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 FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS

Amicus Curiae First Amendment Lawyers Association ("FALA") is a nonprofit corporation with some 187 members throughout the United States and Canada.[1] Its membership predominately consists of attorneys whose practice emphasizes the defense of First Amendment rights. FALA members have litigated those rights in a wide spectrum of cases involving free expression, free association, and privacy issues.

Members of FALA frequently litigate cases before this Court, and as in this case, are often enlisted to represent parties before this Court after certiorari is granted. The cases briefed and argued by FALA members include such landmark decisions as *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Of particular relevance to the issues before the Court in this case, FALA members have briefed and argued virtually every major case in the realms of obscenity and adult entertainment, including, in chronological order:

Roth v. United States, 354 U.S. 476 (1957)

Smith v. California, 361 U.S. 147 (1959)

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[1] Pursuant to Supreme Court Rule 37.6, no person or entity, other than the Amicus Curiae, its members, or its counsel, made any monetary contribution or otherwise participated in the preparation or submission of this brief. Both parties have consented to the filing of this brief: Respondent has filed a letter of blanket consent with the Court, and the government's letter of consent is filed herewith.

The First Amendment Lawyers Association naturally took note when this case raised the question of the facial constitutionality of 18 U.S.C. § 48, the first federal law for many decades to criminalize a new category of unprotected expression. Having followed the case closely, and with heightened interest when this Court granted certiorari, the FALA membership has been alarmed at the tenor of the arguments advanced by both the government and its amici. In its collective memory, the FALA membership recalls no case before this Court in which the government has taken such an aggressive position against the most well-established principles of First Amendment doctrine.

Although FALA does not anticipate that the Court would so fundamentally erode First Amendment protections as urged by the government and its amici in this case, the perspectives below are offered in light of FALA members' half-century of experience with the impact of First Amendment doctrine upon free expression.

SUMMARY OF ARGUMENT

The Third Circuit was correct in holding that the statute involved in this case, criminalizing certain depictions of animal cruelty, facially violates the First Amendment. Like any other content-based law, this statute is presumptively invalid, and it must be stricken as unconstitutional for three reasons. First,

it cannot survive strict scrutiny because criminalizing a broad category of depictions is not the least restrictive means of preventing cruelty to animals. Given the breadth of its potential applications, the statute is also substantially overbroad. Finally, the statute's "exception" for materials that have "serious value" is impermissibly vague and exacerbates, rather than curing, the statute's overbreadth.

The government attempts to analogize a subset of the materials targeted under this criminal statute to obscenity, suggesting that they are *a priori* of "low value" and that the statute should therefore be assessed under a "balancing" test rather than strict scrutiny. This Court and other federal courts have been clear, however, that such materials involving sadism and violence are not "obscene." Nor should this Court expand the concept of "obscenity," the only category of unprotected speech this Court has approved without requiring the government to demonstrate that it entails some serious harm. "Obscenity" is also the only context in which the Court has ever undertaken to calibrate First Amendment protection to the "value" of the expression, having announced long ago in *Winters v. New York*, 333 U.S. 507, 510 (1948), that even if materials have no "possible value to society," they are "as much entitled to the protection of free speech as the best of literature."

The problems that have attended the obscenity doctrine, both conceptually and on the ground, provide a cautionary tale. As several members of this Court have staunchly maintained over the years,

standards such as "serious value" are impermissibly vague, because they are unavoidably subjective. Criminal obscenity laws defined by these amorphous criteria have resulted in abusive prosecutions, unpredictable results, and censorship by chilling effect. This Court has been compelled to rescue mainstream Hollywood fare, the film "Carnal Knowledge," from an obscenity conviction; a major art museum has endured a criminal obscenity trial for exhibiting the work of Robert Mapplethorpe.

Here the statute's "exception" for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value" would give rise to the same sorts of problems, perhaps even more so than in obscenity cases. This "exception" is not properly construed as an element of the offense, but rather appears to place the burden on the defendant to establish "value," worsening the statute's chilling effect. As illustrated by the facts of this very case – the first such prosecution to proceed to trial – triers of fact will inevitably rely upon subjective evaluations of the "worth" of particular materials. Depending upon the ideological bent of the trier of fact, footage of bullfighting may lack "serious value" (as the government's expert witness opined in this case), or PETA activists may violate the statute when they obtain and disseminate depictions of animal cruelty in an attempt to oppose it.

Especially in light of the unconstitutional vagueness of the "serious value" defense, the potential reach of this statute is enormous, far beyond the materials the government describes as its targets. Even

if the Court finds a compelling governmental interest, this statute is facially invalid as a blunderbuss means of achieving its goal, and for its substantial overbreadth.

ARGUMENT

This case is important because it raises so many core First Amendment principles, and because the government and its amici assail those principles so boldly. It is critical that this Court uphold the essential doctrines of its First Amendment jurisprudence at stake in this case: the strict scrutiny of content-based laws, the narrowness of exceptions to the presumptive protection the First Amendment affords all expression, and the availability of facial overbreadth and vagueness challenges to laws that would otherwise chill free expression.

The Third Circuit concluded that this statute could not survive strict scrutiny; if that conclusion was correct, then further analysis of the statute's overbreadth was unnecessary. The First Amendment Lawyers Association agrees with the court below that the statute is facially unconstitutional, but would urge this Court to reach that conclusion on other grounds: that because the "exception" for "serious value" is unconstitutionally vague, it cannot save this statute from facial overbreadth.

Informed by its members' half-century of experience litigating the question of "obscenity," dating back

to *Roth v. United States*, 354 U.S. 476 (1957), FALA urges the Court to consider this case in light of the the doctrinal and practical problems that have attended the *Miller* test. This Court has been sharply divided over the constitutionality of criminalizing a broad, vaguely defined category of "obscene" speech. The present case raises many of these same problems, particularly as the statute would criminalize depictions based in part upon a prosecutor's or jury's subjective reaction that the expression lacks "serious value."

In short, the government's attempt to analogize this statute to criminal obscenity laws raises more hard questions than it answers. Creating a new categorical exception to the First Amendment for animal-cruelty depictions lacking "serious value" would magnify the problems inherent in attempts to define what is "obscene." This invitation to replicate and expand the constitutional flaws of the obscenity doctrine should be firmly rejected.

I. Any content-based law, such as this statute categorically criminalizing certain depictions of animal cruelty, must be subjected to strict scrutiny under the First Amendment.

This should not become the classic hard case that makes bad law. As described in the briefs of the government and its amici, many of the targeted materials are far more disturbing than any that has

ever come before this Court under the obscenity laws. Unfortunately, as well explicated in the Respondent's brief, this statute threatens a much broader spectrum of expression than the government contends.

FALA takes no position as to whether the government's interest is compelling. As discussed in the thoughtful brief of Amicus Group of Law Professors (in support of neither party), this question is one of first impression, and of great potential import in the burgeoning field of legal issues concerning animals. The question of a compelling governmental interest in this case is of little consequence, however, as this statute does not entail the least restrictive means to advance the government's purpose of eliminating the animal cruelty involved in "crush videos," the express purpose behind this legislation. For the same reasons, this statute is substantially overbroad, and unconstitutional regardless of any compelling interest.

Betraying its concern that this statute cannot survive strict scrutiny, the government rests its entire case upon the diminution of basic First Amendment principles. The government asks this Court to loosen the strictures of the First Amendment in two critical ways: by scuttling strict scrutiny for content-based laws in favor of a long-rejected "balancing" test, and by requiring that content-based laws must also be substantially overbroad to be facially invalid.

Tellingly, the briefs of the government and its amici are replete with invocations of outdated precedents long rejected by this Court in its modern First

Amendment jurisprudence. The government relies centrally upon *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a case this Court has subsequently limited to its central holding that "fighting words" are unprotected speech. Amicus Humane Society would return us to a regime in which virtually any type of speech could be criminalized if deemed contrary to public morals. The government and several of its amici would expand the "obscenity" doctrine to allow a nebulously conceived catch-all of "bad and worthless" speech to be criminalized.

FALA does not seriously anticipate that this Court would embrace any of these dangerous, retrograde notions.[2] But the tenor of these assaults on

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[2] Many of the positions advanced by the government's amici do not merit serious discussion – for example, the arguments that depictions of animal cruelty simply are not expression at all, and that virtually any type of offensive and "worthless" speech could be criminalized as "obscenity." Obviously, these propositions would swallow the First Amendment whole.

Nor need this Court be reminded that in its recent decisions disfavoring the facial invalidation of other types of statutes, it has emphatically noted First Amendment cases as an exception, *see Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (2008), contrary to the misuse of this case in support of the radical notion that First Amendment facial challenges should never succeed unless the law is invalid in every conceivable application. Br. of Amicus Center on the Administration of Criminal Law at 18-22. As this Court has made clear in countless decisions, the facial invalidation of unjustified content-based and substantially overbroad statutes is critical in the First Amendment realm to avoid a chilling effect upon protected expression.

established First Amendment principles is alarming, and in the collective memory of FALA's membership, unprecedented in any First Amendment case before this Court in modern times.

This case does presents a valuable opportunity for the Court to reflect upon its approach to the categorical criminalization of expression as a general matter. Laws criminalizing "fighting words" and "obscenity" have created dilemmas of definition and enforcement,[3] especially because, as discussed below, the protected or unprotected nature of the speech is always contextual, and especially in obscenity cases, laden with the subjective reactions of the trier of fact. These problems would plague enforcement of this statute as well, as the facts of this case well illustrate.

A. The court below correctly employed a strict scrutiny standard.

The government, and some of its amici, would conflate the strict scrutiny standard for content-based restrictions on speech with the facial overbreadth

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[3] Even in the area of child pornography, where the societal interest is unquestionably compelling and the unprotected nature of much of the targeted material is clear by objective standards, the laws criminalizing such material have raised difficult questions such as the ancillary burdens upon protected expression. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

doctrine. The government badly misapprehends First Amendment doctrine when it argues that the court below erred because it "placed the burden of proving the statute's facial constitutionality on the government, rather than requiring respondent to demonstrate substantial overbreadth." Pet. Br. at 41. The government apparently seriously contends that the courts can never invalidate a content-based law under the First Amendment unless the law is also substantially overbroad, asserting that the "court of appeals erred in striking down the statute without engaging in overbreadth analysis." *Id*. This notion finds no support in this Court's First Amendment jurisprudence.

The government also puts the cart before the horse when it argues (Pet. Br. at 39):

> "Assuming the materials covered by Section 48 do not fall within an unprotected category, any application of Section 48 – as a content-based regulation of expression – would have to satisfy a strict scrutiny standard. . . . But when a statute reaches both unprotected and arguably protected speech, and a challenger seeks to invalidate the law on its face[,] . . . the challenger bears the burden of establishing real and substantial overbreadth."

The government's reasoning is not entirely clear, as this half-hearted concession to strict scrutiny follows 28 pages of argument to the effect that the Court should assume the materials unprotected – the

antithesis of the bedrock assumption of First Amendment protection.

As this Court's modern First Amendment jurisprudence has uniformly made clear, of course, the threshold question is whether the government can justify the definition of the "unprotected category" by establishing a compelling interest in banning the expression. "Content-based regulations are presumptively invalid," as this Court reiterated in *R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377, 382 (1992); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). In countless of its First Amendment cases, this Court has held content-based laws unconstitutional, at times expressly noting that further inquiry into overbreadth is unnecessary. *See, e.g., R.A.V.,* 505 U.S. at 381.

The court below properly applied strict scrutiny and, given its conclusions regarding the lack of a compelling governmental interest, did not need to reach the question of facial overbreadth. Unless this Court determines that the statute can survive strict scrutiny, the question of overbreadth need not be considered, although it certainly plagues this statute, especially in light of the problematic "exception" for materials having "serious value," as discussed below.

B. Materials depicting animal cruelty are not "obscenity."

The government and its amici would also categorize some (or even all, in the troubling view of Amicus Humane Society) of the materials targeted by this law with "obscenity." The obscenity doctrine has been troubling enough, as discussed further below, without being made a catch-all for deeply disturbing material. Both Congress, and now the government in defense of the statute, have attempted to shoe-horn its subject matter into the obscenity realm. This tack actually weakens the government's argument, because it suggests that the "crush videos" expressly targeted by this legislation could be prosecuted under existing obscenity laws, thus undermining the necessity for this new, broad category of unprotected speech.

In any event, this attempt to expand the obscenity doctrine does not bear scrutiny, given this Court's clear limitation of the *Miller* doctrine to sexually-explicit expression. These animal cruelty materials involve violence and sadism, not sex. Conflating these materials with "obscenity" just muddies the waters.

This Court has long ago made clear that violent expression is not the equivalent of obscenity. *See Winters v. New York*, 333 U.S. 507 (1948); *see also Cohen v. California,* 403 U.S. 15, 20 (1971). More recently, the federal courts have roundly rejected this line of argument in the similar context of attempts to

proscribe violent video games. As the court correctly held in *Video Software Dealers v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992), "Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene. . . . Thus, videos depicting only violence do not fall within the legal definition of obscenity for either minors or adults."

C. Deeming speech "low value" should not substitute for meaningful strict scrutiny.

In place of the well-established presumption that content-based proscriptions are unconstitutional, the government would have this Court make an *a priori* assumption that this broad category of expression is "low value." The appropriate starting point under this Court's modern First Amendment decisions is, rather, whether the government has established a compelling justification for criminalizing a new, broad category of expression.

The only modern exception to a threshold inquiry into the harmfulness of the expression, so as to establish a compelling governmental interest, is the obscenity doctrine. In *Miller v. California*, 413 U.S. 49 (1973), and its companion cases, the Court anomalously abandoned the presumption that content-based restrictions are invalid. Emphasizing what it deemed the "low value" of sexually explicit expression, the Court did not apply strict scrutiny and required no compelling justification for the categorical prohibition

of "obscenity." In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973), over four dissents, the Court found sufficient "legitimate state interests" including "the interest of the public in the quality of life and the total community environment."[4]

As discussed further below with regard to the vagueness of "serious value," the question of "value" is unavoidably in the eye of the beholder. The First Amendment presumptively protects all expression, including a vast landscape of expression that some might consider "low value." Many would dismiss as "low value" speech the Sunday comics, or Jerry Lewis movies, or even political speech such as the ravings of extremist talk-radio hosts. Under the diluted standard the government espouses, the courts could "balance" the value of such materials with any legitimate interest the government might advance for censoring them – a notion this Court has rejected for the better part of a century.

This Court has long recognized the tension between the First Amendment and any governmental judgments regarding the "value" of certain forms of expression. At the dawn of modern First Amendment jurisprudence, in *Winters v. New York*, 333 U.S. at 510, the Court rejected the "suggestion that the

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[4] *Cf. Lawrence v. Texas*, 539 U.S. 558, 578 (2003), in which this Court adopted Justice Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to the effect that majoritarian views of morality do not even create a "legitimate" governmental interest.

constitutional protection for a free press applies only to the exposition of ideas. The line between . . . informing and . . . entertaining is too illusive for the protection of that basic right." The Court held unconstitutionally vague a law criminalizing as obscene "pictures or stories of deeds of bloodshed, lust or crime," observing that although the Justices saw "nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.*

In *Stanley v. Georgia*, 394 U.S. 557 (1969), which many saw as the harbinger of an overruling of *Roth*, this Court apparently rejected the notion that expression could be criminalized based in part upon estimations of its value, emphasizing that the "right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society." *Stanley*, 394 U.S. at 564.

Similarly, in *Cohen v. California,* 403 U.S. 15, 20 (1971), this Court held that mere words could not constitute a crime, unless some concrete and serious harm attended their utterance. The Court went on to observe that "one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

In all of these cases, this Court reaffirmed an essential premise of the First Amendment: that the government has no business making this judgment

regarding the "value" of speech, and censoring it, without a compelling interest, i.e., *without demonstrating that the speech causes some serious harm*. The Court abandoned that premise in *Miller* and *Paris Adult Theatre,* and the anomaly of the obscenity doctrine invites further incursions.

Here, the material the government describes as the only expression targeted under 18 U.S.C. § 48 may evoke revulsion, but the visceral impact of such speech should not alter the constitutional analysis. The government has made a strong case that it has a compelling interest in preventing cruelty to animals. As this case demonstrates, however, this statute is equally amenable to the conviction of serious documentary producers who oppose dogfighting. Given this demonstrated overbreadth, the government must be held to explain how this statute employs the least restrictive means to prevent animal cruelty. Notwithstanding any emotional appeal, this case need not, and should not, impel this Court to jettison the core First Amendment principle that laws criminalizing speech on the basis of its content must face strict scrutiny.

II. The statute does not employ the least restrictive means, and is unconstitutionally overbroad, because its "exception" for materials deemed to have "serious value" is too vague to safeguard a wide array of protected material.

This statute cannot survive strict scrutiny analysis, and it violates the First Amendment because its "serious value" exception is too vague[5] to save it from facial invalidation. As experience with the obscenity laws vividly illustrates, vague criteria such as "serious value" invite prosecutorial abuse and unpredictable, subjective decisions by triers of fact. Similar problems, with the attendant chilling effect upon protected expression, would unavoidably accompany the further enforcement of § 48 and the states' potential versions of this law if it were upheld.

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[5] Mr. Stevens unquestionably had standing to raise the facial vagueness of the "serious value" exception, regardless of its status as element or affirmative defense. A published author and documentary producer, he is a notable expert on the Pit Bull breed, and a prominent opponent of dogfighting. His video productions are all, including the materials for which he was prosecuted, intended to educate regarding the proper training of the Pit Bull as a working dog. None of these depictions glamorize or exploit the dogfighting scene for any sensationalistic appeal. *See* Resp. Br. 2-8. As the court below observed, "the facts of this case show just how far afield the statute's language drifted from the original emphasis in the Congressional Record on the elimination of crush videos." 533 F.3d at 224 n.5.

A. Neither the statutory language nor the legislative history supports an interpretation of this "exception" as an element of the offense.

The government maintains, as it must, that "lack of serious value" is an element of the offense that the prosecution must prove. Pet. Br. at 16, 41, 48. On its face, however, the statute does not incorporate the "exception" as an element, and the legislative history is expressly to the contrary. And, as the Third Circuit noted below: "Viewing the exceptions clause as an affirmative defense poses an even greater threat to chill constitutional speech than the interpretation of § 48 offered by the Government in this case." 533 F.3d at 231 n.13.

The court below was right to worry that the unfortunate statutory language, creating an "exception" for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," would likely be treated as an affirmative defense in future cases. The "exception" is enunciated in a separate subsection, 18 U.S.C. § 48(b), apart from the definition of the crime in 18 U.S.C. § 48(a), indicating that it is not an element of the offense. Given the statute's structure and language, judges and juries are likely to conclude that the defendant has the burden of establishing serious value. This burden-shifting has been evident in obscenity prosecutions, in which "serious value" is a de facto affirmative defense, despite statutory language tracking *Miller*, and making the lack of value

an explicit element of the offense. *See Paris Adult Theatre*, 413 U.S. at 56 and n.6, holding that the prosecution need not present affirmative evidence of obscenity.

In this very case, although the judge instructed that the government had to prove the lack of serious value, he also instructed the jury, over the defendant's objection, that "serious value" requires that the materials be "significant and of great import." J.A. 132-133. In light of the facts of this case, including the testimony of the defendant's experts regarding the value of these materials, that the jury convicted Mr. Stevens speaks volumes.

Even under a strained construction that this "exception" comprises an element of § 48, it cannot save the statute from facial invalidation. Given the vagueness and subjectivity inherent in evaluations of "serious value," this criterion cannot safeguard a much broader swath of protected speech than the ostensibly targeted genres of animal-fighting and "crush" videos. Indeed, its incurable vagueness and the consequent overbreadth of the statute is arguably the soundest basis on which to invalidate the law.

The government itself suggests that this language "is not a fail-safe mechanism." Pet. Br. at 48. Without a reliable filter to assure that this statute cannot be employed against depictions other than those the government assures us are its real targets, however, the statute is unquestionably overbroad.

B. The history of obscenity litigation highlights the potential abuses of a statute criminalizing expression on vague criteria such as "serious value."

As experience with the *Miller* standard demonstrates, an inquiry into material's "serious value" is fraught with subjectivity and thus vagueness. The vagueness of such criteria creates a regime of virtually unbridled prosecutorial discretion, and for the past 35 years, free expression has often been the loser, even when the federal courts have ultimately intervened to enjoin blatant attempts to censor protected expression.

From the dawn of the modern obscenity doctrine, this Court has been sharply divided regarding a categorical proscription of "obscenity," largely because of the intractable vagueness of the concept. Reportedly, in the "*Miller* Quintet" cases, the Court was prepared to repudiate *Roth* and abolish the doctrine of criminal obscenity. When Chief Justice Burger ultimately mustered a fifth vote to uphold the obscenity doctrine, the other four members of the Court dissented sharply, especially on vagueness grounds.

Justice Brennan, who had reconsidered after authoring the opinion in *Roth*, dissented in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973), that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice . . . , to prevent substantial erosion of protected

speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." He noted in particular the vagueness of the "serious value" component of the *Miller* test:

> "Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist . . . , we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."

413 U.S. at 84.

Subsequently in *Ward v. Illinois*, 431 U.S. 767, 782 (1977), Justice Stevens in dissent called for the "ultimate downfall" of the *Miller* test due to its vagueness: "One of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept." *See also Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., dissenting) (criticizing federal obscenity law on grounds that "the present constitutional standards . . . are so intolerably vague that even-handed enforcement of the law is a virtual impossibility");

Smith v. United States, 431 U.S. 291, 314 (1977) (Stevens, J., dissenting).

A decade later, in *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (concurring opinion), Justice Scalia suggested that the Court's fragmented views of the obscenity doctrine "display the need for reexamination of *Miller*," for reasons including the problem that "it is impossible to come to an objective assessment of (at least) literary or artistic value. . . . If evenhanded and accurate decisionmaking is not always impossible under such a regime, it is at least impossible in the cases that matter."

A testament to the vagueness problem, the history of obscenity prosecutions in the wake of *Miller* is replete with examples of inconsistent results and censorial impact upon protected expression. Immediately after *Miller* was decided, a spate of prosecutions targeting such mainstream erotic fare as *Playboy* and *Penthouse* magazines ensued, and continued for much of the next decade, with erratic results. In *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), the court held that *Playboy* was protected by the First Amendment but *Penthouse* was obscene, after the district court had determined that both periodicals were constitutionally protected, 436 F. Supp. 1241 (N.D. Ga. 1977); *cf. State v. Walden Book Co.*, 386 So.2d 342 (La. 1980), holding that contemporaneous issues of *Penthouse* were not obscene.

Hollywood films and art museums have also been fair game for obscenity prosecutions. The next term after deciding the *Miller* Quintet, in *Jenkins v. Georgia,* 418 U.S. 153 (1974), this Court was compelled to reverse an obscenity conviction of a theater operator who had exhibited the Hollywood feature film "Carnal Knowledge," upheld by the Georgia Supreme Court after this Court decided *Miller*. 418 U.S. at 156. The Court was required to clarify that "nudity alone is not enough to make material legally obscene under the *Miller* standards." *Id.* at 161.

In more recent memory, the Cincinnati Contemporary Arts Center and its director were forced to defend themselves against criminal obscenity charges for exhibiting the work of world-renowned photographer Robert Mapplethorpe. *See* Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, October 6, 1990.

As the Times story went on to report:

> "[T]he Mapplethorpe case is just one of several current disputes over sexual subject matter in the arts. Members of the Miami rap music group 2 Live Crew are to stand trial next week on obscenity charges stemming from a performance of songs from their recording, 'As Nasty as They Wanna Be,' which a Federal judge had previously declared obscene. And a Fort Lauderdale record store owner was convicted this week on obscenity charges for selling a copy of the

> 2 Live Crew recording to an undercover police officer."

A federal court subsequently held the 2 Live Crew recording nonobscene as a matter of law, on grounds that it entailed serious artistic value, in *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

In addition, the federal courts have been required with some frequency to enjoin abuses of the amorphous obscenity laws, by both state and federal prosecutors. In *PHE, Inc. v. U.S. Dept. of Justice*, 743 F. Supp. 15, 25-26 (D.D.C. 1990), for example, the court enjoined multi-district obscenity prosecutions patently designed to harass if not bankrupt the defendants, based on uncontested evidence of prosecutorial bad faith:

> The intrusive and intimidating manner in which defendants searched plaintiffs' premises, the 118 subpoenas which another federal court characterized as "harassment" of plaintiffs, the acknowledgement by the defendants that many of the materials they seek to prevent plaintiffs from distributing *are* constitutionally protected, the allegation that investigations were initiated despite the fact that the FBI advised Showers, then Assistant United States Attorney for the Eastern District of North Carolina, that the materials distributed by plaintiffs were not within the scope of FBI guidelines for the prosecution or investigation of obscenity, the threats of multiple prosecutions if plaintiffs

> did not cease distribution of certain materials nationwide and cease distribution entirely in Utah, including Playboy magazine and The Joy of Sex, and the admitted desire to get [the plaintiff] "out of the business," substantiate plaintiffs' allegations of bad faith.

Such cases of bad-faith prosecution have surfaced in the federal courts on too regular a basis to be dismissed as isolated instances. *See Black Jack Distributors, Inc. v. Beame*, 433 F. Supp. 1297, 1306-07 (S.D.N.Y. 1977) (enjoining New York City Police Commissioner from harassing plaintiffs through bad-faith enforcement of obscenity laws such as daily arrests and seizures undertaken with the admitted purpose of injuring plaintiffs' business); *United Artists Corp. v. Gladwell*, 373 F. Supp. 247 (N.D. Ohio 1974) (enjoining sheriff from threatening obscenity prosecutions for exhibitions of "Last Tango in Paris"); *see also The Video Store, Inc. v. Holcomb*, 729 F. Supp. 579 (S.D. Ohio 1990); *ACLU v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984); *Penthouse International, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), aff'd, 610 F.2d 1353 (5th Cir. 1980); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972). Rather, these cases speak volumes regarding the unbridled discretion that vague standards for unprotected expression afford both prosecutors and police. *See P.A.B., Inc. v. Stack*, 440 F. Supp. 937 (S.D. Fla. 1977) (open police surveillance of patrons of adult bookstore and suggestions that they should not enter the store); *Maguin v. Miller*, 433 F. Supp. 223 (D. Kan. 1977)

(detention of patrons of adult theater until they divulged their names and other personal information); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968) (uniformed police stationed outside adult bookstore). Moreover, one can safely assume that these numerous reported cases are merely the tip of an iceberg.

This history should deeply concern anyone who takes First Amendment freedoms seriously. A vague standard such as "serious value" invites headline-grabbing prosecutorial discretion. Regardless of the outcome at trial, the damage to free expression is already done by the trauma and expense of defending against criminal charges. Depending upon vagaries such as funds available for a defense and the economic climate, such a prosecution could easily prove ruinous to a theater, record store, or art museum.

As the court noted in *Krahm v. Graham*, 461 F.2d at 705-06, enjoining continued obscenity prosecutions after finding a "bad faith" use of the obscenity law: "Surely, the damage from [such prosecutions] is both irreparable and 'grave and immediate.' You can put the Plaintiffs out of business without ever convicting them of anything. Nor can the threat to Plaintiffs' First Amendment rights be eliminated by defense against state prosecutions."

The notion that materials may be unprotected by the First Amendment in part because they "lack serious value" is at least as problematic under 18

U.S.C. § 48 as it is in obscenity cases. As Justice Brennan observed in *Paris Adult Theatre,* any determination of "serious value" necessarily turns upon the "experience, outlook, and idiosyncrasies" of the beholder. For the same reasons that a Georgia jury could find the tame, mainstream film "Carnal Knowledge" to be criminally obscene, and a Cincinnati prosecutor could launch criminal charges against a Mapplethorpe exhibit, prosecutors and triers of fact would inevitably come to such censorial decisions with regard to depictions of animal cruelty.

One aspect of the vagueness problem is *context* – especially in this realm of depictions of cruelty to animals, the question of value may heavily depend upon the context in which they are produced, possessed, or distributed. The Court has returned to this aspect of the "fighting words" doctrine in a number of post-*Chaplinsky* decisions, all requiring that the context of alleged "fighting words" be considered to determine whether an actual threat of violence arose. *See Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) ("*Lewis II*"), *Hess v. Indiana,* 414 U.S. 105 (1973), and *Cohen v. California,* 403 U.S. 15 (1971). As Justice Powell noted, "[W]ords may or may not be 'fighting words,' depending upon the circumstances of their utterance." *Lewis*, 415 U.S. at 135 (concurring opinion).

The courts have rarely addressed this problem with regard to obscenity, except for this Court's holding in *Ginzberg v. United States*, 383 U.S. 463, 475-76 (1966), and subsequent cases that evidence of

"pandering" may be considered in determining obscenity. *See also Hamling v. United States*, 418 U.S. 87, 90 (1974). Although such a case has never arisen, this Court would surely hold that the Kinsey Institute's exhibition of sexually graphic material as part of an educational conference would have scientific value as a matter of law, even if the materials could be deemed criminally obscene in some other context.

Under this statute criminalizing depictions of animal cruelty, the problem of context would be likely to arise with some frequency. Activists concerned with protecting animals from cruelty frequently produce, possess, and distribute such depictions.[6] The very same depictions of animal cruelty such as dogfighting may violate this statute in most contexts, but have value in the hands of activists using it to oppose such bloodsports. As well detailed by the Respondent (Br. at 19-21), one can cite countless examples of animal-cruelty depictions in contexts with serious educational, journalistic, and political import.

The government would apparently obliterate even this consideration of context, however. Effectively conceding the enormous reach of this criminal statute, the government insists that although "a

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[6] Although the statute requires an intent to distribute for commercial gain, this element could arguably be satisfied by an intent to sell videos for fundraising purposes, or by the sale of a documentary film for commercial distribution.

person may express any idea . . . about animal cruelty," one must run the risk of a federal prison term for expressing such ideas "by creating, selling, or possessing videos of live animals being tortured or killed in violation of law." Pet. Br. at 23.

The problem of context is compounded by the inevitable subjectivity of any evaluation of "serious value." Americans have widely divergent and even antithetical attitudes toward matters such as hunting, vegetarianism, animal rights, etc. Just as jurors' discomfort with sexual material have led to obscenity convictions for materials like "Carnal Knowledge," jurors' discomfort with hunting or bull-fighting could lead to a conclusion that such graphic depictions "lack serious value," regardless of context. In this very case, a veterinarian witness for the government opined that depictions of Spanish bull-fights have no serious value. J.A. 87.

By the same token, a jury in Kentucky might consider the activities of PETA to have no serious value, and find that its members violated this statute when they obtained footage of cruelty to thoroughbreds at horse-racing tracks. As the Respondent concretely documents, such scenarios are far from fanciful. Resp. Br. at 28.

Given the influential interests behind businesses such as racetracks, experimental laboratories, slaughterhouses, and the like, this statute as written creates a vehicle to suppress animal-rights activists whenever they might seek to expose animal cruelty

with films or photographs. The mere fact of a prosecution, given the expense and trauma of fighting criminal charges, could well derail the activities of a small organization with negligible resources.

In light of these realities, the vagueness of this "exception" exacerbates the statute's overbreadth. Should the Court uphold this law, the potential chilling effect upon a great deal of expression unquestionably protected by the First Amendment would be enormous, especially as amplified by similar state laws likely to follow in the wake of such a decision. At the very least, it is important that the Court's opinion clarify that the creation, possession, and distribution of such materials for purposes such as exposing and opposing cruelty to animals are protected for their political, educational, and journalistic value, as a matter of law.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed on grounds that the statute is facially unconstitutional under the First Amendment.

Respectfully submitted,

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