

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*

REPLY BRIEF FOR THE UNITED STATES

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Respondent portrays a dire threat to free speech from Congress’s decade-old prohibition of commercially trafficked depictions of illegal acts of cruelty to animals. In respondent’s view, images of the intentional killing of animals “pervade” our culture (Br. 22); Section 48 suppresses such images based on viewpoint; and the interests advanced by Congress do not support the asserted major incursion on free speech. The statute that respondent attacks bears little resemblance to the statute that Congress enacted; and respondent’s absolutist view of the First Amendment finds scant support in this Court’s cases.

Section 48 does not favor particular viewpoints or speakers (Resp. Br. 54); it is not an indiscriminate “blunderbuss” (*id.* at 50); and it poses no threat to the arts, to educational objectives, or even to the views of dogfighting aficionados (of whom respondent is unquestionably one). The legislation merely requires individuals to refrain from

trafficking in depictions of illegal cruelty perpetrated against live animals in order to prevent the injury inflicted in the manufacture of those depictions.

In tailoring Section 48, Congress drew on this Court's precedents to ensure that it did not squelch ideas or viewpoints, but instead reached a limited class of depictions because they are inherently connected to illegal acts against animals. The First Amendment's broad protection does not forbid Congress's carefully calibrated effort.

I. SECTION 48 PERMISSIBLY REGULATES DEPICTIONS OF ANIMAL CRUELTY BECAUSE OF THEIR UNIQUE PRODUCTION HARMS, NOT BECAUSE OF THEIR IDEAS OR VIEWPOINTS

A. Section 48 Regulates A Very Narrow Category Of Speech Because Its Mode Of Production Is Uniquely Harmful

1. Section 48 does not target a speaker's viewpoint. It is simply aimed at prohibiting a gruesome means of producing horrific images. A speaker can have whatever viewpoint he wishes, and can distribute videos *that look identical to the ones respondent made*, so long as the videos were not produced through cruelty to an actual living animal.¹ That key fact (and not respondent's attempt to foist upon Congress any belief in the equivalence of children and animals) explains why *New York v. Ferber*, 458 U.S. 747, 763-764 (1982), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002), control this case.

¹ "The committee has drafted this statute carefully so that it restricts content, but not viewpoint. Persons holding the view that [animal cruelty] is acceptable are still free to use any means of interstate commerce to express that view. * * * What is restricted is the commercial pandering of graphic depictions of the actual torture of a real animal." H.R. Rep. No. 397, 106th Cong., 1st Sess. 5 (1999).

This Court upheld the New York statute in *Ferber* “because of the State’s interest in protecting the children exploited by the production process.” *Free Speech Coal.*, 535 U.S. at 240. “The production of the work, not its content, was the target of the statute.” *Id.* at 249. To the extent there was any doubt about that statute’s intent, the absence of any prohibition on simulated images resolved it. *Id.* at 251; *Ferber*, 458 U.S. at 763. The statute at issue in *Free Speech Coalition*, by contrast, “proscribe[d] the visual depiction of an idea” and therefore could be supported only by a very different rationale, that “harm flows from the content of the images, not from the means of their production.” 535 U.S. at 242, 246.

Respondent treats Section 48 as if it were like the statute in *Free Speech Coalition*, suggesting that Section 48 somehow targets a speaker’s views. That suggestion in turn underlies his misunderstanding of Congress’s rationale for the statute as revolving around harm to viewers. But the rationale for this statute in fact does not relate to viewers—either to harms they might suffer from observing the depictions or to harms they themselves might cause as a result. Congress instead was concerned about the harms these depictions would cause even if they had no viewers at all—the harm to living animals occurring in the creation of the depictions, as well as associated harms arising from these acts of violence. To affirm this statute, the Court need only recognize that Congress targeted a uniquely harmful means of production, and as it has in the past, uphold Congress’s ability to do so.

Congress’s interest in this case therefore is wholly unrelated to respondent’s message or viewpoint. Respondent is free to extol the virtues of pit bull fighting all he wants, and he may even use simulated depictions of such killings in his

videos. The only thing he cannot do is use certain depictions of actual cruelty to actual animals in his footage.

2. Respondent overreads the government's argument, stating that it advances "the notion that Congress can suddenly strip a broad swath of never-before-regulated speech of First Amendment protection" "based on nothing more than a legislative weighing of the speech's pros and cons." Br. 11. The government has not advanced that argument, and it would have had no reason to do so, given that Section 48's restriction is anything but "broad." Once the statute's narrow contours are understood, it becomes clear that the government's legal argument does not rest upon the simplistic balancing respondent attacks, as described pp. 11-13, *infra*.

Respondent attempts to define (Br. 12, 19) the category of speech at issue as any "images of animals being intentionally wounded or killed." That description ignores several key limitations in the statute's text. The depiction not only must show a living animal "intentionally" being "maimed, mutilated, tortured, wounded, or killed," 18 U.S.C. 48(c)(1); it also must depict conduct that is illegal where the image is made, sold, or possessed, *ibid.*, and must be "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). See U.S. Br. 14-16 (analyzing each of these textual limitations). The statute, moreover, requires "knowing[]" conduct, which means that the defendant must know that the depictions are images of real animals being maimed, tortured, and the like. *Id.* at 15. The resulting narrow category of illegal and violent acts of animal cruelty depicted for commercial gain is further limited by the statute's exceptions clause. 18 U.S.C. 48(b).

Many, if not all, of respondent's hypothetical applications of Section 48 do not fall within its plain text. For example, because of the statute's "commercial gain" requirement, 18 U.S.C. 48(a), Section 48 would not reach images of animal cruelty displayed on the website of non-profit animal welfare organizations, Resp. Br. 18-22 & n.4—or indeed of a counterpart non-profit that sought to promote vicious dogfighting. The statute is not directed at persons who use images of animal cruelty to "inform, educate, lobby, debate, and persuade." *Id.* at 19. It targets and reaches only those who profit from illegal animal cruelty, on the rationale that drying up the commercial market for certain, carefully circumscribed images will deter the underlying acts of cruelty. See *Ferber*, 458 U.S. at 761 (eliminating the "economic motive" for illegal acts will prevent those acts from occurring).

Further, the conduct depicted must be illegal where the depiction is made, sold, or possessed, 18 U.S.C. 48(a), which exempts images of animals being used for legal purposes, such as scientific testing, participation in circuses, and slaughtering for food, see Resp. Br. 12, 19-20 & n.5. Although the statute does not require the act depicted to have been illegal when the filming took place (*id.* at 22), that omission is unlikely to affect materially the statute's reach, because all States prohibit animal cruelty in general and certain specific types of cruelty (such as dogfighting) in particular, U.S. Br. 26-28 (citing statutes), and the exceptions clause further protects material with social value.²

And, of course, Section 48 exempts any material with "serious religious, political, scientific, educational, journalis-

² Moreover, it was reasonable for Congress to regulate depictions of animal cruelty that are illegal where made, sold, or possessed, because "[i]t is often impossible to determine where such material is produced," and it is necessary to prohibit all materials—even those produced elsewhere—to remove the incentives for committing acts that are illegal here. *Ferber*, 458 U.S. at 766 n.19.

tic, historical, or artistic value.” 18 U.S.C. 48(b). That provision was designed to ensure that “any material depicting animal cruelty which society would find to be of at least some minimal value” would be protected. H.R. Rep. No. 397, 106th Cong., 1st Sess. 4 (1999) (*1999 House Report*). It exempts news reports about animal cruelty (Resp. Br. 19-20) because of their “journalistic” value; pictures of bullfighting in Spain (*id.* at 23-24) because of their “historical” and “educational” value; instructional videos for hunting (*id.* at 24-25, 31), because of their “educational” value; and many books and movies (*id.* at 23-24) because of their “historical,” “educational,” or “artistic” value. Indeed, Congress cited precisely these hypotheticals when explaining the statutory exceptions. See, e.g., *1999 House Report* 8 (Spanish bullfights; hunting and fishing; television documentaries; materials from animal welfare organizations).

Moreover, this Court’s precedents make clear that the value of a depiction is determined by examining the work as a whole. See, e.g., *Free Speech Coal.*, 535 U.S. at 248; see also J.A. 132 (jury instructions). As a result, the statute would not reach materials with serious educational, historical, or artistic value when viewed in their totality, despite brief scenes of animal cruelty.³

The government’s sparing use of the statute over the past decade is consistent with the statute’s text, which the government reads to exclude depictions in which animals are killed without accompanying acts of cruelty. The government neither has brought nor will bring a prosecution

³ Respondent is therefore wrong to argue that the exceptions clause “forecloses consideration of the speakers’ work ‘as a whole.’” Br. 33. Congress prohibited the creation, sale, or possession of a “depiction,” a word which is most naturally read to refer to the entire work at issue, rather than a particular scene in the work. Any doubt about the meaning of the statute should be construed in favor of its constitutionality. E.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994).

for anything less. The meaning of the word “killed” is “narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated,” *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008)—so that the statute requires the type of grotesque behavior that its various terms contemplate. That conclusion is buttressed here because the term being defined is “depiction of animal *cruelty*.” 18 U.S.C. 48(c)(1) (emphasis added); see, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (“In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term ‘crime of violence.’”). There is, in short, no risk—given the narrow terms of Section 48 and its exceptions clause—that the hypothetical prosecutions or chilling effect conjured up by respondent would materialize.

Section 48 therefore reaches a tightly circumscribed category of materials, including “crush videos” in which animals are tortured and killed solely to gratify a specific sexual fetish, U.S. Br. 17-18, and animal-fighting videos in which animals literally tear each other apart, *id.* at 18-19.⁴ Notably, respondent’s own amici characterize the material covered by Section 48 as “*far more disturbing* than any that has ever come before this Court under the obscen-

⁴ Members of Congress did not “expressly disavow[]” (Resp. Br. 13, 40) Section 48’s application to animal-fighting videos. Only one person who testified at a hearing—not a Member of Congress—suggested that the statute’s reference to animal cruelty would not reach animal fighting. See *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. 20, 31-32 (1999) (statement of Tom Connors). In any event, the terms of the statute plainly reach animal-fighting videos, which show animals intentionally “maimed, mutilated, tortured, wounded, or killed” for commercial gain. 18 U.S.C. 48(a) and (c)(1).

ity laws.” First Amend. Lawyers Amicus Br. 8-9 (emphasis added). Especially in light of the statute’s exceptions clause, it is difficult “to imagine the circumstances that would have to coalesce for [material with redeeming value] to come within the reaches of section 48.” Pet. App. 60a (Cowen, J., dissenting).

3. Respondent’s objections to Section 48’s exceptions clause lack merit.

Respondent contends (Br. 26) that the First Amendment does not permit the exceptions clause to “do all the constitutional work.” It does not. Subsection (a) of the statute and the associated definitions focus on illegal acts of cruelty involving live animals—itsself a substantial limitation on the regulation of depictions of animal cruelty. See 18 U.S.C. 48(a) and (c)(1). That subsection further restricts the ban to depictions used for commercial gain, placing persons who profit from the illegal torture and killing of animals “on notice” in exactly the way respondent wishes, Resp. Br. 32. Only then does subsection (b) kick in to protect any depictions of the illegal torture and killing of real animals for commercial gain that contribute in some way to the marketplace of ideas.

In adopting that structure, Congress laced this Court’s speech-protective jurisprudence into Section 48 itself. *1999 House Report 4-5*; see *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. 37 (1999) (Hearing)* (statement of Rep. Scott). Congress defined the speech that would be exempt from regulation (even assuming the speech was not excluded by the various and sundry other restrictions in Section 48) by following this Court’s decision in *Miller*—borrowing and indeed adding to its list of exceptions employed for obscenity. Compare 18 U.S.C. 48(b), with *Miller v. California*, 413 U.S. 15,

24-26 (1973). Like the exception for works with redeeming value in the obscenity context, *Miller*, 413 U.S. at 34-35, Section 48(b) “critically limits” the statute’s sweep, *Reno v. ACLU*, 521 U.S. 844, 873 (1997). Congress can hardly be faulted for including “essentially the same constitutionally approved” exceptions clause as in *Miller, Williams*, 128 S. Ct. at 1839-1840, especially when the *Reno* Court had reminded Congress just two years earlier of the need for such a provision, see 521 U.S. at 865, 873-874.⁵

Respondent is wrong to suggest (Br. 30-31) that the exceptions clause is unconstitutionally vague. Persons “of common intelligence” need not “guess” (*Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) at the meaning of terms like “educational,” “political,” and “historical” value, 18 U.S.C. 48(b); if these terms were too vague, the Court’s own standard in *Miller* would be constitutionally deficient. And assuming “marginal cases” may arise, that is not “sufficient reason to hold the language” unconstitutional. *Roth v. United States*, 354 U.S. 476, 491-492 (1957) (internal quotation marks omitted). Close cases are addressed “not by

⁵ Requiring “serious” value is not a “stark departure from *Miller*[,]” as respondent appears to contend. Resp. Br. 33. That is the exact language adopted in *Miller* to guard against pretextual additions to otherwise-unprotected material. See 413 U.S. at 25 n.7 (“A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.”) (internal quotation marks omitted). The “serious value” standard functions similarly—neither more nor less restrictively—under Section 48.

Respondent also contends (Br. 33) that the jury instructions at his trial defined the term “serious” incorrectly. Even if the district court’s definition of “serious” were wrong, however, that would not provide a basis for invalidating Section 48 on its face. See *Virginia v. Black*, 538 U.S. 343, 376 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (the Court has never “facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction”).

the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.” *Williams*, 128 S. Ct. at 1846. That mechanism is suitable here because, as the government explained (U.S. Br. 16 & n.2) and respondent earlier agreed (C.A. Br. 73), the burden of proof is on the *government*, not the speaker, to demonstrate that the depiction at issue lacks societal value.⁶

Respondent also is mistaken in contending (Br. 32-33) that uncertainty about the scope of the exceptions clause will chill valuable speech. His dire predictions are amply rebutted by experience under the statute; respondent points to no evidence of a cooler climate for speech in the ten years since Section 48 was enacted. Cf. *Miller*, 413 U.S. at 35-36. And the government’s sparing use of Section 48 (Resp. Br. 43) confirms that the exceptions clause affords ample breathing room for any valuable speech otherwise covered.

Finally, the exceptions clause answers respondent’s claim that Section 48 “allows the Nation’s most-animus-protective jurisdictions to” define its reach. Resp. Br. 35. Although the illegality of the depicted act turns on state and federal laws, the exception for material with redeeming societal value does not. Instead, that exception applies when “a reasonable person would find such value in the material, taken as a whole.” *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987); see J.A. 131-132 (jury instructions). The exceptions clause therefore erects “a national floor for socially redeeming value” which alleviates any concern about

⁶ Contrary to respondent’s contention (Br. 32), a jury is constitutionally competent to decide whether a depiction has serious societal value. See *Miller*, 413 U.S. at 25-26 & n.9. And under Section 48, of course, a jury can decide such a question only after the Executive Branch has taken the rare and significant step of seeking an indictment.

variations among the 50 States' laws. *Reno*, 521 U.S. at 873; see *Ashcroft v. ACLU*, 535 U.S. 564, 584-585 (2002).

4. Once Section 48's extremely narrow scope is recognized, it becomes clear why Congress may regulate the material it covers without running afoul of the First Amendment. Whether the Court calls this limited body of depictions not within the area of protected speech (under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 & n.2 (1942)), or says that it may be "regulated because of [its] constitutionally proscribable content" (under this Court's more recent formulation in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (emphasis omitted)), or chooses some different formulation entirely, makes little difference. The critical point is that this legislation is permissible because (1) it covers a highly restricted set of materials (2) that, by virtue of the statute's limitations, definitions, and exclusions, has scant social value, and (3) that causes significant harm through the manufacture of the materials themselves and not through their communicative effect, and (4) does so in a way that steers clear of targeting viewpoints or suppressing any ideas.⁷

This Court has in the past ruled entire categories of speech unprotected by asking whether "the evil to be restricted * * * overwhelmingly outweighs the expressive interests, if any, at stake," *Ferber*, 458 U.S. at 763-764. That analysis reflects that some limited kinds of expressive materials both have little value and cause great harm. The Court has employed that analysis repeatedly, U.S. Br. 11-13 (citing, *e.g.*, *Chaplinsky*, 315 U.S. at 572; *Roth*, 354 U.S.

⁷ Had Congress prohibited *simulated* images of animal cruelty, for example, it would bear a far heavier burden because such a prohibition would correspond to a very different set of harms, which are communicative in nature, and would raise the suspicion that the government was acting to suppress ideas.

at 484, 487; *Miller*, 413 U.S. at 20-21, 34-35; *Ferber*, 458 U.S. at 763-764, and *Williams*, 128 S. Ct. at 1841-1842), and it “has remained an important part of [the Court’s] First Amendment jurisprudence,” *R.A.V.*, 505 U.S. at 383.⁸

In certain respects, the nature and extent of the regulation on speech here is less troubling than in these historic examples. Contrary to respondent’s claim (Br. 12), Congress did not make the judgment that all depictions of animal cruelty are “*categorically* valueless and harmful.” Congress expressly found to the contrary, because it recognized in its exceptions clause that such depictions may have educational and other value. And even more tellingly, Congress limited the scope of the statute in the first place to only materials whose creation involves harm to living animals. Section 48 therefore regulates certain depictions of animal cruelty not because they embody a societally unacceptable message, but because “their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.”

⁸ Respondent contends (Br. 15-16) that speech is unprotected only if there exists a “history and tradition” of excluding it from the First Amendment’s reach. Although historical evidence certainly is relevant in determining whether certain categories of speech lack First Amendment protection, see U.S. Br. 11, the Court has never deemed historical evidence a necessary prerequisite for regulation today. For example, the Court did not rely upon evidence about the proliferation of child pornography at the time of the Founding in *Ferber*; instead, it determined that the relatively recent “proliferation of exploitation of children as subjects in sexual performances,” 458 U.S. at 757 (internal quotation marks omitted), justified prohibiting child pornography as a class, *id.* at 764. In any event, had the Framers been confronted with this case, nothing suggests that they would have offered the producers of crush videos or videos of brutal dogfights a First Amendment shield, especially because animal cruelty was illegal even then. See Pet. App. 39a (Cowen, J., dissenting) (laws prohibiting animal cruelty date back to 1641).

R.A.V., 505 U.S. at 393. Congress prohibited only a particularly violent method of producing certain images—knowing that speakers might convey the same messages through other means (without torturing and mutilating animals) and accepting that result. See *1999 House Report* 5. By way of analogy, Congress surely could prohibit the sale of “snuff” videos containing actual, rather than simulated, killings of human beings.⁹ Nothing in the First Amendment disables Congress from doing the same thing with respect to animals.¹⁰

B. Section 48 Is Justified By Congress’s Desire To Avoid Compelling, And Devastating, Harm

1. Respondent misunderstands (Br. 37, 42) the congressional judgment underlying Section 48. It is not that exposure to the depictions at issue leads *viewers* to commit acts of animal cruelty; it is that the very production of the depictions requires animal cruelty. U.S. Br. 29-30. Although respondent may argue about the legal status of the act at the precise place and time committed (Br. 43), he cannot deny that the act depicted is the intentional maiming, mutilation, torture, wounding, or killing of an animal. He also cannot deny that those acts of animal cruelty cause harms to humans—wholly apart from the communicative effect of the depictions on their viewers. U.S. Br. 32-34. Section 48 restricts the commercialization of depictions of

⁹ Such videos, unfortunately, are not hypothetical. See, e.g., *United States v. DePew*, 932 F.2d 324, 326 (4th Cir.), cert. denied, 502 U.S. 873 (1991).

¹⁰ This argument does not equate harm to humans with harm to animals. The snuff video analogy simply makes clear that when Congress targets certain inherently harmful modes of production (as opposed to regulating particular viewpoints), the First Amendment does not stand in the way, particularly if Congress includes the failsafe mechanism of a “serious value” exception.

those acts to stop the harms that necessarily and unavoidably occur with their creation.

2. The governmental interests supporting Section 48 are compelling. All 50 States, the District of Columbia, and the federal government have long prohibited needless acts of animal cruelty. See U.S. Br. 25-28 (citing statutes). Those bans are deeply ingrained in our national culture, dating back to well before America's first colonists. See Pet. App. 39a (Cowen, J., dissenting). This longstanding consensus in state and federal law demonstrates "a government objective of surpassing importance." *Ferber*, 458 U.S. at 757.

As the government has explained, animal cruelty is prohibited both because it results in serious harm to animals and because it is often accompanied by harms to humans. The harms suffered by animals in the making of these depictions are horrific. Crush videos show animals being pulverized to death by women in high-heeled shoes. U.S. Br. 16-17; Humane Soc'y Amicus Br. 2-5. Dogs featured in dogfighting videos are tormented their entire lives before being torn apart in the ring. U.S. Br. 18-19; Humane Soc'y Amicus Br. 5-6. And the harms to humans accompanying these acts are substantial. Dogfighting takes place in a criminal underworld rife with gambling, drug dealing, and gang activity. U.S. Br. 33; States' Amicus Br. 12-18; Humane Soc'y Amicus Br. 8. Dogs bred and conditioned to this activity pose a serious threat to public safety. U.S. Br. 33; Humane Soc'y Amicus Br. 6-8. And evidence indicates that persons who engage in cruel acts towards animals also engage in violence toward human beings. U.S. Br. 32-33; Am. Law Professors Amicus Br. 18-34; H.R. Con. Res. 338, 106th Cong., 2d Sess. (2000).

Respondent unsuccessfully downplays these harms. Minor variations among state animal cruelty laws (Resp. Br. 43) do not diminish the broad societal consensus that

gratuitously torturing and killing defenseless animals is wrong. See *1999 House Report* 3-4; U.S. Br. 2-3, 26-28; Am. Law Professors Amicus Br. 11-18. And society's long use of animals for utilitarian purposes (Resp. Br. 49-50) does not countenance their wanton and cruel mistreatment. As members of Congress stated when considering Section 48, the statute was motivated by avoiding the infliction of "excessive physical pain or suffering" upon animals. *1999 House Report* 4.

3. Unable to demonstrate that the government's interests are less than compelling, respondent argues (Br. 40-48) that regulating depictions of animal cruelty will not curtail the underlying acts. But Congress's judgment to the contrary, similar to the conclusion upheld in *Ferber*, makes eminent sense. Closing the commercial market for the depictions at issue will help eliminate the financial incentives to make them and thus will reduce the acts of animal cruelty inherent in their manufacture. U.S. Br. 28-30; see 145 Cong. Rec. 31,217 (1999) (statement of Sen. Kyl) (Section 48 "[e]liminat[es] the videos' commercial incentive" to "stem [their] creation"). Experience over the past decade bears out Congress's reasoning. Crush videos were not generally available for a decade, but once the decision below was announced, the images reemerged. Humane Society Amicus Br. 4-5; States' Amicus Br. 1-2. Respondent argues (Br. 44) that animal-fighting ventures may generate income even without a market in videos. That is true, but it is no less true that curtailing this market will make the activity less profitable and thereby reduce it. That is a permissible legislative judgment, see *Ferber*, 458 U.S. at 759-761, especially when the conduct in question is so difficult to prosecute directly, see U.S. Br. 44-46; States' Amicus Br. 8-12.

Respondent contends (Br. 43) that Congress was required to provide empirical evidence demonstrating that Section 48 prevents animal cruelty. He is mistaken, both

because it would be difficult, if not impossible to document crimes that do not occur because of Section 48, and because logic amply supports the view that removing an incentive for an illegal act will make that act less likely. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (challenger cannot “demand a multiyear controlled study” to support commonsense conclusion).

Finally, respondent contends (Br. 41, 43-44) that Section 48 will not “reinforc[e] laws against animal cruelty” because it punishes depictions of animal cruelty more severely than some States punish the underlying acts. But Congress’s judgment to punish harshly commercial trafficking in depictions of illegal conduct demonstrates its partnership with the States in eradicating an intractable problem. Congress need not adopt, for its part in this joint effort, the most lenient punishment that any State imposes.

4. This Court’s approval of the regulation of child pornography in *Ferber* provides strong support for Congress’s regulation of depictions of illegal acts of animal cruelty. Here, as in *Ferber*, the government has a compelling interest in preventing depraved acts against a “uniquely vulnerable and helpless class of victims.” Pet. App. 57a (Cowen, J., dissenting). Here too, the act is “intrinsically related” to the depiction, *Ferber*, 458 U.S. at 759, because each time a depiction is produced, a terrible act is committed, and indeed, the harm associated with that act may radiate beyond the precise moment in which it occurs, see U.S. Br. 36. Congress determined that it is necessary to attack the “visible apparatus of distribution” for these depictions because “it is difficult, if not impossible” to prosecute the underlying acts directly, and because “[t]he advertising and selling” of the depictions “provide[s] an economic motive for” their creation. *Ferber*, 458 U.S. at 759-761; see, e.g., *Hearing* 1-2 (statement of Rep. McCollum); *id.* at 6 (statement of Rep. Scott); *id.* at 18-19 (statement of Tom Connors); *id.* at 64

(prepared statement of William Paul LeBaron). Finally, Congress added the exceptions clause to ensure that the only depictions reached would be those whose value is “exceedingly modest, if not *de minimus*.” *Ferber*, 458 U.S. at 762.

Respondent points out (Br. 48-49) that harms to animals are not of the same order as sexual abuse of children. That is, of course, true—but also irrelevant. The compelling interest standard does not require all harms to reach the level involved in *Ferber*. Animal cruelty surely qualifies as a compelling societal problem when compared to the many other governmental interests that this Court has placed in that category. U.S. Br. 31-32.

In short, Section 48 reaches a limited set of materials whose manufacture causes great harm to animals and humans and which contribute in no meaningful way to the marketplace of ideas. See Pet. App. 48a (Cowen, J., dissenting). The prohibition suppresses no viewpoints or messages, but only a particular means of production. Insisting that this speech lies at the heart of the First Amendment, as respondent does, misunderstands the essential purpose of that constitutional protection.

II. EVEN IF SECTION 48 REACHES SOME PROTECTED SPEECH, IT IS NOT FACIALLY UNCONSTITUTIONAL

Even if this Court determines that Section 48 reaches some protected speech, the statute remains facially constitutional. To justify invalidating the statute in all of its applications, respondent must show that Section 48 is substantially overbroad. He has not made that showing. Worse yet, the court of appeals did not even consider this question. Instead, it invalidated the statute on its face based merely on a few isolated hypotheticals, and without considering whether it could resolve the case on the basis of an as-applied challenge.

A. Section 48 Is Not Facially Unconstitutional Unless It Is Substantially Overbroad

Respondent suggests (Br. 52-53) that if this Court decides that Section 48 reaches some protected speech, then the statute is facially invalid. That is incorrect. A conclusion that the depictions covered by Section 48 are not entirely outside the First Amendment’s protection is nearer to the beginning than to the end of analysis. Even if Section 48 reaches some protected speech, that would not “justify prohibiting all enforcement” of the law. *McConnell v. FEC*, 540 U.S. 93, 207 (2003) (internal quotation marks omitted). As this Court recently made clear in *Williams*, when a statute reaches both protected and unprotected speech, and the challenger seeks to invalidate the law in all of its applications, the question becomes whether the statute suffers from real and substantial overbreadth. See 128 S. Ct. at 1838; see also, *e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 458 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973).¹¹

This court has warned against the “disfavored” remedy of facial invalidation because “facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). That is precisely what the court of appeals did here by nullifying Section 48 in *all* of its appli-

¹¹ This Court has facially invalidated statutes on First Amendment grounds without a finding of substantial overbreadth in some cases, such as *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-814, 816-817 (2000). But in *Playboy*, as in other similar cases, there was no argument that the statute reached both protected and unprotected speech. See *id.* at 814 (“The speech here, all agree, is protected speech.”).

cations. Pet. App. 25a n.13, 32a; Br. in Opp. 5, 15, 16. Notably, even respondent does not contend that all of the speech reached by Section 48 is barred from regulation under the First Amendment. See Resp. Br. 38-39 (crush videos). Rather, he argues only that the statute reaches too much speech. Accordingly, he must demonstrate substantial overbreadth. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (“The overbreadth claimant bears the burden of demonstrating * * * that substantial overbreadth exists.”). If he fails to do so, then the statute is facially valid. He still may argue that the statute is unconstitutional as applied to him, but he can obtain through that argument only a case-specific remedy.

The court of appeals erred in declining to apply overbreadth analysis to this case. It invalidated Section 48 on the basis of a mere handful of hypotheticals, without comparing those potentially unconstitutional applications to the large number of legitimate uses of the statute. Neither did the court review the way Section 48 actually has operated over the last decade, which belies any notion of overbreadth. See Center on Admin. Crim. Law Amicus Br. 18-22. And the court did not consider whether it could decide the case on narrower grounds, such as by invalidating Section 48 as applied to respondent. See, e.g., *Board of Trs. of the State Univ. v. Fox*, 492 U.S. 469, 481-486 (1989). For all of those reasons, reversal is warranted.

B. Section 48 Is Not Substantially Overbroad

Section 48 contains no substantial overbreadth and has plainly constitutional applications, such as to crush videos and animal-fighting videos.

To determine whether Section 48 is substantially overbroad, a court must “construe the challenged statute” and determine whether it “criminalizes a substantial amount of protected expressive activity.” *Williams*, 128 S.

Ct. at 1838, 1841. When comparing the permissible and impermissible applications of the statute, respondent’s burden is to show, “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).

At a minimum, Section 48 has numerous constitutional applications. As an initial matter, the crush videos covered by the statute may be regulated as obscenity. U.S. Br. 42-43. They meet each element set out in *Miller*: they appeal to the prurient interest according to contemporary community standards; they depict conduct that is sexual in nature in a patently offensive way; and they lack serious redeeming societal value when taken as a whole. See *Miller*, 413 U.S. at 24. Respondent’s suggestion that crush videos do not appeal to a prurient interest is amply refuted by evidence in the legislative record. See, e.g., 1999 *House Report* 2-3. And respondent has no basis for suggesting (Br. 39) that Congress cannot regulate obscene materials—by definition, wholly unprotected speech—except by virtue of a general obscenity statute. See *R.A.V.*, 505 U.S. at 388 (“When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”).

Still more significantly, Section 48 would satisfy even a strict scrutiny standard with respect to much of the material it covers—particularly, crush videos and animal-fighting videos.¹² As argued earlier, compelling reasons support

¹² The Court could well determine that strict scrutiny is inappropriate for Section 48. Because Section 48 is aimed at the “secondary effects” of the covered depictions (here, the acts of cruelty involved in their manufacture and the various harms associated with those acts), rather than at the viewpoint or message conveyed by these depictions, the provision is akin to a time, place, and manner regulation. See *City of*

regulating these materials. See pp. 14-15, *supra*. The strength of these interests is amply demonstrated by the broad societal consensus against animal cruelty, reflected in the laws of every State and the federal government. See U.S. Br. 26-28.

Section 48 directly furthers those compelling interests in its application to crush videos. These materials depict the illegal torture and killing of animals done solely in order to produce the video. See *1999 House Report 2-3*. Respondent does not dispute that without the commercial demand for crush videos, the acts of animal cruelty depicted in them would never occur. And inherent difficulties frustrate direct prosecution of the illegal acts; the acts themselves elude detection because the victims do not talk and the videos do not show the faces of the women crushing the animals or the locations of those acts. See *id.* at 3; U.S. Br. 28-29; States' Amicus Br. 8-12. And because crush videos are "almost exclusively distributed for sale through interstate or foreign commerce," usually over the Internet, *1999 House Report 3*, Congress is uniquely able to attack the "visible apparatus" of their distribution network to stop the videos' production, *Ferber*, 458 U.S. at 759-760.

Section 48 also directly furthers Congress's compelling interests in its application to animal-fighting videos. Dog-fighting has long been illegal everywhere in the United States. See U.S. Br. 26-28. It results not only in the horrific mistreatment of dogs, but in a variety of other harms, including gang activity, gambling, and violence. Respondent makes no attempt to minimize these serious problems.

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-50 (1986); see also *R.A.V.*, 505 U.S. at 388-390. In that event, Section 48 would be upheld so long as it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *City of Renton*, 475 U.S. at 50.

And underground dogfights are inordinately difficult to prosecute directly. *Id.* at 45-46. Even though States have made prosecution of animal cruelty a “top priority” (States’ Amicus Br. 6-7), they continue to face “exceptional[] difficult[ies]” (*id.* at 2, 8-12) in prosecuting animal-fighting ventures. Because a significant and visible market for videos of dogfights flourishes, U.S. Br. 46, targeting the depictions is a critically effective way to target the underlying crimes, see *Ferber*, 458 U.S. at 759, 760 n.11, 766 n.19.

Respondent makes no attempt to compare the statute’s permissible and impermissible applications, instead simply asserting (Br. 54) that the statute has no “plainly legitimate sweep.” But that assertion blinks reality; it overlooks both the constitutional applications described above (such as crush videos) and the minimization of unconstitutional applications that is a function of the exceptions clause. It is indeed difficult to imagine how Section 48 could sweep in many unconstitutional applications given its exclusion of material with “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” 18 U.S.C. 48(b). But even if some such applications exist, they are properly addressed through “case-by-case analysis of the fact situations” at issue. *Broadrick*, 413 U.S. at 615-616. Facial invalidation is too extreme a solution for the purely hypothetical problems that respondent envisions—problems that have never manifested themselves in ten years of nationwide experience under the statute.

C. Section 48 Is Constitutional As Applied To Respondent

If the Court reverses the court of appeals’ facial invalidation of Section 48, it should remand to permit the lower courts to adjudicate any remaining preserved as-applied challenge. In any event, an as-applied challenge would lack merit.

1. Respondent's videos depict vicious and bloody dog-fights targeted toward those in the underground dogfighting subculture. In *Pick-A-Winna*, respondent offers play-by-play commentary during seven different fights. Video: *Pick-A-Winna* 3:16-3:38 (Robert Stevens date unknown) (*PAW*). He expresses his approval when the fighting is "fast and furious," *PAW* 14:25-14:29; 24:25-24:27; 28:36-28:39; 53:46-53:47, and praises pit bulls as "real predator[s]" that have long "reigned supreme as the gladiator[s] of the pit," *PAW* 2:06-2:12; 56:48-56:55. He advises viewers how to condition a pit bull for fighting (*PAW* 10:48-10:59; 24:00-24:11; 1:03:17-1:03:26); design an effective pit (*PAW* 28:21-28:34); and handle a pit bull during a fight (*PAW* 10:12-10:20; 14:55-15:17; 32:15-32:20; 36:42-37:04; 53:00-53:08).

Japan Pit Fights features three dogs that respondent sent to Japan for the purpose of dogfighting. Video: *Japan Pit Fights* 1:03-1:11 (Robert Stevens date unknown) (*JPF*); J.A. 143. Respondent invites viewers to "sit back with [him] and enjoy some good [fights]" showing the "best fighting dog breed in the world." *JPF* 1:25-1:34. There is no commentary during the fights. At the end of the video, respondent brags that he and his partners are breeding pit bulls to create the ultimate fighting dog, with "the gamest blood in the world" and "the most destructive, the hardest biting mouth in the world." *JPF* 1:46:17-1:46:44.

In *Catch Dogs*, respondent highlights his pit bulls' destructiveness through footage of a savage dog fight and gruesome scenes of pit bulls attacking pigs. Although respondent asserts (Br. 3) that this is merely a hunting video, the video focuses on the suitability of his dogs for fighting. See Video: *Catch Dogs* 6:19-6:22 (Robert Stevens date unknown) (*CD*) ("I don't breed for catch work. I breed pit dogs."). He shows pit bulls attacking pigs, as typically occurs in organized hog-dog fights (see U.S. Br. 19-20),

praises “[f]ighting [that] is fast and furious,” *CD* 8:25-8:26, and notes his pit bull’s ability to “fight[] th[e] farm hog like it was a dog,” *CD* 47:39-47:48.

Respondent’s repeated assertions (Br. 4, 11, 21, 57) that he does not support dogfighting ring hollow—just as they did at trial. His videos glorify and promote dogfighting. He advertised these videos in *Sporting Dog Journal*, an underground publication that fuels the dogfighting subculture. J.A. 48-50, 53, 71-72. And in addition to selling videos, respondent sold merchandise commonly used to condition dogs for fighting, such as break sticks, J.A. 50, 65-66, and directly facilitated dogfighting by supplying the dogs featured in *Japan Pit Fights*, *JPF* 1:05-1:11; J.A. 143. Respondent also claims to be trying to breed the ultimate fighting dog. *JPF* 1:46:17-1:46:44. Respondent cannot credibly claim that he is opposed to dogfighting.

2. Respondent suggests a variety of reasons why his prosecution was infirm, none of which has merit. For example, respondent contends that Section 48 does not apply because his videos have redeeming societal value. The jury in this case disagreed after watching the videos and hearing testimony from a number of experts. C.A. App. 675. That conclusion is amply supported by the evidence, *e.g.*, J.A. 73-74, 87-88, 95-96, 98, 103-104, and there is no reason for this Court to revisit it, see, *e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (jury’s verdict ordinarily upheld unless no rational juror could reach that verdict). Respondent’s videos are not educational materials about the pit bull breed; they are simply depictions of dogfights.¹³

¹³ Respondent has waived the argument (Br. 56) that the value of his videos should be reviewed *de novo*. See Resp. C.A. Br. 72-79 (arguing only that “no reasonable juror could have concluded” that his videos lacked serious value).

3. The government has explained (pp. 21-2, *supra*) why dogfighting videos may be regulated consistently with the First Amendment. Respondent's videos are exactly the kind the government described: they depict dogs being forced to fight other dogs and hogs as pure bloodsport. And this case highlights the reasonableness of Congress's judgment about the connection between such videos and the underlying illegal conduct. Respondent admits that he created the videos in order to "satisfy[] a public demand to view what made our breed the courageous and intelligent breed that it is"—*i.e.*, dogfighting. J.A. 135. The *raison d'être* of respondent's conduct is thus the market for dogfighting videos. Further, respondent's videos highlight the steps dogfighters take to conceal their illicit conduct. Rather than fight his dogs in the United States, respondent shipped three dogs to Japan for fighting, see *JPF* 1:05-1:11; J.A. 143, and then sold the videos of that fight in the United States, see J.A. 50-55. And in order to hamper prosecution of dogfighters in the United States, respondent "purposefully edited out the[ir] faces." Pet. App. 54a (Cowen, J., dissenting); see *PAW* 13:44-13:56; 22:09-22:16.¹⁴ This case therefore demonstrates the compelling basis for Congress's decision to attack the "visible apparatus of distribution" so as to target a "low-profile, clandestine industry" that spawns a variety of significant societal harms. *Ferber*, 458 U.S. at 760.

¹⁴ Respondent is wrong to suggest (Br. 17, 44 n.18) that the persons shown in *Pick-A-Winna* faced no legal liability because dogfighting was legal in the United States in the 1960s. "[M]ost states outlawed it by the 1860s," Nancy R. Hoffman & Robin C. McGinnis, *2007-2008 Legislative Review*, 15 *Animal L.* 265, 276 (2009), and respondent admits (J.A. 135) that dogfighting was a crime at the time of the fights in *Pick-A-Winna*.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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