

No. 08-769

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICAN PUBLISHERS,
INC., AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES,
COMIC BOOK LEGAL DEFENSE FUND, ENTERTAINMENT CONSUMERS
ASSOCIATION, ENTERTAINMENT MERCHANTS ASSOCIATION, FILM
INDEPENDENT, FREEDOM TO READ FOUNDATION, INDEPENDENT
BOOK PUBLISHERS ASSOCIATION, INDEPENDENT FILMMAKER
PROJECT, INDEPENDENT FILM & TELEVISION ALLIANCE,
INTERNATIONAL DOCUMENTARY ASSOCIATION, NATIONAL
ASSOCIATION OF RECORDING MERCHANDISERS, NATIONAL
ASSOCIATION OF THEATRE OWNERS, INC., AND PEN AMERICAN
CENTER IN SUPPORT OF RESPONDENT**

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INTRODUCTION AND INTEREST OF THE AMICI

Amici represent producers, distributors, and consumers of content in a wide range of media.¹ The material that Amici's members collectively produce, sell, and consume covers the gamut of subjects – factual and imaginary, educational and entertaining – including real-world subjects that, while useful and thought-provoking, some may find distasteful or upsetting. The rights guaranteed by the First Amendment are fundamental to Amici's activities.

This filing is motivated by Amici's deep concern with the serious threat to the First Amendment rights of mainstream content providers, and to First Amendment doctrine more generally, posed by 18 U.S.C. § 48 ("Section 48" or "the Act") and the arguments the Government offers in its defense. If accepted, those arguments would significantly narrow the reach of the First Amendment.

The Government urges the Court to declare that images of violence can be criminalized as a means of combating both the acts depicted and the purported psychological effect of the images on viewers. If the Court were to agree that speech about violence can be

¹ A list and description of the Amici is appended to this brief. The parties have consented to this filing; a copy of Respondent's blanket consent has been lodged with the Court, and the Government's consent letter is lodged herewith. No counsel for either party authored this brief in whole or in part. No person not affiliated with one of the Amici made a monetary contribution to the preparation or submission of this brief.

banned in order to discourage violence – in this case, cruelty to animals – it would imperil not just a wide range of speech that engages with the violent world in which we live but also speech concerning other conduct that may be viewed as undesirable and thus potentially subject to restriction.

The Court has never approved criminalizing depictions of violence. As the Seventh Circuit has observed:

Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial. The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity.

American Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 575-76 (7th Cir. 2001) (Posner, J.).

There has long been a clear distinction in the Court's First Amendment jurisprudence between illegal conduct and depictions of same – child pornography being the sole exception. Maintaining this crucial distinction is essential if speakers in all media are to have the freedom to grapple honestly and directly with the world around them. This freedom would be jeopardized if the Court were to adopt the balancing test the Government proposes.

The Government's reliance on the rationale for banning child pornography articulated in *New York v. Ferber*, 458 U.S. 747 (1982), is flawed in fundamental respects, as the Court of Appeals explained. Among those flaws is the fact that the Act applies to depictions in which the harm to animals and the creation of the imagery are not inextricably intertwined, as they are with child pornography.

Amici are troubled by the prospect of the specific rationale for banning child pornography – protecting child performers from the sexual abuse and psychological harm caused by the performance and its dissemination – morphing into a justification for banning depictions of any illegal or otherwise reprehensible conduct on the premise that the depictions support or encourage the conduct. In *Free Speech Coalition*, the Court declined to extend *Ferber* to “virtual” child pornography, and it should decline to extend *Ferber* to depictions of animal cruelty for many of the same reasons.

For the Court to accept the Government's argument, it would have to sweep away its precedents requiring that a ban on speech to prevent harm be justified by a direct and immediate connection between the speech and the harm – a requirement Section 48 fails to incorporate.

Further, endorsing Congress's broad rationale for the Act also would represent a failure to heed the Court's own recent admonition that First Amendment freedoms “are most in danger when the government seeks to control thought or to justify its laws for that

impermissible end.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253. (2002). As the Seventh Circuit observed, “If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.” *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (Easterbrook, J.), *aff’d*, 45 U.S. 1001 (1986).

Antipathy to animal cruelty, which Amici share, should not obscure the extent to which Section 48 contravenes these bedrock principles of the Court’s First Amendment jurisprudence.

The Act, and the Government’s defense of it, raises the specter of a troublingly open-ended, ad hoc framework for carving new exceptions out of the First Amendment. In positing a balancing test that would deprive categories of speech of First Amendment protection whenever the social value of the speech is deemed to be outweighed by the social value of restricting it, the Government seeks to bootstrap the federal and state laws against animal cruelty into a justification for criminalizing *depictions* of such conduct. With this argument, the Government encourages the Court to abandon its extremely limited approach to defining categorical First Amendment exceptions. It urges the Court to replace criteria that constrain the use of speech restrictions to inculcate desirable habits of thought and conduct with a new criterion that would allow it – at great potential cost, Amici fear – to freedom of speech.

The breadth of the Act magnifies the danger of adopting the Government's approach. The Government offers false assurance that it applies only to "crush videos" and images of organized animal fighting. On its face, though, the Act is far broader, covering any commercially motivated depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed if the conduct is illegal where the depiction is created, sold, or possessed with intent to sell and it lacks "serious" religious, political, scientific, educational, journalistic, historical, or artistic value.

Under a plausible reading of the Act, the creators and distributors of illustrated books, films, or magazines that graphically depict conduct such as slaughterhouse practices, the inhumane treatment of farm animals, bullfighting, or poaching would, if the work were created, sold, or possessed with the intent to sell where such activities are illegal, be at risk of prosecution.

Such defendants would escape conviction only if the images in question were found to have "serious" value, which the trial court in this case interpreted as requiring a showing of "significant and great import" (JA132) – a standard it is easy to imagine any number of films and other images not meeting. In addition, the Act does not require that such value be assessed with reference to the work as a whole, and it places nationwide and international distributors risk under the varying animal cruelty laws of each state. The dividing line between proscribed and protected material under the Act is simply too unclear, and the resulting chilling effect on protected speech too great, for the Act to survive Respondent's facial challenge.

The Act’s “serious value” exception does not remedy the Act’s glaring defects. In addition to failing to cure the Act’s overbreadth, engrafting a “serious value” exception onto an otherwise invalid speech restriction is a legislative tactic that could become a blunt instrument of censorship, providing a false veneer of constitutionality on a range of substantial incursions on protected speech.

In short, this case is the tip of a very large iceberg that threatens serious damage to the First Amendment. Amici urge the Court to affirm.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL BASIS FOR CRIMINALIZING DEPICTIONS OF ANIMAL CRUELTY

A. The Court Has Required a Close Causal Link Between Unprotected Speech and Harmful Conduct

The Court has taken an extremely cautious “limited categorical approach” to defining speech that may be prohibited based on its content without offending the First Amendment. *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). The last time it recognized a content-based categorical First Amendment exception was 1982, with its ruling as to child pornography in *New York v. Ferber*, 458 U.S. 747.² In *Ashcroft v. Free Speech Coalition*, 535

² The Court did not create a new category of unprotected speech in *United States v. Williams*, 128 S. Ct. 1830 (2008), as
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U.S. 234, the Court rejected the Government’s request to expand the *Ferber* rationale to “virtual” child pornography. In doing so, the Court demonstrated proper skepticism toward the government’s appeal to restrict speech in order to facilitate law enforcement. The fundamental First Amendment principles articulated in *Free Speech Coalition* dictate rejecting a similar entreaty from the Government in this case.

“All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests.” *Miller v. California*, 413 U.S. 15, 20 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). This principle has led the Court to permit categorical content-based restrictions of speech in only “a few limited areas.” *R.A.V.*, 505 U.S. at 382-83. In defining those areas, the Court has been guided by solicitude for “the sensitive nature of protected expression,” *Ferber*, 458 U.S. at 768, and it has “draw[n] vital distinctions between words and deeds, between ideas and conduct.” *Free Speech Coalition*, 535 U.S. at 253. The Court has observed that there must be a “direct connection” between speech and conduct for the speech to be deprived of First Amendment protection. *Id.* (holding that showing of “no more than a remote connection between speech that

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the Government states (*see* Brief for the United States (“Gov’t Br.”) at 11); it merely extended the child pornography category to solicitation.

might encourage thoughts or impulses and any resulting child abuse” was an insufficient basis for criminalizing the possession or distribution of “virtual” child pornography).

Reflecting the close nexus between speech and harm that must exist to avoid curtailing free speech rights, the government can restrict advocacy of the use of force or of a violation of law only if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Similarly, the government may restrict true threats only where necessary to protect individuals from the fear of violence, from the disruption that fear engenders, and from “the possibility that the threatened violence will occur.” *R.A.V.*, 505 U.S. at 388. And the Court deemed “fighting words” unprotected because “by their very utterance, [they] inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

The requisite nexus between unprotected speech and undesirable conduct is satisfied *a fortiori* by speech that is an integral part of a crime. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”). *See also United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) (“[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself.”). Thus, agreements to enter into illegal conduct and solicitations for such

agreements can be prohibited without running afoul of the First Amendment. *See Brown v. Hartlage*, 456 U.S. 45, 55 (1982).³

In all these areas, the Court has withheld First Amendment protection from carefully defined categories of speech that cause otherwise proscribable harm in a direct and immediate manner. The Court's conclusion in *Ferber* that child pornography falls outside the First Amendment is consistent with this approach. The Court held there that child pornography is not protected speech because it is "intrinsically related to the sexual abuse of children" in that it records their participation in sexual acts; its distribution compounds the harm by adding further psychological injury; and closing the distribution network for the material was thought to be necessary to control the production of the material. 458 U.S. at 759.

Critical to the Court's analysis was the fact that with child pornography, "the creation of the speech is itself the crime of child abuse." *Free Speech Coalition*, 535 U.S. at 254. As the Court stated in *Ferber*: "When a definable class of material . . . bears so heavily and persuasively on the welfare of children *engaged in its production*, we think the balance of competing interests is clearly struck, and that it is permissible to consider these materials as without the protection of the First Amendment." 458 U.S. at 763-64 (emphasis added).

³ The same principle extends to speech-based torts such as defamation, where the speech and the wrong are inseparable.

In *Free Speech Coalition*, the Court drew a First Amendment line at “virtual” child pornography, which does not contribute directly to the sexual abuse of children because no real children are used in creating it. *See* 535 U.S. at 250 (noting that unlike actual child pornography, “virtual” child pornography “creates no victims by its production” and is not “‘intrinsicly related’ to the sexual abuse of children”). The prohibition of child pornography, the Court stated, was based on “how it was made, not on what it communicated.” *Id.* at 251. With “virtual” child pornography, by contrast, the Court found that the causal link was “contingent and indirect” and that the harm “does not necessarily follow from the speech but depends upon some unquantified potential for subsequent criminal acts.” *Id.* at 250.

If the narrow parameters of *Ferber* are disregarded in this case, “no readily ascertainable general principle exists,” *Cohen v. California*, 403 U.S. 15, 25 (1971), that would confine the curtailment of First Amendment rights to commercial depictions of animal cruelty.

The Government tries to circumvent *Ferber* by contending speech can be restricted whenever it is of “such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.” *Chaplinsky*, 315 U.S. at 572 (quoted in *R.A.V.*, 505 U.S. at 382-83). *See* Gov’t Br. at 12. The Government notes the Court’s statement in *Ferber* that content-based classifications of speech are acceptable where “the evil to be restricted . . . so overwhelmingly outweighs the expressive interests . . . that no process of case-by-case adjudication is required.” 458 U.S. at 763-64.

It is clear, however, that the Court in *Chaplinsky* and *Ferber* was making a general observation about categorical First Amendment exceptions; it was not describing the substantive criteria for *identifying* such exceptions. As shown above, the criteria the Court has used to identify unprotected speech (other than obscenity) require direct and immediate connection between speech and harm.

Adopting the balancing test urged by the Government would invite legislative efforts to criminalize depictions of a wide range of illegal and/or undesirable conduct on the premise that penalizing those who create, distribute, or possess the depictions will discourage the underlying conduct. As the Court of Appeals pointed out, this theory could be used to suppress depictions or descriptions of any crime. *See United States v. Stevens*, 533 F.3d 218, 231 (3d Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 1984 (2009). The Court's precedents, however, foreclose Congress's attempt to combat illegal animal cruelty by criminalizing images of such acts.

The questionable premise that restricting images of animal cruelty will reduce incidents of animal cruelty runs up against this Court's holdings that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," *id.*, and that "[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech." *Id.* at 245. *See also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. . . . [I]t would be quite remarkable to hold

that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”).

In fact, the Court long ago rejected the theory that depictions of violence can be banned as a means of preventing violence. In *Winters v. New York*, 333 U.S. 507 (1948) – decided six years after *Chaplinsky* – the Court considered a First Amendment challenge by a New York bookseller to a state statute denominated “Obscene prints and articles” that applied to the distribution of any publication “principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime. . . .” *Id.* at 508. The New York Court of Appeals had construed the statute as forbidding “the massing of stories of bloodshed and lust in such a way as to incite to crime against the person.” *Id.* at 514. This Court observed: “Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.” *Id.* at 510.

The *Winter* Court thus implicitly rejected both the theory that graphic depictions of violence can be banned on the ground that they cause the commission of violent acts as well as the use of a balancing test along the lines the Government contends was established in *Chaplinsky*.

First Amendment scholar Melville B. Nimmer aptly observed with respect to case-by-case interest-balancing in First Amendment litigation that “in the sensitive and vital area of freedom of expression, constitutional

protection must not be predicated on ad hoc balancing.” Melville B. Nimmer, *Nimmer on Freedom of Speech* 2-10 (1984). Concern with the speech-restricting consequences of balancing speech interests against legislative priorities is no less acute when, as here, the question is whether an entire category of speech should be deprived of First Amendment protection.

B. The Act Cannot Be Reconciled With the Court’s Precedents Involving Asserted Harm-Causing Speech

The Government argues that the Act is a constitutional effort to eradicate certain forms of animal cruelty as well as the desensitization to violence that depictions of such conduct supposedly causes. This argument is foreclosed by the precedents discussed above.

1. The Act covers a substantial amount of protected speech

Like the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.* (CPPA) struck down in *Free Speech Coalition*, Section 48 “finds no support in *Ferber*.” *Free Speech Coalition*, 535 U.S. at 251. In *Ferber*, the Court found that that the possibility that any material of value would be prohibited by the New York statute at issue was “exceedingly modest, if not de minimis.” 458 U.S. at 762. This is not true of Section 48.

Whereas the *Ferber* Court was, with reason, skeptical that any significant amount of child pornography would possess compensating social value,

such skepticism is not warranted with respect to Section 48, which potentially covers a broad array of mainstream material far removed from the speech to which the Government contends the Act is limited.

Many readily available books, for example, address animal fighting from various perspectives, including *Gladiator Dogs* (1998) by Carl Semencic, *The History of Fighting Dogs* (1996) by Dieter Fleig and William Charlton, and *The Breeding and Management of Fighting Cocks* (2004) by Everard Simpson, and *Animal Abuse and Unlawful Killing: Forensic veterinary pathology* (2008) by Ranald and Helen Munro, which “guides veterinarians and lawyers through the diverse and complex fields of alleged cruelty to, and unlawful killing of, companion animals, farm livestock and wildlife.” See Product Description of Animal Abuse and Unlawful Killing, http://www.elsevier.com/wps/find/bookdescription.cws_home/715393/description#description (last visited July 21, 2009).

In the realm of film, pit-bull documentaries containing gory dogfighting footage include “Off the Chain,” <http://video.google.com/videoplay?docid=-2125514336431717180> (last visited July 23, 2009), which examines the (benign) history of the terrier breed and looks unflinchingly at the more recent illegal, underground phenomenon of training pit bulls to be vicious killers for sport. Other recent animal-abuse documentaries include the HBO films *Dealing Dogs* (2006), which includes footage shot undercover at a dog kennel showing dogs being beaten and shot, dogs suffering from malnutrition and disease, and corpses of dogs that have been butchered for their organs, and

Death on a Factory Farm (2009), which tracks a cruelty case at a hog farm and includes footage of pigs being beaten to death. *Earthlings* (2003), narrated by Joaquin Phoenix, is an award-winning documentary film about the suffering of animals for food, fashion, pets, entertainment, and medical research.

A recent libel action arose out of a video of ducks being force-fed and attacked by rats at a foie gras farm. See Robert Mitchum, *Lawsuit settled over foie gras foe's video*, Chicago Tribune, June 18, 2009, available at 2009 WLNR 1127820.

Michael Moore's 1989 documentary *Roger and Me*, a work of serious political and social commentary, includes a gruesome scene in which the economic deprivation of Flint, Michigan is illustrated by footage of a local resident who sells rabbits for "Pets or Meat" clubbing a rabbit to death with a lead pipe.

In each of these films, the disturbing nature of the depictions of animal cruelty is central to the message sought to be communicated, and it is a response to, not a cause of, the violence depicted. Such works would seem to have serious value. Yet the Act's exception clause, which does not require that the value be assessed with reference to the work as a whole (as does the obscenity standard, see *Miller*, 413 U.S. at 24), seems to permit a "serious value" assessment of each individual depiction in isolation. Thus, a prosecutor could argue, and a jury could find, that graphic images of animal cruelty in works such as those listed above (assuming the acts were illegal in the jurisdiction) were gratuitous and lacking any serious value (or lacking value sufficient to outweigh the actual or potential harm attributed to the material).

The possibility of such enforcement actions gives rise to a significant chilling effect on mainstream distributors and retailers, especially now that the Government has signaled that it will not confine enforcement of the Act to “crush videos.”

Examples of material covered by the Act also abound in the less politically-pointed realm of popular entertainment. Regrettably, actual horses were injured or killed during the filming of many Western movies (a practice now banned). As the website of the International Fund for Horses stated: “[M]any animals have been abused, injured, and killed during the making of movies. Some of the most heinous cases of animal abuse and neglect noted in filmmaking involve horses. . . . [Horses used in Western movies] were spurred, shot at, forced to jump through windows, and ridden through burning buildings.” <http://www.fund4horses.org/info.php?id=129> (visited June 18, 2009).

In 1980, the entertainment industry granted the American Humane Association the authority to protect animals used in film, *see id.*, but films made since then have contained scenes of actual animals being injured or killed, often where the conduct was legal where filmed. Examples include *Fast & Furious 4* (2009), which depicts legal cockfighting in Mexico, and *Southern Comfort* (1981), which depicts the legal slaughter of wild boars in Louisiana.

Under the Act, the fact that the acts were not unlawful when or where the film was made – as is true of the footage for which Respondent was convicted – is

irrelevant.⁴ This magnifies the Act’s chilling effect on creators and distributors and further weakens the attenuated link between the Act and prevention of illegal acts of animal cruelty. Moreover, works of entertainment would seem to be particularly vulnerable to the objection that the inclusion of animal violence is gratuitous and not of “significant and great import,” JA132, and thus not protected by the Act’s exception clause.

* * *

Had Congress sought to proscribe only “crush videos,” it could have done so, and this would be a much different case.⁵ But the objective of the law expanded from eradicating “crush videos” to “regulating the treatment of animals.” H.R. Rep. No. 106-397, at 3 (1999). The statute’s language, correspondingly, “drifted [far afield] from the original emphasis in the Congressional Record on the elimination of crush

⁴ Thus, the Government’s statement that the Act “applies only to depictions of illegal conduct” (Gov’t Br. at 15) is misleading to the extent it suggests that the conduct must be illegal *where it occurred* for the Act to apply.

⁵ Consistent with Congress’s initial focus on “crush videos,” which, it found, appealed to a specific sexual fetish, *see* H.R. Rep. No. 106-397, at 2-3, President Clinton, in his signing statement, attempted to give the Act a constitutional gloss by stating that it would be interpreted to prohibit only depictions “of wanton cruelty to animals designed to appeal to a prurient interest in sex.” Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324. But the Act was not so narrowly interpreted by the prosecutor or the trial court in this case, nor is it so interpreted by the Government before this Court.

videos.” *Stevens*, 533 F.3d at 224 n.5. *See also id.* at 234 (“[C]rush videos constitute only a portion of the speech banned by the terms of § 48.”).

As a result, like the CPPA, the Act is not limited to depictions of harm inflicted for the purpose of creating the depiction, as is child pornography; instead, it targets the contents of an image rather than the circumstances of its production. *See Free Speech Coalition*, 535 U.S. at 249. The analogy to *Ferber* is further undermined by the fact that unlike child pornography, the dissemination of depictions of animal cruelty does not inflict psychological harm on animals. *See Ferber*, 458 U.S. at 759; *Stevens*, 533 F.3d at 228.

There is no justification for this worrisome intrusion on free speech rights. Existing laws in all fifty states can be and are used successfully to punish animal cruelty;⁶ overbroad restrictions on speech will only interfere with the flow of protected discourse.

⁶ Earlier this month, for example, the largest dogfighting raid in U.S. history across six states (Oklahoma, Missouri, Arkansas, Texas, Illinois, and Iowa) resulted in the seizure of more than 300 dogs and the arrest of more than two dozen people. *See* Jennifer Loren, “Reward Offered for Dogfighting Arrests,” <http://www.newson6.com/Global/story.asp?s=10666976&clienttype=printable> (last visited July 21, 2009). A recent study by the First Amendment Center concluded that animal cruelty cases are not difficult to prosecute, with a ninety percent success rate overall and a ninety-four percent success rate in cases involving dog- and cockfighting; that the reversal rate of such convictions is extremely low; and that videotape evidence significantly

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The Act, then, is overbroad because it “reaches a substantial number of impermissible applications.” *Ferber*, 458 U.S. at 771. *See Stevens*, 533 F.3d at 235 n.16 (concluding that the Act “potentially covers a great deal of constitutionally protected speech”). There is “a realistic danger that the statute . . . will significantly compromise recognized First Amendment protections of parties not before the Court.” *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

That the Government can identify some arguably legitimate applications of the statute cannot force those who produce and sell works that fall outside those discrete categories to defend themselves a case-by-case basis, with the legality of their speech dependent upon the discretion of prosecutors and juries, who may well act out of animus to the message of a book or film or distaste for graphic violence rather than out of dispassionate appraisal of its value. The Government’s position that prosecution must be risked, and protected speech vindicated, in a piecemeal “as applied” manner, while allowing the statute, with its chilling effect on Amici’s activities, to remain in place is unacceptable.

(Cont’d)

increases the chances of conviction (ninety-eight percent versus ninety percent overall). *See* Adam Ezra Schulman, “Animal-cruelty videos & free speech: some observations from data,” <http://www.firstamendmentcenter.org/analysis.aspx?id=21814> (last visited July 21, 2009).

2. The Act is an impermissible attempt to control thought by banning speech

The Act also contravenes the general constitutional ban on seeking to shape thought by restricting speech. The House Committee Report expresses the view that “[i]f society fails to prevent adults from engaging in [the torture and killing of animals], they become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans.” H.R. Rep. No. 106-397, at 4. *See also* Gov’t Br. at 34 (“Section 48 furthers the substantial interest in preventing the erosion of public morality that attends acts of this nature.”).

This objective squarely implicates the Court’s admonition that First Amendment rights are endangered “when the government seeks to control thought or to justify its laws for that permissible end.” *Free Speech Coalition*, 535 U.S. at 253.

The constitutional barrier to banning violent content in order to influence thought was invoked eloquently in *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (Easterbrook, J.), *aff’d*, 45 U.S. 1001 (1986). In that case, the Seventh Circuit considered the constitutionality of an Indianapolis anti-pornography ordinance that was similar to Section 48 in that it sought to criminalize violent imagery in order to discourage the formation of a particular mindset: discriminatory, subordinating attitudes toward women. Toward that end, the ordinance prohibited the “graphic sexually explicit subordination of women,” whether in pictures or words, that includes, *inter alia*, women “presented

as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts” or “presented in scenarios of degradation, injury, abasement, torture, . . . bleeding, bruised, or hurt in a context that makes these conditions sexual.” 771 F.2d at 324.

In striking the statute down as impermissible viewpoint discrimination even while endorsing its objective, the Seventh Circuit observed: “Racial bigotry, anti-semitism, violence on television, reporters’ biases . . . influence the culture and shape our socialization. . . . Yet all is protected as speech, however insidious.” 771 F.2d at 330. As noted, the court pointed out that if the role of speech in conditioning thought were a sufficient rationale for restricting it, “that would be the end of freedom of speech.” *Id.*

The *Hudnut* court’s concern with a slippery slope of restricting speech in the interest of social engineering bears heeding here too, where “regulating the treatment of animals” and eradicating “desensitization” to the suffering of animals were Congress’s stated objectives in passing the Act. Attempting to advance these objectives by suppressing speech crosses the line separating punishment of unprotected speech from thought control, thereby placing the First Amendment “in danger.” *Free Speech Coalition*, 535 U.S. at 253.

II. THE “SERIOUS VALUE” EXCEPTION DOES NOT RENDER THE ACT CONSTITUTIONAL

If the Court is to maintain its “limited categorical approach” to First Amendment exceptions, *R.A.V.*, 505 U.S. at 383, it must reject the Government’s argument that adding a “serious value” exception to an otherwise impermissible speech restriction renders it constitutional. Speech that is not obscene does not have to be shown to have value, let alone “serious” value, to be protected; it requires no special justification. *See Stevens*, 533 F.3d at 232.

As the Court of Appeals noted, a contrary approach to First Amendment exclusions could, in theory, be used to justify prohibitions on any kind of speech deemed to be socially undesirable. *See Stevens*, 533 F.3d at 232 (observing that if merely appending an exception clause were enough to render a speech restriction constitutional, “it is difficult to imagine what category of speech the Government could not regulate through similar statutory engineering”).

Although a “serious value” exception makes sense for a standard governing speech that otherwise is not entitled to First Amendment protection, such as obscenity, it is not appropriate with respect to speech such as “depictions of acts of animal cruelty” that, as shown, embraces a great deal of protected expression. Jeopardizing that protected expression by making its constitutionality dependent on the exception clause undermines the Court’s careful and cautious segregation of discrete categories of unprotected speech

from all others, which can be regulated in a content-based manner only in conformity with strict scrutiny.⁷

Congress’s reliance on the “serious value” exception is especially problematic because, as noted, whereas the *Miller* obscenity standard requires that the material be considered “as a whole” when assessing serious value, the Act, omits this important limitation. Although the trial court instructed the jury to consider the material as a whole, *see* JA132, the statute does not so provide.

The implication of the omission of the “as a whole” requirement is that the violent imagery in materials such as those discussed in Part I.B.1 above could more readily be identified as gratuitous and lacking in “serious” value by, for example, a prosecutor seeking retribution against a whistleblower for documenting animal abuse at a local cattle ranch. Unlike theft, assault, or arson, this determination necessarily involves subjective judgment, and the potential for prosecutions of speakers based on such subjective judgment presents a real threat of chilling protected expression.⁸

Respondent’s conviction for selling materials that were prepared and disseminated for educational

⁷ Amici agree with the Court of Appeals’ conclusion that the Act fails strict scrutiny.

⁸ This concern recently led the Third Circuit to conclude that the Child Online Protection Act, 47 U.S.C. § 231, was not narrowly tailored because the “as a whole” language in that statute, as applied to Internet communications, required evaluation of images in isolation rather than in context. *See American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 191-92 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

purposes (and which, according to experts who testified at trial, have bona fide educational value, *see* JA109-125) undermines any assurance that mainstream content providers have nothing to worry about because prosecutors must find that the speech lacks “serious” value. Respondent wrote that he made “Pick-A-Winna” as “a documentary on the history of our breed” that “shows what distinguishes our breed,” and he pointed out that one can find “much more animal cruelty in most of the hunting videos available today.” JA135. Yet the film did not meet the trial court’s “significant and great import” threshold. JA132. Who can say with confidence what will? How will a given prosecutor distinguish a legitimate documentary from a violation of the Act? “It is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” *Cohen*, 403 U.S. at 25.

The Government’s concession that the prosecution bears the burden of proof as to the absence of serious value does not eliminate the problem. *See Stevens*, 533 F.3d at 231 n.12. To be sure, the statute would be even more clearly unconstitutional if the exception were an affirmative defense. *See Free Speech Coalition*, 535 U.S. at 255 (“The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.”). Regardless of which party bears the burden of proof, however, the prospect of having to litigate the question of “serious value” should a prosecution be initiated is a burden that cannot constitutionally be placed on speech that is not on the Court’s short list of unprotected speech categories.

Where the conduct depicted is considered to be lacking in serious value (as would be true by definition if the conduct were illegal where the prosecution was brought), it is reasonable to fear that a *depiction* of that conduct also could be characterized as lacking serious value and, hence, a violation of the Act.

The objection that prosecutions based on “mainstream” materials containing depictions of animal cruelty would be “thrown out at the threshold,” *Williams*, 128 S. Ct. at 1846,⁹ does not answer the objection that the fear as well as the fact of prosecution are harmful to protected expression. The unlikelihood of a conviction “would not bar the prosecution.” *Free Speech Coalition*, 535 U.S. at 256.

⁹ See also Gov’t Br. at 47 (arguing that “isolated hypotheticals” do not warrant striking the statute down on overbreadth grounds).

CONCLUSION

Like the CPPA, Section 48 “covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in [the Court’s] precedents.” *Free Speech Coalition*, 535 U.S. at 256. Upholding the Act would represent a great step backward from the Court’s steady advance as a champion of freedom of speech. Because 18 U.S.C. § 48 is unconstitutional on its face, Amici urge the Court to affirm the decision below.

Respectfully submitted,

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