No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER
v.
ROBERT J. STEVENS, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE NORTHWEST ANIMAL RIGHTS NETWORK IN SUPPORT OF PETITIONER

JAMES H. JONES, JR.
Counsel of Record
ABIGAIL W. S. CROMWELL
Attorney
JENNIFER KAPLAN
Attorney
NORTHWEST ANIMAL RIGHTS NETWORK
10015 Lake City Way
Box #127
Seattle, WA 98125
(206) 250-7301

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

Constitution

Federal Statutes

State Statutes

Miscellaneous:

I. RELIEF REQUESTED

We ask this Court to reverse the Third Circuit Court of Appeals and reinstate the convictions of Respondent on the grounds that, under the precedent of this Court, depictions of animal cruelty as defined in Section 48 of Title 18 of the United States Code are unprotected by the Free Speech Clause of the First Amendment and therefore are subject to regulation.[1]

II. THE INTEREST OF *AMICUS CURIAE*

Northwest Animal Rights Network is an all-volunteer Seattle-based animal protection organization. NARN has been dedicated to ending the exploitation of animals by raising awareness of animal suffering in the food, entertainment, experimentation, and fashion industries since 1986. NARN's efforts include outreach, demonstrations, litigation, and educational events.

NARN's purpose in filing this brief *amicus curiae* is to supplement the arguments presented by the Solicitor General in her brief on behalf of Petitioner by providing additional information on the

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

compelling interest of government in regulating and prohibiting animal cruelty and on the *de minimis* value of depictions of animal cruelty as defined by 18 U.S.C. § 48.

III. SUMMARY OF THE ARGUMENT

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court propounded a five-factor test for analyzing a law that banned the sale of child pornography: 1. whether there is a compelling state interest, *id.* at 756-757; 2. whether the speech is intrinsically related to the harm the state seeks to prevent, *id.* at 759; 3. whether the depictions "provide an economic motive for and are thus an integral part of the production of such materials," *id.* at 761; 4. whether the value of the depictions is *de minimis*, *id.* at 762; and 5. whether banning the category of speech is compatible with previous First Amendment jurisprudence. *Id.* at 764. Under this framework, this Court held that child pornography, as defined by the New York law, was unprotected by the First Amendment. This brief will demonstrate that *Ferber* is the proper framework for approaching 18 U.S.C. § 48 and that an analysis of the *Ferber* factors, particularly those addressing the state's compelling interest and *de minimis* value of the material, establishes that depictions of animal cruelty fall outside the realm of First Amendment protection.

IV. ARGUMENT

A. Under the *Ferber* analysis, the material proscribed by 18 U.S.C. § 48 falls outside the

protections of the First Amendment and is therefore subject to regulation

Although *Ferber* did not explicitly overrule the simple balancing test—whether the value of utterances is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"—of *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-72 (1942), it marginalized it, noting that the five-factor framework was necessary to give the government leeway to regulate a grave social ill. *Ferber*, 458 U.S. at 756.

Ferber's progeny, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *Osborne v. Ohio*, 495 U.S. 103 (1990), illustrate the appeal of the five-factor test in evaluating both further restrictions on sexual depictions of children and in analogous categories of expression. The *Ferber* methodology has proven eminently workable in proscribing speech that is inherently harmful while preserving the right to engage in discourse that, while tasteless, is not intrinsically deleterious.

In *Ashcroft*, this Court struck down a ban on virtual child pornography. Using the *Ferber* analysis, this Court noted, "[i]n the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. . . . We need not consider where to strike the balance in this case, because here, there is no underlying crime at all." *Ashcroft*, 535 U.S. at 254 (internal citations omitted).

This Court also relied upon *Ferber* in upholding an Ohio statute banning the possession of child pornography. *Osborne, supra.* Distinguishing *Stanley v. Georgia*, 394 U.S. 557 (1969), which invalidated a statute banning private possession of obscene materials, this Court noted:

> In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted [the child pornography possession law] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

Id. at 109.

In addition to being this Court's most recent examination of an unprotected category of speech, *Ferber* and its successor cases are the most apt analysis for the material at issue because of the obvious parallels between child pornography and

depictions of animal cruelty. Both categories of speech are created by capturing in a visual medium the infliction of a serious injury, in a manner proscribed by state law, upon a vulnerable victim. A depiction of animal cruelty, like a depiction of a child engaged in a sexual performance, is not "the visual depiction of an idea," *Ashcroft*, 535 U.S. at 246, but the visual depiction of an underlying crime that, by definition, causes a concrete harm to its subject. Like in *Osborne*, and unlike in *Ashcroft*, Congress's intent here was not to create a thought crime or to impose a paternalistic regime upon the nation, but instead was to deter a serious violent crime by destroying the market for the exploitative use of animals.

This Court's analysis in *Ferber* thus provides the proper framework for approaching both child pornography and depictions of animal cruelty. The Third Circuit correctly identified the *Ferber* framework, but, reticent to create a new category of unprotected speech absent explicit guidance from this Court, *United States v. Stevens*, 533 F.3d 218, 225 (3d Cir. 2008), analyzed them incorrectly in concluding that depicting base and illegal acts of animal cruelty was protected by the First Amendment.

1. The First *Ferber* Factor: The government has a compelling interest in prohibiting wanton acts of animal cruelty.

In *Ferber*, this Court found that protecting children, especially from sexual exploitation, "constitutes a government objective of surpassing

importance." *Ferber*, 458 U.S. at 757. To reach this conclusion, this Court relied in substantial part on the findings of the New York legislature and on a plethora of psychological studies. This Court and the legislature looked not only at the instant harm created when a child is sexually abused, but also at long-term damage that is done to that child and to society as a whole. "[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole." *Id*. at 758, n.9, (*citing* S.Rep.No. 95-438, p. 5 (1977), U.S.Code Cong. & Admin.News 1978, p. 42.) Several studies that this Court considered indicated that "sexually exploited children . . . have a tendency to become sexual abusers as adults." Schoettle, Child Exploitation: A Study of Child Pornography, 19 J.Am.Acad.Child Psychiatry 289, 296 (1980). *See Ferber*, 458 U.S. at 758, n9.

In *Ferber*, this Court rested its decision on the legislature's careful evaluation of available materials, stating, "[w]e shall not second-guess this legislative judgment. Suffice to say that virtually all of the States and the Unites States have passed legislation proscribing the production of or otherwise combating 'child pornography.'" *Ferber*, 458 U.S. at 758. Indeed, several leading cases on First Amendment jurisprudence look to the existence of widespread state consensus to gauge whether an interest is compelling. For example, in *Roth v. United States*, 354 U.S. 476, 485 (1957), this Court observed that there existed "universal judgment that obscenity should be restrained, reflected in the . . . obscenity laws of all the 48 states."

In analyzing the government's interest in combating animal cruelty, this Court should utilize the same methodology that it used in *Ferber*. This Court should consider the suffering that animals endure and the harm that animal cruelty creates in society as a whole, taking into account the legislature history of the statute and relevant research. This Court should find that government has a compelling interest in protecting animals from wanton acts of cruelty.

a. Animal Cruelty Causes a Direct Injury to its Victims.

Government has long recognized the compelling interest in protecting animals for the animals' own sake, as evidenced by statutory provisions stretching back in the nation's early history. Even before this nation formed, its forebear enacted laws as early as 1641 prohibiting cruelty to animals. Massachusetts Body of Liberties of 1641 § 92. Since that time, animal protection statutes have proliferated; each of the fifty states has enacted a criminal statute forbidding cruelty to animals. This statutory chronicle reflects our profound sentiment that tormenting vulnerable creatures gravely offends our collective sensibilities. Animal cruelty is criminalized, not in "virtually" every state, as child pornography was at the time the *Ferber* case was decided, but in *every* state of the United States and by the Federal Government. 7 U.S.C. § 2131, et seq.

Congress pronounced the importance of protecting animals from wanton acts of violence during the passage of 18 U.S.C. § 48 saying, "[t]he

great majority of Americans believe that all animals, even those used for utilitarian purposes, should be treated in ways that do not cause them to experience excessive physical pain or suffering." H.R. REP. No. 397, 106th Cong., 1st Sess. 4 (1999) (*1999 House Report*).

The suffering endured by animals who are victims of deliberate acts of cruelty is immense. And animals, like people, remember the pain they have suffered, bearing physiological and psychological scars for years following their abuse. *See* e.g., David DeGrazia and Andrew Rowan, *Pain, Suffering and Anxiety in Animals and Humans*, Theoretical Medicine 12, 193-211 (1991); Patrick Bateson, *Assessment of Pain in Animals*, Animal Behavior 42, 827-39 (1991). Protection of animals is therefore a compelling interest unto itself.

b. Animal Cruelty Causes a Negative Impact on Society.

Beyond its impact on individual animal victims, animal cruelty has a well-documented relationship with several other social ills. A large corpus of research indicates that animal abuse is interrelated with violence against humans. During the discussions on 18 U.S.C. § 48, Congress observed:

> [T]he increasing body of research . . . suggests that humans who kill or abuse others often do so as the culmination or a long pattern of abuse, which often begins with the torture and killing of animals. When society fails to prevent

> these persons from inflicting harm upon animals as children, they may fail to learn respect for any living being."

1999 House Report 4.

Animal abuse is often intertwined with other forms of violence, particularly domestic violence and sexual assault. For example, studies have found that at domestic violence shelters, the overwhelming majority of women seeking shelter "mention experiences of companion animal abuse." Frank R. Ascione et al., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 SOCIETY AND ANIMALS 205, 213 (1997). The incidence of violence against animals is even more prevalent when the domestic violence includes child abuse cases. "One of the things abusive men do is threaten, batter, or kill pets in the presence of their partner or their children, or both, in order to threaten the humans or control them." Daniel M. Warner, *Environmental Endgame: Destruction for Amusement and a Sustainable Civilization*, 1 S.C. ENVTL. L. J. 1, 49, n. 150 (2000) (*citing*, Carol Adams, *Bringing Peace Home: A Feminist Philosophical Perspective on the Abuse of Women, Children, and Pet Animals*, 9 HYPATIA 63, 66-69 (1994).

In addition, a significant number of criminals who commit serious acts of violence against humans have a history of cruelty to animals.[2] Children who

---

[2] M. Varn Chandola, Dissecting American Animal Protection Law: Healing the Wounds With Animal Rights and Eastern

are exposed to violence against animals often go on to abuse animals themselves and studies have shown that abuse of animals is but a stepping stone en route to directing violence toward humans. Randall Lockwood & Guy R. Hodge, *The Tangled Web of Animal Abuse, in Cruelty to Animals and Interpersonal Violence* 78, 82 (Randall Lockwood & Frank R. Ascione eds., 1998). In a presentation to former President William H. Clinton, Senator William Cohen declared "[v]iolence is not an isolated event and animal abuse is often part of a larger cycle of violence."142 Cong. Rec. S4630-05 (daily ed. May 2, 1996) (statement of Sen. Cohen). The FBI has conducted research among sexual predators and has found high rates of sexual assault of animals. Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 ANIMAL L. 131, 149, 2005, *citing* Robert K. Ressler et al., *Sexual Homicide: Patterns and Motives*, (LEXINGTON BOOKS 1988), at 38.

The desensitization towards suffering, beginning with animals and progressing to humans, further demonstrates government's compelling interest in preventing cruelty to animals.

Enlightment, 8 WIS. ENVTL. L. J. 3, 5-6 n. 21 (2002), (*citing* David Tingle, George W. Barnard, Lynn Robbins, Gustave Newman & David Hutchinson, Childhood and Adolescent Characteristics of Pedophiles and Rapists, 9 INT'L J.L. & PSYCHIATRY 103-16 (1986)) (explaining that "[a] study conducted by the aforementioned scientists demonstrated the strong correlation between cruelty to animals and violent crimes. Forty seven percent of the rapists studied, for example, were shown to have a history of cruelty to animals."

c. The Experience in Washington: Pasado the Donkey

In the State of Washington, crimes against animals are taken very seriously. The main statutes criminalizing cruelty to animals in Washington were enacted in 1994. RCW 16.52, et seq. Prior to 1994, legislation to criminalize cruelty to animals had been in the works for several years, as the legislators wrestled with the wording, *mens rea* requirements, and exceptions, until an event in 1992 which focused the public eye on the pressing need for criminal animal cruelty laws.

On April 16th, 1992, caretakers of the Kelsey Creek Farm Park in Bellevue, Washington, arrived at work to discover Pasado, the park's donkey, dead in his pasture. Pasado had been beaten, strangled, and left to die. Kay Kusumoto, *Donkey's Death Blamed On Vandals*, Seattle Times, April 17, 1992, at A1. Three young men, aged 16, 18, and 20, all with prior criminal convictions, were eventually charged with the crime. They initially claimed that they wanted only to "play with" Pasado. Kay Kusumoto, *Calls About Donkey Flood Prosecutor's Office*, Seattle Times, April 24, 1992, at C1 (Kusumoto: *Calls About Donkey*). However, the hangman's noose that was found around Pasado's neck indicated that the killing was premeditated and intentional. Kay Kusumoto, *Pasado's Cruel Death Raises Fear—Police Say 'Blatant Torture' Of Donkey Was Planned*, Seattle Times, April 18, 1992, at A1.

The local media covered this incident extensively and the public was outraged. Calls

flooded the King County Prosecuting Attorney's Office. Spokesperson Dan Donohoe said, "[i]t's surprising to receive so many calls . . . but we understand the outrage. Here's an animal who was totally defenseless." Kusumoto: *Calls About Donkey* at C1. The late King County Prosecutor Norm Maleng said, "[i]n my 14 years in office, there has never been a case that has sparked the outrage of the public as the killing of Pasado the donkey." Steven Clutter, *One Year After Pasado: Animal Cruelty Laws Unchanged*, Seattle Times, April 13, 1993 at C1.

The public outcry about the torture that Pasado endured fueled a new criminal statutory regime to broadly combat animal cruelty, which passed the State House of Representatives by a vote of 95-2. Shannon Johnston, *Lawmakers Crack Down On Cruelty To Animals*, Seattle Times, February 16, 1994, at B1.

The Washington laws broadly prohibit many forms of animal cruelty and neglect. Intentionally inflicting unnecessary pain upon, criminally neglecting, having sexual relations with animals, and participating in animal fighting constitute felony first degree animal cruelty. RCW 16.52.205 and RCW 16.52.117. Less egregious instances of animal cruelty constitute misdemeanor animal cruelty in the second degree. RCW 16.52.207. The Washington Legislature's motivation for enacting these laws mirrors Congress' interest in passing 18 U.S.C. § 48: broad concern for animal welfare and the well-documented link between animal abuse and other crimes and harms inflicted upon society.

To ensure enforcement of these laws, the King County Sheriff's Office, the largest law enforcement agency within the State of Washington, has trained every officer to recognize and investigate instances of animal cruelty. Such widespread focus on crimes committed against animals, and the dedication of resources and time to combat them, demonstrates that, for the State of Washington, there is a compelling interest in protecting animals from wanton acts of cruelty.

d. The Federal Government has a specific compelling interest in preventing animal cruelty.

The Federal Government shares the state's interest in protecting animals and has enacted many laws mandating their humane treatment. *See e.g.*, Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901 *et seq.*; the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*; The Twenty-Eight Hour Law, 49 U.S.C. § 80502; and the Endangered Species Act, 16 U.S.C. §1531 *et seq*. Article I, § 8, cl. 3 of the United States Constitution vests authority to regulate commerce among the several states. The federal government therefore has a unique role in protecting animals when crimes against them involve interstate commerce. The federal government's intervention in preventing animal cruelty is significant in establishing the compelling nature of preventing animal cruelty. Whereas, when *Ferber* was decided, Congress had not yet acted to eradicate child pornography, here both the federal

and state governments have spoken conclusively on their intent to eradicate crimes against animals.

Animal cruelty crimes present a unique set of circumstances that make enforcement through traditional state channels problematic. Despite thorough state laws criminalizing acts of cruelty committed against animals, state law enforcement frequently encounters several roadblocks in their attempts to prosecute acts of cruelty captured in depictions. It has proven difficult determine "when the practice occurred, where it occurred, and who has been involved." 145 Cong. Rec. S15220-03, 106th Cong., 1st Sess. (1999) (statement of Sen. Smith).

Prior to the passage of 18 U.S.C. § 48, the House of Representatives and the Senate heard extensive testimony about attempts to prosecute these crimes. Tom Connors, a Deputy District Attorney in California explained:

> The majority of filmed segments showed filming occurred in several different locations making it nearly impossible to accurately determine the appropriate jurisdiction. . . . The identity of the person responsible for the acts of animal cruelty was going to be extremely difficult to ascertain and prove. The Statute of Limitations was the final obstacle that we were not able to overcome.

Testimony, Sept. 30, 1999, House of Representatives, 1999 WL 781872.

Congress carefully drafted Section 48 to overcome these difficulties. Under Section 48, the Department of Justice is able to prosecute those who knowingly create, sell or possess depictions of animal cruelty when those persons do so with the intent for interstate commercial gain. Ascertaining the identity of the creator of the depictions is not necessary because the law is directed at those who create, sell or possess the depictions for commercial gain. The location where the depiction was created is not an element of the federal prohibition, instead, jurisdiction is based on the location where the creating, selling, or possessing occurs. Finally, the statute of limitations is no longer a barrier because the federal provision does not depend on the date the depiction was made, allowing prosecution based upon the date the depiction was created, possessed or sold.

Because the federal government has exclusive power to act in the realm of interstate commerce, only Congress had the power to adequately address the limitations of the state anti-cruelty provisions. The legislative record illustrates that Congress's intent in passing Section 48 was to use its interstate commerce power to supplement the authority of the states to bring those who profit from animal abuse to justice. *See* 145 CONG. REC. H10267-01 (daily ed. Oct. 19, 1999) (statement by Sen. McCollum: "[T]his bill is a necessary complement to State animal cruelty laws. Congress alone has the power to regulate interstate commerce, and this bill does just that . . . [I]t restricts the conduct that heretofore has gone unchecked by State law, the sale across State

lines of these horrible depictions for commercial gain."

Based on the foregoing, it is clear that the States in general and the Federal government in particular have a compelling interest in prohibiting animal cruelty.

2. The Second and Third *Ferber* Factors: Intrinsic Relationship of the Depictions to the Abuse and Economic Motive

Other *amici* address these factors thoroughly and NARN will not duplicate their arguments.

3. The Fourth *Ferber* Factor: The value of the depictions of animal cruelty proscribed by 18 U.S.C. § 48 is *de minimis*

The *Ferber* Court did not analyze in depth *why* the value of lewd depictions of minors is "exceedingly modest, if not *de minimis*;" *Ferber*, 458 U.S. at 762; indeed, the parameters of the category resolves the inquiry, as "patently offensive" images of children's genitals have no purpose in the marketplace of ideas. Likewise, depictions of animal cruelty of the sort proscribed by 18 U.S.C § 48 are "no essential part of any exposition of ideas." *Id.* at 754. Scrutiny of the material proscribed by the statute makes clear that it has no legitimate social value.

18 U.S.C. § 48 only proscribes depictions of animals being "intentionally maimed, mutilated, tortured, wounded, or killed 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," *id.* at (c)(1), unless such depictions have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.*

At the outset, there is scant value in intentionally maiming, mutilating, torturing, wounding, or killing animals. Just as with child pornography, some deference to the states, all of which have enacted criminal statutes—many at the felony level—prohibiting cruelty to animals, is warranted. No jurisdiction in the United States permits its denizens to perpetuate wanton acts of cruelty upon animals. 18 U.S.C. § 48 only prohibits *depicting* what the states prohibit *doing*. A review of the state laws and their application is therefore instructive in demonstrating the worthless nature of the depictions at issue.

First, no state animal cruelty law has been interpreted to forbid culturally accepted commercial and recreational uses of animals. Many state animal cruelty statutes contain explicit exemptions for hunting, fishing, scientific experimentation, and routine farm animal husbandry practices.[3] Even in

---

[3] *See, e.g.*, 18 Pa.C.S.A. § 5511(c)(3) ("This subsection shall not apply to activity undertaken in normal agricultural operation."); 510 ILCS 70/3.03 (exempting "any alteration or destruction of any animal by any person for any legitimate purpose, including, but not limited to: castration, culling, declawing, defanging, ear cropping, euthanasia, gelding, grooming, neutering, polling, shearing, shoeing, slaughtering, spaying, tail docking, and vivisection.")

states that do not specifically exempt these uses of animals, no prosecutions have ever been undertaken against those who use animals in these manners—unless their actions involved gratuitous infliction of pain unnecessary for accomplishing these industrial purposes. *See*, *e.g.*, The Associated Press, *Iowa: Firing and Lawsuit in Pig Abuse,* New York Times, October 24, 2008 (Hormel Foods employees prosecuted for beating sows with metal rods and killing piglets by slamming them onto concrete floors).

The exemptions from state animal cruelty laws are so vast and deferential to industry that there is little need for concern that depictions of common utilitarian uses of animals, even if deemed cruel by those outside industry, will fall within the ambit of 18 U.S.C. § 48. For example, in *New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dept. of Agriculture*, 955 A.2d 886 (N.J. 2008), the New Jersey legislature directed its Department of Agriculture to promulgate humane farming standards. The law contained a safe harbor provision, exempting from the purview of the state animal cruelty statute practices codified by the Department. A coalition of animal protection groups called upon the courts to assess whether the agency had violated its mandate by codifying castration of swine, horses, and calves; de-beaking of chickens and turkeys; and toe-trimming of turkeys. *Id.* at 909. New Jersey's high court declined to find these practices inhumane as a matter or law, but took issue with the agency's rule that they must be performed in a "sanitary manner" by a "knowledgeable individual" in a manner that

"minimize[s] pain" without defining those standards. *Id.* at 911-12.

In the other states, where there is no specific legislative mandate to treat livestock in a humane manner, the exemption is even broader. In *Com. of Pennsylvania v. Barnes*, 629 A.2d 123 (Pa.Super., 1993), two horse farmers had no commercial use for some of their livestock and therefore stopped providing them food or water. They argued that this willful neglect did not constitute animal cruelty because intentionally starving unwanted horses was a "normal agricultural operation," as exempted by the statute. The appellate court disagreed; however, its holding was not based upon a quarrel with the notion that "normal" should be described descriptively rather than normatively, but because it was not convinced of the prevalence of the practice. *Id.* at 132-33. If states construe "normal agricultural operations" as a race to the bottom rather than an objective standard for determining what procedures are too cruel for animals to endure, the Third Circuits concern that 18 U.S.C § 48 will sweep in depictions of culturally accepted practices or technical violations of the law, *Stevens*, 533 F.3d at 235, is unfounded.

That 18 U.S.C. § 48 prohibits depictions of conduct proscribed by *criminal* statutes is significant. No animal cruelty statute contains a private right of action, which means that state executives hold the exclusive privilege of even initiating proceedings that would expand the boundaries of what is prohibited by their respective statutes. Animal cruelty statutes have thus proven

unsusceptible to commandeering to animal rights agendas. Several animal protection organizations, seeking to improve animal welfare conditions in the agricultural and experimentation industries, have attempted to use the animal cruelty statutes as predicates for civil violations, but have thus been unsuccessful.

In *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F.Supp. 278 (D. Mass.1986), ALDF sued a veal producer under Massachusetts's consumer protection statute, alleging that the intensive confinement of calves raised for veal violated the state animal cruelty law and that engaging in this illegal activity to produce veal was therefore an unfair trade practice. The court rejected ALDF's arguments, stating that "However well-intentioned it is, the ALDF is pursuing its goals along an improper avenue in this litigation. If convinced it has uncovered gross and systematic mistreatment of animals, the ALDF should concentrate its estimable advocacy urging public officials and the designated private animal protection organizations to proper action." *Id.* at 281. No state prosecution followed.

Two decades later, ALDF renewed its attempt to use consumer protection laws to bypass the standing requirement of the criminal statute. In *Animal Legal Defense Fund v. Mendes*, 160 Cal.App.4th 136 (Cal.App. 5 Dist.,2008), ALDF and two dairy consumers alleged that a company that raised the male offspring of dairy cows for veal on behalf of the dairy farmers engaged in unfair trade practices by violating the animal cruelty laws—by

confining the calves in filthy crates "not large enough to turn around or lie in a natural position"—in furtherance of selling milk, and again the court rejected this complaint, finding that ALDF lacked standing to enforce animal cruelty laws and that any economic harm suffered by the dairy consumers was too attenuated to the inhumane conditions to sustain the action.

In *Humane Soc. of U.S. v. State Bd. of Equalization*, 152 Cal.App.4th 349 (Cal.App. 1 Dist.,2007). The Humane Society of the United States used the state taxpayer standing rule to challenge the California State Board of Equalization's practice of granting tax exemptions to purchasers of battery cages which are designed and used to confine hens in violation of state animal cruelty laws. Once again, the court rejected this argument, stating that "numerous citations suggest that [the animal cruelty] statute is regularly enforced by California prosecutors," *id.* at 359, and therefore suggesting that if prosecutors shared The Humane Society's belief that battery cages were cruel, it would be their prerogative to bring an action against the farmers.

What the state statutes do proscribe, then, is nothing but clearly defined, gratuitous acts of cruelty. It is worth noting that Respondent does not launch an as-applied challenge. It does not appear that Respondent has ever suggested that the content of the material for which he was prosecuted has any social value. This is a wise concession: he was convicted for two videotapes of pitbulls fighting one another and a third of a pitbulls attacking wild boars

and a domestic farm pig, sinking their teeth into the defenseless pig's jaw. *Stevens*, 533 F.3d at 221. *See* also other descriptions of dogfights: *Vawser v. Updegrove*, 2009 U.S. Dist. LEXIS 41012, 10-11 (D. Neb. May 14, 2009) (dogs subjected to fighting were severely underweight and covered in scabs; blood spatter evidence consistent with slamming dogs against wall); *Ware v. State*, 949 So.2d 169, 174-175 (Ala.Cr.App.2006) (fighting dog missing large portion of tongue and unable to eat or drink; another's muzzle swollen to twice normal size from untreated bite wounds.). Respondent would be at pains to establish how such images contribute in any meaningful way to the marketplace of ideas.

Case law is also replete with incidences of cockfights, *All States Humane Game Fowl Org., Inc. v. City of Jacksonville*, 2008 U.S. Dist. LEXIS 60760, 4-6 (M.D. Fla. July 29, 2008); mutilations, *People v. Brush*, 2009 WL 1056518, 2 (Cal.App. 5 Dist.,2009); stabbings, *State v. Coulter*, 2009 WL 765460 (Ohio App. 5 Dist.,2009); shootings, *Shiver v State*, 327 So.2d 251 (Fla.App. 1976), *Haines v. State*, 82 Ga.App 129 (1950); burnings, *Anderton v. State*, 390 So.2d 1083 (Ala.Cr.App. 1980); beatings, *Regalado v. United States*, 572 A.2d 416 (D.C.App.1990); and various other forms of gratuitous torture. Clearly, the value of such depictions of animal cruelty is *de minimis* at most.

4. The Fifth *Ferber* Factor: Finding depictions of animal cruelty unprotected is consistent with this Court's previous decisions

Due to the similarities between the material deemed unprotected in *Ferber*, child pornography, and the material defined by 18 U.S.C § 48, depictions of animal cruelty, it is clear that finding such depictions of animal cruelty as outside First Amendment protection is consistent with this Court's precedent.

B. 18 U.S.C. § 48 has an appropriately defined scienter requirement.

The material defined in 18 U.S.C. § 48 surpasses every factor identified in *Ferber* and thus is unprotected speech subject to regulation. The statute is not required to meet the strict scrutiny test because the material in question lies outside First Amendment protection. Although *Ferber* did not explicitly include a scienter requirement as part of its five-factor methodology for determining whether a category of speech could be rendered unprotected, it did address the scienter requirement of the child pornography statute at issue, "criminal responsibility many not be imposed without some element of scienter on the part of the defendant." *Ferber*, 458 U.S. at 765. Because 18 U.S.C. § 48 requires acting "knowingly" *id.* at (a), and because the material described includes only depictions of acts that are illegal as defined clearly by State law, the statute satisfies this final requirement and can be enforced as written.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Third Circuit and should reinstate Respondent's convictions.

Respectfully submitted.

JAMES H. JONES, JR.
Counsel of Record
ABIGAIL W. S. CROMWELL
Attorney
JENNIFER KAPLAN
Attorney

JUNE 2009.

APPENDIX

1. Revised Code of Washington 16.52.205 provides:

(1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering, or forces a minor to inflict unnecessary pain, injury, or death on an animal.

(2) A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

(3) A person is guilty of animal cruelty in the first degree when he or she: (a) Knowingly engages in any sexual conduct or sexual contact with an animal; (b) Knowingly causes, aids, or abets another person to engage in any sexual conduct or sexual contact with an animal; (c) Knowingly permits any sexual conduct or sexual contact with an animal to be conducted on any premises under his or her charge or control; (d) Knowingly engages in, organizes, promotes, conducts, advertises, aids, abets, participates in as an observer, or performs any service in the furtherance of an act involving any sexual conduct or sexual contact with an animal for a commercial or recreational purpose; or (e) Knowingly photographs or films, for purposes of

sexual gratification, a person engaged in a sexual act or sexual contact with an animal.

(4) Animal cruelty in the first degree is a class C felony."

2. Revised Code of Washington 16.52.117 provides:

(1) A person commits the crime of animal fighting if the person knowingly does any of the following: (a) Owns, possesses, keeps, breeds, trains, buys, sells, or advertises or offers for sale any animal with the intent that the animal shall be engaged in an exhibition of fighting with another animal; (b) Knowingly promotes, organizes, conducts, participates in, is a spectator of, advertises, prepares, or performs any service in the furtherance of, an exhibition of animal fighting, transports spectators to an animal fight, or provides or serves as a stakeholder for any money wagered on an animal fight at any place or building; (c) Keeps or uses any place for the purpose of animal fighting, or manages or accepts payment of admission to any place kept or used for the purpose of animal fighting; (d) Suffers or permits any place over which the person has possession or control to be occupied, kept, or used for the purpose of an exhibition of animal fighting; or (e) Takes, leads away, possesses, confines, sells, transfers, or receives a stray animal or a pet animal, with the intent to deprive the owner of the pet animal, and with the intent of using the stray animal or pet animal for animal fighting, or for training or baiting for the purpose of animal fighting.

(2) A person who violates this section is guilty of a class C felony.

. . .

(4) For the purposes of this section, "animal" means dogs or male chickens.

3. Revised Code of Washington 16.52.207 provides:

(1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

(2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence: (a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure; or (b) Abandons the animal.

(3) Animal cruelty in the second degree is a misdemeanor."