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 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. HSUS is the nation's largest non-profit animal protection organization with more than 11 million members and constituents. HSUS's mission is to protect animals through legislation, litigation, investigation, education, science, advocacy and field work. HSUS regularly 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.

INTRODUCTION

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 interstate trafficking for financial gain in 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 Petitioner consented to the filing of this brief. Counsel of record for Respondent filed a letter of consent 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 her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. 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.

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.[3] This Court granted certiorari on April 20, 2009 to address whether §48 is facially invalid under the Free Speech Clause of the First Amendment.

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[2] HSUS has submitted a letter to the Clerk requesting an opportunity to present the Court with a DVD containing footage of the depictions described herein.

[3] "Pet.App." refers to the Appendix filed with the Petition for Writ of Certiorari filed December 15, 2008. "Gov't Br." refers to Brief for United States and "JA" refers to Joint Appendix filed June 8, 2009 by Petitioner United States.

The brief submitted by the United States explains the many reasons why §48 is not facially invalid. The Humane Society submits this brief to provide further historical perspective about §48 and animal welfare legislation in general, and to elaborate on three critical reasons why the Third Circuit's decision cannot stand.

First, and most importantly, §48 serves a compelling government interest in preventing cruelty to animals. Criminal statutes designed to ensure the humane treatment of animals and to preserve public morals are older than our Nation and reflect its deepest values.

Second, the "speech" at issue is not entitled to strict scrutiny. It is "obscene" in every sense of the word, and affording *sexual* obscenity very limited protection under the First Amendment while wrapping other depraved and obscene speech in the cloak of strict scrutiny has no basis in history or logic.

Third, if §48 violates Respondent's First Amendment rights, the proper remedy would be to vacate his conviction, *period.* There is no reason to invalidate §48 *in toto* when an as-applied remedy fully vindicates the litigant's rights.

BACKGROUND

The core material criminalized by §48 are videos of people crushing animals, staged dogfights, and other animal fighting.

A. 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). A woman's domineering voice "blend[s] 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 escape 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.").

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. Press Release, Elton W. Gallegly, *Beyond Cruelty*, U.S. Fed. News, Dec. 16, 2007. Even overseas websites shut down in the wake of §48. 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.

B. 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; *see also* 153 Cong. Rec. S10409 (daily ed. July 31, 2007) (statement of Sen. Kerry) ("Dogfighting is one of society's most barbaric and inhumane activities.… This illegal and despicable activity has no place in a civilized society."). Despite state and federal prohibitions, *infra* at 13-16, 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 abused dogs 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 sticks, and

electrocution.[4] Dogs are conditioned never to give up a fight, even if they will be gravely hurt or killed.[5] As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones.[6] Losing dogs are routinely refused treatment, beaten further as "punishment" for the loss, and executed by drowning, hanging, or incineration.[7]

Impact on Public Resources: Dogfighting strains public resources. Twenty to 75% of dogs entering animal shelters nationwide are pit bulls or pit mixes.[8] Many require emergency veterinary care and shelter,

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[4] *See The Reality of Dog Fighting*, http://www.pitbullsontheweb.com/petbull/articles/brownstein.html (last visited June 15, 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.

[5] *See* ASPCA, *Fight Animal Cruelty*, http://aspca.org/site/PageServer?pagename=cruelty_pitbull (last visited June 15, 2009).

[6] *See* Johnna A. Pro, *Dogfighting Bust*, Pittsburgh Post-Gazette, July 1, 1999, *available at* http://www.post-gazette.com/regionstate/19990701dogs1.asp; *see also* JA-66-67, 79-85.

[7] *See The Reality of Dog Fighting*, *supra* note 4; *Vick Case Reminds of Pit Bull's Changing Image*, *supra* note 4.

[8] *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, http://cbs5.com/local/pit.bulls.SPCA.2.434742.html; *see also* ASPCA, *supra* note 5.

and hundreds of thousands are euthanized annually.[9] 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.[10] Although there is no national data on the expense of sheltering and rehabilitating dogs used in animal fighting, the annual cost is surely in the hundreds of millions of dollars.

Impact on Community: Because escapes are not uncommon, animals trained for fighting 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.[11] These attacks send approximately 334,000 victims to hospital emergency rooms each year at an estimated cost of $102.4 million.[12] In 2005, 81% of dog bite fatalities were

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9 *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 June 15, 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.

10 *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.

11 *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.

12 *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),

caused by dogs trained for fighting or to guard property.[13]

And these figures do not account for the increase in crime spawned by the violent subculture dogfighting supports. *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'"). Nor do they measure the traditional insight, increasingly backed by research, that cruelty to animals coarsens the moral sensibilities of the perpetrator and lowers inhibitions to violence directed at humans.[14]

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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).

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

[14] *See* H.R. Rep. No. 106-397, at 4 (1999); *see also* Benita J. Walton-Moss et al., *Risk Factors for Intimate Partner Violence and Associated Injury among Urban Women*, 30 J. of Community Health 377, 383-85 (2005) (pet abuse a statistically significant risk factor for domestic violence); Ernest S. L. Luk et al., *Children who are cruel to animals: a revisit*, 33 Austl. & N.Z. J. of Psychiatry 29, 35 (1999) (28% of children with persistent conduct problems presented to mental health services had exhibited cruelty towards animals); David Tingle et al., *Childhood and Adolescent Characteristics of Pedophiles and Rapists*, 9 Int'l J.L. & Psychiatry 103, 113 (1986) (nearly half of convicted rapists and nearly one-third of convicted child molesters engaged in childhood acts of animal cruelty).

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 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. If an owner can *prove* that his dog has killed five other dogs without intervening losses, he 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.[15] Videos also encourage gambling activity because they allow 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/hb1213.pdf (last visited June 15, 2009). Moreover, some of the cruelty depicted on film, like crush videos, is created solely for the purpose of selling the video (and not for a live audience).

While these videos clearly capture the dogs'

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15 *See* JA-72; 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.

suffering, they rarely reveal who made the recording or staged the fight. H.R. Rep. No. 106-397, at 3 (1999). 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; *see also* JA-61-62. 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. *See* 145 Cong. Rec. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum).

C. Other Animal Fighting Videos

Hog-dogfighting is "a vicious blood sport" that breeds many of the same ills as traditional dogfights.[16] Organizers unleash brutalized dogs to fight feral or domestic hogs.[17] Trainers render the hogs defenseless by removing their tusks with makeshift tools such as bolt cutters. They use cattle prods to force the hogs into small pens where dogs corner and attack, ripping their ears, snout, and body until "victorious." Only then do organizers pry the dog's jaws off the hog's body using a blade known as a "breakstick." Fight

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16 Targeted News Service LLC, *Mississippi Passes Law to Combat Hog-Dog Fighting*, Apr. 3, 2008.

17 Ron Barnett, *'Hog dogging' has some fighting mad*, USATODAY.com, Apr. 5, 2006, http://www.usatoday.com/news/nation/2006-04-05-hog-dogging_x.htm.

operators pour apple vinegar on the hog's wounds to expedite healing so the animal can be forced to fight again within a matter of days.[18]

Cockfights involve brutal confrontations between animals specially trained to maximize harm.[19] Trainers affix sharp metal blades or spikes to the legs of roosters and place them in a fighting ring. The ensuing fights inflict trauma on the roosters, often resulting in the loss of eyeballs, severe lacerations and death.[20]

Both "industries" also produce serious societal harms beyond the brutal injuries inflicted on the unwilling participants. Hogs used in the fights pose special health risks to other livestock, as they are more likely to develop a viral disease transmittable to cattle and sheep and fatal to dogs and cats.[21] Cockfighting is associated with the spread of disease, including avian flu. Gov't Br. at 33. Both are lucrative, commercial enterprises linked to a criminal subculture and video

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[18] Danielle Ring, HSUS, *Hog Dog Fighting: Bloodsport Packaged as Family Entertainment*, http://www.hsus.org/acf/fighting/hogdog/hog_dog_fighting.html (last visited June 15, 2009); *see also* JA-73.

[19] *La. is last state to ban cockfighting*, USATODAY.com, Aug. 10, 2008, http://www.usatoday.com/news/nation/2008-08-10-la-cockfighting_N.htm.

[20] *Id.*; *see also* HSUS, *Cockfighting Fact Sheet*, http://www.hsus.org/acf/fighting/cockfight/cockfighting_fact_sheet.html (last visited June 15, 2009).

[21] *See* USDA, APHIS, *Swine Indemnity Information*, http://www.aphis.usda.gov/animal_health/animal_diseases/pseudorabies/ (last visited June 15, 2009).

market that encourage additional acts of brutality.[22] Videos capturing the fights provide an important revenue stream, promote upcoming fights, and serve as training videos for organizers new to the "business."

ARGUMENT

I. SECTION 48 FURTHERS A COMPELLING GOVERNMENT INTEREST IN PROTECTING ANIMALS FROM NEEDLESS CRUELTY

The Third Circuit *en banc* grievously erred in "fail[ing] to see how" §48 "serves a compelling government interest." Pet.App.-22a, 18a.

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 a law impinges 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)). In practice, this Court has recognized a wide range of compelling interests. *See, e.g.*, *id.* at 328 (diversity in higher

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[22] *See The dogfighting scourge*, The Post & Courier (Charleston, S.C.), Aug. 13, 2007, http://www.postandcourier.com/news/2007/aug/13/the_dogfighting_scourge12886/ (discussing criminal subculture associated with underground animal fighting).

education); *Johnson v. California*, 543 U.S. 499, 512 (2005) (maintaining prison security and discipline); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991) (compensation of crime victims); *Regan v. Time, Inc.*, 468 U.S. 641, 656 (1984) (preventing counterfeiting).

However this Court ultimately resolves this case, it should correct the Third Circuit's holding that preventing cruelty to defenseless animals is not a compelling interest. Laws against animal cruelty and animal fighting serve powerful governmental interests and have deep roots in American law. The Third Circuit's contrary decision rests on a misreading of this Court's precedents, a misunderstanding of the relationship between the compelling interest and narrow tailoring prongs of strict scrutiny, and federalism concerns that are wholly insubstantial.

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

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). All 50 states had codified animal protection laws by 1913. *Id.* at 4 (12 states enacted statutes prior to gaining statehood).

Such laws aim to protect animals from 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, 459 (Miss. 1887); *accord Johnson v. District of Columbia*, 30 App. D.C. 520, 522 (D.C. 1908) (preventing animal cruelty "is in the interest of peace and order and conduces to the morals and general welfare of the community").

Today all states have laws prohibiting acts of animal cruelty, Gov't Br. at 25 & n.7, and all specifically criminalize animal fighting—unanimously classifying certain dogfighting offenses as felonies.[23] Attending a

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[23] *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.

dogfight is prohibited by 48 states and is a felony in twenty.[24]

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 enacted the Animal Welfare Act 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. §§1901-06, 9 C.F.R. §313.1-.90; mandating investigation and authorizing regulation of non-ambulatory livestock at stockyards and dealers, 7 U.S.C. §1907; 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

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§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. §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.

[24] *See supra* note 23. Hawaii and Montana's dogfighting statutes do not specifically prohibit attendance. *See id.*

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. 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 commitment by "the great majority of Americans" to the humane treatment of animals. *See* H.R. Rep. No. 106-397, at 4. The enormous public and private resources spent on animal care and control evidence 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.
- A 2007 public survey of the most important philanthropic causes placed animals in the number two spot, ahead of other important causes such as education and illiteracy, health and medicine, and the environment. Press Release, Nationwide, Mike Switzer, *Jerry Lewis tops list of celebrities who influence change* (Aug. 27, 2007), *available at*

http://www.nationwide.com/newsroom/press-release-jerry-lewis-tops-list-celebrities-influence-change-2007.jsp.

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

The ubiquity and endurance of federal and state laws curtailing inhumane practices against animals, including animal fighting, is strong evidence of a compelling governmental interest. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 211 (1992); *New York v. Ferber*, 458 U.S. 747, 758 (1982). So is the national consensus against the depictions of animal torture made illegal under §48. *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.").

As in *Burson*, which found a compelling interest in protecting the right to vote, the Government's interest here is 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 interest is not one of them.

B. The Third Circuit's Compelling Interest Analysis Was Flawed

The Third Circuit wrongly concluded otherwise by ignoring the Government's interest in preventing cruelty to animals, *see* Section I.A, *supra*, 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. *Lukumi* considered whether municipal ordinances aimed exclusively at prohibiting a particular religion's animal sacrifices violated the Free Exercise Clause. 508 U.S. at 526-28, 535-38. 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 claimed interests in protecting public health and preventing animal cruelty were not compelling. *Id.* at 543-47. Indeed, *Lukumi* illustrates the use of strict scrutiny to "smoke out" illegitimate government purposes, as the city's actions appeared to have nothing to do with actually preventing animal cruelty. *See* Pet.App.-43a (Cowen, J., dissenting) ("[T]he real rationale behind the prohibitions [in *Lukumi*] was an unconstitutional suppression of religion."). This Court did not deny the societal importance of preventing animal cruelty through laws that were even-handed toward religion, a point that Justice Blackmun wrote separately to stress. *Lukumi*, 508 U.S. at 580

(Blackmun, J., concurring) (Court's holding "does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals").

Second, the Third Circuit improperly injected narrow tailoring concerns into the compelling interest inquiry. Pet.App.-18a-19a. Whether the Government has a compelling interest does not depend 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 here there is no illicit motive to "smoke out"—it is undisputed that the Government's stated desire to protect animals is quite real. Thus, even if "there [were] not a sufficient link between §48 and the interest in 'preventing cruelty to animals,'" Pet.App.-19a, the Third Circuit erred in holding that preventing animal cruelty may *never* be a compelling interest on that basis.

Finally, the Third Circuit erred by importing the Commerce Clause and principles of federalism into the compelling interest analysis. Specifically, the court concluded that because Congress purportedly "does not have the constitutional authority to pass" general animal cruelty legislation, the "stated government interest"—to "'prevent cruelty to animals'"—was "too broad." Pet.App.-28a-29a. It therefore 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's *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's motives, and label congressional enactments "underinclusive" merely because Congress properly chose to respect potential constitutional limits on its power.

The Third Circuit's compelling interest holding is an affront to deeply rooted American values and will distort judicial and legislative consideration of animal welfare legislation in the future. It should be reversed even if §48 is held to be unconstitutional for other reasons.

II. THE DEPICTIONS OF ANIMAL CRUELTY COVERED BY §48 ARE "OBSCENE" MATERIALS NOT ENTITLED TO HEIGHTENED SCRUTINY

The gruesome depictions of animal mutilation targeted by §48 simply do not merit the dignity of full First Amendment protection. 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); "true threat[s]," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (internal quotation marks omitted); 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 754-64; and solicitations to engage in illegal activity, *United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008), are so far afield from the concerns animating the First Amendment that heightened scrutiny is unnecessary. We agree with the Government that the materials proscribed by §48 bear a striking resemblance to many of these categories and warrant little (or no) First Amendment protection under the *Chaplinsky* balancing test. *See* Gov't Br. at 10-38.

HSUS respectfully submits that the materials proscribed by §48 should be evaluated under the constitutional standards usually applied to sexual obscenity. 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. *Miller*, 413 U.S. at 23-24. Congress itself recognized that connection when it required proof in §48 that the challenged material has no serious literary, political, artistic, or scientific value.

In the last half-century, this Court has confined its obscenity jurisprudence to materials that appeal to the *sexual* subset of base human instincts. *See id.* at 24;

Roth v. United States, 354 U.S. 476, 487 (1957). The time has come to reconsider that limitation. As a matter of history, constitutional theory, and common sense, there is no persuasive basis for singling out sexually obscene materials as entitled to no First Amendment protection—while treating the appalling videos proscribed by §48 as the constitutional equivalent of the Lincoln-Douglas debates. Much of the material targeted by §48, such as videos of women brutally crushing defenseless animals, already fits squarely within the current obscenity doctrine. Modifying the doctrine slightly to also encompass sadistic videos of animal fighting would make the doctrine more coherent and respectful of legislative prerogatives, without genuinely threatening the important values protected by the First Amendment. Under this revised definition material would be obscene if:

> (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the depraved or prurient interest;
>
> (b) the work depicts or describes, in a patently offensive way, conduct specifically defined by the applicable law; and
>
> (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The gruesome depictions of live animal mutilation proscribed by §48 are "obscene" in every way that matters.

A. The Early History of Obscenity Law Does Not Support An Exclusive Focus on Sexual Material

"The First Amendment was the product of a robust, not a prudish, age." *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 132 (1973) (Douglas, J., dissenting). "The four decades prior to its enactment 'saw the publication, virtually without molestation from any authority'" of "'classics of pornographic literature.'" *Id.* (citation omitted). When the First Amendment was enacted, the only existing obscenity ban was aimed at religious mockery, proscribing "any filthy, obscene, or prophane song, pamphlet, libel or mock-sermon" in imitation of religious services. 1711-12 Mass. Bay Acts, ch. 6, §19.

The early obscenity laws covered a great deal of material that should be constitutionally protected, and HSUS certainly would not endorse any change in First Amendment law that would authorize regulation as broad as those statutes attempted. Nonetheless, the scope of those laws demonstrates that prurient material was not their exclusive focus. Instead, early laws broadly targeted materials thought to undermine public morality. *See State v. Appling*, 25 Mo. 315, 317 (1857) (prohibiting under common law "'whatever openly outrages decency and is injurious to public morals'" (citation omitted)); *Commonwealth v. Tarbox*, 55 Mass. 66 (1848) (reviewing defendant's conviction for publishing an "obscene" advertisement for a contraceptive device). By the late 19th century, states routinely banned depictions of violence and criminal activity under their general obscenity laws. In 1884, for example, the New York legislature enacted a provision banning "[o]bscene prints and articles,"

applicable to anyone who distributes material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." N.Y. Penal Laws, ch. 380, §1141(2) (most recently amended in 1941).[25] At least a dozen other states codified similar provisions.[26]

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[25] In *Winters v. New York*, 333 U.S. 507, 519-20 (1948), this Court invalidated the statute as unconstitutionally vague but did not address whether violent depictions may ever be obscene.

[26] *See* Kan. Stat. Ann. §21-1102 (1935) (ban on obscene literature included "stories of deeds of bloodshed or crime"); Mich. Comp. Laws §12802 (1929) (same); Ky. Rev. Stat. §436.110 (1946) (same); Or. Comp. Laws Ann. §23-924 (1940), derived from Act of Feb. 25, 1885, at 126 (any "publication that purports to relate or narrate the criminal exploits of any desperate or convicted felon, or any … publication that is principally devoted to … accounts or stories of crime or lust or deeds of bloodshed"); N.D. Rev. Code §12-2109 (1943), derived from 1895 Law, ch. 84, §1 (defining "[o]bscene literature" to include papers "devoted principally or wholly to the publication of criminal news or pictures or stories of deeds of bloodshed or crime"); Ohio Rev. Code Ann. §13035 (1940), derived from 82 Sess. Law 184 (1885) ("obscene literature" includes "accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime"); 18 Pa. Stat. Ann. §4524 (1945), derived from Law 1887, Pub. L. No. 38, §2 ("[o]bscene literature" includes "accounts of criminal deeds, or pictures of stories of deeds of bloodshed, lust or crime"); Wash. Rev. Stat. §2459(2) (1932), derived from Law 1909, c. 249, §207(2) (same); Wis. Stat. §351.38(4) (1945), derived from Law 1901, ch. 256 (same); Iowa Code §725.8 (1946), derived from 21 Acts, Gen. Assembly, ch. 177, §4 (1886) (obscene literature includes material "devoted to the publication … of criminal deeds"); Me. Rev. Stat. Ann. ch. 121, §27 (1944), derived from Acts and Resolves 1885, c. 348, §1 (same); Conn. Gen. Stat. §§6244-6245 (1930) (ban on "[o]bscene literature" included any person who sells a "magazine, pamphlet, or paper, devoted to the publication … of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust or crime").

Early federal statutes similarly proscribed a wide range of "obscene" materials thought to be injurious to public morality, extending beyond those with a lascivious bent. In 1873, Congress passed the "Comstock Act," banning dissemination of any "obscene book, pamphlet … or other material" describing "any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion." 42 Cong. Ch. 258, 17 Stat. 598, 598 (1873). "[T]he test of obscenity, within the meaning of the [Comstock Act] [was], whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences …." *United States v. Bennett*, 24 F. Cas. 1093, 1102 (S.D.N.Y. Cir. Ct. 1879). Fifteen years later, Congress proscribed mailing materials that were "indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another." 50 Cong. Ch. 394, 25 Stat. 187, 188 (1888). An early prosecution under this statute targeted an individual who, attempting to return a model car, sent a postcard stating that the seller could "be damned." *United States v. Davis*, 38 F. 326, 327 (W.D. Tenn. 1889).

In short, the early history of obscenity law does not require the particular focus on *sexual* materials imposed in the 20th century. Even this Court has recognized that the common meaning of "obscenity" is far broader: "[p]ornographic material which is obscene forms a sub-group of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language." *Miller*, 413 U.S. at 18 n.2; *see also Roth*, 354 U.S. at 487 ("sex and obscenity are not

synonymous"). And leading dictionaries reflect this understanding. *See, e.g.*, Merriam-Webster's Collegiate Dictionary (11th ed. 2008) (defining "obscene" material as "disgusting to the senses," "repulsive," "abhorrent to morality or virtue"); Oxford English Dictionary (2d ed. 1989) (defining obscene as "[o]ffensively or grossly indecent, lewd; … tending to deprave and corrupt those who are likely to read, see, or hear the contents," and "[o]ffending against moral principles, repugnant; repulsive, foul, loathsome").

B. The Reasons For Placing Sexually Obscene Material Beyond The Reach Of The First Amendment Apply Equally To Depraved, Patently Offensive Depictions of Actual Violence

Obscene speech does not warrant full First Amendment protection because it plays "'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.'" *Roth*, 354 U.S. at 485 (quoting *Chaplinsky*, 315 U.S. at 572). The First Amendment "assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 494. It "creates an open marketplace where ideas, most especially political ideas, may compete without government interference." *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 801 (2008).

Sexual obscenity falls outside the First Amendment because it fails to contribute meaningfully to the marketplace of ideas and upsets community moral

standards. The obscene, albeit non-sexual, "speech" at issue here shares similar characteristics.

First, sexual depictions are "obscene" and can be regulated when they do not "express a point of view on an issue of public importance." Cass R. Sunstein, Commentary, *Low Value Speech Revisted*, 83 Nw. U. L. Rev. 555, 560 n.18 (1989). As this Court recognized in *Miller*, purveyors of sexual obscenity "'engage[] in the commercial exploitation of the morbid and shameful craving for materials with prurient effect.'" *Miller*, 413 U.S. at 35 n.15 (citation omitted). Hard core pornographers are not seeking to communicate ideas to their audience; they are appealing to base sexual desires far afield from core First Amendment values. Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* 182 (1982) ("The basis of the exclusion of hard core pornography from the coverage of the Free Speech Principle is not that it has a physical effect, *but that it has nothing else*."); *Ginzburg v. United States*, 383 U.S. 463, 470 (1966) (holding works sexually obscene where purveyor represents publications "as erotically arousing" and, as a result, reader "looks for titillation, not for saving intellectual content").

Obscene depictions of actual violence likewise add nothing of consequence to the civic dialogue. Depictions of dogs ripping each other to pieces in coerced death matches communicate nothing beyond the horrific images conveyed. *See* Craig A. Anderson et al., *The Influence of Violence on Youth*, 4 Psychol. Sci. Pub. Int. 81, 93-94 (2003) (explaining the physiological responses of excitement or arousal attendant to viewing violent materials). "Violence does not, in itself, express a point of view on important issues; its effect is visceral and noncognitive." Kevin

W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 Wm. & Mary Bill Rts. J. 107, 166 (1994).

Contemporary media are, of course, awash in depictions of violence that could not be restricted even if the obscenity standard applied. But the violence in films, television, and video games is almost always simulated and occurs within a context with at least *some* message (even if just that the targets of the violence deserve it) and redeeming political, artistic, or social merit. In contrast, videos of actual defenseless animals being tortured does not convey any coherent message and adds nothing of even marginal value to the marketplace of ideas. As the Government explains, "'if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal' could be simulated." Gov't Br. at 21 (citation omitted).

Second, sexually obscene "speech" is afforded less protection because it "violates community norms regarding the permissible scope of depictions of sexual or sex-related activity." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir.) *("AAMA")*, *cert. denied*, 534 U.S. 994 (2001). The obscenity doctrine imposes "a limit on the extent to which the community's sensibilities can be shocked by speech." *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003).

The same social values justify regulation of the graphic depictions of actual violence at issue here. Judge Posner posited that "violent photographs of a person being drawn and quartered could be" "described as 'obscene,'" and could even be "included within the legal category of obscene" under *Miller*, "even if they have nothing to do with sex." 244 F.3d at

575 (holding that city ordinance limiting minors' access to violent video games was unconstitutional because the games featured only "cartoon-like" depictions of violence that were clearly not obscene). Again, unlike *simulated* depictions of violence in movies or video games—where the audience understands that the violence is fake—these materials depict real violence that offends community standards. It is "difficult to see how language or material dealing with love, lust, and sex is any less entitled to First Amendment scrutiny when regulation is attempted than is the language or depiction of violence." *State v. Henry*, 732 P.2d 9, 16 (Or. 1987) (disagreeing with *Miller* and finding no historical justification for affording obscenity less than full protection under state constitution). The inverse is equally true.

Indeed, the public appears more concerned with the display of sexual *violence* than with sex itself. As the Oregon Supreme Court noted in *Henry*, a 1985 survey showed 73% of the population supported a ban on *violent* sexual material, whereas only 47% supported a ban on other sexual material. *Id.* at 16 n.7. Most recent federal obscenity prosecutions bear this out. *See United States v. McDowell*, 498 F.3d 308 (5th Cir. 2007) (prosecution for videos showing sadistic and masochistic "sexual torture"); *United States v. Davidson*, 283 F.3d 681 (5th Cir. 2002) (prosecution for, *inter alia*, snuff videos and depictions of rape and torture); *United States v. Thomas*, 74 F.3d 701 (6th Cir.) (images depicting, *inter alia*, bestiality and sadomasochistic abuse), *cert. denied*, 519 U.S. 820 (1996). It is hard to escape the conclusion that what actually offends contemporary public morality is the distribution of depictions of sexual *violence* and

coercion. Removing the "sexual" from "torture" and the rape from a snuff film does not purify the offense.

The definition of "obscenity" adopted by this Court—"patent[] offens[e]," appeal to base instincts instead of conveying ideas or information, and "lack[] [of] serious literary, artistic, political, or scientific value," *Miller*, 413 U.S. at 24—describes the depictions proscribed by §48. The grotesque images of animal fighting and torture banned by §48 epitomize patently offensive material. *See*, *e.g.*, 145 Cong. Rec. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum) ("I do not believe in my entire time in Congress, I have ever seen anything … as repulsive as [crush videos]. And I doubt anyone else who had to watch it would say anything [differently].").

As Justice Stewart famously said: "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The videos criminalized by §48 most certainly are "it":

- "High Heel Hell Part III—The Ritual": A provocatively dressed model crushes five large rabbits, one by one, with high heels, pounding on their backs and heads until they are bleeding, and placing their dead bodies in the center of a room in the shape of a cross.
- "Kitten Torture and Crush": A kitten confined to a cage is repeatedly burned by cigarettes and a lighter and shrieks in pain as its back and face are set on fire. The charred (but living) animal is pulled from the cage, kicked and viciously ripped to pieces by the woman's high heel.

- Brutalized dogs track a defenseless and terrorized hog as it runs along the edge of a confined pen in a futile effort to find an escape path. The hog squeals in pain while one dog corners it, savagely rips the flesh and attempts to break the hog's neck, while other dogs attack its legs and torso.

Because these depictions appeal predominantly or exclusively to morbid, depraved, and other base human instincts (and, in the case of crush videos, also deviant prurient interests), society's interest in morality outweighs whatever minimal expressive content they convey. And the statute itself expressly exempts any material with "serious religious, political, scientific, educational, journalistic, historical, or artistic value"—an expanded version of what *Miller* requires. 18 U.S.C. §48(b).

A free speech doctrine that allows government to regulate the distribution and sale of sadistic video depictions of animal mutilation 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?

This Court should clarify that the obscenity doctrine encompasses some patently-offensive depictions of actual violence that appeal to depraved but not necessarily prurient interests, such as the sadistic cruelty prohibited by §48. That extension would make the jurisprudence more coherent and more

consistent with both Founding-era and contemporary morality, without denying First Amendment protection to any expression genuinely implicating the purposes of that Amendment. And because this extension would include only depictions of *actual*, patently offensive violence that appeal to depraved interests and that have no redeeming political, artistic, literary, and scientific value *when viewed as a whole*, it would not in application substantially expand the universe of materials currently covered by the obscenity doctrine.

The videos sold by Mr. Stevens in this case are obscene. The animal fighting videos easily satisfy the "patently-offensive" prong. A screening of the graphic images contained therein makes plain that they could appeal only to a depraved interest. And, of course, the jury already concluded that Mr. Stevens' videos lack any serious literary, artistic, political or scientific value. Gov't Br. at 5.

III. THE THIRD CIRCUIT ERRED BY FACIALLY INVALIDATING §48

At the very least, this Court should reverse the Third Circuit for resorting to the "disfavored" remedy of facial invalidation. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008). This Court has repeatedly stressed that facial invalidation is not "generally desirable." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484 (1989). Here, the Third Circuit should have engaged in an as-applied analysis that could have vindicated Stevens' free speech rights, if any, without doing violence to

other applications of the statute.[27]

This Court has long adhered to "the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). In *United States v. Grace*, 461 U.S. 171, 183-84 (1983), this Court rejected a facial challenge and instead invalidated a federal prohibition against "carrying signs, banners, or devices" on Supreme Court grounds only "as applied to [the public] sidewalks" surrounding the building. In *NAACP v. Button*, 371 U.S. 415, 419, 439 (1963), this Court invalidated a State's rules against solicitation by attorneys to the extent the rules had been applied to the NAACP attorneys involved in the case—but no further. *See also Brockett*, 472 U.S. at 502-03 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-11 (1940), and *Marsh v. Alabama*, 326 U.S. 501, 509-10 (1946), as other examples).

"[T]wo … cardinal rules govern[] the federal courts": (1) "'never … anticipate a question of constitutional law in advance of the necessity of deciding it'"; and (2) "'never … formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett*, 472 U.S. at 501 (citation omitted). Just last Term, this Court reiterated that facial challenges are disfavored because "they run contrary to the fundamental principle of judicial restraint." *Wash. State Grange*,

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[27] As the Government explains, the Third Circuit also failed to apply a proper overbreadth analysis. *See* Gov't Br. at 38-49. Such analysis would show that §48 is not substantially overbroad. *Id.* at 41-49.

128 S. Ct. at 1191. Such restraint is essential to "'free[] the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Id.* (citation omitted).

United States v. National Treasury Employees Union illustrates these principles. 513 U.S. 454 (1995). There this Court considered a facial challenge to an honoraria ban on executive branch employees and held that the ban on employees below a certain pay grade violated the First Amendment. 513 U.S. at 465-77. The lower courts had held the same and invalidated the statute "as applied to the entire Executive Branch of the Government." *Id.* at 477. This Court disagreed with this remedy because, *inter alia*, "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants" and because "the Government conceivably might advance a different justification" for application of the statute to parties not before the court "thus presenting a different constitutional question than the one we decide today." *Id.* at 478.

If this Court holds that Stevens' dogfighting videos are constitutionally protected speech, the remedy should be limited to vacating his conviction. There is no reason to invalidate §48 *in toto*, and principles of judicial restraint embodied in this Court's case law counsel otherwise. Where a statute sweeps too broadly in its speech restriction and the litigant's speech is constitutionally protected, the proper remedy is to strike down the statute as-applied to that litigant and leave other applications to future cases.

This Court of course allows a litigant whose speech

is constitutionally proscribable to raise a First Amendment overbreadth challenge out of concern that the speech restriction could have an unconstitutional "chilling" effect. But that doctrine does not relieve a court of its general obligation to avoid sweeping relief when an as-applied challenge will do. *Fox*, 492 U.S. at 484-85; *Brockett*, 472 U.S. at 502-04. In any event, the Third Circuit made clear it did not conduct an overbreadth analysis but was resting solely on strict scrutiny grounds. *See* Pet.App.-32a n.16. When and if the issue were properly presented, there would be strong arguments that §48 *is not* substantially overbroad—even if Stevens' conduct is protected. The Third Circuit recognized that "a hypothetical statute … only regulat[ing] crush videos" would likely survive constitutional scrutiny. Pet.App.-10a n.5 & 33a n.16. "[W]here, despite some possible impermissible application, the 'remainder of the statute … covers a whole range of easily identifiable and constitutionally proscribable … conduct,'" facial invalidation is inappropriate. *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984) (citation omitted) (omissions in original); *Ferber*, 458 U.S. at 770 n.25.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the United States, this Court should reverse the Third Circuit and hold that Respondent's conviction under §48 did not violate the First Amendment.

Respectfully submitted,

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