value." That is debateable. But it also misses the point. As the seven "value" exceptions reflect, Congress implicitly concluded that this speech was not categorically valueless based on its *content*, but only based on its *viewpoint or speaker identity*. So Congress enacted a statute, the net effect of which is to hinge the freedom to speak on the speaker's willingness to run the gauntlet of *post hoc* value assessments by prosecutors and juries with a five-year felony sentence hanging over his head.

That will not do. "The Speech Clause has no more certain antithesis" than the proposition that government can suppress speech "to produce

thoughts and statements acceptable to some groups or, indeed, all people," because that "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Grp.*, 515 U.S. 557, 579 (1995).

Finally, even if one were to assume that Congress could balance itself out of the First Amendment, the interests asserted here fall significantly short. To begin with, the government asserts an interest – halting all animal cruelty – that the legislative record expressly disavows. Members of Congress repeatedly denied any intent to prohibit anything other than crush videos. The problem is that the statute bears little resemblance to that professed purpose. But when Congress chooses to legislate at the constitutional precipice as Section 48 does, Congress itself needs to explain why rather than rely on courts and the Solicitor General to divine the reasons.

In any event, the interests proffered by the Solicitor General fail. Congress cannot candidly assert an interest in combating animal abuse when it long punished the cruel *conduct* more lightly than the *speech* depicting it. And the claim that drying up the supposed market for all depictions of harm to animals will end the conduct is unsubstantiated by any empirical evidence and countermanded by experience that shows the importance of such images in educating the public and facilitating prosecutions. In short, the only thing Section 48 dries up is protected speech about an important issue – or at least one perspective on that debate.

ARGUMENT

I. SECTION 48 UNCONSTITUTIONALLY CRIMINALIZES SPEECH PROTECTED BY THE FIRST AMENDMENT.

The government's brief forgets something basic: the First Amendment limits Congress; Congress does not limit the First Amendment.

A. Congress Cannot Create Categories Of Unprotected Speech Through *Ad Hoc* Balancing.

The government's argument depends critically on its assumption (Br. 12) that, "whether a certain class of speech enjoys First Amendment protection" depends on a legislative "balancing analysis" that weighs "the expressive value of the speech" against its "societal costs." That argument ignores both the Constitution's text and decades of precedent.

1. If the First Amendment meant to permit such a balancing test, then the First Amendment would read more like the Fourth Amendment, proscribing only "unreasonable" prohibitions on speech. U.S. Const., Amend. IV; *see Illinois v. Lidster*, 540 U.S. 419, 426-427 (2004). The Bill of Rights, however, made a different choice, commanding that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I. That is not the language of legislative weighing. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality) ("[W]e have never set forth a general test to determine * * * what categories of speech are so lacking in value that they fall outside the protection of the First Amendment.").

To be sure, enforcement of the Free Speech Clause has not hewed in every respect to its literal text. This Court has recognized, as a matter of "histor[y] and tradition[]," that certain very narrow categories of speech can be proscribed consistent with the First Amendment's design. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment); *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-383 (1992) ("From 1791 to the present, * * * our society * * * has permitted restrictions upon the content of speech in a few limited areas" "*because of their constitutionally proscribable content*"); *Roth v. United States*, 354 U.S. 476, 483-485 (1957) (per curiam) ("contemporaneous evidence" from the time of the First Amendment's adoption supports obscenity ban).

That focus on history and tradition is critical because it ensures that the First Amendment's shield is withheld only from those narrow categories of speech for which the Constitution itself never intended protection, but not from those forms of speech that the legislative majority just prefers not to protect. Protection against legislative hostility or constantly shifting public sentiment is, after all, the whole purpose of the First Amendment.

History and tradition thus have permitted the prohibition of words that, by their very utterance, initiate or threaten imminent criminal conduct or injury. *See United States v. Williams*, 128 S. Ct. 1830 (2008) ("offers to engage in illegal transactions"); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (fighting words); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) ("true threat[s]");

New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (defamation). History and tradition also permit categorical prohibitions of obscenity, *Roth v. United States*, 354 U.S. 476, 485 (1957), and child pornography, *see New York v. Ferber*, 458 U.S. 747, 760-761, 764-765 (1982), because those images were not historically or by tradition part of the Nation's discourse.

At the same time, the constraints of history and tradition explain why, "since the 1960's," this Court has steadily "limited" and "narrowed the scope of the traditional categorical exceptions," not swung wide the door to legislative supplementation as the government advocates. *R.A.V.*, 505 U.S. at 383; *see Cohen v. California*, 403 U.S. 15, 24 (1971) ("[W]e cannot overemphasize that * * * most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions."); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002) (virtual child pornography not "an additional category of unprotected speech"); *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (no "separate juridical category" for the Flag).

Indeed, even those categories previously recognized have gotten narrower, not broader. In fact, other than *Ferber*'s "adjust[ment]" of *Miller*'s obscenity test to strengthen longstanding prohibitions on child pornography, 458 U.S. at 764, the balancing approach discussed in *Chaplinsky v.*

New Hampshire, 315 U.S. 568, 572 (1942), has not uncovered any categories of unprotected speech.[2]

2. The government does not dispute that its category – depictions of the intentional wounding or killing of an animal that is illegal in some U.S. jurisdiction, 18 U.S.C. § 48(a) – falls outside the existing categories of unprotected speech. Nor does the government make any effort to ground its new category in historic and traditional limitations on the First Amendment. While acts of animal cruelty have long been outlawed, there have never been any laws against speech depicting the killing or wounding of animals from the time of the First Amendment's adoption through the intervening two centuries.[3] Thus every one of the scenes of American dogfights that Stevens compiled from others in the 1960s and 1970s was both lawful and constitutionally protected when originally created. It is only through the magic of congressional balancing that their constitutional protection supposedly evaporated so that what was constitutionally protected on Wednesday, December

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[2] The government's citation (Br. 11) of *Williams* is misplaced. *Williams* was "largely resolved" by the earlier holding in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), that "[o]ffers to engage in an illegal transaction are categorically excluded from First Amendment protection." *Williams*, 128 S. Ct. at 1841 (citing *Pittsburgh Press*, 413 U.S. at 388).

[3] The federal dogfighting law was not enacted until 1976, *see* Pub. L. No. 94-279, § 17, 90 Stat. 421 (1976), and most state felony laws were not enacted until the 1980s, http://aspca.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.html.

8, 1999, became the foundation for felony charges on Thursday, December 9th.

That notion – that *Chaplinsky* licensed Congress to write itself out of the First Amendment's prohibition without so much as a nod to original intent, history, or tradition – lacks any grounding in precedent and threatens to transform the Free Speech Clause from a bulwark of liberty into a blueprint for legislation.

B. Depictions Of The Intentional Wounding Or Killing Of Animals Are Protected Speech.

The government's balancing argument is wrong too. The linchpin of the government's position is its contention that the speech outlawed by Section 48 has "little or no social utility" (Br. 14) and is "no essential part of any exposition of ideas" (Br. 21). In particular, the government stakes out the position that, while "a person may express any idea he wishes about animal cruelty," he may not "do so by creating, selling, or possessing videos of live animals being tortured or killed in violation of law" (Br. 23). The government cannot possibly believe its own argument. Or so its amici should hope.

1. Section 48 Images Support Animal Rights Efforts.

As Section 48's House Report acknowledged, the proper treatment of animals has been a matter of intense public debate and interest, with organizations seeking to improve the treatment of animals "active participants in political dialog." H.R. Rep. No. 397, 106th Cong., 1st Sess. 4 (Oct. 19, 1999).

Images of the illegal and intentional wounding and killing of animals, however, have fueled the animal rights movement in this Country and influenced that political dialogue. One need look no further than amici's websites to see how they daily use images "of live animals being tortured or killed in violation of law" "to express any idea [they] wish[] about animal cruelty" (U.S. Br. 23), as well as to raise funds. HSUS Br. 16 (animal protection groups raise $1.3 billion annually).[4]

Similar images are used by law enforcement, documentarians, investigative journalists, and countless interest groups to inform, educate, lobby, debate, and persuade about the proper treatment of animals in scientific experimentation, recreation, slaughterhouses, industrial farms, the harvesting of fur from baby seals and other animals, and entertainment (ranging from rodeos to circuses to horse racing to movie-making). *See, e.g., Panorama: Dogfighting Undercover* (BBC One television

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[4] *See, e.g.*, HSUS Cert Br. 2 nn.2 & 3; http://multimedia.hsus.org/investigation/squishy.html (hyperlinks to crush videos); http://video.hsus.org/ (hyperlinks to numerous videos containing depictions of animal cruelty, including dogfights (*End Dogfighting in Chicago*), hog-dog fights (*Hog Dog Fighting: Cruelty in the Ring*); and cockfights (*A Fight to the Death: Putting an End to Cockfighting*)); http://aspcacommunity.ning.com/video/658300:Video:432385 (video containing images of dogfighting); http://www.youtube.com/aldfstaff (containing hyperlink to video entitled "Dog shooting in Florida"). *See also* People for the Ethical Treatment of Animals, http://savethesheep.com/photo.asp (containing images of animal cruelty in the wool industry overseas).

broadcast Aug. 30, 2007), *available at* http://topdocumentaryfilms.com/dogfighting-undercover/); "Dogs of War," *Dateline, NBC: Dogs of War* (NBC television broadcast June 28, 1994) (dogfighting); *Food, Inc.* (Participant Media 2008) (2008 documentary revealing, *inter alia*, inhumane and unsanitary conditions at slaughterhouses).[5]

While such images are unpleasant to watch, that is not the test for constitutional protection. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414 (1989); *see Virginia v. Black*, 538 U.S. 343, 357 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas' – even ideas that the overwhelming majority of people might find distasteful or discomforting."). If such images were not protected speech – if such images could not force people to look at and think about the true costs of meat-eating, fur-wearing, and using animals for entertainment – the animal-rights

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[5] *See also Death on a Factory Farm* (HBO television broadcast Mar. 16, 2009), (documentary featuring footage of pigs being beaten to death and other inhumane conditions); Robert Mitchum, *Foie Gras Video: Animal-rights Activist Settles Libel Suit with Foie Gras Producer,"* CHICAGO TRIBUNE, June 18, 2009, *available at* http://www.chicagotribune.com/news/local/chi-foie-gras-trial-18-jun18,0,3767930.story (discussing a video allegedly revealing abuse of ducks at Foie Gras producing farm); *see generally Statement on Animals in Entertainment and Competition*, http://www.hsus.org/about_us/statements/animals_in_entertainment.html.

movement, journalists, and documentarians would find it profoundly more difficult to provoke public thought and debate about such issues. Certainly, the dissent's assertion that any "serious work" could be accomplished through "simulat[ion]" (Pet. App. 48a) falls flat in this context.

Indeed, while the Humane Society tells this Court that "gruesome depictions" of dogfighting "do not merit the dignity of full First Amendment protection" and do not "convey[] any ideas or information" (HSUS Br. 20), the Humane Society's own website employs such images as part of its advocacy effort to convey ideas and information, *see* http://video.hsus.org (Video Search for "dog fight" leads to hyperlinks to, *e.g.*, *Dog Fighting: Brutal Bloodsport* and *End Dogfighting in Chicago).*

Furthermore, outside of Court, the Society lauds as a "must see" Hollywood producer David Roma's documentary about Pit Bulls that contains horrific images from modern-day dogfights of dogs with portions of their eyes, ears, and noses torn away and a dog disemboweled after a fight in the pit. *See* Bobby Brown & David Roma, *Off the Chain* (24/7 Food Inc. and Illucid Productions 2005) (Humane Society review on cover: "This film is a must see – exposing the ultimate betrayal of man's best friend.").

Stevens' dogfighting images, by contrast, lack any such images of blood or serious injury to the dogs both because he opposes dogfighting and because his purpose is to illustrate the genetic traits of Pit Bulls – endurance, courage, stamina, strength, and disposition – that make the breed so well-suited for

non-dogfighting activities like hunting, field trails, and weight pulling.[6] Nowhere in its brief does the Society explain why its own or Roma's "gruesome depictions" of dogfighting are constitutionally protected and "must see," but Stevens' far tamer depictions are not. Unless, that is, they just object to Stevens' viewpoint.

2. Protected Images Pervade American Culture.

Images of the intentional wounding or killing of animals covered by Section 48 pervade our society, media, and literature because animals pervade our lives. Keeping in mind that Section 48's felony prohibition turns on whether the act depicted (i) "is illegal," not "was illegal" when the depiction was created, (ii) is illegal wherever the image is possessed or sold, "regardless" of the act's legality where recorded, and (iii) is illegal under any federal or state law, regardless of whether it is labeled an "animal

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[6] Tellingly, the prosecutor had to instruct the jury to "[l]ook carefully" to see any blood droplets in Stevens' images of dogfighting, C.A. App. 439, and had to bring in an expert to opine that the dogs might have suffered injuries, J.A. 80-84. The government's claim (Br. 20-21) that the dogs in Stevens' films are "ripped and torn" and "screaming in pain" overstates the record and underscores the government's refusal to consider the work as a whole. There are no "ripped and torn' dogs in these films, there are no dog sounds at all in *Winna* and there are, at most, 25 seconds containing yelps in *Japan Fights*', 108-minute film. *See Japan Fights* at 47:43-48:17, 1:44:57-1:45:07 (visible wounds); *id.* at 43:01, 43:58, 44:00-01, 44:49-51, 44:55-56, 45:00-04, 47:11, 47:17, 47:20-22, 1:18:54-55, 1:23:24-25 (yelps).

cruelty" law, 18 U.S.C. § 48(c)(1), the government's assertion (Br. 14) that the statute's sweep is "narrowly circumscribe[d]" blinks reality.

Because, as a form of animal fighting, bullfighting is illegal in the United States, 7 U.S.C. § 2156, Section 48's definition of "depiction[s] of animal cruelty" reaches books like Ernest Hemingway's DEATH IN THE AFTERNOON (Scribner 1960), with its pictures of bulls being wounded and killed in actual Spanish bullfights; the innumerable photographs of bullfighting that accompany the annual Running of the Bulls in Pamplona, Spain (*see, e.g.*, Leigh Ann Henion, *Ernest Hemingway's Spain*, WASH. POST. MAGAZINE, Mar. 29, 2009, at 1, 24; *Thrill-Seekers Run with the Bulls in Spain*, WASH. POST., http://www.washingtonpost.com/wp-dyn/content/gallery/2009/07/08/GA2009070802841.html; Running of the Bulls, Philly.com, http://www.philly.com/philly/news/world/50261147.html); and the Colbert Report's recent use of a bullfighting clip in discussing the American soccer team's victory over Spain, (Soccer by Ives: Stephen Colbert Talks American Soccer, http://www.soccerbyives.net/soccer_by_ives/2009/07/stephen-colbert-talks-american-soccer.html). Photographs depicting Philippine cockfighting now face prosecution. *See, e.g.*, http://www.jacobimages.com (search for "cockfight" in the "Search Images" box).

In addition, countless movies – ranging from Errol Flynn's, *The Charge of the Light Brigade* (1936), where filmmakers used wires to trip over one hundred horses, causing several horses to die, to *Apocalypse Now* (1979) (water buffalo dismembered),

from Arnold Schwarzenegger's *Conan, the Barbarian* (1982) (wires tripped horse), to *Fast and Furious 4* (2009) (Mexican cockfight) – have been identified as containing depictions of intentional and illegal animal cruelty, *see* Addendum B, *infra*, and thus fall within Section 48's grasp if screened in theaters or rented by Netflix.

Because all hunting is illegal in the District of Columbia, D.C. Code § 19-1560.1 (2009), and is subject to a patchwork quilt of regulation across the Country (with broad variation in which animals can be killed and with what weapons), thousands of hunting videos, magazines, photographs, and television shows also trigger Section 48's coverage.[7]

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[7] For example, Alabama, Georgia, Tennessee, Texas, and Virginia allow hunting with crossbows. Ala. Code § 9-11-45.1; Ga. Code Ann. § 27-3-4; Tenn. Wildlife Resources Agency, 2008 Tennessee Hunting & Trapping Guide 15 (2008), *available at* http://www.state.tn.us/twra/pdfs/huntguide.pdf; Tex. Parks & Wildlife Code Ann. § 62.014(d); Va. Code Ann. § 29.1-519. Oregon bans it, *see* Or. Admin. R. 635-065-0725, and a majority of States permit it only for those with disabilities, *see* http://www.huntersfriend.com/crossbows/crossbow-state-regulations.htm (summarizing regulations by State). Hunting wolves is legal in at least one state, *see* Alaska Stat. § 16.05.340, but is illegal in others, *see* News Release, U.S. Dep't of Interior, Secretary Salazar Affirms Decision to Delist Gray Wolves in Western Great Lakes, Portion of Northern Rockies (Mar. 6, 2009), *available at* http://www.doi.gov/news/09_News_Releases/030609b.html. Hunters in Alabama can use a spear to kill deer, *see* Ala. Admin. Code. r. 220-2-.02, but hunters in New York cannot, *see* http://www.dec.ny.gov/outdoor/28182.html. The majority of States permit captive hunting (the hunting of animals in enclosures), while eleven States do not. *See* http://www.hsus.org/wildlife_abuse/campaigns/canned/stateregs.

The Discovery Channel's own segment filming (just like Stevens does) the use of catch dogs to capture wild boar likewise triggers Section 48. *See Pig Bomb* (Discovery Channel television broadcast May 17, 2009), *excerpt available at* http://www.discoverychannel.ca/Article.aspx?aid=16572. *See also, e.g.*, www.cabelas.com (selling, *e.g.*, *Coyote Overdose* (2005) with "over 30 awesome kills"); www.druryoutdoors.com ("Predator Madness" series with scores of "kills"); http://www.deeranddeerhunting.com (videos of deer hunting); HuntSmart.com (hunting videos include the multi-volume *Texas Dogs on Hogs* video series, and *Master of the Black Bears*, which depicts hunting bears with bows).[8]

3. The "Serious Value" Exception Does Not Save Section 48.

While the United States backhands the reality of Section 48's scope as "isolated hypotheticals" (Br. 47), Stevens can hardly be faulted for "believ[ing] the written law means what it says." *Baggett v. Bullitt*,

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[8] *See also* Amazon.com, (listing 592 videos under VHS > Sports > Hunting and 163 videos under DVD > Sports > Hunting); http://www.walmart.com/search/search-ng.do?search_constraint=4096&ic=48_0&search_query=hunting&Find.x=0&Find.y=0&Find=Find ("Sports Afield: Hunting" series); http://quakerboygamecalls.com/store.php?crn=210 ("Born to Hunt Turkey" and "Born to Hunt Deer" series); http://store.mossyoak.com/SearchResult.aspx?CategoryID=43 ("Turkey School" series, "Wild Fair Chase" series, "Extreme Spring" series); http://www.realtree.com/store/ ("Monster Bucks" series, "Monster Bulls" series).

377 U.S. 360, 374 (1964). Tellingly, the government never denies that every one of those images (and countless more) falls squarely within the plain text of Section 48's covered "depiction[s] of animal cruelty." Instead, the government confidently asserts that the statutory exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. § 48(b), solves all of Section 48's problems. That stands First Amendment law on its head.

First, if "depictions of animal cruelty" are otherwise protected speech, then nothing in the First Amendment permits Congress to imprison speakers because their speech has value but not "serious value," let alone because their speech is not "significant and of great import," J.A. 132. Incoherent ramblings and "[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Cohen*, 403 U.S. at 25 (citing *Winters v. New York*, 333 U.S. 507, 528 (1948)).

More to the point, Section 48's seven "serious value" exceptions confess that this speech is not *categorically* unworthy of constitutional protection. But then Congress's attempt to condition speakers' First Amendment protection on the existence of serious value is itself unconstitutional.

Second, because Section 48 leaves the "serious value" exception to do all the constitutional work of distinguishing legal from illegal speech, the statute's dividing line, in practice, turns not on content, but impermissibly along viewpoint or speaker-identity lines. Graphic images of illegal dogfights displayed by Hollywood producers, Dateline, and the Humane

Society are statutorily protected as educational, journalistic, or political speech because they oppose dogfighting, but Stevens must go to prison for three years just because his condemnations of dogfighting were not deemed enthusiastic enough and he used far tamer images to teach about alternative uses for Pit Bulls.

Likewise, the law apparently allows publication of Hemingway's *Death in the Afternoon*, with its lengthy discussion and pictures illustrating the rules and customs of bullfighting, but makes Stevens a felon for his combination of literature and images discussing the rules and customs of Pit Bull fighting. Pet. App. 3a (noting the "accompanying literature" that came with each film).

And again, Section 48 permits the Discovery Channel to broadcast images of catch dogs hunting wild boar or any other image journalists "acquired * * * from another." *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 46 (Sept. 30, 1999) ("1999 Hearing"). However, Stevens' images of catch dogs hunting wild boars and publication of images that he acquired from another (which are all the depictions for which he was prosecuted) makes him a felon. But just as the First Amendment forbids the imposition of exceptional burdens on journalists, it equally proscribes imposing disparate burdens on a speaker for lacking "journalistic * * * value," 18 U.S.C. § 48(b). Stevens has the same right to speak as the Discovery Channel and Dateline. *Cf. Simon & Schuster*, 502 U.S. at 120 ("press/non-press

distinction" unconstitutional); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (law cannot "treat[] the press differently" from other speakers).

Moreover, amici's apparent confidence that they will always come out on the winning side of the "serious value" determinations is whistling past the graveyard. In many communities, anger has been directed more at the outsider whose documentary film reveals abuses at local businesses than at the neighbors who run the exposed operations. *See* Mike Hale, *How These Piggies Went to Market*, N.Y. TIMES, Mar. 16, 2009, at C2 ("This case is actually about an animal-rights group from California coming to Wayne County, Ohio, trying to tell us how to run our farms."); *Foie Gras Video, supra* (libel suit brought against animal rights filmmaker). Thus, amici's unqualified enthusiasm for stripping the speech that is the lifeblood of their advocacy efforts of all First Amendment protection is hard to understand.

Even within long-established categories of proscribable speech, Congress cannot adopt prohibitions that result in their "practical operation" in viewpoint or speaker discrimination. *R.A.V.*, 505 U.S. at 391.[9] Even more so, then, Congress cannot

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[9] *See also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) (Alito, J.) ("Loosely worded" laws may unconstitutionally "regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint."); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (definition of pornography can "not depend[] on the perspective the author adopts"), *aff'd*, 475 U.S. 1001 (1986) (mem.); *see generally Arkansas Writers'*, 481

use Section 48 to gerrymander certain long-protected viewpoints or perspectives in and out of the First Amendment's aegis, or otherwise seek "to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 641 (1994); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (animal cruelty laws cannot be used to proscribe the exercise of First Amendment rights selectively).

Indeed, neither in *Chaplinsky* nor in any other case has this Court permitted Congress to outlaw a broad category of otherwise historically protected speech and then require speakers one-by-one to proceed at the peril of having a prosecutor or jury decide *post hoc* that their speech lacks "serious" value. Instead, when categories of unprotected speech have been recognized, the line does not vary based on the individualized "content of particular works." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.). There is no "serious value" exception for child pornography. *Ferber*, 458 U.S. at 764. And once fighting words are uttered under *Brandenburg*, 395 U.S. at 447, or a defamatory statement occurs under *Sullivan*, 376 U.S. at 279-80, the loss of constitutional protection applies evenhandedly .

Third, the "serious" value prong as employed in Section 48 is unconstitutionally vague.

U.S. at 228 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

(i) "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (law must give "fair warning" that speech is outlawed and be sufficiently concrete to avoid risk of "arbitrary and discriminatory enforcement").

Yet Section 48 is completely lacking in concrete, objective, or predictable criteria for prognosticating the "serious value" assessments of prosecutors and juries across the Country. Nothing in the exception (other than speaker identity) explains why *Catch Dogs* sends Stevens to jail, while similar images on the Discovery Channel and bloodier images on scores of other hunting videos are permitted. The government's experts opined that one scene ran too long and that it is better to show things being done right rather than being done wrong. J.A. 73-74; C.A. App. 494, 555. But such Monday-morning editing does not "provide[] an ascertainable standard of conduct." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

Likewise, nothing in the statutory text warned Stevens that his images were outlawed, when similar images broadcast on Dateline or in a bloody dogfighting documentary by a Hollywood producer are not. The only objectively discernible line is that those images devoted to opposing dogfighting on governmentally approved terms are protected, while images used for other purposes are not. But that cannot be the dividing line. *See R.A.V.*, 505 U.S. at 387 (government cannot "effectively drive certain ideas or viewpoints from the marketplace"). Nor does the statute explain how Stevens or any other

reasonable person could know that depictions of bullfights in Spain are okay, but depictions of Pit Bull fights in Japan are not. People "of common intelligence cannot be required to guess" at the lawfulness of their actions. *Winters*, 333 U.S. at 515.

Section 48's plain scope also leaves the makers and sellers of thousands of similar hunting videos at sea, trying to figure out, without any objective or predictable guidance, which videos were pushed out of the First Amendment in 1999 and which remain lawful. Simply consigning retailers, as the government would, to crossing their fingers and hoping that prosecutors and juries agree that every depiction of intentional "kills" on their store shelves or Internet sites has "serious" value does not provide either the fair notice that due process requires or the "breathing space" that the First Amendment demands, *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

In short, Section 48 provides no workable standard that allows ordinary people "to distinguish between innocent conduct and conduct threatening harm," *Morales*, 527 U.S. at 57, or to predict "the uncertainties and vagaries of prosecutorial discretion," *Ferber*, 458 U.S. at 771 n.26. The "indeterminacy" of those factors, *Williams,* 128 S. Ct. at 1846, and the "utter impossibility of * * * know[ing] where this new standard of guilt would draw the line between the allowable and the forbidden," *Winters,* 333 U.S. at 519, render Section 48 unconstitutionally vague.

(ii) That *Miller*'s obscenity test includes a "serious value" provision does nothing to repair Section 48's vagueness. In *Miller*, speakers are

already on notice that their patently offensive and prurient speech is pushing the margins of legality, 413 U.S. at 24, and the "serious value" inquiry simply enforces a protective "national floor for socially redeeming value." *Reno v. ACLU*, 521 U.S. 844, 873 (1997).

Here, by contrast, Section 48's definition of the covered depictions does nothing to sift out the protected from the (purportedly) unprotected speech or to alert speakers of their speech's likely illegality. The "serious value" exception thus stands as the *sole* statutory criteria differentiating in any material way between speech that is protected and that which subjects the speaker to a five-year felony sentence. Section 48 thus vests prosecutors and juries with a "vast amount of discretion," *Morales*, 527 U.S. at 63, with no roadmap for exercising it. "Just because [the *Miller*] definition including three limitations is not vague, it does not follow that one of those limitations standing by itself[] is not vague." *Reno*, 521 U.S. at 873.

"Error in marking" that "serious value" line "exacts an extraordinary cost" in terms both of wrongfully punished speech and the chilling effect that reverberates from such uncabined and thus unpredictable discretion. *United States v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 817 (2000). "History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 531 (1952) (Frankfurter, J., concurring); *see Playboy*, 529 U.S. at 871-872 ("The vagueness of such a regulation raises special First Amendment concerns

because of its obvious chilling effect on free speech."). The First Amendment, in short, "does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who c[an]" speak and who cannot. *Morales*, 527 U.S. at 60 (internal quotation marks omitted).

Fourth, the "serious value" exception unconstitutionally forecloses consideration of the speakers' work "as a whole." *See Miller*, 413 U.S. at 24. Section 48 outlaws "any visual or auditory depiction," including "*any* photograph" or "electronic image." 18 U.S.C. § 48(c)(1) (emphasis added). Section 48(b) further requires, before the "serious value" exception will attach, a finding that the "depiction" itself has serious value, 18 U.S.C. § 48(b) & (c). Because the requirement that the value of an expressive work be viewed as a whole is an "essential First Amendment rule," *Free Speech,* 535 U.S. at 248, that error is fatal. *See Roth*, 354 U.S. at 488-491; *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 649 (7th Cir. 2006).

Furthermore, the government's consistent position throughout this litigation has been that "serious" value means a depiction that is "significant and of great import." J.A. 132**,** 133; C.A. App. 646, 650; Gov't C.A. Br. 49-50. Despite its reliance on the "serious value" exception to do the constitutional heavy lifting under Section 48, the government never mentions, let alone defends, that standard, which is a stark departure from *Miller*'s speech-protective use of the "serious value" assessment, *Reno*, 521 U.S. at 87.

Finally, the government argued at trial that Stevens' films were "of interest to dogfighters." C.A.

App. 419, 437. Perhaps – although the government never showed that a single dogfighter ever bought one of his films, despite being provided with the name of every purchaser, Gov't Exhs. 6A, B, C. His films are also of interest to University professors, hunters, lovers of the Pit Bull breed, and the American Canine Foundation. J.A. 110-114, 121-122; C.A. App. 563-564, 599-600; Bui Dep. at 13:19-20. The right to speak does not depend on which adults choose to listen.[10]

C. No Governmental Interest Overrides The First Amendment's Protection.

Because depictions of the wounding and killing of animals have historically enjoyed constitutional protection and because the "serious value" exception makes matters constitutionally worse not better, the government is left to contend (Br. 23-38) that Section 48 is constitutional because the individual interest in free speech is outweighed by the illegality of the depicted conduct or the hope for commercial remuneration. Both are wrong.

1. Speech Memorializing Conduct That is Illegal in One Jurisdiction Retains Constitutional Protection.

The government cannot suspend the First Amendment just because the conduct depicted is illegal – somewhere.

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[10] *See Free Speech*, 535 U.S. at 253 (fact that speech "whets the appetites" of criminals "is not a sufficient reason for banning it").

First, the starting premise (Br. 15) that Section 48 "only applies to depictions of illegal conduct" is wrong. The statute quite deliberately does *not* require that the conduct be illegal, defining the proscribed depictions in terms of whether the conduct portrayed is illegal where the image is created, sold, or possessed, "regardless" of whether the act depicted was illegal where it occurred. 18 U.S.C. 48(c)(1).[11] Indeed, "here, there is no underlying crime at all," *Free Speech,* 535 U.S. at 254, because dogfighting is legal in Japan and the old images from the United States (circa the 1960s or 1970s) were never found by the jury to have violated either Virginia's or Pennsylvania's laws at the relevant time. Other than the brief clip of a Japanese dogfight, the single depiction in *Catch Dogs* to which the federal government objected – the dog miscatching a pig – was filmed in Mexico. While the government now complains (Br. 21) about multiple dogs attacking a boar, federal law does not punish "the use of one or more animals in hunting another animal." 7 U.S.C. § 2156(g)(1). Federal law only criminalizes the speech.

Indeed, one of the central flaws in Section 48 is that it allows the Nation's most-animal-protective jurisdictions to force speakers across the United States either to muzzle their speech or to eschew Internet or nationwide marketing. But "[i]t is neither realistic nor constitutionally sound to read

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[11] By way of contrast, the federal animal-fighting law requires illegality in the jurisdiction where the fighting occurs. *See* 7 U.S.C. § 2156(a)(2) & (d)

the First Amendment as requiring that the people of" Texas or Arizona receive only that speech "found tolerable in" San Francisco or Washington, D.C. *Miller*, 413 U.S. at 32; *see Ashcroft v. ACLU*, 542 U.S. at 674 (Stevens, J., concurring) ("[T]he Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in American deem unfit.").

Second, and in any event, in an age of Internet sales and evolving animal protection laws, simply requiring that the depicted conduct be illegal *now* (not when the act occurred) in some jurisdiction does not disentitle the speech to constitutional protection.

The First Amendment has always protected truthful speech about and thus the memorialization of illegal conduct, whether images of torture at Abu Ghraib prison, the assassination of President Kennedy, investigative journalism, Dateline's "To Catch a Predator" series, the COPS series, and the endless stream of grainy images from security and police car videocameras. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 527-535 (2001) (broadcast of illegal wiretaps); *Simon & Schuster*, 502 U.S. at 121-122 (noting that "hundreds of works" "contain descriptions of the crimes for which the authors were incarcerated," including works by Thoreau and Dr. Martin Luther King, Jr.). Particularly when, as here, there is no allegation that the speaker himself broke the law, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki*, 532 U.S. at 535. Instead, "[t]he normal method of deterring unlawful conduct is to impose an

appropriate punishment on the person who engages in it." *Id*. at 529.

Third, the government cannot escape that limitation by relabeling its interest as the enforcement of "public morality" (Br. 34). Whatever government's authority to regulate *conduct* to prevent the "coarsen[ing] [of] the broader society" (*ibid*.), that interest will not sustain a content-based prohibition on *speech*. "The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments * * * can be formed, tested, and expressed" free from governmental dictate. *Playboy*, 529 U.S. at 818; *see Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of NY*, 360 U.S. 684, 688-689 (1959) (film about adultery cannot be banned because of moral opposition).

2. Speech for Commercial Gain Enjoys Full Constitutional Protection.

Although the government emphasizes the statute's "commercial gain" requirement – which it pejoratively reformulates as "commercial trafficking" (Br. 15) – the government offers no legal authority for that factor's supposed relevance. That is not surprising: it "is as immaterial * * * as is the fact that newspapers and books are sold." *Sullivan*, 376 U.S. at 265-266. The First Amendment does not condition its protection on speakers' taking a vow of poverty.

The reduced constitutional protection for commercial speech is limited to communications that "propose a commercial transaction." *See Board of Trs. of State Univ. v. Fox,* 492 U.S. 469, 473-74

(1989). But that is not what this statute targets or what Stevens was convicted for.

D. Section 48 Does Not Survive Exacting Scrutiny.

Section 48's imposition of severe criminal penalties based entirely on the content of Stevens' speech "is a stark example of speech suppression" that strikes at the heart of the First Amendment. *Free Speech*, 535 U.S. at 244. Section 48 is thus "'presumptively invalid,'" *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009), and the government bears the burden of rebutting that presumption by demonstrating that Section 48 survives "the most exacting scrutiny," *United States v. Eichman*, 496 U.S. 310, 318 (1990); *Playboy*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). The government has not met that burden.

1. Section 48 Does Not Advance a Compelling Interest.

a. The legislative record disavows any interest in banning images of animal fighting.

Despite its enormous intrusion on First Amendment rights, one searches Section 48's text in vain for Congress's articulation of a compelling interest that matches Section 48's sweeping suppression of speech. Section 48 contains neither a statement of purpose nor relevant findings. The legislative history makes things worse, not better. It

focuses exclusively on the narrow problem of crush videos.[12]

But even with respect to crush videos, the government's insistence that such images are obscene (Br. 42-43) renders Section 48 unnecessary because federal obscenity laws are already on the books, 18 U.S.C. § 1460 *et seq.* *See* H. R. Rep. No. 106-397, *supra*, 13 (dissenting views of Rep. Barr) (crush videos "can already be prosecuted using other methods"); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 203 (1999) (First Amendment violated where conduct already regulated and "[t]he added benefit" of speech limitation "is hardly apparent" "from the record").

In any event, whatever Congress's aim, Section 48 wildly overshoots any interest in targeting crush videos as obscene.[13] That is why the government is forced to argue more broadly that animal cruelty generally and animal-fighting in particular are compelling interests.

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[12] *See* H. R. Rep. No. 106-397, *supra*, 2-3; 145 Cong. Rec. H10267 (Oct. 19, 1999) (Rep. McCollum) (legislation "will stop the interstate sale of these [crush] videos"); *id.* at H10268 (Rep. Smith) ("This bill * * * will put a stop to the production and sale of videos that feature the crushing and often the killing of small, innocent animals."); *id.* at H10270 (Rep. Gallegly) ("The current law is insufficient to prosecute crush videos."); Statement by President William J. Clinton, *supra*, 1999 U.S.C.C.A.N. 324.

[13] Indeed, while the statute would likely capture some crush videos, Section 48 comes up short with respect to those involving rats, mice and other rodents because many States except the extinguishment of rodents and vermin from their animal cruelty laws. *See* Addendum D, *infra*.

The problem is that the legislative history expressly disavows the interest the Solicitor General asserts. The only reference in the legislative history to animal fighting is the assurance that Section 48 "does not include animal fighting in its definition." 1999 Hearing at 45; *id*. at 65-66 (repeating that "animal fighting," "dog fights, cock fights, bull fights" are not covered by the Bill).[14]

The government thus asks this Court to find a compelling interest in broadly banning depictions of animal treatment – one strong enough to support a content-based criminal prohibition on speech – that not one member of Congress ever articulated.[15] But when Congress chooses to legislate at the precipice of its constitutional authority and seeks to send people to jail based on the content of their speech, Congress has the constitutional obligation to articulate the compelling interest that justifies its measure, rather than rely on the Solicitor General or this Court to guess at the reason for it.

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[14] Other references to the wounding or killing of animals likewise come in the form of denials of a broad regulatory interest. *See* H.R. Rep. No. 106-397, *supra*, 8; 145 Cong. Rec. H10267 (Oct. 19, 1999) (Rep. McCollum); *id*. at H10268 (Rep. Smith); *id*. at H10270 (Rep. Gallegly); *id*. at H10272.

[15] A few Members, in fact, denied the existence of *any* compelling interest. "If ever there were a bill unnecessary, this is one." 145 Cong. Rec. H10270 (Oct. 19, 1999) (Rep. Paul); *see id*. at 10267-10268 (Rep. Scott); *id*. at H10269 (Rep. Barr); H.R. Rep. No. 397, *supra*, at 10-11 (dissenting views) ("little cogent support" for law).

b. Congress has no compelling interest in punishing speech more severely than the conduct it depicts.

Even assuming that a compelling interest Congress never articulated and the legislative record disavows is sufficient to support a content-based criminal prohibition on speech, Section 48 cannot be upheld as reinforcing laws against animal cruelty. As worthwhile as that goal is, the federal government's actions simply do not match its words. Almost none of the laws that the Solicitor General cites (Br. 24 nn. 5 & 6) as evidence of a compelling interest punishes acts of animal cruelty as harshly as Section 48 punishes speech.[16]

Indeed, at the time Congress enacted Section 48's five-year felony sentence for speech, federal law punished dogfighting as a misdemeanor subject to no more than one year in prison. *See* Pub. L. No. 94-279, §17, 90 Stat. 421 (1976). It was just in 2007 – two years *after* Stevens' felony conviction for speech –

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[16] *See* 49 U.S.C. § 80502 (confining animals without food and water for more than 28 hours during transportation subject only to a civil penalty of $100-$500 per violation); 7 U.S.C. §§ 1901 & 1902 (articulating humane slaughter practices; no penalty); 7 U.S.C. § 2131 (congressional statement of policy about the humane treatment of animals; no penalty); 7 U.S.C. § 2142 (authorizing the promulgation of rules for humane standards; no penalties); 7 U.S.C. § 2158 (misdemeanor penalty of no more than one year imprisonment for violating certification, holding, and recordkeeping rules); 15 U.S.C. § 1825 (one to three years' imprisonment for the soring of horses); 16 U.S.C. § 1338 (misdemeanor penalty of up to one year imprisonment for "maliciously" killing or harassing wild free-roaming horses and burros).

that Congress made dogfighting itself a felony, *see* Pub. L. No. 110-22, §§ 2-3, 121 Stat. 88 (2007), and it was just last year that Congress finally made the penalty for dogfighting even with the penalty for speech, *see* Pub. L. No. 110-234, § 14207(b), 122 Stat. 2223 (2008); Pub. L. No. 110-246, § 14207(b), 122 Stat. 2224 (2008). Even still, the dogfighter Michael Vick's federal sentence was 14 months *shorter* than Stevens'. *See* Sentencing Minutes, *United States v. Michael Vick*, Criminal No. 3:07CR274 (E.D. Va. 2007).[17]

That gets the Constitution's priorities exactly backwards. If the First Amendment means anything, it means that content-based criminal prohibitions on speech should be the last, not the first, tool to which government resorts in an effort to regulate conduct.

c. The prohibited speech is not integrally related to the underlying conduct.

The assertion of a compelling interest in combating the conduct of animal cruelty fails for an even more fundamental reason: When it comes to speech suppression, simply identifying a compelling interest in combating conduct – which presumably exists for every federal criminal prohibition – is insufficient. The government must have a compelling interest in regulating speech *qua* speech, and thus must demonstrate an interest in "content discrimination" itself. *R.A.V.*, 505 U.S. at 395; *see*

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[17] Section 48's five-year sentence also exceeds that authorized by almost half of the States for a first-time animal cruelty offense, Addendum D, *infra*, and exceeds the animal-fighting penalties imposed by 20 States, Addendum C, *infra*.

First Nat'l Bank v. Bellotti, 435 U.S. at 789, 795 (1978) (harm must be in the speech itself). That interest, moreover, "must reflect the seriousness of the actual burden on First Amendment rights," *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). For a categorical, content-based, felony prohibition on speech, only an interest of the highest magnitude will suffice. There is none here.

First, if the government were correct (Br. 29) that Section 48 is a "critical tool" for law enforcement, one might expect more than three prosecutions a decade, Stevens Cert. Opp. 12. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 n.16 (1989) (claim of compelling interest "is called into question * * * because the State has never enforced" the law).

Even putting that aside, the argument fails because Section 48 does not require an "underlying illegal act" of animal cruelty (Br. 29). The statute very deliberately requires only that the conduct *depicted* be illegal under the law where the commerce prong is triggered, "regardless" of the legality of the conduct where and when it occurred. 18 U.S.C. § 48(c)(1). Section 48 thus so far exceeds the scope of animal cruelty laws that it cannot plausibly be characterized as an adjunct to them.

Second, the government's contention (Br. 28-29) that Section 48 remediates the "difficulties in prosecuting" animal cruelty crimes fares no better. While the government insists that animal fighting ventures are difficult to prosecute (Br. 28), it offers no empirical evidence that such crimes are any harder to detect and prosecute than most other crimes. Presumably all but the most inept criminals strive to

commit their crimes "away from the prying eyes of law enforcement and private citizens" and "survive on secrecy" and "reconnaissance to keep law enforcement in the dark." Br. 29.

Of course, Congress provided no help because it never thought about the issue outside the narrow context of crush videos, which is what every snippet of legislative history cited by the government (Br. 28-29) addresses. Realistically, the substantial gambling revenue that fuels dogfights depends on the influx of large numbers of people and dogs to urban alleys or outdoor locations, with loud noise levels. Moreover, the American Canine Foundation expert testified that getting invited to a modern urban dogfight was not particularly difficult. Bui Dep. at 14:14:43-14:15:36. Furthermore, criminalizing the creation of such images may harm, rather than help, prosecutors. Empirical evidence – that Congress could consider if it ever wanted to study the matter – suggests that animal cruelty prosecutions have a very high success rate, and having video images of the fights actually assists prosecutions. Adam Ezra Schulman, First Amendment Center, *Animal Cruelty Prosecutions & The Relationship Between Expression & Conduct: A Few Empirical Observations*, July 7, 2009, http://www.firstamendmentcenter.org/analysis.aspx?id=21814. [18]

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[18] The government's contention (Br. 45-46) that Stevens edited out individual's faces to protect them from prosecution is just silly. Stevens explained that one of the people was deceased and, unless some State had a 20-30 year statute of limitations for dogfighting, not one of the participants faced

d. Ferber *is inapplicable.*

Try as the government might, *Ferber*'s mantle does not fit Section 48.

First, there is no evidence to support the contention that the distribution of dogfighting or other animal cruelty images is "intrinsically related to" the underlying wounding or killing. U.S. Br. 36. Unlike child pornography, the "creation of the speech is [not] itself the crime of [animal] abuse." *Free Speech*, 535 U.S. at 254. Under Section 48, no crime need be committed at all. Moreover, child pornography is excised from the First Amendment because of "how [the image] was made," "not on what [the image] communicate[s]." *Free Speech*, 535 U.S. at 251. Section 48's "serious value" provision, by contrast, hinges liability entirely on communicative content.

Second, the government has provided no substantial empirical evidence that the creation of images is anything more than incidental to most acts of animal mistreatment and marginal to its motivation. Unlike child pornography, which is a multi-billion dollar industry, *see Joshua Brockman, Child Sex as Internet Fare, Through Eyes of a Victim*, N.Y. Times, Apr. 5, 2006, at A20 (sexual exploitation of children on the Internet alone is a $20 billion industry), there is no evidence of a vast and profitable market for images of animal cruelty generally or dogfighting in particular. The only evidence the government cites (Br. 46) is the $14,000

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criminal liability – even indulging the unlikely assumption that the fights were illegal when and where they occurred.

that Stevens made over two and one-half years for the sale of the two films with dogfighting depictions.[19] But $5700 annually hardly constitutes a lucrative market. *See Bartnicki*, 532 U.S. at 531 (statute fails even intermediate scrutiny where "there [is] a dearth of evidence in the legislative record to support the dry up the market theory").

Furthermore, all the empirical evidence – including from the government's amici – is that gambling and spectator revenue, not film profits, are what fuels the modern dogfighting industry. *See, e.g.*, Pet. App. 24a & n.10 (citing Humane Society fact sheet); *People v. Bergen*, 883 P.2d 532, 545 (Colo. Ct. App. 1994) ("[W]ithout the knowing presence of spectators, much of the 'sport' of the fights would be eliminated."). That presumably is why most States ban being a spectator at dogfights. *See* Addendum C. Thus, the only thing that the ban on depictions is likely to dry up is free speech, not crime.

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[19] The government claims $20,000 for all three videos, but, because *Catch Dogs* is a hunting video and was marketed as such, Gov't Exh. 7, its sales do not support the government's argument. Nor does the record support the government's effort to sweep in Stevens' other sales as "dogfighting merchandise" (Br. 46). The additional sales it cites include Stevens' book that promotes alternatives to dogfighting – $6500 of which were sold to Amazon.com, Borders, and Barnes and Noble, *see* Gov't Exh. 6A, B, C, which presumably are not part of the speech community the government aims to dry up – and films and equipment that support the training and conditioning of Pit Bulls for hunting, Schutzhund protection, and show rings. *See* J.A. App. 122-123 (expert discussing legitimate uses for breaking sticks and other equipment).

To be sure, there is a vast market for other images that Section 48's text outlaws like hunting videos and old movies. But the government prefers not to talk about that market.

Second, while the government's adjunct interest (Br. 33) in combating everything from avian flu to gang activity is understandable, the empirical and logical nexus between suppressing speech and accomplishing those goals is entirely missing from both the congressional record and the government's brief. In any event, speech cannot be banned based upon "some unquantified potential for subsequent criminal acts." *Free Speech Coalition*, 535 U.S. at 250-251.

Piling surmise on top of speculation, the government (Br. 32-33) argues that Section 48 will help to prevent the Nation's youth from turning into serial killers and abusers. That too undoubtedly is a laudable goal. But, whatever the correlation between *committing* acts of animal cruelty and subsequent crime, there is no evidence whatsoever that *viewing depictions* of the intentional wounding and killing of animals causes such sociopathic behavior. *See* ALDF Br. 23 (acknowledging lack of linkage). And there certainly is no evidence that viewing Stevens' films will cause harm, but Roma's or Dateline's or journalists' or artists' or historians' will not. The First Amendment requires the government to do more than "simply posit the existence of the disease sought to be cured," *Turner*, 512 U.S. at 664, because "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno*, 521 U.S. at 885; *see Winters*, 333 U.S. at 514, 519

(unsubstantiated contention that "pictures and stories of bloodshed and of lust" could "become vehicles for inciting violent and depraved crimes'" insufficient).[20]

That daisy chain of unsubstantiated hypotheses is too thin a reed to support the heavy hammer of a categorical content-based prohibition on speech. "The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this" – an assessment corroborated by "hard evidence of how widespread or how serious" the asserted problem is. *Playboy*, 529 U.S. at 819. Moreover, the government must prove that speech suppression will alleviate the posited harm "to a material degree." (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)) *Id.* at 817; *see Turner,* 512 U.S. at 664. When presented with a "near barren legislative record," governmental "anecdote and supposition" are constitutionally insufficient "to establish a pervasive, nationwide problem justifying [a] nationwide * * * speech ban." *Playboy*, 529 U.S. at 822-823.

Third, the analogy to *Ferber* fails in another respect. Preventing the physical abuse of children and drying up the substantial commercial market that exists is an "objective of surpassing importance." *Ferber*, 458 U.S. at 757; *Bartnicki,* 532 U.S. at 532 ("highest order"). But, as commendable as progress in combating animal cruelty is, Congress has not

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[20] The government also fails to explain why existing parental controls and information used to limit youth exposure to violence in films will not suffice.

made that interest "of the same order" as combating the child sexual abuse industry, as even the dissenting judges acknowledged, Pet. App. 50a n.24.

To begin with, if suppressing speech were as essential to ending animal cruelty as the government professes, then Section 48 would not be so crannied with exceptions. *Lukumi*, 508 U.S. at 547 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order * * * when it leaves appreciable damage to that supposedly vital interest unprohibited."). After all, the harm and suffering endured by an animal is not mitigated in the least by the artistic, journalistic, historical, scientific, or religious value of the imagery.

More broadly, the real test of a "compelling interest" is not whether all 50 States have laws against the conduct – there are lots of laws against lots of conduct – but the government's allegiance to that interest when confronted with powerful countervailing interests. The government's argument here fails that test. Rightly or wrongly, the federal government (like state governments generally, *see* Addendum D) takes a far more calibrated approach to the treatment of animals, broadly excepting certain types of recreational hunting and fishing, vermin control, and sports and entertainment activities from animal cruelty laws.

The further reality is that animals, unlike children, are still routinely killed by the millions for their fur and skin, and silk worms are boiled alive to produce silk, not because, in an age of synthetics, such forms of clothing are needed, but because they are preferred. Ronald Cherry, Sericulture, 35 BULL.

ENTOMOL. SOC. AM. 83-84 (1993), as reprinted in Bugbios, http://www.bugbios.com/ced1/seric.html. Animals are subjected to pain, illness, and injury in laboratory experiments not just to test life-saving medicines, but to test cosmetics. Gilbert M. Gaul, *In U.S., Few Alternatives To Testing On Animals; Panel Has Produced 4 Options in 10 Years*, WASH. POST., Apr. 12, 2008, at A1. Almost 97% of the American population chooses to eat meat, http://www.reuters.com/article/pressRelease/idUS145083+15-Apr-2008+PRN20080415; many enjoy boiling lobsters and crabs alive at parties, and tens of millions of Americans kill animals for recreation, http://www.census.gov/prod/2008 pubs/fhw06-nat.pdf.

In the nuanced balance that our Nation strikes between animal protection and human desires, the Free Speech Clause must be given at least the same weight in the balance as vanity, gastronomical pleasure, and entertainment.

2. Section 48 Is Not Narrowly Tailored Or The Least Restrictive Means Of Protecting Animals From Harm.

Section 48 is also unconstitutional because it is "not reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Congress, in fact, used a blunderbuss where the Constitution requires a scalpel. Legislating an entire category of speech out of the First Amendment is the most, not least, restrictive means of attacking the very narrow and specialized problem of crush videos. If that were Congress's aim, it should have crafted an obscenity statute (or used an existing one) to specifically address "this sliver * * * of speech,"

Pet. App. 31a, and left the thousands of other depictions covered by Section 48 alone.

Likewise, "[i]f the sanctions that presently attach" for acts of animal cruelty "do not provide sufficient deterrence, perhaps those sanctions should be made more severe," and the resources devoted to their investigation enhanced, rather than strangling the very images that facilitate prosecutions and that contribute to public education and debate. *Bartnicki,* 532 U.S. at 529. If Congress is unwilling to do that, then the "'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." *Ashcroft v. ACLU*, 542 U.S. at 670.

3. Section 48 Is Substantially Overbroad.

Rather than defend Section 48 against exacting scrutiny, the government spends its time trying to shift to Stevens the burden of proof on Section 48's constitutionality (Br. 39-41). While the government's desire to escape the burden of defending this law is understandable, its argument makes no sense.

First, the government seems to forget that this is a criminal prosecution and it seeks to send Stevens to jail *solely* because his speech fell within a category of communications categorically outlawed by Section 48. For all of the government's supposed preference for "as applied" challenges, it *never* tried to show that Stevens' speech lacks constitutional protection in its own right. Instead, Congress here enacted and the government has enforced against Stevens a criminal prohibition against an entire *category* of speech precisely because the government insists that "[c]ase-

by-case adjudication is not required" (U.S. Br. 12) to determine the protected status of Stevens' speech. *See Ferber*, 458 U.S. at 764 (same).

From the outset, the government's only basis for obtaining and defending its conviction and putting Stevens' films to the test has been to contend that the entire category of speech is properly proscribed and then to prove nothing more than that Stevens' speech falls within that category. Stevens' "facial" constitutional challenge does nothing more than respond in kind by challenging the category enforced against him. Either the category constitutionally exists or it does not, and the constitutionality of this conviction rises or falls with that determination because there is no independent First Amendment justification for outlawing Stevens' speech. *See Ferber,* 458 U.S. at 774 n.28.

Having chosen that path, the government cannot make the criminal defendant prove his right not to be prosecuted for speaking. To the contrary, a "law imposing criminal penalties on protected speech * * * provides a textbook example of why we permit facial challenges to statutes that burden expression." *Free Speech*, 535 U.S. at 244. And when the government imposes a content-based prohibition on speech, the government bears the burden of showing that its regulation survives "rigorous scrutiny." *Playboy*, 529 U.S. at 812.

To do otherwise would "decrease the legislature's incentive to draft a narrowly tailored law in the first place," *Osborne v. Ohio,* 495 U.S. 103, 121 (1990), and would perpetuate the chill for a broad swath of speech while speakers are forced to wait for their individual criminal trial(s) to determine, case by case,

their constitutional entitlement to speak. That has never been the law under the Free Speech Clause.[21]

Second, the "serious value" exception does not change that equation. Insisting that Stevens and other speakers run the gauntlet of a criminal prosecution on a case-by-case basis simply assumes in the first instance the constitutional power to put speech to that proof. Thus, in this unique circumstance, as-applied and facial challenges to Section 48 collapse into the same fundamental inquiry – can the government hinge liberty on a *post hoc* jury assessment of whether Stevens' speech has "serious" value? If they cannot do it for him under Section 48's terms, they cannot do it for anybody.

Third, the government's argument makes no sense in another respect. The question of Section 48's facial invalidity only arises once the Court determines that the speech covered by Section 48 is protected speech and thus immune from categorical proscription. But, at that juncture, the government cannot save its statute or its prosecution simply by showing that the statute is not substantially overbroad. Even were it not overbroad, the

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[21] Beyond that, free speech cases are a traditional exception to limitations on facial challenges, *see*, *e.g.*, *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 n.6 (2008), and the *Salerno* formulation the government advances (Br. 39 n.21 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)) "has never been the decisive factor in any decision of this Court" under the First Amendment, *Morales*, 527 U.S. at 55 n.22. *See also Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (noting "[t]he latitude given facial challenges in the First Amendment context").

government would still have to establish a compelling interest for outlawing Stevens' speech based on its content and the absence of less restrictive alternatives.[22]

Fourth, the government loses either way because Section 48 is substantially overbroad. Having purported to outlaw a category of speech that is constitutionally protected, having textually rejected any consideration of speech "as a whole," and having injected viewpoint- and speaker-identity discrimination into the scheme through a crabbed reformulation of *Miller*'s "serious value" exception, Section 48 has no "plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. To the contrary, the statute sweeps vast amounts of protected speech within its grasp. The most the government can do is identify a single sub-category of speech – crush videos – that might well be proscribable under a *different Miller*-like obscenity statute (Br. 42). *See* Br. 43 (acknowledging that obscenity of crush video would have to be looked at "as a whole" and "appeal[] to the prurient interest," which are not Section 48 elements).

Beyond that, the government's contention that the problems with Section 48's sweep are confined to "isolated hypotheticals" at the "margins" of the statute (Br. 47) defies reality. The unconstitutional

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[22] Furthermore, because substantial-overbreadth analysis entails considering the interests of third parties not before the Court, which exacting scrutiny does not, prudential factors counsel that facial overbreadth should be the review of "last resort," not first resort, as the government advocates. *Broadrick*, 413 U.S. at 613.

applications come straight out of "the statute's facial requirements," and no "imaginary" or fanciful fact patterns are needed to expose the statute's constitutional fault lines. *Grange,* 128 S. Ct. at 1190.

The government instead bravely places all of its faith in the "serious value" exception. But that exception exacerbates, rather than ameliorates, Section 48's constitutional problems because it (i) unconstitutionally assumes the authority to require value in the first instance, (ii) is unconstitutionally vague, and (iii) results in practical operation in viewpoint and speaker discrimination.[23]

E. Stevens' Conviction Is Unconstitutional.

For all of those same reasons, Stevens' conviction is unconstitutional and was properly vacated by the court of appeals. Stevens' speech does not fit within any existing category of unprotected, prosecutable speech, and the government has never contended otherwise. His prosecution-by-category is invalid because Section 48's categorical prohibition is invalid.

Likewise, the government's unconstitutional definition of Section 48's serious value standard was reflected in the jury instructions. The jury was told to convict if his films were not "significant and of great import" and, in applying that standard, to

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[23] Indeed, because speech need not be "significant and of great import" or even of "serious value" to be protected and because Section 48 lacks the elements required to capture crush videos as obscenity, Section 48 could not even survive scrutiny under the (inapplicable and debated) standard of *United States v. Salerno*, 481 U.S. 739 (1987). *See Grange*, 128 S. Ct. at 1190 (noting debate over *Salerno*'s formulation).

consider only whether the "depiction[] * * * as a whole," not his films with their accompanying literature as a whole, lacked value. J.A. 132; C.A. App. 673 (prosecutor arguing lack of value because Stevens "chose the length of that *scene*") (emphasis added); J.A. 73-74; C.A. App. 589, 614 (evidentiary focus on length of one scene).

Furthermore, the independent *de novo* review constitutionally required for any "serious value" provision requires reversal. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) ("appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'") (citing *Sullivan*, 376 U.S. at 284-86); *Smith v. United States*, 431 U.S. 291, 305 (1977) (serious value decision by jury "is particularly amenable to appellate review").

In this case, three experts testified that Stevens' films have serious value to educators, historians, and to the wider public debate about Pit Bulls. That evidence was not meaningfully countered. To be sure, the pork industry representative saw little value in films about hunting wild pigs (rather than buying pork from pork dealers), but that was because he considers depicting mistakes and images that hurt industry to be valueless, J.A. 104. The First Amendment takes a different view. The other government experts just disagreed with the number of seconds devoted to particular scenes or disagreed that there was any point to documenting the history of dogfighting at all. J.A. 73-74; C.A. App. 491. But

the First Amendment does not permit the use of criminal trials as editorial boards.

Thus, Section 48's unconstitutional "serious value" standard had a material impact on the outcome of this case. Because jeopardy has attached, and the record as a whole demonstrates that Stevens' speech cannot constitutionally be punished, the judgment of the court of appeals vacating the conviction must be affirmed. *See Burks v. United States*, 437 U.S. 1, 16-18 (1978).

* * * * *

In the end, this case boils down to one question: what exactly did Mr. Stevens do that merits sending him to prison for more than three years? He made films. No other criminal conduct is alleged – neither animal cruelty nor dogfighting (nor anything else). His films, moreover, are neither obscene nor pornographic, neither inflammatory nor defamatory; they are not even untruthful. His films are in the same category of speech in which animal rights groups, Hollywood producers, documentary makers, investigative reporters, and hunting video producers commonly engage.

Mr. Stevens' only crime is to look at things differently than the government and its amici do. While he joins them in opposing dogfighting, he believes that images of old-fashioned or highly regulated Japanese fights can teach people to appreciate the very special genetics and characteristics of a proud and historic breed of dog and, from there, persuade them to find better uses for such dogs. There is no doubt that the government and its amici dislike and strongly disagree with that approach. But the First Amendment matters most

when we most vehemently disagree. The Constitution's prescription for objectionable speech is "more speech, not enforced silence." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). While failure to hew to orthodoxy in viewpoint and message is enough to send individuals to prison in other Countries, it should not be enough in the United States.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 20, 2009

ADDENDUM A: RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 48 of Title 18 of the United States Code provides:

Depiction of animal cruelty

(a) CREATION, SALE, OR POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) DEFINITIONS.—In this section—

> (1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in

which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

ADDENDUM B:
DEPICTIONS OF ANIMAL CRUELTY IN MEDIA

Films Rated Unacceptable by the American Humane Association (AHA) due to animal cruelty.

AHA is "the only animal welfare organization in the world with on-set jurisdiction from the Screen Actors Guild to supervise the use of animals [in film]." Film & TV Unit, http://www.americanhumane.org/protecting-animals/programs/no-animals-were-harmed/ (last visited July 17, 2009). AHA is also the only organization authorized to approve the label that "No Animals Were Harmed"® during the production of films. *Ibid.*

In addition to monitoring many films on-set, AHA also compiles information about films that it does not monitor. AHA uses this information and/or observations from its own set monitors to develop film ratings.

The films contained in this table have been either monitored and/or reviewed by AHA and deemed "Unacceptable" on the basis of treatment of animals during production. According to AHA, the "Unacceptable" designation is used if "[d]eliberate

cruelty occurred on set." AHA Ratings – Unacceptable, http://www.ahafilm.info/movies/ratingsinfo.phtml?rid=5 (last visited July 17, 2009).

Film	***Description***[1]
APOCALYPSE NOW (Zoetrope Studios 1979)	Film depicts a water buffalo being killed and cut into pieces.
HEARTLAND (Filmhaus/National Endowment for the Humanities 1979)	Film depicts the killing of a pig scheduled for slaughter for food. The film also depicts actual ranchers branding and castrating cattle that they owned.

[1] The information contained in this column was obtained from AHA's online database of reviewed films. AHA Search, http://www.ahafilm.info/movies/search.phtml (last visited July 17, 2009). Where AHA did not monitor these films on-set, AHA collected information from other sources in issuing an "Unacceptable" rating.

Film	***Description***[1]
THE MOUNTAIN MEN (Columbia Pictures 1980)	Film depicts horses being tripped by wires after AHA monitors left the set.
TOM HORN (Warner Bros. Pictures 1980)	Film depicts horses being tripped.
CHORAKE (Chaiyo Productions 1981) (also released as CROCODILE)	Film depicts a live crocodile being slashed with a knife.
LEGEND OF THE LONE RANGER (Incorporated Television Company 1981)	Film depicts horses tripped by wires.
LION OF THE DESERT (Falcon International Productions 1981)	Film depicts horses being tripped by wires.
MOMENTS OF TRUTH (Archer Productions 1981)	Documentary footage depicts the hunting and killing (often with bow and arrow) of various big game animals, including a bull elephant, rhinoceros, polar bear, and lion.
REDS (Paramount Pictures 1981)	Film depicts horses being tripped.

Film	***Description***[1]
SOUTHERN COMFORT (Cinema Group Pictures 1981)	Film depicts the slaughter of pigs by Louisiana people who routinely killed the pigs for food.
CONAN, THE BARBARIAN (Dino de Laurentiis Company/Universal Pictures 1982)	Film depicts horses tripped by wires, including one horse that fell onto pointed stakes.
TRIUMPHS OF A MAN CALLED HORSE (Hesperia Films S.A. 1982)	Film depicts horses being tripped by wires.
CONAN, THE DESTROYER (De Laurentiis 1984)	Film depicts a camel and horse being tripped by wires.

Film	***Description***[1]
YELLOW HAIR AND THE FORTRESS OF GOLD (CineStar Productions 1984)	Film depicts horses tripped by hidden wires, including one horse that then fell down a rocky slope.
MONDO NEW YORK (International Harmony 1988)	Film depicts an actor biting the heads off live mice,[2] as well as a cockfight.
RAMBO III (Carolco Pictures 1988)	Film depicts horses being tripped.
ROGER & ME (Dog Eat Dog Films/Warner Bros. Pictures 1989)	Documentary footage depicts a woman killing a rabbit.
IN THE BLOOD (Endless Grass Sea 1990)	Documentary footage depicts big game hunting, including the killing of water buffalo and birds.

[2] An actor in the film, Joe Coleman, was charged with (and pled guilty to) animal cruelty for biting the heads off live mice in the film. Jim Sullivan, *Fine, Probation for Shock Artist,* BOSTON GLOBE, Feb. 16, 1990 at 94.

Film	***Description***[1]
FAST & FURIOUS 4 (Neal H. Moritz Productions 2009).	Film depicts a cockfight filmed in Mexico, where such fights are legal, and which AHA believes was real.

Other Films/Broadcasts Containing Reported Depictions of Animal Cruelty[3]

Film/Broadcast	***Description***
TARZAN OF THE APES (National Film Corporation of America 1918)	Film depicts the killing of a lion.[4]
BEN-HUR: A TALE OF THE CHRIST (Metro-Goldwyn-Mayer 1925)	Film depicts horses being killed during a chariot race.[5]

[3] The following films were not reviewed by AHA, but have been identified by independent sources as containing possible depictions of animal cruelty.

[4] *See* Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009); Stephanie Zacharek, *Jungle Love*, SALON, June 6, 1997, http://www.salon.com/june97/tarzan970606.html.

[5] *See* Susan Orlean, *Animal Action*, NEW YORKER, Nov. 17, 2003, at 92, 93; Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009).

Film/Broadcast	***Description***
THE CHARGE OF THE LIGHT BRIGADE (Warner Bros. Pictures 1936)	Film depicts horses being tripped by wires, including at least five horses which were killed.[6]
JESSE JAMES (Twentieth-Century Fox Film Corporation 1939)	Film depicts a horse (which later died) being driven off a rocky cliff.[7]
LE SANG DES BETES (Forces et Voix de la France 1949)	Documentary footage depicts a Paris slaughterhouse.[8]

[6] *See* Orlean, *supra* note 5 at 92, 93; Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009).

[7] *See* Orlean, *supra* note 5 at 92, 93; Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009).

[8] *See* Harvard Film Archive, http://hcl.harvard.edu/hfa/films/2000sepoct/nonfiction.html (last visited July 17, 2009); Georges Franju – Biography, Awards, News, Pictures, Clips and History, http://www.spout.com/players/Georges_Franju/P____90345/default.aspx (last visited July 17, 2009).

Film/Broadcast	***Description***
WHITE WILDERNESS (Walt Disney Productions 1958)	Film depicts lemmings being intentionally driven off a cliff.[9]
OFF THE CHAIN (Ardustry Home Entertainment 2005)	Documentary footage depicts dogfights. [10]
Thirty Days: Animal Rights (FX television broadcast Jun. 17, 2008)	Documentary footage depicts inhumane treatment of farm animals.[11]

[9] *See* Riley Woodford, *Lemming Suicide Myth: Disney Film Faked Bogus Behavior*, ALASKA FISH & WILDLIFE NEWS, Sept. 2003, http://www.wildlifenews.alaska.gov/index.cfm?adfg=wildlife_news.view_article&issue_id=6&articles_id=56; John Corry, *'Cruel Camera,' About Animal Abuse*, N.Y. TIMES, Mar. 24, 1986, at C18.

[10] If the Court desires, Respondent will lodge this film with the Clerk for the Court's review.

[11] *See* Christopher Monfette, *30 Days: "Animal Rights" Review*, IGN, June 18, 2008, http://tv.ign.com/articles/882/882790p1.html; Jon Caramanica, *The Monitor: Fish-Out-of-Water Experiences*, L.A. TIMES, June 15, 2008, at E24.

FOOD, INC. (Participant Media 2008)	Documentary footage depicts inhumane treatment of slaughterhouse animals.[12]
Death on a Factory Farm (HBO television broadcast Mar. 16, 2009)	Documentary footage depicts pigs being beaten to death and in other inhumane conditions.[13]

[12] *See* Mark Hinson, *'Food, Inc.' Serves up a Sobering Look at Dinner*, TALLAHASSEE DEMOCRAT, July 17, 2009.

[13] *See* Mike Hale, *How These Piggies Went to Market*, N.Y. TIMES, Mar. 16, 2009, at C2.

ADDENDUM C:
STATE DOGFIGHTING STATUTORY PROHIBITIONS[1,2]

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
ALA. CODE § 3-1-29 (West, Westlaw through Act 2009-580)	1–10 years; $15,000	1–10 years; $15,000	1–10 years; $15,000

[1]This table is based on Ranking of State Dogfighting Laws, http://www.hsus.org/acf/fighting/dogfight/ranking_state_dogfighting_laws.html (last visited July 17, 2009). The table has been re-formatted and updated to reflect recent developments in state law.

[2] Penalties listed are the maximum available for a first-time offender.

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
ALASKA STAT. § 11.61.145 (LEXIS, LexisNexis through 2008 Reg. Sess. of the 25th State Leg. & the 2008 4th Spec. Sess.)	5 years; $50,000	5 years; $50,000	$500
ARIZ. REV. STAT. ANN. §§ 13-2910.01–.02 (West, Westlaw through June 16, 2009)	6 months–2 1/2 years; $150,000	6 months–2 1/2 years; $150,000	4 months–2 years; $150,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
ARK. CODE ANN. § 5-62-120 (LEXIS, LexisNexis through Feb. 24, 2009)[3]	6 years; $10,000	6 years; $10,000	1 year; $1,000
CAL. PENAL CODE § 597.5 (West, Westlaw through July 1, 2009)	3 years; $50,000	3 years; $50,000	6 months; $1,000

[3] Arkansas recently amended this statute; the amendment is irrelevant to the range of penalties imposed under the statute, and serves primarily to change the term "dog" to the generic "animal" wherever it appears (consequently prohibiting "animal fighting," rather than only "dog fighting"). Act of Feb. 4, 2009, § 6, 2009 Ark. Adv. Legis. Serv. 33 (LexisNexis) (to be codified at ARK. CODE ANN. §§ 5-62-120).

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
COLO. REV. STAT. § 18-9-204 (LEXIS, LexisNexis through Dec. 1, 2008).	1–3 years; $1,000-$100,000	1–3 years; $1,000-$100,000	1–3 years; $1,000-$100,000
CONN. GEN. STAT. ANN. § 53-247 (West, Westlaw through May 25, 2009)	5 years; $5,000	5 years; $5,000	5 years; $5,000
D.C. CODE § 22-1015 (West, Westlaw through June 1, 2009)	5 years; $25,000	5 years; $25,000	5 years; $25,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
DEL. CODE ANN. title 11 § 1326 (LEXIS, LexisNexis through 77 Del. Laws, ch. 70)	3 years; discretionary fine	3 years; discretionary fine	2 years; discretionary fine or 3 years; discretionary fine for gambling on a dog fight
FLA. STAT. ANN. § 828.122 (West, Westlaw through June 30, 2009)	5 years; $5,000	5 years; $5,000	5 years; $5,000
GA. CODE ANN. § 16-12-37 (LEXIS, LexisNexis through 2009 Reg. Sess.)	1–5 years; $5,000	1–5 years; $5,000	1 year; $5,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
HAW. REV. STAT. ANN. § 711-1109.3 (LEXIS, LexisNexis through 2009 Legis. through Act 19 of the Reg. Sess.)	5 years; $10,000	5 years; $10,000	None
IDAHO CODE ANN. § 25-3507 (LEXIS, LexisNexis through 2008 Reg. Sess.)	5 years; $50,000	5 years; $50,000	6 months; $100–$5,000
720 ILL. COMP. STAT. ANN. 5/26-5 (West, Westlaw current through P.A. 96-30 of the 2009 Reg. Sess.)	1–3 years; $50,000	1–3 years; $50,000	1 year; $2,500

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
IND. CODE ANN. §§ 35-46-3-4–10 (West, Westlaw through 2009 1st Reg. Sess.)	6 months–3 years; $10,000	6 months–3 years; $10,000	1 year; $5,000
IOWA CODE ANN. §§ 717D.1–6 (West, Westlaw through 2009 Reg. Sess.)	5 years; $750–$7,500	5 years; $750–$7,500	2 years; $500–$5,000
KAN. CRIM. CODE ANN. § 21-4315 (West, Westlaw through 2008 Reg. Sess.)	5-7 months; $100,000	5-7 months; $100,000	6 months; $1,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
KY. REV. STAT. ANN. §§ 525.125–130 (West, Westlaw through end of 2008 legis.)	1–5 years; $1,000–$10,000	1–5 years; $1,000–$10,000	12 months; $500
LA. REV. STAT. ANN. § 4:102.5 (West, Westlaw through 2008 Reg. Sess.)	1–10 years; $1,000–$25,000	1–10 years; $1,000–$25,000	1–10 years; $1,000–$25,000
ME. REV. STAT. ANN. title 17, § 1033 (West, Westlaw through ch. 150 of the 2009 1st Reg. Sess. of the 124th Leg.)	5 years; $5,000 + a $500 minimum additional fine	5 years; $5,000 + a $500 minimum additional fine	1 year; $2,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
MD. CODE ANN., CRIM. LAW §§ 10-605, 607 (LEXIS, LexisNexis through June 1, 2009)	3 years; $5,000	3 years; $5,000	90 days; $2,500
MASS. GEN. LAWS ANN. ch. 272 §§ 94–95 (West, Westlaw through ch. 24 of the 2009 1st Ann. Sess.)	1–5 years; $1,000	1–5 years; $1,000	2.5–5 years; $1,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
MICH. COMP. LAWS ANN. § 750.49 (West, Westlaw through P.A. 2009, No. 57 (except 46) of the 2009 Reg. Sess., 95th Leg.)	4 years; $5,000–$50,000; 500-1000 hours of community service	4 years; $5,000–$50,000; 500-1000 hours of community service	4 years; $1,000–$5,000; 250-500 hours of community service
MINN. STAT. ANN. § 343.31 (West, Westlaw through 2009 Reg. Sess., ch. 1–58)	1 year + 1 day minimum	1 year + 1 day minimum	1 year maximum; $3,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
MISS. CODE ANN. § 97-41-19 (LEXIS, LexisNexis through 2008 1st Extraordinary Sess.)	1–3 years; $1,000–$5,000	1–3 years; $1,000–$5,000	1 year; $500–$5,000
MO. ANN. STAT. § 578.025 (West, Westlaw through June 26, 2009)	10 years	10 years	6 months
MONT. CODE ANN. § 45-8-210 (Westlaw, through May 2007 Spec. Sess.)	1–5 years; $5,000	1–5 years; $5,000	1–5 years; $5,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
NEB. REV. STAT. ANN. § 28-1005 (LEXIS, LexisNexis through Nov. 2008)	5 years; $10,000	5 years; $10,000	5 years; $10,000
NEV. REV. STAT. ANN. § 574.070 (LEXIS, LexisNexis through 25th Spec. (2008) Sess. & updates from Legis. Counsel Bureau through Apr. 2009)[4]	1–4 years; $5,000	1 year; $2,000	6 months; $1,000

[4] The penalty provisions discussed here are to take effect on October 1, 2009; Nevada revised its dog fighting statute on May 26, 2009 to, among other things, clarify that possession of a dog for fighting is unlawful. *See* A.B. 199, 2009 Leg., 75th Sess. (Nev. 2009).

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
N.H. REV. STAT. ANN. § 644:8-a (West, Westlaw through July 7, 2009)	7 years; $4,000	7 years; $4,000	7 years; $4,000
N.J. STAT. ANN. § 4:22-24 (West, Westlaw through L.2009, c. 68 & J.R. No. 7)	3–5 years; $15,000	3–5 years; $15,000	3–5 years; $15,000
N.M. STAT. ANN. § 30-18-9 (West, Westlaw through Apr. 10, 2009)	18 months; $5,000	18 months; $5,000	18 months; $5,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
N.Y. AGRIC. & MKTS. LAW § 351 (McKinney, Westlaw through L.2009, ch. 1–14 & 16–68)	4 years; $25,000	4 years; $25,000 if the animal is trained for fighting purposes, or 1 year; $15,000 if the owner possesses an animal, and the circumstances evince an intent to use the animal for fighting	1 year; $1,000
N.C. GEN. STAT. § 14-362.2 (LEXIS, LexisNexis through 2008 Reg. Sess.)	4–10 months	4–10 months	4–10 months

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
N.D. CENT. CODE § 36-21.1-07 (LEXIS, LexisNexis through Gen. Election of Nov. 4, 2008)	5 years; $5,000	5 years; $5,000	1 year; $2,000
OHIO REV. CODE ANN. §§ 959.15–16 (LEXIS, LexisNexis through June 1, 2009)	6–18 months; $5,000	6–18 months; $5,000	6–18 months; $5,000
OKLA. STAT. title 21 §§ 1694–1699.1 (West, Westlaw through ch. 214 of the 1st Reg. Sess. of the 52d Leg. [2009])	1–10 years; $2,000-$25,000	1–10 years; $2,000-$25,000	1 year; $500

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
OR. REV. STAT. ANN. §§ 167.365, 370 (West, Westlaw through June 18, 2009)	5 years; $125,000	5 years; $125,000	5 years; $125,000
18 PA. CONS. STAT. ANN. § 5511(h.1) (West, Westlaw through Act 2009-10)	7 years; $15,000	7 years; $15,000	7 years; $15,000
R.I. GEN. LAWS §§ 4-1-9–15 (LEXIS, LexisNexis through Jan. 2008 Sess.)	2 years; $1,000	2 years; $1,000	2 years; $1,500

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
S.C. CODE ANN. §§ 16-27-10–80 (West, Westlaw through end of 2008 Reg. Sess.)	5 years; $5,000	5 years; $5,000	6 months; $500
S.D. CODIFIED LAWS §§ 40-1-9–10.1 (West, Westlaw through 2009 Reg. Sess.)	2 years; $4,000	2 years; $4,000	1 year; $2,000
TENN. CODE ANN. § 39-14-203 (LEXIS, LexisNexis through 2008 Reg. Sess.)	1–6 years; $3,000	1–6 years; $3,000	6 months; $500

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
TEX. PENAL CODE ANN. § 42.10 (Vernon, Westlaw through ch. 87 of the 2009 Reg. Sess. of the 81st Leg.)	180 days–2 years; $10,000	1 year; $4,000	1 year; $4,000
UTAH CODE ANN. § 76-9-301.1 (LEXIS, LexisNexis through 2008 2d Spec. Sess. & 2008 Gen. Election)	5 years; $25,000	5 years; $25,000	6 months; $1,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
VT. STAT. ANN. title 13, §§ 352, 364 (LEXIS, LexisNexis through 2007 Adjourned Sess. [2008])	5 years; $5,000	5 years; $5,000	5 years; $5,000
VA. CODE ANN. § 3.2-6571 (LEXIS, LexisNexis through Acts 2009, cc. 1 to 879)	1–5 years; $2,500	1–5 years; $2,500	1–5 years; $2,500
WASH. REV. CODE ANN. § 16.52.117 (West, Westlaw through July 1, 2009)	5 years; $10,000	5 years; $10,000	5 years; $10,000

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
W. VA. CODE ANN. §§ 61-8-19–19b (LEXIS, LexisNexis through July 7, 2009)	1–5 years; $1,000–$5,000	6 months; $300–$2,000	1 year; $100–$1,000
WIS. STAT. ANN. § 951.08 (West, Westlaw through 2009 Act 24, published June 26, 2009)	3.5 years; $10,000	3.5 years; $10,000	9 months; $10,000
WYO. STAT. ANN. § 6-3-203 (LEXIS, LexisNexis through 2009 legis.)	2 years; $5,000	2 years; $5,000	6 months; $750

Statute	***General dogfighting penalties***	***Penalties for possession of dogs for fighting***	***Penalties for being a spectator at a dogfight***
7 U.S.C.A. § 2156; 18 U.S.C.A. § 49 (West, Westlaw through Pub. L. No. 111-40)	5 years; $250,000	5 years; $250,000	N/A

ADDENDUM D:
STATE ANIMAL CRUELTY STATUTES[1,2]

State Statute	*Penalties for first offense*
ALA. CODE § 13A-11-14 (West, Westlaw through Act 2009-580).	**Misdemeanor – six months** §§ 13A-11-14(b), 13A-5-7(a)(2).

[1] State dogfighting statutes and penalties are identified separately in Addendum C.

[2] This chart includes penalties for imprisonment only and does not address fines or other types of penalties.

State Statute	*Penalties for first offense*
ALASKA STAT. § 11.61.140 (LEXIS, LexisNexis through 2008 Reg. Sess. of the 25th State Leg. & the 2008 4th Spec. Sess.). Exceptions to the prohibition include hunting, § 11.61.140(c)(4), and "generally accepted dog mushing or pulling contests or rodeos or stock contests," § 11.61.140(e).	**Misdemeanor – one year** §§ 11.61.140(f), 12.55.135(a).

State Statute	*Penalties for first offense*
ARIZ. REV. STAT. ANN. § 13-2910 (West, Westlaw through July 8, 2009). Exceptions to the prohibition include hunting, § 13-2910(C), and killing vermin, § 13-2910(B)(2).	**Misdemeanor – six months** §§ 13-2910(G), 13-707(A)(1). **Felony – .33 years to two years** §§ 13-2910(G), 13-702.

State Statute	***Penalties for first offense***
Act of Feb. 4, 2009, § 3, 2009 Ark. Adv. Legis. Serv. 33 (LexisNexis) (to be codified at ARK. CODE ANN. §§ 5-62-102–109). [3] Exceptions to the prohibition include pest control, § 5-62-105(a)(6), participating in—or training for—a rodeo, § 5-62-102(a)(7), and hunting, § 5-62-102(a)(9).[4]	**Misdemeanor – one year** §§ 5-62-101(b), 5-4-401(b)(1).

[3] Arkansas recently amended its animal cruelty statutes. The offense of cruelty to animals, a misdemeanor punishable by up to one year of imprisonment, is to be codified at § 5-62-103.

[4] *See* n.3 *supra*. The rodeo exemption is to be codified at § 5-62-105(a)(7), and the hunting exemption is to be codified at § 5-62-105(a)(9). The exemption for pest control will remain codified at § 5-62-105(a)(6).

State Statute	***Penalties for first offense***
CAL. PENAL CODE § 597 (West, Westlaw through July 15, 2009) Exceptions to the prohibition include killing vermin, § 599c, and hunting, *ibid.*	**Misdemeanor or felony – one year** § 597.

State Statute	*Penalties for first offense*
COLO. REV. STAT. § 18-9-202 (LEXIS, LexisNexis through Dec. 1, 2008) Exceptions to the prohibition include "the treatment of animals used in rodeos," § 18-9-202(a.5)(VII), wildlife control, *ibid.*, and hunting, *ibid.*	**Cruelty: misdemeanor – six to eighteen months** §§ 18-9-202(1), (1.5)(a), (2), 18-1.3-501(1)(a).[5] **Aggravated cruelty: felony – one year to eighteen months plus an additional ninety days' imprisonment or home detention** §§ 18-9-202(1.5)(b), (2)(c), 18-1.3-401(1)(a)(V)(A).[6]

[5] Colorado updated the statute containing penalties for misdemeanors in 2009; however, the amendments have no effect on the penalty discussed here. *See* Act of May 21, 2009, 2009 Colo. Legis. Serv. ch. 305 (West) (to be codified at, *inter alia*, COLO. REV. STAT. § 18-1.3-501).

[6] The Colorado statute governing felony sentencing was updated in April, 2009, to alter sentencing for youthful offenders, allowing sentencing in the state's youthful offender system. *See* Act of April 2, 2009, 2009 Colo. Legis Serv. ch. 77 (West) (to be codified at, inter alia, COLO. REV. STAT. § 18-1.3-401).

State Statute	*Penalties for first offense*
CONN. GEN. STAT. ANN. § 53-247 (West, Westlaw through May 25, 2009). Exceptions to the prohibition include hunting, § 53-247(b).	**One to five years**[7] § 53-247.
DEL. CODE ANN. title 11 § 1325 (LEXIS, LexisNexis through 77 Del. Laws, ch . 70). Exceptions to the prohibition include hunting, §1325(f).	**Misdemeanor – one year** §§ 1325(b), 4206(a). **Felony – three years** §§ 1325(b), 4205(b)(6).

[7] Punishment varies according to the subsection of the violation. For example, violation of subsection (a), which prohibits, *inter alia*, depriving an animal of necessary sustenance, is punishable by up to one year of imprisonment. Violation of subsection (b), on the other hand, which prohibits maliciously and intentionally torturing an animal is punishable by up to five years' imprisonment.

State Statute	*Penalties for first offense*
D.C. CODE § 22-1001 (West, Westlaw through June 17, 2009).	**180 days** § 22-1001(a)(1).

State Statute	*Penalties for first offense*
FLA. STAT. ANN. § 828.12 (West, Westlaw through July 1, 2009).	**Misdemeanor – one year** §§ 828.12(1), 775.08(2). **Felony – 5 years** §§ 828.12(2), 775.082(4)(d).
GA. CODE ANN. § 16-12-4 (LEXIS, LexisNexis through 2009 Reg. Sess.).	**Cruelty: misdemeanor – one year** §§ 16-12-4(b), 17-10-3(a). **Aggravated cruelty: one to five years** § 16-12-4(c).

State Statute	*Penalties for first offense*
HAW. REV. STAT. ANN. §§ 711-1108.5, -1109 (LEXIS, LexisNexis through 2009 Legis. through Act 79 of the Reg. Sess.). Exceptions to the prohibition include the killing of vermin, § 711-1109(2)(c).	**Cruelty in the first degree: felony – five years** §§ 711-1108.5(4), 706-660. **Cruelty in the second degree: misdemeanor – one year** §§ 711-1109(4), 706-663.
IDAHO CODE ANN. § 25-3504 (LEXIS, LexisNexis through 2008 Reg. Sess.).	**Misdemeanor– six months**[8] §§ 25-3504, 25-3520(A).

[8] There is a separate provision at § 25-3503 that prohibits the poisoning of an animal as an offense punishable by up to three years' imprisonment.

State Statute	*Penalties for first offense*
510 ILL. COMP. STAT. ANN. 70/3.01 (West, Westlaw through P.A. 96-36 of the 2009 Reg. Sess.). The prohibition on depictions of animal cruelty includes exceptions for "rodeos, sanctioned livestock events, or normal husbandry practices," § 70/3.03-1(b).	**Cruel treatment: misdemeanor – less than one year** title 510, § 70/3.01; title 730, § 5/5-4.5-55. **Aggravated cruelty: felony – one to three years** title 510, § 70/3.02; title 730, § 5/5-4.5-45. **Animal torture: felony – two to five years** title 510, § 70/3.03; title 730, § 5/5-4.5-40. **Depiction of animal cruelty: misdemeanor – less than one year** title 510, § 70/3.03-1; title 730, § 5/5-4.5-55.

State Statute	*Penalties for first offense*
IND. CODE ANN. § 35-46-3-7 (West, Westlaw through 2009 1st Reg. Sess.).	**Misdemeanor – one year**[9] §§ 35-46-3-7, 35-50-3-2.
IOWA CODE ANN. § 717B.3A (West, Westlaw though 2009 Reg. Sess.). Exceptions to the prohibition include wildlife management, § 717B.3A(1)(d), and hunting, § 717B.3A(1)(e).	**Aggravated misdemeanor – two years** §§ 717B.3A(3)(a)(1), 903.1(2).

[9] The provision cited is for abandonment and neglect. Other animal cruelty statutes in Indiana may carry higher penalties. For example, violation of § 35-46-3-11.5, which pertains to interference with service animals, is classified as a felony.

State Statute	***Penalties for first offense***
KAN. CRIM. CODE ANN. § 21-4310 (West, Westlaw through 2008 Reg. Sess.). Exceptions to this prohibition include hunting, § 21-4310(b)(3), wildlife management, *ibid.*, "rodeo practices accepted by the rodeo cowboys' association," § 21-4310(b)(4), and the killing of vermin, § 21-4310(b)(10).	**Misdemeanor – one year** §§ 21-4310(d)(2), 21-4502(a). **Felony – thirty days to one year** § 21-4310(d)(1).

State Statute	*Penalties for first offense*
KY. REV. STAT. ANN. §§ 525.125, .130, .135 (West, Westlaw through end of 2008 legis.). Exceptions to this prohibition include hunting, *e.g.*, § 525.130(2)(a), and pest control, § 525.130(2)(i).	**Cruelty in the first degree: felony – one to five years** §§ 525.125(3), 532.020(1)(a). **Cruelty in the second degree/torture of dog or cat[10]: misdemeanor – ninety days to twelve months** §§ 525.130(4), 525.135(3), 532.020(2).

[10] This may become a felony if the dog or cat suffers serious injury or death. § 525.135(3).

State Statute	*Penalties for first offense*
Act of June 19, 2009, 2009 La. Sess. Law Serv. Act 106 (West) (to be codified at LA. REV. STAT. ANN. § 14:102.1); *see also* Act of June 29, 2009, 2009 La. Sess. Law Serv. Act 179 (West) (amending Act 106). Exceptions to this prohibition include hunting, § 14:102.1(C)(1), and "[t]raditional rural Mardi Gras parades, processions, or runs involving chickens," § 14:102.1(C)(5).	**Simple cruelty – six months** § 14:102.1(A)(2). **Aggravated cruelty – one to ten years** § 14:102.1(B)(4).

State Statute	*Penalties for first offense*
ME. REV. STAT. ANN., title 17, § 1031 (West, Westlaw through ch. 150 of the 2009 1st Reg. Sess. of the 124th Leg.). Exceptions to this prohibition include the killing of vermin, § 1031(2)(B) (an affirmative defense), hunting, § 1031(5), and wildlife management, *ibid.*	**Cruelty – one to three years** title 17, § 1031(1); title 17-A, § 4-A(3). **Aggravated cruelty – three to five years** title 17, § 1031(1-B); title 17-A, § 4-A(3).
MD. CODE ANN. CRIM. LAW § 10-604 (LEXIS, LexisNexis through July 1, 2009).	**Misdemeanor – ninety days** § 10-604(b)(1).
MASS. GEN. LAWS ANN. ch. 272, § 77 (West, Westlaw through ch .24 of the 2009 1st Ann. Sess.).	**Five years in state prison or two and a half years in a house of correction** § 77.

State Statute	*Penalties for first offense*
MICH. COMP. LAWS ANN. §§ 750.50, .50b (West, Westlaw through P.A. 2009, No. 65 (except 46) of the 2009 Reg. Sess., 95th Leg.). Exceptions to this prohibition include hunting, § 750.50(11)(b), wildlife management, *ibid.*, and the killing of vermin, § 750.50(11)(e).	**1 animal involved: misdemeanor – ninety days** § 750.50(4)(a). **2-3 animals involved: misdemeanor – one year** § 750.50(4)(b). **4-10 animals involved: felony – two years** § 750.50(4)(c). **10 or more animals involved: felony – four years** § 750.50(4)(d).

State Statute	*Penalties for first offense*
MINN. STAT. ANN. § 343.21 (West, Westlaw through 2009 Reg. Sess., ch. 1–58).	**Misdemeanor – ninety days**[11] §§ 343.21(9), 609.03(3).
Mississippi	**N/A**[12]

[11] Sentences of up to four years are authorized under the statute where aggravating circumstances are present *See* §§ 343.21(9)(b) through (h).

[12] Mississippi's animal cruelty statute, MISS.CODE ANN. § 97-41-1 (LEXIS, LexisNexis through 2008 1st Extraordinary Sess.), was held unconstitutional in *Davis v. State*, 806 So.2d 1098, 1104 (Miss. 2001). To date, the Mississippi State Legislature has been unable to pass a new animal cruelty statute. *See, e.g.*, H.B. 941, 2009 Leg., Reg. Sess. (Miss. 2009) (not voted out of committee).

State Statute	*Penalties for first offense*
MO. ANN. STAT. § 578.012 (West, Westlaw through June 26, 2009).	**Misdemeanor – one year** §§ 578.012.2, 558.011.1(5). **Felony – four years** §§ 578.012.2, 558.011.1(4).
MONT. CODE ANN. § 45-8-211 (West, Westlaw through May 2007 Spec. Sess.). Exceptions to this prohibition include "rodeo activities that meet humane standards of the professional rodeo cowboys association," § 45-8-211(4)(c), hunting, § 45-8-211(4)(d), wildlife management, § 45-8-211(4)(e), and the killing of vermin, § 45-8-211(4)(h).	**One year** § 45-8-211(2)(a).

State Statute	*Penalties for first offense*
NEB. REV. STAT. ANN. § 28-1009 (LEXIS, LexisNexis through Nov. 2008).	**Misdemeanor – one year** §§ 28-1009(2)(a), 28-106(1). **Felony – five years** §§ 28-1009(2)(b), 28-105(1).

State Statute	*Penalties for first offense*
NEV. REV. STAT. ANN. § 574.100 (LEXIS, LexisNexis through 25th Spec. (2008) Sess. & updates from Legis. Counsel Bureau through Apr. 2009). Exceptions to this prohibition include accidental animal injuries or deaths occurring "in the normal course of . . . carrying out the activities of a rodeo or livestock show," § 574.100(5)(a).	**Misdemeanor – two days to six months** § 574.100(2)(a).

State Statute	*Penalties for first offense*
N.H. REV. STAT. ANN. § 644:8 (West, Westlaw through July 7, 2009).	**Misdemeanor – one year** §§ 644:8(III), 625:9(IV)(a). **Felony – one to seven years** §§ 644:8(III-a); 625:9(III)(a)(2).
N.J. STAT. ANN. § 4:22-17, -26 (West, Westlaw through L.2009, c. 78, 80-81 & J.R. No. 7).	**Disorderly persons offense – six months** § 4:22-17(a). **Fourth degree crime – eighteen months** §§ 4:22-17(b), 2C:43-6(a)(4). **Third degree crime – three to five years** §§ 4:22-17(c), 2C:43-6(a)(3).

State Statute	*Penalties for first offense*
N.M. STAT. ANN. § 30-18-1 (West, Westlaw through 1st Reg. Sess. of the 49th Leg.) Exceptions to this prohibition include hunting, § 30-18-1(I)(1), the killing of vermin, § 30-18-1(I)(3), and the use of commonly accepted Mexican and American rodeo practices, § 30-18-1(I)(5).	**Cruelty: misdemeanor – one year** §§ 30-18-1(D), 31-19-1(A). **Extreme Cruelty: felony – eighteen months** §§ 30-18-1(F), 31-18-15(A)(10).
N.Y. AGRIC. & MKTS. LAW §§ 350, 353-a (McKinney, Westlaw through L.2009 ch. 1–14 & 16–68).	**Cruelty: misdemeanor – one year** § 353; NY PENAL LAW § 70.15. **Aggravated cruelty: felony – two years** § 353-a(3).

State Statute	*Penalties for first offense*
N.C. GEN. STAT. §§ 14-360, -361 (LEXIS, LexisNexis through 2008 Reg. Sess.). Exceptions to this prohibition include hunting, § 14-360(c)(1), the killing of vermin, § 14-360(c)(4), and wildlife management, *ibid.*	**Misdemeanor – forty-five days (if a Class 1 Misdemeanor) or sixty days (if a Class A1 Misdemeanor)** §§ 14-360(a)–(a)(1), 14-361, 15A-1340.23. **Felony – ten months** §§ 14-360(b), 15A-1340.17; N.C. STRUCTURED SENTENCING TRAINING & REFERENCE MANUAL 2 fig.A, 18–19, 19 fig.B (2004).

State Statute	*Penalties for first offense*
N.D. CENT. CODE § 36-21.1 (LEXIS, LexisNexis through 2009 Leg. Sess.). Exceptions to this statute include rodeo activities, trail or pleasure riding, shows, fairs, and parades. § 36-21.1-01(5).	**Misdemeanor – one year** §§ 36-21.1-11, 12.1-32-01(5).
OHIO REV. CODE ANN. §§ 959.13, 131 (LEXIS, LexisNexis through July 6, 2009).	**Misdemeanor – 180 days (if perpetrated against a companion animal) or 90 days (if perpetrated against another kind of animal)** §§ 959.99, 2929.24(A).

State Statute	*Penalties for first offense*
OKLA. STAT. title 21, § 1685 (West, Westlaw through ch. 214 of the 1st Reg. Sess. Of the 52d Leg. [2009]).	**Felony – five years in the State Penitentiary or one year in county jail** § 1685.
OR. REV. STAT. ANN. §§ 167.310, .315, .320 (West, Westlaw through June 18, 2009); *see also* Act of June 4, 2009, 2009 Or. Laws ch. 233 (West) (to be codified at OR. REV. STAT. ANN. §§ 167.310, 340) (amending the applicable definitions section to include "equine").	**Animal abuse in the second degree: misdemeanor – six months** §§ 167.315, 161.615(2). **Animal abuse in the first degree: misdemeanor – one year** §§ 167.320, 161.615(1).

State Statute	*Penalties for first offense*
18 PA. CONS. STAT. ANN. § 5511 (West, Westlaw through Act 2009-12). Exceptions to this prohibition include hunting and wildlife management, § 5511(p).	**Summary offense – ninety days** §§ 5511(b)–(h), 106(c). **Misdemeanor – two years** §§ 5511(a)(1), (2.1), 106(b)(7). **Felony – seven years** §§ 5511(a)(2), 106(b)(4).
R.I. GEN. LAWS §§ 4-1-2, -3, -5 (LEXIS, LexisNexis through Jan. 2008 Sess.). Exceptions to this prohibition include hunting, § 4-1-5(b).	**Eleven months** (§§ 4-1-2, -3, -4) **to two years** (§ 4-1-5).

State Statute	*Penalties for first offense*
S.C. CODE ANN. § 47-1-40 (West, Westlaw through end of 2008 Reg. Sess.). Exception to this prohibition include wildlife management and hunting, § 47-1-40(C).	**Misdemeanor – sixty days** § 47-1-40(A). **Felony – 180 days to five years** § 47-1-40(B).
S.D. CODIFIED LAWS §§ 40-1-1, -2.2, -27 (West, Westlaw through 2009 Reg. Sess.).	**Misdemeanor – one year** §§ 40-1-27, 22-6-2(1).
TENN. CODE ANN. § 39-14-202 (LEXIS, LexisNexis through 2008 Reg. Sess.).	**Misdemeanor – six months** (§§ 39-14-202(f)(3), 40-35-111(e)(2)) **to eleven months, twenty-nine days** (§§ 39-14-202(g)(1), 40-35-111(e)(1)).

State Statute	*Penalties for first offense*
TEX. PENAL CODE ANN. §§ 42.09, 42.092 (West, Westlaw through ch. 87 of the 2009 Reg. Sess. of the 81st Leg.). Exceptions to this prohibition include hunting, §§ 42.09(f)(1)(A), 42.092(f)(1)(A), and wildlife management, §§ 42.09(f)(1)(B), 42.092(f)(1)(B).	**Misdemeanor – one year** §§ 42.09(c), 42.092(c), 12.21. **Felony – 180 days to two years** §§ 42.09(c), 42.092(c), 12.35.

State Statute	*Penalties for first offense*
Utah Code Ann. § 76-9-301 (LEXIS, LexisNexis through 2008 2d Spec. Sess. & 2008 Gen. Election). Exempted from this prohibition are animals traveling with circuses temporarily within the state, § 76-9-301(1)(b)(ii)(A)(II)(Cc), animals treated in accordance with "accepted rodeo practices," § 76-9-301(1)(b)(ii)(B), and animals hunted or culled, § 76-9-301(1)(b)(ii)(D).	**Cruelty: misdemeanor – ninety days** (§§ 76-9-301(3)(b), 76-3-204(3)) **to six months** (§§ 76-9-301(3)(a), 76-3-204(2)). **Aggravated cruelty: misdemeanor – ninety days** (§§ 76-9-301(5)(c), 76-3-204(3))**, six months** (§§ 76-9-301(5)(b), 76-3-204(2))**, or one year** (§§ 76-9-301(5)(a), 76-3-204(1)). **Torturing a companion animal: felony – five years** §§ 76-9-301(6), 76-3-203.

State Statute	*Penalties for first offense*
VT. STAT. ANN. title 13, §§ 352, 352a (LEXIS, LexisNexis through 2007 Adjourned Sess. [2008]).	**Cruelty – one year**[13] §§ 352, 353(a)(1). **Aggravated cruelty – three years** §§ 352a, 353(a)(2).
VA. CODE ANN. § 3.2-6570 (LEXIS, LexisNexis through Acts 2009, cc. 1 to 879). Exceptions from this prohibition include hunting and wildlife management, § 3.2-6570(D), and the dehorning of cattle, § 3.2-6570(C).	**Misdemeanor – twelve months** §§ 3.2-6570(A), (E), 18.2-11(a). **Felony – twelve months to five years** §§ 3.2-6570(F), 18.2-10(f).

[13] For several of the cruelty provisions, the penalty is a civil citation if the offender has never been adjudicated in violation of any provision in the entire chapter. *See* § 353(a)(4)(B).

State Statute	*Penalties for first offense*
WASH. REV. CODE ANN. §§ 16.52.205, .207 (West, Westlaw through July 1, 2009).	**Cruelty in the first degree: felony – five years** §§ 16.52.205, 9A.20.021.1(c). **Cruelty in the second degree: misdemeanor or gross misdemeanor** (§ 16.52.207) – **ninety days** (§ 9A.20.021.3) **or one year** (§ 9A.20.021.2).
W. VA. CODE ANN. § 61-8-19 (LEXIS, LexisNexis through July 7, 2009). Exceptions from this prohibition include hunting, § 61-8-19(f).	**Misdemeanor – six months** § 61-8-19(a)(2). **Felony – one to five years** § 61-8-19(b).

State Statute	*Penalties for first offense*
WIS. STAT. ANN. §§ 951.01–02, .18 (West, Westlaw through 2009 Act 24, published June 26, 2009).	**Misdemeanor** (§ 951.18) – **ninety days** (§ 939.51(3)(b)) **or nine months** (§ 939.51(3)(a)). **Felony** (§ 951.18) – **three years, six months** (§ 939.50(3)(i)) **or six years** (§ 939.50(3)(h)).
WYO. STAT. ANN. § 6-3-203 (LEXIS, LexisNexis through 2009 legis.). Exempted from this provision are rodeo events, § 6-3-203(m)(iii), and hunting or wildlife management, § 6-3-203(m)(iv).	**Cruelty to animals: misdemeanor – six months** § 6-3-203(e). **Aggravated cruelty to animals: felony – two years** § 6-3-203(n).