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M E M O R A N D U M

TO:	Honorable Rep. Kropf, Chair
FROM:	Aaron Knott, MCDA Policy Director
SUBJECT:	Testimony in support of HB 4145 -1
DATE:	2/8/24

There is no real question that the practice of torturing animals should be penalized under the law. We also stand with Rep. Gomberg in support of the assertion that videos which record the torture of animals and are distributed for the purpose of enjoying the torture of animals are unacceptable and the viewing and possession of any such video should be penalized under the law.

However, because any law which regulates the possession, viewing or distribution of recorded material has the potential to implicate free speech, we must view HB 4145 through that lens. Laws which regulate content- dependent speech are generally subjected to strict scrutiny, which is the highest legal standard of review. Under strict scrutiny, the proposed legislation must be narrowly tailored to achieve a compelling governmental interest. If the bill reaches speech beyond that narrow purpose, the bill is subject to being struck down as overbroad. Any such legislation must pass muster under both state and federal free speech standards. To complicate matters further, the state and federal tests are not the same.[1]

The first anti-animal crushing statute was struck down by the United States Supreme Court in the case of *U.S. v. Stevens* on the basis of overbreadth.[2] While the bill covered acts of animal crushing committed simply for cruelty, it also included acts of hunting, bull fighting and other acts which are considered legally permissible. The federal government responded by amending their bill to add the requirement of obscenity via a sexual element, which is a permissible theory of regulation of speech under the federal

[1] *State v. Robertson*, 293 Or. 402 (1982)
[2] *United States v. Stevens*, 559 U.S. 460 (2010)

First Amendment.[3] However, the Oregon Supreme Court rejected the notion of a *per se* obscenity doctrine in *State v. Henry*, and simply declaring an act as obscene, or attempting to regulate the act purely through that mechanism, does not pass legal muster under the terms of Art. I, Sec. 8 of the Oregon constitution.[4]

As introduced, HB 4145 may be stricken down as unconstitutional for this reason, and was so flagged by reviewing attorneys at both the Multnomah County District Attorney's Office and the Oregon Department of Justice. The -1 amendments represent a rewriting of the base version of the bill in order to comport with the requirements of Oregon's free speech provisions.

Rather than focusing on obscenity doctrine, the -1 amendments focus on the cruel infliction of pain on the animal as the central harm to be regulated. We believe this is consistent with the test that was articulated by Oregon's Supreme Court under State v. Stoneman, which requires us to narrowly focus on a permissible harm and avoid overbreadth of the regulation of that harm.[5] Otherwise stated, our objective must be to regulate solely the infliction of impermissible cruelty without intruding into speech outside of that narrow objective.

To further this interest, we have also added a range of exceptions to the coverage of the bill, including recordings of animal cruelty made in furtherance of a law enforcement activity, recordings made in the larger public interest (in order, for example, to further awareness of animal cruelty), and the necessary distribution of such a video that might occur within either the criminal or civil court systems. Most of these constitutional exceptions are drawn from existing Oregon statute and have existed for years under Oregon law.[6]

The resulting amendments have been found likely to be upheld as constitutional by MCDA, DOJ and Legislative Counsel. While it is impossible to conclusively resolve all risk, we believe that these provisions are more likely than not to survive legal challenge and are well founded in law. With these legal issues thereby resolved, we urge the passage of this important legislation.

Contact: Aaron Knott – MCDA Policy Director.

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[3] *United States v. Richards*, 755 F.3d 269 (2014)
[4] *State v. Henry*, 717 P.2d 189 (1986)
[5] *State v. Stoneman*, 323 Or. 536 (1996)
[6] See ORS 163.472(4).