No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 533 F.3d 218. The decision of the district court denying respondent's motion to dismiss (Pet. App. 64a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2008. On October 4, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 15, 2008. On November 6, 2008, Justice Souter further extended the time to and including December 15, 2008, and the petition was filed on that date, and was granted on April 20, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the appendix. App., *infra*, 1a-2a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, respondent was convicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing them in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated his conviction on the ground that Section 48 is facially unconstitutional. Pet. App. 1a-63a.

1. Section 48 of Title 18 prohibits "knowingly creat-[ing], sell[ing], or possess[ing] a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). The statute is limited to a "visual or auditory depiction * * * in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 18 U.S.C. 48(c)(1). The conduct depicted must be "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." *Ibid.* The statute specifically exempts "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b).

Section 48 was designed to prevent, and to stop persons from profiting from, the unlawful torture and killing of animals. Congress recognized that, although animals "have long been used, and valued, for their utility," a broad societal consensus supports treating animals humanely. H.R.

Rep. No. 397, 106th Cong., 1st Sess. 3-4 (1999) (*1999 House Report*). That consensus is reflected in laws from all 50 States, the District of Columbia, and the federal government that prohibit persons from engaging in acts of animal cruelty. *Id.* at 3; see notes 7-12, *infra*. Those laws are based on the recognition that animal cruelty harms animals, humans, and public mores. *1999 House Report* 4.

Congress enacted Section 48 after learning of a substantial and growing market for videos and photographs depicting the gruesome torture and killing of animals. See *1999 House Report* 2-3. No federal laws prohibited the production or sale of such depictions, and the States were thought unlikely to enact such laws because the depictions were "almost exclusively distributed for sale through interstate or foreign commerce." *Id.* at 3. Congress therefore enacted Section 48 to remove the commercial incentives associated with those depictions and thereby deter the underlying acts of animal cruelty. *Id.* at 3-4.

Congress ensured that Section 48 was "narrowly drawn to proscribe only a limited class of" depictions of cruel, illegal acts made, sold, and possessed for commercial gain. *1999 House Report* 4. For that narrow class of material, Congress determined that "the harm from the continued commercial sale of the material so outweighs the value of the material that it is appropriate to prohibit the creation, sale, or the possession of such material in [its] entirety." *Id.* at 4-5.

2. Respondent operated a business called "Dogs of Velvet and Steel" and a website called Pitbulllife.com, through which he sold videos of pit bulls participating in dog fights and attacking other animals. Pet. App. 3a; J.A. 53-55. He advertised those videos and other pit bull-related merchandise in *Sporting Dog Journal*, an underground publication

that carries the results of illegal dogfights. Pet. App. 3a; J.A. 48-50, 71-72.

Law enforcement agents purchased several videos from respondent through the mail. Pet. App. 3a; J.A. 49-52. The videos contain scenes of savage and bloody dog fights, as well as gruesome footage of pit bulls viciously attacking other animals. Pet. App. 3a. Agents searched respondent's residence pursuant to a warrant and found other videos and dogfighting merchandise, as well as sales records establishing that respondent sold videos to recipients throughout the United States and in foreign countries. *Id.* at 4a; J.A. 53-54.

3. Respondent was indicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. Pet. App. 4a; J.A. 16-17. He moved to dismiss the indictment on the ground that the statute is facially invalid under the Free Speech Clause of the First Amendment and is void for vagueness under the Due Process Clause of the Fifth Amendment. Pet. App. 4a, 64a-65a.

The district court denied the motion, holding that Section 48 regulates a narrow category of speech that is not protected by the First Amendment. Pet. App. 64a-75a. The district court observed that the First Amendment does not protect certain narrow categories of speech whose harmful effects clearly outweigh their slight social value. *Id.* at 65a-66a. Section 48 defines just such a category, the court explained, because images of illegal acts of animal cruelty have "exceedingly little, if any, social value," which is "greatly outweighed" by the government's compelling interests in "insuring that animals, as living beings, be accorded certain minimal standards of treatment" and in "preventing a criminal from profiting from his or her crime." *Id.* at 66a-67a, 69a, 71a.

The district court compared the depictions at issue to obscenity, explaining that "if the government has a sufficiently compelling interest in prohibiting the sale of depictions of sexual activity between consenting adults, it has an equal, if not greater, interest in preventing the torture, maiming, mutilation and wanton killing of animals who have no ability to consent to such treatment." Pet. App. 67a. The court also determined that Section 48 is "akin to the laws prohibiting possession and distribution of * * * child pornography," because "all fifty states have enacted laws prohibiting animal cruelty"; "the distribution of depictions of animal cruelty is intrinsically related to the underlying conduct"; "the creation, sale, or possession of depictions of animal cruelty for profit provides an economic incentive for such conduct"; and "the value of the depictions * * * is de minimis at best." *Id.* at 70a-71a.

The court then rejected respondent's overbreadth and vagueness claims. Pet. App. 71a-75a. As relevant here, it determined that Section 48 is not substantially overbroad because it applies only to depictions of cruelty to live animals when the depictions are illegal and lack societal value. *Id.* at 71a-73a.[1]

A jury found respondent guilty on all counts, and the district court sentenced him to concurrent sentences of 37 months of imprisonment on each count, to be followed by three years of supervised release. Pet. App. 4a; J.A. 33, 37.

4. The en banc court of appeals vacated respondent's conviction. Pet. App. 1a-63a. The court first rejected Congress's and the district court's view that the depictions at issue are so valueless that they lack First Amendment protection. *Id.* at 7a. Although recognizing that the existing categories of unprotected speech may be supplemented, *id.*

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[1] The court of appeals did not address respondent's vagueness claim, and therefore it is not before this Court.

at 10a, the court stated that it was "unwilling" to do so "without express direction" from this Court, *id.* at 14a.

The court rejected a proposed analogy to child pornography. Although acknowledging that all 50 States have laws prohibiting animal cruelty, and that animal cruelty offenses are often difficult to prosecute because of their clandestine nature, Pet. App. 6a, 8a-9a & n.4, the court decided that the government's interest in preventing animal cruelty is not compelling. The court reasoned that this interest it is not "of the same magnitude as protecting children," *id.* at 18a-19a, and read this Court's decision in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), as supporting this view. Pet. App. 15a-16a. In addition, the court rejected the argument that Section 48 necessarily reaches only speech with no redeeming societal value, stating that "[t]he exceptions clause cannot on its own constitutionalize § 48." *Id.* at 25a-26a.

The court then applied strict scrutiny and invalidated the statute on its face. Pet. App. 27a-32a. The court repeated its view that the government's interests in stopping acts of animal cruelty and the harms attendant to them are not compelling. *Id.* at 28a. The court added that, in any event, the statute does not further those interests because it merely "aid[s] in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime." *Id.* at 29a. The court observed, in a footnote, that the statute "might also be unconstitutionally overbroad," but it decided to "rest [its] analysis on strict scrutiny grounds alone" because "voiding a statute on overbeadth grounds is 'strong medicine.'" *Id.* at 32a-34a n.16 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

Three judges dissented. Pet. App. 34a-63a (Cowen, J., dissenting). In their view, the First Amendment does not protect the "narrow subclass" of depictions of "depraved acts committed against an uniquely vulnerable and helpless

class of victims" that is regulated by Section 48. *Id.* at 57a. The dissenting judges traced the long history of state and federal laws prohibiting animal cruelty, *id.* at 39a-40a, observing that those laws are "powerful evidence of the importance of the governmental interest at stake," *id.* at 41a. They also noted the widespread belief that "cruelty to animals is a form of antisocial behavior that erodes public mores" and "ha[s] a deleterious effect on the individual inflicting the harm." *Id.* at 42a. And they determined that the depictions covered by Section 48 have "little or no social value," both because "depictions of animals being intentionally tortured and killed" generally appeal only "to those with a morbid fascination with suffering," and because the statute's exceptions clause "circumscribe[s] the scope of [the] regulation to only this category's plainly unprotected portions." *Id.* at 47a-49a. The dissenting judges also analogized the depictions at issue to child pornography, because the depictions are "intrinsically related" to the underlying criminal acts, *id.* at 51a, and prohibiting them will dry up the "lucrative market for depictions of animal cruelty," *id.* at 53a-55a.

Finally, the dissenting judges concluded that the statute is neither substantially overbroad nor impermissibly vague, Pet. App. 57a-63a (Cowen, J., dissenting), and that constitutional concerns about the statute therefore should be addressed "through case-by-case analysis," *id.* at 61a (citation omitted).

SUMMARY OF ARGUMENT

Section 48's prohibition of the commercial trade in depictions of the illegal torture and killing of animals is constitutional. In enacting Section 48, Congress recognized a direct link between a narrow category of expressive material and the cruel and illegal exploitation of animals depicted in that material. To prevent the underlying illegal

acts of animal cruelty, and the harm attendant on them, Congress therefore prohibited the interstate and international commercial trade in those depictions. The court of appeals' holdings that the depictions are protected speech and that the statute is facially unconstitutional are wrong.

I. Section 48 encompasses a very narrow category of speech that is unprotected under the First Amendment.

A. This Court has recognized that some categories of speech lack First Amendment protection, because the speech has little or no expressive value and causes serious societal harms. Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.

B. Section 48 does not reach any speech that advances the exposition of ideas. By its terms, the statute is limited to depictions of illegal acts of extreme cruelty, and it expressly exempts any speech with serious religious, political, scientific, educational, journalistic, historical, or artistic value. The resulting narrow category of material includes crush videos, in which women in high-heeled shoes slowly crush animals to death. It also includes videos of dogfights, hog-dog fights, and cockfights—bloody spectacles of vicious animals forced to fight to the point of exhaustion or death. Such images are far removed from the free trade in ideas that the First Amendment was designed to protect.

C. The minimal value of the depictions regulated by Section 48 is greatly outweighed by the harm they cause. Illegal acts of animal cruelty result in great suffering to defenseless animals, as well as injuries to human beings and the erosion of important public mores. Every state and the federal government prohibit these acts, underscoring the compelling nature of the government's interest in their eradication. All of the material that Section 48 covers involves the performance of these acts and the concomitant

infliction of this suffering and injury. By prohibiting trade in these depictions, Section 48 targets this netherworld of animal cruelty.

D. The material prohibited by Section 48 is analogous to other unprotected speech. As is true of child pornography, the acts underlying this material are illegal and injurious and can be addressed by targeting the market for their depiction. Like obscenity, the depictions are of patently offensive conduct that appeals only to the basest instincts. The Court therefore has ample basis for concluding that the depictions do not enjoy First Amendment protection.

II. Even if Section 48 reaches some protected speech, the statute is not facially invalid.

A. When a challenger seeks to invalidate a statute in all of its applications based on the First Amendment, and the statute has both permissible and impermissible applications, the challenger must establish substantial overbreadth. Here, the court of appeals invalidated Section 48 on its face without requiring respondent to make that showing. Reversal is warranted on that basis alone.

B. Section 48 is not substantially overbroad in relation to the statute's plainly legitimate sweep. Section 48 covers some material—most notably, crush videos—that qualify as obscenity under prevailing law. And numerous applications of the statute, including to crush videos and animal fighting videos, would satisfy even the strict scrutiny standard.

C. The court of appeals' suggestion that certain hypothetical applications of the statute would violate the First Amendment does not render the statute substantially overbroad. The permissible applications noted above far outnumber these hypotheticals, all of which exist at the outer margins of the statute. Moreover, Section 48 expressly excludes from coverage any material with redeeming societal value. Especially in light of that broad exceptions clause, Section 48 could not possibly have a substan-

tial number of impermissible applications relative to its legitimate scope.

ARGUMENT

SECTION 48'S PROHIBITION OF DEPICTIONS OF ANIMAL CRUELTY MADE, SOLD, OR POSSESSED FOR COMMERCIAL GAIN IS CONSTITUTIONAL

I. SECTION 48 DOES NOT REGULATE PROTECTED SPEECH

This Court has long recognized that certain narrow categories of speech are excluded from First Amendment protection because they have minimal, if any, expressive value, and they cause great harm. Congress correctly made that judgment about the depictions targeted by Section 48. Depictions of illegal acts of animal cruelty made, sold, or possessed for commercial gain lack expressive value, and they are integrally linked to harms to animals, humans, and society. Those depictions share critical characteristics with other kinds of unprotected speech, such as child pornography and obscenity. Accordingly, they may be regulated as unprotected speech.

A. Certain Narrow Categories Of Speech Do Not Enjoy First Amendment Protection Because Their Harms Greatly Outweigh Their Expressive Value

1. The First Amendment provides: "Congress shall make no law * * * abridging the freedom of speech." Despite its broad language, "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 & n.2 (1942) (citing cases); see, *e.g.*, *Miller* v. *California*, 413 U.S. 15, 29 (1973) (rejecting "an absolutist, 'anything goes' view of the First Amendment"). That has been true since the Nation's Founding: Although several States guaranteed freedom of expression in their constitutions, those guarantees did not

extend to certain categories of speech, such as libel, blasphemy, profanity, and obscenity. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382-383 (1992); *Roth* v. *United States*, 354 U.S. 476, 482-483 & nn.10-11 (1957). In light of that historical evidence, "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id.* at 483.

Accordingly, this Court long has recognized that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky*, 315 U.S. at 571-572. Those categories include "fighting words," *id.* at 572; speech inciting imminent lawless activity, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam); "true threat[s]," *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam) (internal quotation marks omitted); obscenity, *Roth*, 354 U.S. at 485; child pornography, *New York* v. *Ferber*, 458 U.S. 747, 754-764 (1982); and offers or solicitations to engage in illegal activity, *United States* v. *Williams*, 128 S. Ct. 1830, 1841-1842 (2008).

The speech in these categories does not serve the central purposes of the First Amendment, while causing significant societal harms. The First Amendment was principally designed "to create[] an open marketplace where ideas, most especially political ideas, may compete without government interference." *New York State Bd. of Elections* v. *Lopez Torres*, 128 S. Ct. 791, 801 (2008); see, *e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (First Amendment protects the "free trade in ideas"). But certain speech, the Court has explained, has no or minimal expressive value: These limited categories of speech are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-

weighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. Accordingly, they may be regulated "because of their constitutionally proscribable" content. *R.A.V.*, 505 U.S. at 383 (emphasis omitted).

2. To determine whether a certain class of speech enjoys First Amendment protection, this Court has performed a categorical balancing analysis, comparing the expressive value of the speech with its societal costs. Where the First Amendment value of the speech is "clearly outweighed" by its societal costs, the speech may be prohibited based on its content. *Chaplinsky*, 315 U.S. at 572. Case-by-case adjudication is not required, because "it may be appropriately generalized that * * * the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake" that the entire category may be prohibited. *Ferber*, 458 U.S. at 763-764.

The Court first enunciated that approach in *Chaplinsky*, where it explained that "fighting words" may be regulated consistent with the First Amendment because they have no or minimal expressive value and "by their very utterance inflict injury." 315 U.S. at 572. Subsequently, in *Roth*, the Court relied on the *Chaplinsky* balancing test in determining that obscene speech does not enjoy First Amendment protection. The Court there explained that material which "deals with sex in a manner appealing to [the] prurient interest" utilizes a mode of expression that is "utterly without redeeming social importance." 354 U.S. at 484, 487; see *Miller*, 413 U.S. at 20-21, 34-35 (also relying on *Chaplinsky*). In *Ferber*, the Court conducted a similar analysis, explaining that child pornography lacks First Amendment protection because the "balance" of "the expressive interests, if any, at stake" and "the evil to be restricted" "is clearly struck" in favor of regulation. 458 U.S. at 763-764.

And in its recent decision in *Williams*, the Court held that offers to engage in illegal activity are "categorically excluded" from First Amendment protection because they "have no social value" in light of their low expressive content and the government's substantial interest in preventing the commission of crimes. 128 S. Ct. at 1841-1842. These cases confirm that the "limited categorical approach" set out in *Chaplinsky* "has remained an important part of [the Court's] First Amendment jurisprudence." *R.A.V.*, 505 U.S. at 383.

3. The court of appeals failed to apply that settled framework in considering whether the speech covered by Section 48 is protected under the First Amendment. Although the court acknowledged that *Chaplinsky* establishes a "balancing test" that "weighs the government interest in restricting the speech against the value of the speech," it then suggested that *Chaplinsky* has "been marginalized." Pet. App. 11a n.6 (internal quotation marks and citation omitted). It therefore declined to recognize a new category of unprotected speech based on the *Chaplinsky* framework, stating instead that the "only possible way to conclude that § 48 regulates unprotected speech" is if the speech regulated can be directly analogized to an existing category of unprotected speech. *Ibid.*; see *id.* at 10a.

Contrary to the court of appeals' view, this Court has employed *Chaplinsky*'s approach, where appropriate, to identify new categories of unprotected speech. See pp. 12-13, *supra*. Each unprotected category created by the Court over the decades shares certain characteristics, but each also has its own distinct scope. So, for example, in *Ferber*, the Court rejected the view that child pornography must fit into the existing definition of obscenity to fall outside the First Amendment's protection. In that case, the court of appeals had assumed that the material at issue must qualify as obscene, 458 U.S. at 753-754, but this Court disagreed,

explaining that the First Amendment does not prohibit a State from "going further" than obscenity so long as "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake," *id.* at 760-761, 763-764. Thus, whether a specific category of speech lacks First Amendment protection is governed by the analysis initiated in *Chaplinsky*, and does not depend on whether the speech to be regulated is equivalent or strictly analogous to an existing "low-value" category.

B. Section 48 Regulates A Narrow Category Of Speech That Does Not Advance The Exposition Of Ideas

1. Congress drafted Section 48 carefully to ensure that it "proscribe[s] only a limited class" of harmful material with "little or no social utility." *1999 House Report* 4. Four features of the statute narrowly circumscribe the statute's reach.

First, the statute covers only those depictions "of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 18 U.S.C. 48(c)(1). Section 48 thus requires that the animal portrayed in the depiction must suffer serious bodily injury or death. See, *e.g.*, *Webster's Third New Int'l Dictionary* 1362 (1993) ("maim" is "to wound seriously"); *id.* at 1493 ("mutilate" is "to cut off or permanently destroy a limb or essential part of" a body); *id.* at 2414 ("torture" is "the infliction of intense pain"); *id.* at 2638 ("wound" is to inflict "an injury to the body consisting of a laceration or breaking of the skin or mucous membrane"); *id.* at 1242 ("kill" is "to deprive of life").

The injury must be to a real, living animal; simulated animal cruelty is not reached by Section 48. See 18 U.S.C. 48(c)(1) (requiring a "living animal"); *1999 House Report* 7 ("[T]he statute does not apply to simulated depictions of animal cruelty."). Moreover, the acts depicted must have

been done "intentionally," 18 U.S.C. 48(c)(1); inadvertent harm to animals does not qualify.

Second, the statute only applies to depictions of illegal conduct. See 18 U.S.C. 48(c)(1) (animal cruelty depicted must be "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place"). That limitation narrows the statute's reach to acts of harm to animals that society already has determined are unjustifiable. Moreover, because an illegal act is an essential prerequisite for liability under Section 48, the statute does not reach "abstract advocacy of illegality," *Williams*, 128 S. Ct. at 1842, but only depictions in which illegal acts play an "integral" role, *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

Third, Section 48 encompasses only those images that are "knowingly create[d], s[old], or possesse[d]" with the specific "intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). The requirement that the creation, sale, or possession be "knowing[]" limits the statute's reach to those traffickers who know that the depictions are images of real animals being tortured or killed. See, *e.g.*, *Black's Law Dictionary* 888 (8th ed. 2004) (defining "knowing" as "[h]aving or showing awareness or understanding"; "[d]eliberate; conscious"). And the requirement that the actor place the depiction in interstate or foreign commerce for commercial gain narrows the statute to reach only persons who choose to engage in commercial trafficking in images of animal cruelty, as opposed to persons who for some other purpose possess or view such images. See *1999 House Report* 7-8.

Fourth, Congress exempted from the statute's reach any depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b). The exceptions clause is broad by its terms, and Congress confirmed what is apparent from the text:

The exceptions clause "ensure[s] that * * * material with at least some value recognized by society" is not covered by the statute. *1999 House Report* 8; see *Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty*, 35 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999) (*HR 1889 Statement*).[2] Whether the depictions have any redeeming societal value is to be determined based on an assessment of the work as a whole. See *id.* at 2558 (the provision should be interpreted "to require a determination of the value of the depiction as part of a work or communication, taken as a whole"); see also, *e.g.*, *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 248 (2002). Thus, if any depictions of the illegal torture and killing of animals are created, possessed, or sold for commercial gain, but the work in which they appear has redeeming societal value when taken as a whole, the depictions cannot be reached by the statute.

Each of the statutory limitations circumscribes the material covered by Section 48, so that all that remains is an extremely narrow category: depictions of the illegal torture or killing of animals that are created, sold, or possessed knowingly and for the specific purpose of commer-

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[2] The exceptions clause narrows the scope of the offense defined in Section 48, rather than describing an affirmative defense, so that the statute does not "impose on the defendant the burden of proving his speech is not unlawful." *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 255 (2002). The government took that view at respondent's trial and established the videos' lack of serious value in its case in chief. See C.A. App. 131 n.4, 649-650; see also J.A. 128-129, 131-132. Interpreting the exceptions clause as an element of a Section 48 offense avoids any constitutional questions that might otherwise arise were the clause treated as creating an affirmative defense. Pet. App. 72a-73a; see, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (constitutional avoidance canon).

cial gain in interstate or foreign commerce and that lack any serious societal value.

2. Several examples illustrate the kind of materials that Congress intended to reach in Section 48.[3] One set of depictions targeted by the statute are "crush videos," which are videos designed to "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *1999 House Report* 2; see 145 Cong. Rec. 10,685 (1999) (statement of Rep. Gallegly). In those videos, "women inflict[] * * * torture [on small animals] with their bare feet or while wearing high heeled shoes" until the animals are trampled to death. *1999 House Report* 2. Typically, the animals "are tortured in a slow, cruel, and deliberate way," *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 27 (1999) (*Hearing*) (statement of Susan Creede, Investigator, Ventura County District Attorney's Office), while taped or tied to the floor so that they cannot escape, *Hearing* 6 (statement of Rep. Scott); *id.* at 63 (statement of William Paul LeBaron, Detective, Long Beach Police Department).

The women in these videos "talk[] to the animals in a kind of dominatrix patter" while the animals "cr[y] and squeal[] * * * in great pain." *1999 House Report* 2; see *Hearing* 63 (statement of William Paul LeBaron) (the women "taunt the animal[s]" and "order [them] to beg for mercy"). The videos capture the entire grisly process of the animal's being crushed to death, and they often show the woman continuing to crush the animal after it has died,

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[3] The government has submitted a letter to the Clerk offering to present documentation of the availability and nature of the material described in this brief.

until all that is left is a "bloody mass of fur." *Id.* at 65 (statement of William Paul LeBaron).

Although the videos typically show "mice, hamsters, and other small animals" being crushed to death, crush videos have been made showing "cats, dogs, and even monkeys being tortured." *1999 House Report* 2; see *Hearing* 27 (statement of Susan Creede) (videos made using mice, guinea pigs, rats, squirrels, rabbits, birds, chickens, cats, dogs and monkeys). Crush videos are also "ma[de] * * * to order, in whatever manner the customer wished to see the animal tortured and killed." *1999 House Report* 2-3.

Crush videos "turn a brisk business, particularly over the Internet." Pet. App. 6a. There are "thousands of titles available for sale nationwide," typically costing between $30 and $100. *Hearing* 6 (statement of Rep. Scott). Made-to-order videos can cost hundreds of dollars. *Id.* at 65 (statement of William Paul LeBaron). Several websites are specifically dedicated to crush fetishes, and crush videos are available for purchase from numerous sources on the Internet. Crush videos make up a significant part of the depraved depictions of animal cruelty, made for commercial gain, that are regulated by Section 48.

Another kind of material covered by the statute is the depiction of animal fighting ventures, such as dogfighting, hog-dog fighting, and cockfighting. Dogfighting is a "grisly business in which two dogs either trained specifically for the purpose or maddened by drugs and abuse are set upon one another and required to fight, usually to the death of at least one and frequently both animals." H.R. Rep. No. 801, 94th Cong., 2d Sess. 9 (1976); see J.A. 63-70. Dogs are trained to fight and to endure pain, and then are often starved just before a match in order to make them even more aggressive and violent. James C. McKinley, Jr., *Dogfighting Subculture, Illegal and Secretive, Is Taking Hold in Texas*, N.Y. Times, Dec. 7, 2008, at A29 (*Dogfighting*

Subculture). Dogs that earn Champion status (by winning three fights) or Grand Champion status (by winning five consecutive fights) become more valuable and may be used for stud services. J.A. 72, 139.

Records of dogfights, showing victories and losses, are published in underground magazines such as *Sporting Dog Journal.* J.A. 49, 70-71, 145; Bill Burke, *Out of the South: Dogfighting on the Rise*, Chi. Tribune, July 5, 2007, at 5 (*Dogfighting on the Rise*). Dogfights often are videotaped in order to document when a dog reaches Champion or Grand Champion status, Shane DuBow, *Dog Bites Dog*, N.Y. Times, Sept. 29, 2002, at F48; to enable off-site gambling on the outcomes of fights, *Dogfighting on the Rise* 5; to create "training" materials for dogfighting, *ibid.*; J.A. 70; or to be sold purely for their so-called "entertainment" value, Renee C. Lee, *Dogfight Culture Thrives on Secrecy*, Houston Chronicle, Sept. 4, 2006, at A1 (*Dogfight Culture Thrives*). Videos of dogfights are available for sale on the Internet and through underground dogfighting magazines. Pet. App. 3a.

In some areas, dogs are trained to fight not other dogs but instead pigs or wild hogs. In a hog-dog fight, the dog attacks the hog "by clamping its jaws against its snout, ears, or testicles"; "[i]f the pig survives, it's returned to the ring for another fight." Roberto Santiago, *Florida Bloodbath: Dog-Pig Sport Fighting*, Miami Herald, Jan. 27, 2006, at A1. The "same hog may face eight to 10 dogs during the course" of a fight. Ron Barnett, *"Hog Dogging" Has Some Fighting Mad*, USA Today, Apr. 5, 2006, at 3A. And sometimes the fight organizers remove the hog's tusks or outfit the dog in a Kevlar vest to give the dog an additional advantage in the fight. See Humane Soc'y of the U.S., *Hog-Dog Fighting* <http://www.hsus.org/acf/fighting/hogdog> (visited June 5, 2009). Hog-dog fights, like dogfights, are often documented in and promoted

through videos. See, *e.g.*, Ellen Barry, *7 Arrested in Hog and Dog Competitions*, L.A. Times, Dec. 21, 2004, at A15.

Cockfighting is another common animal fighting venture. As in dogfighting, roosters are bred and trained to fight. Jim Stratton, *Cockfighting Persists as Underground Sport*, Orlando Sentinel, Jan, 18, 2005, at A1 (*Cockfighting Persists*). They are injected with steroids, have "flesh-slicing blades" called gaffs attached to their legs, and are placed in makeshift rings to fight to the death. *Ibid.*; Robert Crowe, *Legal Loopholes Let Cockfighting Flourish in Texas*, Houston Chronicle, Dec. 28, 2006, at A1 (*Legal Loopholes*). The birds then "rush each other, pecking at their opponent's eyes and swiping with the gaffs." *Cockfighting Persists* A7. Fights typically last only a matter of minutes, but they are often prolonged by the handlers' efforts to revive injured birds so they can continue to fight. See, *e.g.*, Michael Perlstein, *In Cajun Country, a Fight to the Finish*, N.Y. Times, June 1, 2007, at F1. Videos are made to document cockfights and to serve as training tools, and they are commonly available over the Internet. See, *e.g.*, *Cockfighting Persists* A7; Debbi Farr Baker & Anne Krueger, *Cockfight Raid Called Nation's Largest*, San Diego Union-Tribune, Oct. 16, 2007, at B-1 (*Cockfight Raid*).

The videos for which respondent was convicted provide concrete examples of the kind of violent and depraved material covered by the statute. *Japan Pit Fights* and *Pick-A-Winna* include footage of pit bulls savagely fighting in enclosed bloody pits. See, *e.g.*, Video: *Japan Pit Fights* 11:00-11:07, 33:34-35:13, 46:39-48:36 (Robert Stevens date unknown) (*JPF)*; Video: *Pick-A-Winna* 22:20-25:50, 29:50-36:00 (Robert Stevens date unknown) (*PAW*).[4] The dogs

[4] Citations to the videos are to the time-stamp when the cited material appears.

are forced to fight to the point of exhaustion, when they are "bitten, ripped and torn," noticeably fatigued, and "screaming in pain." J.A. 86 (testimony of expert witness in veterinary medicine); see *id.* at 79-85; see also *JPF* 46:39-48:36. *Catch Dogs* includes more footage of dogfighting, as well as a "gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig." Pet. App. 3a; Video: *Catch Dogs* 47:34-48:40 (Robert Stevens date unknown) (*CD*); see J.A. 98 (hog industry executive testified that pig is in "a great deal of pain and stress" and its "bottom jaw [i]s pretty much removed"); *id.* at 96-98 (noting that, despite his many years in the hog industry, he had never before seen a pig attacked in such a manner). The dog is not merely hunting the pig, but is "fighting th[e] farm hog like it was a dog." *CD* 47:41-47:45; see J.A. 96; see also *CD* 58:24-58:59, 1:00:51-1:01:50 (scenes of multiple dogs attacking a hog at once). These animal fighting videos, like crush videos, constitute a substantial proportion of the material that Section 48 prohibits.

3. The graphic depictions of the torture and maiming of animals reached by Section 48 are "no essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572. Section 48 covers depictions of depraved acts against a "uniquely vulnerable and helpless class of victims." Pet. App. 57a (Cowen., J., dissenting). Like child pornography and images of hard-core sexual conduct, depictions regulated by Section 48 almost never could "constitute an important and necessary part of a literary performance or scientific or educational work." *Ferber*, 458 U.S. at 762-763. And "if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal" could be simulated. Pet. App. 48a (Cowen, J., dissenting). As the above examples illustrate, the material reached by the statute is leagues distant from the "free dissemination of ideas of social and political significance" that lie at the core of the

First Amendment. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). To paraphrase the Court's rationale for treating obscenity as unprotected expression: "To equate the free and robust exchange of ideas and political debate with commercial exploitation of" depictions of animal cruelty "demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Miller*, 413 U.S. at 34.

Indeed, the depictions at issue here do not reflect any "inten[t] * * * to express an idea" at all. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). The depictions are not designed to appeal to the intellect. Cf. *Miller*, 413 U.S. at 35. Nor do they speak to the emotions, as commonly understood. The only possible appeal of the depictions here is to the most vile instincts—or, as the dissenting judges below put the point, "to those with a morbid fascination with suffering." Pet. App. 48a (Cowen, J., dissenting); see *Ferber*, 468 U.S. at 763. Congress was right to conclude that "no reasonable person would find any redeeming value" in these horrific images. *1999 House Report* 5.

And even if some of the depictions reached by Section 48 do express some sort of idea—for example, that gratuitous cruelty to animals is tolerable or appropriate—they may be prohibited because of the way the idea is expressed. As this Court has explained, certain narrow categories of speech are unprotected not because "they constitute '*no* part of the expression of ideas,'" but because they constitute "'no *essential* part of any exposition of ideas'"; "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 385, 393 (quoting *Chaplinsky*, 315 U.S. at 572). So, for example, child pornography may express an idea about the appropriateness of certain sexual behavior with children, but the Court nonetheless has declined to extend First Amendment pro-

tection to such material. A similar analysis should obtain in this case. The First Amendment ensures that a person may express any idea he wishes about animal cruelty, but does not protect his decision to do so by creating, selling, or possessing videos of live animals being tortured or killed in violation of law. See *1999 House Report* 5.

Finally, Section 48's exceptions clause ensures that the statute reaches only material that lacks serious societal value. "By the very terms of the statute," any material that "has serious utility—whether it be religious, political, scientific, educational, journalistic, historic, or artistic—falls outside the reach of the statute." *1999 House Report* 4. The court of appeals discounted the significance of the exceptions clause on the ground that it "cannot on its own constitutionalize § 48." Pet. App. 25a. But the clause does not "on its own" make the statute constitutional. Instead, Congress started "with the legislative judgment that the category of speech at issue—depictions of animals being intentionally tortured and killed—is of such minimal redeeming value as to render it unworthy of First Amendment protection," and then exempted from that class any "subsets of these materials" with redeeming societal value. *Id.* at 48a-49a (Cowen, J., dissenting). Congress added the exceptions clause to protect any isolated depictions that have value within the class of generally valueless depictions of unlawful animal cruelty. The court of appeals had no basis to read out that provision of the statute.

C. The Harm From The Speech Reached By Section 48 Greatly Outweighs Its Expressive Value

In enacting Section 48, Congress identified a number of overlapping governmental interests that justify regulating the commercial trade in depictions of illegal acts of animal cruelty, including the harms to the animals themselves and attendant harms to humans and public morality. Those

governmental interests overwhelmingly outweigh any limited value of the covered depictions, so as to allow the prohibition of this class of materials.

1. Section 48 is justified by the government's compelling interest in preventing the illegal torture, maiming, mutilation, and killing of animals. The provision reflects a societal consensus that, although animals are often used for utilitarian purposes, they are living creatures that should be "treated in ways that do not cause them to experience excessive physical pain or suffering." *1999 House Report* 4.

Prohibitions on acts of animal cruelty are deeply ingrained in our culture and laws. Bans on wanton cruelty to animals first appeared in this country during the colonial period, and every State had a law prohibiting animal cruelty by 1913. See Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, in *Animals and Their Legal Rights: A Survey of American Laws from 1661 to 1970*, at 1 (1978); see also Pet. App. 39a (Cowen, J., dissenting). The first federal animal cruelty law was enacted in 1873,[5] and Congress has repeatedly acted to prohibit the mistreatment of animals.[6]

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[5] See Act of Mar. 3, 1873, ch. 252, 17 Stat. 584 (49 U.S.C. 80502) (animals being transported may not be confined for more than 28 consecutive hours without unloading for feeding, water, and rest).

[6] See, *e.g.*, 7 U.S.C. 1901, 1902 (ensuring humane methods for slaughtering of livestock); 7 U.S.C. 2131 (ensuring humane handling of animals for sale in interstate commerce and for use at government research facilities); 7 U.S.C. 2142 (ensuring humane treatment of animals for purchase and sale at auction); 7 U.S.C. 2156 (Supp. II 2008) (prohibiting animal fighting ventures); 7 U.S.C. 2158 (protecting pets in pounds and shelters); 15 U.S.C. 1821 *et seq.* (preventing cruel and inhumane practice of "soring" horses); 16 U.S.C. 1331 *et seq.* (protecting free-roaming horses and burros from capture, branding, mistreatment, and death).

All 50 States and the District of Columbia now have general laws prohibiting animal cruelty.[7] Other state and

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[7] Ala. Code § 13A-11-14 (LexisNexis 2005); Alaska Stat. § 11.61.140 (2008); Ariz. Rev. Stat. Ann. § 13-2910 (Supp. 2008); Ark. Code Ann. § 5-62-101 (LexisNexis 2005) (repealed, effective July 31, 2009); 2009 Ark. Acts 33, § 3 (to be codified at Ark. Code Ann. §§ 5-62-102 *et seq.*) (effective July 31, 2009); Cal. Penal Code § 597 (West 1999); Colo. Rev. Stat. § 18-9-202 (2006); Conn. Gen. Stat. Ann. § 53-247 (West 2007); Del. Code Ann. tit. 11, § 1325 (2007); D.C. Code Ann. §§ 22-1001 *et seq.* (2001); Fla. Stat. Ann. § 828.12 (West 2006); Ga. Code Ann. § 16-12-4 (2007); Haw. Rev. Stat. Ann. §§ 711-1108.5, 711-1109 (LexisNexis Supp. 2008); Idaho Code Ann. §§ 25-3502 *et seq.* (2000); 510 Ill. Comp. Stat. Ann. §§ 70/3.01 *et seq.* (West 2004); Ind. Code Ann. §§ 35-46-3-7 *et seq.* (LexisNexis 2004); Iowa Code Ann. § 717B.3A (West Supp. 2009); Kan. Stat. Ann. § 21-4310 (Supp. 2008); Ky. Rev. Stat. Ann. §§ 525.125, 525.130, 525.135 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:102.1 (West Supp. 2009); Me. Rev. Stat. Ann. tit. 17, § 1031 (West Supp. 2008); *id.* § 1033 (2006); Md. Code Ann., Crim. Law § 10-604 (LexisNexis Supp. 2008); Mass. Ann. Laws ch. 272, § 77 (Law Co-op Supp. 2009); Mich. Comp. Laws Ann. §§ 750.50, 750.50b (West 2004 & Supp. 2009); Minn. Stat. Ann. § 343.21 (West 2004); Miss. Code Ann. § 94-41-1 (West 1999); Mo. Ann. Stat. § 578.012 (West 2003); Mont. Code Ann. §§ 45-8-211, 45-8-217 (2007); Neb. Rev. Stat. Ann. § 28-1009 (Supp. 2008); *id.* §§ 28-1010, 28-1017 (2003); Nev. Rev. Stat. Ann. §§ 574.050 *et seq.* (LexisNexis 2004); N.H. Rev. Stat. Ann. § 644:8 (LexisNexis Supp. 2008); N.J. Stat. Ann. §§ 4:22-17, 4:22-26 (West Supp. 2009); N.M. Stat. Ann. § 30-18-1 (Michie Supp. 2008); N.Y. Agric. & Mkts. Law §§ 350 *et seq.* (McKinney 2004); N.C. Gen. Stat. §§ 14-360 *et seq.* (2007); N.D. Cent. Code §§ 36-21.1-01 *et seq.* (2004); Ohio Rev. Code Ann. §§ 959.01 *et seq.* (LexisNexis 2004); Okla. Stat. Ann. tit. 21, § 1685 (West Supp. 2009); Or. Rev. Stat. §§ 167.310, 167.320 *et seq.* (2007); 18 Pa. Cons. Stat. Ann. § 5511 (West Supp. 2009); R.I. Gen. Laws §§ 4-1-1 *et seq.* (1998); S.C. Code Ann. §§ 47-1-10 *et seq.* (Law. Co-op. 1987); S.D. Codified Laws §§ 40-1-1 *et seq.* (West 2004); Tenn. Code Ann. § 39-14-202 (Supp. 2008); Tex. Penal Code Ann. §§ 42.09, 42.092 (West Supp. 2008); Utah Code Ann. §§ 76-9-301 *et seq.* (2008); Vt. Stat. Ann. tit. 13, §§ 351 *et seq.* (Supp. 2008); Va. Code Ann. § 3.2-6570 (2008); Wash Rev. Code Ann. §§ 16.52.205, 16.52.207 (West Supp. 2009); W. Va. Code Ann. § 61-8-19 (LexisNexis Supp. 2008); Wis. Stat. Ann. §§ 951.01 *et seq.* (West 2005);

federal laws target specific kinds of animal cruelty. Dogfighting, for example, is illegal in all 50 States and the District of Columbia,[8] and it has been prohibited by federal law

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Wyo. Stat. Ann. § 6-3-203 (LexisNexis 2007). See generally Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69 (1999).

[8] See Ala. Code § 3-1-29 (Michie 1996); Alaska Stat. § 11.61.145 (2008); Ariz. Rev. Stat. Ann. §§ 13-2910.01, 13-2910.02 (2001); Ark. Code Ann. § 5-62-120 (LexisNexis 2005) (amended, effective July 31, 2009, by 2009 Ark. Acts 33, § 6); Cal. Penal Code § 597.5 (West 1999); Colo. Rev. Stat. § 18-9-204 (2006); Conn. Gen. Stat. Ann. § 53-247(c) (West 2007); Del. Code. Ann. tit. 11, § 1326 (2007 & Supp. 2008); D.C. Code § 22-1015 (Supp. 2008); Fla. Stat. Ann. § 828.122 (West 2006); Ga. Code Ann. § 16-12-37 (Supp. 2008); Haw. Rev. Stat. Ann. § 711-1109.3 (LexisNexis 2007); Idaho Code § 25-3507 (Supp. 2008); 720 Ill. Comp. Stat. Ann. 5/26-5 (West Supp. 2009); Ind. Code Ann. § 35-46-3-8 (LexisNexis 2004); Iowa Code Ann. §§ 717D.1, 717D.2 (West Supp. 2009); Kan. Stat. Ann. § 21:4315 (2007); Ky. Rev. Stat. Ann. § 525.125 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:102.5 (West Supp. 2009); Me. Rev. Stat. Ann. tit. 17, § 1033 (West 2006); Md. Code Ann., Crim. Law. §§ 10-605(a), 10-607 (LexisNexis Supp. 2008); Mass. Ann. Laws ch. 272, §§ 94, 95 (Law. Co-op. Supp. 2009); Mich. Comp. Laws Ann. § 750.49 (West 2004 & Supp. 2009); Minn. Stat. Ann. § 343.31 (West Supp. 2008); Miss. Code Ann. § 97-41-19 (West 1999); Mo. Ann. Stat. § 578.025 (West 2003); Mont. Code Ann. § 45-8-210 (2007); Neb. Rev. Stat. Ann. § 28-1005 (2003); Nev. Rev. Stat. Ann. § 574.070 (LexisNexis 2004); N.H. Rev. Stat. Ann. § 644:8-a (LexisNexis Supp. 2008); N.J. Stat. Ann. § 4:22-24 (West 1998); N.M. Stat. Ann. § 30-18-9 (Michie Supp. 2008); N.Y. Agric. & Mkts. Law § 351 (McKinney Supp. 2009); N.C. Gen. Stat. § 14-362.2 (2007); N.D. Cent. Code § 36-21.1-07 (2004); Ohio Rev. Code Ann. § 959.16 (LexisNexis Supp. 2009); Okla. Stat. Ann. tit. 21, §§ 1693 *et seq.* (West 2002); Or. Rev. Stat. §§ 167.365, 167.370 (2007); 18 Pa. Cons. Stat. Ann. § 5511(h.1) (West Supp. 2009); R.I. Gen. Laws §§ 4-1-9 *et seq.* (1998); S.C. Code Ann. §§ 16-27-10 *et seq.* (2003); S.D. Codified Laws § 40-1-10.1 (West 2004); Tenn. Code Ann. § 39-14-203 (Supp. 2008); Tex. Penal Code Ann. § 42.10 (West Supp. 2008); Utah Code Ann. § 76-9-301.1 (2008); Vt. Stat. Ann. tit. 13, § 352(5) (Supp. 2008); Va. Code Ann. § 3.2-6571 (2008); Wash. Rev. Code Ann. § 16.52.117 (West Supp.

since 1976.[9] All 50 States and the District of Columbia likewise have prohibited cockfighting,[10] and several states have

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2009); W. Va. Code § 61-8-19a (2005); Wis. Stat. Ann. § 951.08 (West 2005); Wyo. Stat. Ann. § 6-3-203(c) (LexisNexis 2007).

[9] See Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 421 (codified as amended at 7 U.S.C. 2156 (Supp. II 2008)).

[10] See Ala. Code § 13A-12-4 (LexisNexis 2005); Alaska Stat. § 11.61.145 (2008); Ariz. Rev. Stat. §§ 13-2910.03, 13-2910.04 (2001); Ark. Code Ann. § 5-62-101 (LexisNexis 2005) (repealed, effective July 31, 2009); 2009 Ark. Acts 33, § 3 (to be codified at Ark. Code Ann. §§ 5-62-102 *et seq.*) (effective July 31, 2009); Cal. Penal Code §§ 597b, 597c, 597i, 597j (West Supp. 2009); Colo. Rev. Stat. § 18-9-204 (2006); Conn. Gen. Stat. Ann. § 53-247(c) (West 2007); Del. Code Ann. tit. 11, § 1326 (2007 & Supp. 2008); D.C. Code Ann. § 22-1015 (Supp. 2008); Fla. Stat. Ann. § 828.122 (West 2006); Ga. Code Ann. § 16-12-4 (2007), as construed in *Hargrove* v. *State*, 321 S.E.2d 104, 108 (Ga. 1984)); Haw. Rev. Stat. Ann. § 711-1109(1)(c) (LexisNexis 2008); Idaho Code § 25-3506 (2000); 510 Ill. Comp. Stat. Ann. 70/4.01 (West Supp. 2009); Ind. Code Ann. §§ 35-46-3-8 *et seq.* (LexisNexis 2004); Iowa Code Ann. §§ 717D.1, 717D.2 (West Supp. 2009); Kan. Stat. Ann. § 21-4319 (2007); Ky. Rev. Stat. Ann. § 525.130(1)(a) (LexisNexis Supp. 2008); La. Rev. Stat. Ann. § 14:102.23 (West Supp. 2009); Me. Rev. Stat. Ann. tit. 17, § 1033 (West 2006); Md. Code Ann., Crim. Law §§ 10-605(b), 10-608 (LexisNexis Supp. 2008); Mass. Gen Laws Ann. ch. 272 §§ 94, 95 (Law. Co-op. Supp. 2009); Mich. Comp. Laws Ann. § 750.49 (West 2004 & Supp. 2009); Minn. Stat. Ann. § 343.31 (West Supp. 2008); Miss. Code Ann. § 97-41-11 (West 1999); Mo. Ann. Stat. § 578.050 (West 2003); Mont. Code Ann. § 45-8-210 (2007); Neb. Rev. Stat. Ann. § 28-1005 (2003); Nev. Rev. Stat. Ann. § 574.070 (LexisNexis 2004); N.H. Rev. Stat. Ann. § 644:8-a (LexisNexis Supp. 2008); N.J. Stat. Ann. § 4:22-24 (West 1998); N.M. Stat. Ann. § 30-18-9 (Michie Supp. 2008); N.Y. Agric. & Mkts. Law § 351 (McKinney Supp. 2009); N.C. Gen. Stat. § 14-362 (2007); N.D. Cent. Code § 36-21.1-07 (2004); Ohio Rev. Code Ann. § 959.15 (LexisNexis 2004); 21 Okla. Stat. Ann. §§ 1692.2 *et seq.* (West 2002); Or. Rev. Stat. §§ 167.426 *et seq.* (2007); 18 Pa. Cons. Stat. Ann. § 5511(h.1) (West Supp. 2009); R.I. Gen. Laws §§ 4-1-9 *et seq.* (1998); S.C. Code Ann. § 16-17-650 (West Supp. 2008); S.D. Codified Laws § 40-1-9 (West 2004); Tenn. Code Ann. § 39-14-203 (Supp. 2008); Tex. Penal Code Ann. § 42.09(b)(7) (West Supp. 2008); Utah Code Ann.

recently enacted laws to prohibit hog-dog fighting.[11] In 2007 and 2008, Congress twice strengthened the penalties for persons who participate in animal fighting ventures.[12]

These laws reflect a societal consensus that animals should be treated with at least a minimal level of decency. See *1999 House Report* 4. They are powerful evidence of the importance of the government's interest in eradicating animal cruelty. See *Ferber*, 458 U.S. at 757-758 (fact that "virtually all of the States and the United States have passed legislation" banning child pornography demonstrates "a government objective of surpassing importance"); see also, *e.g.*, *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Roth*, 354 U.S. at 484-485. This interest lies at the very core of Section 48.

Section 48 plays an important role in the longstanding state and federal effort to prevent depraved acts of animal cruelty. Section 48 regulates commercial trafficking in the depictions of animal cruelty largely because of the numerous difficulties in prosecuting those acts directly. See *1999 House Report* 3. For example, prosecuting directly the persons who make crush videos is very difficult, because

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§§ 76-9-301(2)(d), 76-9-301.5 (2008); Vt. Stat. Ann. tit. 13, § 352(5) (Supp. 2008); Va. Code Ann. § 3.2-6571 (2008); Wash. Rev. Code Ann. § 16.52.117 (West Supp. 2009); W. Va. Code §§ 61-8-19a, 61-8-19b (2005); Wis. Stat. Ann. § 951.08 (West 2005); Wyo. Stat. Ann. § 6-3-203(c) (LexisNexis 2007).

[11] See Ala. Code § 13A-12-6 (LexisNexis Supp. 2008); La. Rev. Stat. Ann. § 14:102.19 (West Supp. 2009); Miss. Code Ann. § 97-41-18 (West Supp. 2008); N.C. Gen. Stat. § 14-362.2 (2007); S.C. Code Ann. § 16-27-80 (West Supp. 2008); Tenn. Code Ann. § 39-14-203 (Supp. 2008).

[12] See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. 2223; Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

"the videos are generally created by a bare-boned, clandestine staff; the woman doing the crushing is filmed in a manner that shields her identity[;] and the location of the action is imperceptible." Pet. App. 53a (Cowen, J., dissenting); see *1999 House Report* 3. Animal fighting ventures also are nearly impossible to prosecute directly: Fights are held in secret locations, away from the prying eyes of law enforcement and private citizens, and attendance is limited to those persons the organizers consider trustworthy. *Dogfighting Subculture* A35; J.A. 62. Because the fights are "part of a criminal underworld that survives on secrecy, hidden locations, codes and reconnaissance to keep law enforcement in the dark," "[u]sually police become aware of dogfighting through insider tips or pure luck." *Dogfight Culture Thrives* A1. Section 48 thus provides law enforcement with a critical tool to reach acts of animal cruelty that long have been shielded from prosecution.

The effect of Section 48's regulation of depictions of animal cruelty is to prevent and deter the underlying illegal acts. In a crush video, the animal is tortured and killed for the sole purpose of manufacturing the video: Without the market for the video, the cruel killing would not take place. *1999 House Report* 3-4. A significant commercial market also exists for videos of animal fights, see p. 46, *infra*, and by targeting that market, Section 48 removes one of the financial incentives for persons to engage in animal fighting ventures. See 145 Cong. Rec. 10,685 (1999) (statement of Rep. Gallegly); see also *Simon & Schuster, Inc.*, 502 U.S. at 119 (government has an "undisputed compelling interest in ensuring that criminals do not profit from their crimes"). Section 48, then, targets the "visible apparatus of distribution" in order to stop the commission of illegal acts of animal cruelty, which are difficult to prosecute directly because of their clandestine nature. *Ferber*, 458 U.S. at 759-760.

Importantly, Section 48 does not restrict speech because its communicative or persuasive effect might cause illegal activity. This Court has made clear that the mere "prospect of crime," standing alone, "does not justify laws suppressing protected speech." *Free Speech Coal.*, 535 U.S. at 245. And, of course, advocacy of unlawful conduct correctly receives First Amendment protection in all but the most extraordinary circumstances. See *Brandenburg*, 395 U.S. at 447-449. But Section 48 targets not advocacy of illegality, but only the memorialization of a particular kind of illegal activity, where the recordings are integrally linked both to the commission of the prohibited acts and to the harms attendant on them. See *Ferber*, 458 U.S. at 758-762; cf. *Giboney*, 336 U.S. at 498 ("the constitutional freedom for speech and press" does not "extend[] its immunity to speech or writing used as an integral part of [illegal] conduct"). Section 48, in other words, does not prevent anyone from expressing a message; rather, it prohibits certain depictions because the commercial manufacture and distribution of the materials themselves produce harm.

The court of appeals determined that the government's interest in preventing animal cruelty is not compelling for two reasons, neither of which is correct. First, the court incorrectly believed that *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), resolved that issue. See Pet. App. 15a-16a. In *Lukumi*, this Court determined that city ordinances prohibiting the ritual slaughter of animals violated the Free Exercise Clause, because the ordinances—which were rife with exceptions—were essentially pretextual and designed to suppress aspects of the Santeria faith. See 508 U.S. at 540, 542-547. The Court did not hold that the city's interest in preventing animal cruelty could never be compelling; rather, it faulted the city for "restrict[ing] only conduct protected by the First Amendment" rather than enacting a

generally applicable anti-cruelty law. *Id.* at 546-547; see *id.* at 580 (Blackmun, J., concurring) (Court did not address "the strength of a State's interest in prohibiting cruelty to animals" through a generally applicable anti-cruelty law).

Second, the court of appeals observed that animal cruelty "does not implicate interests of the same magnitude as protecting children from physical and psychological harm." Pet. App. 18a-19a. But this is surely the wrong standard. This Court has recognized a wide variety of governmental interests as "compelling,"[13] and the prevention of cruelty to animals, which is an interest shared by every State and the federal government, fits comfortably on this list. The acts

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[13] See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 n.11 (2005) ("not facilitating inflammatory racist activity that could imperil prison security and order"); *McConnell* v. *FEC*, 540 U.S. 93, 205 (2003) ("regulating advertisements that expressly advocate the election or defeat of a candidate for federal office"); *Grutter* v. *Bollinger,* 539 U.S. 306, 328 (2003) ("attaining a diverse student body"); *Burson* v. *Freeman*, 504 U.S. 191, 199-200 (1992) (protecting right to vote freely for chosen candidates and right to vote in unbiased and reliable elections); *Simon & Schuster, Inc.,* 502 U.S. at 118-119 ("ensuring that victims of crime are compensated by those who harm them" and "that criminals do not profit from their crimes"); *Sable Commc'ns of Cal., Inc.* v. *FCC,* 492 U.S. 115, 126 (1989) ("shielding minors from the influence of literature that is not obscene by adult standards"); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989) (prevention of railway accidents); *Eu* v. *San Francisco County Democratic Cent. Comm.,* 489 U.S. 214, 226 (1989) ("[m]aintaining a stable political system"); *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (protecting classified information); *United States* v. *Salerno,* 481 U.S. 739, 749 (1987) (preventing crime by arrestees); *Wayte* v. *United States*, 470 U.S. 598, 611 (1985) ("a nation's need to ensure its own security"); *FEC* v. *National Conservative Political Action Comm.,* 470 U.S. 480, 496-497 (1985) (preventing governmental corruption); *Regan* v. *Time, Inc.*, 468 U.S. 641, 656 (1984) (preventing counterfeiting of currency); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) (eliminating racially based discrimination in education).

targeted by Section 48 are "so antisocial that [they] ha[ve] been made criminal" for centuries, *Williams*, 128 S. Ct. 1838, and their deterrence meets the constitutional test.

2. Section 48 also furthers the overlapping interest in preventing the harms to humans that often attend and follow from acts of animal cruelty. In enacting Section 48, Congress noted the growing body of research that "suggests that humans who kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals." *1999 House Report* 4. That body of evidence is substantial.[14] There is a strong correlation, for example, between domestic violence and abuse of family pets.[15] Some gangs use participa-

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[14] See Frank R. Ascione, *Children Who Are Cruel to Animals: A Review of Research and Implications for Developmental Psychopathology*, 6 Anthrozoös 226, 229-233 (1993) (surveying literature tying animal cruelty to other violent criminal acts); Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty Toward Animals Among Criminals and Noncriminals*, 38 Human Relations 1113, 1127 (1985) (exploring correlation between aggression among adult criminals and childhood cruelty toward animals); Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 Animal L. 81, 81-82 (1999) (Lockwood) ("nearly fifty classic references from the last two hundred years make[] this connection in the literature of psychology, psychiatry, anthropology, criminology, and veterinary medicine").

[15] See, *e.g.*, Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 Journal Emotional Abuse 1, 4 (1998) (reporting that 71% of domestic abusers harmed, killed or threatened to harm or kill family pets); see also 145 Cong. Rec. 25,898 (1999) (statement of Rep. Morella) ("My experience in working on domestic violence issues alerted me to the connection between animal abuse and violent behavior. * * * The legislation reflects a growing awareness, a growing concern, that violence perpetrated on animals * * * often escalates to violence against humans.").

tion in dogfighting to desensitize younger gang members.[16] Notorious killers, such as Jeffrey Dahmer, Ted Bundy, and David Berkowitz (the "Son of Sam" killer), all committed acts of violence against animals before moving on to human victims.[17] Because animal cruelty is a kind of antisocial behavior that often leads to violence against humans, the government has an additional substantial interest in preventing it.

Moreover, organized acts of animal cruelty, such as animal fighting ventures, are accompanied by other crimes and pose serious risks to the public. Dogs bred and trained to kill pose an acute public safety risk.[18] Cockfighting has been associated with the spread of certain avian diseases, including avian flu.[19] Dogfighting, hog-dog fighting, and cockfighting are part of an underground criminal subculture that includes gang activity, drug dealing, and illegal gambling.[20] The government's interest in eradicating all of

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[16] Angela Rozas, *Cops Look for Gangs Behind Each Dogfight—Animal Crimes Unit Now Part of Investigations*, Chi. Tribune, Aug. 29, 2008, at 3.

[17] See, *e.g.*, *Hearing* 7 (statement of Rep. Gallegly); Lockwood 83.

[18] See, *e.g.*, *Dogfighting Subculture* A35 (explaining that dogs rescued from large-scale dogfighting ring had to be euthanized because of their propensity to attack); Jamey Medlin, Comment, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DePaul L. Rev. 1285, 1304 (2007) ("[T]he culture of dogfighting creates serious dangers to communities" and "creates unstable animals that present a potential threat to anyone they encounter.").

[19] See, *e.g.*, *Cockfight Raid* B-1; Karoun Demirjian, *Bill Targeting Animal Fights Facing Obstacles in Senate*, Chi. Tribune, Mar. 29, 2007, at C8.

[20] See, *e.g.*, Amanda J. Crawford, *Hog-to-Dog Fights Net Phoenix Pair*, Ariz. Republic, Dec. 18, 2004, at B1; Bryan Denson, *63 Accused in Federal Sting on Cockfights*, Oregonian, Mar. 18, 2008, at A1, A8; *Dogfighting on the Rise* 5; *Dogfighting Subculture* A29; Jack Douglas

these harms reinforces the importance of Section 48's core purpose of preventing illegal acts of cruelty to animals.

3. Finally, Section 48 furthers the substantial interest in preventing the erosion of public morality that attends acts of this nature. Animal cruelty laws have long been justified not only as offenses against animals, but as "offense[s] * * * against the public morals." *Commonwealth* v. *Turner*, 14 N.E. 130, 132 (Mass. 1887); see, *e.g.*, *Waters* v. *People*, 46 P. 112, 113 (Colo. 1896); *Johnson* v. *State*, 36 Tenn. (4 Sneed) 614, 621-622 (1857). Modern criminal codes often classify animal cruelty offenses as offenses against public order and morality. See, *e.g.*, Ala. Code § 13A-11-14 (LexisNexis 2005); Ariz. Rev. Stat. Ann. § 13-2910 (Supp. 2008); Kan. Stat. Ann. § 21-4310 (Supp. 2008); Md. Code Ann., Crim. Law § 10-604 (LexisNexis Supp. 2008); Utah Code Ann. §§ 76-9-301 *et seq.* (2008). "Our society prohibits, and all human societies have prohibited, certain activities," including "cockfighting," because "they are considered, in the traditional phrase, '*contra bonos mores*,' *i.e.*, immoral." *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment).

Acts of animal cruelty are considered offenses against public morality because they debase the persons who engage in them and coarsen the broader society. See, *e.g.*, *Broadway* v. *ASPCA*, 15 Abb. Pr. (n.s.) 51, 77 (N.Y. Ct. of Common Pleas 1873) (anti-cruelty statute "has its origin in the intent to save a just standard of humane feeling from being debased by pernicious effects of bad example" and to prevent "the human heart from being hardened by public and frequent exhibitions of [animal] cruelty"); *Commonwealth* v. *Higgins*, 178 N.E. 536, 538 (Mass. 1931) (anti-cruelty statute targeted "acts which may be thought to

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Jr., *Dogfighting Linked to Drugs, Gangs, Violence*, Fort Worth Star-Telegram, Oct. 18, 2007, at B6; *Legal Loopholes* A1, A8.

have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts"). That debasement of individuals and society causes widespread, if sometimes inchoate, harm. See John Locke, *Some Thoughts Concerning Education* 91 (Dover ed. 2007) ("[T]he custom of tormenting and killing of beasts will, by degrees, harden their minds even towards men; and they who delight in the suffering and destruction of inferior creatures, will not be apt to be very compassionate or benign to those of their own kind."). The government's interest in preventing the erosion of public morality thus provides additional support for enacting Section 48 as an important measure for attacking gratuitous cruelty to animals.

4. Section 48 furthers the government's compelling interest in eradicating illegal acts of animal cruelty and preventing associated harms. Because the depictions at issue feature—and in some instances, themselves cause—acts of illegal animal cruelty that are difficult to prosecute directly, see pp. 28-29, Congress chose to target these depictions as a way to deter the underlying conduct, *Ferber*, 458 U.S. at 759-760. In so doing, Congress acted to prevent the serious injury this conduct causes to animals, humans, and society.

D. Its Similarities To Other Kinds Of Unprotected Speech Confirms That The Speech Covered By Section 48 Is Unprotected

The depictions of animal cruelty at issue (*i.e.*, those lacking in serious value, showing illegal activity, and trafficked commercially) share several characteristics with other kinds of unprotected speech. Those similarities confirm that the material covered by Section 48 falls outside the protection of the First Amendment.

1. Congress's ability to regulate the material covered by Section 48 draws substantial support from this Court's recognition of its power to regulate child pornography. Like child pornography, the material here depicts the horrific maltreatment of helpless victims, which society long has deemed reprehensible. Cf. *Ferber*, 458 U.S. at 757-758. As with child pornography, the distribution of these depictions "is intrinsically related to" the underlying illegal act. *Id.* at 759. In each case, the materials produced are simply the record of the harm done to the victim. And the particular harm captured on film may stretch backwards and forwards in time, representing a single moment of a longer-term experience of cruelty and abuse. With respect to animal cruelty, videos of dogfights provide one example. Pit bulls depicted in these videos typically are brutalized for their entire lives to increase their lust for blood. Humane Soc'y Cert. Amicus Br. 2; see *Dogfighting Subculture* A35. And after the fights are over, the surviving animals often are drowned, bludgeoned to death, hung, or set on fire. Humane Soc'y Cert. Amicus Br. 10-11; see *Dogfighting Subculture* A35.

Further, as the Court recognized with respect to child pornography, permitting the distribution of these materials encourages the very unlawful acts they record. The commercial market for depictions of animal cruelty "provide[s] an economic motive for" production of these materials—and the abuse that is inherent in this production. *Ferber*, 458 U.S. at 761; see p. 29, *supra*. Congress explained that it enacted Section 48 to dry up the market for depictions of animal cruelty in order to eliminate the commercial incentives for persons to engage in the underlying, unlawful acts. See, *e.g.*, *1999 House Report* 2-3; 145 Cong. Rec. 31,217 (1999) (statement of Sen. Kyl). Here, as with child pornography, the government reasonably can conclude that closing the "distribution network" will decrease the production

of illegal depictions of animal cruelty—and so decrease the frequency of animal cruelty itself. *Ferber*, 458 U.S. at 759; *id.* at 760 (States may attack a "a low-profile, clandestine industry" through its "visible apparatus of distribution").

Finally, as with child pornography, the value of the depictions is "exceedingly modest, if not *de minimis*," *Ferber*, 458 U.S. at 762. As noted earlier, depictions of the brutalization of real animals are unlikely to "constitute an important and necessary part of a literary performance or scientific or educational work," *id.* at 762-763, let alone a component of political discourse. But in the rare case in which a work of this kind does have such value, the exceptions clause of Section 48 ensures that it will be protected.

2. The depictions at issue also have much in common with obscenity. Like obscenity, the depictions appeal to viewers only at the basest level and "offend[] the sensibilities" of most citizens. *Miller,* 413 U.S. at 18-19. Also like obscenity, the images Section 48 covers are "specifically defined by" law and are created for "ensuing commercial gain," rather than for any educational, scientific, or other useful purposes. *Id.* at 24, 35. And of course, the exceptions clause in Section 48 is an expanded version (excluding more material from the Section's coverage) of one part of *Miller*'s obscenity test. *Id.* at 24; see 18 U.S.C. 48(b). To be sure, only some of the material here appeals to sexual cravings or depicts sexual conduct, as all legally defined obscenity does. But if non-sexual obscenity were possible—if obscenity were to retain some of its original, colloquial meaning as depraved and loathsome to the senses—then this material surely would qualify. Cf. *American Amusement Mach. Ass'n* v. *Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001) (Posner, J.) ("violent photographs of a person being drawn and quartered" may well qualify as "obscene," even though they "have nothing to do with sex"), cert. denied, 534 U.S. 994 (2001).

Indeed, the material falling within Section 48—depictions of the deliberate and gratuitous torture and killing of defenseless animals—may call out for regulation even more than some obscenity does. Sexual activity has been "a subject of absorbing interest to mankind through the ages," *Roth*, 354 U.S. at 487, and the Court's definition of obscenity may include depictions of lawful sexual activity between consenting adults. By contrast, the depictions at issue here are all of unlawful and non-consensual activity—as offensive as obscenity, as addressed to base instinct rather than intellect or emotion, and with the added definitional element of physical cruelty. The material covered by Section 48, like obscenity, therefore may be regulated as a class consistent with the First Amendment.

II. SECTION 48 IS NOT SUBSTANTIALLY OVERBROAD

Even if Section 48 reaches some protected speech, the statute is not invalid on its face. Because respondent brought a facial challenge to Section 48, and Section 48 has at least some constitutional applications, he was required to demonstrate that Section 48 is substantially overbroad in relation to its legitimate sweep. He has not made, and cannot make, such a showing. The statute covers a core of depictions—including crush videos and animal fighting videos—whose regulation is plainly constitutional. And the exclusion from Section 48 of speech with serious value ensures that Section 48 will not have a significant number of unconstitutional applications. The court of appeals therefore erred in taking the extraordinary step of facial invalidation. At a minimum, reversal is warranted for the court of appeals to conduct a proper overbreadth analysis.

A. Respondent Was Required To Demonstrate Substantial Overbreadth To Invalidate Section 48 On Its Face

1. Assuming the materials covered by Section 48 do not fall within an unprotected category, any application of Section 48—as a content-based regulation of expression—would have to satisfy a strict scrutiny standard. See, *e.g.*, *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 816-817 (2000). But when a statute reaches both unprotected and arguably protected speech, and a challenger seeks to invalidate the law on its face—*i.e.*, in all of its applications—the challenger bears the burden of establishing real and substantial overbreadth. See, *e.g.*, *Williams*, 128 S. Ct. at 1838; *Virginia* v. *Hicks*, 539 U.S. 113, 118-119 (2003); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973).[21]

The overbreadth doctrine balances a law's potential to chill protected speech against the "obvious harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional." *Williams*, 128 S. Ct. at 1838. To ensure that invalidation for overbreadth is not "casually employed," *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999), this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but

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[21] A challenger could, of course, also seek to invalidate a statute on its face by demonstrating that it has *no* constitutional applications. See, *e.g.*, *Virginia* v. *Black*, 538 U.S. 343, 373 n.2 (2002) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("This Court has made clear that to succeed in a facial challenge *without* relying on overbreadth doctrine, 'the challenger must establish that no set of circumstances exists under which the Act would be valid.'" (quoting *Salerno*, 481 U.S. at 745). But respondent has never made such an argument, and it plainly would not succeed, see pp. 42-46, *infra*.

also relative to the statute's plainly legitimate sweep," *Williams*, 128 S. Ct. at 1838. That means that "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771.

Invalidation for overbreadth is "strong medicine" for remedying a constitutional deficiency because it invalidates the statute in all its applications—constitutional as well as not. *Broadrick*, 413 U.S. at 613. This Court therefore has employed it "only as a last resort." *Ibid.* The Court has also placed on the challenger the burden of demonstrating, "from the text of [the law] and from actual fact, that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (internal quotation marks omitted; brackets in original). And it has made clear that the "mere fact" that the challenger "can conceive of some impermissible applications of a statute is not sufficient to render it" unconstitutionally overbroad. *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

2. In this case, the court of appeals dealt with respondent's facial challenge to Section 48 by applying strict scrutiny and invalidating the statute in all of its applications. Pet. App. 25a n.13, 32a, 61a (Cowen, J., dissenting); see Br. in Opp. 5, 12-13, 15 (agreeing). In doing so, the court of appeals did not consider whether the statute was constitutional as applied to respondent. See *Board of Trs.* v. *Fox*, 492 U.S. 469, 481-486 (1989). Nor did the court ask whether Section 48 was substantially overbroad. Indeed, in a peculiar inversion of established First Amendment doctrine, the court specifically declined to decide the case on that ground, observing that invalidation for overbreadth is "strong medicine" that should be used "sparingly and only as a last resort." Pet. App. 34a n.16 (quoting *Broadrick*, 413 U.S. at 613).

The court of appeals erred in striking down the statute without engaging in overbreadth analysis, and indeed misunderstood this Court's doctrine in several respects. The court placed the burden of proving the statute's facial constitutionality on the government, rather than requiring respondent to demonstrate substantial overbreadth. See Pet. App. 32a. In addition, the court assumed that this burden was effectively insurmountable, *id.* at 27a-28a, and struck down the statute based on unsupported speculation about its reach, *e.g.*, *id.* at 25a (scope of exceptions clause is "subject to debate"); *id.* at 25a n.13 (hypothesizing that government would treat exceptions clause as affirmative defense, despite government's concession that it is an element of the offense). The effect of the court's approach was to invalidate an Act of Congress on its face on a much lesser showing than ever used by this Court. At a minimum, therefore, reversal is required for the court of appeals to apply the correct legal standard.

B. Section 48 Is Not Substantially Overbroad

1. "The first step in overbreadth analysis is to construe the challenged statute." *Williams*, 128 S. Ct. at 1838. As explained (pp. 14-17, *supra*), Congress included in Section 48 a number of features designed to limit its application in a manner consistent with the First Amendment. The statute covers only depictions of extreme acts of animal cruelty—intentional maiming, mutilating, torturing, wounding, or killing—that are illegal where the depictions are made, sold, or possessed. 18 U.S.C. 48(c)(1). Moreover, the statute applies only to depictions of cruelty to live animals. See *ibid.* (covering depictions "in which a living animal" is severely hurt or killed); Pet. App. 70a. Further, Section 48 covers only depictions intentionally placed in the commercial interstate market; it does not apply to possession of images of animal cruelty for personal use or to the inadver-

tent viewing of such images. See *1999 House Report* 8. And the exceptions clause protects any depiction with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b). "What is restricted," therefore, "is the commercial pandering of graphic depictions of the actual torture of a real animal." *1999 House Report* 5.

2. The second step of the overbreadth analysis is to determine whether the statute "criminalizes a substantial amount of protected expressive activity." *Williams*, 128 S. Ct. at 1841. As argued earlier, the statute is drafted so as to reach only an unprotected class of expression. See pp. 10-38, *supra*. But even if this Court disagrees, the statute has at its core a substantial number of plainly constitutional applications.

At a minimum, the application of the statute to crush videos is constitutional because those materials are categorically unprotected under the obscenity doctrine. This Court has defined "obscenity" as depictions that, in the view of an average person applying contemporary community standards, appeal to the prurient interest; that depict or describe sexual conduct in a patently offensive way; and that, taken as a whole, lack serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24. One significant category of depictions covered by Section 48—crush videos—meets this test. Those materials are sexual—even if perversely so—in their very nature and essence. They are purposefully designed to appeal to "persons with a very specific sexual fetish who find" the portrayal of pain and suffering in animals "sexually arousing." *1999 House Report* 2-3.

That the materials appeal only to a deviant sexual group does not exempt them from the category of obscenity. This Court has held that depictions "designed for and primarily disseminated to a clearly defined deviant sexual group"

need not "appeal to a prurient interest of the 'average person'" so long as "the dominant theme of the material taken as a whole appeals to the prurient interest in sex of members of th[e defined] group." *Mishkin* v. *New York*, 383 U.S. 502, 508-509 (1966). The sole purpose of crush videos is to appeal to such a deviant sexual desire. They therefore qualify as obscene. See *id.* at 508 (depictions of "fetishism" qualify as obscenity).

In any event, Section 48 would survive strict judicial scrutiny in a substantial number of its applications. As discussed above, see pp. 24-35, *supra*, three principal interests support Section 48. First, the government has an interest in reinforcing the prohibitions of animal cruelty in state and federal law by removing a financial incentive to engage in that egregious, illegal conduct. Second, the government has an interest in preventing the additional criminal conduct that is associated with the torture and mutilation of animals underlying the production and distribution of those materials. Third, the government has an interest in protecting public mores from the corrosively anti-social effects of this brutality. For the reasons stated, these interests are compelling.

Section 48 is narrowly tailored to further those interests in at least a substantial number of its applications. For example, Section 48 is constitutional with respect to crush videos. Crush videos depict conduct that is illegal in every state because they require an animal to be crushed to death for no purpose other than the sexual gratification of the viewer. *1999 House Report* 3-4. The only reason that the animals are tortured and killed is to make the videos for sale, and videos are often manufactured to order based on viewers' specific requests. *Id.* at 2-3. The "growing market" for crush videos (*id.* at 2) confirms that they are a substantial portion of the depictions reached by Section 48. See Martin Kasindorf, *Authorities Out to Crush Animal*

Snuff Films, USA Today, Aug. 27, 1999, at 4A ("Devotees buy nearly $1 million worth of the tapes every year.").

A prohibition on the interstate trade in crush videos is a critical supplement to the state and federal prohibitions on the conduct depicted. See *1999 House Report* 3. Law enforcement officers "struggle to prosecute those involved in crush videos" because it is difficult to catch the makers of those videos in the act and because the videos themselves do not show the faces of the women performing the illegal acts of animal cruelty. Pet. App. 53a (Cowen, J., dissenting); see *1999 House Report* 3; Thomas R. Collins, *Long Odds Lead to Okeechobee 'Crush' Prosecution*, Palm Beach Post, Oct. 24, 1999, at 7C. As a result, even when the police are able to identify and arrest the perpetrator of the abuse, the defendant often is "able to successfully assert as a defense that the State c[an] not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in the State statute of limitations." *1999 House Report* 3; cf. *Ferber*, 458 U.S. 760 n.11, 766 n.19. By targeting the market for crush videos, Congress can overcome many of the barriers faced by the States in attempting to prosecute the underlying acts. And because crush videos are "almost exclusively distributed for sale through interstate or foreign commerce," usually over the Internet, *1999 House Report* 3, federal legislation was necessary to stop the spread of these videos.

Indeed, Section 48's application to crush videos illustrates the highest possible connection between a prohibition on expression and its goal of deterring underlying unlawful activity. The commercial trade in crush videos is what drives the underlying acts of animal cruelty in this context. See *1999 House Report* 2-3. Thus, prohibiting commercial trafficking in such videos directly prevents these acts of animal cruelty. See *Ferber*, 458 U.S. at 760 ("The most expeditious if not the only practical method of

law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.").

Section 48 also is constitutional as applied to many depictions of animal fighting, such as dogfighting. Dogfighting is criminal in every State and is a felony in all but two States, and Congress has long prohibited animal fighting ventures in interstate commerce. See notes 8, 9, 12, *supra*. The government's compelling interests in attacking that practice include preventing harms to dogs before, during, and after fights; curbing the antisocial behavior that often accompanies live dogfights, such as gang activity, drug dealing, and gambling; reducing the significant public safety risk posed by dogs that are trained to kill; and enforcing contemporary standards of decency. See pp. 18-19, 33-34, *supra*; Humane Soc'y Cert. Amicus Br. 10-13.

Section 48's prohibition on the commercial trade in depictions of dogfights furthers those interests by deterring persons from participating in dogfighting enterprises. Dogfighting rings are very difficult to detect and infiltrate; organizers typically keep the locations of fights secret until the last minute, screen potential spectators before admitting them to the event, and rarely use their real names. See, *e.g.*, *Dogfighting Subculture* A35. As a result, law enforcement officials have great difficulty prosecuting directly the persons who arrange the fights, train the dogs used in them, and participate in them as handlers. See, *e.g.*, *Dogfight Culture Thrives* A1; see also pp. 28-29, *supra*. Even when the police obtain a videotape of a dogfight, they usually cannot prosecute the perpetrators for animal cruelty, because they cannot identify the persons or places in the videos. Respondent, for example, "purposefully edited out the faces of the handlers involved in the fights occurring in the United States" in his videos so those persons

could avoid prosecution. Pet. App. 54a (Cowen, J., dissenting); see *PAW* 22:09-22:16.

Targeting persons who distribute dogfighting videos in interstate commerce is an effective way to suppress the underlying conduct. Dogfights are routinely videotaped.[22] Fights are recorded to produce "training" videos for future fights, to document a dog's prowess, to facilitate gambling, or to glorify and encourage dogfighting. See p. 19, *supra*. The market for such videos is lucrative, as this case demonstrates. In two and one-half years, respondent generated over $57,000 from the sale of dogfighting merchandise, over $20,000 of which came from the three videos at issue in this case. J.A. 53-54; Presentence Investigation Report ¶ 16. Moreover, dogfighting enterprises, and the commercial markets that accompany them, have grown marketedly over the Internet. See *Dogfighting on the Rise* 5; cf. *Williams*, 128 S. Ct. at 1846 (upholding statute criminalizing offers or requests for child pornography, where "[b]oth the State and Federal Governments have sought to suppress [the conduct] for many years, only to find it proliferating through the new medium of the Internet"). Congress therefore targeted the mounting sales of depictions of illegal and clandestine dogfights as a necessary means to reinforce state and federal efforts to eradicate that conduct. Because Section 48 at a minimum may be applied constitutionally to such animal fighting videos, as well as to crush videos, the statute is not substantially overbroad.

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[22] See, *e.g.*, *Commonwealth* v. *Craven*, 817 A.2d 451, 452-453 (Pa. 2003); *State* v. *Shelton*, 741 So. 2d 473, 475-476 (Ala. Crim. App. 1999); *Ash* v. *State*, 718 S.W.2d 930, 931 (Ark. 1986).

C. Isolated Hypotheticals Do Not Justify Invalidating Section 48 On Its Face

1. The court of appeals invalidated Section 48 on its face because it believed that the statute would be unconstitutional in some of its applications. The mere possibility of *some* unconstitutional applications, however, is not enough to justify facial invalidity for overbreadth. See, *e.g.*, *Hicks*, 539 U.S. at 122. Even if a statute infringes on protected expression "at its margins," facial invalidation is inappropriate "if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Osborne* v. *Ohio*, 495 U.S. 103, 112 (1990) (internal quotation marks omitted). That is because few statutes would survive an overbreadth challenge if a challenger needed only to hypothesize a handful of unconstitutional applications. See *Ferber*, 458 U.S. 772 n.27 ("It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.").

2. None of the examples cited by the court of appeals provides a basis for concluding that Section 48 is unconstitutional in a substantial number of its applications. For example, the court of appeals suggested that a person "could be prosecuted for a bullfight in Spain if bullfighting is illegal in the state in which this person sells the film." Pet. App. 33a n.16. But the exceptions clause suggests to the contrary, because it exempts material with "educational," "journalistic," or "historical" value. 18 U.S.C. 48(b). Indeed, in enacting Section 48, Congress specifically stated its view that "television documentaries about Spain which depict bullfighting" would be exempted by the clause. *1999 House Report* 8. Videos of illegal dogfights of the kind respondent makes have little in common with documentation of the cultural and historical traditions associated with bullfighting in Spain. The court of appeals had no warrant

to interpret the exceptions clause as failing to exclude such material; to the contrary, it was obligated to interpret the statute to avoid constitutional difficulties. See *Ferber*, 484 U.S. at 769 n.24 (citing cases); see also *HR 1889 Statement* 2558 (exceptions clause should be interpreted broadly).

Second, the court suggested that the statute cannot constitutionally be applied to depictions of animal cruelty when the underlying acts were legal where they were performed. Pet. App. 30a, 33a n.16. That is incorrect. Congress may choose to prohibit depictions of conduct that is illegal where made, sold, or possessed for commercial gain in order to dry up the market in that place, because doing so would in turn deter the manufacture of similar depictions (and the underlying conduct) there. *Id.* at 59a-60a (Cowen, J., dissenting). Moreover, Congress may choose to rely on the material's illegality at the place of sale because "[i]t is often impossible to determine where such material is produced." *Ferber*, 458 U.S. at 766 n.19. But even if Section 48 could not constitutionally be applied in this situation, facial invalidation of the statute is not the right remedy. These circumstances will arise only rarely, especially given that state and federal laws uniformly ban animal cruelty generally and certain forms of cruelty like dogfighting specifically. See notes 7-12, *supra*. At most, the court of appeals identified an uncommon application, which a court could strike down while leaving the statute intact.

3. The statute's exceptions clause for depictions that have serious value, which requires the government to show a lack of value as part of its case in chief, see note 2, *supra*, further ensures that Section 48 will have few unconstitutional applications. That clause will exclude depictions with sufficient expressive value to outweigh the compelling interests furthered by the statute. And again, even if the exceptions clause is not a fail-safe mechanism, it surely will work enough of the time to make wholesale invalidation of

the statute a profound error. To the extent problems emerge as Section 48 is applied and its exceptions clause is interpreted, the proper judicial course is to engage in "case-by-case analysis of the fact situations" at issue. *Broadrick*, 413 U.S. at 615-616; see *Crawford* v. *Marion County Election Bd.*, 128 S. Ct. 1610, 1621-1623 (2008). The court of appeals' extraordinary decision instead to invalidate Section 48 in all its applications warrants reversal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 48 of Title 18 of the United States Code provides:

Depiction of animal cruelty

(a) CREATION, SALE, or POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) DEFINITIONS.—In this section—

(1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which

the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.