IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES	]	
	]	
v.	]	No. 25-cr-75-JL-AJ
	]	
LYNN SEYMOUR	]	

MOTION TO DISMISS

Lynn Seymour respectfully moves this Court to dismiss the indictment. This motion is grounded in the First and Fifth Amendments to the Constitution of the United States.

As grounds it is stated:

I. INTRODUCTION AND SUMMARY

This case involves repulsive and shocking videos. But under the First Amendment, repulsiveness and shock are not sufficient to permit restrictions on speech. *See, e.g. Brandeburg v. Ohio*, 395 U.S. 444 (1969) (reversing on First Amendment grounds a Klansman's conviction for a speech containing disturbing and offensive statements to a group of armed hooded men after a cross-burning)

Miller v. California, 413 U.S. 15 (1973) set out a three-part test under which hard-core pornography may be regulated by the government because "obscenity" is a category of speech that has traditionally received less protection under the First Amendment. Under this test, a video is obscene only if "the average person, applying contemporary community standards would find that the [video], taken as a whole, appeals to the prurient interest; (b) [] the [video] depicts or describes, in a patently offensive way, *sexual conduct specifically defined by the applicable state [or federal] law*; and (c) [] the [video], taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id*. at 24 (emphasis added). Thus, not only must the video appeal to

"prurient" interest – *i.e.* a "shameful or morbid interest in *sex*." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504 (1985) (emphasis added), the video must also depict *sexual conduct*. Under the First Amendment, a video that does not meet all prongs of the *Miller* test may not be regulated by the government.

The defense maintains that the videos allegedly involved in this case – which graphically depict violence directed towards animals, including violence directed at the animal's sexual organs – fail to meet the *Miller* obscenity standard, but that is an issue for the trial jury, and for the Court on a Fed. R. Crim. P. 29 motion. The issue here is whether the indictment must be dismissed pretrial. It should be because the statute on which the indictment is based is unconstitutional for multiple reasons.

First, the statute does *not* incorporate the full *Miller* standard. Rather, it incorporates a standard under which a video that depicts violence towards animals, appeals to the prurient interest, and is patently offense, is outlawed, even if the video does not depict human sexual conduct. Second, the statute is unconstitutionally vague, especially under the more demanding vagueness standard that applies to speech regulation, because it contains ambiguities that leave the average person uncertain of its reach and encourage arbitrary enforcement. Third, even if the statute is construed to incorporate *Miller,* and is not void for vagueness, the statute unconstitutionally discriminates based on both viewpoint and content: it provides a prison sentence for some graphic depictions, but completely excludes from its reach depictions of governmentally-favored activities such as farming, hunting, and scientific research, no matter how brutal the treatment of animals; and the statute singles out for punishment a subcategory of obscene videos based on those videos' non-proscribable content.

II. THE INDICTMENT'S STATUTORY BASIS

Ms. Seymour is charged in a two-count indictment with violating and conspiring to violate 18 U.S.C. § 48, which makes it "unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce." 18 U.S.C. §48(a)(3). The statute defines an "animal crush video" as any "photograph, motion-picture film, video or digital recording, or electronic image that A) depicts animal crushing; and (B) is obscene." 18 U.S.C. § 48(f)(2).

The statute does not define the term "obscene." "Animal crushing" is defined as "actual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242) [.])" *Id*. at (f)(1).[1]

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[1] The term "serious bodily injury" is defined in 18 U.S.C. §1365 as follows:

> (3) the term "serious bodily injury" means bodily injury which involves — (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and
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> (4) the term "bodily injury" means— (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.

18 U.S.C. §§ 2241 and 2242 define the crimes of Aggravated Sexual Abuse and Sexual Abuse, respectively. Section 2241 provides that:

(a) By Force or Threat.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act— (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

> (b)By Other Means.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

Finally, 18 U.S.C. § 48(d) contains an exceptions provision:

> d) Exceptions.— (1) In general.—This section does not apply with regard to any conduct, or a visual depiction of that conduct, that is—
>
> (A) a customary and normal veterinary, agricultural husbandry, or other

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(1)renders another person unconscious and thereby engages in a sexual act with that other person; or (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby— (A) substantially impairs the ability of that other person to appraise or control conduct; and (B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With Children.— Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense or an offense under the Uniform Code of Military Justice that would have been an offense under any such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of Mind Proof Requirement.— In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

18 U.S.C. § 2242 provides that: "Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

> (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping);
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> (2) engages in a sexual act with another person if that other person is— (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or
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> (3) engages in a sexual act with another person without that other person's consent, to include doing so through coercion; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life
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> .

In sections 2241 and 2242, the term "sexual act" has the following definition: (A)contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B)contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; 18 U.S.C. § 2246(2).

> animal management practice;
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> (B) the slaughter of animals for food;
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> (C) hunting, trapping, fishing, a sporting activity not otherwise prohibited by Federal law, predator control, or pest control;
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> (D) medical or scientific research;
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> (E) necessary to protect the life or property of a person; or
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> (F) performed as part of euthanizing an animal.

III. THE STATUTE'S ENACTMENT AND LEGISLATIVE HISTORY, AND THE SUPREME COURT DECISION STRIKING DOWN AN EARLIER VERSION OF IT

Congress originally enacted 18 U.S.C. § 48 in 1999. PL 106–152, 113 Stat 1732 (1999). That version of the statute targeted depictions of "animal cruelty" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violated federal or state law where "the creation, sale, or possession takes place." *United States v. Stevens*, 559 U.S. 460, 465 (2010) (internal quotation marks omitted). In his signing statement, President Clinton announced the following:

> Today I have signed into law H.R. 1887, a bill that would establish Federal criminal penalties for the "creation, sale, or possession" of "a depiction of animal cruelty" with the intent to distribute such a depiction in interstate or foreign commerce, except when the depiction has "serious religious, political, scientific, educational, journalistic, historical, or artistic value." I strongly support the objectives of this legislation. Its enactment should assist in reducing or eliminating some of the deplorable and indefensible practices that were identified during the Congress's deliberations on the bill and described in the House Judiciary Committee report on the bill.
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> Concerns were raised, however, during congressional consideration of H.R. 1887 that its application in certain contexts may violate the the [*sic*] First Amendment of the Constitution. It is important to avoid constitutional challenge to this legislation and to ensure that the Act does not chill protected speech. Accordingly, I will broadly construe the Act's exception and will interpret it to require a determination of the value of the depiction as part of a work or communication, taken as a whole. *So construed, the Act would prohibit the types of depictions,*

> *described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex*. I will direct the Department of Justice to enforce the Act accordingly.

1999 U.S.C.C.A.N. 324, 1999 WL 33178029 (December 9, 1999) (emphasis added).

In *Stevens*, the Supreme Court struck down the statute as substantially overbroad and therefore facially violative of the First Amendment. 599 U.S. at 481. In reaching this conclusion, the Court emphatically rejected the government's argument that, like child pornography, depictions of animal cruelty constitute a class of speech that is unworthy of protection because its harms outweigh its benefits. *Id*. at 469-72. *Stevens* stands for the proposition that treating depictions of animal cruelty as a class of unprotected speech is inconsistent with the First Amendment:

> [I]n *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. The statute covered depictions 'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed' if that harm to the animal was illegal where 'the creation, sale, or possession t[ook] place[.]' A saving clause largely borrowed from our obscenity jurisprudence, *see Miller v. California*, 413 U.S. 15, 24 (1973), exempted depictions with 'serious religious, political, scientific, educational, journalistic, historical, or artistic value[.]' We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the depiction of animal cruelty—though States have long had laws against *committing* it.

Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 791 (2011) (striking down as content-based regulation of speech in violation of the First Amendment a statute banning the sale of violent video games to minors) (internal citations to § 48 omitted). In *Brown*, the Supreme Court made it clear that "violence is not part of the obscenity that the Constitution permits to be regulated. And "the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" *Brown*, 564 U.S. at 792-793

Because the Supreme Court has shut down the new-category-of-unprotected-speech factory, *see Brown*, 564 U.S. at 791, those in Congress and the Executive Branch who favor new speech restrictions have been forced to dress these new categories in the old clothes of the traditional categories. In the aftermath of *Stevens*, Congress passed a revised version of § 48 – essentially the one at issue in this case – after both the House and the Senate conducted hearings on how to draft a narrower statute that would pass Constitutional scrutiny by modifying the traditional definition of "obscenity" to fit animal cruelty videos. *See* H.R. REP. 111-549, H.R. Rep. No. 549, 111TH Cong., 2ND Sess. 2010, 2010 WL 2816371, 2010 U.S.C.C.A.N. 1224; *Prohibiting Obscene Animal Crush Videos in the Wake of United States v. Stevens: Hearing before the Committee on the Judiciary, United States Senate*, 111th Cong. 3-4 (2010) (hereafter "*Prohibiting Obscene Animal Crush Videos*")[2].

"The witnesses concurred that Congress can ban interstate and foreign commerce in depictions of acts of illegal animal cruelty that appeal to the 'prurient interest, are patently offensive,' and 'lack serious literary, artistic, political or scientific value." Although obscenity may generally apply to materials that depict or describe a more obviously sexual act, case law shows that obscenity can also cover unusual deviant acts." H.R. REP. 111-549, 5, 2010 U.S.C.C.A.N. 1224, 1228, 2010 WL 2816371 at *5 (footnotes omitted). In other words, the witnesses claimed that "sexual conduct" can be read out of the *Miller* definition.

Senator Kyl stated at the Senate Judiciary Committee hearing on the statute that "[t]ypical animal crush videos feature women, often clad in high heels, crushing helpless animals to death with their feet…The videos are said to appeal to a sick subset of persons with a specific

[2] Available at https://www.congress.gov/event/111th-congress/senate-event/LC7003/text (last visited March 7, 2026).

sexual fetish." *Prohibiting Obscene Animal Crush Videos*, at 1. One witness explained the reasoning behind the theory that "crush videos" were sexual in nature:

> A typical animal crush video will show a scantily clad, high heeled woman stomping, squishing, and impaling animals to death … These videos appeal to a particular sexual deviancy. The women carrying out the slow, deliberate torture often talk to the animals in a dominatrix patter or other sexual tones. Camera angles are used to create the sensation for the viewer that they are in the place of the tortured animal, looking up at the woman's body, keying into a crush fantasy.

See Prohibiting Obscene Animal Crush Videos at 3-4 (testimony of Nancy Perry, Vice President for Government Affairs, the Humane Society of the United States).

The legislative history clearly demonstrates that Congress targeted animal violence videos that appeal to the prurient interest of a deviant group and are patently offensive, even if they do not depict sexual *conduct*:

> Senator KYL. And, Dr. Volkan, in your testimony today we learned that these animal crush videos do not involve actual sexual intercourse, or at least typically. Is it your professional opinion that animal crush videos are, nevertheless, sexual in content and, therefore, can fall within the definitions of obscenity which sometimes are the basis for courts looking at the issue?
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> Mr. VOLKAN. That is a very good question, Senator. I am not an expert to speak to the legal definitions of obscenity, but I can say in my professional opinion that these videos are produced almost purely for the object of sexual gratification of the people who are watching these videos. They are clearly sexual in nature.

Prohibiting Obscene Animal Crush Videos, at 8 (testimony of Kevin Volkan, Professor of Psychology, California State University).

The "Findings" section of the Animal Crush Video Prohibition Act of 2010, the instant statute, entirely omitted the "sexual conduct" language in the *Miller* standard. "In the judgment of Congress, many animal crush videos are obscene in the sense that the depictions, taken as a whole—(A) appeal to the prurient interest in sex; (B) are patently offensive; and (C) lack serious literary, artistic, political or scientific value." Pub. L. 111–294, 124 Stat. 3177, § 2(6)(A)-(C).

IV. GROUNDS FOR DISMISSAL

A. THE STATUTE CONSTITUTES CONTENT-BASED REGULATION OF SPEECH THAT VIOLATES THE FIRST AMENDMENT

The distribution of videos is a form of speech generally protected by the First Amendment. *See Brown*,564 U.S. at790. When it comes to restrictions on speech "exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (striking down a statute criminalizing false claims of receipt of military decorations or medals) (plurality opinion).

The statute at issue in this case regulates speech based on its content: the statute provides for a substantial prison sentence if the video depicts "animal crushing" and is "obscene." Content-based regulation of speech is presumptively unconstitutional. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000). Such regulation necessarily violates the First Amendment unless it either falls within a "a few limited areas" in which content-based regulation has traditionally been permitted, *Brown*, 564 U.S. at 791, or it passes "strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Id*. at 799.

The government bears the heavy burden of showing that a statute that regulates the content of speech that does not fall squarely within less protected areas passes strict scrutiny. *See Playboy*, 529 U.S. at 818. The defense does not expect that the government will attempt to make such a showing in this case. Rather, the defense expects that the government will argue that the speech at issue here falls within a category of speech that the government historically has been permitted to regulate.

The Supreme Court has already found that there is no "tradition [of] excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment." *Stevens*, 559 U.S. at 469. Instead, the defense expects that the government will argue that the speech regulated here falls within the traditional category of "obscenity."

The Supreme Court has held that "obscenity" is category of speech that may be regulated based on its content without triggering strict scrutiny. *Brown*, 564 U.S. at 781. The nature and contours of this category were articulated in *Miller v. California*:

> State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe *sexual conduct*. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, *which portray sexual conduct in a patently offensive way*, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
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> 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.

Miller, 413 U.S. at 23–24 (footnotes, quotation marks and internal citations omit) (emphases added). Here, "prurient interest" means a "shameful or morbid interest in sex." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504 (1985).

The issue here is whether the term "obscene" in § 48 was intended by Congress to incorporate the full *Miller* definition of that term, as the government is expected to argue. This is a question of statutory interpretation.

If the statutory language is "plain," the Court "must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 486 (2015). Conversely, the Court may resort to "legislative history or

other aids of statutory construction in the case of ambiguity or an unreasonable result." *Laaman v. Warden, New Hampshire State Prison*, 238 F.3d 14, 16 (1st Cir. 2001).

Statutory "ambiguity is a creature not just of definitional possibilities but also of statutory context." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 98–99 (2007) (internal quotation marks, brackets, and citations omitted). "Oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, [the Court] must read the words in their context and with a view to their place in the overall statutory scheme. [The Court's] duty, after all, is to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. at 474; *see also Yates v. United States*, 574 U.S. 528, 537 (2015) (The Supreme Court has "several times affirmed that identical language may convey varying content when used in different statutes….") (plurality opinion); *Muscarello v. United States*, 524 U.S. 125, 132 (1998) ("We conclude that neither the statute's basic purpose nor its legislative history support circumscribing the scope of the word, 'carry' by applying an 'on the person' limitation.") (extensively considering Section 924(c)'s legislative history); *Busic v. United States*, 446 U.S. 398, 406 (1980) ("the committee reports and congressional hearings to which we normally turn for aid in these situations simply do not exist, and we are forced in consequence to search for clues to congressional intent in the sparse pages of floor debate that make up the relevant legislative history"); *Zedner v. United States*, 547 U.S. 489, 501 (2006) (considering the statutory purpose and legislative history of the Speedy Trial Act to conclude that it does not permit prospective waivers, despite statutory language that the district court had concluded meant otherwise).

Here, the word "obscene" appears in the statute, but Congress has not defined it in § 48. The statute in question appears not in the Criminal Code chapter together with other statutes

dealing with obscenity, 18 U.S. Code, Part I, Chapter 71 Part I ("Obscenity"), but in 18 U.S. Code, Part I, Chapter 3 ("ANIMALS, BIRDS, FISH, AND PLANTS"). Aside from the undefined term "obscene," the rest of the statute deals specifically and solely with conduct that results in serious bodily injury to animals. There is no reference in the statute at all to human sexual conduct. In fact, when referencing other statutes that do refer to human sexual conduct, Congress in this statute has specifically stated that those statutes should be read "as if" the animal were a human being. The statute criminalizes, for example, an "obscene" video of drowning an animal, conduct that is difficult to map onto the *Miller* definition of obscenity.

In this context, the Act's stated purpose and its legislative history should be consulted. As detailed above in Section III, when these interpretive aids are used, it becomes clear that Congress had in mind not a video that, 'taken as a whole, appeals to the prurient interest [and] … depicts or describes, in a patently offensive way, *sexual conduct specifically defined by the applicable state law*," *Miller*, 413 U.S. at 23–24 (emphasis added), but videos that "taken as a whole … appeal to the prurient interest in sex [and] are patently offensive," Pub. L. 111–294, 124 Stat. 3177, § 2(6)(A)-(C), in the absence of sexual conduct.

This Court should reject this broadening of the definition of the term "obscene." *See United States v. Richards*, 940 F. Supp. 2d 548, 555 (S.D. Tex. 2013) ("To expand that which is unprotected by the First Amendment is to shrink that which is protected. The court therefore rejects the United States' argument that the speech proscribed by § 48 falls within the "traditional, well-established definitions of obscenity."), *rev'd and remanded*, 755 F.3d 269 (5th Cir. 2014). The *Miller* definition is broad enough to encompass a variety of offensive and graphic depictions of human sexual conduct. *See Mishkin v. New York*, 383 U.S. 502, 505-510 (1966) (involving flagellatory acts on humans); *Hamlin v. United States*, 418 U.S. 87, 89 (1974)

(involving bestiality); *Ward v. Illinois*, 413 U.S. 767 (involving human sadomasochism). However, depictions of animal abuse, no matter how provocatively dressed the abuser is, which the legislative history of § 48 demonstrates was included in Congress's intended target, is not obscenity under *Miller* no more than a video of high-heeled woman dressed in lingerie while fondling vegetables would fit that definition.

In § 48 Congress intended a definition of "obscene" that differs crucially from the *Miller* definition by leaving "sexual conduct" out of the second prong. This difference is fatal to the statute's constitutionality as the statute no longer fits within the traditional historically permitted regulation of obscenity. *See Brown,* 564 U.S. at 792–93 ("As in *Stevens,* California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct [.]"). Simply put, "violence is not part of the obscenity that the Constitution permits to be regulated." *Brown*, 564 U.S. at 793.

B. EVEN IF THE TERM "OBSCENE" IN THE STATUTE CODIFIES *MILLER*, THE STATE IS UNCONSTITUTIONALLY VAGUE.

The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." As the Supreme Court has explained, "the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595–96 (2015) (striking down the residual clause of the definition of a "violent felony" for purposes of the Armed Career Criminal Act). The Court clarified in *Johnson* that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory

that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602.

In the First Amendment context, a "heightened vagueness standard" applies. *Brown,* 564 U.S. at 793 (citing *Winters v. New York,* 333 U.S. 507, 517-19 (1948)). The "'government may regulate in the area' of First Amendment freedoms 'only with narrow specificity,'" *Id.,* 564 U.S. at 807 (Alito, J., concurring in the judgment) (*quoting NAACP v. Button,* 371 U.S. 415, 433 (1963)).

In the context of depictions of human sexual conduct, the Supreme Court has ruled that the *Miller* standard is not vague because it is clear to an ordinary person that the reach of that standard is limited to "hard-core pornography." *See Hamling. v. United Statutes*, 418 U.S. 87, 115 (1974).

> The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as "patently offensive" in a [Section] 1461 prosecution are the "hard core" types of conduct suggested by the examples given in *Miller*.

Smith v. United States, 431 U.S. 291 (1977).

Miller gave two "plain examples" of the kind of depictions that could be prosecuted under the standard it set out:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Miller, 413 U.S. at 25.

Thus, ordinary people are on fair notice that depictions of hard-core pornography may fall outside the protections of the First Amendment. In contrast, what is obscene under the statute at issue has hardly been made clear with "narrow specificity" to the average person. *NAACP v. Button,* 371 U.S. 415, 433 (1963).

Consider the portion of the statute that appears to proscribe depictions that are obscene and are of "conduct" by which an animal is "subjected to serious bodily injury (as defined in section 1365 and including conduct that, *if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242*)" (emphasis added). Read literally, the statute appears to say that certain *conduct* that would be sexual assault if committed against a person is included in the definition of "serious bodily injury." But an act (sexual assault) sensibly cannot be defined as part of a result (serious bodily injury) in a criminal statute. An act or conduct is one kind of statutory element, and the result that act or conduct produces is a different mutually exclusive kind of statutory element.[3]

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[3] As the Model Penal Code puts it:
(5) "conduct" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;
…
(9) *"element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct* as
(a) is included in the description of the forbidden conduct in the definition of the offense; or
(b) establishes the required kind of culpability; or
(c) negatives an excuse or justification for such conduct; or
(d) negatives a defense under the statute of limitations; or
(e) establishes jurisdiction or venue;

ALI, Model Penal Code § 1.13 (emphasis added).

Federal courts may consider the MPC as an aid to statutory construction. *See., e.g. Liparota v. United States*, 471 U.S. 419, 439, n. 5 (1985) (referring to the Model Penal Code when discussing the structure of a criminal statute)

Further problems arise even if one glosses over this equating of two different kinds of statutory elements and attempts literally to treat "conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242d" as included in "serious bodily injury." For example, section 2242(2) prohibits "engaging" in a sexual act with another person if that other person is— (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." A "sexual act" includes "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(D). So the mere touching of an animal's genitalia would fall within the definition of "serious bodily injury" to the animal. It is difficult to make sense of how such touching, which causes no injury whatsoever, was intended to be "included" in the definition of "serious bodily injury," along with the definition in Section 1365:

> (3) the term "serious bodily injury" means bodily injury which involves—
>
> (A)a substantial risk of death;
> (B)extreme physical pain;
>
> (C)protracted and obvious disfigurement; or
>
> (D)protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and
>
> (4)the term "bodily injury" means—
>
> (A)a cut, abrasion, bruise, burn, or disfigurement;
>
> (B)physical pain;
>
> (C)illness;

(D)impairment of the function of a bodily member, organ, or mental faculty; or

(E)any other injury to the body, no matter how temporary.

18 U.S.C. § 1365.

While the construct "serious bodily injury (as defined in section 1365 and including …)" suggests an intent to extend the definition of "serious bodily injury" beyond the strict contours of the definition in section 1365, section 48 appears under this reading to extend "serious bodily injury" to circumstances in which there is no bodily injury whatsoever. Such an odd reading runs contrary to the statute's focus, consistent with the legislative history, on physical violence done to animals.

If, on the other hand, it is assumed that a parenthesis has been misplaced, then the statute appears to proscribe obscene depictions of conduct that, if committed against a person and in the special maritime jurisdiction of the United States, would violate section 2241 or 2242. Included in the two statutes is, for example, is "engag[ing] in a sexual act with another person without that other person's consent." 18 U.S.C. § 2242(3). Does 18 U.S.C. § 48 prohibit an obscene video of a person engaging in a sexual act with an animal without the animal's consent? And how would the consent of the animal be determined?

Or consider the provision that prohibits "knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years." 18 U.S.C. § 2241(c). Does 18 U.S.C. § 48 prohibit engaging in sex with an animal that has not attained the age of 12?

Even if other provisions of sections 2241 and 2242 are found to apply meaningfully when animals are substituted for humans in the statutes, Congress intended for these two sections to be incorporated in their entirety into section 48. Therefore, section 48 is unconstitutionally vague unless it gives fair notice of how each section of sections 2241 and 2242 is intended to apply

when humans are replaced by animals in them. *See Johnson v. United States*, 576 U.S. 591, 602 (2015) ("our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.") (emphasis in original)

Other scenarios further demonstrate the statute's lack of fair notice. Consider a video created by splicing together a segment depicting hard core human sex with another segment depicting the drowning of an animal. On the one hand such a video arguably "depicts animal crushing;" and "is obscene," when considered as a whole. On the other hand, that would be an extremely broad reading of a statute that provides for years in prison for speech, not conduct. Such a statute would not be one drawn with narrow specificity.

Count Two of the indictment in this case further illustrates the vagueness of the statute. That count alleges a conspiracy to distribute videos that depict "the torture, murder, sexually sadistic mutilation, and sexual abuse of animals, specifically baby and adult monkeys." Some of these depictions – torture and murder – include no sexuality at all. Others involve only animal sexuality. Section 48 has not put the ordinary person on notice that distribution of videos that contain no human sexuality can result in years of imprisonment.

Section 48 does not with narrow specificity put individuals on fair notice of the conduct it proscribes. Furthermore, it allows for arbitrary enforcement against individuals allegedly distributing graphically violent videos depicting animals. The statute violates the Due Process Clause of the Fifth Amendment.

C. EVEN IF THE TERM "OBSCENE" IN THE STATUTE CODIFIES *MILLER,* AND THE STATUTE IS NOT VAGUE, THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT SINGLES OUT SOME FORMS OF OBSCENITY BASED ON VIEWPOINT AND CONTENT

Regulation of speech that falls within a few categories, including obscenity, libel, and "fighting words" receives lesser protection under the First Amendment. But this does not mean that the First Amendment places no restrictions on such regulation. While these categories "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)," these are not "categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992). A statute prohibiting selected forms of expression within these unprotected categories--due to hostility towards the particular subject matter—is constitutionally invalid. See *id*.

R.A.V. involved a cross-burning inside the fenced yard of a black family under an ordinance that was construed by the state's highest court to reach only conduct that amounted to "fighting words." 505 U.S. at 380. But the ordinance banned not all "fighting words" (which, like obscenity, is a category of less-protected speech), but only those "fighting words" that "insult, or provoke violence … 'on the basis of race, color, creed, religion or gender.'" 505 U.S. at 391. The Court struck down the ordinance: "Assuming, *arguendo,* that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 505 U.S. at 381.

The Court explained as follows the contours and rationale of this limitation on regulating only some speech that falls within a proscribable category:

> Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate them freely. That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.
>
> …
>
> The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.,* obscenity) but not on the basis of another (*e.g.,* opposition to the city government) is commonplace and has found application in many contexts. …
>
> …
>
> [T]he First Amendment imposes … a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for … that … would not discriminate on the basis of content. …
>
> …
>
> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.,* that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. …
>
> Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular secondary effects of the speech, so that the regulation is *justified* without reference to the content of the ... speech …A State could, for example, permit all obscene live performances except those involving minors. …
>
> These bases for distinction refute the proposition that the selectivity of the restriction is even arguably conditioned upon the sovereign's agreement with what a speaker may intend to say. …

R.A.V., 505 U.S. at 384-390 (internal citations and quotation marks omitted). The Court then applies these principles to the ordinance before it:

> … [T]he ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.
>
> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." …
>
> … The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

R.A.V., 505 U.S. at 391-93.

Here, the statute does not proscribe all obscene videos, but only those in which animals are killed or seriously injured. The reason why Congress focused on this subset of obscene videos is not the "very reason the entire class of speech at issue is proscribable." *R.A.V.,* 505 U.S. 377 at 388 ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class."). Unlike the Court's example of what is permissible – a statute targeting "the most lascivious displays of sexual activity," *id*., this statute's concern is with

violence done to animals, a specifically non-proscribable category of speech. *See Brown*, 564 U.S. at 793 ("violence is not part of the obscenity that the Constitution permits to be regulated.")

Nor does the Court's carve-out based on "secondary effects" save this statute. 505 U.S. at 389. The "secondary effects" doctrine has "primarily served as a potent tool for municipal officials to restrict adult businesses." David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 Stan. L. & Pol'y Rev. 19 (2012). The Fifth Circuit – and only the Fifth Circuit - has employed the doctrine to uphold Section 48 against an *R.A.V.*-based challenge. *See United States v. Richards*, 755 F.3d 269, 277 (5th Cir. 2014). If the government frames its objection to this motion relying on this doctrine, the defense will file a reply addressing the issue and, to the extent the government's argument tracks this out-of-circuit case, respond to the Fifth Circuit's analysis.

But independently of that issue, the Supreme Court has made it clear that the First Amendment is violated where "the selectivity of the restriction is even arguably conditioned upon the sovereign's agreement with what a speaker may intend to say." *R.A.V.*, 505 U.S. at 390. Here, regardless of the merits of the "secondary effects" argument, Section 48 also engages in such unconstitutional viewpoint discrimination. As with the examples of viewpoint discrimination of which *R.A.V.* disapproved, Section 48 silences governmentally disfavored speech through its exceptions provision:

d) Exceptions.— (1) In general.—This section does not apply with regard to any conduct, or a visual depiction of that conduct, that is—

> (A) a customary and normal veterinary, agricultural husbandry, or other animal management practice;
>
> (B) the slaughter of animals for food;

(C) hunting, trapping, fishing, a sporting activity not otherwise prohibited by Federal law, predator control, or pest control;

(D) medical or scientific research;

(E) necessary to protect the life or property of a person; or

(F) performed as part of euthanizing an animal.

Thus, the statute criminalizes only some videos that are obscene and depict animal cruelty. It excludes videos that are obscene and depict animal cruelty, but fall within the following list of activities preferred by the government.

This is discrimination of the type that *R.A.V.* prohibits. Modern factory farming practices have been amply documented to involve extremely brutal treatment of animals.[4] Same with scientific research.[5] The statute excludes depictions of these practices, dividing horrific depictions of animal cruelty into some that acceptable to the government and others that are not. If a video contains a segment that contains hardcore pornography followed by the brutal slaughter of an animal for food, that is permitted speech. But if a video contains hardcore pornography followed by the torture of an animal for a different purpose or for no purpose at all,

[4] *See generally* Animal Defense Fund, *Customary Cruelty in the Farm Industry: When Animal Abuse is Legal* (Apr. 3, 2015) available at https://aldf.org/article/customary-cruelty-in-the-farm-industry-when-animal-abuse-is-legal/ (describing practices including bodily mutilation, often without anesthesia); Ulrike Weiler, et. al., *Penile Injuries in Wild and Domestic Pigs. Animals (Basel).* 2016 Mar 25;6(4):25 available at https://pmc.ncbi.nlm.nih.gov/articles/PMC4846825/; Jean-Loup Rault, *et. al*, *Castration induced pain in pigs and other livestock*, Applied Animal Behavior Science, 2011 Dec. 15; 135(3) available at https://www.sciencedirect.com/science/article/abs/pii/S0168159111003224

[5] *See* People for the Ethical Treatment of Animals, *NIH's Bizarre Sex Experiments on Animals Need to Go, Says PETA*, available at https://www.peta.org/media/news-releases/niha-bizarre-sex-experiments-animals-need-go-says-peta/ (documenting practices including "cutting the skin off live mice's penises"); *Peta Attacks Animal Research for Sexual Health Issues*, Baltimore Sun (Dec. 3, 2013) available at https://www.baltimoresun.com/2013/12/03/peta-attacks-animal-research-for-sexual-health-issues-2/; *See also* Elif Akkaya & Harun Resit Güngör, *The dark side of the animal experiments*, Jt. Dis. Relat. Surg 2022;33(2):479-483, available at https://pmc.ncbi.nlm.nih.gov/articles/PMC9361100/.

that is not permitted speech. Such discrimination between forms of speech is permitted under *R.A.V.*

The government may choose to fund scientific research and subsidize farming, even when they involve grotesquely cruel practices, yet criminalize other forms of violence directed towards animals. The drawing of such lines involves legislative judgments to which courts defer. But when the government criminalizes the distribution of videos based on this same distinction, it runs up against the First Amendment.

V. CONCLUSION

The First Amendment protects much hurtful speech, facilitates the spreading of dangerous falsehoods, and sometimes results in the distribution of depictions that are harmful to those who appear them, as well as those who view them, such as videos containing "child erotica" and virtual child pornography. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (declining to add "virtual child pornography" as a new category of less protected speech). Whether such an approach is ethically sound is a difficult question. But the First Amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (*quoting* Judge Learned Hand). This Court, bound by the First Amendment, should dismiss the indictment.

Respectfully submitted,

/s/ Behzad Mirhashem
Behzad Mirhashem
N.H. Bar #10031
Federal Defender Office
22 Bridge Street
Concord, NH 03301
(603) 226-7360

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2026, the above document was served electronically upon all counsel of record through the CM/ECF filing system.

/s/ *Behzad Mirhashem*
Behzad Mirhashem