UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT

DOCKET NO. 05-2497

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT J. STEVENS.

Appellant,

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA (No.04-51)

[PROPOSED] BRIEF *AMICUS CURIAE* OF THE HUMANE SOCIETY OF THE UNITED STATES IN SUPPORT OF APPELLEE UNITED STATES OF AMERICA

Latham & Watkins LLP
Claudia O'Brien
Heather L. Foran
One Newark Center, 16th Floor
Newark, NJ 07102
Telephone: (973) 639-7270
Facsimile: (973) 639-7298

Attorneys for the Humane Society of the United States

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ASPCA, Pit Bull Cruelty, http://aspca.org/site/PageServer?pagename=cruelty_pitbull (last visited Aug. 2 2007) 4, 6

Associated Press, Vick Case Reminds of Pit Bull's Changing Image (July 24, 2007), http://www.sportingnews.com/yourturn/viewtopic.php?t.....2, 4

Brian Mann, Illegal Dogfighting Rings Thrive in U.S. Cities (NPR broadcast July 20, 2007) http://www.npr.org/templates/story/story.php?storyId=12104472.....6, 10

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Justin Post, Stray dogs could cost local taxpayers, Mont. Standard, June 28 2007 http://mtstandard.com/articles/2007/06/28/butte/hjjcjdhbjihafd.txt.....7

Pit Bull Rescue San Diego, Pit Bull Fighting, http://www.pitbullrescuesandiego.com/learn/fighting.htm (last visited Aug. 2, 2007). 3

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Amicus Curiae The Humane Society of the United States ("HSUS") respectfully submits this brief Amici Curiae in support of Appellee United States of America to affirm the conviction and sentence entered against Appellant Robert J. Stevens in the United States District Court of the Western District of Pennsylvania. HSUS is the nation's largest non-profit animal protection organization with more than ten million members and constituents. The HSUS's mission is to protect animals through legislation, litigation, investigation, education, advocacy and field work.

BACKGROUND

Dog Fighting Is Cruel And Inhumane

Dog fighting is one of the most violent and depraved acts that persists in our society.[1] As early as 1976, Congress recognized the senseless and gruesome cruelty inherent in dog fighting. In the Animal Welfare Act Amendments passed that year, the House Report concluded that "[d]og fighting...is a grisly business in which two dogs either trained specifically for the purpose or maddened by drugs

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[1] See Hanna Gibson, Dog Fighting General Overview, Animal Legal & Historical Center (2005), http://animallaw.info/articles/qvusdogfighting.htm (last visited Aug. 20, 2007) ("From an animal welfare standpoint, dog-fighting is one of the most serious forms of animal abuse....The collective American conscience has long been repulsed by the undeniable brutality within the culture of dogfighting...").

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).[2]

Animals forced to participate in dog fighting are tormented and brutalized for their entire lives. They are intentionally tortured to make them "mean" and ready to fight using tactics that include pouring chili pepper in their mouths, kicking them, prodding them with sticks, and electrocution.[3] Dogs that don't show enough blood lust are routinely executed in sadistic ways such as drowning,

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[2] The Animal Welfare Act Amendments of 1976 made it unlawful "for any person to knowingly sponsor or exhibit an animal in any animal fighting venture to which any animal was moved in interstate or foreign commerce." 7 U.S.C. § 2131 et seq. (1976). On May 3, 2007 the Animal Fighting Prohibition Enforcement Act of 2007 was signed into law. This law amends the federal criminal code to impose a fine and/or prison term of up to three years for violations of the Animal Welfare Act relating to: (1) sponsoring or exhibiting an animal in an animal fighting venture; (2) buying, selling, transporting, delivering, or receiving for purposes of transportation, in interstate or foreign commerce, any dog or other animal for participation in an animal fighting venture; and (3) using the mails or other instrumentality of interstate commerce to promote or further an animal fighting venture. Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88. Congress is currently considering H.R. 3219, introduced in July 2007, which seeks to amend the Animal Welfare Act to prohibit all dog fighting ventures.

[3] See The Reality of Dog Fighting, http://www.pitbullsontheweb.com/petbull/articles/brownstein.html (last visited Aug. 2 2007) (interviewing Chicago police officer Sgt. Steve Brownstein who specializes in the prosecution of dog fighters:
"They beat these animals. They feed them hot peppers. Feed them gunpowder. Lock them in small closets. They do everything they can to make these animals vicious and mean."); see also Allen G. Breed, Vick Case Latest Manifestation of Pit Bull's Changing Image as American Icon, ASSOCIATED PRESS, July 24, 2007, available at http://www.sportingnews.com/yourturn/viewtopic.php?t=244674.

hanging or being set on fire.[4] Trainers commonly teach their dogs to fight using smaller animals, such as cats, puppies or rabbits, for "bait."[5] Dogs that survive to become fighting dogs are conditioned never to give up a fight, even if it means they will be gravely hurt or killed.[6] Common dog fighting injuries include severe bruising, lacerations, ripped ears, puncture wounds and broken bones.[7] Losing dogs are often left untreated or beaten further as "punishment" for the loss.[8] Injured animals frequently die of infection, dehydration, exhaustion and blood loss.[9] Dogs that are born or brought into dog fighting endure abbreviated and painful lives only to suffer cruel and painful ends, at the whim of their keepers and for the sole purpose of an evening's entertainment or wagering.

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[4] See, e.g., Breed, supra at http://www.sportingnews.com/yourturn/viewtopic.php?t=244674.

[5] See, e.g., ASPCA, Pit Bull Cruelty, http://aspca.org/site/PageServer?pagename=cruelty_pitbull (last visited Aug. 20, 2007); see also The Cruel "Sport" of Dogfighting, Encyclopedia Britannica's Advocacy for Animals (February 19, 2007), http://advocacy.britannica.com/blog/advocacy/2007/02/the-cruel-sport-of-dogfighting/.

[6] See ASPCA, supra, at http://aspca.org/site/PageServer?pagename=cruelty_pitbull

[7] See Johnna A. Pro, Dogfighting Bust, PG News (July 10, 1999), *available at* http://www.post-gazette.com/regionstate/19990701dogs1.asp.

[8] See The Reality of Dog Fighting, supra at http://www.pitbullsontheweb.com/petbull/articles/brownstein.html

[9] See, e.g., Pit Bull Rescue San Diego, Pit Bull Fighting, http://www.pitbullrescuesandiego.com/learn/fighting.htm (last visited Aug. 20, 2007).

Dog Fighting Imposes Significant Societal Costs Without Any Commensurate Societal Benefits

Animals are not the only victims of dog fighting. The negative social impact of dog fighting on both individuals and communities is staggering. Dog fighting engages individuals in the torture, maiming and killing of animals, which studies have shown can have a dehumanizing and desensitizing effect, especially on children.[10] Dog bites are another serious, and sometimes fatal, consequence of dog fighting. Dog bites send 334,000 victims to hospital emergency departments each year at an estimated cost of $102.4 million annually, excluding workers' compensation claims, lost wages, and sick leave.[11] It is estimated that 60 percent

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[10] See Sara C. Haden and Angela Scarpa, Childhood Animal Cruelty: A Review of Research, Assessment, and Therapeutic Issues, FORENSIC EXAMINER, 2005, at 30, *available at* http://www.acfei.com/pdf/onlinece/2005/SU2005_AnimalCruelty.pdf (Finding that "[e]xposure to childhood animal cruelty.. is [] related to more severe conduct disorder symptoms and possibly adult interpersonal violence."); see also David Partenheimer, Exposure to Media Violence Predicts Young Adult Aggressive Behavior, American Psychological Ass'n Online, *at* http://www.apa.org/releases/media_violence.html (last visited Aug. 20, 2007) (documenting that men who watched a lot of violent television programs as children were 300% more likely to have been convicted of a crime than other men); Frank Ascione, Animal Abuse and Youth Violence, Juvenile Justice Bull., at 4 (Sept. 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/188677.pdf (documenting that psychology and criminology studies indicate that those who commit violent acts toward animals are more likely to have violent criminal records than non-abusers).

[11] See, e.g., J Gilchrist, et al., Nonfatal Dog Bite-Related Injuries Treat in Hospital Emergency Departments – United States, 2001, 52 CDC MORBIDITY MORTALITY WK. REP. 605 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm (last visited Aug. 20,

of dog bite injuries are caused by the dog breeds most commonly used in dog fighting.[12] Another recent study found that in 2005, 81 percent of dog bite fatalities were caused by dogs trained for fighting or to guard property.[13]

Dogs trained to fight pose an acute public safety risk at all times, even when they are not being fought. Wherever fighting dogs are bred and housed, people nearby are at risk, as escapes are not uncommon. Fighting dogs must also be transported to fights, and are often trucked long distances when bought and sold. At every juncture, the entire community – and not just the dogs' handlers – is at risk of attack from these abused and hyper aggressive animals. Thus, dog fighting almost certainly results in tens, if not hundreds of thousands of dog bites each year that are serious enough to warrant emergency room treatment, and millions, if not tens of millions of dollars' worth of medical expenses each year.

Dog fighting also exhausts the resources of community animal control and shelter facilities. Throughout the United States, anywhere from 20 to 75% of dogs entering animal shelters are pit bulls, the vast majority of which are "byproducts"

2007); Harold B. Weiss, et al., Incidence of Dog Bite Injuries Treated in Emergency Departments, 279 JAMA 51 (1998); Canine Aggression Task Force, A Community Approach to Dog Bite Prevention, 218 JAVMA 1732, 1733 (2001).

[12] 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).

[13] See Dennis Selig, The Pit Bull Controversy, Feb. 14 2007, *at* http://www.legacy.com/chicagotribune/Pets/PetsLinkView.aspx?LinkId=393&GroupId=204 (last visited Aug. 20, 2007).

of the dog fighting industry, meaning that they are either dogs who have been seized from owners who were using them in dog fighting, or they are dogs that are discarded from litters where only the most aggressive are selected for fighting.[14] These animals frequently arrive in need of emergency veterinary care, shelter and rehabilitation. Because of their association with fighting, pit bulls are a particularly hard breed to find homes for, and the vast majority—hundreds of thousands annually—have to be euthanized.[15] Conservative estimates suggest that the costs associated with the handling, care, sheltering, and euthanasia of fighting

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[14] See AnimalSheltering.org, Pit Bull Poll, http://animalsheltering.org/resource_library/magazine_articles/sep_oct_2006/pit_bull_poll.html (last visited Aug. 20, 2007) (when asked to complete surveys indicating what proportion of dogs entering shelters were pit bulls, the average figure was 30%, with 38% percent of respondents indicating that pit bulls make up more than one third of their intake); Ann Notarangelo, New Effort to Place Pit Bulls in Good Homes, CBS5.com, Aug. 10, 2005, http://cbs5.com/topstories/local_story_222201632.html (last visited Aug. 2, 2007) (stating that 75% percent of dogs coming into shelters in the Bay Area are pit bulls and pit bull mixes); see also ASPCA, supra, at http://aspca.org/site/PageServer?pagename=cruelty_pitbull ("In March 2000, the ASPCA asked representative U.S. shelters about their experiences with pit bulls. Thirty-five percent take in at least one pit bull a day, and in one out of four shelters, pits and pit mixes make up more than 20 percent of the shelter dog population.")

[15] See The Biggest Battle: The Epidemic That's Killing The Pit Bulls, *available at* http://www.badrap.org/rescue/breeding.cfm (last visited Aug. 2, 2007); KAREN DELISE, FATAL DOG ATTACKS, 86 (Anubis Press 2002) ("Every single day, abandoned, lost, and unwanted pit bulls pour into shelter doors; some shelters get as many as 10 a day. Most will never find homes."); see also 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 ("The thousands of fighting dogs recovered every year in the U.S. are kept alive only as long as they're needed for evidence, but they can never be adopted out as normal pets.")

animals could be hundred of millions, and perhaps as much as billions of dollars annually. [16]

Given that the only reason dog fighting exists is to amuse and entertain a subset of society that derives enjoyment or profit from these animals' misery, it is clear that dog fighting and the serious collateral costs to society associated with it have no commensurate benefits.

Dog Fighting Is Part Of An Underground Criminal Subculture That Is Difficult For Police To Infiltrate

All fifty states and the District of Columbia have determined that dog fighting is criminally inhumane and have passed laws making dog fighting a felony (with the exception of Idaho, where dog fighting is a misdemeanor).[17] Eighteen

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[16] Largely due to a lack of funding for data-collection, there is no documentation of the total financial cost of dog fighting to animal control agencies and animal shelters. However, extrapolating from the minority of jurisdictions that do collect data on animal control and care expenses adds up to a figure in the billions of dollars. For instance, California spends $300 million a year on the cost of intake, housing, care, feeding, euthanasia and disposal of dogs and cats at animal shelters. See Patrick McGreevy, The Fur Flies Over Spaying Proposal, L.A. TIMES, July 10, 2007, at 10. In Los Angeles county alone, the price tag for critical animal shelter renovations will reach over $160 million. *Id.* Oklahoma city budgeted $2,870,304 for the fiscal 06-07 year for animal control, shelter and veterinary costs. See James D Couch, City of Oklahoma City Annual Budget, Fiscal Year 2006-2007 (June 13, 2006), http://www.okc.gov./budget/FY06_07/06_07_final.pdf. Butte, Montana has proposed a budget of $649,829 for animal control. See Justin Post, Stray dogs could cost local Taxpayers, MONT. STANDARD, June 28 2007, *available at* http://mtstandard.com/articles/2007/06/28/butte/hjjcjdhbjihafd.txt.

[17] Ala. Code § 3-1-29 (2007); Alaska Stat. § 13-2910.01 (2007); Ark. Code Ann. § 5-62-120 (2007); Cal. Penal Code § 597.5 (2007); Colo. Rev. Stat. § 18-9-204

states and the District of Columbia have made it a felony to even attend a dog fight as a spectator, of which Pennsylvania is one;[18] and spectating is a misdemeanor in 29 other states.[19] Despite the fact that dog fighting, and even watching a dog fight,

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(2006); Conn. Gen. Stat. § 53-247 (2007); Del. Code Ann. tit. 11, § 1326 (2007); D.C. Code § 22-1015 (2007); Fla. Stat. § 828.122 (2007); Ga. Code Ann. § 16-12-37 (2007); Haw. Rev. Stat. § 711-1109.3 (2007); 720 Ill. Comp. Stat. 5/26-5 (2007); Ind. Code Ann. § 35-46-3-9 (2007); Iowa Code § 717D.2 (2006); Kan. Stat. Ann. § 21-4315 (2006); Ky. Rev. Stat. Ann. § 525.125 (2006); La. Rev. Stat. Ann. § 14:102.5 (2007); Me. Rev. Stat. Ann. § 1033 (2007); Md. Code art. 27, § 59 (2007); Mass. Gen. Laws ch. 272, § 94 (2007); Mich. Comp. Laws § 750.49 (2007); Minn. Stat. § 343.31 (2006); Miss. Code Ann. § 97-41-19 (2007); Mo. Rev. Stat. § 578.025 (2007); Mont. Code Ann. § 45-8-210 (2005); Neb. Rev. Stat. Ann. § 28-1005 (2007); Nev. Rev. Stat. Ann. § 574.070 (2007); N.H. Rev. Stat. Ann. § 644:8-a (2007); N.J. Stat. Ann. § 4:22-24 (2007); N.M. Stat. Ann. § 30-18-9 (2007); N.Y. Agric. & Mkts. Law § 351 (2007); N.C. Gen. Stat. § 14-362.2 (2007); N.D. Cent. Code § 36-21.1-07 (2007); Ohio Rev. Code Ann. § 959.16 (2007); Okla. Stat. tit. 21, § 1693 (2007); Or. Rev. Stat. § 167.365 (2007); 18 Pa. Cons. Stat. § 5511 (2006); R.I. Gen. Laws § 4-1-9 (2007); S.C. Code Ann. § 16-27-30 (2006); S.D. Codified Laws § 40-1-9 (2007); Tenn. Code Ann. § 39-14-203 (2007); Tex. Penal Code Ann. §42.10 (2007); Utah Code Ann. § 76-9-301.1 (2007); Vt. Stat. Ann. tit. 13, § 352 (2007); Va. Code Ann. § 3.1-796.124 (2007); Wash. Rev. Code § 16.52.117 (2007); W. Va. Code § 61-8-19 (2007); Wis. Stat. § 951.08 (2006); Wyo. Stat. Ann. § 6-3-203 (2007) (felony if fighting results in death of the animal). Animal fighting is also being outlawed on the federal level.

[18] 18 Pa. Const. Stat. Ann. § 5511(h.1)(6) ("[A] person commits a felony of the third degree if he … attends an animal fight as a spectator."). See also Ala. Code § 3-1-29(b) (2007); Alaska Stat. § 13-2910.02; Colo. Rev. Stat. § 18-9-204 (2006); Conn. Gen. Stat. § 53-247(c) (2007); D.C. Code § 22-1015(b) (2007); Fla. Stat. § 828.122 (2007); Ga. Code Ann. § 16-12-37 (2007); Mich. Comp. Laws § 750.49 (2007); Miss. Code Ann. § 97-41-19 (2007); Mo. Rev. Stat. § 578.025 (2007); Mont. Code Ann. § 45-8-210 (2005); N.H. Rev. Stat. Ann. § 644:8-a (2007); N.J. Stat. Ann. § 4:22-24 (2007); N.C. Gen. Stat. § 14-362.2 (2007); Ohio Rev. Code Ann. § 959.16 (2007); 18 Pa. Cons. Stat. § 5511 (2006); R.I. Gen. Laws § 4-1-11 (2007); Vt. Stat. Ann. tit. 13, § 352 (2007); Wash. Rev. Code § 16.52.117 (2007).

[19] Ark. Code Ann. § 5-62-120(b) (2007); Cal. Penal Code § 597.5(b) (2007); Del. Code Ann. tit. 11, § 1326(b) (2007); Idaho Code Ann. § 25-3507 (2007); Ill.

is illegal throughout virtually all of the United States, people continue to breed and train dogs, particularly pit bulls, to participate in underground dog fights. The proliferation of dog fighting is due in large part to the fact that dog fighting has become part of a "criminal subculture" that involves gang activity, drug crimes, illegal gambling and possession of illegal weapons.[20] Organizers work surreptitiously, "offering patrons the opportunity to witness and gamble upon a series of dog fights and to indulge at the same time in many questionable and criminal activities." H.R. Rep. No. 94-801, at 9 (1976) (outlawing the interstate trafficking of animals for fighting ventures as part of the Animal Welfare Act

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Comp. Stat. 5/26-5(g) (2007) (misdemeanor for first offense; felony for any subsequent offense); Iowa Code § 717D.4 (2006); Kan. Stat. Ann. § 21-4315 (2006); Ky. Rev. Stat. Ann. § 525.130 (2006); La. Rev. Stat. Ann. § 14:102.5 (2007); Me. Rev. Stat. Ann. § 1033 (2007); Md. Code art. 27, § 59 (2007); Mass. Gen. Laws ch. 272, § 95 (2007); Minn. Stat. § 343.31 (2006); Mo. Rev. Stat. § 578.025 (2007); Neb. Rev. Stat. Ann. § 28-1005 (2007) (misdemeanor for first offense; felony for any subsequent offense); Nev. Rev. Stat. Ann. § 574.070 (2007) (misdemeanor for first offense; felony for any subsequent offense); N.M. Stat. Ann. § 30-18-9 (2007); N.Y. Agric. & Mkts. Law § 351 (2007); N.D. Cent. Code § 36-21.1-07 (2007); Okla. Stat. tit. 21, § 1693 (2007); S.C. Code Ann. § 16-27-40 (2006) (misdemeanor for first offense; felony for any subsequent offense); S.D. Codified Laws § 40-1-9 (2007); Tenn. Code Ann. § 39-14-203 (2007); Tex. Penal Code Ann. §42.10 (2007); Utah Code Ann. § 76-9-301.1 (2007); Va. Code Ann. § 3.1-796.124 (2007); W. Va. Code § 61-8-19 (2007); Wis. Stat. § 951.08 (2006); Wyo. Stat. Ann. § 6-3-203 (2007) (felony if fighting results in death of the animal).

[20] See Hanna Gibson, Dog-Fighting Database, supra, at http://www.animallaw.info/articles/art_img/dog_fighting_database.doc ("The overwhelming correlation between dog-fighting and other criminal activity has prompted many law enforcement agencies to develop specially trained units to handle dog-fighting.").

Amendments of 1976).[21] However, because dog fighting is illegal, matches usually take place in secret underground locations that are known only by word of mouth and change constantly. The underground nature of the activity makes dog fighters extremely difficult to identify, catch and prosecute.[22]

Videotaping dog fights is an integral part of this criminal subculture. Recordings of matches are frequently discovered by law enforcement in connection with dog fighting arrests. See, e.g., Commonwealth v. Craven, 572 Pa. 431, 434 (Pa. 2003) (videotapes of dog fights and videotaping equipment found at the home of a dog fight organizer); Ash v. State, 290 Ark. 278, 279 (Ark. 1986) (where the defendant's 12-year-old son had been made to videotape the dogfight); State v. Shelton, 741 So. 2d 473, 475 (Ala. Crim.App. 1999) (videotapes of dogfights found in defendant's home); Johnna A. Pro, Dogfighting Bust, PG NEWS,

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[21] See also Hanna Gibson, Dog Fighting General Overview, supra, at http://animallaw.info/articles/qvusdogfighting.htm. ("Many [dog fighters] are heavily involved in organized crime, racketeering, drug distribution, or gangs, and they arrange and attend the fights as a forum for gambling and drug trafficking.").

[22] See The Reality of Dog Fighting, supra, at http://www.pitbullsontheweb.com/petbull/articles/brownstein.html (last visited Aug. 2 2007) ("Compounding the problem is the difficulty of locating, never mind gathering evidence on a dog fight, fleeting encounters which are either hidden from view or easily dispersed at the glimpse of a squad car."); see also Pro, supra at http://www.post-gazette.com/regionstate/19990701dogs1.asp. (quoting a police officer in Pittsburgh after his first dog fighting arrest "infiltrating dogfighting is a lot harder than infiltrating a drug ring."); see also Mann, supra at http://www.npr.org/templates/story/story.php?storyId=12104472 ("The practice is a felony in 48 [sic] states, but for years, the secretive network of trainers, breeders and owners have managed to avoid scrutiny from law enforcement").

July 10, 1999 (where officers confiscated three firearms in connection with dog fighting bust, and a videotape a fight in which the dogs were injured).[23] These depictions of live animal fights serve as "training" videos for other fighters, documentation of an important fight, marketing or advertising materials, or as another stream of revenue to fund those involved in this underground criminal activity. Video documentation is a critical aspect of the actual fighting ventures, because once a dog kills five other dogs, he or she receives the title "Grand Champion," and fights involving one or more Grand Champions command higher purse, entry fees, and side bets.

While these gory depictions clearly capture the dogs' actual suffering, they rarely reveal who made the recording or staged the dog fight. Depictions preserve the perpetrators' anonymity and frustrate law enforcement's efforts to stamp out this criminal activity. Limiting the ability of operators, fighters and enthusiasts to profit from depictions of live dog fights undermines a primary reason to stage such fights and presents the best means available for law enforcement to fight against the substantive evil of dog fighting.

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[23] See Pro, supra, at http://www.post-gazette.com/regionstate/19990701dogs1.asp ("The videotape that the officers viewed later showed the real horror.").

LEGAL ARGUMENT

I. THE VIDEOS SOLD BY MR. STEVENS SHOULD NOT BE CONSIDERED PROTECTED SPEECH

Mr. Stevens cannot invoke freedom of speech to shield him from the consequences of his illegal activities. Speech is not afforded First Amendment protection if the government has a "compelling interest in its regulation" and if the speech has "exceedingly 'slight social value'" New York v. Ferber, 458 U.S. 747, 776 (Brennan, J., concurring). Using these guidelines, the Supreme Court has found several categories of speech to be outside of the ambit of First Amendment protection, including obscenity Miller v. California, 413 U.S. 15 (1973); child pornography (New York v. Ferber, 458 U.S. 747 (1982); fighting words Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); and libel. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The "speech" that Mr. Stevens seeks to engage in is likewise not protected: The government has a compelling interest in regulating commercial activity when it is integrally related to criminal activity, and the live recordings of horrific acts of animal violence Mr. Stevens seeks to distribute and promote for profit are of slight, if any, social value.

The Supreme Court has repeatedly made it clear that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Certain categories of speech, such as the videos sold by Mr.

Stevens, are so integrally connected to the underlying illegal conduct that they facilitate, that the government has a compelling interest in their regulation and the First Amendment offers them no protection. See, e.g., New York v. Ferber, 458 U.S. 747, 761-62 (1982) ("It has rarely 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 criminal statute.") (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

Child pornography is the paradigmatic example of those narrow categories of speech excepted from the protection of the First Amendment because of their intimate relationship with an underlying species of illegal conduct. See, e.g., New York v. Ferber, 458 U.S. at 759 (finding that "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."). As the Ferber Court correctly recognized, "[t]he advertising and selling of child pornography provide an economic motive for and are thus *an integral part of the production of such materials*." Id. (emphasis added); see also id. at 762, n.13 (citing the findings of the Texas House Select Committee on Child Pornography that "[t]he act of selling child pornography is guaranteeing that there will be additional abuse of children."). Accordingly, the Ferber Court determined that because criminalizing the commercial distribution of child pornography was

necessary to effectively combat the underlying illegal conduct, the government had a compelling interest in doing so.

Although child pornography is the archetypal example of those narrow categories of speech which are not afforded the protection of the First Amendment because of their intimate relationship with an underlying species of illegal conduct, it is not the only such category. The Court has found that the First Amendment offers no protection to: newspapers advertising jobs in a manner so as to facilitate illegal gender-based job discrimination (Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)); and businesses attempting to utilize First Amendment protections to engage in a conspiracy to commit antitrust violations (California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)). The fundamental principle guiding all of these cases has been that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." Id. at 515 (citing NAACP v. Button, 371 U.S. 415, 444 (1963)).

Similarly here, depicting dog-fighting for commercial gain, or distributing or selling such depictions, is so intimately related to the underlying act of staging, attending and participating in illegal animal cruelty that it does not deserve First Amendment protection. Most states, including Pennsylvania, have made dog fighting a felony crime and have criminalized even the act of watching a dog-

fight.[24] Dog fighting videos record the actual suffering of live animals forced to participate in these illegal death matches. Because dog-fighting is criminalized, these fights take place shrouded in secrecy and documentation of matches can only be obtained through underground newspapers (such as the one Mr. Stevens used to advertise his videos), or by making and selling video recordings or other depictions of the fights. The training and breeding of dogs for fighting also takes place secretly, and organizers and fighters often record live fights for training purposes.

Numerous dog-fighting cases have exposed how intimately connected the video market is to participation in and supporting for live dog-fighting. See, e.g., Commonwealth v. Craven, 572 Pa. 431, 434 (Pa. 2003); Ash v State, 290 Ark. 278, 280 (Ark. 1986); State v. Shelton, 741 So.2d 473, 475 (Ala.Crim.App. 1999) (discussed supra at 10). It would make little sense to say that the First Amendment does not offer its protection to individuals attending an illegal, cruel, and barbaric dog fighting match in person, but it nevertheless protects anyone who can obtain and sell a video tape of the *same conduct*—even the same fight. In both cases, the ability to transmit a depiction of the dog-fight, whether live or on tape, serves as the predicate motivation for the underlying criminal act—participation in criminal animal cruelty.

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[24] 18 Pa. Cons. Stat. Ann. § 5511(h.1)(6) (2006) ("[A] person commits a felony of the third degree if he … attends an animal fight as a spectator."); See supra, notes 17-19.

Crush videos present a similar phenomenon. In crush videos, small animals such as mice or kittens, are "crushed" or trampled to death by human feet, for the sole purpose of feeding an underground market of "crush fetishists." Like dog fighting and child pornography, the making of crush videos requires that live animals suffer actual death and injury in order for the video market to prosper. The suffering these animals are forced to endure has already been outlawed by existing anti-cruelty statutes, and so the makers, sellers and distributors of such videos continue their work underground. Only by targeting that marketplace can law enforcement effectively prevent and deter the gruesome underlying criminal acts. As is the case with child pornography, depictions of animal cruelty, such as dog-fighting tapes and crush videos, fall precisely within that narrow category of "speech" whose connection to criminal activity should deprive it of First Amendment protection.

Not only does the government have a compelling interest in regulating such material, Congress has repeatedly voiced the overwhelming sense of the American people that the practice of dog fighting is "dehumanizing, abhorrent, and *utterly without social value.*" H.R. Rep. No. 94-279, at 10 (1976) (emphasis added).[25]

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[25] 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."; "Animal fighting is a deplorable activity with a purely negative impact on society." 153 Cong. Rec. E655 (daily ed. Mar. 28, 2007) (statement of Hon. Maloney).

There is no credible argument that forcing two animals to maim and kill each other for mere sport has any redeeming social value for any one, to say nothing of the thousands of animals that are killed, maimed, tortured or abandoned in connection with this so-called "sport." To the extent that any depiction of illegal animal cruelty would contain "serious religious, political, scientific, educational, journalistic, historical, or artistic value," the statute excludes those depictions from prosecution, making the statute apply, by definition, only to depictions lacking social value. 18 U.S.C. § 48(b) (1999).

Because the government's compelling interest in regulating commercial depictions of criminal animal cruelty clearly outweighs the *de minimus* value of the speech regulated by the statute, Appellant's conduct is not protected by the First Amendment.

II. EVEN IF 18 U.S.C. § 48 RESTRICTS PROTECTED SPEECH, THE STATUTE PASSES STRICT SCRUTINY

Even if this Court finds that 18 U.S.C. § 48 does contain a content-based restriction on protected speech, the regulation passes the strict scrutiny test since it (1) serves a compelling governmental interest; (2) is narrowly tailored to achieve that interest; and (3) is the least restrictive means of advancing that interest. Sable Commc'n of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); American Civil Liberties Union v. Ashcroft, 322 F. 3d 240, 247 (3d Cir. 2003).

A. The State Has A Compelling Interest In Prohibiting Animal Cruelty

Appellant incorrectly argues the Supreme Court decision in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) held that laws designed to prohibit cruelty to animals would never pass strict scrutiny (Appellant's Brief at 60). In fact, the Lukumi Court explicitly declined to hold that anti-cruelty laws would never pass strict scrutiny ("The result in the case before the Court today. . .*does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals*.") Id. at 580 (Brennan, J. concurring). The law at issue in Lukumi – a local ordinance prohibiting animal sacrifice – was struck down because it was specifically and intentionally designed to suppress a particular group's free exercise of its religion, not because the state lacked a compelling interest in preventing animal cruelty. Lukumi, 508 U.S. at 525-27 (finding that the City of Hialeah had passed the ordinance to discourage the Santeria Church from establishing itself openly in the city). The Lukumi Court did not address the question at issue before this Court - whether a narrowly tailored statute designed to proscribe depictions of illegal animal cruelty promotes a compelling government interest.

Even though the Lukumi Court did not address the question at issue before this Court, that Court acknowledged that the state could have a compelling interest

in preventing animal cruelty. Id. And, in fact, there are multiple reasons why this compelling interest exists.

Congress has long recognized that "the great majority of Americans believe that all animals....as living things, are entitled to certain minimal standards of treatment by humans...[and] should be treated in ways that do not cause them to experience excessive physical pain or suffering." H.R. Rep. No. 106-397, at 4 (1999). The fact that all fifty states have passed anti-animal cruelty laws (the majority of which include dog fighting as a criminal felony punishable by up to life in prison) reflects Americans' overwhelming interest in deterring and stopping animal cruelty.[26]

In addition, the government's compelling interest in preventing animal cruelty is justified by the state's widely recognized compelling interest in promoting public health and safety. See, e.g., Mackey v. Montrym, 443 U.S. 1, 18 (1979) (finding compelling state interest in promoting highway safety); Sable

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[26] See Vt. Stat. Ann. tit. 13, § 352 (2007) (for fourth offense). Sentences for first offenders range from 18 months (Ohio Rev. Code Ann. § 959.16 (2007)) to 10 years (Okla. Stat. tit. 21, § 1693 (2007)). In 2007 the Animal Fighting Prohibition Enforcement Act of 2007 amended the federal criminal code to impose a prison term of up to three years for violations of the Animal Welfare Act relating to: (1) sponsoring or exhibiting an animal in an animal fighting venture; (2) buying, selling, transporting, delivering, or receiving for purposes of transportation, in interstate or foreign commerce, any dog or other animal for participation in an animal fighting venture; and (3) using the mails or other instrumentality of interstate commerce to promote or further an animal fighting venture. Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

Commc'ns, Inc. v. FCC, 492 U.S. 115, 126 (1989) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors."); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (recognizing the government's "compelling interests in safeguarding our borders and the public safety"); Simopoulos v. Virginia, 462 U.S. 506, 519 (1983) (acknowledging the State's "compelling interest" in protecting the health and safety of women in the context of abortions).

Dog fighting, which has been outlawed as animal cruelty, continues to be directly and indirectly responsible for serious injury and death. The vast majority of dog fatalities are caused by dogs trained for fighting or guarding, with the majority of victims being children.[27] And every year, tens of thousands of dog bites requiring emergency room visits are caused by the estimated 40,000 people involved in the dog fighting industry domestically.[28]

The state also has a compelling interest in protecting the public from criminal activity. See, e.g., Oliver v. U.S., 682 A.2d 186, 190 (D.C. Cir. 1996); see also Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (J. Powell, concurring) (characterizing the detection and prosecution of crime as an "essential societal interest"); Cf. Moran v. Burbine, 475 U.S. 412, 426 (1986) (recognizing society's

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[27] See supra, note 12.

[28] See supra note 11.

compelling interest in finding, convicting, and punishing those who violate the law.).

Like the laws upheld in the above cases, 18 U.S.C. § 48 also supports the state's compelling interest in preventing crime and enforcing its criminal laws. As discussed supra, video recordings of dog fighting are integrally related to the underlying criminal conduct of holding, promoting, or spectating at a dog fight. See also, supra at 9 (noting indirect criminal effects caused by dog fighting). Thus, the state's legitimate interest in suppressing the direct commission of criminal animal cruelty as well as preventing its indirect criminal effects, supports the government's compelling interest in proscribing the commercial marketplace that motivates the underlying criminal acts.

Finally, suppressing illegal animal cruelty supports the state's compelling interest in eliminating a significant drain on state and local coffers. Conservative estimates suggest that the costs of handling, care, sheltering, and euthanasia of dogs associated with fighting is hundreds of millions to billions of dollars annually – the majority of which is left to the municipalities and states to pay.[29] Dog bites are another significant cost at an estimated $102.4 million annually, excluding workers' compensation claims, lost wages, and sick leave.

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[29] See supra, note 16.

The Supreme Court has never held that animal cruelty as a compelling government interest could not pass strict scrutiny. For the reasons stated above, the government interest in preventing animal cruelty in general, and illegal dog fighting in particular, is indeed serious and compelling.

B. The Statute is Narrowly Tailored

Unlike the statute at issue in Lukumi – which the Supreme Court found to be both targeted directly at suppressing religion and substantially overbroad -- 18 U.S.C. § 48 is narrowly tailored to effect the state's compelling interest in preventing criminal animal cruelty. Congress constructed the statute in such a manner to target only content lacking any "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b) (1999). Consequently, the statute fits within the requirements espoused in Miller v. California 413 U.S. 15, 22-23 (1973) (In cases involving "freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."). Relying on the Miller test, Congress intentionally excluded all content falling within the area of special concern by prohibiting material it found to have "little or no social utility," in which "no reasonable person would find any redeeming value." H.R. Rep. No. 106-397, at 4-5 (1999).

Congress was purposeful and exacting when it enacted this law. Appellant is, therefore, mistaken when he argues that the statute is overbroad because it includes distributors and sellers of depictions of illegal animal cruelty, in addition to those who were responsible for their creation. The Supreme Court has explicitly recognized that where an illicit marketplace in depictions of illegal conduct is integrally-related to and facilitative of the underlying category of illegal conduct itself, statutes drawn to target that marketplace are narrowly tailored. See Ferber, 458 U.S. at 750-51. ("[T]here is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies…The *most expeditious if not the only practical method* of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.") (emphasis added).

18 U.S.C. § 48(a) targets only those who "knowingly create[], sell[], or possess[] a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. § 48(a) (1999). Moreover, the statute only prohibits commerce in depictions of animal cruelty that are *already illegal* under state or federal law. 18 U.S.C. § 48(c)(1) (1999). A statute narrowly tailored to target only those who *knowingly* stand to *profit from* subsidizing and motivating acts of criminally illegal animal cruelty should

rightfully include creators of these depictions, as well as others further down the distribution chain such as sellers or distributors. This is exactly what 18 U.S.C. § 48 does. It targets those that would otherwise be "beyond the reach of (state) law enforcement officials." H.R. Rep. No. 106-397, at 3-4 (1999).

C. 18 U.S.C. § 48 is the Least Restrictive Means of Advancing the Government's Compelling Interest

Appellant argues that section 48 is not the least restrictive means of preventing animal cruelty or the profit therefrom because it "does not limit its impact to either actual acts [of animal cruelty] or profit [from acts of animal cruelty]." (Appellant's Brief at 63). Appellant is incorrect. The statute targets those who knowingly participate in a chain of commerce that supports and stimulates illegal animal cruelty such as dog fighting - whether any individual *actually* profited from their activities is irrelevant. Criminalizing only the act would also be ineffective and redundant – the statute is narrowly tailored to affect only individuals knowingly seeking to profit from conduct that is already illegal in the first place. All fifty states have anti-cruelty laws that narrowly tailor the statute's application. However, dealing with illegal conduct that frequently takes place in secret, and a market of people who are interested in watching this illegal conduct, also in secret, the goals of the statute cannot be effectuated without targeting the distributors and commercial purveyors of films and videos which

document these lethal acts of animal cruelty. 18 U.S.C. § 48 is the least restrictive means of achieving the government's compelling interests here.

The making of dog fighting videos is primarily motivated by an illicit marketplace interest in illegal activity which can not exist without harming and killing, in horrible ways, actual living beings. Dog fighting also engages individuals in furtive criminal activities that often require undercover agents and long investigations before prosecution is possible. The Supreme Court has recognized that where a marketplace in the illicit depiction of criminal conduct substantially drives the underlying conduct, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." See Ferber, 458 U.S. at 750-51. Whereas in Ferber the regulation of depictions of child pornography presented the least restrictive means available to fight against that impregnable network of child sexual abusers, in this case regulation of the depiction of dog fighting presents the least restrictive means of fighting against the obscure underworld of illegal dog-fighting.

18 U.S.C. § 48 is the least restrictive means of suppressing the market for dog-fighting. If the statute were limited in its reach to those few individuals that the police could actually catch in the act of organizing dog fights, it would be insufficient to address the compelling government interests advanced by this

statute: to ensure that animals are not subjected to severe pain and suffering, to protect public health and safety from unnecessary injuries such as those attributable to dog fighting, to enforce its criminal laws, and to reduce the fiscal burden on states resulting from illegal activities such as dog fighting. By criminalizing the actions of those willing to distribute depictions of animal cruelty for commercial gain, the statute targets the financial interest motivating and enabling the underlying acts of animal cruelty in the most expeditious if not the only practical method available.

D. The Statute is not Overbroad

Appellant argues that the statute is unconstitutionally overbroad. (Appellant's Brief at 53). The overbreadth doctrine is designed to prevent the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 237 (2002). The Supreme Court has, however, held that when addressing conduct-related scrutiny, the overbreadth doctrine should only be employed "with hesitation" and even then "'only as a last resort.'" New York v. Ferber, 458 U.S. 747, 769 (1982) (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Before a statute may be invalidated on overbreadth grounds, the Court has insisted that challenges be "judged in relation to the statute's plainly legitimate

sweep." Osborne v. Ohio, 495 U.S. 103, 112 (1990) (citing Broadrick, 413 U.S. at 615).

Appellant argues that the statute is overbroad because it prohibits the sale of depictions of animal cruelty that are legal where created (as dog fighting is in Japan) but not legal where sold or possessed; because it would allegedly encompass technical violations of the law, and because it bans depictions of animal cruelty, but does not ban the underlying animal cruelty itself. (Appellant's Brief at 64-69). Appellants arguments are without merit.

First, there is no authority to support Appellant's claims that the Government cannot ban depictions of illegal conduct that is otherwise legal in other countries. In fact, the Government already does this with regard to child pornography and obscene materials. See, e.g., 18 U.S.C.A. § 1462 (1996)(making importation of obscenity into United States illegal without regard for whether content was legal in the country in which it was produced). Appellant's argument, if successful, would essentially invalidate these laws as well.

Second, Appellant argues that the statute would prohibit the sale of hunting or fishing depictions, if the hunting or fishing was illegal at the time the depiction was produced. (Appellant's Brief at 65). However, any legal hunting or fishing depiction would be plainly covered by the statute's exemption for "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

18 U.S.C. § 48(b) (1999). And any illegal hunting or fishing activity is plainly not entitled to any First Amendment protection. Even if the statute could possibly be construed to include narrow technical violations of the law, such violations are clearly outside the plainly legitimate sweep of the statute and do not invalidate the statute as overbroad. "Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the 'remainder of the statute ... covers a whole range of easily identifiable and constitutionally proscribable ... conduct....' ." Osborne, 495 U.S. at 112 (1990) (quoting Ferber, 458 U.S. at 770).

Further, there is simply no support in the statute's legislative history for Appellant's assertion concerning hunting and fishing. Importantly, the statute regulates only conduct *defined as animal cruelty* by federal or state law. See Hearing at 66 (where a witness explained that the statute makes illegal a depiction in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed "[*o*]*nly if it is illegal under the* [relevant state or federal] *animal cruelty sections, not if it is just illegal.*"). In other words, for the statute to prohibit commerce in a depiction of hunting or fishing, the hunting or fishing must be "animal cruelty," not just technically illegal due to the season. Indeed, because the statute regulates only depictions of illegal animal cruelty, such as Crush videos and animal fighting, the statute is not overbroad, but perfectly tailored to prohibiting only speech integrally related to illegal animal cruelty.

Lastly, Appellant argues that the statute is overbroad because it bans depictions of animal cruelty but not the underlying crime. Congress specifically designed the statute to "augment, not supplant, State animal cruelty laws." H.R. Rep. No. 106-397, at 3 (1999). 18 U.S.C. § 48 was intended to close any loops on state animal cruelty laws by eliminating the knowing depiction of animal cruelty for commercial gain. It did not need to criminalize the underlying conduct because it was already criminalized via state statutes. Congress' decision in 18 U.S.C. § 48 to explicitly focus on depictions of animal cruelty is no more constitutionally problematic than its decision to focus on depictions of child pornography in 18 U.S.C. § 1466A (2003). In both cases, Congress made a choice to proscribe commerce integrally-related to an underlying criminal act, a decision clearly permissible under Ferber. Mr. Stevens' argument, in fact, actually supports a finding that the statute is not overbroad.

III. THE STATUTE IS NOT VOID FOR VAGUENESS

Mr. Stevens claims that 18 U.S.C. § 48 is unconstitutionally vague because: (1) it outlaws 'depictions' of animal cruelty but it is unclear whether the statute criminalizes only actual performance of such conduct, or also virtual and simulated performances of such conduct; (2) the statute fails to define "animal"; and (3) the statute fails to define what conduct may not be depicted under it. See (Appellant's Brief) 35-36. Appellant's arguments fail.

The Supreme Court has held that statutes may be void for vagueness under two circumstances: (1) it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; and (2) it may authorize and even encourage arbitrary and discriminatory enforcement. City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). In Morales, the Court struck down a Chicago ordinance which granted absolute discretion to the police to define and arrest persons engaged in "loitering," which was defined as "remaining in one place with no apparent purpose" Id. at 60. The Supreme Court found that the ordinance was unconstitutionally vague because it did not provide adequate notice of the proscribed conduct nor set guidelines for enforcement. Id. The Court held that the ordinance provided no way in which a person could determine if they were standing in a public place for no "apparent purpose." Id. Since the ordinance did not give adequate notice as to the type of behavior that was proscribed, there was no way for a person to conform their behavior in accordance with the law. Moreover, the Court held that the ordinance failed to establish minimum guidelines to govern law enforcement; by allowing police officers to arbitrarily decide which members of the public they could order to disperse, the ordnance encouraged discriminatory enforcement. Id. at 58-60.

None of these circumstances are present here. It is abundantly clear both what the statute prohibits and that Stevens' conduct falls squarely within this

prohibition – and there is no meaningful risk of arbitrary or standard-less enforcement.

With respect to Mr. Stevens' specific claims, none render the statute unconstitutionally vague. Mr. Stevens' first argument is incorrect as a matter of fact. The definition of animal cruelty in the statute is specifically limited to acts performed on "living animals". 18 U.S.C. § 48 (1999). The statute clearly does not apply to simulated or virtual depictions.

Second, Mr. Stevens incorrectly argues that 18 U.S.C. § 48 is vague because it does not define "animal" and thus could lead to arbitrary or discriminatory enforcement. This is simply incorrect. Even though there may be some differences under the various state statutes as to which creatures are considered "animals," *every* animal cruelty statute considers dogs to be animals. See, e.g., 18 Pa. Cons. Stat. Ann. § 5511(q) (2006)(animal includes "[a]ny dog, cat, equine animal, bovine animal, sheep, goat or porcine animal"); see also supra fn. 17. Indeed, it is commonly accepted that no matter what the outer bounds of the definition of "animal," dogs are universally considered animals, and Mr. Stevens does not attempt to argue to the contrary. Thus, it is clear, and it should have been clear to Mr. Stevens, that his actions with respect to dogs were proscribed under the Pennsylvania statute. Had Mr. Stevens believed otherwise, he surely would have advertised his videotapes in mainstream publications, instead of using

underground publications to advertise his videotapes. Mr. Stevens' course of conduct demonstrates that the statute is clear enough for Mr. Stevens to know that his actions were illegal.

Third, a statute is not vague merely because it defines conduct by reference to state statutes. In fact, utilizing state and federal law to criminalize conduct is commonplace and does not invalidate a statute. See, e.g., 18 U.S.C. § 1955 (1994)(making it a crime to conduct, supervise, (etc.)... a gambling business which is a violation of the law of a State or political subdivision in which it is conducted) (emphasis added); 18 U.S.C. § 1956 (2006) (making it a crime for a person, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, to conduct or attempt to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity...to avoid a transaction reporting requirement under State or Federal law.) (emphasis added); 18 U.S.C. § 1961(2006) (defining racketeering activity as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year") (emphasis added); United States. v. Greenpeace, Inc., 314 F.Supp.2d 1252, 1260 (S.D.Fla. 2004) (18 U.S.C. § 2279 held not to be vague because it referenced

state law that criminalized boarding of a vessel before arrival); United States v. Tripp, 782 F.2d 38, 42 (6th Cir. 1986) (found that 18 U.S.C. § 1961 did not violate the Fifth Amendment by adopting state law in defining racketeering activity).

In addition, Mr. Stevens' claim that the statute is defective because it forces him to understand the laws of states into which he wishes to send his videotapes for commercial gain is obviously incorrect as a matter of law. Mr. Stevens, as a commercial supplier who ships goods for sale across state lines, is required to understand and comply with the relevant civil and criminal laws of the state into which he ships goods. This is no less than the due diligence that any reasonable person, must conduct before distributing materials into interstate commerce. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982), (holding that an "economic regulation is subject to a less strict vagueness test because...*businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action*". (emphasis added).

Mr. Stevens' conduct is clearly prohibited under 18 U.S.C. §48 and Pennsylvania law – the state in which Mr. Stevens sold his videotapes. Pennsylvania's "Cruelty to Animals Statute", 18 Pa. Cons. Stat. Ann. § 5511(h),(q) (2006) criminalizes "gains" from the "fighting or baiting [of] any bull, bear, *dog*,

cock or other creature." Notably, Mr. Stevens does not challenge the validity of the Pennsylvania animal cruelty statute. [30]

In sum, 18 U.S.C. § 48 does not fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, nor does it authorize arbitrary and discriminatory enforcement.

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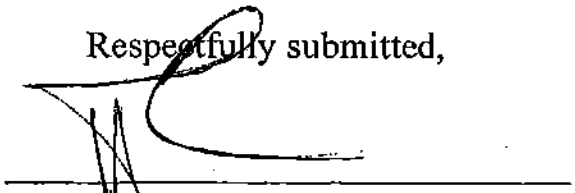
[30] Nevertheless, the Pennsylvania Supreme Court upheld the state's animal cruelty statute as applied to dog fighting against a vagueness challenge in 2003. See Commonwealth v. Craven, 572 Pa. 431 (Pa. 2003).

CONCLUSION

For the foregoing reasons, this Court should deny Appellant Robert J. Stevens' appeal of the judgment and conviction entered against him in the United States District Court for the Western District of Pennsylvania, Criminal No. 04-51.

Dated: August 22, 2007

Respectfully submitted,



Claudia O'Brien
Heather Foran
LATHAM & WATKINS LLP
One Newark Center, 16th Floor
Newark, NJ 07102
Telephone: (973) 639-7270
Fax: (973) 639-7298
Counsel for Amicus Curiae The Humane Society of the United States

CERTIFICATION OF BAR MEMBERSHIP

I certify, under penalty of perjury, that the attorneys whose names appear on this Brief are members of the bar of this Court.

Heather L. Foran

Dated: August 22, 2007

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2003 with 14 point Times New Roman font.

Heather L. Foran

Dated: August 22, 2007

CERTIFICATION OF VIRUS CHECK

I certify that the electronic version of this Brief submitted to the Court in .pdf format was checked for viruses and that no viruses were found. I further certify that the virus software programs used to complete the scan were Sybari and Network Associates.

Heather L. Foran

Dated: August 22, 2007

CERTIFICATION OF IDENTICAL TEXT

I certify that the text of the electronic version of this Brief submitted to the Court in .pdf format and the hard copy of this Brief are identical.

Heather L. Foran

Dated: August 22, 2007

CERTIFICATE OF SERVICE

I certify, under penalty of perjury, that on August 22, 2007:

1. Eleven (11) copies of the Brief of Amicus Curiae of the Humane Society of the United States in Support of Appellee United States of America were sent simultaneously to the Court, Ms. Marcia M. Waldron (Clerk), U.S. Court of Appeals for the Third Circuit, 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106, by federal express and electronic submission; and

2. Two (2) true and correct copies of the Brief of Appellant were simultaneously served on the following counsel of record via electronic submission and federal express:

Lisa B. Freeland
Karen Sirianni Geralch
Federal Public Defender Office
1450 Liberty Center
1001 Liberty Avenue
Pittsburgh, Pennsylvania 15222

Steve R. Kaufman
Assistant United States Attorney
United States Courthouse
Pittsburgh, Pennsylvania 15219

Dated: August 22, 2007