

Supreme Court to Consider Law Criminalizing

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As has been widely reported, the U.S. Supreme Court will review a case this session involving a federal statute that criminalizes the sale of depictions of animal cruelty. Last year, in United States v. Stevens, the Third Circuit declared the statute unconstitutional and vacated the conviction of Robert Stevens, who was prosecuted for selling videos of illegal dog fighting. (Law.com covered the Third Circuit decision when it was released last year.)

The basic question for the court is whether or not the statute on its face runs afoul of the First Amendment. As the Third Circuit framed it, the question for the Supreme Court is, more specifically, whether or not depictions of animal cruelty constitute a new category of speech that receives no First Amendment protection. If it is a new category of unprotected speech, then depictions of animal cruelty will join the likes of obscenity, child pornography, false and misleading advertising, “fighting words,” and similar kinds of speech that may lawfully be criminalized or banned by the government. However, as the Third Circuit pointed out in its 2008 opinion, the Supreme Court has not recognized a new category of unprotected speech in about 25 years—which may suggest that the Court will be reluctant to do so in this case.

Of course, at least theoretically, the Supreme Court could decide more narrowly that depictions of animal cruelty may be limited under certain circumstances, or that the speech at issue is commercial in nature and may be regulated consistent with existing commercial speech principles.

A case like Stevens puts First Amendment principles to the test. On the one hand, as this article discusses, advocates for freedom of expression are concerned that adding another category of speech to the list that the government may lawfully prohibit chips away at the First Amendment and leaves it vulnerable to further attack. On the other hand, other people argue that depictions of animal cruelty are inhumane and, like obscenity, have little or no social value that render them worthy of First Amendment protection. It’s too soon to tell which side of the debate a majority of the Supreme Court will favor.

Oral arguments in the case are scheduled for October 6, 2009. We will continue to follow the story and keep you updated.