UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-21767-CIV-COOKE/BROWN

ADVANCED CONSULTING AND MARKETING, INC.,

Plaintiff,

vs.

PETER KEISLER as ACTING ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.
_____/

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

Plaintiff Advanced Consulting and Marketing, Inc., moves for judgment on the pleadings or for summary judgment and states:

Like many other morally controversial activities that people seek or have historically sought to outlaw—smoking tobacco,[1] smoking marijuana,[2] drinking alcohol,[3] boxing,[4]

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[1] *See, e.g.*, FLA. STAT. ANN. § 386.201 *et seq.* ("Florida Clean Indoor Air Act").

[2] *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that federal Controlled Substances Act was constitutional as applied to California intrastate growers of marijuana used for medicinal purposes, which was legal under California law).

[3] *See, e.g.*, U.S. CONST. amend. XVIII (banning manufacture, sale, and transportation of intoxicating liquors); *id.* amend. XXI (repealing ban on manufacture, sale, and transportation of intoxicating liquors).

[4] *See, e.g.*, FLA. STAT. ANN. § 548.001 *et seq.* (setting forth detailed regulation of pugilistic exhibitions); *Commonwealth v. Mack*, 187 Mass. 441 (1905) (upholding conviction for illegal boxing exhibition); *Commonwealth v. Collberg*, 119 Mass. 350 (1876) (upholding two convictions for assault and battery arising from boxing match and stating "prize-fighting, boxing matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without

aborting pregnancies,[5] and eating *foie gras*[6]—cockfighting is a matter of passionate debate. The statute challenged in this case, 18 U.S.C. § 48, chokes that debate by purporting to ban the broadcasting of cockfights that lack "serious" value. Assuming the federal government and the several states may ban cockfights, the First Amendment prevents any government in the Union from banning depictions of cockfights. And it certainly means that those who broadcast cockfighting do not have to justify their speech by convincing a judge it has "serious" value. The solution for those who believe cockfighting should be outlawed is to work to outlaw cockfighting, not to work to silence those who disagree.

LEGAL STANDARDS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED R. CIV. P. 56(c). A material fact is one that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Mere conclusory allegations or claims asserting legal conclusions are not sufficient. *Bennett v. Parker*, 898 F.2d 1530, 1533-34 (11th Cir. 1990). Rather, the Court must determine whether,

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anger or mutual ill will.").

[5] *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (holding that first trimester abortions cannot constitutionally be criminalized); *United States v. Vuitch*, 402 U.S. 62 (1971) (upholding District of Columbia criminal abortion statute constitutional over vagueness challenge).

[6] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25980 *et seq.* (banning force feeding birds for purposes of enlarging liver and selling of *foie gras* in California made from force fed birds' livers effective 2012).

considering the evidence in the light most favorable to the non-moving party, there is evidence on which a jury could reasonably find a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 606 (1986); *Hilburn v. Murata Electronics N. Am., Inc.*, 181 F.3d 1220, 1225 (11th Cir. 1999). In making this determination, a judge must "avoid weighing conflicting evidence or making credibility determinations." *Hilburn*, 181 F.3d at 1225 (citing *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 919 (11th Cir. 1994)).

"Judgment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. All facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party." *Scott v. Taylor*, 405 F.3d 1251, 1253 (11th Cir. 2005) (citations omitted); *accord Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996) (citing FED. R. CIV. P. 12(c)). "[J]udgment can be rendered by looking at the substance of the pleadings and any judicially noticed facts." *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998).

STATEMENT OF UNDISPUTED AND INDISPUTABLE FACTS

Cockfighting has been practiced as a sport for thousands of years throughout the world, including in Ancient Rome, Ancient Greece, China, Europe, Latin America, and the United States by persons of all socioeconomic backgrounds. Cockfights are contests between a pair of trained roosters held in a ring called a cockpit. Roosters in a cockfight

wear metal or bone spurs fitted over their natural spurs and engage in exciting displays that may or may not entail the death of one or both of the roosters. Roosters have a natural, congenital aggression toward each other which is amplified through conditioning for competition. Cockfighting has been an object of serious anthropological and philosophical study for centuries, and its importance in many cultures stretching from the ancient world to the present day is well-documented and well-established.[7]

While cockfighting remains an important and popular sport in many parts of the world, animal rights groups in the United States have mounted a sustained effort to outlaw the sport. Cockfighting was outlawed in Oklahoma in 2002 and in New Mexico in 2007 after spirited public debate in those places. Louisiana passed in June 2007 a controversial, compromise law which defers a ban on cockfighting until August 2008 while banning gambling on cockfighting immediately. *See* Composite Exhibit B (comprising statutes from Oklahoma, New Mexico, and Louisiana).[8]

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[7]Attached as Exhibit A is a copy of the table of contents to a collection of essays, articles, and writings edited by the late professor of anthropology Alan Dundes (1934–2005) on cockfighting throughout history, *The Cockfight: A Casebook*. This exhibit was copied from the University of Miami library's copy of this book. Also attached is a copy of a sample article from this book, the classic, oft-reprinted, and oft-cited article, "Deep Play: Notes on the Balinese Cockfight" by the late famed anthropologist Clifford Geertz (1926–2006).

The Court may take judicial notice of the existence of this book. Federal Rule of Evidence 201(b) provides that the Court may notice facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The book is not offered for the truth of anything it asserts, so the hearsay doctrine is not implicated. Rather, it is the *mere existence* of an anthropological casebook on cockfighting that is relevant. The existence of this book is not subject to reasonable dispute. Nor is the notion that cockfighting has been carefully studied for centuries.

[8]The Court may take judicial notice of these statutes. The Westlaw printouts of the statutes attached are available to the United States government, which can readily point out any inaccuracies in the attached. Thus, it cannot reasonably be questioned that cockfighting was legal in at least three states until very recently.

Despite the success of animal rights groups' in lobbying for legislation, it is unclear whether their efforts have decreased the popularity of cockfighting, as some evidence suggests that interest in the sport remains vital throughout the United States. Tellingly, the government admits this, as evidenced by a criminal case it brought in the Western District of Virginia after the Complaint in this case was filed. The indictment in *United States v. Moreland* et al., attached as Exhibit C, states that from 2003 through 2007, "persons traveled in interstate and foreign commerce from, among other locations, Delaware Maryland, Massachusetts, New Jersey, New York, Ohio, West Virginia, and Canada to enter their roosters in the Derbies and/or to be spectators at the events."[9] Each Derby allegedly conducted by the four defendants in that case attracted from "70 to hundreds of persons" who each paid "approximately $15 admission fees."[10]

The *Moreland* indictment and the state statutes of such recent vintage establish conclusively that cockfighting is a popular and controversial activity whose devotees are dispersed throughout the Union. Moreover, cockfighting remains legal in Puerto Rico, where the activity is a part of the island's culture, as the Supreme Court has recognized. *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) (quoting Puerto Rican court statement that "horse racing, cockfighting, 'picas,' or small

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No purpose would be served by requiring that witnesses testify to what the law of these three states is.

[9]Indictment, *United States v. Moreland*, No. 07-CR-00048 (W.D. Va. Sept. 18, 2007), at 3 ¶ m. These statements are admissions of the government under Federal Rule of Evidence 801(d)(2)(D).

[10]*Id.* at 3, ¶ g.

games of chance at fiestas, and the lottery 'have been traditionally part of the Puerto Rican's roots,' ... ."). These indisputable facts make cockfighting a topic of interest and popular debate, which cannot constitutionally be squelched by a law purporting to ban the broadcasting of cockfighting contests.

On December 9, 1999, President Clinton signed into law a bill criminalizing the creation, sale, or possession of any depictions of animal cruelty. The law's full text is:

> (a) Creation, sale, or possession.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.
>
> (b) Exception.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.
>
> (c) Definitions.—In this section—
>
> (1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and
>
> (2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

18 U.S.C. § 48 (2007). The law makes it a felony to create, sell, or possess in a United States territory for commercial gain any photograph, video, computer image, movie, or audio recording depicting the intentional maiming, torturing, wounding, or killing of any animal.

The maximum possible prison sentence for a violation of 18 U.S.C. § 48 is five years. The maximum possible fine is $250,000 for an individual and $500,000 for an organization.

There are two exceptions to the statute's broad prohibition. First, it is legal to create, sell, or possess depictions of harming animals in ways that are legal in the place where the creating, selling, or possessing takes place. Thus, one could broadcast a video of a cockfight within Puerto Rico because cockfights are legal there, but no where else:

> The Government is not required to prove that the animal cruelty depicted violated the law of the place where the cruelty actually took place. The activity prohibited by this bill is not the animal cruelty itself. Rather, the illegal activity is the creation, sale, or possession of a depiction of such cruelty with the intent to use interstate or foreign commerce to distribute it for commercial gain.

H.R. Rep. 106-397, 1999 WL 959194 at *8. For the same reason, the statute's legislative history posits that depictions of legal hunting or fishing would not be illegal so long as they were not sent or carried into a place where hunting or fishing is illegal.

Second, there is also a broad exception from the scope of 18 U.S.C. § 48 for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." None of these terms (including "serious") is defined by the statute, leaving its scope unclear.

Plaintiff is in the business of broadcasting over the Internet cockfights staged legally in the Commonwealth of Puerto Rico. These cockfights can be viewed throughout the United States on the Internet. Plaintiff charges a subscription fee to customers who wish

to view these cockfights. The vague text of 18 U.S.C. § 48 alone would seem to cast doubt upon Plaintiff's ability to engage in this business.

The government, in fact, has taken the position that the statute bans the depictions of dog fights. In 2004, the federal government indicted one Robert Stevens in Pennsylvania, charging him with three counts of violating 18 U.S.C. § 48 for selling videotapes of dog fights. Following a trial, Mr. Stevens was convicted in 2005 and sentenced to 37 months imprisonment on each count, with the sentences to run concurrently. The government did not contend or prove that the dog fights depicted in the videos Mr. Stevens sold were illegally staged. Mr. Stevens has appealed his conviction to the Third Circuit which *sua sponte* opted to consider the case *en banc* before a panel opinion issued.[11] No opinion has issued as of the time this Motion.

While dogfighting may or may not boast a significant historical, international, and anthropologically fascinating heritage like cockfighting, Mr. Steven's prosecution nonetheless casts Plaintiff's constitutionally protected speech and press activities into serious doubt. The constitutionality of 18 U.S.C. § 48 has in fact been in doubt since it was enacted. The statute was passed for the specific purpose of suppressing a growing market in "crush videos," which depict women torturing or killing animals to appeal to sexual fetishists. According to the statute's legislative history:

[11]The government in its Answer admits all of the allegations regarding its prosecution of Robert Stevens under 18 U.S.C. § 48.

> Much of the material featured women inflicting the torture with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos. The witnesses explained that, through their investigation into the sale of these materials, they learned that these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting. ... Many Internet sites were blatant in offering to sell these depictions, and some even advertised to make such depictions to order, in whatever manner the customer wished to see the animal tortured and killed.

H.R. Rep. 106-397, 1999 WL 959194 at *2–*3. Recognizing that the language of § 48 was much broader than necessary for this purpose and was of doubtful constitutionality as drafted, President Clinton gave the statute a narrow construction in his signing statement. He wrote:

> It is important to avoid constitutional challenge to this legislation and to ensure that the Act does not chill protected speech. Accordingly, I will broadly construe the Act's exception and will interpret it to require a determination of the value of the depiction as part of a work or communication, taken as a whole. So construed, the Act would prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex. I will direct the Department of Justice to enforce the Act accordingly.

Statement by President William J. Clinton Upon Signing H.R. 1887, 1999 U.S.C.C.A.N. 324. The Department of Justice's decision to prosecute Mr. Stevens in Pennsylvania disregards President Clinton's narrow reading and, as a result, casts the constitutionality of the statute into grave doubt.

MEMORANDUM OF LAW

I. Broadcasting of cockfights is not barred by 18 U.S.C. § 48.

Given that cockfighting is a contentious practice with many devotees willing to travel considerable distances and spend money to enjoy this activity, even in defiance of law, broadcasts and images showing the Nation what this sport involves necessarily have serious "political, scientific, educational, journalistic, historical, [and] artistic value." For example, the Humane Society's website has this picture of a cockfight on a page describing the "centuries-old bloodsport":[12]

[12]A copy of this webpage, subtitled "Cockfighting in Puerto Rico," is attached as Exhibit D.

The Humane Society also hosts on its website a video showing a dogfight.[13] Magazines about cockfighting like *Gamecock*, *Grit and Steel*, and *Feathered Warrior*, are available for purchase from popular Internet retailer Amazon.com. If the government's undercover agent in the *Moreland* case videotaped the illegal cockfights held in Virginia, the government might contend those recordings had value and might play them for the jury in that case. It might issue those videotapes to the media to show the public what the government's work is averting. (The government, in fact, issued a press release trumpeting the Moreland investigation and indictment.[14])

Plaintiff broadcasts legal cockfights held in Puerto Rico attended by hundreds of spectators, including many tourists. These broadcasts undoubtedly have serious value because they shed light on this controversial activity and help Americans decide whether cockfighting is a worthwhile pursuit or not. Additionally, they show Americans what other cultures do for entertainment, whether for better or for worse. Finally, cockfights are highly entertaining to some people, as the government's allegations in *Moreland* make clear. After all, the government emphasizes the large number of people paying $15 each just to attend. Entertainment has serious value.

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[13]A copy of this webpage, showing the link to "Dogfighting Pet Minute", is attached as Exhibit E.

[14]*See* U.S. Attorney's Office, Western District of Virginia, "Four Persons Are Charged With Conspiracy and Illegally Operating a Cockfighting and Gambling Ring," http://www.usdoj.gov/usao/vaw/press_releases/moreland_20sep2007.html (attached as Exhibit F). This is a further admission by the government that cockfighting is a topic of important public interest and debate. It is fair and reasonable to infer that the government issues press releases only for important cases.

Many, many forms of entertainment involve depictions of illegal conduct or cruelty to animals. *Ultimate Fighting Championship* is premised on the idea that boxing is not nearly brutal enough and that a more savage, bloody, painful, and gory beating is more entertaining. The reality show *Cops* offers voyeuristic glimpses of sad people, often intoxicated, committing petty crimes and being humiliated and derided by police before television cameras. The annual running of the bulls in Pamplona, Spain, is broadcast globally every year, with scenes involving people being gored or otherwise seriously injured and the bulls being abused or stabbed to death given the most play. Footage of dogfighting has been ubiquitous on television and on websites, including the Humane Society's and ESPN's, following a series of recent high-profile cases, most notably that of Michael Vick. The 1981 Oscar-winning movie *Arthur* includes an extended montage of the protagonist swerving all through the boroughs of New York thoroughly drunk and drinking all the while. Virtually every episode of the long-running television series *That '70s Show* depicts its teenage protagonists smoking marijuana in a circle as a 360-degree camera pans to show each in turn giggling and enjoying himself or herself. The highly acclaimed series *The Sopranos* glorifies a lifestyle built on organized crime, killing, and violence. One of the most famous scenes from the classic film *The Godfather* showed a movie producer awakening to find his prized horse's severed head in his bed. Broadcasting cockfights has as much "serious" value as any of the foregoing.

II. Title 18 U.S.C. § 48 is facially unconstitutional.

A. The statute is a content-based restriction on non-commercial speech.

The First Amendment will not countenance content-based discrimination against speech unless it serves a compelling government interest and is narrowly tailored to serve that interest. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1260 (11th Cir. 2005) (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–12 (1977)). A statute is 'content-based' where it is "directed only at works with a specific content." *Cooper v. Dillon*, 403 F.3d 1208, 1215 (11th Cir. 2005) (quoting *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). In other words, a content-based statute is one that "cannot be 'justified without reference to the content of the regulated speech' and therefore operates to suppress ideas of a particular content." *Cooper v. Dillon*, 403 F.3d 1208, 1216 (11th Cir. 2005) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Section 48 is a content-based restriction on speech because it allows cruelty to animals to be depicted when doing so has "serious" value but not when it does not. The government, in the person of either a prosecutor or a judge, decides what has "serious" value.

There is no doubt that this statute, with its vaguely-worded exception for depictions having "serious" value, is a content-based restriction on speech. This is easily illustrated. When this case was filed, the Humane Society issued a press release denying that Plaintiff's

speech is constitutionally protected. A copy of this release is attached as Exhibit G. Given that its own web site includes depictions of animal cruelty, the Humane Society cannot sensibly maintain that all depictions of animal cruelty on the Internet are unprotected. Rather, the Humane Society's hypocritical position is that depictions of animal cruelty used to foster *its particular lobbying agenda* are protected and not criminalized by § 48, but these same depictions cannot be used by people who do not share the Humane Society's legislative agenda.

Section 48 cannot survive strict scrutiny because the blanket ban on depictions of cruelty to animals is not narrowly tailored to serve a compelling government interest. In *Cooper*, the Eleventh Circuit held that a statute barring disclosure of information related to internal investigations of law enforcement officers was unconstitutional because it was a content-based restriction on speech. The court reasoned that "the purpose of the statute is to stifle speech of a particular content, namely, speech regarding pending investigations of law enforcement officers." 403 F.3d at 1216. The Court rejected the state's arguments that ensuring the integrity of investigations, protecting officers' reputations, or protecting the privacy of investigators and witnesses were compelling government interests. 403 F.3d at 1216–18.

In the same way, § 48 stifles speech of a particular content, namely speech regarding cockfighting. Just as in *Cooper*, the government's asserted interest in banning "crush

videos" is plainly insufficient to justify the blanket prohibition on depicting any cruelty to animals whether or not related to the indulgence of crush fetishists. The statute, therefore, cannot survive strict scrutiny. Regardless of whether stamping out the crush video trade is a compelling interest, without a doubt § 48 is hardly narrowly tailored. Rather, it is drafted in such broad language that President Clinton doubted it was constitutional when he signed it.

B. The statute is overbroad.

Title 18 U.S.C. § 48 purports to criminalize a substantial amount of protected speech rendering it unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Depictions of cockfighting have permeated our popular culture—from Jean-Leon Gerome's 1846 painting, *Jeunes Grecs faisant battre des coqsi (Young Greeks at a Cockfight)*, to the 1974 movie *Cockfighter* to *Seinfeld* episode 145 "The Little Jerry", which revolves around a rooster the characters enter into a cockfight, to the 2006 videogame *Scarface: The World is Yours*, which features cockfighting scenes players can bet on.[15] The statute at issue here is so overbroad that it

Jeunes Grecs faisant battre des coqsi, musée d'Orsay, Paris, France

[15]There are, of course, many many more examples of cockfighting in our popular culture. For example, in Simpsons episode "Kamp Krusty", Krusty the Clown takes the children to a cockfight. The

would criminalize protected speech.

Congress may, of course, pass laws to protect animals from abuse, but the prospect of crime does not justify laws suppressing protected speech. *See Ashcroft*, 535 U.S. at 245 (citing *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.") (internal quotation marks and citation omitted)). Not only may Congress do so, it has. *See* Exhibit C, *United States v. Moreland* et al.

Reasonable people may disagree about the value of cockfighting. Indeed, the recent heated debates over cockfighting legislation in Oklahoma, New Mexico, and Louisiana demonstrate that the topic inspires passionate discussion. Even if a majority of the public has soured on cockfighting, it is well established that speech may not be prohibited because it concerns subjects offending our sensibilities. *Ashcroft*, 535 U.S. at 245 (citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment' ") (quoting *Sable Communications of Cal., Inc. v. FCC*, 492

University of South Carolina's mascot is a game cock. The list could go on and on.

U.S. 115, 126 (1989)); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

The Supreme Court has, of course, recognized that as a matter of common sense, the First Amendment does not protect defamation, incitement, obscenity, and pornography created by exploiting actual children. *Ashcroft*, 535 U.S. at 246 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)). Section 48, however, criminalizes speech that does not come within any of these limited categories. This section criminalizes not just the potentially obscene crush videos it was intended to outlaw, but a great deal of lawful speech, including the videos Plaintiff disseminates of cockfights. Neither the fact that cockfighting is illegal in many places nor the fervent desire of some groups that it be banned globally can justify banning videos showing cockfighting, as the Supreme Court has repeatedly made clear. *See Kingsley Int'l Pictures Corp.*, 360 U.S. at 689; *see also Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

Assuming that crush videos are obscene and therefore unprotected by the First

Amendment,[16] § 48 is unconstitutional because, as President Clinton noted when he signed it, its language sweeps far too broadly, covering more protected speech than unprotected speech. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." *Broadrick v. Oklahoma*, 413 U.S., at 612. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process, as it is here.

C. The statute is vague.

Title 18 U.S.C. § 48 is unconstitutionally vague. Laws that are insufficiently clear are void (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of sensitive First Amendment freedoms.[17] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because

[16]Having never seen a crush video, undersigned counsel can evaluate neither the genre nor any particular instance of it under Justice Stewart's famous test. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). (concurring opinion).

[17]With respect to chilling effects, the problems of vagueness and overbreadth are intertwined because those potentially covered by the statute are bound to limit their behavior to that which is unquestionably safe. *See United States v. Williams*, 444 F.3d 1286, 1305 (11th Cir. 2006), cert. granted, 127 S.Ct. 1274 (2007).

their consequences are more severe. *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

To pass constitutional muster, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357 (1983); *Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F.3d 1542 (11th Cir.1997).

The statute here is vague in a number of ways. First, it is not clear what is meant by "animal cruelty." Does this include hunting, fishing, bullfighting, the running of the bulls, boxing, *Ultimate Fighting Championship*, dog racing, and force-feeding geese to make *pâté*? The statute's vague definition of animal cruelty—intentionally maiming, mutilating, torturing, wounding, or killing an animal if such conduct is illegal where the creation, sale, or possession takes place —would arguably prevent the broadcasting of all these activities as they are all illegal throughout the United States for at least part of every year.

It gets more confusing. The statute then provides an amorphous safe harbor provision, excluding depictions of animal cruelty that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." This forces speakers to guess whether a prosecutor or a judge might decide that a publication lacks "serious" value. No standards are provided and there is no way to guess. This case provides the

paradigmatic problem: while condemning Plaintiff in its press release, the Humane Society's web site features a photograph of a cockfight. They believe their speech is serious but Plaintiff's is not. Likewise, their page summarizing the *Stevens* case features a link to a video showing dogfighting. They have the right to show dogfights but applaud jailing Stevens for doing the same thing.

This language is so vague and standardless that the public is left with no objective measure to which behavior can be conformed. Moreover, the exception requires a wholly subjective determination by law enforcement personnel of what has "serious" value. Individual officers are thus endowed with incredibly broad discretion to define whether a given utterance or writing contravenes the law's mandates. *See City of Chicago v. Morales*, 527 U.S. 41 (1999) (holding unconstitutionally vague an anti-loitering ordinance, which defined loitering as remaining in place with "no apparent purpose," finding that standard "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene."); *City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987) (finding unconstitutionally vague a city ordinance prohibiting speech that "in any manner" interrupts a police officer in the performance of his duties, without limitation to fighting words or to obscene or opprobrious language).

President Clinton acknowledged that the statute was not clear and tried to set forth exactly who could be prosecuted under the statute. But, as the *Stevens* case shows, the

current administration has departed from the narrow interpretation of the statute. It is this subjective and arbitrary enforcement of the statute—changing from one administration to the next—that demonstrates the statute's lack of clarity.

D. The statute violates the freedom of the press.

Plaintiff has the right to publish and disseminate video depicting actual events wherever they take place. The fact that some individuals or groups may find such activities distasteful, abhorrent, or even criminal does not in any measure mitigate the First Amendment right to publish information concerning such activities. The Supreme Court has repeatedly emphasized this:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach.

Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (plurality opinion). "'The right of freedom of speech and press ... embraces the right to distribute literature, and necessarily protects the right to receive it.'" *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (quoting *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

By banning depictions of animal cruelty, § 48 restricts the spectrum of available knowledge on an activity, cockfighting, that has been the subject of very recent debate and legislation and of centuries of study. Meaningful discourse on the importance, desirability,

legality, and history of cockfighting cannot be had if Plaintiff is denied the right to publish and people are denied the right to see exactly what cockfighting entails. Just as importantly, the First Amendment protects the right of people to be entertained by video of cockfighting contests, regardless of whether the government deems it of "serious" value.

CONCLUSION

WHEREFORE Plaintiff is entitled to judgment as a matter of law and the Court should enter judgment accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed this 27th day of November, 2007, and served on all appropriate parties through that system.

/s/ David Oscar Markus
David Oscar Markus