No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Rifle Association of America, Inc. ("NRA") is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4).[1] Founded in 1871, the NRA is the oldest civil rights organization in America. Its over four million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms.

Approximately 20 million people in this country exercise their Second Amendment right to engage in various forms of hunting, which is deeply rooted in this country's history and traditions. As part of its mission, the NRA educates hunters and supports their rights. For example, the NRA maintains websites (www.nrahuntersrights.org and www.nraila.org/hunting) that educate visitors on state hunting laws and address current legal issues affecting hunters. The NRA also represents hunters' interests before legislative bodies and courts.

In addition, the NRA—like thousands of other entities—produces and sells hunting media. The NRA produces American Hunter Television ("AHTV"). AHTV programming is frequently shown

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[1] Counsel of record for Respondent has filed a blanket consent to the participation of *amicus curiae* with the Court. Counsel of record for Petitioner provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

to millions of viewers on television stations such as the Outdoor Channel and is available for viewing online. The NRA also publishes *American Hunter*, which is the largest-circulation all-hunting magazine in the world, with over 1 million readers.

The NRA files this brief because, although the NRA condemns animal cruelty, 18 U.S.C. § 48 on its face criminalizes a wide swath of protected speech related to hunting. To date, Section 48 has existed in obscurity, with almost no Government enforcement. This case, however, has raised the statute to national prominence and startled the producers and sellers of hunting media. If this Court reverses the Third Circuit and allows the statute to stand, then entities like the NRA will be chilled from producing and selling hunting media, and the millions of Americans who learn from and enjoy such media will be deprived of it.

INTRODUCTION

Although apparently intended to address only depictions of depraved animal cruelty such as crush videos, Section 48 also criminalizes hunting-related media that indisputably is entitled to First Amendment protection. For example, all of the following fall within Section 48(a)'s criminal prohibition: selling a video depicting a deer hunt to a citizen of the District of Columbia, showing a television program depicting a dove hunt to a citizen of Iowa, or selling a magazine with a photograph of a mountain lion hunt to a citizen of California. Yet organizations like the NRA, retailers like Wal-Mart and Amazon.com, and media companies like ESPN create and sell these types of media into these states

every day, and therefore potentially run afoul of Section 48.

Section 48(b)'s exception for works of "serious" educational, journalistic, or artistic value does not eliminate the threat to hunting media from Section 48(a)'s overbroad prohibition. While enjoyable to millions of Americans, an average hunting video or television show might not be found by a jury to have "serious" educational, journalistic, or artistic value or—as the district court here interpreted the standard—to be of "great import."

Section 48 thus is not narrowly tailored to achieve—and does not use the least restrictive means to achieve—the Government's stated objectives of eliminating animal cruelty and the societal implications flowing from animal cruelty. Moreover, Section 48 criminalizes substantially more protected speech, including hunting media, than all of the speech that the Government claims is unprotected. Section 48 is therefore substantially overbroad on its face.

Never has a statute that reaches this far beyond the Government's stated interests—and that reaches so much protected speech—been upheld under the First Amendment. And the case for allowing the Government to sacrifice so much protected speech here is particularly weak, because Section 48 is rarely employed and superfluous.

BACKGROUND

Section 48 criminalizes hunting-related media, which is sold by thousands of companies and enjoyed

by millions of American hunters. Although this result does not advance any purpose behind the statute, it is the clear result of the statute's plain language.

A. 18 U.S.C. § 48

In drafting and passing 18 U.S.C. § 48, Congress intended to criminalize and combat a narrow category of speech: so-called "crush videos." H.R. Rep. No. 106-37, at 2 (1999); *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, at 7 (Sept. 30, 1999) (hereinafter "House Hearing") (Rep. Gallegly) ("I introduced H.R. 1887 to put a stop to the production and sale of crush videos."). These videos feature women crushing small animals with their feet and appeal to the prurient interest of a tiny segment of the population. H.R. Rep. No. 106-37, at 2.

To accomplish its purpose, however, Congress did not define "crush videos" and simply make "crush videos" criminal. Instead, Congress made it a felony—punishable by fine and up to five years in prison—to "knowingly create[], sell[], or possess[] 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) (emphasis added).

"[D]epiction of animal cruelty" is defined in Section 48(c)(1). With respect to "depiction," the statute makes clear that any type of "visual or

auditory depiction" is covered, including "photograph[s]" or "video recording[s]." *Id.* § 48(c)(1). "[A]nimal cruelty" is defined as "conduct in which a living animal" is "wounded" or "killed" when "such conduct is illegal under Federal law or the law of the State in which the creation, sale or possession [of the depiction] takes place, regardless of whether" the wounding or killing "took place in that State." *Id.*

Finally, Section 48(b) contains an exception for certain works that fall within Section 48(a)'s prohibition. Specifically, the criminal prohibition "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* § 48(b).

B. Hunting in the United States

Since the founding of this country, countless Americans have hunted for sustenance and for sport. According to a survey by the National Sporting Goods Association of those age 7-years-old and older, during 2008, 6.2 million Americans hunted with a bow and arrow and 18.8 million Americans hunted with a firearm.[2] In 2006, Americans hunted 220

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[2] The National Sporting Goods Association's website is located at www.nsga.org. The results of the participation survey can be found at www.nsga.org/files/public/2008ParticipationRankedby Alpha_4Web_080415.pdf (last visited July 23, 2009). Every five years, the U.S. Fish & Wildlife Service conducts a survey of Americans, age 16-years-old and older, regarding their fishing, hunting, and wildlife watching participation and expenditures. *See* U.S. Fish & Wildlife Service, *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, at 2, *available at* http://www.census.gov/prod/2008pubs/fhw06-nat.pdf (hereinafter "2006 Wildlife Survey"). The 2006 Wildlife Survey, which is the most recent, indicates that there are 12.5

million days and took 185 million hunting trips. 2006 Wildlife Survey at 22.

The societal benefits of hunting are many. For example, the U.S. Fish & Wildlife Service recognizes that "hunting is an important tool for wildlife management" that "gives resource managers a valuable tool to control populations of some species that might otherwise exceed the carrying capacity of their habitat and threaten the well-being of other wildlife species, and in some instances, that of human health and safety." U.S. Fish & Wildlife Service, *Hunting*, *at* http://www.fws.gov/hunting/.

According to a study by the Association of Fish & Wildlife Agencies—the organization that represents all of North America's fish and wildlife agencies—if hunting were stopped, the following year there would be an additional 50,000 human injuries as a result of a 218 percent increase in auto-deer collisions, and auto repair costs related to auto-wildlife collisions would surge from $1.2 billion to $3.8 billion. Animal Use Issues Committee of the International Association of Fish and Wildlife Agencies, *Potential Costs of Losing Hunting and Fishing as Wildlife Management Tools*, at 6 (May 25, 2005), *at* http://www.fishwildlife.org/pdfs/costs_of_losing_huntingandtrapping_US-Canada.pdf.

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million licensed hunters age 16 or older. As evidenced by the National Sporting Goods Association 2008 Sport Participation Survey, the actual number of hunters is much higher, because not all hunters are required to have a license and the 2006 Wildlife Survey only collected data from those 16-years-old and older.

Finally, hunters are the primary financiers (to the tune of more than $1.5 billion per year) of conservation programs in the United States. *See* National Shooting Sports Foundation, *at* http://www.nssf.org/hunting/.

Given hunting's societal benefits, and its deep roots in this country, it is not surprising that the federal and state governments protect and promote hunting. In fourteen states, the right to hunt is explicitly preserved by the state constitution. Ala. Const. amend. 597; Del. Const. art. I, § 20; La. Const. art. I, § 27; Minn. Const. art. XIII, § 12; Mont. Const. art. IX, § 7; Neb. Const. art. I, § 1; Nev. Const. art. I, § 11; N.M. Const. art. II, § 6; N.D. Const. art. I, § 1 & art. XI, § 27; Okla. Const. art. II, § 36; Vt. Const. ch. II, § 67; Va. Const. art. XI, § 4; W. Va. Const. art. III, § 22; Wis. Const. art. I, § 25 & art. I, § 26. Every state has a hunter anti-harassment law.[3]

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[3] Ala. Code § 9-11-270 (2001); Alaska Stat. § 16.05.790 (2008); Ariz. Rev. Stat. § 17-316 (2006); Ark. Code Ann. § 5-71-228 (2008); Cal. Fish & Game Code § 2009 (2009); Colo. Rev. Stat. § 33-6-115.5 (2006); Conn. Gen. Stat. § 53A-183A (2007); Del. Code Ann. tit. 7, § 724 (2006); Fla. Stat. Ann. § 379.105 (2009); Ga. Code Ann. § 27-3-151 (2003); Haw. Rev. Stat. § 183D-27.5 (2008); Idaho Code Ann. § 36-1510 (2006); Ill. Comp. Stat. 720/125-0.01 (2003); Ind. Code § 14-22-37-2 (1998); Iowa Code § 481A.125 (2009); Kan. Stat. Ann. § 32-1014 (2008); Ky. Rev. Stat. Ann. § 150.710 (2009); La. Rev. Stat. Ann. § 56:648.1 (2004); Me. Rev. Stat. Ann. tit. 12, § 10654 (2005); Md. Code Ann. [Nat. Res.] § 10-422 (2009); Mass. Gen. Laws Ann. ch. 131, § 5C (2002); Mich. Comp. Laws Ann. § 324.40112 (2007); Minn. Stat. Ann. § 97A.037 (2008); Miss. Code Ann. § 49-7-147 (1999); Mo. Ann. Stat. § 578.152 (2003); Mont. Code Ann. § 87-3-142 (2009); Neb. Rev. Stat. § 37-564 (2008); Nev. Rev. Stat. § 503.015 (2000); N.H. Rev. Stat. Ann. § 207:57 (2000); N.J. Stat. Ann. § 23:7A-2 (1997); N.M. Stat. Ann. § 17-2-7.1 (2003); N.Y.

Moreover, states are taking affirmative steps to encourage their citizens to hunt. In Illinois, game managers are holding learn-to-hunt classes for single mothers. In Vermont, the Fish and Wildlife Department sponsors youth hunting weekends three times a year. New Hampshire started a "Leave No Child Inside" initiative that encourages families and children to try fishing and hunting. *See* Ian Urbina, *To Revive Hunting, States Turn to the Classroom*, THE (POLK COUNTY) LEDGER, March 8, 2008.

In addition to various state initiatives to promote hunting, President George W. Bush ordered federal agencies in 2007 "to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat." Exec. Order No. 13,443, 72 Fed. Reg. 46,537 (Aug. 20, 2007). Moreover, the U.S. Fish & Wildlife Service currently states on its website that, "[w]orking together with the U.S. Forest Service, Bureau of Land Management, and 17 sportsmen organizations, the Service continues to promote and improve access to Federally-managed public lands for hunters and anglers. . . . Hunters and anglers, who are often called the original conservationists, are among our greatest partners." U.S. Fish &

Envtl. Conserv. Law § 11-0110 (2005); N.C. Gen. Stat. § 113-295 (2000); N.D. Cent. Code § 20.1-01-31 (2008); Ohio Rev. Code Ann. § 1533.03 (1996); Okla. Stat. Ann. tit. 29, § 5-212 (2009); Or. Rev. Stat. § 496.994 (2003); 34 Pa. Cons. Stat. Ann. § 2302 (1997); R.I. Gen. Laws § 20-13-16 (1998); S.C. Code Ann. § 50-1-137 (2008); S.D. Codified Laws § 41-1-8 (2004); Tenn. Code Ann. § 70-4-302 (2004); Tex. Parks & Wild. Code Ann. § 62.0125 (2002); Utah Code Ann. § 23-20-29 (2003); Vt. Stat. Ann. tit. 10, § 4708 (2006); Va. Code Ann. § 29.1-521.1 (2005); Wash. Rev. Code § 77.15.180 (2001); W.Va. Code § 20-2-2A (2002); Wis. Stat. § 29.083 (2004); Wyo. Stat. Ann. § 23-3-405 (2009).

Wildlife Service, *Hunting and Fishing*, *at* www.fws.gov/home/huntingandfishing/.

Despite being widespread, socially beneficial, and encouraged by both state and federal governments, there are some who hold extreme negative views on the subject of hunting. For example, Wayne Pacelle, the President and CEO of *Amicus* The Humane Society of the United States has said that "[o]ur goal is to get sport hunting in the same category as cock fighting and dog fighting." John Haines, *Hunting Doomed? Animal Rights Leader Says It's Only a Matter of Time*, BOZEMAN DAILY CHRONICLE, Oct. 8, 1991, at 1. He has also stated: "If we could shut down all sport hunting in a moment, we would." Associated Press, *Impassioned Agitator*, Dec. 31, 1991.

These views are not shared by the vast majority of Americans. Approximately 73% of Americans support legalized hunting. *See* Congressional Sportsmen's Foundation, *Hunting and Fishing: Bright Stars in the American Economy*, at 13 ("Bright Stars"), *available at* http://www.nssf.org/07report/CompleteReport.pdf (last visited July 23, 2009).[4] Very few Americans would equate legal hunting with animal cruelty such as in crush videos. But the existence of organized, well-funded, and outspoken hatred for hunting must be considered in evaluating the potential for abuse of Section 48.

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[4] *See also* Mark Damian Duda & Kira C. Young, *American Attitudes Toward Scientific Wildlife Management and Human Use of Fish and Wildlife: Implications for Effective Public Relations and Communications Strategies*, *available at* http://www.responsivemanagement.com/download/reports/AmericanAttitudes.pdf (last visited July 23, 2009).

C. The Size and Significance of Hunting Media

Hunting not only provides food, recreation, and social benefits, but also supports jobs and economic activity on which thousands rely. Surveys indicate that hunting contributes anywhere from $23 billion to more than $30 billion annually to the U.S. economy and supports approximately 600,000 to 1 million jobs. *See* National Shooting Sports Foundation, *at* http://www.nssf.org/hunting/; 2006 Wildlife Survey at 4–6; Bright Stars at 7.

Hunting media is a particularly robust form of hunting-related activity. Hunting media includes videos/DVDs, television shows, print publications, and internet-based videos, stories, and photographs. The content of hunting media, in whatever form it comes, varies widely. Some hunting media is educational, intending for example to teach proper techniques. Some is advocacy-related, intending to train hunters about their rights and responsibilities. *See, e.g.,* www.nrahuntersrights.org. Finally, as the below descriptions reveal, a vast quantity of hunting media is simply for entertainment.

Videos/DVDs. A brief search of the websites of large outlets including Wal-Mart, Amazon.com, Dick's Sporting Goods, Cabela's, and Bass Pro Shops reveals hundreds of hunting DVD and VHS video titles for sale, generally ranging in price from $10 to $40 per title. Many less-known companies also produce and sell hunting videos, often through websites. For example, the Bluewater Group sells hundreds of hunting DVD and VHS video titles on its website, www.bluewtr.com; Drury Outdoors sells 74

different hunting DVD titles on its website, www.druryoutdoors.com/dvds.php; Outdoor Visions advertises 400 titles of DVDs involving hunting on its website, www.outdoorvisions.com; and Ident-I-Card advertises "100's" of hunting DVD titles for sale on its website, www.identicards.com. Virtually all of these DVDs and VHS videos depict the "intentional[]" "wound[ing]" and "kill[ing]" of "a living animal"—*i.e.,* hunting. 18 U.S.C. § 48(c)(1).

Television Shows. Major television network stations deliver programming that shows hunting to millions of viewers. ESPN has a variety of hunting programming on its family of stations. For example, from July to September 2009, ESPN2 will televise weekly "Chronicles of the Hunt," which features "a mix of North American big game hunts, African Safaris, unplanned game birds and hardcore waterfowl hunting." *See* http://sports.espn.go.com/outdoors/tv/news/story?page=g_tv_desc_chronicles_hunt (last visited July 23, 2009). The Outdoor Channel, which daily features hunting programs like Realtree's "Monster Bucks" and "Road Trips," is subscribed to by 30 million viewers. Outdoor Channel Holdings, Inc., Form 10-Q (May 15, 2009), at 26, *available at* http://www.outdoorchannel.com/Investors.aspx; *see also* www.realtree.com/tvshows. Similarly, the Sportsman Channel, which also regularly has hunting programming like "Xtreme Outdoors Huntin' Hard," has 17 million subscribing households. Press Release, Sportsman Channel, Sportsman Channel Unveils New, Enhanced Brand Image (June 29, 2009), *available at* http://www.thesportsmanchannel.com/newsandevents/pressroom/index.php; *see also* http://www.thesportsmanchannel.com/programming/descriptions/descripti

on.php?ID=242 (last visited July 23, 2009). Other television channels that show hunting programs include Versus, Fox Sports Net, Lone Star Channel, SportSouth, and Wild TV.

Print Publications. There are thousands of print publications devoted at least in part to hunting. With respect to books, as of the date of this brief, Amazon.com alone has 5,059 titles relating to hunting for sale.[5] With respect to magazines, just the top 20 hunting-related magazines by circulation have a collective circulation of over 10 million and collectively retail for over $135 million annually.[6] *Field & Stream*, the largest magazine featuring hunting, has a circulation of 1.5 million, see http://www.fieldandstream.com/fsmk09/rp.html (last visited July 23, 2009), and the NRA's *American Hunter*, the largest all-hunting magazine, has over 1 million readers. Both *Field & Stream* and *American Hunter*, like other hunting magazines, contain photographs of conduct in which an animal is legally hunted or fished, and killed.

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[5] Publishers that specialize in hunting-related books include Safari Press, Quayside Publishing Group, Krause Publications/F&W Media, Stackpole Books, Lyons/Globe Pequot Press, and Trophy Room Books.

[6] These figures are derived from the SRDS Consumer Magazine Source and the Audit Bureau of Circulation, which provide circulation audits regarding print circulation. They indicate that the top 20 magazines that feature hunting are *Field & Stream*, *American Rifleman*, *Outdoor Life*, *American Hunter*, *North American Hunter*, *Sierra*, *Ducks Unlimited*, *Game & Fish Magazine*, *North American Fisherman*, *Guns & Ammo*, *America's 1st Freedom*, *Petersen's Hunting*, *Shooting Times*, *Petersen's Bowhunting*, *Texas Parks and Wildlife*, *Bowhunter*, *North American Whitetail*, *Deer and Deer Hunting*, *Handguns*, and *Guns Magazine*.

Websites. Hunting photographs and video programming are also available through the internet. Magazines such as *Field & Stream*, see www.fieldandstream.com/videos, *Petersen's Hunting*, see www.huntingmag.com, and *Bowhunter*, see www.bowhunter.com, have hunting videos and photographs on-line that depict the legal hunting and killing of animals. Similarly, retailers like Cabela's, see www.cabelas.com, display and sell hunting videos and photographs on-line, while L.L.Bean posts clips of its "Guide to the Outdoors" series that is televised on the Outdoor Channel, see www.llbean.com/hunting1/guideToOutdoors.html (last visited July 23, 2009). Finally, ESPN Outdoors puts clips of its hunting programming on-line; these clips contain depictions of the legal hunting and killing of live animals. *See, e.g.*, "Hunt Like a Parker - Episode 3," *at* http://sports.espn.go.com/outdoors/tv/news/story?page=g_tv_desc_hunt_like_a_parker (last visited July 23, 2009).

D. Laws Prohibiting the Killing and Wounding of Animals

As noted above, Section 48 defines "animal cruelty" by reference to laws that forbid the killing or wounding of animals. Broadly speaking, the federal and state governments have two types of laws that prohibit the killing or wounding of animals: (1) animal cruelty laws, and (2) laws regulating hunting activities.

Animal Cruelty Laws. As extensively discussed by the Government and its *amici*, there are numerous federal and state laws that prohibit killing and wounding of animals that the governments have

deemed to be animal cruelty. These include general laws that prohibit animal cruelty—such as the crushing of animals as featured in crush videos. *See* Brief of the United States at 25 n.7. They also include statutes that specifically cover dog fighting, see Briefs of *Amici* The Humane Society at 14 and Animal Legal Defense Fund at 9 n.3; cock fighting, see Brief of the United States at 27 n.10; and hog-dog fighting, see Brief of the United States at 28 n.11.

It seems from the legislative history of Section 48 that Congress was trying to tie the definition of "animal cruelty" to the conduct prohibited by these animal cruelty laws. *See, e.g.,* H.R. Rep. No. 106-37, at 3 (explaining the purpose of the statute: "While all States have some form of a cruelty to animal statues, none have a statute that prohibits the sale of depictions of such cruelty."); House Hearing at 21 (discussing whether there was a "need to pass legislation like this in addition to animal cruelty laws"). But Congress actually reached much further, apparently because it failed to consider the provisions of federal and state hunting and conservation laws, and how those laws would interact with Section 48.

Hunting Laws. The killing and wounding of animals also is prohibited to some extent by laws different in kind than animal cruelty laws—hunting and related conservation laws. These laws are aimed at, *inter alia*, ensuring hunter safety and conserving land and animals.

State hunting and conservation laws reflect the needs of particular states and accordingly vary extensively from state-to-state. For example, the

following are just some of the patchwork of laws regarding the types of animals that may be hunted:

- Washington, DC allows no hunting at all. D.C. MUN. REGS. tit. 19, § 1560.1 (2001).

- Although black bear hunting is legal in many states, it is banned in Florida,[7] Louisiana,[8] and Texas.[9]

- Dove hunting is illegal in Connecticut, Iowa, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, and Vermont, but is allowed in every other state.[10]

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[7] Florida Fish & Wildlife Conservation Commission, *Florida Hunting Regulations Handbook (2009-2010)*, at 4, *available at* http://myfwc.com/docs/RecreationActivities/Hunt_2009-10_RegulationsHandBook.pdf.

[8] Louisiana Department of Wildlife & Fisheries, *Louisiana Hunting Regulations (2008-2009)*, at 19, *available at* http://www.wlf.state.la.us/pdfs/hunting/2008-2009huntingregulations.pdf.

[9] Texas Parks & Wildlife Department, *Texas Outdoor Annual Hunting and Fishing Regulations (2008-2009)*, at 73, *available at* http://www.tpwd.state.tx.us/publications/nonpwdpubs/media/outdoor_annual_2008_2009.pdf.

[10] U.S. Fish & Wildlife Service, *Mourning Dove, White-winged Dove, and Band-tailed Pigeon – 2009 Population Status* (June 2009), at 2–3, *available at* http://www.fws.gov/migratorybirds/NewReportsPublications/PopulationStatus/MourningDove/Dove%20and%20Pigeon%20Status%20Report%202009.pdf (hereinafter "2009 Dove Population Status").

- Mountain lion hunting is legal in Nevada[11] and Arizona,[12] but not California.[13]

Moreover, *where* hunting *particular animals* is allowed, *when* hunting is allowed, and *the types of weapons* that may be used in hunting also all vary from state-to-state. For example, every state (but not the District of Columbia) allows the hunting of deer, but only during hunting "seasons." In New Hampshire, for example, the archery season runs from September 15 to December 8, the muzzleloader season runs from November 1 to November 11, and the firearm season runs from November 12 to December 7. New Hampshire Fish & Game Department, *2008-2009 Hunting Digest*, at 38, http://www.wildlife.state.nh.us/Hunting/Hunting_PDFs/Hunting_Digest_2008-09.pdf. In Texas, the archery season runs from September 27 to October 31, the general firearm season runs from November 1 to January 18, and a late season for antlerless and spike deer runs from January 19 to February 1. Texas Parks & Wildlife Department, *2008-2009 Texas Hunting Season Dates by Animal*,

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[11] Nevada Department of Wildlife, *Nevada Hunt Book: 2009 Hunting and Trapping Laws and Regulations for Big Game, Furbearer, Upland Game and Waterfowl,* at 41, *available at* http://www.ndow.org/law/regs/huntregs/huntbook/2009/09_hb_full.pdf.

[12] Arizona Game and Fish Department, *2009-10 Arizona Hunting and Trapping Regulations*, at 54, *available at* http://www.azgfd.gov/pdfs/h_f/regulations/HuntingRegulations.pdf.

[13] California Department of Fish and Game, *Commonly Asked Questions About Mountain Lions*, http://www.dfg.ca.gov/news/issues/lion/lion_faq.html (last visited July 23, 2009).

http://www.tpwd.state.tx.us/huntwild/hunt/season/animal_listing/. In California, the state is divided into zones. Depending on the zone, the archery season may run from as early as July 11 to as late as October 25, while the general firearm season may run from as early as August 8 to as late as November 29. California Department of Fish & Game, *Approved 2009 Deer Seasons by Zone*, http://www.dfg.ca.gov/wildlife/hunting/deer/tags/docs/09-ApprovedDeerZoneSeasons-Quotas.pdf.

Not only does the type of weapon that may be used vary by season, as set out above, but some states forbid hunting with certain types of weapons that can be used in other states. For example, hunting with a crossbow is legal in a majority of states, see http://www.huntersfriend.com/crossbows/crossbow-state-regulations.htm (last visited July 23, 2009), but is prohibited in Oregon[14] and New York (which allows exceptions for disabled hunters).[15]

Finally, the hunting laws in the United States also differ greatly from those of *other countries*. For example, as noted above, the hunting of dove is illegal in nine states. Moreover, every state that allows dove hunting sets a "bag limit" on the number of doves that can be hunted per day and only allows hunting for approximately 70 days per year. 2009

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[14] Oregon Department of Fish & Wildlife, *2009 Oregon Big Game Regulations*, *available at* http://www.dfw.state.or.us/resources/hunting/big_game/regulations/2009biggameregsweb.pdf

[15] New York State Department of Environmental Conservation, *New York Hunting & Trapping: 2008-2009 Official Guide to Laws & Regulations*, at 11, *available at* http://www.dec.ny.gov/docs/wildlife_pdf/08hunttrap.pdf.

Dove Population Status at 21–22; *see also* Press Release, Florida Fish & Wildlife Conservation Commission, *Florida Dove Hunters Get Unexpected Bonus with Higher Bag Limit* (Sept. 30, 2008), *at* http://myfwc.com/NEWSROOM/08/northwest/News_08_NW_Dove.htm. But in Argentina doves are so plentiful that they threaten crops and are considered pests. Therefore, the Argentine government allows dove hunting any time and has no bag limit. If hunting does not sufficiently limit the dove population, then the government sanctions poisoning of doves. *See* Layne Simpson, *Argentina Wingshooting*, PETERSEN'S HUNTING (May 2009), at 32-33.

This variation in laws regulating hunting—and particularly the state-to-state variation in when the killing of an animal is legal—plays an important role in Section 48's unconstitutionality. This is because Section 48 defines "depiction of animal cruelty" as a depiction of the killing or wounding of an animal when "illegal under Federal law or the law of the State in which the creation, sale or possession [of the depiction] takes place, *regardless of whether*" the killing or wounding was legal in the place where act took place. 18 U.S.C. § 48(c)(1) (emphasis added). Put differently, under Section 48, a depiction showing hunting that is legal in one state (or another country) becomes criminally punishable when sold into a state where that form of hunting is illegal. This effectively sweeps a massive amount of hunting media into the condemnation of Section 48.

ARGUMENT

The Government's defense of Section 48 proceeds from a false premise: "Section 48 regulates a narrow category of speech" that has no value and that inflicts grave public harm—namely, videos depicting "animal cruelty" such as crush videos. Brief of the United States at 14. The Government has confused Section 48's *purpose* with its *effect*. While Section 48 may have been intended to pinpoint a narrow strand of speech depicting animal cruelty, it in fact goes much further and sweeps in a whole host of indisputably protected speech—such as speech about hunting. Because Section 48 is not narrowly tailored to achieve (and does not use the least restrictive means to achieve) the Government's proposed interests relating to eliminating animal cruelty—and because Section 48 is substantially overbroad on its face—it violates the First Amendment.

A. Section 48 Reaches Hunting Media

The first step in determining whether a statute runs afoul of the First Amendment is to define its reach. *See United States v. Williams*, 128 S. Ct. 1830, 1838–39 (2008). Section 48 contains two critical provisions related to hunting media. The first is the definition of "depiction of animal cruelty" in Section 48(c)(1), which includes hunting media. The second is the exception for works of "serious religious, political, scientific, educational, journalistic, historical, or artistic value" in

Section 48(b), which does not exclude hunting media.[16]

1. "Depiction of Animal Cruelty"

By defining "animal cruelty" by reference to laws that prohibit the killing or wounding of an animal, Section 48 incorporates into "animal cruelty" conduct prohibited by state and federal *animal cruelty laws*. These are the laws on which the Government exclusively focuses. The reason for this is that animal cruelty laws prohibit the type of conduct described by the Government in defense of the statute—namely, the crushing of animals, cock-fighting, dog-fighting, and hog-dog fighting. *See* Brief of the United States at 24-28.

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[16] The Government suggests that two other provisions in Section 48 "narrowly circumscribe the statute's reach," Brief of the United States at 14, but neither exclude hunting media. *First*, the Government claims that, because the statute covers "conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed," § 48(c)(1), then (1) the "animal portrayed in the depiction must suffer serious bodily injury or death"; (2) the injury must be to a "real, living animal; simulated animal cruelty is not reached"; and (3) "the acts depicted must have been done 'intentionally'; inadvertent harm to animals does not qualify." Brief of the United States at 14-15. But this does not eliminate hunting media, which typically portrays the intentional killing of real animals—*i.e.,* hunting. *Second*, the Government points out that the statute encompasses only a depiction that is "knowingly create[d], s[old], or possess[ed]" with the specific "intention of placing that depiction in interstate or foreign commerce for commercial gain." *Id.* at 15 (quoting § 48(a)). Of course, producers and sellers of hunting media knowingly create, sell, and possess hunting media with the specific intention of placing it in commerce for commercial gain.

Accordingly, by criminalizing "depiction[s]" of conduct prohibited by animal cruelty statutes, Section 48 criminalizes "depiction[s]" of the only conduct that the Government describes as animal cruelty. Moreover, because this conduct is universally condemned and illegal, there is no concern that this conduct will be illegal in the state where the depiction of that conduct is sold (which makes it "animal cruelty" under the statute) but not in the state where the conduct "took place" (which is explicitly made irrelevant by the statute). 18 U.S.C. § 48(c)(1). If this were the entire story, Section 48's definition of a "depiction of animal cruelty" might make some sense. But this is only half—indeed, less than half—of the story.

Section 48's definition of "animal cruelty" does not *just* incorporate conduct prohibited by animal cruelty laws. It also (probably inadvertently) incorporates conduct prohibited by *hunting and conservation laws*. This, combined with the wide variation in these laws, means that a whole host of hunting media is brought within the definition of a "depiction of animal cruelty."

For example, if one state bans the hunting of a certain type of animal (*e.g.,* because of a decline in that animal's population in the state), media that depicts a legal hunt of that animal occurring in *another* state becomes criminally punishable when sold to a citizen of the banning state. This alone sweeps untold amounts of hunting media within the statue's reach, as demonstrated by the following examples:

- Any media showing the shooting of a deer that is sold into the District of Columbia, where all hunting is illegal, constitutes a "depiction of animal cruelty"—even though deer hunting is legal in every other state. Just some examples of media for sale to District residents showing deer hunting are: (i) television shows like *Buck Commander* showing on ESPN2, *see* http://www.buckcommander.com/, and *Deer & Deer Hunting TV Season V* on Versus Country, *see* http://www.deeranddeerhunting.com/ddhtv; (ii) videos like *Best of L.L.Bean Guide to the Outdoors*, available from L.L.Bean; (iii) magazines like *American Hunter*, which has 250 subscribers in the District of Columbia; and (iv) books like *Bowhunter's Guide to Accurate Shooting*, available from Amazon.com.

- Any media showing the shooting of a black bear that is sold into Florida, Louisiana, and Texas, all of which prohibit black bear hunting, constitutes a "depiction of animal cruelty"—even though many other states allow the hunting of black bears. Currently, there are approximately 40 DVD and VHS video titles featuring black bear hunting available through Amazon.com (last visited July 23, 2009). There also are numerous black bear hunting video titles available through smaller outfitters and distributors, including *Black Bear Safari DVD* (available at Smoky River Outfitting, *at* http://www.smokyriveroutfitting.com/hunting_videos.asp); *Bears in the Backwoods* (available at Bear Hunting Magazine, *at* http://bear-hunting.com/store.cfm?Action=Products&CategoryID=2); and *Wilderness Black Bear Hunts* (available at Trophy Book Outfitters,

Ltd., *at* http://www.trophybookoutfitters.com/hunting_videos.asp).

- Any media showing the shooting of a dove that is sold into Iowa, Michigan, Vermont, New Hampshire, Maine, New York, Massachusetts, Connecticut, and New Jersey, which all ban dove hunting, constitutes a "depiction of animal cruelty"—even though dove hunting is legal in other states. There are a number of videos showing dove hunts on-line posted by outfitters seeking to attract customers. *See, e.g.*, http://www.cordobadovehunting.com/ (featuring videos and photographs of live dove hunting). There are also television shows depicting the legal hunting and killing of doves. *See, e.g.*, "Beretta's Bird Hunting Journal: Missouri Dove Hunting" (Versus Country television broadcast, June 24, 2008), *available at* http://www.versuscountry.com/itemdetail.aspx?id=2353&sectionType=-1.

And this is only the tip of the iceberg. As noted above, hunting and conservation laws regulate, in addition to the *types* of animals that may be hunted, *when* and *how* they may be hunted. Given the myriad differences in these laws, it is almost certain that a depiction of legal hunting in one state (or another country) will run afoul of some prohibition in a state in which that depiction is sold and therefore become a "depiction of animal cruelty." For example:

- Any media depicting a legal deer hunt in California on July 11 using a bow and arrow would become criminally punishable when sold in New Hampshire and Texas, where deer hunting

using a bow and arrow at that time of the year is prohibited. *See supra* at 16-17 (discussing laws related to seasons).

- Any media showing a legal crossbow hunt in any number of states would become criminally punishable when sold in Oregon, where crossbow hunting is prohibited.[17] *See supra* at 17 (discussing crossbow hunting laws).

- Any media showing a dove hunt in Argentina occurring out of season in a particular state—or showing more than a particular state's "bag limit" being taken—would become criminally punishable when sold in that state. *See supra* at 15-18 (discussing dove hunting laws).

Finally, if all this were not enough, it is critical to recognize that the statue forbids an act depicted that "is illegal," regardless of whether it *was* illegal when it occurred. 18 U.S.C. § 48(c)(1). Therefore, media featuring a hunt that was legal when the media was made, but which became illegal due to a change in a law, will be transformed into a "depiction of animal cruelty." For example, Florida closed its Canvasback duck hunting season for 2008-2009 due to concerns about breeding and population. Florida Fish & Wildlife Conservation Commission, *2008-2009 Migratory Game Bird Regulations for Waterfowl and Coot Seasons*, *at*

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[17] There are numerous items for sale on-line showing crossbow hunting. *See, e.g.,* Horton's Crossbow Chronicles DVD series, *available at* http://www.crossbow.com/beapartofhortonscrossbowchronicleshunting; William Hovey Smith, *Crossbow Hunting* (Stackpole Books 2006), *available at* http://www.amazon.com/.

http://myfwc.com/docs/RulesRegulations/duck_08_09_reg_season.pdf. If a Florida retailer sold a video of a Canvasback duck hunt from 2007 during this closed season, then it would fall within Section 48(a)'s prohibition because the video would depict the killing of an animal that "*is* illegal under . . . the law of the State in which the creation, sale, or possession [of the depiction] takes place." 18 U.S.C. § 48(c)(1) (emphasis added).

It appears that Congress did not recognize that Section 48 would sweep in virtually the entire market for hunting media. In fact, Congress specifically thought that its definition of a "depiction of animal cruelty" *excluded* everyday hunting media, and thereby resolved a potentially problematic application of the statute. The House Report states: "[I]n order to fall within the conduct prohibited by new section 48, the conduct depicted must be illegal under Federal law or the law of the State in which the creation, sale, or possession takes place. *Thus, depictions of ordinary hunting and fishing activities do not fall within the scope of the statute*." H.R. Rep. No. 106-37, at 8 (emphasis added).[18] By failing to take account of hunting and conservation laws, Congress codified clear statutory language criminalizing protected speech that concededly does not advance any legislative purpose.

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[18] *See also* 145 Cong. Rec. 10267 (Rep. McCollum) (Oct. 19, 1999) ("Thus, the sale of depictions of legal activities, such as hunting and fishing, would not be illegal under this bill"); 145 Cong. Rec. 10268 (Rep. Smith) (Oct. 19, 1999) (This legislation "will in no way prohibit hunting, fishing, or wildlife videos.").

2. Works of "Serious . . . Value"

Because Section 48(a) covers hunting media in its criminal prohibition of "depiction[s] of animal cruelty," the only hope for a producer or seller of such media to avoid a substantial fine and up to five years in prison is the exception found at Section 48(b). This exception provides that the criminal prohibition "does not apply to any depiction that has *serious* religious, political, scientific, educational, journalistic, or artistic value." 18 U.S.C. § 48(b) (emphasis added). But this exception does not exclude hunting media from the statute's reach and certainly does not eliminate the chill to the First Amendment rights of producers and sellers of hunting media. Indeed, by setting up a system that in effect invites *viewpoint* discrimination, the exception if anything amplifies the First Amendment deficiencies in Section 48.

The threshold problem is that the "serious . . . value" exception is so vague—and the process for determining "serious . . . value" is so subjective—that there is no way for a producer or seller of hunting media to know *ex ante* whether a work will be deemed of "serious . . . value." As the trial of Mr. Stevens demonstrates, the jury will likely hear conflicting "expert" testimony on how "serious" the "value" of a hunting video is, C.A. App. 555 (expert testimony of John Parker on behalf of the government: "I'm trying to think what value it would be to show a man doing a wrong thing. We like to show people doing the right thing."); features of the video will be critiqued, C.A. App. 588-89, 673 (government focusing on Stevens' decision to include certain scenes and the length of those scenes); and

the government and defense attorneys will argue to the jury various features of the video that, in their opinion, dictate its "serious[ness]." In the end, the jury will be left to debate and decide whether the media has "serious . . . value"—a judgment that, like the "evidence" meant to inform it, necessarily will be based on the individual, subjective view of the juror. No rational producer or seller of media would risk a substantial fine and up to five years in prison on this process.

If a producer or seller of hunting media takes that risk, then the chances are high that a jury will find that the hunting media does not have "serious . . . value." This "serious . . . value" standard sets a high bar: The work must be more than valuable, it must be "serious[ly]" valuable. In Mr. Stevens' trial, the jury was instructed, with the encouragement of the Government, that "serious . . . value" means "significant and of great import." C.A. App. 641; *see also Andrews v. State*, 652 S.W.2d 370, 389 (Tex. Crim. App. 1983) (en banc) (equating "serious value" in the obscenity context with "important value").[19]

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[19] The Government claims that "serious . . . value" must be judged in relation to the work "taken as a whole." Brief of the United States at 16. The language of the statute, however, relates the "serious . . . value" inquiry to the particular "*depiction*" and not the work as a whole. 18 U.S.C. § 48(b) ("Subsection (a) does not apply to *any depiction* . . . ." (emphasis added)); *id.* § 48(c)(1) (defining "depiction" to include "any photograph" or "electronic image"). To the extent the focus is on the "depiction"—*e.g.,* an image of an animal being killed in a hunt—the risk of hunting media falling outside the "serious . . . value" exception is substantially furthered. But even if hunting media is judged as a whole, a substantial amount of hunting

The types of hunting media vary widely. But much of the content of hunting media—like the content of many sports shows, sitcoms, and popular magazines and books—is merely *recreational* in nature. This media often does not (and is not intended to) replicate the high-minded journalism of *The Economist* or a PBS documentary. Nor is it intended to conjure up deep thoughts, or to endure through the ages. For example, Matt Duff, a founder of *Buck Commander* shown on ESPN2, explained about the show: "We kill big bucks, but the show is more about having fun out there." David Hunter, *The Buck Commanders* (July 7, 2009), *available at* http://sports.espn.go.com/outdoors/hunting/news/story?id=4303092. With this description, it is difficult to imagine that a jury would find the show to be "of great import."

Moreover, the "serious . . . value" inquiry will necessarily delve into not just the content of media, but also its form. *Cf. Tipp-It, Inc. v. Conboy*, 596 N.W.2d 304, 314 (Neb. 1999) (discussing expert testimony evaluating "serious value" in the obscenity context by using the "four-corners" test, which considers "such criteria as space, composition, design, color, harmony, and form and balance"). In this way, the statute especially threatens the numerous entrepreneurs and smaller producers of hunting media, whose works are ubiquitous on the internet. These producers do not have the production budgets of major content providers, and their cinematography is unlikely to compare to that of a Steven Spielberg film. Just as an example,

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media will not fall within the exception for the reasons described above.

Outdoor Visions sells hunting media from over 60 producers and warns that, because the productions are "made with various camera equipment under harsh and difficult situations," viewers must "expect some variance in the production and audio of each title." *See* www.outdoorvisions.com/about.php.

The likelihood that a jury would not find hunting media to have "serious . . . value" is particularly acute in parts of the country where the population is less exposed to hunting or certain types of hunting. Is the average jury in Washington, DC going to see any value—much less "serious" value—in a video featuring deer hunting, which is legal in every state but not the District? Is the average jury in San Francisco, California, going to see any value—much less "serious" value—in a video featuring the hunt of a mountain lion, which is legal in some western states but not California? Is a jury in New York City going to see any "value"—much less "serious" value—in a video featuring a crossbow hunt, which is legal in the majority of states but not New York (with limited exceptions)? *See supra* at 15-18 (discussing deer hunting, mountain lion hunting, and crossbow hunting laws).

Worse, in a place where many people are hostile to hunters or groups like the NRA, a prosecutor or jury might use a Section 48 prosecution as the means to express that hostility. Unfortunately, there is evidence of courts and juries exhibiting bias toward the NRA and its members, and even basing verdicts on that bias. *See, e.g., United States v. Salamone*, 800 F.2d 1216 (3d Cir. 1986) (reversing conviction and holding that district court abused its discretion when it systematically excluded members of the NRA

from the jury); *Brodbeck v. National Rifle Ass'n of America*, No. Civ.-A-98-5361, 1999 WL 722815, at *4 (E.D. Pa. Sept. 14, 1999) (reversing a jury verdict for approximately $150,000 in compensatory damages and $1,600,000 in punitive damages against the NRA as based on "bias against the NRA").[20]

In practice, Section 48(b)'s exception invites viewpoint discrimination. *See Lamb's Chapel v. Center Moriches School District,* 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (internal quotation marks and citation omitted)). Whether a juror will see "serious . . . value" in a depiction of hunting may well depend on that juror's viewpoint as to whether hunting is legitimate in a moral and political sense. Thus, if anything, the Section 48(b) exception increases—rather than decreases—the First Amendment problem.

Section 48(b)'s exception does not remove hunting media from the reach of Section 48(a)'s prohibition. And once it becomes clear that Section 48 reaches the vast market of hunting media, Section 48's unconstitutionality is readily apparent.

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[20] The NRA did not have any interest in the subject matter of the *Salamone* case, nor a relationship with any party. Further, it was not just the NRA and its members who were excluded from the jury in *Salamone*, but also former NRA members, those who had family members in the NRA, and anyone who subscribed to the principles of the NRA. 800 F.2d at 1220–21. The exclusion of these jurors apparently was based on animus toward the NRA, its members, and its principles.

B. Section 48 Is Not Immune from First Amendment Scrutiny

As an initial matter, the Government's argument that Section 48 is exempt from First Amendment scrutiny fails in its operating premise: that Section 48 "is limited to depictions of illegal acts of extreme [animal] cruelty"—specifically, "crush videos" and "videos of dog fights, hog-dog-fights, and cockfights." Brief of the United States at 8. Instead, the statute covers depictions of the killing and wounding of animals that is *currently* illegal *somewhere* in the United States, even if it is legal (and government-promoted) in the rest of the country and even if it was legal when the conduct occurred. This category of speech encompasses not just "acts of extreme cruelty," but speech about ordinary hunting activity. The question, then, is whether *this* category of speech—not the "narrow category" of animal cruelty depictions that the Government defines—deserves *no* First Amendment protection.[21]

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[21] The analysis does not change if the category of speech covered by Section 48 is defined to include the "serious . . . value" exception—*i.e.,* depictions of the killing and wounding of animals that is currently illegal somewhere *and is not of "serious . . . value." First,* this Court has plainly rejected that a work has to have "serious . . . value"—or *any* value—in order to gain First Amendment protection. *See Winters v. New York,* 333 U.S. 507, 667, 669 (1948) ("Although we can see nothing of any possible value to society in these magazines," "they are as much entitled to the protection of free speech as the best of literature."). *Second,* as demonstrated above, the "serious . . . value" exception does not limit Section 48's reach to just "acts of extreme animal cruelty" and particularly does not exclude indisputably protected speech like hunting media.

Even adopting the Government's test for whether a category of speech is exempt from First Amendment protection—namely, whether the speech's "First Amendment value is clearly outweighed by its social costs"—the category of speech covered by Section 48 is not exempt. *Id.* at 12. Hunting media, which makes up a substantial portion of the speech covered by Section 48, is viewed by millions of Americans who learn from the media and enjoy its content. The Government does not attempt to identify any negative "social costs" with hunting media. And presumably it would not claim—as it has with respect to those who participate in and view acts of animal cruelty—that the millions of Americans who hunt and enjoy hunting-related media are sociopaths whose anti-social behavior is exacerbated by hunting-related media. *See, e.g., id.* at 36.

Once the Government's false premise is removed, it is plain that the category of speech covered by Section 48—including media depicting legal (and often government-promoted) hunting—is not analogous to the speech that the Court has identified as so useless and socially harmful as to deserve no First Amendment protection, including (i) fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); (ii) speech inciting imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); (iii) "true threat[s]," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (internal quotation marks omitted); (iv) defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); (v) obscenity, *Miller v. California*, 413 U.S. 15, 19 (1973); (vi) offers to engage in illegal activity, *Pittsburgh Press Co. v. Pittsburgh Commission on*

Human Relations, 413 U.S. 376 (1973); *see also United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008); and (vii) child pornography, *New York v. Ferber*, 458 U.S. 747, 754-64 (1982). Indeed, the speech covered by Section 48 is not even comparable to certain categories of speech that are generally condemned by society but which *are not exempt* from First Amendment protection, including (i) "sacrilegious" speech, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); (ii) speech that "strike[s] at prejudices," *Terminello v. Chicago*, 337 U.S. 1, 4 (1949), and (iii) "offensive" or profane speech, *Cohen v. California*, 403 U.S. 15, 22 (1971).

To be sure, there are a minority of people in this country who find hunting—as well as the eating of meats, medical testing, and the every day use of animal products such as leather—offensive. These people are likely to find any depiction of the killing or wounding of an animal offensive as well. But "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Section 48 is not immune from First Amendment scrutiny.

C. Section 48 Fails Strict Scrutiny

Section 48 regulates speech based on its content—namely, depicting the killing or wounding of animals. Because Section 48 is a content-based (if not viewpoint based) regulation, it is subject to strict scrutiny. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) ("Since § 505 is a content-based speech restriction, it can stand only

if it satisfies strict scrutiny."). Thus, in order to survive, Section 48 must be "narrowly tailored to promote a compelling Government interest," and "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*[22]

The legislative history suggests that, in enacting Section 48, the Government had one interest: to eliminate "crush videos." In order to defend the statute, the Government now claims that Section 48 promotes three broader interests: "preventing animal cruelty," Brief of the United States at 30; "preventing the harms to humans that often attend and flow from acts of animal cruelty," *id.* at 32; and "preventing the erosion of public morality that attends acts" of animal cruelty, *id.* at 34. Even assuming that any and all of these interests are "compelling," Section 48 is not narrowly tailored to achieve these interests and the Government could achieve these interests by less restrictive means.

The fundamental problem with Section 48 is that it is overinclusive—*i.e.,* it restricts more speech than is necessary to achieve its purported aims of eliminating animal cruelty and the implications of animal cruelty. Congress could have drafted a statute that more precisely aimed at its objectives.

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[22] The Government argues that the Third Circuit should not have considered the statute on its face under a strict scrutiny analysis, but instead should have conducted an overbreadth analysis. *See, e.g.*, Brief of the United States at 38. This question, however, has no practical effect here because Section 48 is so overbroad that it is unconstitutional under either a strict scrutiny or an overbreadth analysis.

For example, Congress could have defined and criminalized "crush videos." Alternatively, to the extent that it was bent on defining "animal cruelty" by reference to other laws, Congress could have referenced only *animal cruelty laws*.

Congress also could have made clear that a depiction of conduct that is legal *where it takes place* or *when it occurs* will not be criminalized. Finally, Congress could have taken care to exclude protected speech like hunting media from the statute's reach, instead of drafting an exception that invites viewpoint discrimination and complicates the First Amendment problems.

Congress, however, did none of these things. Instead, it drafted an overbroad statute that reaches far beyond the objective stated in the legislative history and even the objectives that the Government *post hoc* assigns to the statute. Therefore, the statute is not narrowly tailored to achieve—and does not use the least restrictive means to achieve—the Government's purported objectives. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 112 (1991) (finding a law affecting speech not "narrowly tailored" because it was "overinclusive"); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (finding law requiring teachers to list organizations to which they belonged did not use least restrictive means because the "sweep of the statute" went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers").

D. Section 48 Is Substantially Overbroad

For similar reasons, Section 48 is substantially overbroad on its face. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Specifically, the "overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of speech is prohibited or chilled in the process." *Id.* at 255. Here, Section 48 prohibits and chills a substantial amount of protected expression—namely, hunting media—and therefore is unconstitutional.

The overbreadth inquiry asks whether a substantial amount of protected speech is covered by the statute "in the absolute sense," and as compared to the "plainly legitimate sweep of that statute." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). Under both tests, Section 48 fails. *First*, as an absolute matter, the statute sweeps in a volume of hunting media that, although hard to quantify with precision, is under any definition "substantial." As described above, Section 48 criminalizes innumerable titles and types of hunting media ranging from DVDs to magazines to internet content.

The specific examples of hunting media described above that are both protected by the First Amendment and brought within the statute are not "fanciful hypotheticals." *Id.* at 1843. They are real: the tens of thousands of pieces of media showing legal hunting are, when sold into the District of

Columbia, within Section 48's reach; the dozens of black bear hunting videos and DVDs available on Amazon.com are, when sold into Florida, Louisiana, and Texas, within Section 48's reach; and the websites that contain links to dove hunting videos to attract customers are within Section 48's reach in at least Iowa, Michigan, Vermont, New Hampshire, Maine, New York, Massachusetts, Connecticut, and New Jersey. *See supra* at 22-23 (describing these examples). The list could go on, but there is no need to belabor the point.

Second, the statute is substantially overbroad considering the statute's "plainly legitimate sweep." Assuming *arguendo* that all of the "depiction[s] of animal cruelty" identified by the Government are within the statute's legitimate sweep, the market for such depictions cannot possibly approach the market for hunting media, which is not within the statute's legitimate sweep. The imbalance is overwhelming.

The briefs of the Government and its *amici* provide the following information about the market for the depictions of animal cruelty identified by the Government: (i) approximately 2,000 to 3,000 crush video titles existed at the time of Section 48's passage in 1999, Brief of *Amicus Curiae* The Humane Society at 4; Brief of *Amicus Curiae* Animal Legal Defense Fund at 27; (ii) nearly $1 million worth of crush videos are sold per year, Brief of the United States at 43-44; Brief of *Amicus Curiae* The Humane Society at 4; and (iii) in this case, Mr. Stevens generated over $20,000 from the sale of his videos in two-and-one-half years, Brief of the United States at 46. By contrast, this brief shows that: (i) there are probably tens of thousands of hunting

video titles that range in price from approximately $10 to $40 a piece; (ii) dozens of hunting shows on networks with millions of viewers like the Outdoor Channel and ESPN2; (iii) the top 20 hunting-related magazines by circulation alone have a collective circulation of over 10 million, and collectively retail for over $135 million annually; and (iv) there are numerous websites that contain photographs and videos of hunting. *See supra* at 10-13. Even if generous assumptions are made about the market for the depictions of animal cruelty identified by the Government, the comparison is not close.

Because the statute is so overbroad—reaching well beyond the Government's stated purposes—it must be struck down as a whole on its face. *See Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (striking down as facially overbroad a regulation that did "not merely regulate expressive activity . . . that might create problems," but also covered a range of protected speech). The "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" is too high to allow First Amendment rights to be worked out on a case-by-case basis through as-applied challenges. *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963); *see also Board of Airport Commissioners*, 482 U.S. at 575-76 ("[I]t is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable").

This is particularly true given the severe criminal penalties imposed by Section 48—including a substantial fine and a maximum of five years in prison. As the Court explained in *Free Speech Coalition* in reference to criminal penalties of protected speech: "While even minor punishments can chill protected speech, this case provides a textbook example of why we permit facial challenges to statutes that burden expression." 535 U.S. at 244. This case, too, is a textbook example of a statute that imposes severe criminal penalties on a wide array of protected speech, and therefore cannot be left on the books.

In the final analysis, it is important to take a step back and measure what is at stake. On one hand, there is a statute (18 U.S.C. § 48) that has been used in all of *three* prosecutions in the ten years that it has been in effect. *See* Brief of Respondent in Opp. to Pet. for Cert. at 12. Moreover, the Government states that crush videos—the prime evil at which the statute is aimed—are obscene, and therefore they already can be prosecuted under obscenity law. Brief of the United States at 42-43. On the other hand, there is an entire market of protected speech that the statute criminalizes and chills, which is much larger than the market of speech that the Government claims Section 48 is needed to prohibit. The statue violates the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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