



Memorandum in Opposition to Delaware House Bill 346

The members of Media Coalition believe that House Bill 346 is clearly unconstitutional. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Delaware: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

H.B. 346 would make it illegal to knowingly view or possess any visual depiction of a live animal being intentionally tortured or killed when the torture or killing depicted in the image is illegal under Delaware or federal law. The image must also be deemed to lack serious scientific, journalistic, or political value when applying contemporary community standards. A conviction is a felony.

This legislation is very similar to a federal law, 18 U.S.C. §48, struck down in April by the Supreme Court in an 8-1 decision written by Chief Justice Roberts. *U.S. v. Stevens*, 130 S. Ct. 1577 (2010). The federal law banned the creation, sale or possession with the intent to distribute images of cruelty to actual animals if the act of cruelty was illegal where the image was created, sold or possessed with the intent to distribute. The law also included a safe harbor for material with serious religious, scientific, political, educational, journalistic, historical or artistic value.

In *Stevens*, the Court declined to create a new exception to the First Amendment for images of illegal cruelty to animals. *Stevens*, 130 S. Ct. at 1585. The Court then reviewed the law under traditional strict scrutiny analysis. They first considered the substantial breadth of the law. The Court acknowledged that reach of an obscenity law could be limited by exempting "serious" material but that such a safe harbor could not be used as a pre-condition for other categories of speech and therefore can not be used to limit this law. *Stevens*, 130 S. Ct. at 1594. They then ruled that the law is unconstitutional as substantially overbroad and that it violates the First Amendment. *Stevens*, 130 S. Ct. at 1597.

There is no language in the *Stevens* opinion that would suggest that this bill is constitutional where §48 was not. H.B. 346 seeks to criminalize the same types of images of illegal animal cruelty while allowing a safe harbor for "serious" material. In fact, H.B. 346 may also be unconstitutional in that it is limited to possession of such images rather than their sale or creation. The Supreme Court has ruled that even where the government may ban the creation or sale of material as obscene, they may not prosecute individuals for its mere possession. *Stanley v. Georgia*, 394 U.S. 557 (1969).

Please defend the First Amendment and defeat H.B. 346