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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 OF *AMICUS CURIAE* THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS IN SUPPORT OF PETITIONER

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June 15, 2009

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"The greatness of a nation and its moral progress can be judged by the way its animals are treated." — Mahatma Gandhi

INTEREST OF *AMICUS CURIAE*[1]

The American Society for the Prevention of Cruelty to Animals ("ASPCA") submits this brief as *amicus curiae* in support of Petitioner, the United States of America. As the oldest humane organization in North America, the ASPCA has played a unique role in the history of animal protection. Incorporated in 1866 by a special act of the New York state legislature, the ASPCA was the first humane organization to be granted legal authority to investigate and make arrests for animal cruelty. Now a privately funded not-for-profit corporation with over one million supporters, the ASPCA's mission remains "to provide effective means for the prevention of cruelty to animals throughout the United States."[2] As part of this mission, the ASPCA educates law enforcement, veterinarians, prosecu-

[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 curiae* made a monetary contribution to the brief's preparation or submission, except for Proskauer Rose LLP whose *pro bono* representation of the ASPCA included absorption of the preparation and submission costs. Counsel of record for all parties were timely notified ten days prior to filing. A letter of consent from Petitioner and a blanket consent from Respondent have been filed with the Clerk of the Court.

[2] ASPCA, *About Us*, http://www.aspca.org/about-us (last visited June 10, 2009).

tors and judges on proper responses to animal cruelty and also assists in cruelty investigations.[3]

SUMMARY OF ARGUMENT

Cruelty to animals is a crime in every state—and for good reason: it is barbaric and intolerable in a civilized society to allow the senseless suffering of defenseless beings capable of experiencing (and expressing) pain. Thus, the Government clearly has a compelling interest in preventing animal cruelty due to its far-reaching and devastating consequences on animals and humans alike, the longstanding nationwide interest in its prevention, and the indisputable link between animal cruelty and other forms of serious criminal and violent behavior.

Furthermore, 18 U.S.C. § 48 ("Section 48") is a narrowly tailored means to prevent animal cruelty and its attendant harms to humans because it reaches only a narrow subcategory of speech depicting *intentional* and *illegal* acts of animal cruelty to *live* animals, created solely for profit, that lack any redeeming social value and depend on criminal acts of animal torture.

Even if this Court does not find preventing animal cruelty to be a compelling interest, reversal should still be granted because the Court of Appeals fundamentally erred in failing to apply the

[3] As used herein, the phrases "animal cruelty" and "cruelty to animals" refer only to criminally sanctioned animal cruelty.

framework of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1949), which weighs the governmental interest in restricting speech against the value of the speech to determine whether the speech at issue warrants First Amendment protection. This Court should uphold Section 48 because proper application of *Chaplinsky* establishes that the speech the law prohibits is not constitutionally protected.

ARGUMENT

I. PREVENTING ANIMAL CRUELTY CONSTITUTES A COMPELLING GOVERNMENT INTEREST

Anti-cruelty laws predate the nation's founding, and animal cruelty is a crime in all fifty states and the District of Columbia.[4] Criminalizing depictions of animal torture will promote public morality and avert the related crimes and other harms stemming from the indisputable link between animal cruelty and human violence. The Court of Appeals erroneously held that this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), precluded a finding that preventing animal cruelty is a compelling government interest and failed to recognize that preventing animal cruelty is at least comparable to other interests this Court has recognized as compelling.

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[4] *See United States v. Stevens*, 533 F.3d 218, 224 n.4 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 1984 (2009) (listing animal protection statutes from 50 states and the District of Columbia).

a. The History and Scope of American Anti-Cruelty Legislation Show that Preventing Animal Cruelty Constitutes a Compelling Government Interest

As the history and scope of American anti-cruelty legislation reveal, the government has a compelling interest in preventing the crime of animal cruelty. Indeed, the protection of animals from the abuse of humans is of such paramount importance that laws prohibiting it have existed since long before this country's founding. By 1641, the Massachusetts Bay Colony had adopted its "Body of Liberties," which prohibited "any [t]iranny or [c]rueltie towards any [b]ruite creature which are usuallie kept for man's use."[5] In 1866, the ASPCA was established by an act of the New York state legislature and granted legal authority to investigate and make arrests for animal cruelty.[6] Shortly thereafter, in 1874, the ASPCA's founder, Henry Bergh, was instrumental in founding the Society for the Prevention of Cruelty to Children and participated in the prosecution of one of the nation's first known child abuse cases, which became the foundation of the child protection movement.[7]

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[5] Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL LAW 81 (1999) (*citing* GERALD CARSON, MEN, BEASTS AND GODS: A HISTORY OF CRUELTY AND KINDNESS TO ANIMALS, 71 (1972)).

[6] *See* ASPCA, *History*, http://www.aspca.org/about-us/history.html (last visited June 10, 2009).

[7] *See* ASPCA, *ASPCA Milestones*, http://www.aspca.org/pressroom/press-kit/aspca-milestones-2009.pdf (last visited

Thus, anti-cruelty legislation predates even child protection laws, although both were motivated by the same profound sense of the fundamental importance of protecting the most vulnerable among us.[8]

Today, animal cruelty, including dogfighting, is a crime in every state and the District of Columbia.[9] Some states also ban related activities, such as attending a dogfight or transporting animals across state lines for the purpose of dogfighting.[10]

June 12, 2009); Stephen Zawistowski, ASPCA, *Bergh, Henry*, *available at* http://learningtogive.org/papers/paper357.html (last visited June 12, 2009), *adapted from* Marion S. Lane and Stephen L. Zawistowski, HERITAGE OF CARE (Praeger Publishers 2007).

[8] *See* Zawistowski, *supra* note 7.

[9] *See supra* note 4.

[10] *See* Hanna Gibson, *Dog Fighting Detailed Discussion*, ANIMAL LEGAL & HISTORICAL CENTER (2005), *available at* http://www.animallaw.info/articles/ddusdogfighting.htm ("Dogfighting is illegal in all 50 states and the District of Columbia. In 48 states, the District of Columbia, Puerto Rico, and the Virgin Islands dogfighting is a felony."); Dean Schabner, *Arrest Called Break in Dog Fight Effort*, ABC NEWS (Apr. 29, 2003), http://abcnews.go.com/US/Sports/Story?id=90670&page=1 ("Dog fighting is illegal in all 50 states, and there are federal laws against transporting dogs across state lines to be used in fighting."); Lori Huoy, *Underground Magazine Leads Suspects To Officials*, WPXI (July 26, 2004), *available at* http://www.wpxi.com/news/3579417/detail.html (in Pennsylvania it is a criminal offense to aid in or promote illegal dog fighting); 720 ILL. COMP. STAT. 5/26-5 (2009) (knowingly attending a dogfight is illegal); TEX. PENAL CODE ANN. § 42.10 (2009) (same).

Preventing animal cruelty has also repeatedly been the focus of federal legislative attention.[11]

As Congress observed when it enacted Section 48, "[t]he Government has an interest in regulating the treatment of animals," and "[t]hese legislative enactments evidence society's desire to ensure that animals are treated humanely." H.R. Rep. No. 106-397 (1999). The government has expended substantial resources to combat animal cruelty, to enforce anti-cruelty laws, and to care for the animals seized from their abusive owners. The resources expended on, and the nationwide consensus in, preventing animal cruelty weigh heavily in favor of finding that it constitutes a compelling interest.

Congress enacted Section 48 to augment existing anti-cruelty laws and to fill a legal void by targeting the commercial production and distribution of certain depictions of animal cruelty. 145 CONG. REC. H10267 (1999). As Congressman McCollum explained:

> [Section 48] is a necessary complement to State animal cruelty laws. Congress alone has the power to regulate interstate commerce, and this bill does just that. . . . It does

[11] *See Stevens*, 533 F.3d at 238-239 (Cowen, J., dissenting) (*citing*, *e.g.*, 7 U.S.C. § 2131 (2009) (requires humane handling, care, treatment, and transportation of animals held for sale in interstate commerce or that will be used in a government or private research facility); 7 U.S.C. § 1902 (2009) (requires humane methods of slaughter); 7 U.S.C. § 2156 (2009) (prohibits sponsoring an animal in a fighting venture)).

> not create a new Federal crime to punish the harm to the animals itself, rather it leaves that to State law, where it properly lies. What it does do is restrict the conduct that heretofore has gone on unchecked by State law, the sale across State lines of these horrible depictions for commercial gain.

Id.; *see also* H.R. REP. NO. 106-397, at 3 (Section 48 "is intended to augment, not supplant, State animal cruelty laws by addressing behavior that may be outside the jurisdiction of the States, as a matter of law, and appears often beyond the reach of their law enforcement officials, as a practical matter."). Rep. McCollum further explained:

> [B]ecause the faces of the women inflicting the torture in the videos are often not depicted and there often is no way to ascertain when or where the depiction was made, State authorities have been prevented from using State cruelty-to-animals statutes to prosecute those who make and distribute these depictions.[12]

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[12] 145 CONG. REC. H10267 (1999); *see also Punishing Depictions of Animal Cruelty and The Federal Prisoner Healthcare Co-Payment Act of 1999*: *Hearing on H.R. 1887 and H.R. 1349 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. at 63, 65 (1999) ("*Punishing Depictions*") (statement of William Paul LeBaron, Detective, Long Beach Police Dep't (prosecution of participants in the making of animal cruelty videos is difficult since their faces are typically concealed and law enforcement officials have no way to determine whether the film was made within the three year statute of limitations)); *id.* (pre-

Indeed, that is exactly what happened in the instant case. Stevens admitted that in his video—Pick-A-Winna—he purposefully edited out the faces of handlers involved in the fights depicted. 533 F.3d at 245 (Cowen, J., dissenting).[13]

By targeting such depictions, Congress sought to eliminate demand for the underlying acts of animal cruelty and to prevent subsequent crimes committed by depraved viewers so desensitized or aroused by the violence that they seek to emulate the brutal acts depicted. 145 CONG. REC. H10267 (statement of Rep. Gallegly: "[I]t is the prosecutors from around this country . . . that have made an appeal to us for this [bill]. . . . Further, the producer and distributor of the video, the person making the big bucks, is not violating any current State or Federal laws."). After all, the depictions are created, and the underlying crimes they depict are committed, because filmmakers derive a lucrative income from

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pared Testimony of Tom Connors, Office of the District Attorney County of Ventura, California, 1999 Federal News Service (Sept. 30, 1999) (Section 48 eliminates the statute of limitations problem because the relevant tolling period is triggered not by the date of a video's production, but by its creation, sale, or possession, which is much easier to verify).

[13] *See id.* (Prepared Testimony of Tom Connors, *supra* note 12 without Section 48, prosecuting crush videos would require someone to stumble onto the film scene while the film was being made, make an arrest, and then testify about what happened); *Punishing Depictions*, *supra* note 12, at 65 (Citing article in which Rep. Gallegly is quoted as saying that "[T]he most effective way of stopping this trade is by getting to the people who are distributing this product and making a profit.").

their sale. A crush video sells for up to $300 with annual sales totaling nearly $1 million.[14] Likewise, dogfighting videos, such as those for which Stevens was arrested, perpetuate animal cruelty by playing a central role in promoting the dogfighting enterprise and in stimulating the market for "fighting dogs" adept at killing and injuring other dogs. A fighting dog's value and profitability hinges on its success rate.[15] Champions command higher purses, higher entry fees, higher side bets in future fights, higher stud fees, sale prices of up to $10,000, and

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[14] *See Punishing Depictions*, *supra* note 12, at 65 (a single video typically sells for $40 to $45; made to order videos sell for up to $300; video distributor had pending orders totaling $3,349 at the time of arrest; crush video distributors derive "a lucrative income from the sales and making of these videos"); *id.* at 62 ("Devotees buy nearly $1 million worth of the tapes every year"); 145 CONG. REC. H10267 (statement of Rep. Lantos: videos sell for up to $100 and "over three thousand titles [are] now for sale").

[15] A "Champion" has won three fights; a "Grand Champion" has prevailed in five. *See* Christine Haines, *Pennsylvania, PA: Dog Fighting Probe Produces Two Warrants*, HERALD-STANDARD (July 27, 2004) ("pitting champions or grand champions against one another can drive up the stakes in a dog fight to as much as $10,000"); Doug Simpson, *Internet Unleashes US Dogfight Craze*, THE SYDNEY MORNING HERALD (Jan. 15, 2004), *available at* http://www.smh.com.au/articles/2004/01/14/1073877889804.html?from=top5 (wagers at organized fights range from $100 to $50,000); Lori Huoy, *supra* note 10 (purse as high as $100,000); Schabner, *supra* note 10 (purse as high as $100,000); *Leashing a Blood Sport*, THE WASHINGTON TIMES (Jan. 13, 2004), *available at* http://www.washingtontimes.com/news/2004/jan/12/20040112-115320-5139r/print (wagers ranging from $100 to $50,000).

increased sale prices for their puppies.[16] Since written records of success rates are difficult to substantiate and can be faked, video documentation increases the Champion's value and profitability. Videos can also document the dog's attack specialty (*e.g.*, face attack versus leg attack), increasing the dog's sale value since different purchasers seek different fighting styles.

Contrary to the claim of the Court of Appeals, *see* 533 F.3d at 230, empirical evidence confirms that Section 48 sharply reduced the strong financial incentive behind crush and dogfighting videos,[17] thereby preventing the crimes of animal cruelty that their production necessitates.[18] Unfortunately, the erroneous decision of the Court of Appeals

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[16] *See* Haines, *supra* note 15 (championship status increases stud fees and the cost of puppies); Schabner, *supra* note 10 (dogs with strong pedigrees sell for up to $10,000 apiece); Julie Bank & Stephen Zawistowski, *History of Dog Fighting,* ASPCA Animal Watch *(*Fall 1997), *available at* http://www.aspca.org/fight-animal-cruelty/dog-fighting/history-of-dog-fighting.html ("the owner of a grand champion . . . can sell the dog's pups for at least $1,500 apiece").

[17] *See supra* note 14.

[18] David S. Jackson, *Congress Stamps Out Animal-Snuff Videos*, TIME (Sept. 6, 1999) (a crush video site, perhaps anticipating a crackdown after Section 48's enactment, started showing women sitting on inanimate objects rather than crushing animals); *Punishing Depictions*, *supra* note 12 (crush filmmaker said recent publicity about crush videos forced him out of the business of selling crush videos through adult magazines) (*citing* Martin Kasindorf, *Authorities Out to Crush Animal Snuff Films*, USA TODAY (Aug. 27, 1999)).

undid the progress that Section 48 had achieved, and not surprisingly, animal cruelty depictions are already back online.[19]

b. The Third Circuit Erred in Ignoring the Well-Documented Link Between Animal Cruelty and Crimes Against Humans

Section 48 was enacted not only to prevent and deter animal cruelty, but also to prevent its attendant harms to humans. The link between acts of animal cruelty and other criminal and violent behavior has long been recognized.[20] Indeed, an individual's early engagement in or fascination with animal abuse is a significant predictor of later violence and, as the Federal Bureau of Investigation and others have recognized, often provides the first warning signs of potentially dangerous criminal conduct.[21] Compelling anecdotal evidence com-

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[19] *See* http://xxxfetish-media.com/shop68/shop.php?&dept=313&type=VIDEO&page=1 (last visited June 10, 2009); http://www.crushcuties.com (last visited June 10, 2009).

[20] *See* Lockwood, *supra* note 5, at 81 ("The idea that cruelty to animals can be associated with antisocial, or criminal behavior is not new."); CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION (Randall Lockwood & Frank R. Ascione eds., 1998).

[21] *See* Lockwood, *supra* note 5, at 82-83 (*citing* Robert K. Ressler et al., *Murderers who Rape and Mutilate*, 1. J. INTERPERSONAL VIOLENCE 273 (1986)); Randall Lockwood & Ann Church, *Deadly Serious: An FBI Perspective on Animal Cruelty,* HUMANE SOC'Y NEWS 1 (Fall 1996); 145 CONG. REC. H10267 (statement of Rep. Morella: "FBI Special agent Allan Brantly stated last year that, quote, 'animal violence does not

piled by the FBI and other law enforcement agencies has linked high profile serial killers, serial rapists, and other violent offenders to acts of animal abuse earlier in their lives.[22]

Numerous research studies have confirmed the link between engaging in the abuse of animals and committing acts of violence against humans.[23] For example, a 1997 study jointly conducted by the Massachusetts Society for the Prevention of Cruelty to Animals and Northeastern University compared 153 individuals prosecuted for intentional animal abuse between 1975 and 1996 with a group of individuals of the same age, gender, socioeconomic group, and geographic location. The study revealed that animal abusers were five times more likely to have been convicted of another violent

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occur in a vacuum. It is highly predictive in identifying children being abused and cases of spousal abuse.' He continues to say, 'In many cases we have seen examples whereby enjoyment from killing animals is a rehearsal for targeting humans.'").

[22] *See* Lockwood, *supra* note 5, at 83 (noting that serial killer David Berkowitz murdered a parrot and dog before killing humans and school-shooter Luke Woodham killed his dog before murdering his mother and classmates); *see also infra* note 25.

[23] *See*, *e.g.*, Alan R. Felthous & Stephen R. Kellert, *Violence Against Animals and People: Is Aggression Against Living Creatures Generalized?*, 14 BULL. AM. ACAD. PSYCHIATRY & LAW 55-69 (1986); Carter Luke, Physical Cruelty Toward Animals in Massachusetts, 1975-1996, 5 SOC'Y & ANIMALS J. HUMAN-ANIMAL STUDIES (1997), *available at* http://www.psyeta.org/sa/sa5.3/Arluke1.html.

crime and three times more likely to have been involved in another form of serious criminal behavior.[24]

Congress was acutely aware of the link between animal cruelty in childhood and violence against humans in adolescence and adulthood when it enacted Section 48. In debating the merits of the statute, members of Congress observed that some of this country's most infamous killers abused animals when they were children and noted recent cases of extreme violence against humans by children who had a history of animal cruelty.[25] As Rep. Morella noted, Section 48 "reflects a growing awareness . . . that violence perpetrated on animals is unacceptable and often escalates to violence against humans. . . . It is essential that our society recognizes this link and punishes acts of animal cruelty."[26]

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[24] *See* Luke, *supra* note 23.

[25] *See* 145 CONG. REC. H10267 (statement of Rep. Gallegly (author of the bill), "The FBI recently stated that children who torture animals should be considered 'potentially violent' and this may be a factor in profiling a child as the next school shooter. Many studies have found that people who commit violent acts on animals will later commit violent acts on people. Planned acts of animal cruelty is a problem that should be taken seriously."); *id.* (statement of Rep. Smith, noting that "some of society's most brutal killers first began their violent ways by killing and maiming small animals"); *id.* (statement of Rep. Bachus, noting an 11-year-old boy with a history of animal cruelty shot ten classmates).

[26] *See* 145 CONG. REC. H10267 (statement of Rep. Morella).

Thus, the House of Representatives, with Senate concurrence, passed the following resolution, which reflects congressional recognition of the important link between animal abuse in childhood and the subsequent commission of violence against humans:

> [T]he Congress (1) recognizes that individuals who abuse animals are more likely to commit more serious violent crimes against humans; (2) urges social workers, teachers, mental health professionals, and others to be aware of the connection between animal cruelty and human violence and to evaluate carefully and to monitor closely individuals who have a history of abusing animals because this may indicate a propensity to commit violence against other humans; (3) urges appropriate Federal agencies to encourage and support research to increase the understanding of the connection between cruelty to animals and violence against humans in order to utilize instances of animal abuse to identify and intervene with potentially violent individuals, and urges Federal agencies which are undertaking research on violent crime and its causes to incorporate examination of the link between violence against animals and violence against humans; (4) urges local law enforcement officials to treat cases of animal cruelty seriously both because such cruelty is a [sign] of the potential for domestic and other forms of violence against humans; and

> (5) commends the fine work of local animal control officials and humane investigators who enforce laws against animal abuse and urges these professionals to work more closely with local law enforcement personnel to identify and prevent potential violence against humans.[27]

Grisly stories found in recent headlines further illustrate the undeniable link between animal cruelty and subsequent brutality against humans. Just this month (June 2009), pet spa owner Erik Webb slit his estranged wife's throat and then stabbed her to death in front of their children before shooting himself.[28] Webb had a history of domestic violence and alleged animal cruelty toward others' pets and at the time of the murder, was under indictment for the death of a young beagle, Moxie, brought to his business for a bath.[29] The veterinarian who examined Moxie discovered that while in Webb's care, Moxie inexplicably suffered broken ribs, internal bruising of the ear, signs of heat exhaustion, and a lacerated liver, which caused internal hemorrhaging.[30] Moxie's death

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[27] *See* H.R. CON. RES. 338, 106th Cong. (2000).

[28] *See* J.J. Stambaugh, *Pet Spa Owner Kills Wife, Self in W. Knox*, KNOXVILLE NEWS SENTINEL CO. (June 3, 2009), *available at* http://www.knoxnews.com/news/2009/jun/03/pet-spa-owner-kills-wife-self-in-w-knox.

[29] *See id.*

[30] *See id.*

prompted the fourth lawsuit regarding the deaths of pets in Webb's care.[31]

Animal cruelty is also strongly associated with domestic violence as well as elder and child abuse.[32] In one Utah study, 71% of pet-owning victims in a domestic violence shelter reported that their abuser had threatened, harmed, or killed an animal.[33] A Wisconsin study surveying victims at twelve domestic violence shelters revealed that 80% of those who owned pets reported that their batterers had been violent with their animals.[34] Research has also shown that fear of pet abuse is a major factor in preventing victims from escaping

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[31] *See id.*

[32] *See, e.g.*, Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, 17 THE LATHAM LETTER 1 (1996); Domestic Violence Intervention Project, *Domestic Violence Program*, http://alexandriava.gov/DomesticViolence (last visited June 13, 2009) ("Family abuse crosses all categories, even the family pet. Animal cruelty is often an early warning sign of violent tendencies that may turn into domestic violence."); Barbara Rosen, *Watch for Pet Abuse—It Might Save Your Client's Life*, *reprinted in* CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION 340-47 (Randall Lockwood & Frank R. Ascione eds., 1998) (detailing the link between animal abuse and elder abuse); ASPCA, *The Connection Between Domestic Violence and Animal Cruelty*, *available at* http://www.aspca.org/fight-animal-cruelty/domestic-violence-and-animal-cruelty.html (last visited June 13, 2009).

[33] *See* Ascione, *supra* note 32.

[34] *See The Connection*, supra note 32.

their abusive environments.[35] As House members recognized, "[o]ften, women in domestic violence shelters report that their abusers victimize the family pet in order to control their behavior or the children's behavior."[36]

The government also has a compelling interest in preventing animal cruelty because it is an antisocial behavior that erodes public mores and has negative repercussions on both the person inflicting the harm and those viewing its portrayal. Exposure to acts of torture or extreme animal cruelty, whether live or on tape, has the effect of desensitizing viewers to violence and suffering—both of animals and of humans—which in turn can lead to future acts of violence, as viewers lose their ability

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[35] *See* Frank R. Ascione, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women who are Battered*, 5 SOCIETY & ANIMALS 205-18 (1997).

[36] 145 CONG. REC. H10267 (statement of Rep. Morella: "My experience in working on domestic violence issues alerted me to the connection between animal abuse and violent behavior. . . . Abusers often threaten to harm or inflict pain to the animal to demonstrate control within the home. Not surprisingly, children raised in such homes often learned that cruelty to animals is acceptable behavior, certainly when they are watching such videos. In turn, this behavior becomes the first step in repeating a legacy of violence and the conditioning of referring to violence in demonstration of power or frustration. Raising awareness about the link between animal cruelty and domestic violence, child abuse and other forms of violent behavior I think is an important step in trying to prevent such violence.").

to empathize with the pain of others.[37] Members of Congress considered these harmful consequences explicitly when they debated whether to enact Section 48. *See* 145 CONG. REC. H10267 at 16 (Rep. Bachus: "Psychologists tell us that when we view these activities, they desensitize our young people to a behavior which appears to be a gateway to violent acts of indiscriminate, cold-blooded murder."); H.R. REP. NO. 106-397 (1999) ("If society fails to prevent adults from engaging in this behavior, they may become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans."). Evidence also suggests that in the absence of Section 48, desensitization will lead to ever more gruesome depictions of animal cruelty, perhaps on human victims.[38]

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[37] *See, e.g.*, Michael Reynolds, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 351, 367 (2009) ("[F]requent exposure [to violence] may desensitize the viewer, decreasing the unpleasant reactions to violence which would normally inhibit violent behavior.") (*citing* Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 PSYCHOL. SCI. PUB. INT. 81, 96 (2003)).

[38] *Punishing Depictions*, *supra* note 12 (early crush videos began with insects and inanimate objects as victims but progressed to include puppies, kittens, monkeys, etc.); *id*. at 62 (California deputy district attorney notes, "We have some stills of a baby doll they're crushing . . .[eventually] buyers will get desensitized an it'll get to be a baby."); *supra* note 22.

When one considers the clear link between animal cruelty and violence against humans—a link Congress fully recognized when it enacted Section 48—the governmental interest in preventing cruelty to animals becomes all the more compelling.

c. *Lukumi* Does Not Stand for the Proposition that Preventing Animal Cruelty Is Not a Compelling Interest

The erroneous decision of the Court of Appeals was based in large part on its misinterpretation of this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). *Stevens*, 533 F.3d at 227. In *Lukumi,* this Court rejected city ordinances outlawing animal sacrifice because it found that they were merely a pretext designed to burden the exercise of the Santerian religion. 508 U.S. at 540-47.

Lukumi is inapplicable to the instant case because it implicated the Free Exercise of religion, not the Free Speech concerns at issue here. Furthermore, as the dissenting Justices in *Stevens* explained:

> [T]he ordinances there failed not because preventing cruelty to animals was not a sufficiently paramount interest to be deemed compelling; rather, the Court found that the ordinances were so riddled with exceptions exempting all other killings except those practiced by Santeria adherents betrayed that the real rationale behind the prohibi-

> tions was an unconstitutional suppression of religion.

533 F.3d at 240 (Cowen, J., dissenting).

Contrary to the assertion of the Court of Appeals, Justice Blackmun's concurrence in *Lukumi* indicates animal cruelty can be a compelling interest.

> A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. *The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals.* This case does not present, and I therefore decline to reach, the question [of] whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment.

508 U.S. at 580 (Blackmun, J., concurring) (emphasis added).

Clearly then, this Court has *never* held that the governmental interest in preventing animal cruelty is not compelling. In fact, the explosion of media outlets catering to the sale and creation of crush and dogfighting videos had not even occurred when *Lukumi* was decided. Thus, the Court did not address, nor could it have anticipated, the question of whether the government possesses a compelling interest in curbing the particularly insidious

growth of a national market for animal cruelty depictions.

Indeed, in rejecting the idea that Section 48 implicates a compelling governmental interest, the Court of Appeals turned a blind eye to the long line of this Court's compelling interest jurisprudence. Section 48 was not designed merely to regulate the sale of innocuous commercial entertainment. It was specifically (and narrowly) tailored to eliminate the sale of material that can only be created by harming a class of beings in our society who have absolutely no way of speaking for or defending themselves. That is, in fact, exactly the type of interest this Court has repeatedly found to be compelling—whether it be the physical protection of society against crime or war, ending the *de facto* and *de jure* discrimination against those who have wrongly been placed on a lower tier in our society, or protecting the interests of those such as minors and others who cannot protect themselves in the same way as mature human beings.[39]

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[39] *See*, *e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (attaining a diverse student body in higher education); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991) ("ensuring that victims of crime are compensated by those who harm them" and "that criminals do not profit from their crimes"); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("shielding minors from the influence of literature that is not obscene by adult standards"); *United States v. Salerno*, 481 U.S. 739, 749 (1987) (preventing crime by arrestees); *Bob Jones Univ. v. United States,* 461 U.S. 574, 604 (1983) (eliminating racial discrimination in education).

II. THE COURT OF APPEALS FUNDAMENTALLY ERRED BY FAILING TO APPLY *CHAPLINSKY* TO DETERMINE WHETHER THE SPEECH IS PROTECTED UNDER THE FIRST AMENDMENT

Freedom of speech is not an absolute right. Whether a category of speech warrants First Amendment protection requires balancing the governmental interest in restricting the speech against the value of the speech. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The governmental "interest" need not be "compelling"; it must merely outweigh any social or other value the speech at issue may have. As this Court long ago recognized, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky,* 315 U.S. at 571-72. The material proscribed by Section 48 constitutes such a class.

Although content-based regulations of speech have been held to be "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992), this Court has found a number of exceptions to that general presumption where the regulated speech constitutes "no essential part of any exposition of ideas" and is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky,* 315 U.S. at 571-72. Indeed, as the Court explained in *New York v. Ferber*, such exceptions are not so unusual:

> [I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

458 U.S. 747, 763-64 (1982). More recently, in *Virginia v. Black*, this Court explained that "[t]he protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." 538 U.S. 343, 358 (2003) (*citing Chaplinsky*, 315 U.S. at 571-72).

The material proscribed by Section 48 shares a number of similarities with recognized categories of unprotected speech, which include: fighting words (*id.*), threats (*Watts v. United States*, 394 U.S. 705 (1969)), speech that imminently incites or produces illegal activity (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)); child pornography (*Ferber*, 458 U.S. 747); obscenity (*Roth v. United States*, 354 U.S. 476 (1957)); and "offers to provide or requests to obtain child pornography" (*United States v. Williams*, 128 S. Ct. 1830, 1842 (2008)).

First, as discussed above, the creation of crush and dogfighting videos is a *direct cause* of animal cruelty because their production is predicated on the commission of illegal animal brutality as well

as related crimes, including conspiracy and solicitation,[40] attending a dogfight,[41] and the abduction of pets to be used as "bait" to train fighting dogs.[42] If the depictions were illegal and no profit could be earned from their sale, the filmmaker would have no reason to instigate the animal cruelty. This is especially true in the case of made-to-order videos where purchasers specify the victim and torture method.[43] Consequently, their creation incites and produces imminent crime, and speech forming an integral part of a criminal violation does not warrant First Amendment protection. *Brandenburg,* 395 U.S. at 447; *Ferber*, 458 U.S. at 761-62 (*citing Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid

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[40] *See* Gibson, *supra* note 10 (creating a crush video requires the filmmaker to solicit and conspire with another to commit a crime of animal cruelty and aid or abet that crime).

[41] *See* Gibson, *supra* note 10.

[42] *See, e.g.*, ASPCA, *Dog Fighting FAQ*, http://www.aspca.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.html (last visited June 12, 2009); Maryann Mott, *U.S. Dog-Fighting Rings Stealing Pets for "Bait,"* NATIONAL GEOGRAPHIC NEWS (Feb. 18, 2004), *available at* http://news.nationalgeographic.com/news/2004/02/0218_040218_dogfighting.html (one officer estimated up to 275 dogs were stolen each month in his area, and an official stated, "I think every state has a problem with it, whether they know it or not.").

[43] *See Punishing Depictions*, *supra* note 12.

criminal statute."). Second, to the extent the speech appeals to the prurient interest of depraved individuals aroused by animal cruelty, it is obscene. Like child pornography, the speech depends on the forceful, commercially driven exploitation of defenseless victims.

Beyond these basic similarities, the material proscribed by Section 48 fits the *Chaplinsky* framework because it is "no essential part of any exposition of ideas" and is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." 315 U.S. at 571-72. By the very terms of the statute, animal victims featured in the proscribed depictions experience tremendous physical and psychological trauma solely for commercial gain. 18 U.S.C. § 48. Thus, "the evil to be restricted," namely, the prevention of cruelty to animals, "so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Ferber*, 458 U.S. at 763-64.

a. Section 48 Is Narrowly Tailored to Reach Only Commercially Motivated Depictions of Animal Cruelty that Have No Redeeming Value

Section 48 is narrowly drawn to reach only a small subcategory of depictions that lack redeeming social value and display acts illegal in every state. Therefore, upholding its constitutionality will have no negative repercussions on First Amendment freedoms.

First, Section 48 contains a broad exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[44] Notably, the statute challenged in *Ferber* contained no such carve-out. 458 U.S. at 750-51 (discussing N.Y. PENAL LAW § 263.15). Even the obscenity test enunciated in *Miller v. California*, 413 U.S. 15, 15 (1973), only exempts works, which taken as a whole, lack serious "literary, artistic, political, or scientific value."

Second, Section 48 reaches only depictions of cruelty to *live* animals.[45] Thus, use of animation or computer graphics to simulate violence would be permissible. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Third, Section 48 only criminalizes depictions of *intentional and illegal* acts of animal cruelty; legal methods of killing such as deer hunting and accidental maiming are beyond the statute's reach.[46]

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[44] 18 U.S.C. § 48(b) (2009); 145 CONG. REC. H10267 ("These exceptions would ensure that an entertainment program on Spain depicting bull fighting or a news documentary on elephant poachers, to state two examples would not violate the new statute . . . [because] the bill requires that the conduct depicted be illegal . . . the sale of depictions of legal activities, such as hunting and fishing, would not be illegal . . . [the law] will in no way prohibit hunting, fishing, or wildlife videos . . . The bill does not criminalize the mere possession of such depictions, only possession with the intent to transmit the depictions in interstate commerce for commercial gain.").

[45] 18 U.S.C. § 48(c)(1).

[46] *Id.*

Fourth, the statute only reaches the "*knowing*" creation, sale or possession of depictions of animal cruelty.[47]

And finally, the depiction of animal cruelty must be created, sold, or possessed "with the intention of placing that depiction in interstate or foreign commerce for commercial gain"; thus, a home video shot only for personal use is not prohibited.[48]

As Congress narrowly tailored Section 48 such that it reaches only a small subcategory of depictions that lack any redeeming social value and relate only to the display of acts already determined to be illegal in all fifty states,[49] there is little chance that upholding its constitutionality will prohibit a substantial amount of protected speech or negatively impact the exercise of First Amendment freedoms.

b. Section 48 Encompasses Crush and Dogfighting Videos

Both crush and dogfighting videos fall within Section 48's narrow scope. Both constitute depictions of animal cruelty predicated on the commission of intentional and illegal cruelty to live animals created and sold solely for profit. Neither constitutes an "essential part of any exposition of ideas," *Chaplinsky*, 315 U.S. at 571-72, and their

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[47] 18 U.S.C. § 48(a).

[48] *Id.*

[49] 18 U.S.C. § 48(c)(1).

value is overwhelmingly outweighed by the interest in preventing senseless cruelty to defenseless animal victims.

Crush videos typically feature a woman—sometimes partially nude—screaming abusive language at a terrified animal that is taped or pinned to the ground.[50] The woman repeatedly kicks the animal, each time with more force. *Punishing Depictions*, *supra* note 12 ("each time the animal screams, the image is unbearable, blood now running from the animals' [sic] eyes and nose"). The frightened animal struggles to escape as the woman steps on each of its limbs with her stiletto heel, shredding apart its bloody flesh, grinding its bones into dust, and wrenching the limbs one by one from its convulsing body. *Id.* ("a distinct crushing of tiny bones can be heard, only to be drowned out by the piercing scream of the helpless animal."). The woman then smashes and crushes the tiny corpse, continuously kicking and stomping until every bone is broken. *Id.*; 145 CONG. REC. H10267 ("I do not believe in my entire time in Congress I have ever seen anything . . . as repulsive as the [crush video] . . . it was even more gruesome as the tape wore on. . . . And I can assure anyone who is listening to my comments today that there is nothing redeeming, socially or otherwise, about any of the depictions I witnessed in our hearing the other day. . . . These disturbing videos show women crushing small animals to death with their feet. Kittens, hamsters, guinea pigs, birds, small dogs

[50] *See Punishing Depictions*, *supra* note 12.

and other animals are taped to the floor while a woman, sometimes barefooted and sometimes in spiked heels, stomp on the animal until it dies.").

Similarly, dogs featured in dogfighting videos endure a lifetime of brutality. Fighting dogs are bred and trained to be antisocial and aggressive.[51] While still puppies, they are abused and beaten to predispose them to violence.[52] They are forced to run on a treadmill several hours per day and strengthen their jaws with spring poles.[53] Weights affixed to chains are dangled from their necks to build strength, and owners run them with weights attached; dogs are often *permanently* chained this way.[54] Their conditioning has been described as follows:

> First, break the animal's will by keeping it in the dark, in a cramped cage without adequate food or water, and, on occasion, batter it with loud music. Then, once the animal is reduced to a shell, rebuild it physically and mentally through better feeding, strength training and beatings and torture to make it

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[51] *See, e.g., Dog Fighting FAQ*, *supra* note 42; Gibson, *supra* note 10.

[52] *See* Gibson, *supra* note 10 ("The nearly $500 million a year enterprise is extremely abusive, 'when dogs are young, they place them in a sack and beat them. The sack is later opened in front of a cat or small dog, which is attacked so the 'fighter' gets a taste of blood.'").

[53] *See* Simpson, *supra* note 15.

[54] *See* Gibson, *supra* note 10.

> angry. Then, take it out and bet money on what essentially are death matches.[55]

Forced to participate in bloody battles to the death, and maddened by steroids,[56] weight-gain supplements,[57] drugs (including speed and cocaine),[58] and abuse, fighting dogs have their flesh ripped apart by the bare fangs of their opponents. In the rare instance when both dogs limp away, the loser is often abandoned, electrocuted, shot, or even tortured if the owner is angry or embarrassed about his lost wager or damaged reputation.[59]

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[55] Pet-Abuse.com, *Animal Abuse Case Details: Dog-fighting—37 Dogs Seized South Holland, IL* (Jul. 13, 2007), http://www.pet-abuse.com/cases/11727/IL/US.

[56] *See* Simpson, *supra* note 15 (at the home of a man arrested for training 19 pit bulls to fight, police found steroids they believe he fed to the dogs).

[57] *See* Gibson, *supra* note 10.

[58] *See id.*; *see also Dog-Fighting Video: 45 Dogs Seized in Alabama Bust* (June 2, 2009), http://www.aspca.org/blog/dog-fighting-video.html (45 dogs (and the skeletal remains of another) were discovered tied to heavy chains and living in deplorable conditions on the two properties. Controlled substances, illicit drugs and other paraphernalia related to dog fighting were also found. "These dogs definitely suffered abuse and inhumane treatment at the hands of dog fighters," said Dr. Merck, Senior Director of Veterinary Forensics for the ASPCA. "So far, we've seen that one is unable to walk, another that is limping, and many that are injured, some severely.").

[59] *See Leashing a Blood Sport*, *supra* note 15; *see also* Simpson, *supra* note 15 ("The loser may be nursed back to health, if valuable, or it may be shot or abandoned."); Gibson,

Owners often refuse to take injured dogs to veterinarians for fear that their crimes will be unearthed, so even if a dog survives a fight, it may still die from the substandard veterinary care its owner provides.[60]

c. The Third Circuit Erred in Applying the Court's Decision in *Ferber* to Section 48

In determining whether a category of speech warrants First Amendment protection, the Supreme Court has repeatedly utilized the approach articulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), which weighs the gov-

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supra note 10 ("A dog that loses a fight also loses a lot of money and compromises the reputation of his owner. The end result, if the losing dog survives the fight, is immediate death if he is lucky, or torture and mutilation if the owner is embarrassed or irate."); ESPN.com, *Apologetic Vick Gets 23-Month Sentence on Dogfighting Charges* (Dec. 11, 2007), http://sports.espn.go.com/nfl/news/story?id=3148549 (underperforming dogs in the dogfighting ring run by Michael Vick were allegedly executed via electrocution and hanging) (last visited June 12, 2009).

[60] *See* Haines, *supra* note 15 (in some states, "licensed veterinarians must report suspected dog fighting . . . [so] owners of fighting dogs do their own doctoring"); 720 ILL. COMP. STAT. 5/26-5 (2009) ("Any veterinarian in this State who is presented with a dog for treatment of injuries or wounds resulting from fighting where there is a reasonable possibility that the dog was engaged in or utilized for a fighting event for the purposes of sport, wagering, or entertainment shall file a report with the Department of Agriculture and cooperate by furnishing the owners' names, dates, and descriptions of the dog or dogs involved.").

ernmental interest in restricting the speech against the value of the speech. The Court of Appeals ignored this standard and mistakenly found that the reasons listed in *Ferber* created a new test for identifying new categories of unprotected speech. In fact, *Ferber* was merely an application of *Chaplinsky*.

As the *Chaplinsky* Court articulated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

315 U.S. at 571-72 (holding a statute criminalizing the use in a public place of words having a direct tendency to cause violence did not substantially infringe on the constitutional right of free speech).

In *Ferber*, the Court listed five "*reasons*" it was "persuaded that the States are entitled to greater leeway in the *regulation of pornographic depictions of children*." 458 U.S. at 756 (emphasis added). However, the Court never held that these reasons

were intended to create an entirely new *general* test for identifying new categories of unprotected speech. *Id.* at 764. Use of the word "reasons" and the phrase "regulation of pornographic depictions of children" further discredits such a misguided conclusion.

Indeed, the Court notes that the reasons considered to determine whether states should be permitted to ban child pornography differ from the factors considered in determining whether speech is obscene and unprotected. *Id.* ("The test for child pornography is separate from the obscenity standard enunciated in *Miller v. California*, 413 U.S. 15 (1973)."). Nor are the Court's reasons in *Ferber* particularly well-suited for delineating other established categories of unprotected speech: none of its constituent factors speak to imminent incitement to violence, for example, or to threats or fighting words.[61]

Although the Court's reasoning in *Ferber* was clearly not meant as a general test for identifying

[61] Even using *Ferber* as a "test," however, indicates that the speech Section 48 prohibits does not warrant constitutional protection. As explained herein, the animal cruelty depictions proscribed by Section 48 are limited to those that *cause* animal cruelty, and closing their distribution network is the most effective way to stop the underlying crimes on which the creation of the depictions depends. Advertising and selling the depictions provides an economic motive for and is thus an integral part of their production, and the depictions lack redeeming social value. The evil cruelty to be restricted overwhelmingly outweighs the expressive interests of the speech.

new (or old) categories of unprotected speech, the *Stevens* majority incorrectly, and inexplicably, applied it to the question of whether material proscribed by Section 48 warrants First Amendment protection, in spite of its recognition that "the attempted analogy to *Ferber* fails because of the inherent differences between children and animals." *Stevens*, 533 F.3d at 232. In so doing, it improperly deviated from this Court's traditional First Amendment jurisprudence and failed to apply the correct framework to the question at issue here, namely whether whatever value depictions of senseless, intentional acts of animal cruelty have is outweighed by the governmental interest in preventing cruelty to animals and its attendant harms to human beings. For all of the reasons discussed above, the material proscribed by Section 48 is not entitled to First Amendment protection.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,917 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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