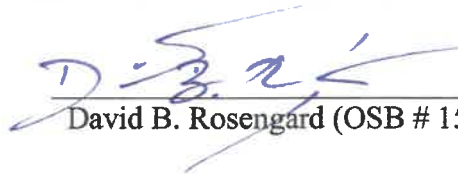



Founded in 1979, the Animal Legal Defense Fund (ALDF) is a national nonprofit organization of attorneys specializing in the protection of animals and working to ensure the enforcement of animal protection laws throughout the United States. ALDF staff attorneys work out of offices in five states, helped by over 1,000 volunteer attorneys nationwide who are ALDF members and who work on a pro bono basis. Total contributing membership of the ALDF is over 200,000.

ALDF's Criminal Justice Program, based in Portland, Oregon, supports legislative efforts to improve animal cruelty laws, promotes legal education in the fields of criminal law and animal law, provides free prosecution assistance in animal cruelty cases nationwide, and produces *amicus* briefs in cases implicating the position of animals within criminal law. ALDF possesses a depth of expertise regarding crimes involving animals, including the issues implicated by criminal animal fighting.

In moving for leave to appear as *amicus curiae* in this matter, ALDF seeks to specifically and exclusively address the animal issues implicated by the instant case. In narrowly addressing those animal issues, ALDF will draw upon the extensive work it has done both around the issue of animal crime victim status, and around the legal significance of animal injuries resulting from unlawful acts. ALDF is thus uniquely able to assist this body in deciding the animal law issues presented by the instant case.



David B. Rosengard (OSB # 154119) & Lora Dunn (OSB # 133460)



Animal Legal Defense Fund
919 SW Taylor Street
Portland, OR 97205
503.231.1602

drosengard@aldf.org || ldunn@aldf.org



Office of the Chief Clerk

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

February 28, 2017

Lora Dunn Esq. & David B. Rosengard Esq.
Animal Legal Defense Fund
919 SW Taylor Street
Portland, OR 97205

Re: Amicus Invitation No. 17-02-02

A

Dear Amici:

The Board of Immigration Appeals received on February 22, 2017, your request for extension of time in which to file your amicus curiae brief. Your request is hereby granted as follows:

Your brief and two copies should be submitted to the Board, no later than **April 6, 2017**. In addition please attach a copy of this letter to the front of your brief.

Respectfully,

Rebecca Noguera

Appeals Examiner

Information Management Team

Enclosure, (parties only)

cc: Ronald Lapid, Acting Chief w/o encl.
OPLA/ICE Headquarters
Potomac Center North
500 12th Street, S.W., MS 5900
Washington, DC 20536

N. David Shamloo, Esq.
The Law firm of N. David Shamloo, LLC
833 SW 11th Ave. suite 320
Portland, OR 97205

DHS/ICE Office of Chief Counsel - POO
1220 SW Third Avenue, Suite 300
Portland, OR 97204

David B. Rosengard & Lora Dunn
Animal Legal Defense Fund
919 SW Taylor Street
Portland, OR 97205
503.231.1602

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:)
)
Agustin Ortega-Lopez)
)
In Removal Proceeding)
)

File No. 17-02-02

**BRIEF OF *AMICUS CURIAE* ANIMAL LEGAL DEFENSE FUND
IN SUPPORT OF NEITHER PARTY**

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ISSUES PRESENTED

- (1) Do animals, as defined in 7 U.S.C. § 2156, constitute a protected class of victim with respect to the provisions of the federal Animal Welfare Act criminalizing sponsoring or exhibiting an animal in an animal fighting venture?

- (2) Does an animal, as defined in 7 U.S.C. § 2156, constitute ‘someone’ whose injury results from, or is intended by, subjecting that animal to conduct criminalized by the federal Animal Welfare Act’s prohibitions on sponsoring or exhibiting an animal in an animal fighting venture (7 U.S.C. § 2156(a)(1))?

SUMMARY OF THE ARGUMENT

Animals are sentient, living creatures, and as such are capable of experiencing pain, suffering, and injury. Animal fighting is a brutal activity, where humans exploit animals to injure and kill each other in the name of entertainment and profit. Seeking to put a stop to the animal suffering promulgated by this blood sport, Congress has criminalized animal fighting as part of the Animal Welfare Act, by prohibiting humans from sponsoring or exhibiting animals in fights with other animals. Those animals—roosters, dogs, and others—who bleed and die for human entertainment do so at the behest of their sponsors and handlers, who control not only those animals’ participation in these gruesome fights, but also those animals’ food, shelter, and very lives. That these animals are abjectly dependent upon their human victimizers, subject to such

pervasive control and manipulation, makes them particularly vulnerable. As such, traditional crimes involving moral turpitude analysis impels the conclusion that animals covered by the Animal Welfare Act's prohibitions on sponsoring or exhibiting an animal in a fighting venture (7 U.S.C. § 2156) qualify as a protected victim class. Similarly, in selecting certain animals as being worthy of protection from animal fighting, while choosing to leave other animals unprotected, Congress has signaled that the animals covered by 7 U.S.C. § 2156—birds and mammals—are deserving of special protection, again leading to the conclusion that those specially protected animals are a protected victim class in regards to the Animal Welfare Act's prohibitions on sponsoring or exhibiting an animal in a fighting venture.

Moreover, being sentient means that animals are significantly injured as a result of being exploited by humans to engage in animal fights. That animal fighting is not a victimless crime is inexorably linked to the very purpose of the fight itself: not the destruction of unfeeling objects, but the injury, mutilation, and death of roosters, dogs, and other animals—living, feeling creatures. It is therefore clear that sponsoring or exhibiting an animal in an animal fighting venture is a crime involving intentionally causing 'someone' to suffer significant injury. The injured 'someones' are the fought animals themselves: their injuries and deaths are caused—indeed, intended—by the humans who sponsor and exhibit them in animal fights.

ARGUMENT

- I. Birds and mammals constitute a protected class of victim with respect to the Animal Welfare Act's prohibitions on animal fighting.**

The contours of protected victim classes in the context of crimes involving moral turpitude have thus far been wide enough to encompass such disparate groups as children, domestic partners, law enforcement officers, vulnerable civilian populations, and governments.¹ As such, identifying protected victim classes requires more than rote application of bright-line analysis: whether a class of victim has protected status is better determined by examining the attributes marking established protected victim classes, and the degree to which the class in question bears the same attributes.² By comparing the attributes of established protected victim classes, it becomes clear that birds and mammals³ constitute a protected class of victims when sponsored or exhibited in fighting ventures. Specifically, these animals are a protected class of victim for two

¹ See *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1061 (9th Cir. 2006) (“child[ren], domestic partner[s], or peace officer[s]”), *Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014) (vulnerable civilian populations and lawful governments are protected classes of victims vis-à-vis acts of international terrorism).

² Cf. generally *Nunez v. Holder*, 594 F.3d 1124, 1131 n.4 (9th Cir. 2010) (as an area of law, non-fraudulent crimes involving moral turpitude are not susceptible to bright-line analysis); see also *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1075 (9th Cir. 2007) (“...we rely on comparisons with other morally turpitudinous crimes when considering whether a crime fits that description. Under our current test for moral turpitude, we compare a crime’s depravity with that of crimes we have previously determined to be base, vile, and depraved...”), *overruled on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011).

³ The Animal Welfare Act’s animal fighting provisions define ‘animal’ as limited to birds and non-human mammals. 7 U.S.C. § 2156(g)(4) (“the term ‘animal’ means any live bird, or any live mammal, except man.”).

independent reasons: they occupy a particularly vulnerable position vis-à-vis their victimizers, and they are socially viewed as deserving special protection.

A. Protected Classes of Victims Are Typified by Occupying Positions of Particular Vulnerability Vis-à-vis Their Victimizers, Being Socially Viewed as Deserving Special Protection, or Both.

A protected class of victim is defined by a dynamic between victim and victimizer where the victim is not simply harmed by the victimizer's actions, but either occupies a particularly vulnerable position,⁴ is viewed "as deserving special protection",⁵ or both.⁶

⁴ See *Galeana-Mendoza*, 465 F.3d at 1061 (discussing moral turpitude in relation to an offender's "willingness ... to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.").

⁵ See, e.g., *Vinh Tan Nguyen*, 763 F.3d at 1029 (holding that "[m]isuse of a passport to facilitate an act of international terrorism is categorically a crime involving moral turpitude" both because it involves an intent to injure and because civilians and lawful governments are "protected classes of victims": "misuse of a passport to facilitate an act of international terrorism 'shocks the conscience.'" (quoting *Nunez*, 594 F.3d at 1131)).

⁶ *Galeana-Mendoza*, 465 F.3d at 1061. Beyond determining protected classes of victims, a larger crimes involving moral turpitude analysis may call for inquiry into the degree of injury a victim must suffer to fulfill a given crime's elements. *Id.* That issue, however, takes place at a separate analytic stage from determining protected victim classes. See, e.g., *id.* (The 9th Circuit points to *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) to demonstrate application of crimes involving moral turpitude analysis to assault and battery offenses. The relevant portion of *Matter of*

Where the victim's vulnerability is relevant, helplessness towards—and dependency upon—the victimizer typifies such a dynamic.⁷ The Ninth Circuit has variously described this victim-victimizer dynamic as “a close relationship to the perpetrator,”⁸ or “a special status or trust relationship vis-à-vis the perpetrator.”⁹ Vulnerability-based protected victim class status thus encompasses, for example, children,¹⁰ domestic partners,¹¹ spouses,¹² and victims categorially

Sanudo, in turn, positions degree of intended physical injury and protected victim class as separate categories: assault and battery is morally turpitudinous when it “necessarily involve[s] the *intentional* infliction of *serious* bodily injury on another,” or when the crime is defined as necessarily involving a protected victim class subject to “infliction of bodily harm.” 23 I&N Dec. at 969 (emphasis in original). In the latter case, protected victim class is a separate analytic component than degree of injury. *Id.*). As such, the degree of physical injury fought animals are subject to is not directly relevant to them being a protected victim class with respect to the Animal Welfare Act's prohibitions on animal fighting. It is, however, clear that fought animals are subject to serious bodily injury, brutal conditions, and death. *See infra* notes 19–24, 25, 31–33 (discussing impact of animal fighting on fought animals).

⁷ *See Morales-Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009) (discussing helplessness and dependency in the context of children and spouses as protected victim classes); *see also Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996) (protected victim class present where a “relationship is likely to be one of trust and possibly dependency”).

⁸ *Escobar v. Lynch*, 846 F.3d 1019, 1024 (9th Cir. 2017) (quoting *Nunez*, 846 F.3d at 1131 n.4).

⁹ *Uppal v. Holder*, 605 F.3d 712, 717 (9th Cir. 2010).

¹⁰ *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 n.4 (9th Cir. 2010).

¹¹ *Uppal*, 605 F.3d at 717.

unable to consent to their treatment.¹³ Underlying the connection between a victim’s vulnerability to their victimizer and protected victim class is the sense that crimes which by their nature require such vulnerable victims are “grave acts of baseness or depravity,” involving “truly unconscionable conduct”¹⁴ that “shock[s] the conscience.”¹⁵

A protected victim class may also arise when the victims in question fall into a category designated by society as deserving special protection, whether that social judgement coincides with a literal victim vulnerability or not. As such, for example, law enforcement officers and lawful governments fall within the protected class of victims for certain crimes, not because peace officers or governments are necessarily helpless, vulnerable, or dependent in the face of victimizers, but because certain crimes targeted at the state and its agents “shock[] the conscience.”¹⁶

¹² *Id.*

¹³ *Cf. Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1217–18 (9th Cir. 2013) (if kidnapping statute was exclusive to victims who were “child[ren] or unable to consent,” statute would implicate protected victim classes).

¹⁴ *Robles-Urrea v. Holder*, 678 F.3d 702, 708 (9th Cir. 2012).

¹⁵ *Castrijon-Garcia*, 704 F.3d at 1213 (quoting *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001)).

¹⁶ *E.g. Vinh Tan Nguyen*, 763 F.3d at 1029 (governments and their civilians as protected victim classes vis-à-vis crimes of terrorism) (quoting *Nunez*, 594 F.3d at 1136); *see also Galeana-*

B. Animals Fought in Contravention of the Animal Welfare Act both occupy positions of vulnerability and are socially deemed deserving of special protection.

- i. Animals used for fighting are dependent upon—and exploited by—the humans who sponsor and exhibit them in fights. Those animals are thus particularly vulnerable to their human victimizers, and therefore constitute a protected class of victim under the Animal Welfare Act.

Animals fought in violation of 7 U.S.C. § 2156(a)(1) are by necessity vulnerable to the humans who knowingly sponsor or exhibit them in those fights. While animal fighting apologists are known to suggest that the animals naturally engage in such combat on their own,¹⁷ such arguments fail in the face of both the Animal Welfare Act’s definition of animal fighting and the blood sport’s de facto reality. Nothing prohibited by the Animal Welfare Act’s animal fighting provisions is natural to animals. The law limits itself to “event[s] ... involving[ing] a fight conducted between at least two animals for purposes of sport, wagering, or entertainment....”¹⁸

Mendoza, 465 F.3d at 1061 (quoting *Matter of Sanudo*, 23 I&N Dec. at 971-73) (law enforcement officers as protected victim class).

¹⁷ See, e.g., Forsyth, “A Pecking Disorder: Cockfighting in Louisiana,” 26 *Int’l Rev. Mod. Soc.* 15, 17 (1996) (“And finally [cockfighters’] most used argument that these animals are natural fighters....”); Forsyth & Evans, “Dogmen: The Rationalization of Deviance,” 6 *Soc. & Animals* 203, 207–9 (1998) (Study finding that dogfight promoters respond to critique by denying anyone is hurt by dogfighting, claiming those who condemn dogfights are hypocrites, and appealing to dogfighting’s historical past. When denying that dogfighting causes harm, the most common argument is that the dogs “love” fighting.).

¹⁸ 7 U.S.C. § 2156(g)(1). The law does not encompass hunting. *Id.*

These fights, in turn, are brutal, vicious spectacles.¹⁹ “Cockfighting is a violent activity where two gamecocks with razor-sharp picks strapped to their feet are entrapped in a ring to fight to the death. Victorious gamecocks usually leave the ring with severe injuries such as missing eyes, punctured lungs, and broken bones.”²⁰ “Dog fighting itself is a grisly business in which two dogs ... are set upon one another and required to fight, usually to the death of at least one and frequently both animals. ... dogs [will] literally chew out each others’ eyes and break or chew off each others’ feet and legs, bloodying each other extensively, all to the cheers and goading of handlers and on-lookers.”²¹ Left to their own devices, animals do not engage in those sorts of lethal contests for the sake of money, sport, or entertainment.²² Using cockfights as an example, while fought roosters are bred and trained for the activity, the wild birds from which they derive are more prone to flee avian conflicts than engage in battle—human intervention by way of conditioning and selective breeding has been necessary to produce “birds that would stay and

¹⁹ This brief uses roosters and dogs as illustrative examples, due to their position as the most commonly fought animals in the United States. Forsyth, *supra* note 17, at 16. The analysis presented here, however, applies with equal force to any mammal or bird subject to animal fighting in violation of the Animal Welfare Act.

²⁰ “2005–2006 Legislative Review,” 12 *Animal L.* 277, 286 (2006).

²¹ H.R. Rep. No. 94-801 (1976), *reprinted in* 1976 U.S.C.C.A.N. 758, 761, *available in* 1976 WL 13854.

²² *See* Kalof & Taylor, “The Discourse of Dog Fighting,” 31 *Humanity & Soc.* 319, 321 (2007) (“Both cock fighting and dog fighting are sport activities staged by humans in which animals are incited to fight, maim, and kill each other.”).

fight....”²³ Similarly, even among the narrow sub-population of dogs purpose-bred and trained for fighting, “only one dog per litter may show the necessary temperament and stamina for the grim task of mortal combat....”²⁴

²³ Lawler, *Why Did The Chicken Cross The World: The Epic Saga of The Bird That Powers Civilization* 98–99 (2014).

²⁴ Dickey, *Pit Bull: The Battle Over an American Icon* 11 (2016). See Sinclair, Merck, & Lockwood, *Forensic Investigation of Animal Cruelty: A Guide for Veterinary and Law Enforcement Professionals* 191 (2006) (“Most canine aggression is highly ritualized. Dogs fight to establish dominance and to control access to resources... they cease fighting when one of the combatants withdraws or displays submission. Most dogs, like their wild counterparts have good bite inhibition....;” continuing to note that producing a fighting dog requires the removal of that natural canine behavior through human intervention, ranging from selective breeding to tail and ear cropping of such an extreme nature that it prevents the dog from signaling its emotional state and intentions.); see also Lockwood, *Dogfighting: Toolkit for Law Enforcement* 14–17 (2011) (A joint production of the Department of Justice and the American Society for the Prevention of Cruelty to Animals, the *Toolkit* describes how neither training nor selective breeding are sufficient to produce “winning fighters” who will persist in combat “despite injury or fatigue.” Even animals bred from proven fighters and subject to minute human control over their housing, food, veterinary care, and training are not sure to be the fighters their human handlers desire. “A common remark among fighters is the advice to ‘breed the best and bury the rest.’ This means that serious dog fighters try to encourage the development of gameness and fighting ability, while regularly evaluating the dog’s potential.”)

The lengths to which humans engaged in animal fighting will go in order to produce a ‘game’ fighter—that is, an animal who will continue fighting despite severe injury²⁵—speaks not only to the fundamental artificiality of animal fighting, but its inherent reliance upon a dynamic where vulnerable animals are subject to consistent manipulation. Producing fighting animals requires significant and pervasive human control over those animals; that degree of control, in turn, is illustrative of the animals’ vulnerability to, and dependency upon, their human victimizers. The animals fought in these events exist then, both in definition and in practice, in a state of dependency upon their sponsors and exhibitors—at the mercy of the humans who keep them, bring them to fights, and set them on other animals.

The dependency and vulnerability of fought animals vis-à-vis their exhibitors and sponsors encompasses all aspects of their lives, typically from birth to death. Sponsors and exhibitors of fought animals manage their animals’ lives with calculated deliberation—the structure of animal fighting incentivizes human facilitators to seek competitive advantages by controlling their animals’ breeding, living conditions, food, water, exercise regimens, medical care, interactions with other animals, and human contact. Fought birds, for example, are subject to manipulations designed to encourage aggression by exploiting the birds’ instincts: “[t]he entire match relies on eliciting an attack response by deliberately crowding the birds together. In this way, each cock serves as a sort of live lure to its opponent ... pushing the bird to become an aggressor. Indeed, to incite gamecocks to begin the fight, the birds are ‘billed’ immediately before the match starts, a practice that involves ‘thrust[ing] the birds together to anger them’ and permitting the cocks to

²⁵ See Lockwood, *Dogfighting: Toolkit for Law Enforcement*, *supra* note 24, at 14–15 (defining gameness as “the willingness to engage in prolonged combat ... to fight and continue despite injury or fatigue”).

peck and tug at each other while being held in the arms of their handlers.”²⁶ Indeed, fought roosters have weapons tied to their legs: “razor-sharp knives or gaffs, which resemble curved ice picks”²⁷—weapons meant to cause more serious injuries than would occur were the birds to fight using their natural spurs.²⁸ Nor is the degree of control human handlers have over fought birds limited to the fight itself: breeding and the ‘keep’—“all aspects of a rooster’s health, including diet, training, exercise, and medical care”—are subject to meticulous control.²⁹ Fought dogs are

²⁶ Jackson, “Dead Dog Running: The Cruelty of Greyhound Racing and the Bases for Its Abolition in Massachusetts,” 7 *Animal L.* 175, 198 (2001) (noting further that the humans who facilitate cockfights exploit the birds’ reproductive instincts to promote fights by “...depriving the cocks access to the hens while they are in training.’ In this way, the cockfighters deprive the birds of acting on natural mating instincts solely to frustrate them and mount their aggression.”) (quoting Tippet, “The Birds of Death,” in *The Cockfight* 59, 62 (Allen Dundes, ed., 1994)).

²⁷ Hoffman & McGinnis, “2007-2008 Legislative Review,” 15 *Animal L.* 265, 278–79 (2009).

²⁸ Jackson at 195. See *Gonzalez v. State*, 376 S.W.3d 141, 144 (Tex. Ct. App. 2012) (recounting testimony that removing natural spurs from roosters is “not part of ordinary animal husbandry... [but] commonly done to facilitate placement of the knives for fighting.”); Velez, “Olé, Olé, Olé, Oh No!: Bullfighting in the United States and Reconciling Constitutional Rights with Animal Cruelty Statutes,” 115 *Penn St. L. Rev.* 497, 498 (2010) (describing cockfight preparation: “Razor-edged spurs are attached to the rooster’s small feet to maximize his ability to cause injury to his rival rooster.”).

²⁹ Young, “Criminal Behavior As an Expression of Identity and A Form of Resistance: The Sociolegal Significance of the Hawaiian Cockfight,” 104 *Cal. L. Rev.* 1159, 1184 (2016) (noting that the studied human cockfight sponsors and exhibitors focus on cockfighting reputation—

subject to similar exploitation: they “do not lead normal lives, but rather every aspect of the dog’s life is carefully calculated to antagonize and thereby increase the aggression level of the dog...”³⁰ These dogs “endure physical torture and emotional manipulation *throughout their lives*

“being a ‘good rooster man’”—“which hinged almost entirely on two aspects: the ‘keep’ and knowledge of breeding strategies.”). Young further notes that cockfight betting strategies have more to do with assessment of a human handler’s “dedicat[ion] to the ‘keep’ and [being] smart enough to raise good birds” than an assessment of individual birds. *Id.* at 1186–88. *See also* “Bobby Jones, Game Fowl Breeder,” *Texas Monthly* (June 2011), <http://www.texasmonthly.com/the-culture/bobby-jones-game-fowl-breeder/> (cockfighter describes breeding and constant care as critical to raising birds for fighting: “Breeding game chickens is like breeding racehorses.... Ultimately what makes a good bird great is the way you care for it. It’s a 365-day-a-year job...”); Forsyth, *supra* note 17, at 16 (“The sport of cockfighting consists of more than just the fighting of chickens. The majority of a cockfighter’s time is spent on such aspects of the sport as breeding, training, and conditioning of the birds.”). Careful control over each aspect of a fought bird’s life has long been presented as desirable within the cockfighting community. *See, e.g., generally* Gray, *Cocker’s Manual*, (2nd ed., Battle Creek, The Journal Stream Printing House 1878) (Exhaustive discussion of “Rules for Feeding, Heeling, Handling, Etc.” fought birds, drawing upon “rules laid down by the best sportsmen... [and] the author’s practical knowledge....” The *Manual* directs prospective sponsors and exhibitors to carefully use controlled breeding, feeding regimens, and deliberate bodily mutilation to produce ‘game’ birds).

³⁰ *United States v. Berry*, No. 09-CR-30101-MJR, 2010 WL 1882057, at *4 (S.D. Ill. May 11, 2010) (detailing control over “basic nutrition, shelter and healthy socialization with humans and

to predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with sticks, and electrocution. [Fought d]ogs are conditioned never to give up a fight, even if they will be gravely hurt or killed.”³¹ Finally, fought animals who underperform are subject to a final, fatal subjugation at the hands of their human handlers: death.³²

The circumstances of these unlawful fights reinforce the conclusion that fought animals are vulnerable to their human victimizers: sponsors and exhibitors control when, where, and how animals will fight. A fought animal’s dependency upon—and vulnerability to—sponsors and exhibitors is concomitant with those humans having complete control over such visceral basics as the time, place, and conditions under which the animal will be exposed to bodily trauma and death.³³ The victimization of fought animals, then, does not simply consist of the vicious injuries

other animals” as well as weight training, regular physical abuse, application of “various ... legal and illegal drugs,” and intentional mutilation).

³¹ *United States v. Stevens*, 559 U.S. 460, 498-99 (2010) (Alito, J., dissenting) (emphasis added).

Justice Alito notes further “As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones.” *Id.*

³² *See, e.g., id.* at 499 (“Losing dogs are routinely refused treatment, beaten further as ‘punishment’ for the loss, and executed by drowning, hanging, or incineration.”); Forsyth, *supra* note 17, at 21 (“The loser will probably die either as a result of the fight or at the hands of its owner (a losing cock is of little use)...”).

³³ *See, e.g., Berry*, 2010 WL 1882057, at *8 (“While many dog fighting enthusiasts advertise the blood sport as a victimless crime, there are in fact many who suffer at the hands of these

they are subjected to in the fighting pit, but is an on-going process that pervades their entire lives. Fought animals are not, however, simply victims, but fall within a protected victim class vis-à-vis 7 U.S.C. § 2156 because their pervasive victimization is inexorably wrapped up in their vulnerability and dependency vis-a-vis the human sponsors and exhibitors who victimize them.

In short, animals fought in contravention of 7 U.S.C. § 2156 are subject to “cruel and barbarous”³⁴ treatment in a manner that trades off the close relationship between animal victim and human victimizer. Were the visceral brutality of animal fights insufficient to shock the conscience as base and vile,³⁵ that fight sponsors and exhibitors exploit the vulnerability of their animals in the course of such fights is surely unconscionable. Indeed, a “degenerate willingness on the part of the offender to prey on the vulnerable”³⁶—an apt description for the conduct of fight sponsors and exhibitors—is solidly within the range of conduct the Ninth Circuit has thus

handlers. The obvious victims of this blood sport are the dogs themselves, who spend their entire lives trapped in a violent and brutal world...”).

³⁴ *Commonwealth v. Tilton*, 49 Mass. 232, 234 (Mass. 1844) (“...we are of opinion, that the game or sport of cock-fighting is unlawful, because it is a violation alike of the prohibitions of a statute, and of the plain dictates of the law of humanity, which is at the basis of the common law, and specially recognized in the constitution, which makes it the duty of the legislature ‘to countenance and inculcate the principles of humanity.’ Const. of Mass. c. 5 § 2. The Rev. Sts. c. 130, § 22, have prohibited cruelty to animals, under penalty of fine and imprisonment. But we think it is prohibited by the principles of the common law, as a cruel and barbarous sport.”).

³⁵ This *amicus* argues separately, in Part II, that animal fights necessarily involve either intent to injure or actual injury, and that the victims of those injuries are fought animals.

³⁶ *Galeana-Mendoza*, 465 F.3d at 1061.

far flagged as morally turpitudinous. As such, fought animals—vulnerable to, dependent upon, and exploited by their victimizers—constitute a protected class of victim with respect to the Animal Welfare Act’s prohibitions on animal fighting.

ii. Birds and mammals are specifically and specially protected by the Animal Welfare Act’s animal fighting prohibitions.

Animals are “[t]he obvious victims of this blood sport [animal fighting]....”³⁷ While Congress has acted to address fighting as a source of animal cruelty, it has done so by choosing to shield certain animals and not others—a statutory decision speaking to a social judgement that the shielded animals are deserving of special protection.

Federal prohibitions on animal fighting are situated within the Animal Welfare Act, the historical purpose of which is to “foster humane treatment” of covered animals by addressing “mistreatment of animals.”³⁸ Indeed, federal criminalization of animal fighting invokes concern for the welfare of the animals involved: “*Animal fighting is cruel*. In this spectacle, dogs and roosters are often drugged to make them hyper-aggressive and forced to keep fighting even after suffering severe injuries. The animals are enclosed in a pit that they cannot escape, and often are killed during the fights.”³⁹ That prohibiting animal fighting also serves ancillary policy goals—including addressing “illegal gambling, narcotics trafficking, public corruption, and gang

³⁷ *Berry*, 2010 WL 1882057, at *8 (discussing dogfighting).

³⁸ 1976 U.S.C.C.A.N. at 758-59.

³⁹ S. 153, 110th Cong., 1d Sess., 153 Cong. Rec. 4317-02 (daily ed. Apr. 10, 2007), 2007 WL 1062394 (emphasis added).

activity”⁴⁰—is not mutually exclusive with, and does not detract from, the goal of “assur[ing] humane treatment of certain animals.”⁴¹

State laws criminalizing animal fighting are similarly meant to “end human involvement in such cruelty”⁴² Whether federal or state, laws criminalizing animal fighting are steeped in a

⁴⁰ *Id.* (emphasis added). (Noting “Animal fighting also spawns other criminal conduct, and endangers public safety,” and recognizing that “Cockfighting has been identified as a pathway for the spread of bird flu, and banning animal fighting is an important step to protect against this pandemic.....”).

⁴¹ Animal Welfare Act Amendments of 1976, Pub. L. No. 94–279, 90 Stat. 417. *See generally* Chiesa, “Why Is It A Crime to Stomp on A Goldfish?—Harm, Victimhood and the Structure of Anti-Cruelty Offenses,” 78 *Miss. L.J.* 1, 65 (2008) (Arguing that “...the chief purpose of criminalizing animal abuse [including prohibiting animal fighting] is to prevent the unjustifiable suffering of animals.” Chiesa further notes “This does not necessarily mean, however, that anti-cruelty statutes were enacted solely for the purpose of protecting animals from harm.”).

⁴² *See, e.g., Edmondson v. Pearce*, 91 P.3d 605, 622 (Ok. 2004) (“Unquestionably, the people acting in their legislative capacity, were acting in furtherance of a legitimate and reasonable exercise of the police power to prevent animal cruelty and to end human involvement in such cruelty, by enacting the ban on cockfighting and related activities. This is a significant and legitimate public purpose meant to remedy a broad and general societal problem and to outlaw an activity deemed injurious to public morals.”); *State v. Wear*, 472 N.E.2d 778, 783 (Oh. App. 1984) (“The cruel and inhumane manner in which animals are treated when forced to engage in mutual combat, whether for profit or the personal amusement of the spectators, can neither be condoned nor tolerated. Likewise, *it is the duty of the government to take those appropriate steps*

historical purpose of protecting certain animals from certain harms.⁴³ It is difficult to coherently conceive of those laws as being about protecting either property or humans to the exclusion of fought animals.⁴⁴ The fight sponsors and exhibitors whose conduct is outlawed by 7 U.S.C. § 2516 and its state law counterparts actively desire to subject their animals to injurious fights—

to curtail such activities and punish those who engage in and promote such activities. The animal fights statute is aimed at preventing cruelty to animals.” (emphasis added). *See also State v. Nix*, 355 Or. 777, 796 (Or. 2014), *vacated on procedural grounds*, 356 Or. 768 (Or. 2015), *reasoning adopted in State v. Hess*, 273 Or. App. 26 (Or. Ct. App. 2015), *review denied*, 358 Or. 529 (Or. 2016) (“Although early animal cruelty legislation may have been directed at protecting animals as property of their owners or as a means of promoting public morality, Oregon’s animal cruelty laws have been rooted—for nearly a century—in a different legislative tradition of protecting individual animals themselves from suffering.”).

⁴³ Chiesa, *supra* note 41, at 65 (noting that “all state jurisdictions in the United States have criminalized dog and cock fighting” despite the historical provenance of animal fighting and objections from its proponents.”). Chiesa argues that “These recent trends in anti-cruelty legislation are difficult to explain unless one believes the chief purpose of criminalizing animal abuse is to prevent the unjustifiable suffering of animals. No alternative conception of animal cruelty laws comes close to explaining this trend in anti-cruelty legislation.” *Id.*

⁴⁴ *See* Chiesa, *supra* note 41, at 30, 35 (“Since the people involved in these sports treat the animals involved as disposable objects that exist solely to generate money or pleasure, it cannot be said that the principal reason for criminalizing dog or cock fighting is to prevent psychological harm to those who have developed close ties to the animals.”)

protecting those animals as the property of their human owners cannot, therefore, account for the conduct being criminalized.⁴⁵

The Animal Welfare Act, however, does not concern itself with the welfare of *all* animals. In the face of the grotesque cruelty Congress identifies animal fighting activities as constituting, only certain animals are picked out as deserving of protection. The Animal Welfare Act's prohibition on animal fighting shields only birds and mammals.⁴⁶ The statutory implication is clear: birds and mammals deserve special protection, while other fought animals—fish,⁴⁷ insects,⁴⁸ and the like—do not. As such, birds and mammals qualify as a protected victim class

⁴⁵ See Chiesa, *supra* note 41, at 26 (“[animal fighting] remains criminal even if the owners of the animals voluntarily decide to engage in the activity. Since these laws protect animals in circumstances in which doing so will be detrimental to the pecuniary interests of their owners, the protection conferred in this context is incompatible with the position that anti-cruelty statutes are primarily enacted as a way to advance property interests.”).

⁴⁶ 7 U.S.C. § 2156(g)(4).

⁴⁷ E.g., the colloquial name of *Betta splendens*—the “Siamese fighting fish”—betrays its connection with fish fighting: male *B. splendens* breeders selecting for fought fish “bred for ... a large and strong body with hard scales ... but smaller fins....” Monvises et. al., “The Siamese Fighting Fish: Well-Known Generally But Little-Known Scientifically,” 35 *ScienceAsia* 8, 8 (2009). Similar to dogfight or cockfight ‘keeps,’ fought fish are subject to breeding programs and training meant to produce more successful combatants. *Id.*; Goldstein, *The Betta Handbook* 2–4 (2004). Such fights take place in the United States. Goldstein at 4.

⁴⁸ E.g., within the United States, arranged fights between crickets are known to take place in New York and Pennsylvania. Jin, “Chinese Cricket Culture,” 3 *Cultural Entomology Digest*

vis-à-vis the Animal Welfare Act's prohibitions on animal fighting for a reason separate from their status as particularly vulnerable victims. Birds and mammals are viewed as deserving of greater—and therefore special—protection as compared with other animals. Simply put, according to 7 U.S.C. § 2156, a rooster or a dog deserves, and receives, protections undeserved by a beta fish or a cricket—making birds and mammals a protected class of victims for the purposes of the Animal Welfare Act's prohibitions on animal fighting.

II. Animal Fighting is Intended to, and Actually Does, Significantly Injure Someone: Fought Animals.

In addition to protected victim class analysis, the effort to determine whether a given crime involves moral turpitude may involve inquiry into the extent to which the crime necessarily involves an intent to injure someone or actually injuring someone.⁴⁹ This analysis parallels

(1994), https://www.insects.org/ced3/chinese_crcul.html. See generally Bidau, "Patterns in Orthoptera Biodiversity II: The Cultural Dimension," 2 *J. Insect Biodiversity* 1, 8 (2014), <http://www.insectbiodiversity.org/index.php/jib/article/view/95>. Like cockfighting, cricketfighting is a "complex and systematized activity" involving detailed breeding and training regimens that exploit the male animals' "aggressive behaviour ... in relation to mating." Bidau at 7.

⁴⁹ *Truijan v. Holder*, 744 F.3d 617, 621 (9th Cir. 2014) (Non-fraudulent crimes involving moral turpitude are "almost always" typified by the necessary presence of an intent to injure, actual injury, or protected class of victim, rendering such crimes "truly unconscionable." (quoting *Robles-Urrea*, 678 F.3d at 1165-66). Crimes involving fraud are beyond the scope of this *amicus*.

protected class of victim analysis.⁵⁰ Each of these indicia—intent to injure, actual injury, or protected class of victim—signals non-fraudulent moral turpitude.⁵¹ In the context of “knowing[ly] sponsor[ing] or exhibit[ing] an animal in an animal fighting venture”—conduct criminalized by the Animal Welfare Act—it is the animals used for those fights who themselves are not only the intended recipients of significant injury, but who actually suffer significant injury.⁵²

A. Fought Animals Are the ‘Someones’ Injured by Animal Fighting

⁵⁰ *Id.*

⁵¹ Aside from protected class of victims, the other two markers of non-fraudulent crimes involving moral turpitude have been variously described by the Ninth Circuit in terms of both injury and harm. Compare *Truijan*, 744 F.3d at 621 (“an intent to injure [or] actual injury”) with *Nunez*, 594 F.3d at 1131 (“an intent to harm someone [or] the actual infliction of harm upon someone”); see also *Linares-Gonzalez v. Lynch*, 823 F.3d 508, 514 (9th Cir. 2016) (using both descriptors: non-fraudulent crimes involving moral turpitude “almost always” involve “an intent to harm someone,” per *Nunez*, or “intent to injure [or] actual injury,” per *Truijan*). For the sake of consistency, we refer to these indicia of non-fraudulent crimes involving moral turpitude in terms of injury, but note the same analysis applies if they are phrased in terms of harm.

⁵² 7 U.S.C. § 2156(a)(1); see also 7 U.S.C. § 2156(g)(4) (for the purposes of federal animal fighting prohibitions, “‘animal’ means any live bird, or live mammal, except man.”).

This inherent and exceptional cruelty suffered by fought animals⁵³ renders animal fighting a “grave act[] of baseness or depravity,”⁵⁴ for reasons independent from the protected class of victim analysis discussed in Part I. As an alternative to involving a protected victim class, non-fraudulent crimes of moral turpitude are typified by either an intent to injure someone or the actual infliction of injury upon someone.⁵⁵ An episode of animal fighting, as criminalized by the Animal Welfare Act, is just such a crime—the injury involved is inflicted on ‘someone’: the animal forced to engage in blood sport.

Finding that fought birds and mammals are ‘someones’ injured by animal fighting requires no great leaps of law or logic. That those animals suffer when subject to the injuries made inevitable by fighting is well-established. While once ignored, denied, or rationalized away, there is now a compelling (and ever-growing) body of evidence that animals possess the capacity to experience pain, stress, and even basic emotions.⁵⁶ The executive board of the American

⁵³ See, e.g., *supra* notes 19–24, 25, 31–33 (describing injuries and death suffered as consequence of dogfights and cockfights).

⁵⁴ *Robles-Urrea*, 678 F.3d at 705.

⁵⁵ See *Truijan*, 744 F.3d at 621 (“Non-fraudulent CIMTs will almost always involve an intent to injure someone, an actual injury, or a protected class of victims.”); *Nunez*, 594 F.3d at 1131 (“...non-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim.”).⁹

⁵⁶ See Matthews et al., “Guidelines for Recognition, Assessment, and Treatment of Pain,” 55 *J. Small Animal Prac.* E10, E14, E24 (2014) (results of the World Small Animal Veterinary Association’s Global Pain Council assessment of canine and feline pain: “Pain is a complex

Veterinary Medical Association (AVMA)⁵⁷ has expressly adopted a set of principles for use in guiding AVMA policy on issues of animal welfare, one of which states: “Animals should be

multi-dimensional experience involving sensory and affective (emotional) components. In other words, ‘pain is not just about how it feels, but how it makes you feel’, and it is those unpleasant feelings that cause the suffering we associate with pain. . . . Animals of all ages feel pain.”); Paul-Murphy et al., “The Need for a Cross-Species Approach to the Study of Pain in Animals,” 244 *J. Am. Vet. Med. Ass’n.* 692, 692 (2004) (“The International Association for the Study of Pain (IASP) has defined pain as an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage and has noted that the inability to communicate in no way negates the possibility that an individual is experiencing pain ... animals feel pain ... Accepting that the IASP definition is a reasonable definition of pain, then if one is to acknowledge that animals feel pain, one must also acknowledge that animals are capable of emotion...”). *Cf. Stevens*, 559 U.S. at 496 (Alito, J., dissenting) (noting that animals—including mammals and birds—“used in crush videos are living creatures [who] experience pain.”).

⁵⁷ With an over 150 year history of representing veterinarians “in private and corporate practice, government, industry, academia, and uniformed services,” the AVMA is “a collective voice” for the veterinary profession, dedicated to “advancing the science and practice of veterinary medicine to improve animal and human health.” *Who We Are*, AVMA, <https://www.avma.org/About/WhoWeAre/Pages/default.aspx> (last visited Mar. 1, 2017); *Vision, Mission and Values*, AVMA, <https://www.avma.org/About/WhoWeAre/Pages/mission.aspx> (last visited Mar. 1, 2017).

cared for in ways that minimize fear, pain, stress and suffering.”⁵⁸ Of particular relevance to 7 U.S.C. § 2156(a)(1)’s prohibitions on animal fighting, the sentience of roosters,⁵⁹ dogs,⁶⁰ and other fought birds and mammals is well-established by veterinary science.⁶¹

⁵⁸ *Animal Welfare Principles*, AVMA, <https://www.avma.org/KB/Policies/Pages/AVMA-Animal-Welfare-Principles.aspx> (last visited Mar. 1, 2017).

⁵⁹ Machin, “Avian Pain: Physiology and Evaluation,” 27 *Compendium* 98 (2005) (observing that birds feel pain, that such pain hurts, and outlining specific evidence that chickens experience and react to pain).

⁶⁰ See, e.g., Takaoka et al., “Do Dogs Follow Behavioral Cues From an Unreliable Human?,” 18 *Animal Cognition* 475, 476, 482 (2015) (dogs are capable of “selective trust” in relationships with humans: “mak[ing] inferences about the reliability of an [human] informant from her prior behavior”).

⁶¹ The Act, for example, also applies to “bear or raccoon baiting ... and similar animal fighting venues.” United States Department of Agriculture & Animal and Plant Health Inspection Service, *Animal Care: The Animal Welfare Act Factsheet 1* (Nov. 2012), https://www.aphis.usda.gov/publications/animal_welfare/2012/animal_welfare_act_english.pdf. Bears and raccoons are sentient, as are all animals. See Matthews et al., *supra* note 56, at E10; Paul-Murphy et al., *supra* note 56, at 692 (all animals are sentient). Moreover, bears and raccoons have the capacity to engage in “constructive and affective” interactions with humans. Preece & Chamberlain, *Animal Welfare and Human Values* 253 (1993). Bears, raccoons, and other birds and mammals less commonly subject to fights are as much the victims of animal fighting, and ‘someones’ whose injury is intended by animal fighting, as are fought roosters and dogs.

It is that very capacity to suffer which constitutes the relevant threshold issue. Beings—sentient creatures—can be injured, in ways inanimate objects never can be. When it comes to suffering injury then, it is sentience—the very essence of what makes a fought bird or mammal an animal—that matters.⁶² Considering an animal to be ‘someone’ for the purposes of crimes involving moral turpitude analysis does not therefore require any greater detour into the status of animals under the law; rather, it flows directly from the simple recognition that animals are distinct from mere unfeeling objects.

A. Causing Animals To Suffer Significant Injury is The Intended and Necessary Result of Animal Fighting

In the current case, both the Immigration Judge considering this matter and the Board of Immigration Appeals have observed that animal fighting “...clearly involves reprehensible conduct.” “[it is] a spectacle, the entire purpose of which is the intentional infliction of harm or pain on sentient beings [who] are compelled to fight, often to the death.”⁶³ On review, the Ninth Circuit did not find fault with that characterization of animal fighting, but remanded with instructions to consider how that criminal conduct fit into the injury and protected victim class

⁶² This sentiment—that sentience is the threshold issue separating mere things from beings with cognizable interests—is famously encapsulated by British jurist and philosopher Jeremy Bentham: “[T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?” Bentham, *An Introduction to the Principles of Morals and Legislation* 310 n.1 (Oxford: Clarendon Press, 1907) (emphasis in original).

⁶³ *Ortega-Lopez v. Lynch*, 834 F.3d 1015, 1017 (9th Cir. 2016) (quoting IJ and BIA).

rubric laid out in *Nunez v. Holder* and subsequent precedent.⁶⁴ While injury analysis (both intent to injure, and actual injury) is typically applied to harms suffered by humans, neither law nor logic call for the counterintuitive conclusion that animal injury must be invisible to the law merely because the sentient creatures suffering those injuries are not human. On the contrary, much as animals are a protected class of victim under 7 U.S.C. § 2156 (a)(1), so too are they the living, feeling, and suffering targets of conduct criminalized by 7 U.S.C. § 2156 (a)(1)—conduct that subjects them to intended and actual injury.

Injuring animals is inseparable from animal fighting. Causing animals to brutalize each other is the *raison d'être* of the fight itself; the goal of an animal fight is to goad animal attacks, attacks meant to injure and kill.⁶⁵ Whether a cockfight, dogfight, or otherwise, the statutorily defined focal point of an animal fighting venture is animals engaged in combat⁶⁶—combat which, in turn, is meant to do harm. The conduct criminalized in the Animal Welfare Act's prohibition of animal fighting is, therefore, conduct that necessarily involves either actual injury suffered by animals, or an intent that animals suffer injury.

That animal fighting involves the intended—if not actual—injury of fought animals is not lessened by the juxtaposition of other criminal activity, such as illegal gambling, with those fights. Not only is betting and other fight-related conduct mediated through the bloody business

⁶⁴ *Id.* at 1018 (specifically calling for protected class of victim analysis).

⁶⁵ *Id.* at 1017.

⁶⁶ 7 U.S.C. § 2156(g)(1) (“the term ‘animal fighting venture’ means any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment...”).

of the animal fight itself, but the conduct criminalized by 7 U.S.C. § 2156(a)(1) is limited to provisioning animals for animal fights⁶⁷—the extent to which other criminal acts are co-existent with animal fighting is therefore irrelevant to this specific analysis.

Nor are the injuries suffered by the fought mammals and birds—most often dogs and roosters, in dogfights and cockfights, respectively—of a de minimis variety that might not rise to the level of significance envisioned by Ninth Circuit jurisprudence.⁶⁸ Fights are premised on animals inflicting grievous, often fatal injuries on each other: rent flesh, blood loss, broken limbs, damaged organs, and death are the order of the day.⁶⁹ These are not minor injuries, but rather violent mutilations and killings brought about in the course of exceptional cruelty. Sponsoring or exhibiting an animal in an animal fighting venture is, therefore, a crime involving the intention that someone—either the handler’s animal or that animal’s opponent—will suffer significant injury, or a crime involving the actual infliction of significant injury to one or both of those ‘someones’.


⁶⁷ Applying the definition of “animal fighting venture” provided in 7 U.S.C. § 2156(g)(1) causes the prohibition to read: “it shall be unlawful for any person to knowingly sponsor or exhibit an animal in [any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment].” 7 U.S.C. § 2156(a)(1), (g)(1).

⁶⁸ See *Nunez*, 594 F.3d at 1137 (explaining that “...de minimus conduct or harm ... is not ordinarily considered to be inherently vile, depraved, or morally reprehensible.” (quoting *Morales-Garcia*, 567 F.3d at 1065)).

⁶⁹ See *supra* notes 19–22 and accompanying text (discussing animal injury and death entailed by animal fighting).

CONCLUSION

The direct and immediate victims of animal fighting are the animals themselves: their vulnerability exploited and their bodies injured. We respectfully ask that the decision issued by this body properly account for the unique attributes of these animal victims. Specifically, we urge this body to recognize that birds and mammals—when fought in violation of the Animal Welfare Act—fall within a protected class of victims due to their particular vulnerability vis-à-vis their victimizers, and their receipt of special protections not extended to other animals. Additionally, we encourage this body to acknowledge that fought animals are sentient ‘someones,’ not unfeeling objects, and that injuries intended and caused by animal fighting are inflicted upon those animal victims.



David B. Rosengard (OSB # 154119) & Lora Dunn (OSB # 133460)

Animal Legal Defense Fund
919 SW Taylor Street
Portland, OR 97205
503.231.1602

drosengard@aldf.org || ldunn@aldf.org

