

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 AMICUS CURIAE OF ANIMAL LEGAL
DEFENSE FUND IN SUPPORT OF PETITIONER**

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June 15, 2009

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INTEREST OF *AMICUS CURIAE*

For 30 years, the Animal Legal Defense Fund (“ALDF”) has been fighting to protect the lives and advance the interests of animals through the legal system.¹ Founded in 1979 by attorneys active in shaping the emerging field of animal law, ALDF has worked tirelessly for stronger enforcement of anti-cruelty laws and more humane treatment of animals. Today, hundreds of attorneys and more than 110,000 members support ALDF’s groundbreaking efforts to push the U.S. legal system to end the suffering of abused animals.

ALDF has been a leader in publicizing the link between human and animal cruelty, and in advocating the adoption and enforcement of criminal laws designed to punish cruelty to animals. ALDF devotes substantial resources to cases involving cruelty to animals, and thus has extensive knowledge of the challenges law enforcement officials face in prosecuting these crimes and the interests served by more effective enforcement of these laws.

¹ Pursuant to Supreme Court Rule 37.6, *Amicus* submitting this brief and its counsel represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *Amicus* paid for or made a monetary contribution toward the preparation and submission of this brief. This *amicus* brief is filed with the consent of the parties. The letters of consent dated May 13, 2009 and May 27, 2009 are on file with the Clerk of Court in accordance with Supreme Court Rule 37.3(a).

I. INTRODUCTION

Every state in the Nation has criminalized animal cruelty, and the U.S. Congress has joined that unanimous chorus by making animal protection a matter of federal law. Americans are joined by members of the international community in their commitment to protect animals from abuse. But illegal cruelty still continues, fueled in part by the market for photographic and video depictions of animal abuse. “Crush videos” are customized for individuals who like to view animals being smashed underfoot. Dog fighting videos enrich those who stage such events by allowing audiences to attend remotely—virtually every state criminalizes actual attendance—and wager on the outcome.

Congress intended by enacting 18 U.S.C. § 48 to attack this market and thereby target one of the reasons acts of animal cruelty are committed. As with the child pornography laws at issue in *New York v. Ferber*, 458 U.S. 747 (1982), § 48 furthers a compelling interest by criminalizing depictions that are “an integral part of conduct in violation of . . . valid criminal statute[s].” *Id.* at 762 (internal quotation marks omitted). As Congress has found, animal cruelty is often committed so that others can watch. It is those who peddle to that market who are § 48’s target. The statute’s language could not be plainer: “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 five years, or both.” 18 U.S.C. § 48(a).

At the same time, § 48 also recognizes there may be depictions of animal cruelty that contain an expressive message beyond the commission of acts of animal cruelty. Consistent with *Miller v. California*, 413 U.S. 15 (1973), § 48 does not criminalize such depictions. If there is some expressive message, if there is content of “serious religious, political, scientific, educational, journalistic, historical, or artistic value,” there is no criminal penalty. 18 U.S.C. § 48(b); *Miller*, 413 U.S. at 34. Section 48 criminalizes depictions only when the depiction’s sole expressive content is an illegal act of cruelty.

For these reasons, § 48 does not violate the First Amendment, and the Third Circuit’s analysis is simply wrong. See *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (*en banc*).

II. SUMMARY OF ARGUMENT

As *Ferber* recognized, in rare circumstances the depiction of an illegal act is so devoid of expressive content and contributes so directly to the evils of that conduct that it enjoys no First Amendment protection. The *Ferber* Court articulated five criteria in support of its conclusion that depictions of children engaged in sexual acts could be criminalized for this reason. *Ferber*, 458 U.S. at 756-64. Those same criteria justify § 48.

First, the government has a compelling interest in prohibiting cruelty to animals. All 50 states have long-standing laws prohibiting acts of animal cruelty. These laws are animated by more than mere principles of moral justice for the most victimized and powerless members of our society, but also for the protection of human society in light of

the proven correlation between cruelty to animals and violence to people. Section III.A., *infra*.

Second, the distribution of photographs and films depicting animal cruelty is intrinsically connected to the acts of cruelty they portray. The acts of animal cruelty targeted by § 48 are themselves criminal, and are committed in secret, to avoid detection by law enforcement. However, the commercial distribution of materials that § 48 prohibits is by its nature a more public process that law enforcement can identify in its efforts to stop the underlying practice. If the market for cruelty videos is eliminated, the commercial motivation for the commission of those acts of cruelty will be greatly diminished. By prohibiting the marketing of these depictions, Congress is taking a permissible step toward eliminating acts of cruelty. Section III.B., *infra*.

Third, the advertisement and sale of depictions of animal cruelty provide an economic motive for, and are an integral part of, the commission of acts of animal cruelty. The marketplace for depictions of animal cruelty economically benefits and motivates the participants in the conduct, who then provide these depictions to those who are unable or unwilling to commit the act but who nonetheless will pay to see the acts performed by others. Section III.C., *infra*.

Fourth, there is little, if any, dispute that the “value” of animal cruelty is, in the language of *Ferber*, “exceedingly modest, if not *de minimis*.” *Id.* at 762. The same is true of depictions whose sole

expressive content is the act of cruelty. Section III.D., *infra*.

Fifth, criminalization is consistent with this Court's First Amendment jurisprudence. Section 48 seeks to regulate the criminal conduct of animal cruelty. It does so by attacking one of the reasons that animal cruelty is committed: so that the act can be memorialized for persons interested in viewing the act of cruelty. Section 48 does not seek to regulate protected speech. If there is some expressive content to a depiction, § 48 does not criminalize it. If, and only if, the only expressive content is the criminal act of animal cruelty, does § 48 apply.

III. ARGUMENT

The Third Circuit correctly observed that this Court rarely recognizes new forms of unprotected speech due to its respect for the important protections embodied in the First Amendment. However, in *Ferber*, this Court recognized that depictions of acts can be criminalized because of their integral relationship to the act itself. While the specific factual context here is different from *Ferber*, this Court's reasoning in that case applies directly here. As established *infra*, the state has a compelling interest in preventing animal cruelty, and for reasons much like those employed in *Ferber*, the act of animal cruelty and its depiction are inextricably intertwined. Section 48 criminalizes depictions of animal cruelty with no protected expressive content, and therefore it does not regulate protected speech.

A. *Ferber* Factor One: The Government Has a Compelling Interest in Prohibiting Animal Cruelty.

This Court in *Ferber* started its analysis with the observation that the government’s interest in “safeguarding the physical and psychological well-being of a minor is compelling.” *Ferber*, 458 U.S. at 756-57 (internal quotation marks omitted). This observation applies equally to the protection of animals, because animal cruelty affects humans and animals alike.

For almost two centuries, states have deployed their police powers to outlaw the malicious and unnecessary infliction of suffering on animals. *See* Section III.A.1, *infra*. The federal government has followed suit, imposing laws that mandate the “humane” slaughter of livestock and requiring the “humane” treatment of animals used in medical and scientific research. *Id.*

The United States does not stand alone in this area. More than 30 countries prohibit cruelty to animals. *See id.* Indeed, some countries have joined the United States in prohibiting the recording, sale, or possession of videos depicting animal cruelty.

Such laws exist because legislatures have concluded that the protection of animals furthers fundamental societal interests. *See* Section III.A.2, *infra*. These laws further the state’s interests in protecting animals, they preserve public morals, and they protect citizens from the degrading and dehumanizing effects of inflicting and witnessing such cruelty. *See, e.g., Bland v. People*, 76 P. 359, 362-63 (Colo. 1904) (“[I]t is within the police power of

the state to prohibit cruelty to animals, because such prohibition is a protection to the animals and tends to conserve the public morals.”).

In light of this, the Third Circuit’s conclusion that there was no compelling interest in protecting animals against cruelty is without basis. *See* Section III.A.3, *infra*.

1. States and the Federal Government Have Long Recognized the Compelling Interest in Prohibiting Animal Cruelty.

Every state has criminalized animal cruelty. While some states make exceptions for certain acts, there is uniform agreement that the wanton, unnecessary infliction of suffering on animals has no place in our society.²

² *See, e.g.*, Alaska Stat. § 11.61.140(a)(1) (“knowingly inflict[ing] severe and prolonged physical pain or suffering on an animal”); Cal. Penal Code § 597(a) (“maliciously and intentionally maim[ing], mutilat[ing], tortur[ing], or wound[ing] a living animal, or maliciously and intentionally kill[ing] an animal”); Conn. Gen. Stat. § 53-247(a) (“mutilat[ing] or cruelly beat[ing] or kill[ing] or unjustifiably injur[ing] any animal”); Idaho Code Ann. § 25-3502(5)(a) (“[t]he intentional and malicious infliction of pain, physical suffering, injury or death upon an animal”); *id.* § 25-3504; 510 Ill. Comp. Stat. § 70/3.03(a) (“infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering, or agony of the animal”); Iowa Code § 717B.3A(1) (“inflict[ing] upon the animal severe physical pain with a depraved or sadistic intent to cause prolonged suffering or death”); Kan. Stat. Ann. § 21-4310(a)(1) (“[i]ntentionally and maliciously killing, injuring, maiming, torturing, burning or mutilating any animal”); Ky. Rev. Stat. Ann. § 525.130(1)(a) (*footnote continued...*)

(“intentionally or wantonly . . . [s]ubject[ing] any animal to or caus[ing] cruel or injurious mistreatment through . . . causing it to fight for pleasure or profit . . . mutilation, beating, . . . tormenting . . .”); Minn. Stat. § 343.21(1) (“tortur[ing], cruelly beat[ing], . . . or unjustifiably injur[ing], maim[ing], mutilat[ing], or kill[ing] any animal”); Mo. Rev. Stat. § 578.012(1) (“[i]ntentionally or purposely kill[ing] an animal . . . [or] purposely or intentionally caus[ing] injury or suffering to an animal”); Mont. Code Ann. § 45-8-217 (“purposely or knowingly . . . kill[ing] or inflict[ing] cruelty to an animal with the purpose of terrifying, torturing, or mutilating the animal”); Neb. Rev. Stat. § 28-1008(4) (“knowingly and intentionally kill[ing], maim[ing], disfigur[ing], tortur[ing], beat[ing], mutilat[ing], burn[ing], scald[ing], or otherwise inflict[ing] harm upon any animal”); *id.* § 28-1009(2); N.J. Stat. Ann. § 4:22-17(b)(1) (“[t]orment[ing], tortur[ing], maim[ing], hang[ing], poison[ing], unnecessarily or cruelly beat[ing], or needlessly mutilat[ing] a living animal or creature”); N.M. Stat. Ann. § 30-18-1(E) (“intentionally or maliciously torturing, mutilating, injuring or poisoning an animal; or maliciously killing an animal”); N.C. Gen. Stat. § 14-360(b) (“maliciously tortur[ing], mutilat[ing], maim[ing], cruelly beat[ing], disfigur[ing], poison[ing], or kill[ing], or caus[ing] or procur[ing] to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal”); Ohio Rev. Code Ann. § 959.13(A)(1) (“[t]ortur[ing] an animal, . . . unnecessarily or cruelly beat[ing], needlessly mutilat[ing] or kill[ing]”); S.C. Code Ann. § 47-1-40(B) (“tortur[ing], torment[ing], needlessly mutilat[ing], cruelly kill[ing], or inflict[ing] excessive or repeated unnecessary pain or suffering upon any animal or by omission or commission caus[ing] the acts to be done”); S.D. Codified Laws § 40-1-2.2 (“any act or omission whereby unnecessary, unjustifiable, or unreasonable physical pain or suffering is caused, permitted, or allowed to continue including acts of mutilation”); *id.* §§ 40-1-2.4, 40-1-27; Va. Code Ann. § 3.2-6570(A)(i) (“tortur[ing], ill-treat[ing], willfully inflict[ing] inhumane injury or pain not connected with bona fide scientific or medical experimentation, or cruelly or unnecessarily beat[ing], maim[ing], mutilat[ing] or

(footnote continued...)

All 50 states specifically prohibit dog fighting.³ Sponsoring or participating in a dog fight is a felony in every State.⁴ In 48 states and the District of Columbia, it is illegal even to attend a dog fight, including in Pennsylvania, where Respondent was convicted for selling his videotapes.⁵ Additionally, in recognition of the fact that dog fighting rings resemble other organized criminal operations, two states have made dog fighting a predicate offense to their state criminal Racketeer Influenced and Corrupt Organizations acts. *See* Or. Rev. Stat. §§ 166.715(6)(a)(T), 167.365, 167.370; Va. Code Ann. §§ 18.2-513, 3.2-6571.

kill[ing] any animal, whether belonging to himself or another”); Wash. Rev. Code § 16.52.205(1) (“intentionally inflict[ing] substantial pain on, caus[ing] physical injury to, or kill[ing] an animal by a means causing undue suffering”).

In addition, Illinois specifically outlaws “any visual or auditory depiction” of animal cruelty (defined to include cruel treatment and animal torture), subject to an exception similar to the federal statute at issue here, and provides for punishment by prison time or probation as well as appropriate psychological or psychiatric evaluation and treatment. 510 Ill. Comp. Stat. § 70/3.03-1. For a comprehensive overview of state statutes, see *Stevens*, 533 F.3d at 223 n.4 (citing statutes).

³ *See generally* Animal Legal Defense Fund, Animal Protection Laws of the United States and Canada, <http://www.aldf.org/article.php?id=259> (last visited June 12, 2009); Animal Legal Defense Fund, Animal Fighting Facts, <http://www.aldf.org/article.php?id=927> (last visited June 12, 2009).

⁴ Animal Protection Laws, *supra* note 3; Animal Fighting Facts, *supra* note 3.

⁵ Animal Protection Laws, *supra* note 3; Animal Fighting Facts, *supra* note 3.

The prevention of animal cruelty has always been part of American law and culture. Anti-cruelty laws in America predate the founding of the Nation. As early as 1641, the Massachusetts Bay Colony prohibited “any Tirranny or Crueltie towards any brute Creature which are usuallie kept for man’s use.” Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, in *Animals and Their Legal Rights—A Survey of American Laws from 1641-1990* 1, 1 (Animal Welfare Inst. 4th ed. 1990). These laws have been motivated historically by concerns about animal welfare, public morality, and the negative effects such cruelty has on society and on its individual members. *See generally* Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law’s Role in Prevention*, 87 Iowa L. Rev. 1 (2001); David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800’s*, 1 Det. Coll. L. Rev. 1 (1993).

Over the last 50 years, the federal government has followed suit. The Humane Methods of Slaughter Act of 1958 declared that “the use of humane methods in the slaughter of livestock prevents needless suffering,” and accordingly made it the “policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.” 7 U.S.C. § 1901. The Animal Welfare Act of 1966 declared that regulation of the conditions under which animals are exhibited publicly or used in research facilities “is necessary . . . to insure that [such] animals . . . are provided humane care and

treatment.” 7 U.S.C. § 2131.

Congress has also passed statutes expressly directed at the protection of particular animals from cruel and inhumane practices. The Horse Protection Act of 1970 declared that the “soring” of horses—a painful practice developed by humans and used to accentuate horses’ natural gaits—“is cruel and inhumane.” 15 U.S.C. §§ 1822(1), 1824(1). The Act prohibits transporting or showing horses who have been sored for exhibition, in order to “destroy the incentive of owners and trainers to painfully mistreat their horses.” H.R. Rep. No. 94-1174, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1699. Federal law prohibits trade in dog or cat fur, based on the Congressional finding that “[t]he methods of housing, transporting, and slaughtering dogs and cats for fur production are generally unregulated and inhumane” and “[t]he trade of dog and cat fur products is ethically and aesthetically abhorrent to United States citizens.” Tariff Suspension & Trade Act, Pub. L. No. 106-476, Title I § 1442, 114 Stat. 2101, 2163-64 (2000); 19 U.S.C. § 1308(b)(1)(A). Of particular salience here, federal law also expressly prohibits “knowingly sponsor[ing] or exhibit[ing] an animal in an animal fighting venture” such as dog fighting, and imposes a prison term of up to five years for each violation. 7 U.S.C. § 2156(a); 18 U.S.C. § 49.

Finally, there is an emerging international consensus in prohibiting cruelty to animals. The following represent selective examples of countries that expressly prohibit cruelty towards animals by

either statute or constitutional provision: Australia (New South Wales),⁶ Bangladesh,⁷ Barbados,⁸ Brazil,⁹ Bulgaria,¹⁰ Canada,¹¹ China (Hong Kong),¹² Czech Republic,¹³ France,¹⁴

⁶ Prevention of Cruelty to Animals Act, No. 200 (1979) (N.S.W., Austl.), <http://www.legislation.nsw.gov.au/fragview/inforce/act+200+1979+whole+0+N?TITLE=%22Prevention%20of%20Cruelty%20to%20Animals%20Act%201979%20No%20200%22&nohits=y&toctnav=y%20>.

⁷ Cruelty to Animals Act, 1920 (Act No. I of 1920) (consol. 1973) (Bangl.), *translation available at* <http://faolex.fao.org/docs/texts/bgd35755.doc>.

⁸ Prevention of Cruelty to Animals (Amendment) Act, 2007-43 (2007) (Barb.), <http://faolex.fao.org/docs/pdf/bar82465.pdf>.

⁹ Constituição Federal [C.F.] [Constitution] art. 225 (Braz.), *translated in* Rüdiger Wolfrum & Rainer Grote, *Constitutions of the World, The Federative Republic of Brazil* (Keith S. Rosenn trans., Oxford Univ. Press) (2008).

¹⁰ Zakon za veterinarната dejnost [Law on Veterinary Activity] (2005) (Bulg.), *abstract available at* Martindale-Hubbell Law Digest, Bulgaria, at 27 (2008).

¹¹ Canada Criminal Code, R.S.C., ch. C-46, ¶¶ 445.1-447.1 (2008) (Can.), *available at* <http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf>.

¹² Prevention of Cruelty to Animals Regulations (Cap. 169A) (1935) (consol. 2006) (H.K.), <http://faolex.fao.org/docs/texts/hk69167.doc>.

¹³ Zakon na ochranu zvirat proti tyrani [Act on the Protection of Animals Against Cruelty], Collection of Laws No. 149 of 2004 (2004), as amended (2006) (Czech Rep.), <http://faolex.fao.org/docs/html/cze74081.htm>, *abstract available at* http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=074081&database=FAOLEX&search_type=link&table=result&lang=eng&format_name=@ERALL.

¹⁴ Code Pénal [C. Pen.] [Penal Code] arts. 521-1, 521-2 (Fr.), *translation available at* <http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3858> (last visited June 8, 2009).

Germany,¹⁵ India,¹⁶ Israel,¹⁷ Italy,¹⁸
 Jamaica,¹⁹ Kenya,²⁰ Malaysia,²¹
 Malta,²² New Zealand,²³ Pakistan,²⁴

¹⁵ Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] art. 20a (F.R.G.), *translated in* Basic Law for the Federal Republic of Germany (Christian Tomuschat & David P. Currie trans.) (2008), *available at* http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf.

¹⁶ The Prevention of Cruelty to Animals Act, No. 59 of 1960; India Code (1993), v. 26 (India), <http://envfor.nic.in/legis/awbi/awbi01.pdf>.

¹⁷ Cruelty to Animals Law (Animal Protection), 5754-1994 (1994) (Isr.), *translation available at* <http://faolex.fao.org/docs/pdf/isr21817e.pdf>.

¹⁸ Act No. 189 Prohibiting Cruelty to Animals, Gazz. Uff. n. 178 (2004) (Italy), <http://faolex.fao.org/docs/texts/ita45509.doc>, *abstract available at* http://faolex.fao.org/cgi-bin/faolex.exe?database=faolex&search_type=query&table=result&query=LEX-FAOC045509&format_name=@ERALL&lang=eng.

¹⁹ Cruelty to Animals Act, Laws of Jamaica (Cap. 86), authorized by L.N. 95/1997 (consol. 1997) (Jam.), <http://faolex.fao.org/docs/pdf/jam81623.pdf>.

²⁰ Prevention of Cruelty to Animals Act, ch. 360 (1962) (consol. 2005) (Kenya), <http://faolex.fao.org/docs/texts/ken63702.doc>.

²¹ Animals Act, 1953, Act 647 (consol. 2006) (Malay.), *translation available at* <http://faolex.fao.org/docs/texts/mal72832.doc>.

²² Animal Welfare Act (Cap. 439), Act No. XXV of 2001 (Malta), <http://faolex.fao.org/docs/pdf/mlt29325.pdf>.

²³ Animal Welfare Act 1999, 1999 No. 142, as amended last 2005 (N.Z.), *available at* http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html?search=ts_act_animal+welfare+act+1999_resel&sr=1.

²⁴ Prevention of Cruelty to Animals Act (No. XI of 1890S) (1890) (Pak.), <http://faolex.fao.org/docs/pdf/pak64057.pdf>.

Philippines,²⁵ Poland,²⁶ Saint Lucia,²⁷ Singapore,²⁸
 Sri Lanka,²⁹ Sweden,³⁰ Switzerland,³¹ Taiwan,³²
 Turkey,³³ Uganda,³⁴ the United Kingdom,³⁵

²⁵ Animal Welfare Act, Rep. Act No. 8485 (1998) (Phil.), <http://faolex.fao.org/docs/texts/phi19221.doc>.

²⁶ Polish Animal Protection Act, OJ No 111, Item 724 (1997), as amended (2006) (Pol.), http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=087209&database=FAOLEX&search_type=link&table=result&lang=eng&format_name=@ERALL.

²⁷ Animals Act, 2003 (No. 25 of 2003) (St. Lucia), <http://faolex.fao.org/docs/pdf/stl50645.pdf>.

²⁸ Animals and Birds Act (rev. 2002) (Sing.), *translation available at* <http://faolex.fao.org/docs/texts/sin46744.doc>.

²⁹ Prevention of Cruelty to Animals Ordinance (Cap. 573) (No. 22 of 1955) (Sri Lanka), *translation available at* <http://faolex.fao.org/docs/pdf/srl37158.pdf>.

³⁰ Djurskyddsförordning [The Animal Welfare Act] (Svensk författningssamling [SFS] 1988:534) (Swed.), *translation available at* <http://faolex.fao.org/docs/pdf/swe19544E.pdf>.

³¹ Loi fédérale sur la protection des animaux [LPA] [Federal Law of Animal Protection], Sept. 1, 2008, Recueil systematique du droit fédéral [RS] 455 (Switz.), http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=081093&database=FAOLEX&search_type=link&table=result&lang=eng&format_name=@ERALL.

³² Animal Protection Act, 1998 (Taiwan), *translation available at* <http://eng.coa.gov.tw/content.php?catid=8998>.

³³ Turkey Law No. 5199 (2004) (Turk.), *abstract available at* Martindale-Hubbell Law Digest, Turkey, at 4 (2008).

³⁴ Animals (Prevention of Cruelty) Act (Cap. 220), Ordinance No. 25 of 1957, as amended last by L.N. No. 224 of 1962 (Uganda), <http://faolex.fao.org/docs/pdf/uga41669.pdf>.

³⁵ Animal Welfare Act, 2006, c. 45 (U.K.), *available at* http://www.uk-legislation.hmso.gov.uk/acts/acts2006/pdf/ukpga_20060045_en.pdf.

Vanuatu,³⁶ Zambia,³⁷ and Zimbabwe.³⁸ Additionally, the European Convention for the Protection of Pet Animals—signed by 19 countries—decrees that humans have “a moral obligation to respect all living creatures and prevent cruel treatment.”³⁹

2. These Laws Further States’ Interests in Protecting Animals and Humans.

State legislatures enacted anti-cruelty laws for at least two reasons. *First*, there is agreement on one uncomplicated principle: animals deserve protection. As expressed more than a century ago, these laws function “for the benefit of animals, as creatures capable of feeling and suffering” and are “intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners.” *Stephens v. State*, 3 So. 458, 458 (Miss. 1888); *accord State v. Prater*, 109 S.W. 1047, 1049, 1050 (Mo. Ct. App. 1908) (“The statute we are dealing with, like much of the modern legislation on the subject, is designed for the protection of animals against cruelty . . . springing from a state of mind which renders the

³⁶ Prevention of Cruelty to Animals Act (Cap. 78), Laws of the Republic of Vanuatu (rev. ed. 1988) (Vanuatu), <http://faolex.fao.org/docs/pdf/van37243.pdf>.

³⁷ Prevention of Cruelty to Animals Act, Laws of Zambia (Cap. 245), Act No. 20 of 1920, amended last by Act No. 13 of 1994 (Zambia), <http://faolex.fao.org/docs/texts/zam47327.doc>.

³⁸ Prevention of Cruelty to Animals Act (Cap. 19:09) (consol. 1986) (Zimb.), <http://faolex.fao.org/docs/pdf/zim60704.pdf>.

³⁹ Council of Europe, European Convention for the Protection of Pet Animals, C.E.T.S. No. 125 (1987), <http://conventions.coe.int/Treaty/en/Treaties/Html/125.htm>.

perpetrator indifferent to the sufferings of the animal and the wrongful quality of the act . . .”).

Second, there was and is recognition that animal cruelty has a deleterious effect on humans. Not only are animals at stake: those who commit acts of animal cruelty are deadened to, more tolerant of, and more willing to engage in acts of violence against humans. “The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt.” *Commonwealth v. Turner*, 14 N.E. 130, 131-32 (Mass. 1887); *accord State v. Porter*, 16 S.E. 915, 916 (N.C. 1893). Put another way, the statutes are “directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those act[s].” *Commonwealth v. Higgins*, 178 N.E. 536, 537-38 (Mass. 1931).

Courts and legislatures continue to recognize that animal cruelty laws protect these interests. Animal cruelty statutes “represent[] the Legislature’s recognition that man’s inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind.” *People v. Garcia*, 812 N.Y.S.2d 66, 68 (N.Y. App. Div. 2006) (citing N.Y. Assembly Mem. in Supp. of L. 1999, ch. 118, 1999 McKinney’s Session Laws of NY, at 1585); *see also, e.g.*, Fla. Senate Staff Analysis & Economic Impact Statement, Senate Bill 1002, FL Staff An., S.B. 1002, 1/24/2002 (adopted at 2002 Fla. Sess. Law Serv. Ch. 2002-51 (C.S.S.B. 1002), revising Fla. Stat. § 828.12(2)) (noting that “studies in psychology, sociology, and criminology have demonstrated that there is a link between

animal cruelty and human violence”); Or. Rev. Stat. § 609.650(1) (“The Legislative Assembly finds that: . . . [t]here is a clear link between animal cruelty and crimes of domestic violence, including child abuse[.]”); Tex. Bill. Analysis, H.B. 653, TX B. An., H.B. 653, 7/17/2001 (adopted at 2001 Tex. Sess. Law. Serv. Ch. 450 (H.B. 653), codified at Tex. Penal Code § 42.09 (2001), later renumbered to Tex. Penal Code § 42.092) (“Research has confirmed a correlation between violence against animals and violence toward humans.”); *Peck v. Dunn*, 574 P.2d 367, 369 (Utah 1978) (“[L]egislation against such practices as the fighting of animals is justified for the purpose of regulating morals and promoting the good order and general welfare of society.”); *State v. Arnold*, 557 S.E.2d 119, 122 (N.C. Ct. App. 2001) (“The validity of statutes prohibiting cruelty to animals has been sustained as a valid exercise of the police power, their aim being not only to protect these animals, but also to conserve public morals, both of which are proper subjects of legislation.” (internal quotation marks omitted)), *aff’d*, 569 S.E.2d 648 (N.C. 2002); *Farm Sanctuary, Inc. v. Dep’t of Food & Agric.*, 74 Cal. Rptr. 2d 75, 79 (Cal. Ct. App. 1998) (“It has long been the public policy of this country to avoid unnecessary cruelty to animals,” as “[t]here is a social norm that strongly proscribes the infliction of any unnecessary pain on animals, and imposes an obligation on all humans to treat nonhumans humanely.” (internal quotation marks omitted)).

Research supports the correlation between crimes against animals and crimes against humans.⁴⁰ Individuals with “a history of repeated acts of intentional violence towards animals are at higher risk for exhibiting similar violence or lawlessness towards people in the future.”⁴¹

⁴⁰ Posting of Joshua K. Marquis to Talking Justice, Nat’l Dist. Attorneys Ass’n, Animal Abuse & Its Association with Other Violent Crimes, <http://communities.justicetalking.org/blogs/day17/archive/2007/08/14/animal-abuse-its-association-with-other-violent-crimes.aspx> (Aug. 14, 2007 4:04 p.m.); Susan Gaertner, Ramsey [Minn.] County Attorney, The Link Between Animal Abuse and a Culture of Violence, 42nd Annual Crim. Justice Inst. (Aug. 27, 2007), <http://www.co.ramsey.mn.us/NR/rdonlyres/E4B3303E-AF48-4DCC-98D1-A31347E96721/8718/GaertnerAnimalAbuseViolence.pdf> (“[O]rganized activities like dogfighting exacerbate a culture of violence that goes far beyond their animal victims.”); Am. Prosecutors Research Inst., Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence (2006); Am. Humane Ass’n, Facts About the Link Between Violence to People and Violence to Animals, <http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-facts-about-the-link.pdf> (last visited June 9, 2009); Am. Humane Ass’n, Understanding the Link Between Violence to People and Violence to Animals, <http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-understanding-the-link.pdf> (last visited June 9, 2009).

⁴¹ Am. Prosecutors Research Inst., *supra* note 40, at 10; *see also* Mass. Soc’y for the Prevention of Cruelty to Animals, Study Proves Link Between Animal Abuse and Other Crimes, http://www.mspca.org/site/PageServer?pagename=lawenforce_Link_Animal_Abuse_Other_Crimes (last visited June 9, 2009) (summarizing study that concluded a person who has committed animal abuse is five times more likely to commit violence against people).

Studies examining the histories of incarcerated violent offenders reveal a high incidence of animal cruelty offenses in childhood and adolescence.⁴² Likewise, studies show a high rate of recidivism against humans among offenders with histories of violent animal abuse. A ten-year study of at-risk children showed that those who were classified at ages six to twelve as “cruel to animals” were more than twice as likely as others to be subsequently referred to juvenile authorities for a violent offense.⁴³ And in one study of animal abusers, “the offense rates of animal abusers were up to five times higher than those seen in non-abusing individuals” of the same “age, gender, race and area of residence.”⁴⁴

In light of these data, it is not surprising that those who abuse animals are also far more likely to commit acts of domestic violence, child abuse and elder abuse, as well as other more violent crimes.⁴⁵

⁴² Am. Prosecutors Research Inst., *supra* note 40, at 34.

⁴³ *Id.* at 10.

⁴⁴ *Id.*

⁴⁵ Am. Humane Ass’n, Why Is the Link Important for [] Law Enforcement?, <http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-law-enforcement.pdf> (last visited June 9, 2009) (noting that the International Association of Chiefs of Police wrote, “[S]ocial scientists and law enforcement agencies have begun to examine cruelty to animals as a serious human problem closely linked to domestic violence, child abuse, elder abuse, and other violent crimes” as a “means of breaking the cycle of family violence from one generation to the next.” (internal quotation marks omitted)); *see also* Stephanie Verlinden, *et al.*, *Risk Factors in School Shootings*, 20 Clin. Psych. Rev. 20(1): 3, 39 (2000) (noting that Columbine
(footnote continued...)

Some of the most well-known serial killers in American history began their criminal careers by abusing animals.⁴⁶ In short, “[i]t is . . . widely recognized that those who abuse animals are more likely to engage in violence against humans.”⁴⁷ This is why the National District Attorneys Association recommends that “[w]hen people see a child or youth perform acts of cruelty on animals, they should take immediate action to stop this behavior, thus preventing future crimes where human lives may be saved.”⁴⁸

Because of this close connection, the Federal Bureau of Investigation (“FBI”) tracks such behavior in violent criminals. In the 1970s and 1980s the FBI organized its Behavioral Science Unit and the National Center for the Analysis of Violent Crime to identify and track serial killers and violent crimes that were particularly vicious, unusual, or repetitive, in hopes of finding patterns or common

High School assailants bragged about their “mutilation of animals”); *see also id.* at 44 (noting that “[c]ruelty to animals was common to approximately half of the assailants” in studied school shootings).

⁴⁶ Angela Campbell, Note, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 B.C.L. Rev. 463, 467 (2002).

⁴⁷ Press release, Humane Soc’y of the U.S., L.A. County District Attorney and The HSUS Announce Animal Fighting Reward Program (Mar. 27, 2008), http://www.hsus.org/acf/news/pressrel/los_angeles_animal_fighting_award_032708.html.

⁴⁸ Press Release, Nat’l Dist. Attorneys Ass’n, Michael Vick’s Sentence Sends a Strong Message to Those Who Abuse Animals Says the National District Attorneys Association (Dec. 10, 2007), http://www.ndaa.org/newsroom/pr_vick_07.html.

characteristics.⁴⁹ FBI surveys of imprisoned multiple murderers revealed that at least 46% had abused or tortured animals as juveniles.⁵⁰ As a result of this research, the “FBI incorporates animal cruelty into its ‘threat assessment’ technique during background checks.”⁵¹ This is so because animal cruelty is “prominently displayed in the histories of people who are habitually violent You can look at cruelty to animals and cruelty to humans as a continuum.”⁵²

3. The Third Circuit Improperly Concluded There Was No Compelling Interest.

Against this backdrop, the Third Circuit’s conclusion that there is no compelling state interest underlying § 48 lacks merit.

First, contrary to the Third Circuit’s conclusion, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) does not “suggest” that the protection of animals from cruelty is not a compelling interest. *Stevens*, 533 F.3d at 226. This Court struck down the statute at issue in *Lukumi* because it specifically targeted one religious group and its use of animals. *Lukumi*, 508 U.S. at 536,

⁴⁹ Randall Lockwood & Ann Church, *Deadly Serious: An FBI Perspective on Animal Cruelty*, 142 Cong. Rec. 27,261 (1996).

⁵⁰ *Id.*

⁵¹ Campbell, *supra* note 46, at 468 (citing Doris Day Animal Found., *The Violence Connection* 3, 7 (1997)).

⁵² *Id.* (quoting Supervisory Special Agent Alan Brantley of the FBI’s Investigative Support Unit).

542. The question of “compelling interest” was not discussed, even in *dicta*. Justice Blackmun’s concurrence clearly made this point, which the majority opinion did not contradict: “The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court’s views of the strength of a State’s interest in prohibiting cruelty to animals.” *Id.* at 580 (Blackmun, J., concurring).

Second, while it may be true, as the Third Circuit concluded, that this Court has generally found that a compelling interest “relate[s] to the well-being of human beings,” *Stevens*, 533 F.3d at 227, that standard is satisfied here. There *is* a significant detrimental impact on human welfare from exposure to and participation in animal cruelty. As established above, such conduct harms us as a society and individuals. Legislatures and courts extend protections to animals because those protections further “the well-being of human beings.” Section III.A.2, *supra*.

Had the Third Circuit considered the historical backdrop and the reasons legislatures extend protections to animals, it could not have reached the conclusion it did. State laws have protected animals for nearly two centuries. There is consensus that acts of animal cruelty are a blight upon and endanger our society. *See* Sections III.A.1, 2 *supra*. This long-standing and overwhelming legislative consensus leaves no other conclusion available: there is a compelling interest in protecting animals from cruelty. *See Ferber*, 458 U.S. at 758 (“We shall not second-guess this legislative judgment.”); *cf. Berman v. Parker*, 348 U.S. 26, 32 (1954) (“[W]hen the

legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . .”).

Third, the Third Circuit was incorrect in concluding that there is an insufficient link between § 48 and “the underlying act of animal cruelty.” *Stevens*, 533 F.3d at 228. As with child pornography, one reason people commit acts of animal cruelty is for the commercial gain to be had from the sale of photographs or videos of the criminal acts. This market is not interested in messages that would be protected by the First Amendment; it is interested only in the vicarious thrill of the cruel (and criminal) act itself. Such depictions cannot be produced without first committing a criminal act of animal cruelty. This stands in contrast to a computer-generated or simulated image of animal cruelty, and distinguishes the interest asserted in this case from that at issue in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Fourth, the link between animal cruelty and acts of violence against humans is not mere surmise. *See Stevens*, 533 F.3d at 229-30 (casting the government’s argument as one that presented a hypothetical connection between depictions of animal cruelty and other crimes); *see also Ashcroft*, 535 U.S. at 250 (rejecting argument that government had an interest in regulating virtual images of child pornography because it may compel the viewer to commit a crime). In contrast to *Ashcroft*, *Amicus* is not arguing that one who views a depiction of animal cruelty will then commit a crime. *See id.* at 253.

Rather, the market for depictions of animal cruelty requires acts of cruelty to animals, creates economic incentives for engaging in those acts, and increases the number of those acts. And it is the commission of the act of cruelty that directly correlates to violence against humans. Because the depiction of animal cruelty compels and motivates the commission of animal cruelty, which in turn leads to other forms of violence, the government has a compelling interest in regulating it.

B. *Ferber* Factor Two: The Distribution of Materials Showing Wanton Animal Cruelty Is Intrinsicly Related to the Underlying Abuse.

The second factor in the *Ferber* analysis justifying criminalization of child pornography was that “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsicly related to the sexual abuse of children.” *Ferber*, 458 U.S. at 759. The same case is readily made with respect to animal cruelty.

Animal cruelty is itself a crime, but it is rarely committed in the public eye, where law enforcement can effectively redress it. As reflected in Congressional testimony on the bill, the acts of animal cruelty the statute targets are committed covertly precisely to avoid unwanted government attention.⁵³ Crush videos, for example, have no

⁵³ Punishing Depictions of Animal Cruelty: Hearing on H.R. 1887 Before the Subcomm. on Crime, H. Comm. on the Judiciary (Sept. 30, 1999) (testimony of Tom Connors, Office of the Dist. Attorney, County of Ventura, State of Cal.) at 42, (footnote continued...)

known provenance; the actors are not identified or identifiable, and the producers' identities are unknowable.⁵⁴ Even the simple matter of disproving a statute of limitations defense is a challenge.⁵⁵

While the Third Circuit made much of the fact that the videos at issue in this case showed faces and provided information making the effort of enforcing anti-cruelty laws that much easier, *see Stevens*, 533 F.3d at 234, the court failed to consider two undisputed propositions: (a) the acts were long over by the time the films were sold; and (b) animal cruelty in general, and animal-fighting events in particular, are staged surreptitiously to avoid detection by law enforcement.⁵⁶ All forms of animal fighting are strictly guarded by an underground industry into which new participants are not

available at http://commdocs.house.gov/committees/judiciary/hju63862.000/hju63862_0F.htm.

⁵⁴ *Id.*

⁵⁵ 145 Cong. Rec. 25,896-25,897 (1999) (statement by Rep. Gallegly).

⁵⁶ *CNN: Protests Over Dog-Fighting Allegations Heat Up* (Transcript of Broadcast July 20, 2007, including Interview with Eric Sakach, Humane Soc'y Undercover Investigator), <http://transcripts.cnn.com/TRANSCRIPTS/0707/20/ng.01.html>; Steve Tuttle, *Going for the Throat*, Newsweek, June 4, 2007 (Transcript of Interview with Detective C. R. Beals of the L.A. County Sheriff's Dep't), <http://www.newsweek.com/id/32932/page/1>; Humane Soc'y of the U.S., Dogfight Investigative Techniques, Local Level, <http://www.nrvanimalshelters.com/VALAWS/Dogfight%20Investigative%20Techniques.pdf> (last visited June 5, 2009).

welcome until fully vetted.⁵⁷ A dog fight investigation “requires many of the same skills and resources as a major undercover narcotics investigation, and challenges the resources of any agency that seeks to respond to it.”⁵⁸

In other words, just as in *Ferber*, the production of these “materials is a low-profile, clandestine industry,” and “[t]he 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.” 458 U.S. at 760.

C. *Ferber* Factor Three: The Commercial Value of the Material Drives the Market.

The third *Ferber* element applies equally to the conduct that § 48 targets: “The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.” *Id.* at 761.

Crush videos exist because there is a commercial market for them. The acts depicted are not staged as spectator events. The cruelty is performed to sell products, and these videos are often made-to-order

⁵⁷ CNN, *supra* note 56; Tuttle, *supra* note 56; Humane Soc’y of the U.S., *supra* note 56; *see also* James C. McKinley, Jr., *Dogfighting Subculture Is Taking Hold in Texas*, N.Y. Times, Dec. 6, 2008, available at <http://www.nytimes.com/2008/12/07/us/07dogs.html>.

⁵⁸ Am. Soc’y for the Prevention of Cruelty to Animals, Dog Fighting FAQ, <http://www.aspca.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.html> (last visited June 5, 2009).

productions. H.R. Rep. No. 106-397, at 3 (1999). At the time the statute was enacted, as many as 3,000 crush videos existed. 145 Cong. Rec. 25,899 (1999) (statement by Rep. Jackson-Lee). They sold for as much as \$300.00 per video. 145 Cong. Rec. 25,896 (1999) (statement by Rep. Gallegly).

Thus, with respect to crush videos—and contrary to the Third Circuit’s conclusion below—criminalization of the depiction of the criminal act is a direct regulation of the crime itself. *See Stevens*, 533 F.3d at 228-29. The videos exist to permit their viewers to participate vicariously in the criminal act.

The same profit motive drives the production of dog fighting videos. While it is true, as the Third Circuit observed, that dog fighting events might involve live spectators, *see id.* at 230 & n.10, dog fighting videos also feed the market for those who are unable or unwilling to attend (much as the remote feed of a boxing match does). Like off-track betting, the production and distribution of dog fighting videos also allow viewers to place wagers on the outcome. Moreover, in addition to the direct economic benefits derived from the sale of these videos, an additional economic incentive is that dog fighters use the videos to promote the prowess of their animals, thus giving them access to more money in the form of larger purses and breeding fees.⁵⁹ The presence of live audiences at the matches

⁵⁹ *See* Jacob Silberman, *How Dogfighting Works*, How Stuff Works, <http://people.howstuffworks.com/dogfighting.htm> (“The Internet has played its own part in the spread of dogfighting in that it allows breeders to link up with clients and fans online and to exchange videos. . . . The ease of use of online video
(footnote continued...)”)

thus is not dispositive of (or even particularly relevant to) the question of whether economic gain is to be had from the production of dog fighting videos, or whether the videos should be subject to First Amendment protection. While criminalization of the depiction itself may not entirely eliminate the economic gain from the particular acts of cruelty involved, it substantially restricts the audience and thus the profit-making opportunity.

Finally, it is no defense to these facts to point out that dog fighting or other acts of animal cruelty would continue regardless of whether they are videotaped and sold. *Stevens*, 533 F.3d at 230-31. The same is true in the case of child pornography: sexual abuse of children continues even though its depiction is criminalized. Nevertheless, this Court has firmly held that Congress is entitled to attack the underlying criminal conduct by drying up the market for its depiction.

D. *Ferber* Factor Four: Animal Cruelty Films That Exist Solely to Depict Animal Violence Have No Value.

As the Court observed in *Ferber*, “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.” 458 U.S. at 762. There can be little debate that the

means that some handlers now broadcast fights on Web sites, allowing people to bet without even attending the fight.”) (last visited June 11, 2009); *see also Off the Chain* (Ardustry Home Entertainment 2005) (documentary on underground subculture of dog fighting).

act of illegal cruelty to animals has no value whatsoever; it is conduct that society has roundly and unequivocally rejected. The act having been condemned, a depiction of that act made solely for the purpose of showing the criminal act of animal violence also “has exceedingly modest, if not *de minimis*,” value. *Id.*

Section 48 seeks to regulate only the depiction of illegal acts of animal cruelty when there is no expressive content (aside from the cruelty) that attends it. Section 48 excepts from its reach any depictions of cruelty that seek to convey a protected message. If the depiction contains a message, or has some expressive content beyond the act of abusing an animal, § 48 does not apply by its terms. *See* 18 U.S.C. § 48(b). Moreover, if there is some expressive content, the statute does not distinguish between an expression that is appealing to society or abhorrent to it: there is no criminal penalty under § 48.

In this respect, the Third Circuit misunderstood the purpose of the “exceptions clause” of § 48(b). It does not allow discrimination between “speech utterly without social value” and “high value speech” so denominated by majority vote. *Stevens*, 533 F.3d at 232. Section 48(b) recognizes that “[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.” *Miller*, 413 U.S. at 34.

If, on the other hand, the only expressive content is the act of cruelty inflicted upon an animal, § 48 criminalizes its depiction. *Ferber* teaches that the

First Amendment does not protect these acts; the *conduct* is criminal and its depiction, when it is integrally related to the crime, as it is in this case, cannot claim protection from the First Amendment. *See* 458 U.S. at 761-62 (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949))).

E. *Ferber* Factor Five: Designating Depictions of Criminal Acts of Animal Cruelty as Outside First Amendment Protections Is Consistent with This Court’s First Amendment Jurisprudence.

This Court concluded its analysis in *Ferber* with the proposition that “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with [this Court’s] earlier decisions.” *Id.* at 763. Recognizing and classifying depictions of animal cruelty as beyond the protection of the First Amendment is entirely compatible with *Ferber*.

This Court has long recognized that the state may regulate conduct, and it may do so even if there is some incidental impact on speech provided “the communicative nature of conduct [is not the] basis for singling out that conduct for proscription.” *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (internal quotation marks omitted). For example, the burning of a draft card may be criminalized. *United States v. O’Brien*, 391 U.S. 367 (1968). Restrictions can be placed on where demonstrators may sleep. *Clark v.*

Community for Creative Non-Violence, 468 U.S. 288 (1984). Zoning laws may control locations of strip clubs. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality). And treasonous acts may be criminalized even if words are used to engage in the conduct. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 389 (1992). Such laws and regulations pass constitutional muster because they regulate conduct and not speech. *Clark*, 468 U.S. at 298-99; *O'Brien*, 391 U.S. at 376-77. They are not deemed to discriminate on the basis of the content of the message because such regulations are justified without reference to the content of the speech. See *R.A.V.*, 505 U.S. at 389.

Ferber extended the rationale of these cases to depictions of criminal acts, when the depiction of an act is indistinguishable from the act itself. *Ashcroft*, 535 U.S. at 254 (“In 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.”). In such instances, the government is entitled to regulate the depiction. The government may do so because it is regulating “how [these depictions] [are] made, not on what [they] communicate[].” *Id.* at 250-51. It may do so because the images “are themselves the product of [animal cruelty] . . . that the State ha[s] an interest in stamping . . . out without regard to any judgment about its content.” *Id.* at 249.

And in so doing, the government need not reach every act of animal cruelty. See *Stevens*, 533 F.3d at 233-34. Section 48 may not reach all acts of animal cruelty or their depictions, but that fact does not render the statute unconstitutional any more than a

law that prohibits obscenity “only in certain media or markets.” *R.A.V.*, 505 U.S. at 387. “[T]he First Amendment imposes not an ‘underinclusiveness’ limitation but a ‘content discrimination’ limitation upon a State’s prohibition of proscribable speech.” *Id.*

In sum, § 48 recognizes that there are depictions of animal cruelty deserving of First Amendment protection no matter how abhorrent to members of our society. Section 48 does not criminalize those expression-laden depictions, consistent with this Court’s First Amendment jurisprudence. *See Miller*, 413 U.S. at 34. But § 48 also recognizes that “the public portrayal of [animal cruelty] for its own sake, and for the ensuing commercial gain, is a different matter,” *id.* at 35, and the First Amendment does not protect such depictions.

IV. CONCLUSION

For the foregoing reasons, ALDF respectfully asks this Court to reverse the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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