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 INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS IN SUPPORT OF PETITIONER, UNITED STATES OF AMERICA

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INTEREST OF *AMICUS CURIAE* [1]

International Society for Animal Rights ("ISAR"), founded in 1959, is a corporation created under the

[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief, except for the firm of Friedman Kaplan Seiler & Adelman LLP whose *pro bono* representation of *amicus curiae* included absorption of the costs associated with such preparation and submission. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to this filing. Letters of consent have been filed with the Clerk of the Court.

Not-for-Profit law of the District of Columbia and is a federal tax-exempt 501(c)(3) organization.

ISAR's chartered purposes include, but are not limited to, promoting "protection of animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause . . . ."

In furtherance of that goal, through the support of thousands of individuals and organizations in the United States and around the world, ISAR engages in extensive public education, including the creation and dissemination of monographs and other material dealing with animal rights.

The first federal and state court opinions to use the term "animal rights" were in cases initiated by ISAR, *see Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974) (three-judge court), *Jones v. Beame*, 380 N.E.2d 277 (N.Y. 1978), and ISAR previously has submitted *amicus curiae* briefs in this Court, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Florida*, 508 U.S. 520 (1993), and other courts, *see O'Sullivan v. City of San Diego*, No. D047382, 2007 WL 2570783 (Cal. Ct. App. Sept. 7, 2007).

SUMMARY OF ARGUMENT

Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals is conduct lacking sufficient communicative elements to implicate the speech guarantee of the First Amendment.

Assuming, *arguendo*, that Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals did contain

communicative elements, if those elements constituted commercial speech, the illegality of the videos' depictions rendered that speech unprotected.

New York v. Ferber, 458 U.S. 747 (1982) illuminates the compelling federal interests behind 18 U.S.C. § 48 (hereinafter "Section 48"), and supports its constitutionality.

It is unnecessary to rely on *Ferber* to uphold the constitutionality of Section 48.

ARGUMENT

INTRODUCTION

The Question Presented in the Petition for a Writ of Certiorari was formulated by the United States as: "whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment."

On April 20, 2009, certiorari was granted on that question.

Thus, as a threshold matter the Court is called upon, in this facial challenge, to determine whether the suppression of speech, as opposed to conduct, is implicated by Section 48. Then the Court must determine whether that speech, to the extent speech rather than conduct is implicated, is of a character that is constitutionally protected.

Section 48(a) provides that "[w]hoever knowingly creates, *sells,* or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce *for commercial gain*, shall be fined under this title or imprisoned not more than 5 years, or both." 18 U.S.C. § 48(a) (emphasis added).

Section 48(b) provides that: "Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* § 48(b)

Respondent was indicted not for "creating" or "possessing," but rather for "knowingly *selling* depictions of animal cruelty with the intention of placing those depictions in interstate commerce for *commercial gain*, in violation of 18 U.S.C. § 48." *United States v. Stevens*, 533 F.3d 218, 220 (3d Cir. 2008) (emphasis added).

According to the Court of Appeals:

> The indictment arose out of an investigation by federal and Pennsylvania law enforcement agents who had discovered that Stevens had been *advertising* pit bull related videos and merchandise through his *business*. Stevens *advertised* these videos in *Sporting Dog Journal,* an underground publication featuring articles on illegal dog fighting. Law enforcement officers arranged to *buy* three videotapes from Stevens, which form the basis for each of the [three] counts in the indictment.

Id. at 220 (emphasis added).

The depictions in those videos are hideous testimony explaining the Congressional motivation for enacting Section 48. According to the Court of Appeals:

> The first two tapes, entitled "Pick-A-Winna" and "Japan Pit Fights," show circa 1960s and 70s footage of organized dog fights that occurred in the United States and involved pit bulls, as well as footage of more recent dog fights, also in-

> volving pit bulls, from Japan. The third video, entitled "Catch Dogs," shows footage of hunting excursions in which pit bulls were used to "catch" wild boar, as well as footage of pit bulls being trained to perform the function of catching and subduing hogs or boars. This video includes a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig. The footage in all three videos is accompanied by introductions, narration and commentary by Stevens, as well as accompanying literature of which Stevens is the author.[2]

Id. at 221.

In sum, Respondent was engaged in the business of trading on the depraved enterprise of dog fighting, for which he was indicted.

In the District Court, Respondent moved "to dismiss the indictment on the grounds that 18 U.S.C. § 48 . . . is invalid and constitutionally overbroad . . . and void for vagueness . . . ." (App. 31.)

The District Court denied the motion on "compelling interest" grounds, and declined to rule that Section 48 was overbroad or void for vagueness.[3]

The case went to trial, and Respondent was convicted.

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[2] No one has ever suggested that Respondent's conviction was at all based on the audio he added to the footage. Indeed, because Section 48 prohibits the trafficking in *depictions* of animal cruelty, Respondent would have been guilty of violating the statute if his dog fighting videos had been silent movies.

[3] In the District Court there apparently was no consideration of whether Respondent's conduct contained expressive elements or, if it did, whether that expression was of a commercial nature.

On appeal, the Government conceded that "Section 48" (presumably all three elements, "create," "sell," "possess") "constitutes a content-based restriction on speech." *Id.* at 223.[4]

In the Court of Appeals, there was no issue presented whether Respondent's conduct contained expressive elements sufficient to bring such conduct within the ambit of the First Amendment or, if it did, whether his communication was of a commercial nature.

The Court of Appeals, sitting *in banc sua sponte*, reversed Respondent's conviction.

In *amicus curiae's* view, the Court of Appeals' analysis gives rise to four questions:

> I. Did Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals lack sufficient communicative elements to implicate the free speech guarantee of the First Amendment?
>
> II. Assuming, *arguendo*, that Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals did contain communicative elements, if this Court's commercial speech analysis applies, does

[4] This Court is not bound by that concession. *See Colo. Republican Fed. Campaign Comm. v. FEC,* 518 U.S. 604, 622 (1996) ("in any event, we are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts."); *Young v. United States*, 315 U.S. 257, 259 (1942) (recognizing that "our judgments are precedents" and the proper understanding of matters of law "cannot be left merely to the stipulation of parties").

the illegality of the videos' depictions render that speech unprotected?

III. Did the Court of Appeals err by ruling that *Ferber* does not support the constitutionality of Section 48?

IV. Is it necessary to rely on *Ferber* to uphold the constitutionality of Section 48?

POINT I

RESPONDENT'S EXTENSIVE INVOLVEMENT WITH THE MAKING, EXPLOITATION, AND SALE OF VIDEOS DEPICTING CRUELTY TO ANIMALS IS CONDUCT LACKING SUFFICIENT COMMUNICATIVE ELEMENTS TO IMPLICATE THE SPEECH GUARANTEE OF THE FIRST AMENDMENT

Respondent's sale of the videotapes for which he was convicted was conduct, not speech, and thus was not protected by the First Amendment.

In Justice O'Connor's concurring opinion in *Acara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), she "agree[d] that the [New York] Court of Appeals erred in applying a First Amendment standard of review where, as here, the government is regulating neither speech nor an incidental nonexpressive effect of speech." *Amicus curiae* contend that is exactly how the Court of Appeals, at the threshold, erred in this case.[5]

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[5] *See also Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 572 (1991) (statute banning totally nude dancing "must be upheld, not because it survives some lower level of First Amendment

In *Acara*, a New York statute allowed closure of any building deemed a public health nuisance because of its use for prostitution.

An undercover investigation of an "adult" bookstore turned up illicit sexual activities on the premises, including solicitation of prostitution.

The New York Court of Appeals applied the *O'Brien* test, which assesses the validity of a statute regulating conduct which also has an expressive element.[6] In other words, the New York Court of Appeals saw some connection between prostitution and, at the same physical location, selling books.

This Court found the use of the *O'Brien* test misplaced.

Acknowledging that "[t]his Court has applied First Amendment scrutiny to a statute regulating conduct which has the incidental effect of burdening the expression of a particular political opinion," *id.* at 702, Chief Justice Burger wrote for the majority that "unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression. . . . First Amendment values may not be invoked by merely linking the words 'sex' and 'books.'" *Id.* at 705.

The same is true of Respondent's considerable involvement in the making, exploitation, and sale of videos depicting depraved torture and killing of domestic animals:

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scrutiny, but because, *it is not subject to First Amendment scrutiny at all*.") (Scalia, J., concurring) (emphasis added).

[6] *United States v. O'Brien*, 391 U.S. 367 (1968).

- He ran a for-profit business—with all the necessary office equipment—called "Dogs of Velvet and Steel," selling pit bull fighting videos and paraphernalia related to dog fighting.

- As part of that business, he created and maintained an Internet website called "Pitbull life.com."

- He advertised his wares—including implements used in dog fighting[7]—in a magazine called *Sporting Dog Journal*, an underground publication containing, *inter alia*, reports of illegal dog fights and the "winners" and "losers" of clandestine bouts.

- He obtained his wares and sold them through the United States Postal Service.

- He possessed multiple copies of the three videos purchased by the undercover agents and other magazines devoted to the blood "sport" of dog fighting, some of which contained reports of illegal dog fights.

- He maintained several years of sales records of his business transactions, within the United States and abroad, disclosing gross receipts of $57,534.95.

(App. 28-30, 445-465, 467-468, 542-549, 683-709.) In sum, Respondent was engaged in the business of trading on the depraved enterprise of dog fighting, for which he was indicted.

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[7] For example, a parting or "break stick" which is used to pry apart the jaws of a pit bull so that they will release the hold or bite they have on something.

Just as in *Acara* where "First Amendment values may not be invoked by merely linking the words 'sex' and 'books,'" 478 U.S. at 705, in this case those values certainly cannot be invoked by placing depraved depictions of animal torture and killing on videos and selling them.

Even accepting *arguendo* that in Respondent's involvement in the sale of the videos depicting cruelty to animals—conduct illegal in every state in America—he was somehow seeking to express ideas, as the *per curiam* opinion noted in the flag-burning case of *Spence v. Washington*, 418 U.S. 405 (1974), this Court "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 418 U.S. at 409 (citing *O'Brien*).

Texas v. Johnson, 491 U.S. 397 (1989) was another flag-burning case.[8] Clearly, Johnson's burning of the flag was conduct. Thus, the question for this Court was whether that conduct constituted *expression* "permitting him to invoke the First Amendment in challenging his conviction." *Id.* at 403. In holding that it did, Justice Brennan said this:

> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an *intent* to convey a particularized message was present, and whether the likelihood

[8] It is noteworthy that Johnson "raised a facial challenge to Texas' flag-desecration statute" (as Respondent did here), but the Court in *Johnson* chose "to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment." 491 U.S. at 404 n.3.

> was great that the message would be *understood* by those who viewed it.

Id. at 404 (internal quotations omitted; emphasis added).

Because the American flag is "pregnant with expressive content," because of "the context in which [the flag-burning] occurred," and especially because the Court found the *Spence*-required expressive intent, Johnson's conviction was reversed. *Id.* at 405.

In this case, however, because Respondent's conviction was reversed by the Court of Appeals on a strict scrutiny analysis, *his intent* in being involved in the sale of the animal cruelty depictions, whatever it may have been, is irrelevant in connection with the facial challenge now before the Court.

Absent evidence of whether Respondent intended to communicate ideas and, if he did, whether they were understood, all that is left is his unambiguous *conduct* (described above) which, alone, does not "bring the First Amendment into play." *See id.* at 404.

Because to bring the First Amendment into play and thus ascertain whether conduct contains a "sufficient communicative element" the two-part *Spence* "intent" and "understood message" test must be applied to the *particular facts* of a case, it is difficult to understand how a facial challenge can ever succeed when conduct such as flag- and draft card-burning, and video selling is present.

The necessity of employing these tests may explain why *Johnson* was decided not on the basis of his proffered facial challenge, but rather on as-applied grounds.

That is what should have happened in the instant case and why, given the absence of evidence of Respondent's intent and how his message was understood by others, the Court of Appeals erred.

However, if Respondent's conduct somehow brings the First Amendment into play, if his known intent was to communicate something, albeit gruesome and depraved, and his known message was so understood by others, then his sale of the videos was commercial speech, and should, therefore, be subject to less exacting scrutiny.

POINT II

ASSUMING, *ARGUENDO*, THAT RESPONDENT'S EXTENSIVE INVOLVEMENT WITH THE MAKING, EXPLOITATION, AND SALE OF VIDEOS DEPICTING CRUELTY TO ANIMALS DID CONTAIN COMMUNICATIVE ELEMENTS, IF THOSE ELEMENTS CONSTITUTE COMMERCIAL SPEECH, THE ILLEGALITY OF THE VIDEOS' DEPICTIONS RENDERED THAT SPEECH UNPROTECTED

Assuming *arguendo* that the conduct of running a business that trades on cruelty to animals is intended to convey a particularized message, and that the likelihood is great that those who view the "message" would understand it, the question arises whether Congress lacks the power to regulate such conduct just because a "message" is involved.

This Court has answered that question in the negative, especially in the category of cases labeled "commercial speech."

Writing for the Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980), Justice Powell set forth a four-part analysis:

> For commercial speech to come within [the First Amendment], it at least must [1] *concern lawful activity* and not be misleading. [2] Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, [4] and whether it is not more extensive than is necessary to serve that interest. (Emphasis added.)

Even if we accept, *arguendo,* that Respondent's involvement in the sale of the videos constituted expressive content, and even if we put aside half of element 1 and all of elements 2, 3 and 4, of the *Central Hudson* analysis, the content of Respondent's videos is wholly unprotected because it depicts activity that is unlawful under the laws of every state in the United States and some laws of the federal government.

For instance, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) established that government may prohibit newspaper *advertisement* of illegal commercial activity. That prohibition is, in principle, no different from prohibition of a video *depiction* of illegal commercial activity.[9]

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[9] In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), where the Court held invalid a federal law prohibiting beer labels from displaying alcohol content, Justice Thomas emphasized that the commercial speech at issue in that case concerned a *lawful*

Under this standard analysis of commercial speech, Respondent's videos' depiction of criminal acts should by itself render any communicative elements in his conduct unprotected.

Amicus curiae recognizes that in both the District Court and the Court of Appeals there were no arguments, discussion, or rulings regarding the issue of whether Respondent's conduct, even if it possessed communicative elements, required a commercial speech analysis. However, to the extent the Court of Appeals may have rested any part of its decision on the existence of communicative elements in Respondent's conduct, the issues necessarily arise as to what kind of speech it was and what level of protection, if any, it should enjoy.

While commercial speech analysis typically involves advertising,[10] just what constitutes commercial speech is not clear,[11] and the touting of a particular product

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activity, thus underscoring the ruling in *Pittsburgh Press* that *illegal* commercial expression is unprotected by the First Amendment.

[10] There appears to be only one commercial speech case of this Court which does not involve advertising; it does not, however, provide an analysis of the degree of protection to be afforded commercial speech which does not constitute the advertising of goods or services. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (licensing requirement to sell items designed or marketed for use with illegal cannabis or drugs).

[11] "Commercial speech may be understood as speech of any form that advertises or product or service for profit or for business purpose. Commercial speech proposes a commercial transaction. *This definition is not precise, and courts have not consistently applied it.*" JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1227 (7th ed. 2004) (emphasis added). "The Court is not troubled by the definition problem. It offers

or service may not be necessary to constitute speech that is "commercial,"[12] especially where the speech at issue more generally promotes a specific commercial activity, here illegal dog fighting.

Accordingly, in the instant case—not an advertising case, where Respondent was indicted, tried, and convicted not of creating or possessing, but of the "selling" prong of Section 48—this Court writes on a clean slate.

The word "speech" is not a talisman, automatically legitimizing everything said regardless of its context and the rights of others. Fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1943)), defamation (*Dun & Bradstreet*, *Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985)), obscenity (*Miller v. California*, 413 U.S. 15 (1973)), imminent incitement to illegal conduct (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), child pornography (*New York v. Ferber*, 458 U.S. 747 (1982)), copyright violations (*Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985))—all this speech is constitutionally suppressed because, at bottom, society deems it injurious to the innocent and violative of their rights. Indeed, when defamation and copyright violations, each clearly speech, are suppressed in civil actions, it is not because the

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less protection to commercial speech than to political speech, and claims that the definition of 'commercial speech' is a matter of common sense." *Id.* at 1232 (citing *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978)).

[12] *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983) ("Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech.").

expression is criminal but rather because the injured victims have had their rights, to a good name and the fruit of their creative process, violated.

This principle is all the more true and applicable when the goal of rights-violative speech is to make money, not to communicate ideas.

Given the commercial nature of Respondent's conduct, if that conduct contained expressive elements, the illegal—indeed depraved—nature of those elements should deprive it of constitutional protection.[13]

POINT III

FERBER ILLUMINATES THE COMPELLING FEDERAL INTEREST BEHIND SECTION 48, AND SUPPORTS ITS CONSTITUTIONALITY

If something more is required to validate Section 48, there is indeed an *interest* advanced by the statute, and that interest is *compelling*. As to the government having an "interest" in Section 48, the Court of Appeals majority expressly recognized:

> The *acts*[14] of animal cruelty that form the predicate for Section 48 are reprehensible, and indeed warrant strong legal sanctions. The Government is correct in arguing that animal cruelty should be the subject of not only condemnation but also prosecution. To this end, anti-animal cruelty

[13] Although the Court of Appeals opted to decide this case on the basis of strict scrutiny analysis and eschew reliance on overbreadth, it could not have used the latter doctrine because "the overbreadth doctrine does not apply to commercial speech." *See Village of Hoffman Estates*, 455 U.S. at 496.

[14] Emphasis in original.

> statutes have been enacted in all fifty states and the District of Columbia. These statutes target the actual *conduct that offends the sensibilities of most citizens*.[15]

533 F.3d at 223 (footnote omitted).

In this regard, the dissent below agreed

> with the government that its interest in preventing animal cruelty is compelling. The importance of this interest is readily apparent from the expansive regulatory framework that has been developed by state and federal legislatures to address the problem. *These laws serve to protect not only the animals, but also the individuals who would commit the cruelty, and more generally, the morals of society.*

Id. at 237 (emphasis added; footnote omitted).

Preliminary to the Court of Appeals assessing whether the federal interest underpinning Section 48 is "compelling," it examined the few cases in which, in its judgment, this Court has held speech to be "categorically unprotected": *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1943) (fighting words);[16] *Watts v. United States*, 394 U.S. 705 (1969) (threat to the President of the United States); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (imminent incitement to illegal activity); *Miller v. California*, 413 U.S. 15

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[15] Emphasis added.

[16] Notwithstanding its citation of *Chaplinsky*, the majority referenced a law review article for the proposition that "later precedents diluted [it] and, while the Court has never overruled it, [the case] has certainly been marginalized." 533 F.3d at 224.

(1973) (obscenity).[17] Another case cited by the Court of Appeals that categorically recognized unprotected speech was *New York v. Ferber*, 458 U.S. 747 (1982), "holding that child pornography depicting actual children is not protected speech." 533 F.3d at 224.

"The common theme," according to the Court of Appeals, "among these [five] cases is that the speech at issue constitutes *a grave threat to human beings or, in the case of obscenity*, *appeals to the prurient interest*." *Id.* at 224 (emphasis added).

Whatever the applicability of *Chaplinsky, Watts, Brandenburg* and *Miller* here,[18] *amicus curiae* em-

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[17] Neither *Watts* nor *Brandenburg,* respectively, stand for the proposition that threats and imminent incitement are "categorically unprotected." In *Watts*, the speech *was protected*, and in *Brandenburg* a syndicalism statute was held unconstitutional because it did not differentiate between protected and unprotected speech. *Miller*, as the Court of Appeals noted, was an obscenity, not a "grave harm," case.

[18] Though apparently not addressed in either the Court of Appeals or District Court, the "crush videos" that Section 48 was designed in part to target may well constitute obscenity. These videos depict "women inflicting . . . torture [on animals] with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." H.R. Rep. No. 106-397, at 2 (1999). "[T]hese depictions often *appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting*." *Id*. at 2-3 (emphasis added). Accordingly, crush videos appeal to the prurient interest of their "fans." *See Ashcroft v. ACLU*, 542 U.S. 656, 679 (2004) ("Insofar as material appeals to, or panders to, 'the prurient interest,' it simply seeks a sexual response."); *Pinkus v. United States*, 436 U.S. 293, 302 (1978) (authorizing jury instruction on prurient appeal to deviant sexual groups). Furthermore, the reason these "fans" become sexually titillated by, e.g., the depiction of a woman ramming

phatically agrees that the speech in *Ferber*—albeit in the context of a pornography statute, rather than, as here, a cruelty statute—"constitutes a grave threat to human beings."

Ultimately, it is upon *Ferber* that the Court of Appeals' decision entirely rests. And it is the Court of Appeals' majority's refusal to apply *Ferber's* "grave threat" test to animals—"because of the inherent differences between children and animals," that the Court of Appeals said "require[d] no further explication," *id.* at 232—that it held Section 48 to be unconstitutional.

The Court of Appeals misapplied *Ferber*. The parallels, *in principle*, between the New York criminal statute in that case and the federal criminal statute in this case are too similar to ignore, and illuminate the compelling interests that Section 48 vindicates—including the protection of both animals *and* humans from grave threats to their well being.

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her stiletto heel through a kitten's eyeball (*see* Snopes.com, http://graphics2.snopes.com/photos/gruesome/graphics/crush06.jpg (last visited June 2, 2009)) is because they equate such despicable acts with filthy sexual acts—and no doubt are titillated due to their wildly transgressive nature. Because they are patently offensive depictions of perverse sexual activity, designed to appeal to their "fans'" prurient interest, crush videos meet the definition of obscenity without the protection of the First Amendment. But even if not strictly obscene, purveyors of crush videos can be prosecuted because "commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)).

A. *Section 48 Helps Address the Serious National Problem of Animal Cruelty.*

In *Ferber*, after identifying the issue for decision, Justice White stated that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem." 458 U.S. at 748.

So, too, as Congress noted in promulgating Section 48, the exploitive use of animals in the production of depictions of living animals being maimed, mutilated, tortured, wounded, or killed is a serious national problem. To say nothing of the serious national problem of the underlying cruelty to animals which is depicted—a problem noted by the Court of Appeals' majority when it provided citations to the anti-cruelty statutes of every state in America.

B. *The Depictions of Animal Cruelty Covered by Section 48 are Utterly Without Redeeming Social Value.*

In *Ferber's* discussion of *Roth v. United States*, 354 U.S. 476 (1957), the Court noted that *Roth* recognized obscenity was "utterly without redeeming social importance," and quoted *Miller* for the proposition that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." 458 U.S. at 754.

So, too, in this case there is no dispute that depictions of cruelty to animals have no redeeming social importance, that there is more than a mere danger of offense, and given Internet and cable access today

juvenile exposure to animals being "maimed, mutilated, tortured, wounded, or killed" is a certainty.[19]

C. *Section 48 Protects Society, Including Minors, From Depraved Images of Illegal Animal Cruelty.*

As to juveniles, the *Ferber* Court emphasized that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*'." *Id.* at 756 (emphasis added).

Although in the instant case Section 48 is not expressly aimed solely at protecting minors, as was the New York statute in *Ferber*, it nevertheless serves that governmental interest. Decreasing the availability of animal cruelty depictions means that fewer minors are likely to have access to it. H.R. Rep. No. 106-397, at 4 (1999) ("the committee believes that society has an interest in preventing its citizens from gaining access to materials which may encourage a lack of respect for . . . animals" and thereby desensitize people to the "suffering of humans"). That the federal government has a comparable interest, realized by Section 48, in protecting juveniles from the gruesome and depraved depictions on Respondent's videos should also be "evident beyond the need for elaboration," and that interest is equally compelling.

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[19] *See, e.g.,* CrushCuties.com, The Best Crush Fetish Videos on the Web, http://www.crushcuties.com/ (last visited June 2, 2009).

D. Ferber *Counsels Deference to Legislative Judgment.*

Another parallel that should be drawn between *Ferber* and the instant case is the former's deference to legislative judgment.

> The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern . . . .

458 U.S. at 757.[20]

> *We shall not second-guess this legislative judgment*. . . . [V]irtually all the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography.' The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Id. at 758 (footnote omitted; emphasis added).

In the instant case, the House of Representatives Report accompanying Section 48 clearly and unambiguously identifies the legislative judgment upon which Section 48 rests:

> The committee also notes the increasing body of research which suggests that humans who kill or abuse others often do so as the culmination of a

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[20] There followed a quotation from the New York legislative findings in support of the statute.

> long pattern of abuse, which often begins with the torture and killing of animals. When society fails to prevent these persons from inflicting harm upon animals as children, they may fail to learn respect for any living being. If society fails to prevent adults from engaging in this behavior, they may become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans. In either case, society's failure to require that living things be treated appropriately may lead some people to be more likely to act upon their desires to inflict harm upon those around them. In short, society has an interest in preventing any disregard for living animals. And so, the committee believes that society has an interest in preventing its citizens from gaining access to materials which may encourage a lack of respect for those animals.

The Court of Appeals in this case erroneously accorded these legislative findings no deference whatsoever despite this Court's clear approach to the contrary in *Ferber*.

E. *Section 48's Suppression of Images of Illegal Animal Cruelty Helps Suppress Illegal Animal Cruelty.*

In support of its ruling that the New York statute in *Ferber* was constitutional, this Court noted that "[w]hile the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to *dry up the market* for this material by imposing severe criminal penalties on persons selling, advertising, or

otherwise promoting the product." 458 U.S. at 760 (emphasis added).

In the instant case, that is exactly what Section 48 is designed to accomplish in part, and for the same reason. Indeed, the majority opinion in the Court of Appeals expressly recognized that "[t]his drying-up-the-market theory, based on decreasing production, is potentially apt in the animal cruelty context." 533 F.3d at 230.[21]

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[21] The majority added, "[h]owever, there is no empirical evidence in the record to confirm that the theory is valid in this case," 533 F.3d at 230, and then proceeded to note that dog fights themselves generate money and, as such, supposedly would not be deterred by suppression of dog fight videos. The Court of Appeals' observation is obtuse. One need not possess Solomonic wisdom to perceive that the trafficking in and watching of dog fight videos encourages interest in the blood "sport" of dog fighting and helps maintain or increase attendance at the fights—otherwise, for instance, NASCAR would not broadcast its races. In any event, whatever value the Court of Appeals' observation might have had in an as-applied challenge, the question the Court of Appeals purported to answer, and the question before this Court, is the *facial* validity of Section 48. Under a facial challenge, Respondent can only succeed by establishing that "*no set of circumstances exists*" under which Section 48 would be valid, *see Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1190 (2008) (emphasis added; internal quotation omitted). Accordingly, the purported lack of linkage between suppressing depictions of dog fighting and the drying up of dog fighting in general, is irrelevant to the facial challenge before the Court—particularly since the crush video business (like child pornography in *Ferber*) is a low-profile, clandestine industry that requires suppression of the images to dry up the making of the images in the first place. *See* H.R. Rep. 106-397, at 3 (noting the difficulty of prosecuting those inflicting the cruelty in crush videos because "the faces of the women inflicting the torture in the material often were not shown, nor could the

F. *The Sale of Depictions of Animal Cruelty Provides an Economic Motive for the Underlying Animal Cruelty.*

In *Ferber,* this Court recognized that "[t]he 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." 458 U.S. at 761.

In other words, there is an incentive for the illegal production of child pornography because the product of that crime can be advertised and sold.

Here, similarly, the sale of depictions of animal cruelty provides an incentive to the perpetration of acts of animal cruelty captured on film; and Congress correctly took note of this factor when it promulgated Section 48.[22]

As Justice White further noted, "[i]t 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 viola-

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location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction."). In this facial challenge, therefore, the constitutionality of Section 48 is strengthened because the "most expeditious if not the only practical method of law enforcement may be to dry up the market for" at least one kind of depiction of animal cruelty reached by Section 48—i.e., crush videos—by punishing their sale. *See Ferber*, 458 U.S. at 760.

[22] *See* H.R. Rep. 106-397, at 3 (noting that crush videos commonly are available through the internet, and almost exclusively are distributed for sale through interstate or foreign commerce; and many Internet sites are blatant in offering to sell these depictions, and some even advertise "*to make such depictions to order, in whatever manner the customer wishe[s] to see the animal tortured and killed*.") (emphasis added).

tion of a valid criminal statute." *Id.* at 762 (internal quotation omitted). That observation is apt here.

POINT IV

IT IS UNNECESSARY TO RELY ON *FERBER* TO UPHOLD THE CONSTITUTIONALITY OF SECTION 48

Although *Ferber* supports the constitutionality of Section 48, there is nothing sacred about the several *Ferber* factors. Those factors were considerations the Court found persuasive in reaching its conclusion that child pornography constitutionally could be suppressed. For good reason, *Ferber* did not suggest that the factors found to exist in that case were indispensable to holding any other alleged forms of expression outside the protection of the First Amendment. There are other kinds of so-called "speech," just as reprehensible and utterly lacking in any social value as child pornography, that do not nicely fit into the *Ferber* factors, yet can be restricted without doing violence to the Constitution.[23]

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[23] For instance, given the seemingly endless varieties of depravity, one could easily imagine underground groups of people who gather and pay to watch live "performances" of human adults being tortured to death, and narrated videotapes of those events being made and sold. Because the societal value of the "expression" on those tapes would be zero, no one seriously would doubt the government's power to criminalize the interstate trafficking in such depictions, even though: (a) they would involve adults, not children; (b) the circulation of the videotapes would not cause lingering harm to the dead victims; (c) both the live acts and the later trafficking in depictions of those acts would be money-making activities, so that suppression of the images arguably would not "dry up the market" for the live performances; and (d) the mere watching of actual murders-by-torture would not necessarily lead viewers to commit that crime. By the Court of Appeals' reasoning, however, a statute crimi-

The depictions of animal cruelty targeted by Section 48—e.g., "crush videos," that appeal to the prurient interests of those who get a sexual thrill from watching animals being stomped to death; and dog fighting videos, that appeal to the barbaric blood lust of those who enjoy watching animals ripping each other apart—are such "speech" which, in fact, is not speech at all. These reprehensible depictions, at the absolute nadir of human expression, simply are not within the broad swath of speech protected by the First Amendment.

"The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, ___, 128 S. Ct. 791, 801 (2008). And as the Court of Appeals correctly noted in this case, there is a "great spectrum," at one end of which is "high value speech" such as political speech. *See* 533 F.3d at 232. Accordingly, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). As a result, to ensure that speech, particularly unpopular speech, is not singled out for persecution, this Court has articulated a First Amendment jurisprudence that generally requires a

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nalizing such depictions would have to be struck down for failure to meet the *Ferber* factors. Indeed, by the Court of Appeals' reasoning, it might well also have reversed Respondent's conviction had the statute reached the sale of depictions of adults engaged in sexual intercourse with animals.

compelling state interest to justify content-based restrictions.[24]

However, at the other end of the "great spectrum" is "speech utterly without social value," 533 F.3d at 232—i.e., speech that is "no essential part of any exposition of ideas," and is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in law and morality." *Chaplinsky*, 315 U.S. at 571-72. When dealing with such so-called "speech," which is not worthy of the name, it makes no sense to demand compelling state interests to justify its suppression.[25] Instead, as such "speech" is outside the very wide purposes and sweep of the First Amendment, there is not "any Constitutional problem" with preventing and punishing it. *See id.* As this Court stated in *Ferber*:

> Thus, it is *not rare* that a content-based classification has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted *so overwhelming outweighs* the expressive interests, *if any*, at stake, that no process of case-by-case adjudication is required.

458 U.S. at 763-64 (emphasis added).

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[24] *But see Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (questioning appropriateness of "compelling state interest test" in First Amendment cases).

[25] Indeed, the notion that a compelling state interest is no less required for a statute criminalizing, e.g., child pornography, than one criminalizing, e.g., the broaching of certain topics at a national political convention, not only seems wildly incongruous, but over time could be expected to cause a warping of the sense of how *compelling* a compelling interest must be.

It is not a matter of debate that the depictions of wanton animal cruelty targeted by Section 48 are utterly without social value. The question of animal cruelty has percolated throughout the 50 states, and the unanimous verdict is that animal cruelty is intolerable in a civilized society.[26]

Accordingly, depictions of wanton acts of animal cruelty play no role in the marketplace of ideas, and Congress—which in this "free but civilized societ[y]," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), properly may legislate against "a return to barbarism," *see Cleveland v. United States*, 329 U.S. 14, 19 (1946)—has the power to ban the interstate trafficking in such depictions.

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Fundamentally, the New York child pornography depiction statute was upheld in *Ferber* because of society's legitimate, indeed morally and legally "compelling," interest in preventing and punishing actual, and even potential, harm to children from exposure to sexual matters.

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[26] Not coincidentally, the jury in this action found the Government had proven beyond a reasonable doubt that the videotapes Respondent sold lacked any serious religious, political, scientific, educational, journalistic, historical, or artistic value. (*See* App. 640-41.) That factual finding was not disturbed by the Court of Appeals, and is not within the scope of the facial challenge before this Court. Of course, the mere fact that there are people who like cruelty to animals and/or purchasing and watching videos showing such cruelty does not establish that "reasonable people can disagree." After all, the mere fact that there are people out there (albeit far beyond the pale of society) that like and buy actual child pornography properly is given no consideration in the cases of this Court that have determined such loathsome material to play no role whatsoever in the marketplace of ideas that the First Amendment protects.

Yet, according to the majority in the Court of Appeals in this case, the kind of solicitude we feel for the welfare of children does not apply to animals "because of *the inherent differences between children and animals*." 533 F.3d at 232 (emphasis added).

Regrettably, the Court of Appeals did not elaborate on what those inherent differences are, or why they should exclude animals from certain kinds of societal and judicial solicitude.[27]

Probably unknown to the judges in the Court of Appeals, their belief that inherent differences existed between children and animals, justifying different treatment, is attributable in some measure to the teachings of Fifteenth Century French philosopher René Descartes, considered by many to be the father of modern philosophy.

Descartes held that animals were automata—literally. He asserted that lacking a Christian "soul," animals possessed no consciousness. Lacking a consciousness, Descartes concluded, animals experienced neither pleasure nor pain. This convenient conclusion allowed him to rationalize his and others'

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[27] Significantly, the impulses that gave rise to society's protection of animals *preceded* and *gave rise to* its solicitude for the protection of children. *See* Encyclopedia.com, http://www.encyclopedia.com/topic/prevention_of_cruelty.aspx (last visited June 2, 2009) ("In the United States, as in Great Britain, protection of children came after that of animals"); Answers.com, http://www.answers.com/topic/society-for-the-prevention-of-cruelty-to-children (last visited June 2, 2009) ("In April 1874 the American Society for the Prevention of Cruelty to Animals obtained the protection of the state for Mary Ellen Wilson, a mistreated child. In April 1875, because of this case, the first child protective agency, the New York Society for the Prevention of Cruelty to Children, was incorporated.").

dissection of unanesthetized living creatures—perhaps the ultimate cruelty.

Animals, according to Cartesian philosophy, despite their consciousness and other human attributes, were akin to inanimate objects, chattel, to which their owners could do whatever they wished. Cars, furniture, houses, even rocks come to mind.

Although the animals-as-property view dominant in the United States today has not repudiated Descartes' shameful callousness toward non-human living creatures, a large body of existing law does ignore the obvious, though arbitrary, differences between humans and animals and operates to protect the latter.

Some existing law treats animals as if no differences existed between them and humans. It does so because society and law recognize that certain *similarities*—the capacity to suffer, for example—demand that the treatment of animals be commensurate with that afforded humans, especially children.

For example, because of concerns about exploitation and suffering, state law protects *children* from neglect, abuse and cruelty. So, too, as the Court of Appeals majority and dissent both recognized, state law protects *animals* from the same kind of criminal wrongdoing.

Because of the same concerns, federal law provides for the protection of African elephants,[28] bars shooting or harassing certain animals from aircraft,[29] proscribes animal fighting,[30] requires the humane

[28] 16 U.S.C. §§ 4201-4245 (2006).

[29] 16 U.S.C. § 742j-1 (2006).

[30] 7 U.S.C. § 2156 (2006).

slaughter of livestock,[31] and contains many other provisions requiring the humane treatment of mammals and other animals.[32] Indeed, there are nearly 100 federal statutes dealing with animals, many of them devoted to animal protection. [33] For example: Adoption of Military Animals, Animal Health Protection Act, Animal Welfare Act, Asian Elephant Conservation Act, Bald and Golden Eagle Protection Act, Disposition of Unfit Horses and Mules, Dog and Cat Protection Act—and jumping towards the end of the alphabet, Shark Finning Prohibition Act, and Wild Free-Roaming Horses and Burros Act.[34]

Why is this so? Why are animals—protected from cruelty by positive law rooted in moral considerations—a concern of our civilized society? *Amicus curiae*'s answer: Because animals are sentient, can suffer, and are powerless—a view shared, albeit expressed somewhat differently, by the Court of Appeals majority and the dissent alike.

Even the majority below recognized that: "The *acts* of animal cruelty that form the predicate for Section 48 are reprehensible, and indeed warrant strong legal sanctions," 533 F.3d at 223 (emphasis in original); "The Government is correct in arguing that animal cruelty should be the subject of not only condemna-

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[31] 7 U.S.C. § 1901 (2006).

[32] *See* 533 F.3d at 228.

[33] *See* HENRY COHEN, CONGRESSIONAL RESEARCH SERVICE, BRIEF SUMMARIES OF FEDERAL ANIMAL PROTECTION STATUTES (2009), http://www.isaronline.org/f/brief_summaries.pdf (the website of *amicus curiae* International Society for Animal Rights, reproducing a report of the Congressional Research Service of the Library of Congress).

[34] *See generally id.*

tion but also prosecution," *id.*; "Preventing cruelty to animals . . . [is] an exceedingly worthy goal," *id.* at 228; and that "animals are sentient creatures worthy of human kindness and human care," *id.* at 230.

The dissent expressed similar sentiments: "Our nation's aversion to animal cruelty is deep-seated," *id.* at 238; "This overwhelming body of law reflects the 'widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans,' H.R. Rep. No. 106-397, at 4 (1999)," *id.* at 239; "cruelty to animals is a form of antisocial behavior that erodes public mores and can have a deleterious effect on the individual inflicting the harm," *id.*; "Our nation has extended solicitude to animals from an early date, and has now established a rich tapestry of laws protecting animals from the cruelty we so abhor. This interest has nestled itself so deeply into the core of our society—because the interest protects the animals themselves, humans, and public mores—that *it warrants being compelling*," *id.* at 241 (emphasis added).

Not only are the governmental interests behind Section 48 "compelling" in a strict scrutiny sense (see Point III, *supra*), those interests are compelling in a *moral* sense because in enacting and approving that statute Congress and the President sought to make a stand against the savage behavior of psychopaths.

Surely that behavior cannot be protected by a constitutional provision which, no matter how important it is in other contexts, would facilitate "crush videos" and other gruesome and depraved acts. Indeed, if as a constitutional proposition the First Amendment does not protect fighting words, defamation, obscenity, imminent incitement to illegal conduct, child pornography, and copyright violations,

it cannot constitutionally or morally protect the sale of videos which depict acts reminiscent of the Roman coliseum—*unless* American morality and culture has become so coarsened as to sanctify the depiction of acts far beyond the bounds of decency.

CONCLUSION

Respondent made a facial challenge to Section 48. The Court of Appeals, applying a strict scrutiny analysis, concluded that there was no compelling interest to justify the statute's constitutionally. This Court granted certiorari limited to the facial unconstitutionality question.

Amicus curiae has a different view of the case. It is that Respondent was engaged in conduct, not speech, but if there were communicative elements in his sale of the videos, they were in aid of illegal commercial speech and the statute which suppressed them is constitutional.

The parties to this controversy seem to agree that the principles this Court articulated in *Ferber,* and the express and implicit premises which on which those principles rest, control the outcome here, although each reads that case differently.

While a*micus curiae* believes that Section 48 can be upheld without reliance on *Ferber*, we agree with the government's contention that its principles and premises suggest that although there are obviously certain *differences* between humans and animals, the *similarities*—especially the latter's defenselessness and capacity to experience extreme suffering when tortured—argue for application, not extension, of *Ferber* to the instant case.

As Justice Scalia noted in his *Barnes* concurring opinion, "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others, but because they are considered, in the traditional phrase, '*contra bonos mores*,' *i.e.*, immoral." 501 U.S. at 572. Cruelty to animals—and the trading on such cruelty—is immoral and can be suppressed because, like the child pornography in *Ferber*, it causes and fosters the suffering of the most helpless beings among us.

Written in a period which saw cruelty to animals no less brutal than today's "crush videos" and other depictions of animal torture, English utilitarian philosopher and social reformer Jeremy Bentham's famous observation is as apt today as it was centuries ago:

> The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. . . . A full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even [a] month, old. But suppose the case were otherwise, what would it avail. The question is not, Can they *reason?* nor, Can they *talk*? But, Can they *suffer*?[35]

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[35] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. XVII, section IV (The Clarendon Press 1876) (1789).

Not only can they suffer, they *do*—in a manner, and to an extent, unbefitting a country, society and culture which claims, but too often merely pretends, to be humane.

And it is that suffering, especially from torture, which Section 48 seeks to ameliorate. In being applied to sadist Robert J. Stevens (and his ilk), the statute strikes a blow, without trespassing on the First Amendment, for the only living creatures with whom we share this planet—the animals.

Contra bonos mores.

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