UNITED STATES v. STEVENS

533 F.3d 218 (3d Cir. 2008) (en banc)

SMITH, *Circuit Judge.*

The Supreme Court has not recognized a new category of speech that is unprotected by the First Amendment in over twenty-five years. Nonetheless, in this case the Government invites this Court to take just such a step in order to uphold the constitutionality of 18 U.S.C. § 48 and to affirm Robert Stevens' conviction. For the reasons that follow, we decline the Government's invitation. Moreover, because we agree with Stevens that 18 U.S.C. § 48 is an unconstitutional infringement on free speech rights, we will vacate his conviction.

I.

In March of 2004, a federal grand jury sitting in the Western District of Pennsylvania returned a three-count indictment against Stevens. All three counts charged Stevens with 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.

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 dogfighting. Law enforcement officers arranged to buy three videotapes from Stevens. 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 involving 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. 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.

II.

Stevens' case is the first prosecution in the nation under § 48 to proceed to trial, and this appeal represents the first constitutional evaluation of the statute by a federal appellate court. 18 U.S.C. § 48 states:

> (a) Creation, sale, or possession.--Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.
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> (b) Exception.--Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.
>
> (c) Definitions.--In this section--
>
> (1) the term "depiction of animal cruelty" means any visual or

> auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and
>
> (2) . . . .

Resort here to some legislative history is instructive to demonstrate the statute's breadth as written compared to what may originally have been intended. The legislative history for § 48 indicates that the primary conduct that Congress sought to address was the creation, sale, or possession of "crush videos." A crush video is a depiction of "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." Testimony presented at a hearing on the Bill indicates that "these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting."

One of the distinctive features of crush videos is that "the faces of the women inflicting the torture often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction." Consequently:

> defendants arrested for violating a State cruelty to animals statute in connection with the production and sale of these materials often were able to successfully assert as a defense that the State could not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the statute of limitations.

The sponsor of the Bill in the House of Representatives, Rep. Elton Gallegly, emphasized that the purpose of the legislation was to target crush videos. These videos evidently turn a brisk business, particularly over the Internet. Yet, the government interests identified in the House Committee Report do not focus on crush videos. The primary interest identified is the interest in "regulating the treatment of animals." Similarly, the House Report states that the Government has an interest in discouraging individuals from becoming desensitized to animal violence, because that may deter future antisocial behavior toward human beings.

This broader focus on animal cruelty is consistent with the text of § 48 and it is also reflected in the House Report's discussion of why the speech that § 48 targets should be deemed outside the protection of the First Amendment. The Report concedes that § 48 is a content-based restriction, but states that the harm it would address "so outweighs the expressive interest, if any, at stake, that the materials [prohibited by § 48] may be prohibited as a class." The Report minimizes the expressive interest of speech prohibited by the statute because "[b]y the terms of the statute, material depicting cruelty to animals that has serious utility-whether it be religious, political, scientific, educational, journalistic, historic, or artistic-falls outside the statute."

III.

The Government does not allege that Stevens participated in the interstate transport of "crush

videos." Nor does the Government allege that the videos Stevens sold contained prurient material. The Government also concedes that § 48 constitutes a content-based restriction on speech. Nonetheless, the Government argues that the type of speech regulated by § 48 falls outside First Amendment protection. By doing so, the Government asks us to create a new category of unprotected speech. We proceed in two parts. First, we show how § 48 regulates protected speech. Second, because § 48 regulates protected speech, we must subject the statute to strict scrutiny. As shown below, the statute cannot withstand that heightened level of scrutiny.

The *acts* of animal cruelty that form the predicate for § 48 are reprehensible. The Government is correct that animal cruelty should be the subject of not only condemnation but also prosecution. To this end, anti-animal cruelty 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. The fundamental difference between these state statutes and § 48 is that the latter does not federally criminalize the conduct itself. Rather, § 48 prohibits the creation, sale, or possession of a *depiction* of animal cruelty. That regulating a depiction has First Amendment implications is obvious. We begin, then, with the Government's contention that the depictions of animal cruelty restricted by 18 U.S.C. § 48 qualify as categorically unprotected speech.

A. § 48 Regulates Protected Speech

It has been two and a half decades since the Supreme Court last declared an entire category of speech unprotected. *See New York v. Ferber,* 458 U.S. 747 (1982) (holding that child pornography depicting actual children is not protected speech); *see also Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 256 (2002) (refusing to recognize virtual child pornography as a category of unprotected speech). Other types of speech that are categorically unprotected include: fighting words, *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), threats, *Watts v. United States,* 394 U.S. 705 (1969), speech that imminently incites illegal activity, *Brandenburg v. Ohio,* 395 U.S. 444 (1969), and obscenity, *Miller v. California,* 413 U.S. 15 (1973). The common theme among these 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.

The Government acknowledges that the speech at issue in this case does not fall under one of the traditionally unprotected classes. The Government argues, however, that these categories may be supplemented. That, in itself, is an unassailable proposition. But, we disagree with the suggestion that the speech at issue here can appropriately be added to the extremely narrow class of speech that is unprotected. Out of these categories, only *Ferber* is even remotely similar to the type of speech regulated by § 48. Recognizing this difficulty, the Government attempts to analogize between the depiction of animal cruelty and the depiction of child pornography. That attempt simply cannot carry the day.

In *Ferber,* the Court considered the constitutionality of a New York criminal statute that prohibited persons from knowingly promoting sexual performances by children under the age of 16 by distributing material that depicted such performances. A jury convicted Ferber of disseminating child pornography. The New York Court of Appeals reversed, holding that the statute at issue violated the First Amendment because it "could not be construed to include an obscenity standard, and therefore would prohibit the promotion of materials traditionally entitled to protection under the First Amendment." The Supreme Court in turn reversed the New York

Court of Appeals, holding that the statute was constitutional because child pornography, whether obscene or not, is unprotected by the First Amendment. In reaching that conclusion, the Court cited five factors favoring the creation of a new category of unprotected speech:

> 1. The State has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor."
>
> 2. Child pornography is "intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed" in order to control the production of child pornography.
>
> 3. "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography.
>
> 4. The possibility that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not *de minimis*."
>
> 5. Banning full categories of speech is an accepted approach in First Amendment law and is therefore appropriate in this instance.

Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech. The reasoning that supports *Ferber* has never been used to create whole categories of unprotected speech outside of the child pornography context. Furthermore, *Ferber* appears to be on the margin of unprotected speech jurisprudence. Part of what locates child pornography on the margin as an unprotected speech category is the conflation of the underlying act with its depiction. By criminalizing the depiction itself, "[c]hild pornography law has collapsed the 'speech/action' distinction that occupies a central role in First Amendment law[,]" and "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." Child pornography contrasts with other categories of unprotected speech that share a much closer nexus between speech and an unlawful action that proximately results from the unprotected speech. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444 (1969) (addressing speech that imminently incites illegal activity). For these reasons, we are unwilling to extend the rationale of *Ferber* beyond child pornography without express direction from the Supreme Court.

Even assuming that *Ferber* may be applied to other categories of speech, 18 U.S.C. § 48 does not qualify for such treatment. The Court cited five bases in *Ferber* for upholding the law. That reasoning does not translate well to the animal cruelty realm. We address the five-factor rationale in its entirety, although the first factor is the most important because, under *Ferber,* if the Government's interest is not compelling, then this statute violates the First Amendment.

1. First *Ferber* Factor

The compelling government interest inquiry at issue here overlaps with the strict scrutiny analysis discussed presently. No matter how appealing the cause of animal protection is to our sensibilities, we hesitate--in the First Amendment context--to elevate it to the status of a *compelling* interest.

Three reasons give us pause to conclude that "preventing cruelty to animals" rises to a compelling government interest that trumps an individual's free speech rights. First, the Supreme Court has suggested that the kind of government interest at issue in § 48 is not compelling. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). The Supreme Court in *Lukumi* held that city ordinances that outlawed animal sacrifices could not be upheld based on the city's assertion that protecting animals was a compelling government interest. The Government contends that *Lukumi* is inapplicable to a compelling government interest analysis.

Although that case dealt with the Free Exercise Clause rather than the Free Speech Clause, and was limited by the Court to the ordinances at issue, it remains instructive. The relevance of *Lukumi* was noted under the "Dissenting Views" section of the House Report of § 48:

> Although the Supreme court [sic] recognized the governmental interest in protecting animals from cruelty, as against the constitutional right of free exercise of religion[,] the governmental interest did not prevail. Therefore, it seems that, on balance, animal rights do not supersede fundamental human rights. Here, while Government can and does protect animals from acts of cruelty, to make possession of films of such acts illegal would infringe upon the free speech rights of those possessing the films.

When we consider *Lukumi* along with the fact that the Supreme Court has not expanded the extremely limited number of unprotected speech categories in a generation, the only conclusion we are left with is that we--as a lower federal court--should not create a new category when the Supreme Court has hinted at its hesitancy to do so on this same topic.

Second, while the Supreme Court has not always been crystal clear as to what constitutes a compelling interest in free speech cases, it rarely finds such an interest for content-based restrictions. When it has done so, the interest has--without exception--related to the well-being of human beings, not animals. When looking at these cases, as well as the interests at issue in the unprotected speech categories, it is difficult to see how § 48 serves a compelling interest that represents "a government objective of surpassing importance."

The Supreme Court has suggested that a state interest in avoiding an Establishment clause violation may be compelling, although that remains an unsettled question. The Government also "has a compelling interest in ensuring that victims of crime are compensated by those who harm them" and "ensuring that criminals do not profit from their crimes." Similarly important human interests are at issue in constitutionally valid statutes regulating fighting words, threats, speech that imminently incites illegal activity, and obscenity. In *Ferber,* the Court illustrated the type of interest that must be at stake in order for it to be compelling. The Court stated, "[i]t is evident that a State's interest in safeguarding the well-being of a minor is compelling" because "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." Nothing in these cases suggests that a statute that restricts an individual's free speech rights in favor of protecting an animal is compelling.

Similarly, and even more fatal to the Government's position, because the statute does not regulate the underlying act of animal cruelty--which must be a crime under state or federal law in order to trigger § 48--we can see no persuasive argument that such a statute serves a compelling government interest. While the statute at issue in *Ferber* also prohibited the

distribution of the depiction of sexual performances by children under the age of 16, the Supreme Court went to great lengths to cabin its discussion of the depiction/act conflation because of the special role that children play in our society. Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm.

Third, there is not a sufficient link between § 48 and the interest in "preventing cruelty to animals." As the Government recognizes, Congress and the states already have in place comprehensive statutory schemes to protect animals from mistreatment. The Government states that "all fifty states have enacted laws which criminalize the infliction of cruelty on animals. This includes laws which outlaw dog fighting in all 50 states." These statutes are materially different from § 48. Section 48 does nothing to regulate the underlying conduct that is already illegal under state laws. Rather, it regulates only the depiction of the conduct.

In order to serve the purported compelling government interest of preventing animal cruelty, the regulation of these depictions must somehow aid in the prevention of cruelty to animals. With this depiction/act distinction in mind, it seems appropriate to recast the compelling government interest as "preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce." The House Committee Report for § 48 stated that the statute targeted the depiction rather than the act because under-enforcement of state animal cruelty laws is a particular problem in the crush video industry. Consistent with these findings, the Government states that "as a practical matter, it is nearly impossible to identify the persons involved in the acts of cruelty or the place where the acts occurred." While this justification is plausible for crush videos, it is meaningless when evaluating § 48 as written. By its terms, the statute applies without regard to whether the identities of individuals in a depiction, or the location of a depiction's production, are obscured.

The Government also argues that § 48 indirectly serves to deter future animal cruelty and other antisocial behavior by discouraging individuals from becoming desensitized to animal violence. As support for its position, the Government cited the House Committee Report, which cited research that "suggest[ed] that violent acts committed by humans may be the result of a long pattern of perpetrating abuse, which 'often begins with the torture and killing of animals.'"

This reasoning is insufficient to override First Amendment protections for content-based speech restrictions. The Supreme Court has rejected a similar argument in the context of virtual child pornography. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." When balanced against First Amendment rights, the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." The Supreme Court cannot speak more clearly than it has on this issue: "The prospect of crime . . . by itself does not justify laws suppressing protected speech." Similarly, general references to speech repugnant to public mores cannot serve as a compelling government interest sufficient to override constitutional protections of speech.

For these reasons, we fail to see how 18 U.S.C. § 48 serves a compelling government interest.

2. Second *Ferber* Factor

The second factor in the *Ferber* rationale, that child pornography is "intrinsically related to

the sexual abuse of children," is a similarly weak position for the Government to rely upon. In *Ferber*, the Court reasoned that child pornography should be banned, in part, because the pornographic material continues to harm the children involved even after the abuse. While animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend that the animals themselves suffer continuing harm by having their images out in the marketplace. Where children can be harmed simply by knowing that their images are available or by seeing the images themselves, animals are not capable of such awareness. Put differently, when an animal suffers an act of cruelty that is captured on film, the fact that the act of cruelty was captured on film in no way exacerbates or prolongs the harm suffered by that animal.

3. Third *Ferber* Factor

Both the second and third *Ferber* factors assert that the distribution network for child pornography must be closed so that the production of child pornography will decrease. This drying-up-the-market theory, based on decreasing production, is potentially apt in the animal cruelty context. However, there is no empirical evidence in the record to confirm that the theory is valid in this circumstance. Indeed, the fact that most dog fights are conducted at live venues and produce significant gambling revenue suggests that the production of tapes does not serve as the primary economic motive for the underlying animal cruelty the Government purports to target. Moreover, standing alone this factor sweeps so broadly it should not be deployed to justify extracting an entire category of speech from First Amendment protections. Restriction of the depiction of almost any activity can work to dry up, or at least restrain, the activity's market.

4. Fourth *Ferber* Factor

The fourth *Ferber* factor is that the value of the prohibited speech is "exceedingly modest, if not *de minimis*."[1] The Government finds support for the low value of the speech restricted by the Act by pointing to the exceptions clause of § 48(b). Section (b) states that the Act "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." The House Committee Report viewed these categories as broad. Still, just how broad these categories actually are is subject to debate because the legislative history focuses on the depiction of animal cruelty for prurient purposes in crush videos.[2]

The exceptions clause cannot on its own constitutionalize § 48. The exceptions clause in this case is a variation of the third prong of the *Miller* obscenity test. This prong asks "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." As one

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[1] As to the fifth *Ferber* factor, it is discussed throughout this opinion.

[2] One further point of clarification should be mentioned in reference to the section (b) defense. The parties in this case agree that the Government must prove, beyond a reasonable doubt, that the speech contains no serious value. In contrast, the legislative history of the statute specifically states that "[t]he defendant bears the burden of proving the value of the material by a preponderance of the evidence." Because there is a chance that prosecutors in the future will frame the exceptions clause as an affirmative defense, we take this opportunity to sound an alarm. In the free speech context, using an affirmative defense to save an otherwise unconstitutional statute presents troubling issues.

scholar has stated, "[i]t has long been a principle of adult obscenity law that no matter how shocking or how offensive a sexually explicit work might otherwise be, it should be protected speech if it demonstrates serious artistic value." The role of the clause in *Miller* cannot be divorced from the first two parts of the obscenity test.

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

In sum, the speech restricted by 18 U.S.C. § 48 is protected by the First Amendment. The attempted analogy to *Ferber* fails because of the inherent differences between children and animals. Those profound differences require no further explication here.

B. §48 Cannot Survive Heightened Scrutiny

Because the speech encompassed by § 48 does not qualify as unprotected speech, it must survive a heightened form of scrutiny. A content-based restriction on speech is "presumed invalid," and the Government bears the burden of showing its constitutionality. One scholar notes that "a majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons." Section 48 fails strict scrutiny because it serves no compelling government interest, is not narrowly tailored to achieve such an interest, and does not provide the least restrictive means to achieve that interest.

We have already shown why § 48 does not serve a compelling government interest, thus failing strict scrutiny. Because of the peculiarities of this statute, though, we briefly discuss the relationship between § 48 and the strict scrutiny analysis. The problem lies in defining the compelling government interest when Congress does not have the constitutional power to regulate an area that has traditionally been governed by state statutes. When federalism concerns arise, the "least restrictive means" analysis necessarily informs the "compelling government interest" analysis. The stated governmental interest in 18 U.S.C. § 48 is to "prevent cruelty to animals." Taking federalism concerns into account, the interest stated in this manner is too broad. Absent demonstration of the requisite impact on commerce which is absent on this record, Congress does not have the constitutional authority to pass the types of animal cruelty statutes that are seen in the fifty states and the District of Columbia. It is for this reason that we have suggested that the compelling government interest should be redefined as "preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce." And once this reformulation of the interest targeted by § 48 is accepted, we do not see how a sound argument can be made that the Free Speech Clause is outweighed by a statute whose primary purpose is to aid in the enforcement of an already comprehensive state and federal anti-animal-

cruelty regime. Conversely, if we agree with the Government that the compelling government interest is "preventing cruelty to animals," then we do not see how a sound argument can be made that § 48 is narrowly tailored and uses the least restrictive means.

The Supreme Court routinely strikes down content-based restrictions on speech on the narrow tailoring/least restrictive means prong of strict scrutiny. Accepting for a moment that the Government's interest is "preventing cruelty to animals," then § 48 is not narrowly tailored.

First, with respect to the reach of the Commerce Clause, § 48 does not prohibit *any* depictions--including crush videos--that are made solely for personal rather than interstate commercial use. Party X may create a depiction of animal cruelty in Virginia and sell it in Virginia without violating § 48, so long as Party X does not intend to place that depiction in interstate or foreign commerce. Accordingly, if we accept that the government interest served by § 48 is to prevent animal cruelty, the statute is--by its very terms--underinclusive.

Second, § 48 is overinclusive. Although the statute would fail to reach depictions made solely for personal use, Party Y may, however, be prosecuted for selling a depiction in Pennsylvania made in Virginia even if the underlying activity is legal in Virginia but illegal in Pennsylvania. Party Z may be prosecuted for possessing a depiction in Virginia made in the Northern Mariana Islands even if the underlying activity is legal in the Northern Mariana Islands so long as Party Z intends to sell the depiction. If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive.

Third, the second *Ferber* factor implicitly addressed the fit between regulating the depiction of a behavior with preventing that behavior. Specifically, the Supreme Court stated that "the distribution network for child pornography must be closed if the production is to be effectively controlled." To the extent that this applies to § 48, it applies to a lesser degree, and the arguments by the Government in support of this analogy fall flat. The Government first asserts that, as is true in the case of child pornography, the actors and producers of crush videos and other speech banned by § 48-- i.e., the perpetrators of the underlying acts of animal cruelty--are very difficult to find and prosecute for those underlying acts. This is true as to crush videos because the only person typically onscreen is the "actress," and only her legs or feet are typically shown. However, crush videos constitute only a portion of the speech banned by § 48. Prosecution of this sliver of the speech covered by § 48 could not, by itself, justify banning all of the speech covered by the statute.

As to dog fighting, the Government argues that the camera typically focuses on the dogs, with their "handlers" being shown mostly from the waist or elbows down, and it is often difficult to determine when and where such fights occur. At least with respect to the videos in this case, we find the Government's argument empirically inaccurate. It is true that in the first video, "Pick-A-Winna," much of the footage is old, but the faces of the individuals involved are sometimes quite clear. In the second video, "Japan Pit Fights," the fights take place in Japan, where dog fighting is apparently legal and prosecution could not be pursued. The third video, "Catch Dogs," primarily features footage of dogs hunting and subduing wild hogs and being trained to do so. This video gives the name and address of a catch dog supplier, and also takes the viewer on several hunting trips with these dogs. There is no effort to conceal any of the faces

of the people in the video, and Stevens mentions their names and the location of the hunts. In short, the record before us simply does not support the notion that banning depictions of animal cruelty is a necessary or even effective means of prosecuting the underlying acts of animal cruelty. Much less is it the "most expeditious" or the "only practical method" of prosecuting such acts. For these reasons, § 48 is not narrowly tailored using the least restrictive means.

IV.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." The Government has not met this burden. Therefore, we will strike down 18 U.S.C. § 48 because it constitutes an impermissible infringement on free speech. In light of this conclusion, we will vacate Robert Stevens' conviction.[3]

COWEN, Circuit Judge, dissenting with whom FUENTES and FISHER, Circuit Judges join

The majority today declares that the Government can have no compelling interest in protecting animals from intentional and wanton acts of physical harm. Because we cannot agree, in light of the overwhelming body of law across the nation aimed at eradicating animal abuse, that the Government's interest in ensuring the humane treatment of animals is anything less than

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[3]18 U.S.C. § 48 might also be unconstitutionally overbroad. This Court is required to examine the plain language of the statute to determine whether "a substantial amount of protected speech is prohibited or chilled in the process" of regulating depictions of animal cruelty. Even if we incorrectly assume that § 48 constitutionally reaches the type of depictions sold by Stevens, we must pose reasonable but challenging hypotheticals to determine the statute's sweep. We must not forget that "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."

The statute potentially covers a great deal of constitutionally protected speech that stray far from crush videos. Section 48 broadly proclaims that "the term 'depiction of animal cruelty' means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." If a person hunts or fishes out of season, films the activity, and sells it to an out-of-state party, it appears that the statute has been violated. Similarly, the same person could be prosecuted for selling a film which contains a depiction of a bullfight in Spain if bullfighting is illegal in the state in which this person sells the film. The only possible protections for this violator are prosecutorial discretion and the exceptions clause in section (b). If this depiction has "religious, political, scientific, educational, journalistic, historical, or artistic value" but the value is not "serious," then this violator only has prosecutorial discretion to fall back on. We do not believe that the constitutionality of § 48 should depend on prosecutorial discretion. There is no reason to believe that prosecutors will limit themselves to targeting crush videos. However, because voiding a statute on overbreadth grounds is "strong medicine" and should be used "sparingly," we are satisfied to rest our analysis on strict scrutiny grounds alone.

of paramount importance, and because we conclude the speech prohibited by 18 U.S.C. § 48 to be of such minimal socially redeeming value that its restriction may be affected consistent with the First Amendment, we respectfully dissent.

I.

In the seminal case *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Supreme Court articulated the fundamental limits of the First Amendment's protections: “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has 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. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

It is undisputed that the speech at issue in this case does not fit within one of the traditionally unprotected[4] classes. However, as even the majority agrees, that these categories may be supplemented is beyond dispute. Most recently, the Supreme Court in *Ferber* did just this.

The Supreme Court has provided us with two beacons to guide our inquiry into whether depictions of animal cruelty should be recognized as beyond the reach of the First Amendment. First, the Government may restrict certain types of speech when the social value of the speech is so minimal as to be plainly outweighed by the Government's compelling interest in its regulation. Second, in *Ferber*, the Court articulated four critical considerations demonstrating the inextricable connection necessary between the evil sought to be prevented and the speech sought to be proscribed sufficient to render an entire category of speech unprotected. Because depictions of animal cruelty possess the integral characteristics of unprotected speech when considered under these precedents, we conclude that it escapes First Amendment protection.

a.

In discussing the contours of permissible content-based regulations, the Supreme Court has explained speech may be restricted when its "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky,* 315 U.S. at 572. The Court reiterated this statement in *Ferber:* "[T]he evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." Justice Brennan, in his concurrence in *Ferber*, isolated the salient features: "[T]he limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly 'slight social value,' and the State has a compelling interest in their regulation." These statements establish the constitutional floor: for speech to be unprotected, at a bare minimum, its value must be plainly outweighed by

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[4] Throughout this opinion we refer to speech as "unprotected" as a form of shorthand. We mean that "these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content.*

the Government's asserted interest. The speech in this case shares those features.

1.

We agree 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, more generally, the morals of society.

Our nation's aversion to animal cruelty is deep-seated. Laws prohibiting cruelty to animals have existed in this country since 1641. In 1828, the first modern animal cruelty law was enacted in New York, and by 1913 every state had such a law. These anti-cruelty laws have continued to evolve and proliferate. In 1867, New York enacted a law outlawing animal fighting, and today dogfighting is prohibited in all the fifty states.

Congress has also regularly enacted laws that protect animals from maltreatment, including, *inter alia,* laws that: proscribe animal fighting, require that livestock be slaughtered humanely, create standards to protect pets in pounds and shelters, protect free-roaming horses and burros from capture, branding, harassment, and death, help conserve endangered species, and protect marine mammals. The very statute before us illustrates Congress's solicitude for animal welfare.

This overwhelming body of law reflects the "widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans," and is powerful evidence of the importance of the governmental interest at stake. Indeed, the Supreme Court often cites to the prevalence of nationwide legislation on a matter as support for its conclusion that the asserted interest is sufficiently important as to be deemed compelling.

Less obvious, but no less important, cruelty to animals is antisocial behavior that erodes public mores and can have a deleterious effect on the individual inflicting the harm. Early jurists accepted this contention implicitly. And empirical evidence now bears out that understanding.

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 nested itself so deeply into the core of our society -- because the interest protects the animals themselves, humans, and public mores -- that it warrants being labeled compelling.

Notwithstanding the majority's assertion, the Supreme Court in no way suggested to the contrary in *Lukumi*. In *Lukumi,* the ordinances failed not because preventing cruelty to animals was not compelling; rather, the Court found that the ordinances were so riddled with exceptions that the real rationale behind the prohibitions was suppression of religion. Thus, *Lukumi* does not contradict our conclusion that preventing animal cruelty is a compelling interest.[5]

Furthermore, insofar as we understand the majority to suggest that Congress cannot have a compelling interest to advance a goal when the subject of the regulation is not directly within its

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[5] We further reject Stevens's assertion that the fact that society accepts the subjugation of animals for certain utilitarian purposes undercuts this conclusion. While sometimes the line between cruelty to animals and acceptable use of animals may be fine, our society has been living and legislating within these boundaries for centuries.

constitutional sphere of legislative authority, we must disagree with this novel proposition. A congressional act may certainly significantly advance a governmental interest of paramount significance, whether or not it does so directly. Whether a governmental interest is compelling does not, in our view, depend on the extent of the *particular* government's constitutional authority to directly regulate the core conduct at issue. Applied to this case, we do not think it proper for the majority to so narrowly redefine the Government's interest -- as implicating only the evils arising from the under-enforcement of state animal cruelty statutes -- so as to diminish the importance of the Government's posited goals.

Nor do we find that section 48 is sufficiently underinclusive as to undercut the Government's claim of the significance of its interest. That section 48 does not criminalize the personal possession of depictions of animal cruelty or the intrastate trafficking of such materials does not render it impermissibly under-inclusive. On the contrary, Congress could have reasonably decided to focus its attention on purely interstate conduct, lest enforcement efforts be hampered by costly constitutional litigation. This is especially so in light of the indication that the materials Congress sought to prohibit "were almost exclusively distributed for sale through interstate or foreign commerce." We thus find no under-inclusion in section 48 sufficient to cast doubt on the Government's asserted interest here.

2.

Next, we find that the depictions of animal cruelty prohibited by section 48 also satisfy the second part of the balancing inquiry because they have little or no social value. This is guaranteed by the very terms of the statute, which excepts speech that has serious value from its reach. While this exception removes the possibility of the statute reaching serious works, we consider it unlikely that visual depictions of animal cruelty will often constitute an important and necessary part of a literary performance, a scientific or educational work, or political discourse. Nor do we see any reason why, if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal could not be simulated. Here, we have little trouble concluding that the depictions outlawed by section 48, by and large, can only have value to those with a morbid fascination with suffering and thus are of only *de minimis* value.

The Supreme Court has made clear that a category of constitutionally *unprotected* speech may be regulated as long as the regulations do not extend to portions of speech within that category with "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24. Like in the case of obscenity, the relevant analytical starting point here is with the legislative judgment that the category of speech at issue is of such minimal redeeming value as to render it unworthy of First Amendment protection. But acknowledging that certain subsets of these materials may have value, Congress has circumscribed the scope of its regulation to only this category's plainly unprotected portions. Viewed in this light, section 48 is nothing more than an analogous codification of the *Miller* framework, tailored to the animal cruelty context. Thus, the analytical significance of the exceptions clause at issue here merely establishes the outer bounds for the permissible regulation of a category of otherwise *unprotected* speech.

We find that section 48 outlaws depictions that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." The speech

outlawed by the statute at issue shares the salient characteristics of the other recognized categories of unprotected speech, and thus falls within the heartland of speech that may be proscribed based on its content. Having satisfied this threshold inquiry, we thus turn to a discussion of the *Ferber* considerations.

b.

We read *Ferber* to stand for the narrow proposition that a category of speech may be constitutionally restricted where it depicts the intentional infliction of physical harm on a class of especially vulnerable victims in violation of law, where the distribution of such depictions spurs their production but laws prohibiting the underlying acts are woefully under-enforced, and where the speech's social value is so *de minimus* as to be outweighed by the important governmental goal of protecting the victims. We find that the depictions of animal cruelty proscribed by section 48 possesses these essential attributes.

In *Ferber,* the Supreme Court justified the prohibition of child pornography based on four grounds. We elaborate each of these four parts below and detail how depictions of animal cruelty implicate the same interests.

First, the Supreme Court recognized the interest in protecting minors as compelling. As discussed above, we find preventing animal cruelty to also be of the most paramount importance.

Second, the Supreme Court explained that child pornography was an unprotected form of speech because of the intrinsic relationship between the distribution of child pornography and the sexual abuse of children, which it found existed in at least two ways. First, child pornography materials create a lasting record of the abuse, and as the materials are distributed, the harm to the child is exacerbated, and second, because of the daunting obstacles in prosecuting the "low-profile, clandestine industry," targeting the more-visible distribution network was "the most expeditious if not the only practical method" of ensuring enforcement.

The speech at issue here is also intrinsically related to the underlying crime of animal cruelty. In *Ferber,* the Supreme Court found an inextricable connection between child pornography and the underlying abuse based in part on its observation that the pornography's deleterious and stigmatizing effects transcend the single instance of abuse depicted. We do not quarrel with the majority's statement that it would be difficult to directly analogize this ongoing psychological harm suffered by child abuse victims to that of animals. However, even a cursory consideration of circumstances surrounding animal abuse, such as in the dogfighting context, counsels toward the conclusion that the harms suffered also extend far beyond that directly resulting from the single abusive act depicted. Indeed, dogs that are forced to fight are commonly the subjects of brutality and cruelty for the entire span of their lives: prior to the fights, they are emotionally abused and physically tortured to predispose them to violence; after the fights, dogs that do not perform well are not infrequently left to die from their injuries or are executed. Further, the creation of the depictions often spells the end of the lives of the animals involved. Thus, while animals may not suffer harm merely because of the existence of the depictions, that significant attendant harms (both leading up to the abuse and following it) emanate from the single instance of depicted cruelty nevertheless supports our finding that the prohibited depictions are intrinsically linked to the underlying abuse.

In addition, law enforcement officials face similar difficulties in prosecuting the creation of

animal cruelty depictions as they do in policing child pornography, and Congress could have thus reasonably concluded that targeting the distributors would be the most effective way of drying up the animal-cruelty depictions market. In particular, police struggle to prosecute those involved in crush videos because the videos are generally created by a clandestine staff; the woman doing the crushing is filmed in a manner that shields her identity, and the location is imperceptible. Similarly, individuals involved in dogfights are also insulated from law enforcement. Therefore, we must disagree with the majority's characterization of the Government's claims pertaining to the difficulties in enforcement as "empirically inaccurate." The same policing concerns that necessitated a focus on the distribution network in *Ferber* are present in this case. Accordingly, we conclude that the creation and distribution of depictions of animal cruelty is intrinsically related to animal cruelty so as to weigh in favor of its prohibition.

Third, the Supreme Court held in *Ferber* that the advertising and sale of child pornography must be targeted since they "provide an economic motive for and are thus an integral part of the production of such materials." These factors are self-evidently present in the instant case. As discussed, substantial obstacles exist in effectively detecting and prosecuting those directly involved in the creation of animal cruelty depictions. Furthermore, the record here amply demonstrates that a thriving market exists for depictions of animal cruelty: Crush videos and dogfighting videos are advertised and sold in copious amounts over the internet and through magazines. *See* 145 Cong. Rec. S15220-03 (1999) (noting that there are over 2,000 crush-video titles available, priced from $ 15 to $ 300); PSR 6 (showing that Stevens had sold almost 700 videos depicting dogfights in two-and-a-half years for which he earned over $ 20,000). This evidence establishes the existence of a lucrative market, which in turn provides a powerful incentive to create videos depicting animal cruelty.

In our view, the presence of an economic motive driving the production of depictions of animals being tortured or killed is perhaps the critical consideration that distinguishes the speech at issue here from ordinary depictions of criminal activities. A decision allowing prohibition of the distribution of depictions of animal abuse will no more threaten the examples of speech posited by Stevens -- crime scene photographs and surveillance videos -- than did the decision in *Ferber.* Stevens's examples are easily distinguishable as they plainly have more than *de minimis* value; crime scene photographs, for instance, are useful to police officers. Furthermore, no commercial market exists for depictions of run-of-the-mill criminal activities so as to incentivize the commission of the underlying illegal acts; there thus is little danger that individuals will be directly motivated to physically harm others to create depictions in hopes of commercial gain.

Fourth, the Supreme Court justified its restriction in *Ferber* on the fact that the value of child pornography is *de minimis.* The Court considered it unlikely that such depictions would be an important part of scientific, literary, or educational works, and in the off-chance that such was necessary, they could be simulated. While we have already articulated our reasons for concluding that depictions of animal cruelty are of *de minimis* value, this case is even clearer than *Ferber* because section 48 excludes depictions that have any serious value. Thus, there is no potential that the statute will reach work that plays an important role in the world of ideas.

The speech at issue in this case possesses the essential attributes of unprotected speech identified generally in *Chaplinsky* and of child pornography as discussed in *Ferber.* To reiterate, the Government has a compelling interest in eradicating animal cruelty, depictions of animal

cruelty are intrinsically related to the underlying animal cruelty, the market for videos of animal cruelty incentivizes the commission of acts of animal cruelty, and such depictions are of *de minimis* value. In reaching this decision, however, we emphasize that we have before us, not a statute broadly purporting to ban all depictions of criminal acts, but merely one prohibiting depictions of a narrow subclass of depraved acts committed against an uniquely vulnerable and helpless class of victims. As such, we deem it unlikely that our ruling would have broad negative repercussions to First Amendment freedoms. Accordingly, because Congress may proscribe depictions of animal cruelty without running afoul of the First Amendment, we would reject Stevens's challenge to the constitutional validity of 18 U.S.C. § 48.

II.

Section 48 is also not unconstitutionally overbroad. The overbreadth doctrine is "strong medicine that is not to be casually employed." As the Supreme Court recently emphasized: "we have vigorously enforced the requirement that a statute's overbreadth be *substantial*." Courts should invalidate a statute on overbreadth grounds only when the law "reaches a *substantial* number of impermissible applications." Thus, "[t]he mere fact that one can conceive of some impermissible applications is not sufficient." There is no such substantial overbreadth here.

Stevens first argues that the statute is overbroad because it criminalizes depictions of conduct that was not illegal when or where it occurred. However, such speech is within the statute's legitimate scope. In *Ferber,* the Court held that a "State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State" because "the maintenance of the market itself 'increases the risk that [local] children will be injured.'" The same interests are implicated here: so long as the industry peddling depictions of animal cruelty survives, there remains a financial incentive to create more videos within this country. The state of the law years ago in this country, or that in foreign jurisdictions is irrelevant to this consideration. The Government may legitimately endeavor to quash the entire industry. Furthermore, because the difficulty in determining where or when the animal cruelty occurred was part of Congress's motivation for enacting section 48 excepting depictions that occurred at a time or in a place where the conduct was not illegal would essentially gut the statute.

Stevens also argues that the statute is overbroad because it reaches individuals who took no part in the underlying conduct. This argument is likewise foreclosed by *Ferber*. For the Government to extinguish the market for depictions of animal cruelty, it must be allowed to attack its most visible apparatus -- the commercial distribution network.

Stevens's final argument that the statute is overbroad because it could extend to technical violations of hunting and fishing statutes is also unpersuasive. The Supreme Court recently rejected similar contentions in upholding a federal statute criminalizing the promotion and possession of child pornography against an overbreadth challenge. While acknowledging that the plain language of the statute could be read to criminalize the act of turning child pornography over to law enforcement, the Court nevertheless stated that there was no real threat that such activity would be deterred by the federal prohibition. Furthermore, that the statute could also apply to documentary footage of foreign war atrocities did not render it facially unconstitutional.

Turning to the statute at hand, we are unable to imagine the circumstances that would have to coalesce for such a video to come within section 48, especially in light of its exceptions clause.

There is no "realistic danger" that the statute will deter such depictions. Moreover, even if technical violations were to slip through the section 48(b) bulwark, we are confident that they would amount to no more than a "tiny fraction" of the depictions subject to the statute, which thus may "be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Accordingly, section 48 is not substantially overbroad.

III.

Finally, Stevens contends that the statute is unconstitutionally vague. A statute is void on vagueness grounds if it: (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits"; or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." Section 48 is not unconstitutionally vague.

Stevens's primary argument, that the statute is vague because the definition of "depiction of animal cruelty" is predicated on state law, is unavailing. A federal statute is not rendered unconstitutionally vague merely because it incorporates state law; to the contrary, such is a legitimate drafting technique frequently utilized by Congress. Stevens's next contention is that section 48 is void-for-vagueness because the word "animal" is defined differently in different states. We reject this argument as plainly against the weight of legal authority. Notwithstanding Stevens's claims to the contrary, section 48 is not unconstitutionally vague.

IV.

To be sure, we are not insensitive to the concerns implicated when a federal court declares an entire category of speech outside the purview of the First Amendment. However, we know of no principle that lower courts should decline to analogize and apply the Supreme Court's precedents in this area without first receiving permission to do so. We believe our determination both faithfully discharges our judicial obligation to duly advance the law's development when appropriate to do so, and comports with *Chaplinsky* and *Ferber*.

In conclusion, 18 U.S.C. § 48 significantly advances the Government's compelling interest in protecting animals, and the depictions it prohibits are of such minimal social value as to render this narrow category of speech outside the First Amendment. Furthermore, the statute is neither overbroad nor vague. We would hold that section 48 is valid and affirm Stevens's conviction.