



November 15, 2010

U. S. House of Representatives
Washington, DC 20510

**Re: ACLU Opposes H.R. 5566 – Animal Crush Video Prohibition
Act of 2010**

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL.
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Dear Representative:

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 once again in opposition to H.R. 5566, the Animal Crush Video Prohibition Act of 2010. We urge you to vote “NO” when this bill comes to the floor on the suspension calendar.

We opposed the original form of this bill when it came up for a vote in the House in July.¹ We also submitted a written statement to the Senate Judiciary Committee when the bill was the subject of a hearing in that forum in September.² The Senate passed an amended version of the bill, which is scheduled to come before the House for a vote as early as today. While we understand that the House will consider a further amendment that limits the new crimes created by the bill, we continue to oppose the bill. In fact, the bill approved by the Senate is substantially more likely to run afoul of constitutional free speech standards than even the bill approved by the House in July.

H. R. 5566 could be crafted in any of a number of ways to focus on those who actually inflict cruelty on animals. The bill approved by the Senate instead criminalizes the conduct of those who merely document such cruelty or distribute such depictions to others – regardless of the intent of those creating or distributing such depictions. As a result, this bill is far more likely to face constitutional challenge – the same fate that befell predecessor legislation and which resulted in the Supreme Court striking down the law earlier this year.

¹ See ACLU Letter to U. S. House of Representatives dated July 20, 2010, available at http://www.aclu.org/files/assets/ACLU_Opposes_HR_5566_Prevention_of_Interstate_Commerce_in_Animal_Crush_Videos_Act_of_2010_0.pdf.

² See Written Statement of the ACLU dated September 15, 2010, available at http://www.aclu.org/files/assets/ACLU_Statement_for_Senate_Judicay_Hearing_Sept_2010.pdf.

While this bill is a well-intentioned effort to respond to the Supreme Court's decision in *United States v. Stevens*³ earlier this year, it fails to fully resolve the overbreadth problem with the prior law cited by the court. Proponents who are pursuing the laudable goal of stopping animal cruelty would be better served by crafting legislation aimed at giving law enforcement the tools to identify and prosecute those responsible for the cruel acts depicted. Instead, the bill lumps together creators and distributors of animal crush videos with animal rights activists, journalists, educators, and law enforcement personnel and criminalizes the conduct of all of them regardless of intent, if they have occasion to use depictions of animal cruelty in their work. If the bill is effective in banning the creation, sale and distribution of those depictions of animal cruelty it is intended to ban, it arguably would also ban the creation, sale and distribution of those same depictions by anyone who might use the depictions in advocating for the elimination of animal cruelty or for other legitimate purposes. 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. Unfortunately, the crafters of H. R. 5566 chose not to write a bill that would certainly withstand challenge, and instead wrote a bill of arguable constitutionality that will no more benefit the victims of animal cruelty than no legislation whatsoever.

We will not repeat the lengthy analysis of the history of animal crush video legislation and court responses to such legislation included in our earlier communications (referenced above). We would like to highlight elements of the current version of H. R. 5566 that may be problematic:

- H. R. 5566 as approved by the Senate criminalizes not only the sale and distribution of animal cruelty depictions, but also the creation of such depictions. While some might argue that the sale and distribution of a photo or video has only an indirect connection to speech rights, it would be nearly impossible to argue against such a connection with the creation of a photo or video.
- The bill does not distinguish whether such depictions are being used for educational, activist, journalistic, or law enforcement purposes. The bill does exempt depictions of animal husbandry practices, slaughter of animals for food, hunting, trapping and fishing. The inclusion of such activities – typically lawful and not burdened with the prurient intent associated with animal crush videos – simply highlights the basic unfairness associated with failing to make the list of exemptions substantially longer to include others whose intent is not malicious.
- The bill attempts to re-write the standard for obscenity. The court years ago set the legal standard for obscenity, requiring that the speech appeal to the prurient interest under local community standards, depicts explicit sexual or excretory conduct, and lacks serious literary, artistic, political, or scientific value. By attempting to deem animal cruelty depictions as obscene, this bill attempts to override the community interest element and, more importantly, the second element entirely.

The New York Times in an editorial published August 1, 2010, called the original House bill an improvement over the one struck down by Stevens. The editorial cited favorably to Chief Justice

³ 559 U.S. ____, 130 S. Ct. 1577 (2010).

John Roberts, Jr., who said that a new exception to free speech cannot be created simply by balancing the value of the speech against its harm to society. The Time declared “animal cruelty videos may be repugnant to many, but America’s legal tradition keeps them from being illegal.” We agree – and even more so because the bill adopted by the Senate and about to be considered by the House is a more direct assault on the speech process than the bill that served as the basis of the editorial in the first place.

We urge members of the House to vote “NO” on H. R. 5566 when the Senate version of this well-intended but flawed legislation comes to the House floor. We are aware that this is a difficult vote, but would urge you to do so in hopes that Congress will undertake to craft a bill that will be more effective in stopping animal cruelty, while preserving the speech rights of journalists, activists, and educators. If you have any questions, please contact Michael W. Macleod-Ball at 202-675-2309 or by email at mmacleod@dcacclu.org.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The script is fluid and cursive, with a long horizontal flourish extending from the end of the name.

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink that reads "Michael W. Macleod-Ball". The script is cursive and somewhat compact, with the last name being the most prominent part of the signature.

Michael W. Macleod-Ball
Chief of Staff and First Amendment Counsel