No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE HUMANE SOCIETY OF THE UNITED STATES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Humane Society of the United States ("The Humane Society" or "HSUS") submits this brief as *amicus curiae* in support of petitioner United States. The Humane Society is the nation's largest non-profit animal protection organization with more than 10 million members and constituents. HSUS's mission is to protect animals through legislation, litigation, investigation, education, advocacy and field work. HSUS assists state and federal law enforcement officials in the investigation and prosecution of animal cruelty, and has participated as *amicus* in numerous cases raising animal protection issues.

SUMMARY OF ARGUMENT

Congress enacted 18 U.S.C. §48 to provide law enforcement with a vital tool to combat the most abhorrent acts of animal cruelty. Section 48 criminalizes the interstate trafficking of videos 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," and if the depiction does not have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." The proscribed acts include depictions such as:

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to this filing. Letters of consent have been filed with the clerk.

- A woman slowly crushing to death a speckled kitten. The kitten, secured to the ground, watches and shrieks in pain as a woman thrusts the sharp point of her high-heeled shoe into its body, slams her heel into the kitten's eye socket, thrusts it into the kitten's mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. During the attack, the kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.[2]

- An orchestrated fight to the death where tortured dogs and puppies rip the skin and ears off their opponents, and bite through each other's ears, paws, neck and genitals in a desperate attempt to survive. To avoid impending death, one dog rips out the trachea of the other, leaving the dead dog sprawled on the ground, covered in blood, with its eyes closed and paws in the air.[3]

On July 18, 2008, the Third Circuit *en banc* held that the Government has no "compelling interest" in preventing such blatant acts of animal cruelty and struck down §48 on its face. Pet.App.-1a-63a. The United States' petition for certiorari clearly outlines

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[2] *See* http://www.snopes.com/photos/gruesome/crushvideo.asp (last visited Jan. 12, 2009); *see also* http://multimedia.hsus.org/investigation/squishy.html (last visited Jan. 13, 2009).

[3] *See* HSUS, *Unleashed* clip, *available at* http://video.hsus.org/index.jsp?fr_story=58fd7f86d0c45e2bfd1660d18e3baed3db84cb59 (last visited Jan. 11, 2009), *video available for purchase at* http://www.allurbanmedia.com/unleashed-the-realest-pitbull-action-dvd.html.

why this Court's intervention is needed and needed now. The Third Circuit declared a federal statute unconstitutional *on its face* based on gravely flawed reasoning and a fundamental misunderstanding of First Amendment doctrine.

HSUS fully supports the petition and arguments therein, and submits this brief to provide further historical perspective about §48 and animal welfare legislation, and to elaborate on three crucial errors committed by the Third Circuit:

First, and most importantly, the Third Circuit's bald pronouncement that the interest in preventing egregious acts of animal cruelty is not "compelling" is a tragic error that, if left undisturbed, will distort consideration of animal welfare issues in the lower courts, Congress, and state and local legislatures for years to come.

Second, the "speech" here is akin to categories of expression this Court has deemed unprotected by the First Amendment. The Third Circuit's decision to subject §48 to *strict scrutiny* evidences an unduly rigid view of this Court's precedents.

Third, the Third Circuit's facial invalidation of a federal statute in a criminal case is itself unprecedented: §48 was indisputably *not* invalid in all its applications, and the overbreadth doctrine (which the court did not even claim to apply) was wholly inapplicable.

For all of these reasons, and for those set forth in the petition, this Court's review is necessary.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION FACIALLY INVALIDATES A STATUTE CRUCIAL TO HISTORICAL PROTECTIONS AGAINST ANIMAL CRUELTY

A. Protections Against Animal Cruelty are Deeply Embedded in This Nation's Legal Traditions

The Third Circuit seemed to believe that concern for animal welfare is a modern innovation. In fact, prohibitions on animal cruelty are deeply ingrained in American law, dating back to the early settlements. Nearly 400 years ago, the Massachusetts Bay Colony proscribed "any Tirrany or Crueltie towards any bruite Creature which are usuallie kept for man's use." Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, *in* Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1990 1, 1 (Animal Welfare Inst. 1990). By the end of the 19th Century, all 45 then-existing states had enacted anti-cruelty provisions. *Id.* at 4. All 50 states had codified animal protections by 1913. *Id.* (12 states enacted statutes prior to gaining statehood).

Such laws are aimed to protect animals from needless cruelty, but also reflect an interest in public morality as old as the law itself. *See Waters v. People*, 46 P. 112, 113 (Colo. 1896) ("[The anti-cruelty law's] aim is not only to protect these animals, but to conserve public morals ...."). As Justice Scalia explained in *Barnes v. Glen Theatre, Inc.*, "[o]ur society prohibits, and all human societies

have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral ... for example ... cockfighting." 501 U.S. 560, 575 (1991) (Scalia, J., concurring). Courts and legislatures have long recognized that "[c]ruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men." *Stephens v. State*, 3 So. 458, 458-59 (Miss. 1887).

Today all states have laws prohibiting acts of animal cruelty,[4] and all specifically criminalize animal fighting—unanimously classifying certain dogfighting offenses as felonies.[5] Merely attending a

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[4] *See* Stray Pet Advocacy, Animal Cruelty Laws State by State, http://www.straypetadvocacy.org/PDF/AnimalCrueltyLaws.pdf (last visited Jan. 11, 2009).

[5] *See* Ala. Code §3-1-29; Alaska Stat. §11.61.145; Ariz. Rev. Stat. §§13-2910.01-.02; Ark. Code Ann. § 5-62-120; Cal. Penal Code §597.5; Colo. Rev. Stat. §18-9-204; Conn. Gen. Stat. §53-247; Del. Code Ann. tit. 11, §1326; D.C. Code §22-1015; Fla. Stat. Ann. §828.122; Ga. Code Ann. §16-12-37; Haw. Rev. Stat. §711-1109.3; Idaho Code §25-3507; 720 Ill. Comp. Stat. 5/26-5; Ind. Code §35-46-3-9; Iowa Code §§717D.2-717D.4; Kan. Stat. Ann. §21-4315; Ky. Rev. Stat. Ann. §§525.125-.130; La. Rev. Stat. Ann. §14:102.5; Me. Rev. Stat. Ann. tit. 17, §1033; Md. Code art. 27, §59; Mass. Gen. Laws ch. 272, §§94-95; Mich. Comp. Laws §750.49; Minn. Stat. §343.31; Miss. Code Ann. §97-41-19; Mo. Rev. Stat. §578.025; Mont. Code Ann. §45-8-210; Neb. Rev. Stat. §28-1005; Nev. Rev. Stat. §574.070; N.H. Rev. Stat. Ann. §644:8-a; N.J. Stat. Ann. §4:22-24; N.M. Stat. Ann. §30-18-9; N.Y. Agric. & Mkts. Law §351; N.C. Gen. Stat. §14-362.2; N.D. Cent. Code §36-21.1-07; Ohio Rev. Code Ann. §959.16; Okla. Stat. tit. 21, §§1693-98; Or. Rev. Stat. §§167.365-.370; 18 Pa. Cons. Stat. §5511; R.I. Gen. Laws §§4-1-9 to -11; S.C. Code Ann. §§16-27-30 to -40; S.D. Codified Laws §40-1-9; Tenn. Code Ann. §39-14-203; Tex. Penal Code Ann.

dogfight is prohibited by 48 states, and is a felony in twenty.[6]

Congress passed the first federal anti-cruelty statute in 1873. Act of Mar. 3, 1873, 42 Cong. Ch. 252, 17 Stat. 584 (codified as amended at 49 U.S.C. §80502). In 1966, Congress passed the Animal Welfare Act ("AWA") to improve the treatment of animals used in scientific research. 7 U.S.C. §2131 *et seq*. The Act has been amended six times, as recently as 2008, to curtail additional inhumane practices and expand coverage. Subsequent federal enactments forbid mistreatment of animals by, *inter alia*: protecting marine mammals, 16 U.S.C. §§1361-1421; prescribing humane methods of animal slaughter, 7 U.S.C. §§1901-1906, 9 C.F.R. §313.1-.90; establishing humane guidelines governing the purchase, sale and handling of animals at auction, 7 U.S.C. §2142; enumerating standards to protect pets in pounds and shelters, 7 U.S.C. §2158; and protecting free-roaming horses, 16 U.S.C. §§1331-1340.

Like the states, Congress has long outlawed animal fighting, Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, §17, 90 Stat. 417, 421 (codified at 7 U.S.C. §2156), and has strengthened the associated penalties twice in the last three years. Food, Conservation, and Energy Act of 2008, Pub. L.

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§42.10; Utah Code Ann. §76-9-301.1; Vt. Stat. Ann. tit. 13, §352; Va. Code Ann. §3.2-6571; Wash. Rev. Code §16.52.117; W. Va. Code §61-8-19; Wis. Stat. §951.08; Wyo. Stat. Ann. §6-3-203.

[6] *See supra* note 5. Hawaii and Montana's dogfighting statutes do not specifically prohibit attendance. *See id.*

No. 110-246, §14207, 122 Stat. 1651, 2223-24; Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

This extensive web of legislation stems from the firmly held belief by "the great majority of Americans" in the humane treatment of animals. *See* H.R. Rep. No. 106-397, at 4 (1999). The enormous public and private resources spent on animal care and control evidences society's enduring interest in eradicating animal cruelty:

- HSUS estimates that states and local municipalities allocate between $800 million and $1 billion annually to fund more than 1,500 animal shelters nationwide.
- Approximately 10,000 animal protection groups in the United States hold tax-exempt status. These groups raise $1.3 billion annually and operate more than 1,800 private animal shelters. Andrew Rowan, *Counting the Contributions: Benchmarking for Your Organization and Your State*, Animal Sheltering, Nov.-Dec. 2006, at 38.

In just the last two years, California voters overwhelmingly passed a proposition setting humane standards for housing farm animals, and the national media chronicled widespread outrage over NFL star Michael Vick's underground dogfighting enterprise.

B. To Effectuate Long-Recognized Government Interests and to Fill a Regulatory Gap, Congress Enacted §48

Notwithstanding the state and federal statutes proscribing animal cruelty, law enforcement officials found that the perpetrators of such acts were difficult to locate (*i.e.*, they operated in underground criminal markets) and prosecute (*i.e.*, jurisdictional and statute of limitations defenses often prevailed). The underground criminal activity was abetted by an active interstate marketplace of videos documenting gruesome acts of animal abuse and torture. Congress enacted §48 to cut off that visible source of funding, motivation, and publicity for the underlying acts that were all-too-often evading prosecution.

Two types of depictions comprise the vast majority of material criminalized by §48: crush videos and dogfighting videos.

1. Crush Videos

The proliferation of fetish "crush" videos was a driving motivation for passage of §48. These videos show small animals such as "mice, guinea pigs, cats, chickens and monkeys ... being ... slowly ... crushed to death by a woman in an assortment of different types of shoes, sandals and sometimes barefooted." Punishing Depictions of Animal Cruelty and Federal Prisoner Health Care Co-Payment Act of 1999: Hearing before the Subcomm. on Crime of the H. Comm. on the Judiciary, 106th Cong 41 (1999) (statement of Tom Connors, Deputy District Attorney, Ventura County District Attorney Office). The videos often include the woman's domineering

voice "blended together with the animal's screams of pain and his bones breaking." *Id.*

Over 2,000 crush video titles existed at the time of §48's passage; they sold on the internet for as much as $300 with annual sales totaling nearly $1 million. *See* 145 Cong. Rec. 31217 (1999); Thomas R. Collins, *Long Odds Lead to Okeechobee 'Crush' Prosecution*, Palm Beach Post, Oct. 24, 1999, at 7C.

Because crush videos typically reveal only the woman's leg, perpetrators often escaped prosecution. *See* 145 Cong. Rec. 31217 (statement of Sen. Smith) ("It has been difficult for enforcement agents to determine when the practice occurred, where it occurred, and who has been involved, since feet and the crushing of the animals are the only images on the video."); *id.* at 25898 (statement of Rep. Bachus) ("In every State it is against the law for them to do it, but we cannot identify these people. But we can identify who is selling them."); *id.* at. 25896 (statement of Rep. Gallegly) ("Federal and State prosecutors from around the country have contacted me to express the difficulty they have in prosecuting people for crush videos because the only evidence of the crime is on videotape."); *id.* at. 25898 (statement of Rep. Shays) ("We cannot prosecute these people without this law. It will continue. It will grow.").

Section 48 was enacted to eliminate the financial incentive driving production of crush videos. *See id.* at 31217 (statement of Sen. Kyl). It worked. By 2007, sponsors of §48 declared the crush video industry dead. Elton W. Gallegly, *Beyond Cruelty*, U.S. Fed. News, Dec. 16, 2007, *available at* http://www.house.gov/gallegly/media/media2007/col121607animals.htm. Even overseas websites shut

down after enduring heightened scrutiny. Julia Reischel, *Crush Me, Kill Me*, Broward-Palm Beach New Times, Apr. 20, 2006, *available at* http://www.browardpalmbeach.com/2006-04-20/news/crush-me-kill-me&page=29. Now, after the Third Circuit's decision, crush videos are already back online.[7]

2. Dogfighting Videos

Dogfighting "is a grisly business in which two dogs either trained specifically for the purpose or maddened by drugs and abuse are set upon one another and required to fight, usually to the death of at least one and frequently both animals." H.R. Rep. No. 94-801, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 758, 761. Despite state and federal prohibitions, *supra* at 5-7, dogfighting persists and the attendant criminal subculture continues to exact a tremendous toll on the dogs, on public resources, and on communities across this country. Videotapes memorializing dogfights are integral to the success of this criminal industry.

Impact on Dogs: The pit bulls used in fights endure physical torture and emotional manipulation throughout their lives to predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with

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[7] Examples include: http://www.snuffx.com/squishykitty.htm (last visited Jan. 11, 2009); http://www.snuffx.com/squishypuppy.htm (last visited Jan. 11, 2009); *see also* http://multimedia.hsus.org/investigation/squishy.html.

sticks, and electrocution.[8] Dogs demonstrating insufficient blood lust are routinely executed, often by drowning, hanging, or being set on fire.[9] Dogs are conditioned never to give up a fight, even if they will be gravely hurt or killed.[10] As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones.[11] Losing dogs are often refused treatment or beaten further as "punishment" for the loss and are sometimes left to die.[12]

Impact on Public Resources: Dogfighting strains public resources. Twenty to 75% of dogs entering animal shelters are pit bulls or pit mixes.[13]

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[8] *See The Reality of Dog Fighting*, http://www.pitbullsontheweb.com/petbull/articles/brownstein.html (last visited Jan. 11, 2009); *Vick Case Reminds of Pit Bull's Changing Image,* Associated Press, July 24, 2007, *available at* http://www.sportingnews.com/yourturn/viewtopic.php?t=244674.

[9] *See, e.g., Vick Case Reminds of Pit Bull's Changing Image*, *supra* note 8.

[10] *See* ASPCA, *Fight Animal Cruelty*, http://aspca.org/site/PageServer?pagename=cruelty_pitbull (last visited Jan. 11, 2009).

[11] *See, e.g.,* Johnna A. Pro, *Dogfighting Bust*, Pittsburgh Post-Gazette, July 1, 1999, *available at* http://www.post-gazette.com/regionstate/19990701dogs1.asp.

[12] *See The Reality of Dog Fighting*, *supra* note 8.

[13] *See* Katina Antoniades, *Pit Bull Poll*, Animal Sheltering, Sept.-Oct. 2006, at 10, *available at* http://animalsheltering.org/resource_library/magazine_articles/sep_oct_2006/pit_bull_poll.pdf; Ann Notarangelo, *New Effort to Place Pit Bulls in Good Homes*, CBS5.com, Aug. 10, 2005,

Many require emergency veterinary care and shelter, and hundreds of thousands are euthanized annually.[14] The resources expended to shelter and rehabilitate these animals are staggering. California alone spends $300 million annually on the sheltering and disposal of dogs and cats.[15] Although there is no national data on the expense of sheltering and rehabilitating pit bulls, the annual cost is surely in the hundreds of millions of dollars.

Impact on Community: Because escapes are not uncommon, these hyper-aggressive animals pose a risk of attack to members of the communities in which they live. Unsurprisingly, 60% of the dog bites necessitating emergency room care are caused by breeds most commonly used in dogfighting.[16] These attacks send approximately 334,000 victims to hospital emergency rooms each year at an estimated

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http://cbs5.com/local/pit.bulls.SPCA.2.434742.html; *see also* ASPCA, *supra* note 10.

[14] *See* Bay Area Doglovers Responsible About Pitbulls, *The Biggest Battle: The Epidemic That's Killing The Pit Bulls*, http://www.badrap.org/rescue/breeding.cfm (last visited Jan. 11, 2009); Brian Mann, *Illegal Dogfighting Rings Thrive in U.S. Cities* (NPR broadcast July 20, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=12104472.

[15] *See* Patrick McGreevy, *The Fur Flies Over Spaying Proposal – A state bill to require dog and cat owners to neuter their pet rouses emotions on both sides*, L.A. Times, July 10, 2007, at A-1.

[16] *See* Jeffrey J. Sacks et al., *Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998*, 217 JAVMA 836, 840 (2000), *available at* http://www.cdc.gov/ncipc/duip/dogbreeds.pdf.

cost of $102.4 million.[17] In 2005, 81% of dog bite fatalities were caused by dogs trained for fighting or to guard property.[18]

And these figures do not account for the increase in crime supported by dogfighting and attendant gambling. *See, e.g.,* Tom Weir, *Vick case sheds light on dark world of dogfighting*, USA Today, July 26, 2007 ("'drugs and weapons associated with this sport are unbelievable'"). Violent, illegal, and lucrative subcultures produce collateral criminal activity—even apart from the traditional insight, increasingly backed by research, that cruelty to animals coarsens the moral sensibilities of the perpetrator and lowers inhibitions to violence or cruelty directed at humans.[19]

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[17] *See, e.g.*, J. Gilchrist et al., *Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments—United States, 2001*, 52 CDC Morbidity Mortality Wkly. Rep. 605 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm; Harold B. Weiss et al., *Incidence of Dog Bite Injuries Treated in Emergency Departments*, 279 JAMA 51, 53 (1998), *available at* http://www.jama.ama-assn.org/cgi/reprint/279/1/51.pdf; Canine Aggression Task Force, *A community approach to dog bite prevention*, 218 JAVMA 1732, 1733 (2001).

[18] *See* Dennis Selig, *The Pit Bull Controversy,* Feb. 14, 2007, *available at* http://www.gadzoo.com/ChicagoTribune/Article.aspx?id=393.

[19] *See* David Tingle et al., *Childhood and Adolescent Characteristics of Pedophiles and Rapists*, 9 Int'l J.L. & Psychiatry 103, 113 (1986) (finding that nearly half of convicted rapists and nearly one-third of convicted child molesters engaged in childhood acts of animal cruelty); *see also, e.g.,* H.R. Rep. No. 106-397, at 4 ("The committee also notes the increasing body of research which suggests that humans who

Dogfighting Videos for Profit: Videotaping of matches is common. *See, e.g., Commonwealth v. Craven*, 817 A.2d 451, 452-53 (Pa. 2003) (dogfighting videotapes and equipment found at the home of dogfight organizer). These depictions facilitate dogfighting operations by documenting important fights, conferring a significant revenue stream, serving as "training" videos for other fight organizers, and providing marketing and advertising materials. Video documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess—proof demanded by potential buyers and critical to the underground market. For example, if an owner can *prove* that his dog has killed five other dogs, it will earn the "Grand Champion" title and command higher purses, entry fees, and side bets in subsequent fights, sometimes surpassing $100,000 for a single fight.[20] Videos also encourage gambling activity because it allows those reluctant to attend actual fights for fear of prosecution to still bet on the outcome. *See* Department of Legislative Services, Fiscal & Policy Note, H.B. 1213 (Md.), at 2 *available at* http://senate.state.md.us/2006rs/fnotes/bil_0003/hb1

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kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals.").

[20] *See* Bill Burke, *Once limited to the rural South, dogfighting sees a cultural shift*, The Virginian-Pilot, June 17, 2007, *available at* http://hamptonroads.com/node/283641; Richard A. Webster, *Dog Fighting Remains Big Business in Louisiana*, New Orleans City Business, Nov. 26, 2007, *available at* http://findarticles.com/p/articles/mi_qn4200/is_/ai_n21140556).

213.pdf (last visited Jan. 5, 2009). Moreover, some of the cruelty depicted on film, like the crush videos discussed above, are created solely for the purpose of selling the video (and not for a live audience).

While these videos clearly capture the dogs' actual suffering, they rarely reveal who made the recording or staged the fight. H.R. Rep. No. 106-397, at 3. Depictions preserve the perpetrators' anonymity and frustrate law enforcement's efforts to stamp out criminal activity. *See* Aurelio Rojas, *Panel Supports Bill Targeting Animal Torture Videos*, Sacramento Bee, Mar. 15, 2000, at A5. On the rare occasions where police are alerted to a dogfight in progress, organizers "vanish in minutes and regroup with ease." Steven Hepker, *Dog fights an elusive problem*, Jackson Citizen Patriot, Oct. 22, 2006. By criminalizing the distribution of dogfighting videos, Congress sought to inhibit the promotion and documentation of dogfights, undermine the financial motive, and ultimately reduce occurrences of the underlying act.

II. THE THIRD CIRCUIT'S DECISION CONTRAVENES THIS COURT'S PRECEDENTS IN SEVERAL CRITICAL RESPECTS

A. The Third Circuit Fundamentally Erred In Holding That Preventing Animal Cruelty Does Not Constitute A "Compelling Interest"

The Third Circuit *en banc* refused to "elevate" animal protection "to the status of a *compelling* interest" and "fail[ed] to see how" §48 "serves a compelling government interest." Pet.App.-15a, 22a.

This holding is factually unsupportable and legally flawed. As the discussion above reveals, laws against animal cruelty and animal fighting serve powerful governmental interests and have deep roots in American law. The Third Circuit's fundamental misunderstanding of the compelling interest inquiry warrants this Court's review.

The compelling interest prong of strict scrutiny serves two primary goals: to "smoke out" illegitimate government purposes, and to make a normative judgment about the societal importance of the asserted interest. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). These twin purposes ensure that when government enacts a law that might impinge on a fundamental constitutional guarantee, the law is actually driven by societal interests important enough to justify a narrowly tailored incursion on the guaranteed liberty. *See Grutter*, 539 U.S. at 326 (strict scrutiny "'assur[es] that [government] is pursuing a goal important enough to warrant use of a highly suspect tool'" (citation omitted) (second alteration in original)).

As explained above and in the petition, federal and state laws have long contained numerous provisions to curtail inhumane practices against animals, including criminalizing animal fighting ventures. Significant government resources are devoted to combat and prevent animal cruelty, to prosecute the perpetrators, and to care for animals. Such ubiquity and endurance is traditionally strong evidence of a compelling governmental interest. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 211 (1992);

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); *New York v. Ferber*, 458 U.S. 747, 758 (1982).

The national consensus against animal torture depicted in the materials made illegal under §48 is further evidence of the Government's interest, as Congress explained:

> The committee is of the view that the great majority of Americans believe that all animals, even those used for mere utilitarian purposes, should be treated in ways that do not cause them to experience excessive physical pain or suffering. The committee recognizes the widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans.

H.R. Rep. No. 106-397, at 4. This "substantial consensus" weighs heavily in favor of finding a compelling interest here. *Burson*, 504 U.S. at 211; *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 580 (1993) (Blackmun, J., concurring) ("The number of organizations that have filed *amicus* briefs on behalf of this interest, [preventing animal cruelty] ... demonstrates that it is not a concern to be treated lightly.").

The desire to protect animals also reflects an interest in public morality, and in preventing societal harm stemming from the correlation between violence against animals and violence against humans. Protecting public morality, including prohibiting "immoral" "activities" like "cockfighting," has been a bastion of government for centuries. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

Indeed, this Court has rarely held that a governmental interest is *not* compelling. In contrast, a wide range of interests have been recognized as compelling—and preventing animal torture falls comfortably among these. *See, e.g.*, *Grutter*, 539 U.S. at 328 (diversity in higher education); *Johnson v. California*, 543 U.S. 499, 512 (2005) (maintaining prison security and discipline); *Simon & Schuster,* 502 U.S. at 118-19 (compensating victims of crime and ensuring that criminals do not profit from their crime). As in *Burson*, the Government's interest here is more than supported by "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211. As in *Ferber*, a substantial number of studies support the asserted interest, in this case confirming the societal harm traditionally associated with animal cruelty. 458 U.S. at 758 n.9. And like the recognized interests in *Simon & Schuster*, "[t]he force of th[e] interest[] is evidenced by the" federal and state governments' already existing "statutory provisions." 502 U.S. at 119. If §48 has any constitutional shortcomings, lack of a compelling governmental interest is not one of them.

The Third Circuit concluded otherwise by ignoring these interests, misreading this Court's precedents, and distorting the compelling interest inquiry by importing notions of narrow tailoring and federalism.

The Third Circuit's first error was its mistaken reliance on *Lukumi*, 508 U.S. 520. Pet.App.-15a-16a (explaining that under *Lukumi*, "'animal rights do not supersede fundamental human rights'" (citation omitted)). At issue in *Lukumi* was whether municipal ordinances aimed exclusively at

prohibiting a particular religion's animal sacrifices violated the Free Exercise Clause. *Lukumi*, 508 U.S. at 526-28, 535-38. In holding these ordinances unconstitutional, this Court did not decide whether preventing animal cruelty is "compelling" in the abstract; it simply held that "in the context of" grossly underinclusive "ordinances" that evidenced discrimination towards a particular religious group, the city's asserted interests in protecting public health and preventing cruelty to animals were not compelling. *Id.* at 543-47. Indeed, *Lukumi* illustrates use of the compelling interest inquiry to "smoke out" illegitimate government purposes. *See* Pet.App.-43a (Cowen, J., dissenting) ("[T]he real rationale behind the prohibitions [in *Lukumi*] was an unconstitutional suppression of religion."). This Court thus did not negate the societal importance of preventing animal cruelty, a point Justice Blackmun wrote separately to stress. *Lukumi*, 508 U.S. at 580 (Blackmun, J., concurring) (holding "does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals").

Next, the Third Circuit improperly injected narrow tailoring concerns into the compelling interest inquiry. Pet.App.-18a-19a. But whether the Government has a compelling interest is not dependent on whether §48 is narrowly tailored to serve that interest. *See Simon & Schuster*, 502 U.S. at 120-21 (analyzing compelling interest distinct from narrow tailoring); *see also Grutter*, 539 U.S. at 326. There are of course instances, such as in *Lukumi*, where the exceedingly poor fit between the asserted governmental interest and the means chosen to effectuate that interest reveals that the

stated interests were not genuine. But the Third Circuit did not suggest it was "smoking out" any improper motive—it is undisputed that the Government's stated interest to protect animals was quite real.

Finally, the Third Circuit erred by importing the Commerce Clause and principles of federalism into the compelling interest analysis. Specifically, the court took "federalism concerns into account" and concluded that because Congress purportedly "does not have the constitutional authority to pass" general animal cruelty legislation, then the "stated government interest"—to "prevent cruelty to animals"—was "too broad." Pet.App.-28a-29a. Instead, it unilaterally redefined the "government interest" as "'preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce.'" Pet.App.-29a. This entirely misunderstands the purpose of the strict scrutiny analysis (*i.e.,* to ferret out pernicious motives) and confuses the *power* of Congress to act with the legitimacy or importance of Congress' *interests* in acting. The dissent in *Stevens* rightly explained that "the *means* through which Congress seeks to advance these interests—that is, pursuant to its Commerce Clause authority—has no bearing on the uncontroversial propositions that the interests implicated are nevertheless ones of the most paramount order." Pet.App.-45a (Cowen, J., dissenting). The Third Circuit's analysis is actually an unprecedented *assault* on federalism principles—because it would impugn Congress' motives, and label congressional enactments "underinclusive" merely because Congress properly chose to respect potential constitutional limits on its power.

The Third Circuit's flawed and unprecedented analysis led it to declare that preventing animal cruelty cannot be a compelling interest. This precise issue was left undecided in *Lukumi* more than fifteen years ago. In the ensuing decade-and-a-half, no other court has decided this question and there is no reason to believe the issue will present itself in a posture meriting this Court's review again in the near future. Allowing this holding to stand indefinitely as the only definitive ruling would be devastating to the cause of animal welfare and to the interests of HSUS, as well as other animal protection organizations, local animal control agencies, and state and federal officials tasked with preventing animal cruelty and the attendant violence, drug trafficking, and other social ills.

The compelling interest holding has implications beyond simply invalidating §48. It will cast a pall of constitutional doubt over *all* existing and proposed animal welfare legislation that could conceivably be subjected to heightened scrutiny. It will discourage Congress and state legislatures from attempting to enact even more narrowly tailored legislation to address the evils inherent in the marketing and sale of depictions of atrocious and illegal cruelty. And it will distort consideration of animal welfare issues in courts and legislatures in a manner inconsistent with the actual traditions of our country. This case presents a unique and important opportunity to clarify the compelling interest inquiry and to wipe this deeply flawed and pernicious holding off the books.

B. The Third Circuit Erred in Holding That Depictions of Animal Cruelty Covered by §48 Are Entitled to First Amendment Protection

This case also presents an excellent opportunity for this Court to clarify that the gruesome depictions of animal mutilation targeted by §48 simply do not merit the dignity of First Amendment protection at all. This Court explained in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), that "certain well-defined and narrowly limited classes of speech" do not contribute to an "essential part of any exposition of ideas, and are of such slight social value" that government may proscribe their content. So far, this Court has recognized that fighting words, *id.* at 572; speech inciting imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); obscenity, *Miller v. California*, 413 U.S. 15, 19 (1973); child pornography, *Ferber*, 458 U.S. at 754-63; and solicitations to engage in illegal activity, *United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008), are so far from the concerns animating the First Amendment that heightened scrutiny is unnecessary.

As the petition explains, the reasons these categories are "unprotected" apply with equal force to the materials proscribed by §48. Pet.-16-17. Like depraved sexual materials banned by obscenity laws, crush and dogfighting videos are "patently offensive," lack serious social value and appeal to base human instincts rather than conveying any ideas or information. Although this Court has

previously applied its obscenity jurisprudence to materials that appeal to the *sexual* subset of these base instincts, there is no justification in history or reason for treating materials that appeal to sadistic but (perhaps) not sexual impulses any differently.

As Judge Posner recently explained, obscenity is premised on offensiveness, encompassing the "disgusting, embarrassing, degrading, disturbing, outrageous, and insulting," and "one can imagine" an obscenity ordinance directed at offensive depictions of actual violence "even if they have nothing to do with sex." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001). A First Amendment that allows society to regulate the distribution and sale of sadistic video depictions of actual gruesome death-matches between coerced living beings *only* if there happens to be a scantily clad woman involved is one that has lost its original moorings and any real sense of decency. And given the nature of sexual deviance, the distinction is not even coherent. How, exactly, are judges to ascertain that a video of a foot crushing a kitten appeals to the "prurient interest," but a video of two dogs (or two people) forced to tear each other to pieces does not?

Denying constitutional protection to depictions of wanton cruelty covered by §48 is also consistent with this Court's decision in *Ferber*. Like child pornography, dogfighting and crush videos are integrally related to underlying reprehensible and criminal conduct, and provide a commercial motive for the continuation of the criminal enterprise. *Ferber*, 458 U.S. at 761-62. Finally, like the speech described in *Williams*, 128 S. Ct. at 1841-42,

depictions of animal torture have no social value and are integrally related to illegal acts. Importantly, to the extent any such depictions *do* have any serious social or artistic value, they are exempt under §48's terms.

In sum, the depictions of depraved animal cruelty regulated by §48 are patently offensive, appeal principally to base human instincts, are premised on the commission of illegal acts and are integrally related to ongoing criminal enterprises. Congress' compelling reasons for regulating these depictions easily outweigh their *de minimis* contribution to any exposition of ideas, and demonstrate that they hold no entitlement to First Amendment protection.

C. The Third Circuit Erred in Invalidating §48 On Its Face

The Third Circuit further erred by striking down the entire statute as violative of the First Amendment. This Court's precedents provide for facial invalidation on First Amendment grounds in only two circumstances: (1) where "'no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications," *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); and (2) where a law is "impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep,'" *id.* at 1190 n.6 (quoting *Ferber*, 458 U.S. at 769-71). Here, a *Salerno* challenge would have failed, as even the Third Circuit admitted. *See* Pet.App.-10a n.5 (noting that "a hypothetical statute that would only regulate

crush videos" would likely fall under *Miller*); Pet.App.-33a n.16.

And there was simply no basis for an overbreadth analysis—indeed, the Third Circuit did not even attempt one. The court found instead that Defendant Stevens' speech was *protected.* Parties engaging in protected speech may challenge the law *as applied to them*, but have no legitimate need for an overbreadth challenge and no standing to bring one. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (Where the party is engaging in protected speech, "[t]here is ... no want of a proper party to challenge the statute, [and] no concern that an attack on the statute will be unduly delayed or protected speech discouraged."). When one who is engaging in protected speech challenges a statute on First Amendment grounds, "[t]he statute may forthwith be declared invalid to the extent that it reaches too far, *but otherwise left intact.*" *Brockett*, 472 U.S. at 504 (emphasis added). Declaring a statute facially overbroad after finding a party's speech protected "would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989).

Because the Third Circuit (erroneously) concluded that Defendant Stevens' dogfighting videos constituted protected speech, it had no occasion to examine §48 for facial overbreadth. The court should have simply reversed Stevens'

conviction without "mounting [a] gratuitous wholesale attack[]" on the entire statute. *Id.*

CONCLUSION

The petition should be granted.

Respectfully submitted,

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