

In the Supreme Court of the United States

United States of America

v.

Robert J. Stevens

December 3, 2009

Steven's Legal Council

Peter Claus

Emma Polisenno

Morgan Smith

Alexandra Strazzella

Anthony Wadhams

Jessica Waiss

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Introduction

18 U.S.C. § 48 regulates depictions of animal cruelty and persons who “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.”

Our client has been convicted for violating this law and as the legal team representing Robert J. Stevens we strongly feel that 18 U.S.C.S. § 48 is not only overbroad as it pertains to this case, but it is also unconstitutional because it infringes on free speech rights that are guaranteed by the First Amendment to the United States Constitution

As this is the first case to be prosecuted under § 48 there is little precedent to follow and the government has asked the court to take a large leap and create a new category of speech, which would be unprotected by the First Amendment.

Because it has been over twenty-five years since the court has recognized a category of unprotected speech, we look at *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) which established that child pornography is not protected speech under the First Amendment.

Although we recognize that the *acts* of animal cruelty are punishable by state law, we strongly disagree with the attempts made to compare depictions of animal cruelty and depictions of child pornography because they are in no way on the same moral level. We will provide evidence as to how Steven’s case does not meet the elements of the *Ferber* test, which includes five factors needed to create a new category of unprotected speech, and therefore cannot be held at the same level of scrutiny.

A. What constitutes a compelling government interest?

When attempting to decide if this expression of speech is protected under the first amendment, we must first, and principally look to the ruling and guidelines set out in *New York v Ferber*, 458 U.S. 747, (1982) as the five factors presented there are the only strong precedent that this court has to weigh whether or not a category of speech is protected or not. When we look at the five points of the *Ferber* decision, we see that the first in the list that “The State has a “compelling” interest in “safeguarding the physical and psychological well-being of a minor”. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

We must re-write this question slightly, to see if the context makes sense in terms of application to our subject. Meaning, does the government have a compelling interest in safeguarding the physical and psychological well-being of a animal, and in this case the dogs that might “suffer” because of these dog-fighting videos. When we look at this, the first, and one of the most important questions we come to is what makes a government interest “compelling”, this is one of the hearts to this case, and for many of the same reasons we

believe that the government does not have a compelling interest in protecting dogs in this instance, in this way. Overall, the precedents paint the picture that when the rights of animals, and that of people's first amendment clash, the interpretation almost always sides with that of the First Amendment.

First, we as the lower court found, bring up the precedent provided in *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 530 U.S. 290 (1993). Here the court found that referring to the house subcommittee on § 48, "Therefore, it seems that, on balance, animal rights do not supersede fundamental human rights". H.R. REP. NO. 106-397, at 11. This clearly spells out that when animal rights come into conflict with those fundamental rights of humans, the superior position must be given to that of the interest of the people, and the First Amendment. The dissenting opinion, and our opponents suggest that the type of activity that the court is attempting to rule on is not about animal cruelty, but that the city was unfairly discriminating against the Lukumi Church. This is a misdirection from the central issue at hand, and as we will later discuss, clearly has no bearing on the fact that the courts have stated in no uncertain terms that the rights of humans supersede those of animals. Besides the strong backing for this in precedent, this is also obvious sense. Besides the higher place we find for human rights, we also have found that § 48, pushes the boundaries of content based restriction in ways never before seen.

When looking into the precedents of content-based restriction, one fact emerges, that every single "content based" restriction has been in the interest of people, and especially children, instead of that of animals. Because of that a content restriction based on the rights of animals would be a completely new area for the government to pursue that does not have either the precedent, or the moral logic to back it up. As we can again see, the criteria outlined in *Ferber* as "a government objective of surpassing importance" *New York v. Ferber*, 458 U.S. 747, 757 (1982), is clearly not met in this case to any degree to how is met in *Ferber*. When considering this it's helpful to look at the rationale that was used in *Ferber*, in regards to whether or not the government had a compelling interest in safeguarding children, and if that same logic could reasonably apply to that of animals. In the *Ferber* decision, the courts decided that it considered the interest compelling solely because a " democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens" *New York v. Ferber*, 458 U.S. 757, (1982),. What this says in simpler terms is that the very foundation of our country rests on future generations of children being healthy and well adjusted, and that a society cannot function without this. Because of that, it's easy to see the utmost need to protect children from this kind of abuse. When, however, we attempt to apply this same strand of logic, or standard, to that of this case, the differences, and the deficiencies in the argument become blaring. It is beyond absurd to conclude that a democratic society rests on the healthy well-rounded growth of dogs, and because of this the piece of the *Ferber* test cannot rationally be here implied. Because of that, it seems completely impossible for the government to conclude that it has a "reasonable interest", or "compelling" interest, and because of this, we find that § 48, does not meet the first criteria of the *Ferber* test.

The issue at hand needs to have “compelling government interest” to become a category of unprotected speech. For reasons mentioned previously, it has been established that Stevens’ case does not apply to this component. But the dissenting opinion, written by the Circuit Judge Cowen, claims that this issue does in fact warrant compelling interest to the government. The reasoning behind this claim is that the issue’s social value must be outweighed by the government’s interest in regulating the speech and making it another unprotected category. In the dissenting opinion, it is believed that preventing animal cruelty is a “governmental issue of paramount importance”. As the appellant team, we respectfully disagree with the claims made in the dissenting opinion and believe them to be false. Steven’s case has no compelling government interest for the following reasons:

First, it is made very clear in the Cowen’s dissenting opinion that there are extensive and numerous laws that prohibit the cruelty of animals and provide protection to animals that have been subject to abuse. The opinion claims that because of these anti-cruelty laws, it is very apparent that animal cruelty is a cause of concern to people in society. But we beg to differ that these societal concerns would make Steven’s case a compelling governmental interest because according to *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989): “The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

Second, the dissenting opinion is comparing this animal cruelty depiction to a child pornography case. These two issues cannot be weighed on the same scale without the latter showing greater concern. We don’t want to shy away from the fact that animals do have rights, but when being compared to humans and issues of obscene and inappropriate material, there is no way that the same standards can be applied to depictions of animal cruelty. Human’s right to freedom of speech trumps those of animals. It is almost impossible to create a new category of unprotected speech that is outside of the context of child pornography if we are using the components of *Ferber*.

Because of the reasons listed above, the issues of depictions of animal cruelty do not fit into the “certain well-defined and narrowly limited classes of speech” that were articulated from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), because the first component of *Ferber v. New York*, having compelling government interest, cannot be met. Even the dissenting opinion stated: “It is undisputed that the speech at issue in this case does not fit within one of the traditionally unprotected classes” *U.S. v. Stevens* 533 F.3d 218, 571-72 (2008) (Cowen, Circuit Judge, dissenting). Therefore, because Steven’s depiction of animal cruelty is a protected form of speech under the First Amendment, there must be a higher standard of scrutiny during the prosecution of this case.

It was stated in Part II of the dissenting opinion: “Section 48 is not unconstitutionally overbroad” *U.S. v. Stevens* 533 F.3d 218, 247 (2008) (Cowen, Circuit Judge, dissenting). But again, we disagree with statement and believe that the statute of 18 U.S.C. § 48 is in fact unconstitutionally overbroad because when dealing with First Amendment rights the government bares the burden of crafting the laws in the least restrictive means possible. We support this statement by examining Stevens’ video depictions that are in question. The

video “Japan Pit Fights” shows pit bulls in Japan engaging in dogfights where there is no infliction of pain being committed by humans. This video is the main argument for as to why § 48 is overbroad because it “criminalizes depictions of conduct that was not illegal when or where it occurred” *U.S. v Stevens* 533 F.3d 218, 248 (2008). Dog fighting is legal in Japan, so it cannot be held over Steven’s head as an illegal depiction because prosecution for those particular acts of animal cruelty could not be and were never perused. The people committing these acts of animal cruelty could not be prosecuted because the acts were legal where they occurred, so it is overbroad to prosecute Stevens for possession of depictions of those cruelties. § 48 is not clear enough in its statements of when and where the depictions took place and occurred, making it difficult to pinpoint whether or not these depictions really violate 18 U.S.C. § 48 because it is so overbroad.

Along with § 48 being unconstitutionally overbroad, the details of this law are also underinclusive when considering the government’s stated interest is preventing animal cruelty. The statute has no way of addressing this interest and is therefore underinclusive. § 48 was specifically created from the production and depiction of “crush videos”. However § 48 does not necessarily prohibit even these depictions. As long as a person does not meet the very narrow requirements outlined in § 48, then this statute fails to apply. More specifically, if an individual creates a video depicting animal cruelty for private use or even sells that depiction to someone in the same state, Section 48 again fails. The only way in which an individual can meet the standard of § 48 is to place the animal cruelty video into interstate commerce for commercial gain. Because of that, § 48 is underinclusive in regards to the government’s interest in preventing cruelty to animals.

Overall, there is no way that Stevens’ depictions of animal cruelty could reach compelling government interest, and the violation of § 48 is not grounds for prosecution because it is unconstitutionally overbroad and the speech we are dealing with is in fact protected by the First Amendment. It is best summed up in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) and how the government contended that this case is inapplicable to a compelling government interest analysis when dealing with animal sacrifices. Stevens’ video depictions not having governmental interest is further supported by the “Dissenting Views” section of the House Report of § 48:

Although the Supreme Court recognizes the governmental interest in protection animal from cruelty, as against the constitutional right of free exercise of religion, the governmental interest did not prevail. Therefore, it seems that, on balance, *animal rights do not supersede fundamental human rights*. Here, While the Government can and does protect animals from acts of cruelty, to make possession of films of such acts illegal would infringe upon the free speech right of those possession the film, H.R. REP. NO. 106-397 (1999), 227.

B. Rights of children trump rights of animals

The government does not have a high interest to create a new category of unprotected speech for animal cruelty under the First Amendment. It has made an exception for children, but no other group, not women, the elderly, or animals. In *Ferber v. New York*

the Supreme Court came up with five factors favoring the creation of a new category of unprotected speech. The second factor stated that child pornography 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” in order to control the production of child pornography. *Ferber* 485 U.S. at 749 (1982).

Animals and children are not treated in the same manner. A child can continue to be emotionally harmed long after the pornographic material is published. Once the material is published the negative impact on the child may never go away. An animal is not capable of being aware of their images being published and available for the public to view. In other words, images of animal cruelty on the marketplace do not harm animals as child pornography does to the children that participates in it. Thus, child pornography and animal cruelty are not intrinsically related and cannot be compared in this way.

Even though the government controls the distribution network for child pornography does not require the government to do the same to a subordinate level, in this case animals. One factor that regulates what speech the government can and cannot control is how high of interest the government has in the particular subject. In this situation the government does not have the same interest for animals as it does for children. In the *Church of the Lukumi Babalu Awe, Inc v. City of Hialeach*, 508 U.S. 520 (1993), the “Dissenting Views” section of the House Report of § 48 states that “animal rights do not supersede fundamental human rights.” For the Supreme Court to determine what constitutes as a high government interest, it rarely looks into content-based restrictions. And when it does the well-being deals with children, not animals. There is no evidence of their being any prior case in which animal cruelty falls into the category of unprotected speech under the First Amendment. Also, in the *Ferber* case the court stated that “it is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling.” *Ferber*, 485 U.S. at 756-57 (1982). Nowhere does it mention the State having a compelling interest in animals. There is no prior evidence or precedents that back up the decision to create a new unprotected category of speech under the First Amendment.

C. Drying up the market theory

It is important to understand that these animal cruelty videos are in fact protected speech. The case *New York v. Ferber*, dealt with regulating protected speech and resulting in the *Ferber* test, which created five factors in favoring the creation of a new category of unprotected speech. The third factor in the *Ferber* Test states that, “The advertising and selling of child pornography provide and economic motive for and are thus an integral part of the production” of child pornography.” (*New York v. Ferber*, 458 U.S. 747, 761 (1982))

This factor is saying that the network for distributing child pornography material must be closed so that the production of this material will go down. However, this does not apply to the dog-fighting tapes. It is extremely difficult to effectively detect the people directly involved in creating animal cruelty depictions, therefore how can we effectively prove that Stevens is primarily responsible for the creation of these films.

“Caselaw demonstrates that it is not unusual for dog fights to be filmed (describing police raid of dogfight where fight was being videotaped).” (*Ash v. State*, 290 Ark. 278, 718 S.W. 2d 930, 931 (Ark. 1986))

It was also stated in *New York v. Farber* that

“...it is difficult to police the ‘low-profile, clandestine industry’ of child pornography production.” (*United States of America v. Robert J. Stevens*, 533 F.3d, 225 (2008))

The same applies to the industry of animal cruelty depictions. Therefore, if dog-fighting depictions are prohibited, it isn’t going to stop the underlying issue of the dogfights still occurring.

Also, Steven’s examples are easily distinguishable from the speech prohibited in *New York v. Ferber*. In *New York v. Ferber* the examples of speech were child pornography tapes, which deals with human beings. The examples of speech put forth by Stevens were dog-fighting videos, which deals with animals. Therefore, there is little danger that people will be directly motivated by these examples of speech (the dog fighting videos) to physically harm other human beings to create depictions of the same speech in order to make a profit.

The third factor in the *Ferber* Test says that,

“The distribution network for child pornography must be closed so that the production of child pornography will decrease.” (*New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113; 761 (1982))

This is considered the drying up the market theory. However, there is no empirical evidence to support this assumption that the prohibition against animal cruelty depictions will reduce the number of illegal depictions. In *Bartnicki v. Vopper*, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas stated,

“The ‘dry up the market’ theory, which posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime, is neither novel nor implausible. It is a time-tested theory that undergirds numerous laws, such as the {the first amendment}.” (LaFave & A. Scott, *Substantive Criminal Law* §8.10(a), p. 422 (1986))

Therefore, the drying up the market theory is not only a theory that has no evidence behind it, but it is one that goes against numerous laws. Also, if we prohibit the production of animal cruelty depictions, it isn’t going to dry up the market of the dog fighting videos. A lot of dog fighting is recorded live for audiences to watch. Most importantly, § 48 does not regulate the underlying act of animal cruelty, it only regulates the creation and selling of animal cruelty in interstate or foreign commerce for commercial gain. Because it does not

address the underlying act, the market is not even addressed by an underlying statute. Therefore, the drying up the market theory doesn't even apply here.

D. There is an inherent difference between children and animals

In regards to the fourth *Ferber* factor, we strongly feel that it, like all other *Ferber* factors, does not, and should not apply to the case at hand. The fourth *Ferber* factor states, "The possibility that there would be any material of value that would be prohibited under the category of child pornography is 'exceedingly modest, if not *de minimis*,'" *U.S. v Stevens*, 533 F.3d 218, 225 (2008).

We find it to be very unrealistic to attach any similarities between dogs and children. The difference between the two is very obvious. We share this ideology with the majority of the Third Circuit Court of Appeals, which can be found within their opinion delivered by Circuit Judge Smith.

"In sum, the speech restricted by 18 U.S.C. Section 48 is protected by the First Amendment. The attempted analogy to *Ferber* fails because of the inherent differences between children and animals," *U.S. v Stevens*, 533 F.3d 218, 232 (2008).

The court considered the emotional damage that the documented child pornography act could cause on the child when outlining the *Ferber* factors. It is a very far reach to lump dogs into that emotional damage category along with children. There is little doubt that the act of violence towards any animal should not be a welcomed part of society. However this does not dictate the long-standing ideology that the First Amendment in our country represents.

Exception Clause

The Appellant legal team may argue that due to the exception built into 18 U.S.C. § 48, this provides the grounds for declaring 18 U.S.C. § 48, constitutional. However we strongly disagree again citing the majority opinion delivered by Circuit Judge Smith of the Third Circuit of Appeals.

"This type of exception clause has not been applied in non-prurient unprotected speech cases, and taking it out of this context ignores the essential framework of the *Miller* test. Congress and the Government would have the statute operate in such a way as to permit the restriction of otherwise constitutional speech so long as part of the statute allows for an exception for speech that appeals to the prurient interest, the First Amendment does not require speech to have serious value in order for it to fall under the First Amendment umbrella. What this view overlooks is the great spectrum between speech utterly without social value and high value speech. Second, if the mere appendage of an exceptions clause serves to constitutionalize 18 U.S.C. Section 48, it is difficult to imagine what category of speech the Government could not regulate through similar statutory engineering. That is not a road down which this Court is willing to proceed," *U.S. v Stevens*, 533 F.3d 218, 232 (2008).

The mere fact that the “First Amendment does not require protected speech to have serious value to fall under the First Amendment umbrella,” *U.S. v Stevens*, 533 F.3d 218, 232 (2008), directly interferes with the fourth *Ferber* factor. If 18 U.S.C. Section 48 is ruled constitutional this will act as precedent and pave the way for many more content-based areas to become unprotected under the First Amendment, we feel that this strongly goes against the fibers of the First Amendment, one of the foundations of our American belief system.

“It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas,” *U.S., ET AL v Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000).

Again, the fourth *Ferber* factor along with all five total factors does not apply to the case at hand. Therefore the Third Circuit Court of Appeals decision should be upheld finding 18 U.S.C. § 48 to be unconstitutional. Failing to decide any other way will surely act as a crack in our solid pillar known as the First Amendment and is sure to spread soon leaving far less protected freedoms of speech and diluting what this very nation stands for.

Conclusion

Although we recognize that the *acts* of animal cruelty are punishable by state law, we strongly disagree with the attempts made to compare depictions of animal cruelty and depictions of child pornography because they are in no way on the same moral level. We have provided evidence as to how Steven’s case does not meet the five factors for the *Ferber* test needed to create a new category of unprotected speech, and therefore cannot be held at the same level of scrutiny.

We have shown that the government does not have a compelling interest in this issue, that § 48 would not drive the market for animal cruelty and that the law is obtuse and overbroad.

We conclude that human beings First Amendment rights have always and should always supercede the rights of animals.

E. 18 U.S.C. § 48

Depiction of animal cruelty

(a) Creation, Sale, or Possession.— Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or

foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Exception.— Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) Definitions.— In this section—

(1) the term “depiction of animal cruelty” means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.