

No. 08-769

In the

***SUPREME COURT OF THE UNITED STATES***

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UNITED STATES,

*Petitioner,*

v.

ROBERT J. STEVENS

*Respondent.*

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

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*AMICUS CURIAE* BRIEF OF THE THOMAS  
JEFFERSON CENTER FOR THE PROTECTION  
OF FREE EXPRESSION

IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE*  
..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

I. THE COMPELLING INTEREST THIS COURT HAS RECOGNIZED IN PROTECTING CHILDREN FROM THE HARMS ASSOCIATED WITH CHILD PORNOGRAPHY HAS NO COUNTERPART IN THE CONTEXT OF THE HUMANE TREATMENT OF ANIMALS. .... 4

    A. American cultural values and jurisprudence do not equate the interest in protecting children from sexual abuse with the interest protecting animals from inhumane treatment. .... 5

    B. The child pornography exception serves two related but separate compelling interests that 18 U.S.C. § 48 does not serve..... 7

    C. Speculation as to the effects that viewing depictions of animal cruelty might have on viewers is not a compelling enough interest to justify an exception to First Amendment protection..... 9

D. Unlike the prevention of the sexual abuse of children, there is no societal consensus on the humane treatment of animals. ....	10
II. UNLIKE CHILD PORNOGRAPHY, THERE IS NO PROOF THAT AUDIO AND VIDEO DEPICTIONS OF ANIMAL CRUELTY ARE INTRINSICALLY LINKED TO THE UNDERLYING HARMFUL ACT. ....	14
III. CRIMINALIZING THE SALE OF VIDEO AND AUDIO RECORDINGS OF ANIMAL CRUELTY WILL HAVE LITTLE EFFECT IN REDUCING ACTUAL ACTS OF ANIMAL CRUELTY. ....	17
IV. UNLIKE CHILD PORNOGRAPHY, DEPICTIONS OF ILLEGAL ACTS OF ANIMAL CRUELTY POTENTIALLY HAVE COMMUNICATIVE VALUE .....	18
V. AN ANIMAL CRUELTY EXCEPTION TO FIRST AMENDMENT PROTECTION WOULD BE INCONSISTENT WITH THE TYPE OF EXCEPTIONS CONTEMPLATED IN CHAPLINSKY. ....	20
CONCLUSION.....	25

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page</b>
<i>American Amusement Machine Ass’n v. Kendrick</i> , 244 F.3d 572 (7th Cir. Ind. 2001) .....	9, 24
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002).....	9, 10
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969) .....	21
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942) .....	passim
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	21
<i>Entertainment Software Association v. Granholm</i> , 426 F. Supp. 2d 646 (E.D. Mich. 2006) .....	9, 10
<i>Jenkins v. Georgia</i> , 418 U.S. 153 (1974) .....	24
<i>Miller v. California</i> , 413 U.S. 15 (1973).....	passim
<i>New York v. Ferber</i> , 458 U.S. 747 (1982) .....	passim
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) .....	21
<i>Osborne v. Ohio</i> , 495 U.S. 103 (1990) .....	5, 15

<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	21, 24
<i>Simon &amp; Schuster, Inc., v. New York State Crime Victims Board, et al.</i> , 502 U.S. 105 (1991) .....	7
<i>United States v. Stevens</i> , 533 F.3d 218 (3rd. Cir. 2008) (citations omitted).....	passim
<i>United States v. Williams</i> , 128 S.Ct. 1830 (2008).....	22, 23, 24
<i>Video Software Dealers Ass’n v. Schwarzenegger</i> , 556 F.3d 950 (9th. Cir. 2009).....	9
<i>Watts v. United States</i> , 394 U.S. 705 (1969) .....	21

**Statutes:**

Ala. Code §13A-11-241(2000) .....	13
Conn. Gen. Stat. § 53-247 (2004) .....	13
Idaho Code § 25-3504 (2008) .....	13
18 U.S.C. § 48.....	passim
3 P.S. § 459-601(a) .....	5

**U.S. Constitution:**

Amend. I .....passim

Amend. XIV ..... 6

**Other:**

Adam Ezra Schulman, *Animal-Cruelty Videos & Free Speech: Some Observations from Data*, <http://www.firstamendmentcenter.org/analysis.aspx?id=21814> (last visited July 14, 2009) ..... 16, 19

Home & Garden Publications, *How many vegetarians are there? A 2003 national Harris Interactive survey question sponsored by The Vegetarian Resource Group*, [http://findarticles.com/p/articles/mi\\_m0FDE/is\\_3\\_22/ai\\_106422316/](http://findarticles.com/p/articles/mi_m0FDE/is_3_22/ai_106422316/), (last visited July 24, 2009). ..... 12

Humane Society of the United States, *Humane Eating and the Three Rs*, <http://www.hsus.org/farm/humaneeating/rrr.html> (last visited July 14, 2009) ..... 11

John Dunham and Associates, *Meats Fuel America, Impact Methodology* (2009), <http://www.meatfuelsamerica.com/Meat Impact Methodology.pdf>..... 11

Masters of Foxhounds Association of America, *About Foxhunting*, <http://www.mfha.com/abfo.htm> (last visited July 14, 2009)..... 13

People for the Ethical Treatment of Animals, *Vegetarian 101*, <http://www.goveg.com/vegetarian101.asp> (last visited July 24, 2009) ..... 11

People for the Ethical Treatment of Animals, *Legislation Prohibiting or Restricting Animal Acts* (2005), [http://www.circuses.com/pdfs/AnimalActs\\_Legislation.pdf](http://www.circuses.com/pdfs/AnimalActs_Legislation.pdf) ..... 12

STATEMENT OF INTEREST  
OF *AMICUS CURIAE*<sup>1</sup>

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

The central issue of this case is not cruelty to animals. Indeed, regardless of the outcome of this case, the degree to which animals are treated humanely in this country will change very little, if at all. By contrast, the degree to which speech on any topic disfavored by government can be restricted will increase dramatically should 18 U.S.C. § 48 be held constitutional.

By its plain meaning, 18 U.S.C. § 48 does nothing to regulate, prohibit, or criminalize actual

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief, and their consent letters are on file with the Clerk's Office or attached.

acts of animal cruelty; rather, the statute only criminalizes visual or audio recordings of such acts. The United States is thus forced to concede that 18 U.S.C. § 48 is a content-based restriction that does not fall under any of the established categories of unprotected speech. U.S. Br. 12. As such, the United States seeks to save 18 U.S.C. § 48 from constitutional invalidation by proposing this Court adopt an open-ended approach to First Amendment analysis: rather than requiring the government to prove that unwelcome speech falls within an established exception to free speech, courts should consider creating a new category of unprotected expression anytime government claims it has a strong reason for wanting to suppress speech.

The United States attempts to temper the radical nature of its defense by casting its argument in terms of traditional First Amendment analysis and analogy to established categories of unprotected expression, particularly child pornography. The analogy to the child pornography exception is understandable because it “is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime.” *United States v. Stevens*, 533 F.3d 218, 226 (3rd. Cir. 2008) (citations omitted). Beyond the similarity of criminalizing the depiction of an act, examination of the rationale for creating a child pornography exception reveals little support for the United States’ proposed animal cruelty exception.

The opinion of the Court of Appeals and the Reply Brief for the Respondent fully address each of the arguments put forth by the United States. Rather than repeat those analyses, The Thomas Jefferson Center for the Protection of Free Expression believes it could best assist this Court by elaborating on the single issue of the inappropriateness of child pornography as a template for an animal cruelty exception to First Amendment protection; specifically, this brief will address the five factors identified in *New York v. Ferber*, 458 U.S. 747 (1982), that led this Court to conclude that child pornography was unprotected “speech.” Such a review will illustrate not only that society’s interest in protecting children is uniquely compelling and has no counterpart in the humane treatment of animals, but also that the harmful collateral effects of child pornography simply do not exist in the context of audio or visual recordings of acts of animal cruelty. Finally, examination of *Ferber’s* fifth factor will reveal that, unlike child pornography, excepting depictions of animal cruelty from First Amendment protection would represent a dramatic shift in this Court’s established approach of limiting categories of unprotected speech to those explicitly or implicitly recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

## ARGUMENT

In 1982, the Supreme Court was confronted with the question of whether sexually explicit images involving children were protected under the First Amendment if they did not meet the established

definition of the unprotected category of obscenity as set forth in *Miller v. California*, 413 U.S. 15, (1973). *Ferber*, 458 U.S. at 774. The *Ferber* Court articulated five factors that compelled its holding that non-obscene child pornography constituted an unprotected category of expression independent of obscene expression. As the Court of Appeals correctly recognized in this case, these five factors “do[] not translate well to the animal cruelty realm.” *Stevens*, 533 F.3d at 226.

I. THE COMPELLING INTEREST THIS COURT HAS RECOGNIZED IN PROTECTING CHILDREN FROM THE HARMS ASSOCIATED WITH CHILD PORNOGRAPHY HAS NO COUNTERPART IN THE CONTEXT OF THE HUMANE TREATMENT OF ANIMALS.

A key element of the United States’ argument for an animal cruelty exception to First Amendment protection is its assertion that preventing cruelty to animals, like protecting children from sexual abuse, is so compelling it justifies a limit on free expression. U.S. Br. 43. As the Court of Appeals noted, this “first factor is the most important because, under *Ferber*, if the Government’s interest is not compelling, then [18 U.S.C. § 48] necessarily violates the First Amendment.” *Stevens*, 553 F.3d at 226. While the goal of preventing cruelty to animals is indeed laudable, the government’s attempt to equate this interest with the *Ferber* analysis of a compelling interest lacks merit.

- A. American cultural values and jurisprudence do not equate the interest in protecting children from sexual abuse with the interest protecting animals from inhumane treatment.

While children and animals are both living creatures vulnerable to cruelty by human adults, the degree to which we protect children and animals against such abuse differs greatly. Morals, values, religious beliefs, customs and laws compel adult Americans to provide far greater protection to children than they do to animals or even other adults. *See Osborne v. Ohio*, 495 U.S. 103, 108 (1990) (holding that privacy interests cannot justify even mere possession of child pornography, as it may with obscene materials). Such disparate levels of protection stem not from the relative vulnerability of children and animals, but rather from the fact that American cultural values and jurisprudence simply do not equate human interests with those of animals.

Further evidence of this distinction can be found in the fact that animals are often legally designated as property. *See, e.g.*, 3 P.S. § 459-601(a). As such, animals can be forced to endure actions—forced sterilization, for example—that if performed on a human being would be illegal and considered immoral. Wild animals can be caught and imprisoned in zoos and forced to perform in the circuses merely for the viewing enjoyment of humans. Animals are also routinely and legally put to death for reasons involving behavior, health, nuisance, threat to humans and other animals (life threatening or not), or even the lack of a human owner. Humans, by

contrast, are put to death only after procedures constituting “due process of law” prove to an unbiased fact-finder that they committed a heinous act and are deserving of the death penalty. *See* U.S. Const. Amend. XIV.

Of course it does not follow that merely because society places a higher priority on the protection of children, the protection of animals is unimportant. Acts of wanton cruelty to animals are deserving of criminal sanction. Yet rather than punish such acts, 18 U.S.C. § 48 criminalizes “speech” depicting such acts. The issue therefore is whether the humane treatment of animals is to be balanced against the constitutional rights of humans. To conduct such a balancing test would endow the prevention of animal cruelty with unprecedented importance, creating an anomaly in American jurisprudence and societal values. As discussed below, animals are already subjected to lawful acts of cruelty and put to death for reasons far less compelling than a right enshrined in the United States Constitution. Despite this, the United States argues that in creating exceptions to First Amendment protection, this Court “has recognized a wide variety of governmental interests as ‘compelling,’ and the prevention of cruelty to animals . . . fits comfortably on this list.” U.S. Br. 31. In making this statement, however, the government fails to note that all the cases it cites in support involve the rights of humans, not animals.

- B. The child pornography exception serves two related but separate compelling interests that 18 U.S.C. § 48 does not serve.

The prohibition of child pornography seeks to protect children from two related but distinct harms. First, child pornography laws help to protect children from the harm caused by being manipulated, by force or other means, to participate in an illegal act. *Ferber*, 458 U.S. at 759. Second, laws criminalizing the mere possession of child pornography address the ongoing invasion of the victim's privacy and psychological suffering caused by knowledge of the existence of the material. *Id.* at 759-60, n10.

Examining both of these interests as they apply to depictions of animal cruelty reveals that 18 U.S.C. § 48 fails to effectively serve either. As discussed previously, rather than prohibit any actual acts of animal cruelty, the statute only criminalizes depictions of such acts. As such, 18 U.S.C. § 48 at best only arguably serves its stated interest of protecting animals from inhumane treatment by indirectly discouraging such acts—but only in cases in which the depicted act was committed for the purpose of recording it and in a location where the act was illegal. Yet, the United States fails to prove even this indirect connection because it never establishes a link between suppressing depictions and reducing acts of animal cruelty. *See Simon & Schuster, Inc., v. New York State Crime Victims Board, et al.*, 502 U.S. 105, 120-21 (1991) (“[T]he State has a compelling interest in compensating victims from the fruits of the crime, but little if any

interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime.”). In the case now before the Court, the United States is attempting to put Mr. Stevens in prison for his speech about *somebody else's* acts. He was not involved in any of the acts depicted in his videos. Indeed, he was not even involved in recording the acts, only the compiling of archival footage shot by others. Thus, Mr. Stevens is facing the loss of his liberty despite the fact he is not alleged to have committed one act of animal cruelty—prevention of which is allegedly the motivating interest behind 18 U.S.C. § 48.

Further, while animals may suffer ongoing harm from acts of cruelty, none of those harms are a result of the fact the acts are depicted on video or audio recordings. “[W]hen an animal suffers an act of cruelty that is captured on film (or by some other medium of depiction or communication), the fact that the act of cruelty was captured on film in no way exacerbates or prolongs the harm suffered by that animal.” *Stevens*, 533 F.3d at 230.

Therefore, the analogy to the compelling interests of the child pornography exception is inappropriate because one of these interests does not exist in the context of animal cruelty and the other is not effectively served by 18 U.S.C. § 48.

- C. Speculation as to the effects that viewing depictions of animal cruelty might have on viewers is not a compelling enough interest to justify an exception to First Amendment protection.

The United States argues that in addition to the interest in protecting animals, 18 U.S.C. § 48 also serves the goal of protecting potential viewers from the harmful effects of depictions of animal cruelty. U.S. Br. 34. As the Court of Appeals correctly determined, however, such speculation does not justify a limit on First Amendment freedoms. *Stevens*, 533 F.3d at 229-30.

In *Ferber*, the Court emphasized that the rationale for the child pornography exception was the protection of the human subjects, not shielding viewers from unwelcome effects. *Ferber*, 558 U.S. at 763. *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002). Similarly, courts have rejected the idea that materials with violent content have a proven effect on minors similar to that of sexual materials; legislative attempts to limit minors' access to violent video games were struck down in several jurisdictions where the state attempted to make this analogy. For example, in *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009) the Ninth Circuit noted that “[v]iolence and obscenity are distinct categories of objectionable depiction,” and refused to exempt materials depicting violence from First Amendment protection. 556 F.3d at 960 (citing *Kendrick*, 244 F.3d 572, 574-75 (7th Cir. Ind. 2001)). *See also Entertainment Software*

*Association v. Granholm*, 426 F. Supp. 2d 646, 652 (E.D. Mich. 2006).

Finally, the United States' concern for the behavior that might result from viewing video depictions of animal cruelty is contradicted by its earlier claim that 18 U.S. § 48 "does not restrict speech because its communicative or persuasive effect might cause illegal activity." U.S. Br. 30. As this Court has made clear, the "prospect of a crime ... does not justify laws suppressing protected expression." *Free Speech Coalition*, 535 U.S. at 245.

- D. Unlike the prevention of the sexual abuse of children, there is no societal consensus on the humane treatment of animals.

The United States is correct in arguing that societal consensus is an important factor in assessing whether an asserted governmental interest is a compelling societal interest. U.S. Br. 24. While many Americans, if not most, might claim that the humane treatment of animals is an interest of great importance, the harsh truth is that the majority of Americans decline to give it precedence over other interests that are far less compelling than a right enshrined in the United States Constitution. To put it bluntly, our actions speak louder than our words. On a daily basis, many Americans set aside the goal of preventing animal cruelty in order to save time and money, and to satisfy personal indulgences and tastes. At the very least, the varying degree to which people allow the concern for animals to actually

guide their actions demonstrates that there is no societal consensus as to the proper balancing of animal and human interests.

The killing of animals for human consumption is a lawful, multi-billion dollar a year industry. John Dunham and Associates, *Meats Fuel America, Impact Methodology* (2009), [http://www.meatfuelsamerica.com/Meat Impact Methodology.pdf](http://www.meatfuelsamerica.com/Meat%20Impact%20Methodology.pdf). Yet many people believe that meat, poultry and fish are not required for a healthy human diet and therefore, the killing of animals is both unnecessary and inhumane. *See* People for the Ethical Treatment of Animals, *Vegetarian 101*, <http://www.goveg.com/vegetarian101.asp> (last visited July 24, 2009). Even if not advocating a complete cessation to the human consumption of animals, there are those who believe that the methods used in large-scale meat and poultry factories to raise and kill mass quantities of animals are inhumane. *See* Humane Society of the United States, *Humane Eating and the Three Rs*, <http://www.hsus.org/farm/humaneeating/rrr.html> (last visited July 14, 2009).

Despite the existence of less cruel methods of providing meat and poultry products, far more people purchase the products produced through less humane means because they are less expensive and are more readily available. Even assuming that most people would find that standard slaughterhouse treatment of animals is cruel, it is only the minority that prioritizes the comfort of animals over their own financial comfort or gustatory desires. *See* Home &

Garden Publications, *How many vegetarians are there? A 2003 national Harris Interactive survey question sponsored by The Vegetarian Resource Group*, [http://findarticles.com/p/articles/mi\\_m0FDE/is\\_3\\_22/ai\\_106422316/](http://findarticles.com/p/articles/mi_m0FDE/is_3_22/ai_106422316/), (last visited July 24, 2009). And although a distinction is commonly drawn between easy access to food—something everyone needs—and items that people merely may want, many Americans also choose to spend millions on lawfully produced items such as fur coats, animal-hide luxury items, and cosmetics developed through painful testing on animals.

The animal cruelty laws of the fifty states do not prove a societal consensus exists regarding the humane treatment of animals. Although these laws do prohibit animal cruelty to some extent, the variations among these laws in scope and nature reflect ideological splits in our society as to what treatment of animals should be made illegal, and what punishments it should earn. For example, there is tremendous disagreement about whether it is cruel to use animals for the entertainment of humans. A number of localities around the country have banned circuses, rodeos, and other traveling animal acts. People for the Ethical Treatment of Animals, *Legislation Prohibiting or Restricting Animal Acts* (2005), [http://www.circuses.com/pdfs/AnimalActs\\_Legislation.pdf](http://www.circuses.com/pdfs/AnimalActs_Legislation.pdf).

If a crime's punishment represents the degree to which society views the severity of a crime, the different penalties found in the states' animal cruelty

laws reveal a lack of consensus as to how compelling an interest is the humane treatment of animals. For example, in Idaho, any person “who subjects any animal to cruelty” is guilty of a misdemeanor only, while in Connecticut, any person who “maliciously . . . wounds or kills an animal” may be imprisoned for up to five years. Idaho Code § 25-3504 (2008); Conn. Gen. Stat. § 53-247 (2004). Some states punish cruelty to all animals similarly, whereas some have more severe punishments for certain species. *See, e.g.*, Conn. Gen. Stat. § 53-247 (2004), Ala. Code § 13A-11-241(2000) (stating penalties specifically for cruelty to a dog or cat).

Some activities which may be considered cruel to some are not legally punishable at all. This distinction reflects a lack of consensus not only about how harshly a person should be punished for inappropriate treatment of animals, but also about whether the treatment in question is inappropriate at all—whether it is, in fact, cruelty to animals. The hunting of animals, for example, is a lawful activity both cherished and opposed in this country. The goal of fox hunting and “beagling” is to train packs of dogs (or more properly “hounds”) to chase wild foxes, coyotes, or rabbits. *See* Masters of Foxhounds Association of America, *About Foxhunting*, <http://www.mfha.com/abfo.htm> (last visited July 14, 2009). If the hounds are successful in cornering their prey, the pack will often engage in literally tearing apart the animal. Because fox hunting and beagling are legal sports, video depictions of the pack killing its prey would not be prohibited under 18 U.S.C. § 48. But it is debatable whether such a depiction is

more or less “humane” than the images of pit bulls killing hogs, the possession of which was part of the basis for Mr. Stevens conviction under the federal statute.

That the law treats similar circumstances so differently illustrates that American attitudes towards the humane treatment of animals are incredibly diverse and often contradictory. By contrast, diversity of opinion regarding the sexual exploitation of children can only be found only on the outer fringe of society.

II. UNLIKE CHILD PORNOGRAPHY, THERE IS NO PROOF THAT AUDIO AND VIDEO DEPICTIONS OF ANIMAL CRUELTY ARE INTRINSICALLY LINKED TO THE UNDERLYING HARMFUL ACT.

The second *Ferber* factor compelling a child pornography exception to First Amendment protection was the finding that child pornography “is intrinsically related to the sexual abuse of children.” *Ferber*, 458 U.S. at 759. The Court offered two reasons for this connection: First, “the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation,” and second, the “distribution network for child pornography must be closed” in order to control the production of child pornography. *Id.* Contrary to the assertions of the United States, both of these justifications have little

relevance in the context of depictions of animal cruelty.

As discussed previously, although visual materials depicting animal cruelty create a permanent record of an animal's abuse, the harm suffered by the animal is not exacerbated by the fact that their abuse is recorded or that such materials are circulated. *Stevens*, 533 F.3d at 230. The abuse suffered by subjects of child pornography, by contrast, is far more complex. Children are abused in the creation of pornographic images and continue to suffer by the knowledge that their abuse may be viewed by countless numbers of people. *See Ferber*, 458 U.S. at 759, *Osborne v. Ohio*, 495 U.S. at 111. Additionally, such knowledge also forces the families of victims to share in this lifelong suffering. Child pornography may have repercussions beyond the physical or mental abuse of the child, as the victims and their families may have to pay for extensive counseling and suffer social stigmatization. As the Court of Appeals correctly recognized, a visual depiction of animal cruelty does not create such ongoing suffering. *Stevens*, 533 F.3d at 230.

The United States contends, “as in child pornography, the government can reasonably conclude that closing the ‘distribution network’ will decrease the production of illegal depictions of animal cruelty—and so decrease the frequency of animal cruelty itself.” U.S. Br. 36-37. This theory apparently is based on the *Ferber* Court’s finding that the act of creating child pornography is so secretive and clandestine that it is very difficult to

arrest and prosecute people for it. 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 sanctions on persons selling, advertising, or otherwise promoting the product.” *Ferber*, 458 U.S. at 760. Yet, as a recent study illustrates, the proposition that it is extremely difficult to successfully prosecute individuals for acts of animal cruelty is highly questionable. See Adam Ezra Schulman, *Animal-Cruelty Videos & Free Speech: Some Observations from Data*, <http://www.firstamendmentcenter.org/analysis.aspx?id=21814> (last visited July 14, 2009) [hereinafter *Schulman*]. Indeed, much of the available data indicates

(1) that once an arrest has been made, it is not difficult to prosecute animal-cruelty cases generally; (2) that it is even easier to prosecute dogfighting and cockfighting than average animal-abuse cases; (3) that once a conviction is secured, the reversal in animal-fighting cases is very low; and (4) that the absence of videotape evidence decreases the chances for a successful prosecution.

*Id.*

As will be discussed more fully below, even if some acts of animal cruelty are staged solely for the purpose of recording them, there is no proof of a connection comparable to that which exists between

child pornography and the sexual abuse of children. See *Stevens*, 533 F.3d at 230.

### III. CRIMINALIZING THE SALE OF VIDEO AND AUDIO RECORDINGS OF ANIMAL CRUELTY WILL HAVE LITTLE EFFECT IN REDUCING ACTUAL ACTS OF ANIMAL CRUELTY.

“The advertising and selling of child pornography provide an economic motive for and thus are an integral part of the production of child pornography.” *Ferber*, 538 U.S. at 762. This third *Ferber* factor involves many of the same issues as *Ferber*’s second factor in that both factors involve a “drying-up-the-market theory” that asserts, “the distribution network for child pornography must be closed so that the production of child pornography will decrease.” *Stevens*, 533 F.3d at 230-31.

While this theory is on firm ground in the context of child pornography, the facts of this case illustrate how tenuous is its applicability to depictions of animal cruelty. For example, two of the three videotapes on which Mr. Stevens' conviction was based concerned organized dog fighting. Such dogfights are typically staged for a live audience who pay an admission fee to view the fight. See *Humane Society’s Br. 13-14*. The participants enjoy even greater revenue from the gambling that the fights generate. *Id.* Similar conclusions can be made about bull fighting, cock fighting, and organized fights among different species of animals. Unlike child pornography, the principal economic motives for

many acts of animal cruelty exist regardless of whether such acts are captured on video.

Further, 18 U.S.C. § 48 will have no success in drying up the market in states and foreign countries where the depicted acts of animal cruelty are legal. A potential animal abuser may only choose to engage in illegal activities when the potential for monetary gain is great, but without the risk of punishment, even a modest financial gain would encourage acts of animal cruelty for the purpose of recording them.

#### IV. UNLIKE CHILD PORNOGRAPHY, DEPICTIONS OF ILLEGAL ACTS OF ANIMAL CRUELTY POTENTIALLY HAVE COMMUNICATIVE VALUE.

The fourth factor identified by the *Ferber* Court as justifying a child pornography exception to First Amendment protection was “the value of permitting . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.” *Ferber*, 458 U.S. at 762. Ironically, the text of 18 U.S.C. § 48 itself illustrates that this factor is not applicable in the animal cruelty context. As noted above, the statute exempts illegal depictions that possess “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” 18 U.S.C. § 48. These exemptions acknowledge that, unlike child pornography, there are depictions of animal cruelty that have value, even if the depicted acts are illegal.

If this were not the case, there would be no need for the exemptions.

The “value” component of 18 U.S.C. § 48 was obviously inspired by the similar—but not identical—provision contained in the *Miller* formulation of obscenity. *See Miller* 413 U.S. at 24. Unlike the *Miller* formulation, however, the terms of 18 U.S.C. § 48 do not require that “value” be based on an assessment of the work as a whole. Thus, the possibility exists that a particularly gruesome depiction of animal cruelty might blind a jury to the fact it is but one part of a work of value.

Further, expression within the recognized unprotected categories has consistently been deemed to have little or no social or educational value; they do not constitute the kind of “step to truth” that the First Amendment is meant to protect. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This absence of truth, however, has not been shown to exist with films or videos depicting animal cruelty. Where the camera is not part of the acts depicted, there is necessarily communicative value to the footage; it shows animals as they behave and how other animals and humans treat them. The video therefore has some inherent journalistic value even if it was not shot for that purpose. Indeed, one example of this is the potential of an animal cruelty video providing evidence that aids in the prosecution of those who committed the illegal act depicted in the video. *See Schulman*.

Although it could be argued that in rare circumstances, child pornography may be utilized for its documentary value (see *Ferber* 458 U.S. at 778, Stevens, J., concurring), this prospect does not outweigh the interests in prohibiting child pornography for two reasons. As the majority found in *Ferber*, child pornography could be used for informational purposes in only “a tiny fraction” of cases. *Id.* at 773. As demonstrated by the frequent use of animal cruelty footage by animal rights’ groups and even Mr. Stevens’s use of archival footage in the videos at issue in the immediate case, this rationale is not applicable to the animal cruelty context. More fundamentally, the value of any footage is relative, and in the child pornography context it is diminished significantly when balanced against the continuing harm to the victim caused by the mere existence of the material. This ongoing harm to the victim more than justifies the prohibition of sexually explicit materials involving minors. As noted previously, there is no corresponding ongoing harm to the animal victims in depictions of animal cruelty. See *Stevens*, 533 F.3d at 230.

V. AN ANIMAL CRUELTY EXCEPTION TO FIRST AMENDMENT PROTECTION WOULD BE INCONSISTENT WITH THE TYPE OF EXCEPTIONS CONTEMPLATED IN *CHAPLINSKY*.

*Ferber*’s fifth factor states, “Recognizing and classifying child pornography as a category of material outside the protection of the First

Amendment is not incompatible with our earlier decisions.” *Ferber*, 458 U.S. at 763. The United States argues that this factor is simply recognition of the categorical approach to First Amendment protection articulated in *Chaplinsky v. New Hampshire*. See U.S. Br. 11. “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 571-72. Although this statement was dicta (*Chaplinsky’s* holding only established “fighting words” as an unprotected category of speech), it is true that subsequent decisions of this Court represent a categorical approach to unprotected speech. See, e.g., *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (speech inciting lawless activity); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (“true threats”); *Ferber*, 458 U.S. at 756 (child pornography).

Contrary to the argument of the United States, the prevention of cruelty to animals does not fit “comfortably on this list.” See U.S. Br. 31. It is apparent from *Chaplinsky’s* use of the past tense that that history and tradition were guiding the Court’s listing of unprotected categories. “There are *certain well-defined and narrowly limited* classes of

speech . . . *which have never* been thought to raise any Constitutional problem. *Chaplinsky*, 315 U.S at 571-72 (emphasis added); see also *Cohen v. California*, 403 U.S. 15, 24 (1971) (“[W]e cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions.”).

That the Court was not opening the door to the wholesale creation of entirely *new* categories of unprotected speech is evidenced by the fact that all the exceptions to free speech recognized today were either explicitly listed or strongly implied in the language of *Chaplinsky*. Obscenity, defamation (in the form of libel), “fighting” words, and incitement are specifically mentioned. Although “true threats” is not explicitly listed, it is an exception that implicates two of the same concerns articulated by the Court: words that by their very utterance inflict injury and speech inciting lawless activity.<sup>2</sup>

Pornographic images of children also inflict injury “by their very utterance” in that the children depicted suffer from the mere showing of the images.

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<sup>2</sup> Although *United States v. Williams*, 128 S.Ct. 1830 (2008), is sometimes cited as a new exception to First Amendment protection, the pandering conviction sustained in that case was held to be part of a “commission of [a] crime.” *Id.* at 1843. This act itself was not previously protected by First Amendment law, and as with other cases involving unprotected categories of speech, this holding is implicit in the interests articulated in *Chaplinsky*, namely prohibiting speech which “incite[s] an immediate breach of the peace.”

See *Ferber*, 458 U.S. at 758-59. And while child pornography is not specifically mentioned in *Chaplinsky*, few could argue that it does not fall under the meaning of “lewd.” Further, although child pornography is legally distinct from obscenity for the purposes of First Amendment protection (or lack of it), the two categories are closely related in their focus on sex. Indeed, in clarifying what constituted child pornography, the *Ferber* Court merely “adjusted” the *Miller* formulation of obscenity. See *Ferber*, 458 U.S. at 764-65; see also *United States v. Williams*, 128 S.Ct. 1830, 1836 (2008) (stating child pornography was “a related and overlapping category of proscribable speech” to obscenity).

This is not to say that any categorical exception to First Amendment protection must be premised on explicit or implicit authority in *Chaplinsky*. Rather, it is to recognize that under the First Amendment expression is presumptively protected, and that the extent of such protection may be ascertained by examining American history and tradition, not shifting cultural values.

Perhaps recognizing that an animal cruelty exception does not possess the foundation in *Chaplinsky* that child pornography does, Congress attempted to link its proposed exception to another category of unprotected expression. Included in 18 U.S.C. § 48 is a *Miller* inspired component limiting the reach of the statute to depictions that contain “serious religious, political, scientific, educational, journalistic, historical or artistic value.” Among the established exceptions to First Amendment

protection, a “value” component is unique to obscenity because the main reason for obscenity’s proscription is not that it is harmful, but that it is offensive. *See e.g., Williams*, 128 S.Ct. at 1835-36; *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 574 (7th. Cir., 2001). In declaring obscenity unprotected, this Court conducted a review of American history and societal values and concluded that some depictions of sex are both so offensive and lacking in value that they do not warrant First Amendment protection. *Miller*, 413 U.S. at 20. Yet this Court also recognized the uniqueness of an exception to free speech based in audience sensibilities and included a “value” component as a means to limit when the majority may impose its view on those who do not share the same judgment of a sexual depiction. *See Williams*, 128 S.Ct. at 1836.

The insertion of a *Miller* inspired “value” component into 18 U.S.C. § 48 reveals a fundamental misunderstanding of the obscenity exception’s exclusive focus on erotic expression. Unlike obscenity, 18 U.S.C. § 48 is not motivated by the sensibilities of the viewers to depictions of acts, but the harm caused by the underlying acts themselves. U.S. Br. 24. Further, 18 U.S.C. § 48’s “value” component does not include the requirement that the material “taken as a whole, appeal[] to the prurient interest.” *See Miller*, 413 U.S. at 24. (defining a *prurient* interest as “a shameful or morbid interest in nudity, sex, or excretion”). Yet it is only when all these elements (and more) are present that a work can be deemed obscene and undeserving of protection

(see *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974)); the prurient interest requirement is not severable. Thus, the “value” component of *Roth/Miller* effectively protects erotic expression only in conjunction with the other elements of the *Miller* test; its isolated presence in 18 U.S.C. § 48 is far less effective in protecting valuable expression through depictions of animal cruelty.

## CONCLUSION

Although there are full categories of speech unprotected by the First Amendment, depictions of animal cruelty neither fall under an already established category nor warrant creation of a new one. *Amicus curiae* therefore respectfully urge this Court to affirm the decision of the court below.

/s/ J. Joshua Wheeler

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