



July 20, 2010

U. S. House of Representatives  
Washington, DC 20510

**Re: ACLU Opposes H.R. 5566 – Prevention of Interstate Commerce  
in Animal Crush Videos Act of 2010**

Dear Representative:

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On behalf of the American Civil Liberties Union (ACLU), its more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write in opposition to H.R. 5566, the Prevention of Interstate Commerce in Animal Crush Videos Act of 2010. We urge you to vote “NO” when this bill comes to the floor this week on the suspension calendar.

While this bill is a well-intentioned effort to respond to the Supreme Court’s decision in *United States v. Stevens*<sup>1</sup> earlier this year, it fails to fully resolve the overbreadth problem with the prior law cited by the court. Moreover, H.R. 5566 creates ambiguity surrounding the established standard for banned obscenity, thereby possibly opening the door to banning other forms of disfavored content. Finally, if the bill is effective in banning the sale and distribution of depictions of animal cruelty it is intended to ban, it arguably would also ban the sale and distribution of those same depictions by animal rights groups and other who use the depictions in advocating for the elimination of animal cruelty and other legitimate purposes. How ironic if a bill intended to prevent animal cruelty actually inhibits the advocacy of those dedicated to achieving that goal.

## I. Background

In *Stevens*, the Supreme Court invalidated 18 U.S.C. § 48, which made it a crime to create, sell, or possess a depiction of animal cruelty for commercial gain in foreign or interstate commerce. A depiction of animal cruelty was defined as one “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed” if the depicted conduct violates federal law or the law of the state in which the creation, sale, or possession occurs. The statute contained an exemption for any depiction “that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”<sup>2</sup>

<sup>1</sup> 559 U.S. \_\_\_\_, 130 S. Ct. 1577 (2010).

<sup>2</sup> *Id.* at 1579.

The Supreme Court agreed with the Third Circuit that even depictions of animal cruelty are protected by the First Amendment.<sup>3</sup> The court rejected the government’s argument that a balancing of societal costs and benefits should determine whether speech is protected.<sup>4</sup> However, rather than following the reasoning of the Third Circuit, which struck section 48 after determining that the government did not have a compelling interest in preventing cruelty to animals and that section 48 was not narrowly tailored to use the least restrictive means, the Supreme Court instead relied on overbreadth doctrine.<sup>5</sup>

In construing the statute, the court expressed concern that the statute did not require that the illegal conduct depicted be outlawed *because of its cruelty*.<sup>6</sup> The statute covered depictions of activities that, while illegal in some jurisdictions, were not in others. The court was concerned with the patchwork of laws implicated by section 48. A depiction of lawful activity in one state could be the basis for criminal prosecution if distributed in another state.<sup>7</sup> For these and other reasons, the court struck down the law as unconstitutional.

In response, Rep. Gallegly introduced legislation that, in its current form, would make it a crime to “knowingly and for the purpose of commercial advantage or private financial gain sell[ ] or offer[ ] to sell, or distribute[ ] or offer[ ] to distribute an animal crush video in interstate or foreign commerce”.<sup>8</sup> “Animal crush video” is defined as “any obscene photograph, motion-picture film, video recording, or electronic image that depicts actual conduct in which one or more living animals is intentionally crushed, burned, drowned, suffocated or impaled in a manner that would violate a criminal prohibition on cruelty to animals under Federal law or the law of the State in which the depiction is created, sold, distributed, or offered for sale or distribution.” There are exemptions only for depictions of hunting, trapping, fishing, and “customary and normal veterinary or agricultural husbandry practices”.<sup>9</sup>

## **II. Animal Crush Videos Do Not Meet the Court’s Established Definition of Obscenity.**

H.R. 5566 incorporates the term “obscene” in two areas. First, the bill’s findings assert that the country has a history of barring the sale of obscene materials and designates animal crush videos as per se obscene.<sup>10</sup> In the operative section of the bill, the definition of ‘animal crush video’ incorporates the term ‘obscene’.<sup>11</sup> In neither circumstance does the use of the term comport with the court’s accepted definition of obscenity because the recordings in question typically depict nothing in the way of sexual conduct and because they sometimes have value beyond that for which they were perhaps intended.

The court set forth the landmark standard for obscenity in *Miller v. California*:

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<sup>3</sup> *Id.* at 1586.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1592.

<sup>6</sup> *Id.* at 1588.

<sup>7</sup> *Id.* at 1589.

<sup>8</sup> H.R. 5566, 111th Cong. (2010), at § 3(a).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at § 2.

<sup>11</sup> *Id.* at § 3.

The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>12</sup>

One key aspect of the *Miller* decision was its determination that a national standard could not substitute for community standards. Chief Justice Burger wrote that the standards of New York and Las Vegas must not control those in Maine and Mississippi, noting that “[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.”<sup>13</sup> Implicit in this statement is the notion that those within a particular community are best qualified to judge the standards of their community, thereby also suggesting that a fact-finder – a judge or jury – and not Congress is best equipped to determine what content qualifies as obscenity.

The bill’s findings, contrary to the intent of the court’s community standard mandate, declare animal crush videos to be obscene. By the very nature of community standard, an individualized determination must be made. The obscenity standard cannot be applied in a blanket fashion to an entire category of visual depictions. To do so would fly in the face of the court’s decision to set aside the notion of a national standard over 35 years ago.

Moreover, the *Miller* standard for obscenity by its very terms requires sexual content. Animal crush videos, on the other hand, typically contain no such content.<sup>14</sup> Instead, the worst of them contain depictions of cruelty to animals – which some claim appeals to the prurient interest of a small segment of the population. As disturbing as such depictions might be to the great majority of Americans, they do not generally qualify as containing sexual conduct.

Accordingly, the language of the bill can only be viewed as conflicting with the precedential rulings of the Supreme Court in the area of obscenity. Therefore, this bill must be deemed an attempt to expand accepted notions of obscenity. Otherwise its effect will be a nullity since it relies on a definition the courts will reject. In our view, the First Amendment right to speak freely should be expanded by this Congress, not restricted. While animal crush videos, used for their intended purpose, are an outrage, the attempt to ban them does harm to the speech rights of every American in general and to the legitimate speech rights of animal rights activists, journalists, and educators, in particular. The goals of stopping animal cruelty should be achieved by a more vigorous effort targeted at identifying and prosecuting those responsible for committing the cruel acts – and the current legislation does little or nothing to achieve that end.

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<sup>12</sup> *Miller v. California*, 413 U.S. 15, 24-25 (1973) (citation omitted).

<sup>13</sup> *Id.* at 32-33.

<sup>14</sup> *U. S. v. Stevens*, 559 U.S. \_\_\_\_\_, slip op. at 2 (2010).

### **III.H.R. 5566 Will Impact the Speech Rights of Law-Abiding Americans**

The intent of the bill is to stop the distribution of depictions that are used in a prurient fashion. However, as in most attempts to restrict speech, other legitimate uses of the same depictions will also be banned. Walk into any significant conference of animal rights activists, and you are likely to find pamphlets and brochures with mind-numbing depictions of animal cruelty. These depictions could very easily be drawn from the materials intended to be banned by this bill. And yet it is not unreasonable to assume there are more Americans interested in advocating against animal cruelty who use such depictions than there are those who use such depictions for prurient purposes. Nevertheless, this bill makes no exception for the use of these depictions to advance the political arguments of those opposing animal cruelty. The same holds true for educational and journalistic use of such depictions.

A legislative effort to prevent animal cruelty could be achieved in a more closely tailored way to achieve that legitimate governmental purpose. Any bill that would restrict First Amendment speech rights, no matter how well-intended, must be narrowly tailored to achieve a compelling state interest. While some might argue that stopping animal cruelty is a compelling state interest, there can be no question that the current bill is insufficiently narrowly tailored when it applies criminal sanctions to legitimate political, journalistic, or educational uses of depictions of animal cruelty.

We urge you to oppose this well-intended but flawed legislation when it comes to the House floor. If you have any questions, please contact Michael W. Macleod-Ball at 202-675-2309 or by email at [mmacleod@dcaclu.org](mailto:mmacleod@dcaclu.org).

Sincerely,



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