

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 FLORIDA, ALABAMA, ARKANSAS, ARIZONA,
CALIFORNIA, COLORADO, CONNECTICUT, HAWAII,
ILLINOIS, INDIANA, KENTUCKY, LOUISIANA,
MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA,
NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA,
OHIO, RHODE ISLAND, SOUTH CAROLINA, TEXAS,
UTAH, VIRGINIA and WEST VIRGINIA, AS AMICI
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QUESTION PRESENTED

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause of the First Amendment.

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STATEMENT OF AMICI INTEREST

The Amici States have a direct interest in this case because 18 U.S.C. § 48, which prohibits interstate commercial transactions in depictions of animal cruelty that lack any value to society, provides vital assistance to the enforcement of state animal cruelty laws. All fifty states and the District of Columbia have animal cruelty laws on their books. Enforcement of these laws in the commercial interstate marketplace, where animal fighting and “crush video” products tend to exist, has proven very difficult. Moreover, animal cruelty offenses are closely associated with gambling, drug activity, gang activity and violent crimes against people (particularly involving children), all of which the states have a substantial interest in preventing. Finally, animal cruelty restrictions and enforcement serve to uphold public mores, which uniformly condemn the depictions at issue.

Section 48 augments these state laws in important ways by criminalizing commercial transaction in depictions produced by the aberrant unlawful behavior of those who brutalize animals. The law is limited to the interstate market that exists for videos and pictures of animal cruelty. With its distribution channels diminished, purveyors of animal cruelty depictions lessen the demand for these items thereby reducing the underlying illegal activities. Evidence suggests that over the last decade with section 48 in place, the market for depictions of animal violence and cruelty has declined significantly. This trend, however, may be tenuous as states continue to fight cruelty rings that

often reach well beyond their borders. Section 48 is a vitally important tool in their enforcement efforts.

SUMMARY OF ARGUMENT

This Court should reverse the Third Circuit Court of Appeals and hold that 18 U.S.C. § 48 is facially constitutional. States have a compelling interest in § 48 because it vitally assists efforts to deter and enforce their own animal cruelty laws by keeping perpetrators (and downstream distributors) from advertising, selling, and profiting from depictions of their vile crimes in any market.

Animal cruelty crimes should not pay because, first, they are devastating to the interests of states. All fifty states and the District of Columbia have long prohibited animal cruelty and backed up these laws with substantial enforcement efforts and economic investments to combat and stamp it out. Animal crime task forces and other initiatives have sprouted across the nation at all levels of government. Animal law programs in academia proliferate, furthering awareness, detection, and prosecution of these crimes. These efforts would be undermined if a right to openly profit from depictions of animal cruelty crimes were to exist.

Second, states have found enforcement of cruelty laws exceptionally difficult with respect to those animal cruelty crimes most often depicted, marketed, and sold, such as animal fighting, production of “crush videos,” and hog-dog rodeos. Sophisticated producers of these depictions often can easily conceal their acts, especially given their

connections with larger organized crime outfits and gangs. Significant and expensive hurdles exist even where sufficient evidence exists to prosecute the actual acts of cruelty. Prosecutions often require animals, the primary evidence, to be fed and housed for substantial periods of time and demand the participation of forensic and veterinary professionals as experts.

Finally, animal cruelty devastates communities. Serious crimes such as gang activity, gambling, drug dealing, and violent felonies are closely associated with animal cruelty. Young people are particularly affected by this activity. Youth that commit acts of animal cruelty tend to commit increasingly serious violent crime against people, of which there are many infamous and tragic examples. Compounding this problem is that pop culture glorifies animal fighting and draws large numbers of youth into these heinous activities. Moreover, adults that abuse animals tend often to abuse their children. Here again, there are too many tragic examples. Based on the amici states' experience, relaxing societal restraints and legitimizing the activities of animal cruelty purveyors substantially threaten the well-being and mores of the next generation.

In sum, animal cruelty is a serious menace that demands tools like § 48 to assist state enforcement efforts. Also, the adage that crime should not pay has special importance in this context. The amici states urge this Court to reverse the Third Circuit and to recognize a compelling state interest in § 48.

ARGUMENT

The states' limited purpose in filing this brief is to show how 18 U.S.C. § 48 critically assists in the enforcement of the states' longstanding animal cruelty laws. The Third Circuit erred by finding that no compelling governmental interest underlies the law. The amici states view the law as vital in support of their efforts to stamp out acts of animal cruelty that inflict much harm in their communities nationwide.

I. SECTION 48 BOLSTERS LAWS IN ALL FIFTY STATES THAT PROHIBIT ANIMAL CRUELTY AND HELPS TO COMBAT A NATIONAL PROBLEM.

A. State laws against animal cruelty and the gap-filling role of § 48.

Animal cruelty is a nationwide affliction that implicates both state and federal interests. Society views the acts of cruelty at issue as antithetical to public mores and decency, as demonstrated by the longstanding illegality of such acts. *See* Pet. at 16 (citing state cases from the 19th Century); *Waters v. People*, 46 P. 112, 113 (Colo. 1896) (discussing goals of cruelty laws to both protect animals and “to conserve public morals.”). State animal cruelty prohibitions date back hundreds of years, with every state passing laws against cruelty by the end of the 19th Century. Pet. at 15 (*citing* H.R. Rep. No. 106-397, at 4 (1999)); Humane Soc’y C.A. Amicus Br. at 4. The fact that all states have animal cruelty laws going back over a century reflects a unanimous

national consensus that the activity is a serious menace that – like child pornography – is “so antisocial that it has been made criminal.” *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).¹

Traditionally, state laws have required lawbreakers to be caught in the act of abusing animals.² This requirement has proven somewhat ineffectual in the face of organized and sophisticated activities in commercializing forms of animal cruelty by persons adept at concealing their illegal enterprises. Technological advances provide ready access to interstate markets for depictions of animal cruelty, introducing a broader, multi-jurisdictional aspect to the problem.³

Congress recognized the problem and helped states to combat the commercial incentives for abusing animals by passing § 48, directed specifically

¹ Today, as noted by the Humane Society, merely *attending* a dogfight is prohibited in forty-eight states, and is a felony in twenty states. See Humane Soc’y C.A. Amicus Br. at 5-6 n.5 (listing statutes).

² See, e.g., Tona Kunz, *Arenas of cruelty dog fighting*, Chi. Daily News, Dec. 5, 2004, at 1 (quoting a Kane County, Ill. prosecutor that: “A felony conviction usually hinges on arriving during the fighting and betting”).

³ See, e.g., Ellen Barry, *7 Arrested in Hog and Dog Competitions*, L.A. Times, Dec. 21, 2004, at A15 (noting a “major interstate crackdown” and hog-dog rodeo raids in three states in which seven event organizers were arrested with more arrests expected, and that organizers had videotaped the events for distribution).

at commercially-distributed depictions of criminal acts of cruelty. *See* H.R. Rep. No. 106-397, at 3; Pet. at 10 (noting that § 48 “fills a significant gap in state and federal law enforcement efforts by targeting the commercial production and distribution of depictions of animal cruelty in order to dry up the market for such depictions and deter the underlying acts”).⁴ By criminalizing the commercial distribution of depictions of the underlying criminal acts, § 48 added a crucial gap-filling piece to the enforcement puzzle that dovetails with states’ efforts to enforce their own animal cruelty laws.

B. The states continue to take large strides in combating animal cruelty.

Even after § 48’s enactment, states view animal cruelty as a top priority to which they have devoted additional resources. The number of states with felony-level animal cruelty laws has increased six-fold in the last 15 years.⁵ Task forces have been created at various levels of government to address and enforce animal cruelty laws. *Id.* Many attorneys general have concentrated state enforcement efforts on animal cruelty, and the National Association of Attorneys General has created a standing committee

⁴ Section 48 is narrow in scope: it prohibits “the commercial pandering of graphic depictions of the actual torture of a real animal.” H.R. Rep. No. 106-397, at 5 (1999).

⁵ *See Animal Cruelty Prosecution*, American Prosecutor Research Institute, http://www.ndaa.org/pdf/animal_cruelty_06.pdf, at 2, 30 (last visited May 27, 2009) (“APRI Report”).

to address this scourge.⁶ Furthermore, animal law committees of the American Bar Association and over a dozen state bar associations (and more local bar associations) have formed. *See* APRI Report, *supra* note 5, at 2. Almost half of accredited law schools offer animal law-related study and about 100 have chapters of the Student Animal Legal Defense Fund.⁷ Notably, the University of Florida has teamed with an animal rights organization to establish the first veterinary forensics program at a major university whose goal is to train crime scene investigators who will assist with animal abuse prosecutions.⁸

All of these recent developments, coupled with the long history of state anti-cruelty laws, establish a common compelling nationwide interest in the

⁶ *See* http://www.naag.org/naag_standing_committees.php. The NAAG Ad Hoc Committee on Animal Cruelty is co-chaired by Attorney General Richard Blumenthal of Connecticut and Attorney General Henry McMaster of South Carolina, and is especially concerned with keeping the states' attorneys general apprised as to animal cruelty issues of particular concern, including "the prevalence of animal fighting, including staged fighting using dogs, roosters, 'hog dogging' and others; reporting and proper handling of animal cruelty incidents; the link between animal cruelty and human violence; and the social and community ramifications of animal cruelty." *Id.*

⁷ Drake Bennett, *Lawyer for the dog*, Boston Globe, Sept. 9, 2007, at D1.

⁸ *See* Ron Word, *Univ. of Florida, ASPCA fill void for animal CSIs*, USA Today, April 16, 2009, available at http://www.usatoday.com/news/education/2009-04-16-animal-forensics_N.htm.

enforcement community, an interest that § 48 supports and vitally advances.

II. DETECTION AND ENFORCEMENT OF ANIMAL CRUELTY CRIMES HAVE PROVEN VERY DIFFICULT FOR STATES.

Enforcement of animal cruelty laws is notoriously difficult especially for commercially viable cruelty crimes in which depictions can be widely advertised and sold at a profit.⁹ These typically involve dog and cock fighting, animal “crush” crimes, and hog-dog rodeos in which organized interstate crime and gang elements are commonly involved. Some of the primary enforcement challenges are economic, detection and evidentiary.

First, intrastate law enforcement costs are substantial. The chief evidence in many of these cases, the abused or neglected animals themselves, often must be fed, housed, and cared for over long periods of time. A sheriff’s office official in one midwestern county reported that his unit spent \$1.2 million just to house dogfighting evidence from 2002

⁹ See, e.g., http://www.pet-abuse.com/pages/cruelty_database/statistics/cases_by_year.php (last visited May 27, 2009); Martin Van Der Werf, *Dogfighting is on the rise, but arrests are rare*, St. Louis Post-Dispatch, Nov. 16, 2003, at A1 (reporting that the Animal Abuse Team in Chicago made 700 arrests and confiscated about 2,500 animals in its four-year existence).

through 2007.¹⁰ A report of the American Prosecutor Research Institute describes the “enormous burden” that holding animals puts on agency investigations that:

May involve dozens to hundreds of animals needing immediate and long-term care. Fighting dogs and roosters require special housing for the protection of the animals. Cruelty cases may also involve exotic animals or wildlife with special dietary, housing and veterinary needs . . . In some cases, animals cannot receive needed medical treatment without the owner’s consent or willingness to surrender ownership, which may be withheld . . . for animals that are likely [ultimately] to be returned, adopted, or euthanized at the conclusion of proceedings.

See APRI Report, *supra* note 5, at 26-27. Effective prosecution often requires expensive evidentiary analysis by forensic specialists and veterinarians. *Id.* at 36-38.¹¹

¹⁰ See Tom Weir, *Quotes looking inside the bloodsport of dogfighting*, USA Today, July 18, 2007, available at http://usatoday.com/sports/football/nfl/falcons/2007-07-18-dogfighting-quotes_N.htm (last visited May 27, 2009); James Hohmann, *Ending dogfighting no easy task*, Dallas Morning News, Aug. 22, 2007, at 1A (“holding the dogs ... even for a short period puts a strain on the system”).

¹¹ See Ron Wood, *Forensics to aid fight against animal abuse*, Atlanta Journal-Constitution, April 22, 2009, available at <http://www.ajc.com/metro/content/printedition/2009/04/22/currents0422.html> (noting in one prosecution the analysis of bones (Continued...))

Second, enforcement of enterprise-related animal cruelty cases is difficult because producers and purveyors are extremely secretive and can effectively conceal their tracks. According to one investigator in Missouri, “[t]he appearance of a single unfamiliar face at a fight will cause the organizers to call it off.” Van Der Werf, *supra* note 9. A New Mexico prosecutor noted that organizers keep dogfighting operations moving, keeping locations secret until the last minute, and they often use “lookouts.” Trip Jennings, *N.M. Addresses Dogfighting*, Albuquerque Journal, July 20, 2007, at A1. Another report illustrated the secretiveness by describing a fight in which “attendees were told to meet miles from the fight’s location. They then had to relinquish their car keys and cellphones before being bused to the fight. Such secrecy explains why police are rarely able to raid live fights.” George Dohrmann, *The House of Moonlight Road*, Sports Illustrated, June 4, 2007. Regarding the highly secretive nature of the rings and the clandestine nature of the fights, a Buffalo animal control officer’s observation is that “[t]hese people know what they’re doing ... You don’t know who they are and where they’re going next.” Lauren Mariacher, *Death rules in the ring; Animal cruelty as a sport part of underground culture in Buffalo*, The Buffalo News, July 8, 2007, at A1.

from mass graves to substantiate evidence of fighting and dogs being hanged and thrown to the ground); *see also* Sharon Peters, *Crime scene team exposes animal cruelty*, USA Today, Oct. 9, 2007, at 13D (describing forensic science trends as a new frontier in combating animal abuse).

The difficulty is similarly severe with other animal cruelty enterprises. One rare successful prosecution of a crush video production in Florida relied upon a highly improbable string of evidentiary breaks when a man died under suspicious circumstances after being found under the wheel of his car. Upon investigation, authorities discovered time-stamped videotapes the man had produced. They were able to identify his wife crushing live animals under her feet due to the date on the footage, her ankle tattoo, and the backyard in the video (which authorities by happenstance were able to identify due to their investigation of the premises). See Dani Davies, *Woman Avoids Jail Time Despite "Crush Videos,"* Palm Beach Post, May 6, 2000, at 1B; Thomas R. Collins, *Long Odds Lead to Okeechobee "Crush" Prosecution,* Palm Beach Post, Oct. 24, 1999, at 7C. Bizarre evidentiary strings like this do not often coalesce, making prosecutions extremely challenging.

Finally, other animal cruelty investigation and enforcement difficulties exist, including the relative lack of case law, ambiguity surrounding the evidence that is sufficient to convict, establishing intent, and verifying animal ownership, particularly in the animal fighting arena.¹² States not only have a difficult time investigating clandestine acts of cruelty, but also establishing jurisdiction over the perpetrators and prosecuting them within the

¹² Hanna Gibson, *Dog Fighting Legal Overview*, Animal Legal and Historical Ctr., Mich. St. Coll. of Law (2005), available at <http://www.animallaw.info/articles/ovusdogfighting.htm> (last visited May 27, 2009).

statute of limitations period. *See* H.R. Rep. No. 106-397, at 3. Accordingly, § 48 augments state laws “by addressing behavior that may be outside the jurisdiction of the States, as a matter of law, and appears often beyond the reach of their law enforcement officials, as a practical matter.” H.R. Rep. No. 106-397, at 3.

For all of these reasons, § 48 provides a critical means to assist the states in their enforcement of animal cruelty laws. It tempers the abusers’ ability to market and profit from depictions of their illegal acts. The Third Circuit erred in failing to recognize this enormous interest and the federal government’s interest in augmenting state laws by preventing interstate trafficking in depictions of these crimes.

III. ANIMAL CRUELTY FUELS ITSELF AND OTHER SERIOUS CRIMES.

Preventing animal cruelty is a pressing concern for states because of the myriad ways it wreaks harm on communities, affecting children in particular. Animal cruelty is inimical intrinsically, but also because it spawns other violent and debilitating crimes. More often than not, these ancillary crimes had their origin in animal cruelty perpetrated by minors who continue acting anti-socially into adulthood.

Florida’s recent experience shows that animal fighting and other acts of cruelty threaten public safety and fuel other intrastate criminal activity, including gang activity, drug dealing, illegal gambling, and other acts of violence. *See* Pet. at 16;

see also Attorney General McCollum Announces Florida Animal Fighting Tip Line, Press Release of Fla. Att’y Gen. Bill McCollum, Dec. 29, 2008 (noting the association of animal fighting and gang activity and violence).¹³ Recent evidence of the relationship between animal cruelty and other criminal activity abounds. *See, e.g., Looking for drugs, detectives find roosters, cockfighting items*, News Chief (Fla.), Jan. 18, 2009, at A4.¹⁴ Sadly, Florida’s experience is

¹³ Available at <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/7DDC84100BB4615A8525752E00523808>. *See also Attorney General McCollum & Humane Society of U.S. Announce Program to Combat Animal Fighting*, Press Release of Fla. Att’y Gen. Bill McCollum, May 28, 2008, available at http://myfloridalegal.com/_852562220065EE67.nsf/0/EAF3CD773EFC429585257457005E5587 (noting association of animal fighting and other violent crimes, and citing statistics from Chicago that in 2004, 59 percent of people involved in dogfighting were known gang members, and of the 300 people arrested by Chicago police for animal fighting, 65 percent had been previously arrested for violent crimes against people); *“Operation Bite Back” Results in Federal Drug, Gun, and Other Charges Against Nine Involved in Dog-Fighting Ring*, Press Release of Ohio Att’y Gen. Marc Dann, March 27, 2007, available at <http://www.ag.state.oh.us/press/07/03/pr070327.pdf> (describing evidence that the operation served as “a breeding ground for illegal drug and gun activity that reaches across state lines”).

¹⁴ *See also Dogfighting suspect arrested after traffic stop*, Ocala Star Banner, Sept. 4, 2008 (noting that agents found crack cocaine and marijuana and 10 dogs — 9 chained and one in a shallow grave); *Hillsborough deputies say they busted a cocaine and dog fighting ring*, <http://www.wtsp.com/news/local/story.aspx?storyid=37373>, Aug. 11, 2006 (noting recovery of 15 dogs in cages with scars and injuries, 339 grams of crack cocaine, 269 grams of powder cocaine, marijuana, currency, and semi-automatic handguns); (Continued...)

representative of a nationwide problem. *See, e.g.,* Hohmann, *supra* note 10 (reporting the view of a Texas animal control expert that “[d]ogfighting is an entry into the world of illicit criminal activity ... Wherever you have a dogfight, you have illegal drugs, gambling, and guns.”).¹⁵

Increasing the urgency for states is the disturbing trend of youth embracing animal fighting as a status symbol. Apparently, “[t]he most active and numerous dogfighters, experts say, are 13 or 14 or 17 years old – inner city youths who have trained

Walter Pacheco, *When will Latinos give up cockfighting in the U.S.?*, Orlando Sentinel (newstex weblog), Jan. 19, 2009 (describing the Florida arrests of 37 men from as far away as Tennessee on charges of cockfighting, battery on law enforcement officers, and gun and drug possession).

¹⁵ *See also* Maria L. LaGanga & John M. Glionna, *Killer dog linked to ring run by inmates*, L.A. Times, Jan. 31, 2001, at A1 (describing trained fighting dogs that tragically killed a college lacrosse coach to have been raised at the direction of two incarcerated members of the Aryan Brotherhood who ran a breeding operation); Mary Lou Randour, *Creating Synergy for Gang Prevention: Taking a Look at Animal Fighting and Gangs*, HSUS Project Safe, 2007 Conference on Safe Schools, available at <http://gwired.gwu.edu/hamfish/merlin-cgi/p/downloadFile/d/19160/n/off/other/1/name/030pdf> (quoting officials from different parts of the country regarding serious gang problems and violence connected with animal fighting). The recent highly-publicized arrest and incarceration of Michael Vick for his involvement in a dogfighting ring also shed light on the criminal activities attached to animal cruelty rings. *See* Tom Weir, *Vick case sheds light on dark world of dogfighting*, USA Today, July 26, 2007 (noting that the “drugs and weapons associated with this sport are unbelievable.”).

their pit bulls to fight other dogs in the neighborhood.” Sharon L. Peters, *A fight to save urban youth; Programs try to steer kids as young as 13 from dogfighting that has become a way of life – and death*, USA Today, Sept. 30, 2008, at 1D (noting an estimated 100,000 kids fight their dogs); Richard Winton, *Boy, 13, held as alleged organizer of pit-bull fight*, L.A. Times, March 16, 2007, at B4; *see also* Barry, *supra* note 3 (noting that gruesome hog-dog rodeo events are marketed to families and children).¹⁶

Youth participation and esteem for animal violence are especially troubling because of the strong link between a person’s history of animal abuse and subsequent proclivity toward violent crime involving people. By enacting § 48, Congress relied upon and highlighted research showing that those who commit criminal acts of violence against people “often do so as the culmination of a long pattern of abuse,” which typically has its origin in the torture and killing of animals. *See* Pet. at 15 (*citing* H.R. Rep. No. 106-397, at 4); *see also* Humane

¹⁶ *See also* Janice Neumann, *Legal beagles; More lawyers are learning how to give abused animals their day in court*, Chi. Trib., July 28, 2002, at C17 (Sunday Magazine) (noting the spree of two teens who videotaped their abuse of a friendly cat by hanging it from a tree and torturing it with fireworks, tapes which they then sold for \$6 apiece); Brittany Bacon, *Dog Fighting: Cruel, Corrupt and Lucrative*, ABC News, Jan. 8, 2009, <http://a.abcnews.com/m/screen?id=3390721&pid=3029945> (citing a survey that 38-40% of Chicago third to sixth graders had witnessed a dogfight) (last visited May 11, 2009); Van Der Werf, *supra* note 9.

Soc’y C.A. Amicus Br. at 4 n.10. In other words, criminal violence often has its roots in childhood acts of animal abuse, wherein children “may fail to learn respect for any living being.” H.R. Rep. No. 106-397, at 4. Then, as adults, violent criminal activity is more likely because they “become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans.” *Id.*; see also *Stephens v. State*, 3 So. 458, 459 (Miss. 1887) (reasoning that animal cruelty “manifests a vicious and degraded nature, and it tends inevitably to cruelty to men.”).¹⁷

Research confirms this most troubling problem,¹⁸ as do several infamous, high-profile

¹⁷ A recent news story involving humans described a fight scene eerily analogous to that described in the animal context, in which mentally disabled residents of a state group home were forced by night-shift workers into violent fighting with each other while being filmed. Angela M. Hill, Joseph Rhee, & Brian Ross, *Mentally disabled forced into ‘fight club’ at Texas home*, ABC News, May 12, 2009, <http://abcnews.go.com/Blotter/story?id=7556740&page=1>; *Videos show disturbing fights at Texas school*, available at <http://www.google.com/hostednews/ap/article/ALeqM5h1Ux5JnLZfVq1yauCBbIN5Etf-LAD98571LO2> (last visited May 27, 2009).

¹⁸ See *Facts About the Link Between Violence to People and Violence to Animals*, American Humane, available at <http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-facts-about-the-link.pdf> (summarizing scientific research) (last visited May 27, 2009); Merz-Perez, L., Heide, K. M., & Silverman, I. J., *Childhood cruelty to animals and subsequent violence against humans*, *Int’l J. of Offender Therapy and Comparative Criminology*, 45(5), 556-573 (2001) (finding that violent offenders were significantly more likely (Continued...)

cases.¹⁹ Researchers have consistently linked childhood animal abuse to overall family violence, subsequent domestic partner abuse, and a general tolerance for interpersonal violence that can ultimately lead to future violent behavior, including such profound acts as school shootings and serial killings. *Id.* Accordingly, laws in more than 30 states reflect the link between youth offenders and potential adult violence, proactively attempting to address the problem early by requiring counseling or anger management for animal cruelty offenders.²⁰

Second, animal cruelty purveyors too often also abuse children. One early study found that animal abuse occurred in 88% of families under state

than nonviolent ones to have committed acts of animal cruelty as children).

¹⁹ For example, the Columbine murderers (Eric Harris and Dylan Klebold), Jeffrey Dahmer, Ted Bundy, David Berkowitz, Albert DeSalvo, and Lee Boyd Malvo reportedly all had histories of animal cruelty as youths. See Mary Muscari, *Juvenile Animal Abuse: Practice and Policy Implications*, J. of Pediatric Health Care, Jan/Feb.2004 at 17-18; *First Strike: The Violence Connection*, Humane Soc’y of the U.S., http://www.hsus.org/web-files/PDF/animal_fighting/violenceconnection_bklt_08_lowrez.pdf, at 2-3 (2008).

²⁰ *State Animal Cruelty Laws Provisions Fact Sheet*, The Humane Society of the U.S., http://www.hsus.org/web-files/PDF/state_cruelty_chart.pdf (last visited May 27, 2009); see also, e.g., Fla. Stat. § 828.12(2)(a) (requiring psychological counseling or anger management treatment).

supervision for physically abusing their children.²¹ In another study, 71% of battered women reported that a male partner had threatened, harmed or killed a pet and that 32% of their children had done so.²² Recent news reports from Florida support these findings. *See, e.g.*, April Hunt, *OPD seeks child-rape suspect, finds pit bulls*, Orlando Sentinel, Dec. 20, 2007, at B3 (reporting an arrest on sex charges and pending felony dogfighting charges); Dianna Cahn, *Teen accused of sex with dog arrested after police find child porn videos*, S. Fla. (Ft. Lauderdale) Sun-Sentinel, Aug. 26, 2008.²³ Again, the experience in other states is no different.²⁴

²¹ Deviney, E., Dickert, J., & Lockwood, R., *The care of pets within child abusing families*, 4 Int'l J. for Study Animal Problems 321, 329 (1983).

²² Ascione, F.R., Weber, C., and Wood, D., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 Society & Animals 205, 218 (1997).

²³ *See also* Deirdre Conner, *Animal cruelty seen as symptom of bigger problem: More first coast animal cruelty cases*, Fla. Times-Union, http://www.jacksonville.com/news/metro/2009-02-16/story/if_done_to_animals_are_people_next (last visited May 27, 2009) (reporting the arrest of a couple who videotaped the torture and killing of small animals during sex after the woman became fearful for her safety and for the life of a woman, whom her partner fantasized about hanging).

²⁴ *See, e.g.*, *Schambon v. Kentucky*, 821 S.W.2d 804 (Ky. 1991) (describing an animal control call response to a home that found dead and neglected animals as well as four children who had been sexually and physically abused); *In re AP*, 42 S.W.3d 248 (Tex. 2001) (a neglectful home related to father killing (Continued...))

Especially with respect to “crush videos,” the prospect of child victims is profoundly disturbing and an important support for § 48 in its own right, as described by one district attorney:

They start with mice, then move up . . . Unfortunately, they want larger and larger animals to get the sexual kick. We have photos of them crushing a monkey. We’ve received information that there is interest in crushing a human child. In fact, they do (in the films) crush dolls that resemble a human child.

Neil Steinberg, *Not your average schoolboy crush*, Chi. Sun-Times, Aug. 26, 1999, at 52. Crush-related deaths are not inconceivable; in fact, one has already occurred in Florida. A Florida man who had produced a series of crush videos involving live animals used his own car to crush himself to satisfy a fetish. See Julia Reischel, *Crush Me Kill Me; To understand Florida’s most bizarre unsolved murder, it helps to wear stiletto heels*, New Times Broward-Palm Beach (Fla.), April 20, 2006.

Section 48 is vitally important to eliminate the economic incentive underlying these crimes. By drying up the market for videos and other commercial depictions of the underlying illegal conduct, § 48 dampens supply lines and serves to quell other attendant crime. Cf. *United States v.*

animals in front of children); *In re PJM*, 926 S.W.2d 223 (Mo. 1996) (involving animal sacrifices and abused children).

Williams, 128 S. Ct. 1830, 1841-42 (2008) (depictions of child pornography have no social value and fuel heinous illegal acts); *New York v. Ferber*, 458 U.S. 747, 761-62 (1982) (discussing distribution of child pornography as continuing to provide a commercial motive for the underlying criminal acts.). By crippling the commercial profit from depictions of underlying criminal acts, § 48 helps to wipe out despicable acts of cruelty.²⁵ The federal statute thus

²⁵ As pointed out by both the United States and the Humane Society, the videos and other depictions that are sold commercially for profit and thus covered by § 48 are meant to provide training and to market and advertise the “champion” prowess of the animals. See Humane Soc’y C.A. Amicus Br. at 14 (discussing videos as proof that a dog has earned the “Grand Champion” title, and thus can “command higher purses, entry fees, and side bets in subsequent fights.”). These videos are therefore akin to commercial speech involving illegal activity, which can be banned by the states consistent with the First Amendment. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563-64 (1980). This Court long ago held that any protection for commercial speech is “altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389 (1973) (upholding ordinance that disallowed newspaper from publishing want ads that included sex-based job designations); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432-33 (Blackmun, J., concurring) (discussing government’s ability to prohibit commercial speech proposing unlawful activities and stating that “a listener has only a weak interest in learning about commercial opportunities that the criminal law forbids.”). Here, the activities depicted and covered by the federal law are illegal in all states, and the marketing of such materials is constitutionally banned by the federal law as an aid in wiping out the illegal acts themselves. See also *United States v. Raymond*, 228 F.3d 804, 816 (7th Cir. 2000) (upholding (Continued...))

dries up the interstate market and provides much-needed assistance to the amici states' difficult detection and prosecution efforts.

CONCLUSION

For all of the above reasons, this Court should reverse the Third Circuit Court of Appeals and hold that 18 U.S.C. § 48 is facially constitutional.

Respectfully submitted,

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permanent injunction against selling informational program providing instructions on how to avoid federal tax laws); *Lamar Outdoor Adver., Inc. v. Miss. State Tax Comm'n*, 701 F.2d 314, 323 (5th Cir. 1983) (“The public interest in the free flow of actively promoting illegal action, which falls short of incitement, is unprotected.”).