IN THE UNITED STATES COURT OF APPEAL

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	)
	)
PETITIONER-APPELLANT,	)
vs.	)
	)
ROBERT J. STEVENS,	)
	)
RESPONDENT APPELLEE.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE THIRD CIRCUIT

BRIEF OF APPELLANT

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I. QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Third Circuit correctly ruled that 18 U.S.C. § 48 was unconstitutional when Robert J. Stevens sold depictions of animal cruelty.

II. STATEMENT OF THE FACTS

The case United States of America v. Robert J. Stevens, involves the defendant, Robert Stevens, a Pennsylvania resident, selling dogfighting videos and paraphernalia. The videos sold included 1960s and 1970s organized dog fights in the United States and Japan and a video of pit bulls being used to catch wild boar. The defendant not only sold these videos but narrated them as well. Stevens also wrote literature to accompany these videos. Law enforcement officers arranged to buy videotapes from Stevens and convicted him of knowingly selling depictions of animal cruelty within interstate commerce for commercial gain. Stevens' actions were found in violation of § 48, which is a Pennsylvania statute that makes the distribution of animal cruelty illegal unless it is has a serious religious, political, scientific, educational, journalistic, historical

or artistic purpose. Stevens argued that § 48 is a direct violation of his freedom of speech and therefore, the charges against him should be dismissed.

III. ARGUMENT

I. There is a need for an additional category of unprotected speech for the prohibition of depictions of animal cruelty.

In regards to the actions of Robert Stevens, animal cruelty is a major problem in the United States. Depictions of animal cruelty, which is any visual or auditory medium that a living animal is being harmed in, is what Stevens is being charged for and distributing for profit. These media channels include pictures, videos, electronic images, or sound recordings.[1] In this case, what Stevens did is irreprehensible enough regardless of what freedom of speech rights that he claims he has.

Stevens argues that his actions do not fall under the categories of unprotected speech – child pornography, fighting words, threats, speech that incites illegal activity, or obscenity. Albeit that this is correct, we are proposing that another category of unprotected speech be created in this case. All of the previously mentioned categories were created in precedents just like we are trying to do with the case at hand.

For example, in New York v. Ferber, Ferber sold two movies to an undercover police officer of young boys masturbating. The respondent was found guilty of two counts of violating N.Y. Penal Law Statute 263.15, which prohibits endorsing sexual actions by under sixteen-year-olds.[2] It was not required for this law to fall under obscenity. However, Ferber appealed and the order was reversed based on the notion that statute 263.15 infringed the First Amendment. Yet,

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[1] 18 U.S.C. § 48(c)

[2] N.Y. Penal Law Statute 263.15

the case was eventually remanded and child pornography of actual children became a new category of unprotected speech.[3] The *Ferber* case will be disgusted more extensively further in our argument.

Another precedent worth noting is Chaplinsky v. New Hampshire, in which Chaplinsky was convicted of making hateful comments towards another individual. His plea was that it fell under his First Amendment rights, freedom of speech. Yet, the Appellee was able to get the court to create a new category of unprotected speech: fighting words. Since what Chaplinsky said fell under that connotation, his claim of protected speech was nullified.[4]

The idea behind these categories of unprotected speech is that the problems that they deal with present a major threat to human beings. Since the Government fails to recognize the cruelty of animals as a part of these categories, a new one must be formed. There are already laws in the United States Constitution that are geared towards protecting the safety of animals and enforced punishment against those who violate these laws. Harming animals goes against the basic morals of society.

Another thing to take note of is that someone could only claim protected speech if what he or she did had religious, political, scientific, educational, journalistic or historical relevance. Stevens selling of tapes of animals being harmed has nothing to do with religion. Clearly, there were no political ramifications behind it. It is not like he was selling these videos to show how cruel some people can be to animals. He sold them for his own profit. The same thing goes for educational because he was not distributing the videos to teach. Stevens was not doing any type of reporting so no journalism was involved either. Lastly, there is nothing historical about videos

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[3] New York v. Ferber, 458 U.S. 747 (1982)
[4] Chaplinsky v. New Hampshire 315 U.S. 568 (1942)

displaying animal cruelty. The social value of the depictions will be further discussed in our argument.

It is important to take note that the distribution of these videos is the real issue. Along with this new category dealing with the abusing of animals, it should include that releasing grueling material that has no religious, educational, political, scientific or historical importance, is not protected by the First Amendment. In the end, Stevens should be held accountable for the distribution of obscene animal cruelty rather than it actually happening.

II. The depiction of animal cruelty should be restricted because the depictions are not an essential part of any exposition of ideas and have such slight social value that it clearly outweighs the expressive interest.

Prohibiting cruelty to animals outweighs the interests of free speech. In previous cases such as New York v. Ferber and Miller v. California, the Supreme Court has ruled that certain types of speech fall outside First Amendment protection. The Supreme Court held that "unprotected speech may be regulated as long as the regulations do not extend to portions of speech within that category with 'serious literary, artistic, political, or scientific value.' "[5]

In order for speech to be protected by the First Amendment, it must have social value. The lower court ruling stated that this case is similar to Miller v. California, a case where the Supreme Court ruled certain types of sexually explicit and obscene material fell outside First Amendment protection because it had minimal social value. During this case, the lower court argued that animal cruelty, like obscenity has little social value. The Court of Appeals demonstrated this by stating, "[W]e have little trouble concluding that the depictions outlawed by section 48, by and large, can only have value to those with a morbid fascination with suffering

[5] 18 U.S.C. § 48(b)

and thus are of only de minimis value."[6] Since animal cruelty is merely a form of morbid entertainment and does not have any significant social value, it cannot be considered protected speech.

Speech is protected by the First Amendment if it has a religious, political, scientific, educational, journalistic or historical purpose. Section 48 clearly states just that: the distribution of animal cruelty is illegal unless it has a significant religious, political, scientific, educational, journalistic or historical purpose. This means that section 48 will only apply to speech that has absolutely no social value. The Court of Appeals ruling stated that, "[T]his case is even clearer than that in Ferber because section 48, unlike the statute at issue in Ferber, already expressly excludes depictions that have any serious value. Thus, there is simply no potential that the present statute will reach any work that plays an important role in the world of ideas." [7]

This means that section 48 is not meant as a way to censor speech, its goal is to regulate speech with no social value, which wrongfully encourages animal cruelty. Section 48's purpose it too ensures that animals are protected as much as possible, without limiting the dissemination of important ideas and beliefs.

The Court of Appeals also stated, "[S]ection 48 outlaws depictions that 'are no essential part of any exposition of ideas, and are 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.' "[8] This demonstrates that distributing animal cruelty should be considered unprotected speech because the pain and suffering endured by the animals outweighs the harm caused by limiting individuals' First Amendment rights. Not only are animals harmed as a result of animal

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[6] United States of America v. Stevens 533 F.3d 218; 2008 U.S. App
[7] United States of America v. Stevens 533 F.3d 218; 2008 U.S. App
[8] Chaplinsky v. New Hampshire 315 U.S. 568 (1942)

cruelty, but if people become desensitized to observing animal cruelty, they will become more likely to exhibit violet behavior themselves. This further proves that prohibiting the distribution of animal cruelty outweighs protecting free speech.

While free speech is a very important right that should not be restricted carelessly, it is clear that the harm caused as result of animal cruelty outweighs protecting free speech. Section 48 is a fair statute that only limits the distribution of animal cruelty that falls outside the realm of protected speech. We need to send a clear message that distributing and viewing animal cruelty is wrong and the best way to do that is by making the distribution of animal cruelty illegal. By taking the step of restricting speech that clearly has no social value we can do a better job preventing animals from being abused, which is worth the sacrifice of distributing depictions of animal cruelty.

III. Although the prohibitory language of 18 U.S.C. §48, falls outside the traditional protections of the First Amendment, the court must accept the application of such a needed protection in which (a) the government has a compelling interest in prohibiting animal cruelty, (b) there is an intrinsic relationship between the distribution of the material and such an activity, (c) the advertising and selling of animal cruelty provides an economic motive for people and are thus an integral part of production & (d) the value of permitting live performances and photographic reproductions of animal cruelty is exceedingly modest.

In 1982, Paul Ferber owned a Manhattan adult bookstore. An undercover police officer went into the store and purchased two films that depicted young boys masturbating. At the time, there was a New York state law that prohibited the sale of pornographic materials involving children. Ferber challenged the law claiming that he was protected under the First Amendment. The Supreme Court found that child pornography was not protected by the First Amendment. In New York v. Ferber, a test was created to evaluate whether an issue was protected or not under the First Amendment. The case at hand meets all the requirements of the Ferber test.

a. The government has a compelling interest in prohibiting animal cruelty, which should permit the statutory regulations found in §48.

In *Ferber,* the court found that protecting children from sexual exploitation and abuse is compelling. "Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."[9] We find that this case is directly related to the one at hand in that the government has a compelling interest of prohibiting animal cruelty. This compelling interest is apparent in today's state and federal legislatures that work to serve as protection for animals and the morals of society.

From an early time, our nation has protected the well being of animals. In 1641, Nathanial Ward of the Massachusetts Bay Colony wrote "No man shall exercise any Turanny or Crueltie towards any bruite Creature which are usuallie kept for man's use" in a statute concerning animals.[10] This early statute was the start of our compelling interest in the prohibition of animal cruelty. By 1913, every state had a law concerning animal cruelty. In 1954, our nation developed the Humane Society of the United States, which is currently backed by 11 million Americans. "The HSUS seeks a humane and sustainable world for all animals—a world that will also benefit people."[11] The Animal Fighting Prohibition Enforcement Act of 2007 has further exhibited our nation's compelling interest in safeguarding animals.[12] These statutes, organizations and writings prove that animal cruelty is a compelling government interest.

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[9] New York v. Ferber, 458 U.S. 747 (1982)

[10] Emily Stewart Leavitt, *Animals and Their Legal Rights: A Survey of American Laws from 1648 to 1968*, at 13-14 (Animal Welfare Institute, 1968)

[11] The Humane Society of the United States

[12] Animal Prohibition Enforcement Act of 2007 § 261

b. Due to the intrinsic relationship between the creation, sale and possession of the depictions of animal cruelty and the illegal act of animal cruelty, §48 should be upheld in that is directly related.

The Supreme Court found that "The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."[13]

Like the *Ferber* case, the material at issue is also intrinsically related to a criminal act, cruelty to animals. Cruelty to animals is the underlying action that must occur before the creation, sale or possession of the depiction can arise. The first step in creating, selling and possessing the depictions is committing the crime of animal cruelty. Although one of Stevens' films was created outside the country, they still required the first step: real life animal cruelty. Our country should not promote such a thing that is against the morals and laws of American society. In Ashcroft v. Free Speech Coalition*,* it was found that a ban on virtual child pornography was unconstitutional.[14] We agree with this, meaning that if the material at question were simulated instead of actual living creatures, it would be constitutional. Since the material is depictions of real life animals, it meets the two standards of the second part of the *Ferber* test.

The materials produced are a permanent record of harm to animals, and the harm to the animals is exacerbated by the depictions' circulation. We do not directly relate animals to children, but we do find that this is a case that is subject to a new category of unprotected speech, similar to the *Ferber* case. The cruelty that is depicted in these videos goes far beyond the one

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[13] New York v. Ferber, 458 U.S. 747 (1982)
[14] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)

instance that is shown. Dogs who are the subjects of these depictions are forced to fight until death or until one quits. The quitters do not receive veterinary care and are often tortured, starved or left for dead. The harm that is inflicted upon these animals goes far beyond the one time depiction. Animals suffer for much of their lifetime, as a result of the production of these types of videos.

A similar problem has arisen in the law enforcement of animal cruelty and the policing of child pornography. In *Ferber*, the Supreme Court found that "the most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."[15] The dogfighting industry is a comparable market. It is consistently difficult to stop dogfighting and target the individuals that are responsible. Stevens stated that in the "Pick-A-Winna" video, he purposely edited out the faces of the spectators. People in these videos are the people who are committing the crime of animal cruelty. If these people are being editing of these videos are standing in the way of the law. This is an example of the increasing difficulties law enforcement faces in stopping dogfighting, just as child pornography had. These depictions are intrinsically related to animal cruelty.

c. Advertising and the sale of depictions of animal cruelty provide an economic motive for people to enter the industry and is thus an integral part of the production of such materials thus, making §48 constitutional.

In the *Ferber* decision, the Supreme Court held that the advertising and sale of child pornography must be targeted since they "provide an economic motive for and are thus an integral part of the production of such materials."[16] Like *Ferber*, dogfighting videos, such as the

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[15] New York v. Ferber, 458 U.S. 747 (1982)
[16] New York v. Ferber, 458 U.S. 747 (1982)

three Stevens sells, provide an economic incentive for individuals to enter the market and ultimately commit the crime of animal cruelty.

The individuals who choose to view such depictions are further persuaded into the industry of dogfighting by the economic motive, just as those who viewed child pornography were persuaded to enter the industry by the economic motive. Out of the small majority that value dogfighting, many can move from simply utilizing the depictions for pleasure to actually participating in the production and distribution to seek economic value. This case has proven that there is a very lucrative market for these types of videos, and it creates an even larger problem for law enforcement. This means that it increases the amount of people who are participating in animal cruelty and heightens the level of difficulty for policing the criminal act.

Although other criminal activities can be seen in the media, many of those that are seen hold value, unlike the dogfighting videos. For example, crime scene photographs are easily distinguishable in that they possess value for law enforcement officials. Because these animal cruelty depictions have such little value, individuals who watch them are likely to participate in the crime too. The production and distribution of the material is purely for an economic gain.

d. The value of permitting live performances and photographic reproductions of animal cruelty is exceedingly modest, thus making § 48 constitutional.

The *Ferber* case stated that the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest.[17] Paul Ferber was indicted on two counts in violation of two New York laws controlling the dissemination of child pornography. The value of permitting these photographic reproductions is looked at more closely when a state judge in this case observed, if it were necessary for scientific, literary, educational or artistic value, a person over the statutory age who looked younger could be

[17] New York v. Ferber, 458 U.S. 747 (1982)

utilized. If by chance, it was needed for one of the previously stated reasons, then it could be simulated because the First Amendment interest is limited to that of rendering the portrayal of children.

The *Ferber* case is similar to the case at hand in that the depiction of animal cruelty holds no scientific, literary, educational or artistic value. Stevens' videos of dogfighting hold no place in the world of ideas. There is no value in these depictions that could be of use to society. The only purpose it holds is the desensitizing of society and encourages them to participate in the gruesome act. If an individual finds this kind of depiction necessary, they could simply simulate it.

"The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech," Justice White said.[18] The video of the underage boys, as well as the issue at hand, has a heavy impact to the subject of the video that it is permissible to consider these materials as without the protection of the First Amendment.

IV. <u>18 U.S.C § 48 is clearly stated, thus making it constitutional.</u>

Statute 48, depiction of animal cruelty, has been stated as being too vague and failing to provide ordinary people with reasonable intelligence of what conduct is prohibited. The statute states that, "Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both."[19] However, the statute thoroughly covers certain situations by its exceptions. The exceptions to this statute are if the depiction has any religious, political, scientific, educational, journalistic, historical, or artistic

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[18] New York v. Ferber, 458 U.S. 747 (1982)
[19] 18 U.S.C. § 48(a)

value it may be used.

Many hunters and members of the National Rifle Association (NRA) are concerned that by adding the statute of depiction of animal cruelty would limit what they would be able to air on television. Television shows on channels such as the Outdoor network depict people hunting and killing animals. However, these hunting shows are very clear describing to people with ordinary intelligence why they are filming what they are filming. These shows are aired for educational purposes. They show people where and how to safely hunt, and shoot. Hunting also plays an enormous historical role for the entire human race, in that all of our ancestors can be traced back to being the first hunters and gathers. It's a way people made a living for thousands of years. For many people it's a main part of who they are today. The animals on these shows are either taken for sport or for their meat. These animals are not gruesomely tortured and left for dead, as the pit bulls often are in the videos at issue.

Under the same statute, PETA can use images of dogfights to discourage and guilt people into donating money for their cause. It serves a political value. They also make it very clear to their audience why they are showing these images. There is no value in the depiction of facing two pit bulls against each other and having them fight to the death, besides violence. People are naturally drawn to violence and death, but that does not make it right. By making the distribution of animal cruelty illegal, it will in turn limit the audience base. It is inhumane to say that Robert Stevens' videos had any artistic value. On the other hand the television network, ABC can take excerpts from Stevens' videos and show them on national television, because of its journalistic value due to the rising popularity in the case.

What really needs to be looked at here is not what a reasonable person understands to be prohibited, but what a reasonable person understands to be right and wrong. There are videos on

the Internet of beautiful models wearing elegant clothing, while stepping on a small animal. They are called “crush videos”, and they claim to be artistic in value. However, all they really do is appeal to men’s dark sides and curiosity with death. Any reasonable person can see that these types of videos are cruel and demented, and should not to be considered as art. These videos are now illegal.

The Hill v. Colorado case debated whether or not people should be able to protest outside abortion clinics. The Supreme Court ruled that “Judgment affirmed because the state statute creating a bubble zone in which free speech was restricted around persons approaching health care facilities was a narrowly tailored, content neutral, valid time, place, and manner restriction, serving significant and legitimate governmental interests of protecting the public from confrontational and harassing conduct.”[20] This limited protestors in Colorado by not allowing them within eight feet of anyone entering an abortion clinic. The Supreme Court will rule against First Amendment rights if there is physical harm, or the risk of physical harm to people. The court is just trying to prevent situations in which confrontations could lead to fights. Animals should be protected under some of the same rights that people are. As long as people are allowed to distribute dogfighting videos, no matter what narration is in the background, people will watch them. If there are people willing to watch these videos, then someone is being paid to fight animals. Dogfighting can be prevented as long as people take the right steps.

V. CONCLUSION

In sum, the United States respectfully requests that the lower court’s decision be reversed. Although the First Amendment is one of our country’s most fundamental rights, some

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[20] Hill, Himmelmann, and Simpson v. Colorado, 530 U.S. 703 (2000)

speech must be unprotected in order to safeguard society. People who watch these videos will be desensitized to animal cruelty, which will ultimately be detrimental to society. Desensitizing humans to this type of violence is only encouragement to become more enraged and violent citizens. Our forefathers created a country and constitution that relies on the ideas and innovations of progressive individuals who work toward building a greater nation. Exposure to the depiction of animal cruelty serves no purpose in the creation of those individuals. Therefore, these depictions do not have a place in American society.