

No. 08-769

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

**BRIEF AMICUS CURIAE OF ENDANGERED BREED
ASSOCIATION AND AMERICAN DOG BREEDERS
ASSOCIATION IN SUPPORT OF RESPONDENT**

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STATEMENT OF INTERESTS¹

Amici curiae are several organizations representing dog and animal owners dedicated to fighting breed specific or other anti-pet legislation and promoting wholesome animal welfare activities.² The Endangered Breed Association, (EBA) an Oklahoma non-profit corporation was formed in the 1980s to combat breed specific legislation and the preservation of the bull breeds. The American Dog Breeders Association (ADBA) was founded as a registry for the American Pit Bull Terrier in 1909. Recently the registry expanded to become an all breed registry. The registry holds sanctioned dog shows and weight pulls throughout the United States. All amici curiae and their counsel have taken strong stands against dog fighting and animal abuse but believe 18 U.S.C. §48 goes beyond the scope of congressional intent.

¹ Respondent has filed a blanket consent to the participation of amicus curiae with the Court. Pursuant to Rule 37.39(a), a copy of petitioner's consent to the filing of this brief has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than amicus curiae or its members made a monetary contribution to its preparation or submission. Petitioner was notified of amicus curiae intent to file a brief on this matter ten days prior to the filing.

² Attorneys agreeing to have their names appear on the brief were solicited on the basis of their expertise in animal law and legislation.

All organizations share a concern that historical information about various breeds of dogs and their working ability will become unlawful to possess or sell to collectors. Many of the membership of these national organizations participate in activities such as dog training for obedience and agility trials, hunting with dogs, weight pulling contests, rodeo events, herding and other related dog and animal activities.

All amicus curiae share a mutual concern that activities, which are legal today, may become illegal due to anti-pet legislation and thus films and videos of those activities may become unlawful to possess or sell.

All of these organizations support lawful activities with dogs and other animals including hunting with dogs. Many owners of dogs collect prints, videos, books, and other collectibles that may depict historical activities of their breed of dog or of a recent vintage to demonstrate workability of the breed.

18 U.S.C. §48 does not seek to prosecute dog fighters or abusers of animals but seeks to criminalize protected speech related to hunting with dogs, rodeo events, weight pull contests, predator control, vermin control, herding of livestock or dog training if this Court reverses the Third Circuit ruling in this case. All publishers of magazines and producers of videos that relate to dog training, livestock herding, horse shows and rodeo events will experience a chill in the production of such magazines

and videos much to the detriment of those individuals who desire a well trained dog to hunt, perform predator control, vermin control, herd livestock and compete in weight pull contests. Those individuals with horses who enjoy competing in rodeo events or horse shows will be unable to obtain videos of those events.



INTRODUCTION

18 U.S.C. §48 provides in pertinent part:

- (a) **Creation, Sale or Possession.** – Whoever knowingly creates, sells or possesses a depiction of animal cruelty with the intent 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, scientific, educational, journalistic, historical, or artistic value.
- (c) **Definitions** – In the 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.

At the Presidential signing of this act into law in December 1999, President Clinton stated 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 the prurient interest in sex." Statement by President William J. Clinton upon signing H.R. 1997 (December 9, 1999), reprinted in 1999 U.S.C.C.A.N. 324.

Section 48's primary target was the elimination of "crush videos" which feature scantily clad women crushing small animals with their bare feet or while wearing stiletto heels in a manner designed to incite sexual arousal. 145 CONG. REC. E1067-02 (May 24, 1999) (Rep. Gallegly); H.R. Rep. No. 397, 106th Cong., 1st Sess. 3 (1999); 145 CONG. REC. S152220-03 (November 19, 1999) (Sen. Smith).

Local ordinances, state statutes and case law may vary throughout the United States as to the definition of animal cruelty. Some activities may be prohibited in various cities, counties or states but may be exempted under state animal cruelty statutes in others. Weight pulling contests³ are sanctioned events by the United Kennel Club and the American Dog Breeders Association. In addition there are local and national organizations which hold weight pulling contests throughout the United States.⁴ These events are governed by strict rules as to conditions, weight and age of the dog.

In some parts of the country owners of small terriers such as Jack Russell Terriers and Patterdale Terriers hunt with their dogs. The dogs engage the quarry underground and the hunt ends with the quarry dead. The dogs may be injured and sometimes die from their wounds. The dog owners are providing a valuable service to the landowner. The hunters believe that killing vermin with dogs is more humane and safer for other wildlife and pets than poisoning

³ <http://ukcdogs.org> & <http://adbadopt.com> for rules. Dogs pull a sled or cart filled with weights a certain amount of feet or yards. Dogs have the capability of pulling hundreds of times their actual weight. The dogs pull on command and there is no coercion allowed by the handlers. A weight pull judge will disqualify any handler who uses coercion or force on a dog.

⁴ On July 18, 2009 at the Alaskan Malamute Club of Greater Houston and Texas Malmute Rescue sponsored a weight at an American Kennel Club (AKC) event. <http://texalmal.org.events/weightpull09.html>.

the vermin. Other wildlife and family pets can die from poisoning if they eat poisoned vermin. Often the hunters take pictures of their dogs with the dead quarry and sometimes those pictures along with an account of the hunt may be published in club newsletters or magazines. However, there are humane organizations in some parts of the country that consider these hunts to be a form of animal cruelty.

In other parts of the country, coyotes and other predators may pose a threat to livestock and poultry. Dogs may be used to provide predator control by driving off or even killing the predator. Sometimes the dogs may be injured or killed. Sometimes the dog owner or the landowner will take pictures of the dog with the dead predator to establish the working ability of the dog. Sometimes these pictures are published in magazines. Breeders of such working animals want to preserve that working ability and to be able to demonstrate to purchasers of puppies that their dogs have the proper drive and temperament to perform the task.

In some of the southern states with a wild boar population, hunting with dogs is a popular sport but also provides a service to landowners. Wild hogs are known for their ability to dig in the earth and uproot crops and native plants. Wild hogs are considerably different in temperament from the domestic pigs shown at county fairs. Even domestic pigs can become feral and can be deadly. The Discovery Channel aired on January 7, 2009 a segment entitled, "Pig Bomb" on hog hunting with dogs. In

that segment one of the dogs was injured by the wild boar which demonstrated the necessity for a well-trained dog. It is noteworthy that the dogs used in the Discovery Channel segment were “pitbulls.”⁵

At horse shows, particularly the jumpers class, horses may be injured and sometimes have to be destroyed on the spot. All horse shows are filmed and the videos are sold to all competitors.⁶ Many competitors cross state lines to attend these shows. Some humane organizations consider the training of horses to compete in horse show events and the actual competitions a form of animal cruelty.

Rodeos and circus performances with live animals are picketed and harassed by animal rights activists in some parts of the country seeking to have local jurisdictions enact legislation which would ban the use of live animals at rodeos and circuses as a form of animal cruelty. In fact, rodeos are setting strict policies regarding the filming of rodeo events.⁷ According to an article in the Houston Chronicle dated July 15, 2009 the 113 year old Cheyenne Frontier Days rodeo will not allow anyone to film and use the film for commercial use without the express permission of the rodeo. Animal rights activists have filmed past rodeo events claiming the video clips depict cruel and abusive behavior toward animals

⁵ PigBomb.http://www.youtube.com/watch?v=_oF0bvV62go.

⁶ <http://www.reelhorse.com>.

⁷ <http://www.chron.com/dis/story.mpl/ap/tx/6530024.html>.

and use the video clips to obtain donations from the general public via the internet.

Individuals with dogs that fall into the herding groups may engage in herding livestock activities with their dogs to test their dogs working ability with livestock. In addition, there are still farmers and ranchers who use dogs to herd sheep and cattle on their family farms and ranches. There are instructional videos of herding competitions for students so that they may learn from mistakes. Although care is taken to ensure that livestock and poultry such as ducks, sheep and cattle are not injured in the course of the herding trials, sometimes injury and even death occurs to livestock and dogs. There are some humane organizations that believe using dogs to herd other animals is cruel and inhumane.

Electronic collars⁸ or e-collars have been used by dog trainers for many years to achieve reliability of a dog working at a distance in field trial and hunt tests as well as an effective tool for obedience competitors. However, there are some humane organizations that believe that any use of this training tool is a form of animal cruelty. There are trainers who sell videos demonstrating the proper way to use this training aid.

If a local jurisdiction has enacted an ordinance prohibiting the use of the e-collar as a form of animal

⁸ <http://www.gundogsupply.com/tri-tronics-picking-theright-collar.html>.

cruelty and a trainer sells a video demonstrating its use to an individual who resides in that jurisdiction, the trainer may find herself/himself falling under §48 despite the legality of the use of an e-collar in the city, county or state of residence of the seller. The inconsistent statutes may provide inconsistent case law.



ARGUMENT

I. SECTION 48 CANNOT SURVIVE A FACIAL CHALLENGE

The government did not allege that Mr. Stevens was a dog fighter or even that he trained his dogs to fight. The government did not allege that any material sold by Mr. Stevens contained prurient material i.e. material that would be used for sexual arousal. Furthermore the Government concedes that Section 48 constitutes a content-based restriction on speech. *United States v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008).

Throughout history the U.S. Supreme Court has been very careful to protect the rights contained in the First Amendment while being cautious about increasing the restrictions on free speech. In cases when the Court has carved out a category of unprotected free speech, the speech involved a threat to the public or individuals. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Watts v. United States*, 394 U.S. 705 (1969); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

or speech relating to obscenity or prurient interest. *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982).

Ferber, supra, set forth a five-prong test for the upholding of anti-child pornography law. However, one should not equate child pornography with animal cruelty. While all fifty states have enacted anti-cruelty laws demonstrating compassion for animals and their welfare, the courts and the legislatures have not elevated the welfare of animals to the same level as protecting children from harm. *Stevens, supra*, p. 226.

The *Stevens* court interpreted H.R. Rep. No. 106-397, to mean that if an individual does not view videos depicting “animal cruelty” then the individual will not become desensitized to animal cruelty. The Third Circuit court followed the court’s reasoning in *Ashcroft v. Free Speech Coalition*, 532 U.S. 249 (2002), as relating to virtual pornography by stating that a link to child abuse was indirect and speculative. This Court has stated in other cases that even if the speech is repugnant to public mores it cannot serve as a compelling government interest to override the constitutional protections of speech contained in the First Amendment. *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 414 (1989); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).

Videos of dogs fighting and animals being injured or killed while being hunted for food, vermin control or predator control may be repugnant but that fact

alone should not be sufficient to prosecute an individual under §48. What may be repugnant and against public mores in one area as relates to dog training methods, hunting with dogs and other activities enumerated in the introduction of this brief may not be repugnant and against public mores in another part of the country.

Ferber, supra, also specifically stated that there was a continual harm to the child that exists by knowing that videos and films of them engaging in sexual activities are available for viewing. Although we have a tradition in the United States of loving and treating our animals humanely and at times referring to them as our children, they are not children but personal property. There is absolutely no empirical evidence to assert that an animal can suffer lingering harm by or even has the capacity to think that their image on a dog fighting or hunting video will exacerbate the harm.

The third Ferber factor related to drying up of the dog fighting and animal cruelty video market. In *Stevens, supra*, the court ascertained that there is no methodology to ascertain or any evidence to conform that theory. In the area of child pornography the theory has been questioned in several cases. *Barnicki v. Vopper*, 532 U.S. 514, 531 n.17 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-51 (2002); Eugene Volokh, *Speech as Conduct; Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharged Zones*, 90 CORNELL L. REV. 1277, 1324-25 (2005).

In any event even the Humane Society of the United States (HSUS) admitted in their Dog Fighting Fact Sheet prepared for the Steven's trial that "spectators at a dog fight provide much of the profit associated with dog fighting. The money generated by admission fees and gambling helps keep this 'sport' alive." The Humane Society of the United States Dog Fighting Fact, http://www.hsus.org.hsus_field/animalfighting_thefinal_round/dogfighting_factsheet.

Section 48(b) provides exceptions for any work that has serious religious, political, scientific, educational, journalistic, historical, or artistic value. Although Congress viewed these categories broadly, H.R. Rep. No.106-307, at 4. Local laws can vary as to whether a certain activity is considered animal cruelty or performing a valuable service to a landowner such as predator control or vermin control. The scope of §48 is so broad that dog trainers, hunters and sellers of any educational or instructional video regarding hunting or dog training have cause to be concerned as to whether an instructional or what they consider an educational video will fall under §48.

It is patently unfair to the citizenry to be in a position of constantly scrutinizing laws in other jurisdictions to determine whether an educational video falls under §48 and whether they should amass expert witnesses etc. in advance of a prosecution. In the Stevens case, the appendix of the record demonstrated that Mr. Stevens earned a total of \$57,534.95 from January 2001 through April 2003 which amounted to little over \$2000.00 per month in his

business, Dogs of Velvet and Steel. This sum of money did not include other items that were offered for sale which were not charged under §48 nor was there any indication in the record that those other items were illegal to sell. Joint Appendix p. 53-54.

Overturing the Third Circuit opinion in Stevens will chill constitutional speech in the field of educational and instructional videos. It will require small businessmen who may earn \$24,000.00 or less per year from marketing educational videos and books to retain a First Amendment specialist as counsel so that citizens may know whether the video has serious value in order to survive scrutiny under §48. Since even experts can vary in their opinions as to what constitutes serious value, most citizens would choose not to film, edit and sell instructional videos. This would be much to the detriment of the public who seeks to have a well-trained dog or to participate in certain lawful activities.

II. THE SERIOUS VALUE EXCEPTION DOES NOT RENDER §48 CONSTITUTIONAL

Under the heightened form of scrutiny the government must demonstrate its constitutionality. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Animal cruelty laws are enforced on a daily basis in every state. In addition, arrests are made in regard to dog

fighting, the most recent early July 2009 spanning eight states.⁹

Animal cruelty statutes and anti-dog fighting statutes contributed to those recent arrests not §48. These arrests go to the heart of the matter which is to prosecute individuals involved in dog fighting and animal cruelty.

The Court has precedent for striking down content-based restrictions on speech on narrow tailoring/least restrictive means test of strict scrutiny. *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 816 (2000); *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126-31; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395-96 (1992). Preventing cruelty to animals under §48 is a broad sweep rather than narrowly tailored.

The Third Circuit court noted that when viewing the three Stevens videos, the identities of the participants are easily identified. In particular as to the “Catch Dog” video the video shows identities of participants, and provides names and addresses of dog trainers and breeders that will provide a “catch dog” in addition to providing the viewer with a hunt experience. *Stevens, supra*, p. 236.

⁹ <http://www.asPCA.org>; http://hsus.typepad.com/wayne/2009/07/dogfighting_raid.html.

In contrast, those who testified before congressional committees stated that they had difficulty in prosecuting those individuals involved in “crush” videos or videos depicting animal cruelty because faces were concealed. Sellers of educational videos will not conceal identities because they believe that they are providing a valuable service to educate the public about a particular activity.

18 U.S.C. §48 is constitutionally overbroad because it covers a multitude of technical violations found in hunting, fishing, dog training, herding, rodeo events, circus performances, and weight pulling contests.

For example, if a weight pull contest is filmed in a jurisdiction where weight pulls are considered legal but seller sells the video to an individual who resides in an area or community that has banned weight pulls as a form of animal cruelty because of the belief that they overburden the dog, the seller of the video could face prosecution under §48.

The same example could apply to individuals who hunt with small terriers providing vermin control. The hunt could be filmed in an area where the hunt is exempted by statute because the dogs are providing vermin control but if the sellers of the video sell the video to an individual residing in an area where such hunts are not exempted, the sellers of the video could find themselves facing prosecution under §48 much like Mr. Stevens.

The same example could apply to the use of dogs to herd livestock. A farmer or rancher in a rural area who breeds dogs to herd livestock and trains others to work their dogs on stock may film various dogs working stock including those that may be too aggressive and working in an incorrect manner which may depict livestock or dogs injured. The video will demonstrate to the student the proper way to handle or train a dog. The farmer may reside in an area where dogs working livestock are exempt from animal cruelty laws but if the farmer sells a video to someone in an urban setting that finds the video contains scenes of animal cruelty, the farmer may find himself prosecuted under §48.

Another example of the overbreadth of §48 could be the use of the electronic collar to train dogs to work reliably at a distance for hunting tests and field trials as well as obedience competitions. The companies who sell such products also provide an instructional DVD on how to use the training device. These collars are sold all over the United States and there are humane organizations and individuals who are seeking to ban their use and sale. In addition, there are dog trainers who sell videos on how to train dogs using this collar and other methods. For some dogs, this method can save a dog's life but yet a dog trainer could find herself facing a §48 prosecution if she sells such a video to an individual who resides in a city or county that has banned the use of such collars.

The Government will argue that prosecutorial discretion and the exceptions will protect the seller of the video. Does this mean that every seller of an educational and instructional video relating to the training of animals or hunting with animals will have to engage an expert to determine whether this video has serious value? In addition, if the expert determines that the video is not considered a serious work that falls under one of the exceptions, the seller of the video has to rely on the good graces of the prosecutor for prosecutorial discretion. Furthermore, relying on prosecutorial discretion leads to a disparate result in the administration of justice. Our system of justice should be blind and free of any hint of bias, prejudice or favoritism.

Furthermore, the law provides no guidance to prosecutors in the use of their discretionary powers so as to provide for the least restrictive restriction on the rights of free speech of the public. It is foreseeable that under this law that different prosecutors with different discretionary interpretations of the scope of the law and its exceptions might find a video depiction of the same circumstance to be prosecutable under the law in one jurisdiction and qualified for an exception in another jurisdiction. A video used by a commercial breeder to show the condition of his animals and to raise funds for his defense against charges of animal cruelty might be subject to prosecution, while the identical video used by a private organization to demonstrate the alleged cruelty and

to raise funds to assist in their efforts to close down his operation and that of others might be permitted.

◆

CONCLUSION

Our system of jurisprudence is built upon clear, concise laws that afford the common citizenry notice of prohibited behavior in a manner easily understood by all. When one's liberty is at risk, no one should have to rely on the good graces and discretion of the prosecutor as to whether the citizen will be charged with a crime or not. This is especially true when the citizen is exercising his or her rights under the First Amendment. This country was founded on the basis that certain liberties were basic to the survival of our democracy. The right of free speech conferred under the First Amendment embodies one of those basic liberties that this Court has preserved with only minor limitations since its inception.

Therefore, on behalf of the amicus curiae named organizations, we request that this Court affirm the decision reached in the Third Circuit as to this case.

Respectfully submitted,

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