No. 08-769

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

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

BRIEF OF THE DKT LIBERTY PROJECT, THE AMERICAN CIVIL LIBERTIES UNION, AND THE CENTER FOR DEMOCRACY AND TECHNOLOGY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. DKT Liberty Project has a strong interest in this case based on its commitment to protecting citizens from government overreaching and defending their constitutional rights.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended free speech for almost 90 years, and has appeared before this Court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*.

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[1] The parties have consented to the submission of this brief. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

The Center for Democracy & Technology ("CDT") is a nonprofit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free speech cases.

SUMMARY OF ARGUMENT

Section 48 violates the First Amendment on its face. It criminalizes protected expression based on its content, and therefore triggers—and fails—strict scrutiny. Section 48's subjective and vague terms threaten to chill a wide range of protected speech with the threat of prosecution and criminal penalties. Particularly troubling is the fact that the statute makes it a crime to possess or publish portrayals of conduct that is entirely lawful in other states or nations, as well as speech that was made decades ago. Thus, images of bullfighting in Spain, historical footage of cockfighting in Louisiana, and documentaries about clubbing seals in Canada, all could be prosecuted under the statute. We agree with Respondent and other supporting *amici* that the statute impermissibly criminalizes a vast array of protected expression, targets speech based on its viewpoint, and cannot withstand strict scrutiny.

We write to address in particular two arguments made by the government that contravene this Court's First Amendment decisions and would, if accepted, significantly impair the central First

Amendment right to engage in free expression without fear of criminal or other penalties.

First, the Court should reject the government's novel and limitless argument that the question whether speech is entitled to First Amendment protection *at all* should be answered based on a "categorical balancing of the value of the speech against its societal costs." Gov't Br. at 8. The idea that the government may restrict speech based on an assessment of its "value" is antithetical to this Court's longstanding recognition that speech of all kinds—including offensive, controversial, and divisive speech—is protected by the First Amendment, subject to a few very limited exceptions that do not apply here. The government's suggested balancing test is contrary to decades of this Court's First Amendment precedents and is premised on rationales—specifically, a generalized concern about "morality" and a particularized concern about the potential impact of speech on its hypothetical audience—that do not justify the suppression of speech under this Court's well-established jurisprudence. The Court should reject the invitation to start down a path that would allow the government to target certain kinds of speech for disfavored treatment, and leave people uncertain about whether their speech is protected or not.

Second, the government is wrong when it suggests that the constitutionality of Section 48 should be resolved on a case-by-case basis, instead of through facial invalidation of the statute. In essence, the government asks the Court to reverse

the strong presumption that content-based speech restrictions like Section 48 are unconstitutional unless the government carries the burden of satisfying strict scrutiny. The government's suggestion that even if Section 48 fails strict scrutiny, it nonetheless should remain on the books and continue to be applied through a process of case-by-case adjudication would effectively reverse this presumption and force defendants to prove that their speech is protected. Unlike the government, this Court's precedents have consistently recognized that facial invalidation is not only proper, but necessary where, as here, a content-based law does not survive the strict scrutiny that the First Amendment commands.

ARGUMENT

I. The Balancing Test Advocated By The Government Is Contrary To This Court's First Amendment Precedents And Would Have An Impermissible Chilling Effect On Free Expression.

A. The Government's Position Contravenes This Court's Modern First Amendment Jurisprudence.

The government urges the Court to do something it has not done in more than a quarter-century: declare that an entire category of speech falls completely outside the protection of the First Amendment. In making this argument, the government begins not with the Court's well-established jurisprudence holding that content-based

restrictions on speech are presumptively invalid and subject to strict scrutiny, but rather with the astonishing proposition that entire categories of speech can be wholly removed from First Amendment protection through a simple balancing test—merely by weighing the "value of the speech against its societal costs." Gov't Br. at 8. The government essentially claims the authority to designate, on an ad hoc basis, speech that is outside the protection of the First Amendment, so long as the government appends an "exceptions clause" for speech that has "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.*

This is not, and has never been, the test employed by this Court. Indeed, if speech could be removed from First Amendment protection based on such a balancing test, many of the Court's most notable First Amendment cases might have been decided the other way. People disagree over the value of saying "Fuck the Draft," *see Cohen v. California*, 403 U.S. 15 (1971), providing sexually explicit programming, *see United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000), publishing a cartoon showing policemen raping the Statue of Liberty, *see Papish v. Board of Curators*, 410 U.S. 667 (1973), or advertising tobacco products within 1,000 feet of a school, *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Yet in each of these cases, the Court squarely held that the First Amendment applied to the speech at issue and overturned the government's attempts to regulate the speech.

Contrary to the government's suggestion, this Court has repeatedly emphasized that the First Amendment's protection extends even to speech that may not be considered to have "serious value." In reaching this conclusion, the Court has stressed that it "cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important." *Playboy*, 529 U.S. at 826. Indeed, "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *Id.*[2]

Although the Court historically has held that there are some categories of speech that the government may lawfully prohibit—*e.g.,* obscenity, child pornography, defamation, and fighting words—it has emphasized that these categories are "well-

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[2] The Court has long held that the First Amendment shields not only political speech, but also speech meant to entertain. *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968) ("Motion pictures are, of course, protected by the First Amendment."); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Only if we were to conclude that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression—could we possibly find no prior restraint here."); *Winters v. New York,* 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

defined and narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring). Moreover, the Court's "decisions since the 1960's have narrowed the scope of the traditional categorical exceptions" for defamation and obscenity, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), and there is only a "vanishingly small category of speech that can be prohibited because of its feared consequences," *Morse v. Frederick*, 127 S. Ct. 2618, 2646 (2007) (Stevens, J., dissenting). As Justice Kennedy has recognized, when "a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm . . . . [n]o further inquiry is necessary to reject the State's argument that the statute should be upheld." *Simon & Schuster, Inc.,* 502 U.S. at 124 (Kennedy, J., concurring).

The Court has repeatedly rejected invitations like the one issued by the government here to broaden the categories of speech unprotected by the First Amendment. *See, e.g., Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 246 (2002) (declining to recognize virtual child pornography "as an additional category of unprotected speech"); *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("The Government . . . invites us to reconsider our rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or 'fighting words,' does

not enjoy the full protection of the First Amendment . . . . This we decline to do."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (declining to find that an "outrageous" political cartoon was the "sort of expression . . . governed by any exception to the general First Amendment principles"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (rejecting prior precedent that commercial speech was entirely beyond the protections of the First Amendment); *see also Lorillard Tobacco Co.*, 533 U.S. at 589 (Kennedy, J., concurring) ("In effect, [the Respondents] seek a 'vice' exception to the First Amendment. No such exception exists.").

The Court's "hesitancy" to "mark off new categories of speech for diminished constitutional protection" reflects appropriate "skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 804-05 (1996) (Kennedy, J., concurring in part and dissenting in part). For that reason, the trend has been to limit rather than expand the categories of speech that are placed beyond the reach of the First Amendment. Indeed, the Court has recently stated that if "speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Free Speech Coalition*, 535 U.S. at 251.

The government's reliance on *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), is therefore inapt, and ignores nearly all of the Court's modern decisions affirming the First Amendment's strong protection for a wide variety of expression. *Chaplinsky* was decided decades before the development of most of the Court's free speech jurisprudence, including establishment of the principle that content-based restrictions on speech are presumptively unconstitutional and must survive strict scrutiny. And *Chaplinsky*'s statement about the societal cost of so-called fighting words outweighing their expressive value must be taken in context: as the Court in *Chaplinsky* recognized, fighting words "by their very utterance inflict injury," and therefore may be lawfully regulated. *Id.* at 572. "In other words, the exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication." *R.A.V.*, 505 U.S. at 386. That rationale does not apply here, and the Court should reject the government's request to extend *Chaplinsky*.

B. The Government's Asserted Interests Are Not Compelling And Provide No Principled Stopping Point.

None of the government's proffered interests justifies creating a new exception to the First Amendment. To the contrary, acceptance of the government's proposed balancing test would open the

door for the government to regulate a broad range of expression based on interests that the Court has long held are constitutionally insufficient to justify the suppression of speech. Under the government's approach, the government would have virtually unfettered discretion to regulate, and criminalize, any speech it—or a local jury—determines is without serious social value.

The government first asserts an interest in preventing cruelty to animals, where such cruelty is made illegal by state or federal law. Gov't Br. 24-32. But the Court has long held that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001); *see also Free Speech Coalition*, 535 U.S. at 253 ("[T]o protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."). Although the government may regulate acts of animal cruelty, it may not outlaw their depiction.[3]

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[3] For the reasons stated in Respondent's brief and articulated by the court below, the speech at issue cannot be removed from First Amendment protection based upon the rationales for regulating child pornography set forth by this Court in *New York v. Ferber*, 458 U.S. 747 (1982). As Respondent notes, "[u]nlike child pornography, the 'creation of the speech is [not] itself the crime of [animal] abuse.'" Resp. Br. at 45 (quoting *Free Speech Coalition*, 535 U.S. at 254; alterations in original). And while child pornography's "continued existence causes the child victims continuing harm by haunting the children in years to come," *Osborne v. Ohio*, 495 U.S. 103, 111 (1990), there is no such "continuing harm" to animals from depictions of their abuse. Further, there is no evidence in the record to support

Under the rationale it espouses in this case, the government would have the ability to regulate the depiction of virtually any unlawful conduct, a proposition that sweeps too far.

Even more tenuous, and impermissible, is the government's claimed interest in "preventing the harms to humans that often attend and follow from acts of animal cruelty." Gov't Br. 32. This Court has soundly rejected the argument that the government may ban speech based on this sort of attenuated association between expression and undesirable thoughts or behavior. "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Free Speech Coalition*, 535 U.S. at 253. "The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Id.* (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)). Instead, the Court has held that the harm-prevention rationale justifies suppression of speech only where the speech is intended and likely to cause imminent unlawful action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also Free Speech Coalition*, 535 U.S. at 253. If the Court validates the government's claimed interest as constitutionally sufficient to suppress speech covered by Section 48, the government could assert that interest to regulate a broad range of speech, claiming, for example, that harm to humans follows from listening to certain

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the government's "drying-up-the-market" theory, and in any event the market-deterrence rationale has been called into question by this Court as a justification for prohibiting speech. *See Free Speech Coalition*, 535 U.S. at 250-51.

music, or watching certain kinds of movies, or viewing certain kinds of sporting events.

The government's claimed interest in "preventing the erosion of public morality," Gov't Br. 34, is likewise insufficient to justify the suppression of speech. To the extent that the government is arguing that it may ban certain depictions because the underlying acts "debase[] the persons who engage in them," Gov't Br. 34, that is simply another way of saying that the government has the authority to suppress speech in order to target conduct, a proposition that this Court has soundly rejected. *See supra* at 11. And to the extent the government claims that it may suppress expressive works because they "coarsen the broader society," Gov't Br. 34, that argument flies in the face of the well-settled principle "that speech may not be prohibited because it concerns subjects offending our sensibilities," *Free Speech Coalition*, 535 U.S. at 245; *see also FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977); *cf. Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality) (invalidating restriction designed to protect against the "emotive impact" of speech).[4]

[4] Moreover, the notion that preserving a generalized view of morality provides a legitimate governmental interest for restricting constitutional rights has been called into serious doubt. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003). And even if promoting morality were a legitimate interest for generally applicable regulations targeted at conduct, it would

Thus, none of the government's asserted interests is sufficient to justify the wholesale removal of a category of speech from First Amendment protection.

C. The Exceptions Clause Does Not Save The Statute.

The government's argument that Section 48's exceptions clause saves the statute because it is akin to the obscenity doctrine, *see* Gov't Br. at 37, is unavailing. To begin with, obscenity is strictly limited to depictions of sexual conduct, which are not at issue here. *See Miller v. California*, 413 U.S. 15, 24 (1973) (limiting obscenity to "works which depict or describe sexual conduct"). Moreover, obscenity regulations have a deeply rooted history dating back to the Nation's founding. *See, e.g., Roth v. United States*, 354 U.S. 476, 483 (1957) ("At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 104-05 (1973) (Brennan, J., dissenting) (recounting history of obscenity laws). Regulations of depictions of animal cruelty do not have a comparable historical pedigree and cannot be justified by similar historical reasons. *Cf. Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring) (describing the obscenity and fighting-words

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not justify regulations targeted directly at speech or targeted at conduct because of its expressive attributes. *See City of Erie v. Pap's A.M.* 529 U.S. 277, 309-10 (2000) (Scalia, J., concurring in the judgment).

exceptions as "historic and traditional categories long familiar to the bar").

The government's argument that Section 48 should be upheld as an "expanded version" of the obscenity test, Gov't Br. at 37, fails for the additional reason that the exceptions clause is not cabined by the critical limitations that this Court has insisted must apply in the obscenity context. Section 48's "serious value" exceptions clause contains only one prong of the three-prong test for obscenity, and this Court has emphasized that all three prongs must be met before speech can lawfully be prohibited. *See Reno v. ACLU*, 521 U.S. 844, 872-73 (1997). Clearly, the government cannot meet the other two prongs of the obscenity test here and outlaw this speech as obscene.

Overall, far from saving the statute, the "exceptions clause" actually compounds the statute's problems because it leaves it to prosecutors and juries to decide the value of speech. *Cf. Hill v. Colorado*, 530 U.S. 703, 773 (2000) (Kennedy, J., dissenting) ("The criminal statute is subject to manipulation by police, prosecutors, and juries. Its substantial imprecisions will chill speech, so the statute violates the First Amendment."). The breadth and vagueness of Section 48 will make it impossible for people to know whether their speech will be considered criminal, and will leave the fate of speakers up to the subjective judgments of specific prosecutors and juries. Moreover, given the vagaries of state law, it is impossible to predict what speech may run afoul of any particular state's law—and

thus be subject to prosecution under Section 48.[5] Indeed, Section 48 criminalizes speech that is lawful where made. Thus depictions of bullfighting made in Spain or cockfighting made in the Philippines—or even historical footage of cockfighting in Louisiana—would nonetheless subject an individual to criminal prosecution if such depictions are commercially distributed in states where that conduct is illegal. Given these uncertainties, the statute's potential applications are broad and chilling.

Thus, the starting point is not, as the government advocates, to decide whether the speech is covered by the First Amendment. These are clearly communicative materials and "[t]he First Amendment presumptively protects communicative materials." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 79 (1989) (O'Connor, J., concurring in part and dissenting in part); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."). The starting point is instead to presume that this

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[5] State laws vary greatly in the types of conduct they criminalize as well as the types of animals they protect. *Compare, e.g.,* Idaho Code Ann. § 25-3502 and Utah Code 1953 § 76-9-301 (criminalizing cruelty only to vertebrates) with Vt. Stat. Ann. tit. 13, § 351 (prohibiting cruelty to "all living sentient creatures, not human beings") and N.J. Stat. Ann. § 4:22-17 (criminalizing cruelty to any "living animal or creature").

content-based restriction on speech is invalid and subject to strict scrutiny.

II. A Content-Based Restriction Like Section 48 That Fails Strict Scrutiny Is Facially Invalid And Should Not Be Subject to Case-By-Case Adjudication.

A. Content-Based Statutes That Fail Strict Scrutiny Are Facially Invalid.

The government concedes that Section 48 on its face criminalizes speech on the basis of its content. Gov't Br. at 12; *accord* H.R. Rep. No. 106-397, at 4-5 (1999) (acknowledging that the statute is a "content-based restriction"). The government nevertheless asks the Court to depart from its usual practice and evaluate the constitutionality of Section 48 through a series of "as applied" challenges instead of subjecting the text of the statute to strict scrutiny. The Court should reject that novel approach.

The government's approach is contrary to this Court's well-settled test for content-based restrictions on speech. The government's claim that the burden should be placed on the defendant to "demonstrate substantial overbreadth," *see* Gov't Br. at 41, contravenes this Court's longstanding rule that "[w]hen the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. Content-based regulations are presumptively invalid, and the Government bears

the burden to rebut that presumption." *Playboy*, 529 U.S. at 817 (quotation marks and citation omitted). When confronted with such content-based restrictions, this Court has consistently held the statute facially invalid unless the government can meet the rigorous requirements of strict scrutiny. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *Playboy*, 529 U.S. at 817; *R.A.V.*, 505 U.S. at 395; *Simon & Schuster*, 502 U.S. at 123; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Boos*, 485 U.S. at 334. By attempting to reclassify this case as an "overbreadth" challenge, the government essentially asks the Court to reverse the burden of proof and relieve the government of its obligation to show that Section 48 is in fact narrowly tailored to serve a compelling interest.

There was nothing "extraordinary" about the lower court's application of strict scrutiny in this case. Gov't Br. at 38. When content discrimination is apparent on the face of the statute, this Court has consistently applied strict scrutiny based on the statutory terms themselves, not based on the particular speech each individual challenger seeks to engage in. *See Republican Party of Minn.*, 536 U.S. at 774-82 (applying strict scrutiny to text of judicial canon of conduct without analyzing whether plaintiff's particular speech compromised the impartiality of the judiciary); *Boos*, 485 U.S. at 321-29 (applying strict scrutiny to statutory terms without analyzing whether particular signs held by picketers threatened international relations); *Simon & Schuster*, 502 U.S. at 118-23 (applying strict

scrutiny to statute without analyzing the literary value of the book plaintiff sought to publish).[6]

The proper method of evaluating facially content-based restrictions on speech is well-settled. The government bears the burden of showing that the statute is narrowly tailored and serves a compelling interest. If the government cannot meet that burden, the facially content-based statute is facially invalid. Under a straightforward application of these well-settled principles, Section 48 is facially unconstitutional.

B. Relegating Speakers To A Series Of As-Applied Challenges Would Unconstitutionally Burden First Amendment Rights.

The government proposes that, even if Section 48's content-based prohibition on speech fails

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[6] Indeed, the structure of the strict scrutiny test itself often requires courts to examine the facial validity of a statute. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000) ("[C]ourts employ doctrinal tests of constitutional validity, such as 'purpose' tests, 'suspect-content' tests inquiring whether a regulation is closely tailored to a compelling governmental interest, and so forth. And in applying such tests to resolve particular claims, courts often engage in reasoning indicating that a statute is invalid in whole or in part, and not merely as applied." (footnote omitted)); *cf.* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 430-31 (1998) ("The fact that a potential constitutional defect inhering in the statutory terms ordinarily triggers equal protection review structures most equal protection adjudication in the facial challenge mode.").

strict scrutiny, the statute should be left intact, and individual speakers should be forced to vindicate their First Amendment rights through seriatim as-applied challenges. But this Court has made clear that speakers "cannot be made to wait for years before being able to speak with a measure of security," *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 793-94 (1988), and "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others," *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965). Leaving in place a statute that discriminates based on content and fails strict scrutiny would create "a potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004).[7]

Content-based restrictions are subject to strict scrutiny precisely to avoid the need for such case-by-case adjudication. Because content-based restrictions on speech "pose the inherent risk" of suppression of ideas, the litigant challenging the

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[7] Case-by-case adjudication may not raise similar constitutional concerns in the context of a "content-neutral law of general applicability," *see Bartnicki*, 532 U.S. at 526, or a statute aimed at material outside the protection of the First Amendment, *see United States v. Williams*, 128 S. Ct. 1830, 1836, 1844 (2008); *Ferber*, 458 U.S. at 773-74. But, as discussed *infra*, when a statute prohibits fully protected speech on the basis of content, case-by-case adjudication would place an impermissible chill on potential speakers and give rise to arbitrary enforcement and unconstitutional viewpoint discrimination.

statute does not need to prove that the government is seeking to suppress unpopular viewpoints in any particular case. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *see Simon & Schuster*, 502 U.S. at 117. "The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill*, 530 U.S. at 743-44 (Scalia, J., dissenting) (quotation marks omitted). As with statutes that place unbridled discretion in the hands of a licensor, when a statute restricts speech on the basis of content, it will be difficult, if not impossible, "to determine in any particular case whether the [government] is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 758 (1988). Unless justified under strict scrutiny, content-based restrictions will necessarily be facially invalid because "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984) (footnote omitted).

The government blithely asserts that any First Amendment rights restricted by Section 48 can be vindicated during trial. But this Court has made clear that the risk of prosecution is itself an unconstitutional burden on First Amendment rights. Each case-by-case adjudication forces the speaker to "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Riley*, 487 U.S. at 794. "Many persons, rather than

undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citations omitted). Where, as here, a statute takes the extraordinary step of attaching criminal penalties to speech, the chilling effect created by a content-based restriction is particularly intolerable. *See Reno*, 521 U.S. at 872 ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.").

The government's *amici* suggest that the breadth of the statute can be cabined by the judicious use of prosecutorial discretion. *See* Br. of Ctr. on the Admin. of Crim. Law at 20-21. But this Court has repeatedly rejected the suggestion that prosecutorial discretion can serve as a substitute for the Court's protection of First Amendment rights. *See Baggett v. Bullitt*, 377 U.S. 360, 373 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case.").

Far from curing the constitutional flaws inherent in Section 48, the possibility that prosecutors will not evenhandedly enforce the statutory terms only adds

to the statute's constitutional problems. The government may not privilege some speakers over others "through the combined operation of a general speech restriction and its exemptions." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *see City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987) (invalidating ordnance where the "plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested") (internal citation omitted).

Although Section 48 on its face covers a wide array of material, neither the government nor its *amici* describe what standards a prosecutor would follow in distinguishing between various depictions of animal cruelty covered by the statute. The only thing to distinguish a "hard-core violator" of the statute from other violators is the subjective opinions of prosecutors and local juries. *See Smith v. Goguen*, 415 U.S. 566, 578 (1974). When First Amendment rights are at stake, such "personal predilections" are not a valid basis for discriminating among different speakers. *Id.* at 575. Just as the First Amendment does not permit prosecutors and juries to distinguish between a person who burns the American flag in protest and one who burns the American flag as part of a respectful burial ceremony, *see id.* at 575-76; *Eichman*, 496 U.S. at 315-16, the First Amendment similarly does not allow prosecutors and juries to distinguish between a person who distributes videos in order to protest against testing cosmetics on animals and a person who distributes the same images to encourage such activities. *Cf.* H.R. Rep.

No. 106-397, at 8 (stating that Section 48 would not cover "information packets sent by animal rights organizations to community and political leaders urging them to act to combat the problem of cruelty to animals").[8]

The courts should not enable the government to suppress speech indirectly by using the threat of prosecution and case-by-case adjudication to chill speech that it lacks the power to prohibit outright. Because the government cannot show that its content-based restriction is justified under strict scrutiny, the First Amendment requires that the statute be held facially invalid.

C. Section 48 Cannot Be Rewritten As An Obscenity Statute.

In an attempt to save the statute, the government suggests that the Court should construe Section 48 as an obscenity statute limited to "crush videos." Gov't Br. at 42. That request should be rejected, for three central reasons.

First, the government does not attempt to explain why, if Section 48 covers only proscribable obscenity, the statute is needed in the first place—if the government is correct, it may achieve its regulatory goals through the existing obscenity laws. And even

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[8] The risk of arbitrary enforcement and unconstitutional viewpoint discrimination is not similarly implicated when a statute is structured as a content-neutral law of general applicability or is targeted at material that is outside the protection of the First Amendment. *See supra* note 7.

if the government were permitted to regulate "crush videos" under an obscenity theory, Section 48 would still fail because it does not reflect the critical limitations embodied by the *Miller* obscenity standards. *See supra* Part I.C. Second, Section 48 simply is not amenable to the kind of limiting construction urged by the government. *Reno*, 521 U.S. at 884-85 (holding that where narrowing construction is not readily feasible, this Court "will not rewrite a . . . law to conform it to constitutional requirements") (quotation marks omitted; alteration in original). And third, it is doubtful—even if Section 48 were redrafted as an obscenity statute—that the government could selectively regulate obscenity that "encourage[s] a lack of respect" for animals, *see* H.R. Rep. No. 106-397, at 4, without violating the First Amendment. *See R.A.V.*, 505 U.S. at 386-88 ("[T]he power to proscribe [speech] on the basis of *one* content element (*e.g.,* obscenity) does not entail the power to proscribe it on the basis of *other* content elements. . . . A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.,* that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.").

Section 48 should be invalidated on its face, not creatively rewritten by judicial opinion. When a content-based statute fails strict scrutiny, "[t]he appropriate remedy [is] not to repair the statute, it [is] to enjoin the speech restriction." *Playboy*, 529 U.S. at 823.

CONCLUSION

For the reasons stated above, *amici* urge this Court to affirm the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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