

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 NATIONAL COALITION AGAINST
CENSORSHIP AND THE COLLEGE ART ASSO-
CIATION AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

EUGENE VOLOKH*
*405 Hilgard Avenue
Los Angeles, CA 90095
(310) 206-3926*

JOAN E. BERTIN*
*National Coalition Against
Censorship
275 Seventh Avenue
Suite 1504
New York, NY 10001
(212) 807-6222*

ANDREW E. TAUBER*
Counsel of Record
CRAIG W. CANETTI
*Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000
*Counsel for National Coa-
lition Against Censorship*

JEFFREY P. CUNARD†
*Debevoise & Plimpton LLP
555 13th Street, NW
Suite 1100 East
Washington, DC 20004
(202) 383-8043
†Counsel for College Art
Association*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	6
I. THE “SERIOUS VALUE” EXCEPTION DOES NOT SAVE SECTION 48 FROM SUBSTANTIAL OVERBREADTH.....	6
A. Section 48 Criminalizes Far More Than Depictions Of Extreme Animal Cruelty.....	7
B. There Is A Real Risk That Prosecutors And Jurors Will Fail To Recognize The “Serious Value” Of Conceptual And Avant-Garde Art.....	11
C. The Risk Of Prosecution And Conviction Is Compounded Because Section 48 Does Not Require That Works Be Considered As A Whole.	20
II. SECTION 48 INVITES VIEWPOINT DISCRIMINATION.	27
III. SECTION 48 WILL CHILL PROTECTED EXPRESSION BY DISSUADING RISK- AVERSE INDIVIDUALS WHO ARE NECESSARY TO THE CREATION AND DISSEMINATION OF EXPRESSIVE WORKS FROM PARTICIPATING IN PROJECTS THAT INCLUDE ANY DEPICTIONS OF ANIMAL CRUELTY.	31
CONCLUSION	37

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002)	34, 35
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	33
<i>Brancusi v. United States</i> , 54 Treas. Dec. 428 (Cust. Ct. 1928).....	15
<i>Ebeling & Reuss Co. v. United States</i> , 40 Cust. Ct. 387 (1958)	15
<i>Free Speech Coalition v. Ashcroft</i> , 198 F.3d 1083 (9th Cir. 1999)	35
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	35
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston</i> , 515 U.S. 557 (1995)	19
<i>Miller v. California</i> , 413 U.S. 15 (1973)	20
<i>Miniature Fashions, Inc. v. United States</i> , 55 Cust. Ct. 154 (1965)	14, 15
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377 (1992)	27, 31
<i>United States v. Stevens</i> , 533 F.3d 218 (3d Cir. 2008)	27
<i>Winters v. New York</i> , 333 U.S. 507 (1948)	5, 6, 12
STATUTES, RULES AND REGULATIONS	
16 U.S.C. § 1857(1)(P)	27
18 U.S.C. § 48	<i>passim</i>

TABLE OF AUTHORITIES—continued

	Page(s)
18 U.S.C. § 48(a).....	4, 22, 30, 31
18 U.S.C. § 48(b).....	<i>passim</i>
18 U.S.C. § 48(c)(1).....	<i>passim</i>
18 U.S.C. § 2256(8)(A).....	34
Sup. Ct. R. 37.6.....	1
09-137 Me. Code R. § 4.01(D) (Weil 2009).....	9
2 Colo. Code Regs. § 406-2 #203A.5 (2009).....	9
31 Tex. Admin. Code § 65.11(3) (2009).....	9
Ala. Admin. Code r. 220-2-.02(2)-(4), (6)-(7) (2008).....	9
Ala. Code § 9-11-44(e) (West, Westlaw through 2009 legislation).....	9
Ala. Code § 9-11-238 (West, Westlaw through Act 2009-580).....	10
Alaska Stat. §§ 16.20.190 - .200 (West, Westlaw through 2009 legislation).....	23
Cal. Fish & Game Code § 2080 (West, Westlaw through 2009 legislation).....	23
Cal. Fish & Game Code § 3031 (West 1998).....	9
Cal. Fish & Game Code § 3031.2 (West 1998).....	9
Cal. Penal Code § 597m (West 1999).....	22
Conn. Agencies Regs. § 26-66-1(b) (2009).....	9
Conn. Gen. Stat. § 26-38 (2008).....	9
Fla. Stat. Ann. § 828.121 (West, Westlaw through June 30, 2009).....	22
Haw. Code R. § 13-123-22 (b)(10) (2008).....	9

TABLE OF AUTHORITIES—continued

	Page(s)
Kan. Stat. Ann. § 32-946 (West, Westlaw through 2008 Regular Session)	9
Md. Code Regs. 08.03.04.05(A)(2) (2009).....	9
Nev. Rev. Stat. § 503.150(g) (West, Westlaw through 2008 Special Session).....	10
N.C. Gen. Stat. § 113-291.1(a)(4) (2007)	10
Or. Admin. R. 635-065-0725 (2009)	9
P.R. Laws Ann. tit. 15, § 261 (2006)	22
R.I. Gen. Laws § 5-22-25 (West, Westlaw through July 2009).....	22
Wash. Admin. Code 232-12-054(1)(e) (2009)	9
Wis. Stat. Ann. § 951.08 (West 2005)	22
MISCELLANEOUS	
Michael Archer, <i>ART SINCE 1960</i> (2d ed. 2002)	16
Kenneth Baker, <i>Show's Cancellation A Rare Case Of Artists Advocating Censorship</i> , S.F. CHRON., Apr. 1, 2008	17, 28, 29
Ed Bark, <i>Restraint Creates A Classy "Lolita": Suggestion Replaces Tawdriness In This Version Of Nabokov's Tale</i> , DALLAS MORNING NEWS, Aug. 2, 1998.....	35
<i>The Blind Man No. 2</i> (Henri-Pierre Roche et al. eds., May 1917), http://sdrc.lib.uiowa. edu/dada/blindman/2/index.htm	13
<i>Blood Orgies: Hermann Nitsch in America— Summary</i> , https://mmm1932.dulles19- verio.com/slough/store	16

TABLE OF AUTHORITIES—continued

	Page(s)
Corbis Corp.—Profile, http://www.answers.com/topic/corbis-corporation	25
Colin Covert, <i>Lolita: A Surprisingly Chaste, Heartfelt Drama</i> , MINNEAPOLIS-ST. PAUL STAR TRIB., Oct. 9, 1998	34
Ben Davis, <i>Animal Spirits</i> , http://www.artnet.com/magazineus/reviews/davis/davis4-30-09.asp	18, 19
Wim Delvoye—Images, http://images.google.com (search Wim Delvoye)	18
Demeter Galéria, http://www.demetergaleria.hu/album/nitsch/4e.html	16
Terry Diggs, <i>Not A Love Story: Lyne's Lolita Spins Nabokov's Web Of Sex, Love And Control For Our Newly Stultifying Times</i> , S.F. RECORDER, Oct. 14, 1998	34, 35
<i>Duchamp's Urinal Tops Art Survey</i> , http://www.bbc.co.uk/2/hi/entertainment/4059997.stm	13
Dan Eggertsen, <i>Is Noodling To Catch Catfish Legal Or Illegal</i> , http://www.askcatfishfishing.com/is-noodling-to-catch-catfish-legal-or-illegal.html	24
Fabrik Project, Wim Delvoye, June 12, 2009, http://fabrikproject.com.mx/blog/?p=5904	18
Els Fiers, <i>A Human Masterpiece</i> , http://www.artnet.com/magazine/reviews/fiers/fiers1-9-01.asp	18

TABLE OF AUTHORITIES—continued

	Page(s)
Denise Flaim, <i>Animal House</i> , NEWSDAY, Apr. 3, 2008	29
William Fleming, ARTS & IDEAS (9th ed. 1995).....	14
Getty Images—Profile, http://www.answers.com/topic/getty-images-inc	25
Eugene Gorny, <i>Bloody Man: The Ritual Art of Hermann Nitsch</i> , http://www.zhurnal.ru/staff/gorny/english/nitsch.htm	16
Yancey Hall, <i>Using Hands As Bait, “Noodlers” Stalk Giant Catfish</i> , http://news.nationalgeographic.com/news/2005/09/0908_050908_noodling.html	23, 24
Philip Hensher, <i>The Loo that Shook the World</i> , THE INDEPENDENT (Feb. 20, 2008), http://www.independent.co.uk/arts-entertainment/art-and-architecture/features/the-loo-that-shook-the-world-duchamp-man-ray-picabia-784384.html	13, 14
Michael Heron, <i>Digital Stock Photography</i> (2007)	24
http://pro.corbis.com	25
http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-21804358	25
http://pro.corbis.com/Enlargement/Enlargement.aspx?id=NN002288	25
http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-21977530	25, 26

TABLE OF AUTHORITIES—continued

	Page(s)
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=42-21804307	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=YA002677	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=YA002674	26
http://pro.corbis. com/Enlargement/Enlargement.aspx?id=42 -18909885	26
http://pro.corbis. com/Enlargement/Enlargement.aspx?id=Y A002676	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=YA002675	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=42-22639190	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=42-16919604	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=42-19830308	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=42-22642880	26
http://pro.corbis.com/Enlargement/ Enlargement.aspx?id=42-20447858	26
http://www.gettyimages.com	25
http://www.gettyimages.com/detail/920- 304/AP-Archive	25
http://www.gettyimages.com/detail/200112574- 001/Photographers-Choice	27

TABLE OF AUTHORITIES—continued

	Page(s)
http://www.gettyimages.com/detail/200162337-001/The-Image-Bank	25
http://www.gettyimages.com/detail/dv298006/Photodisc	26
http://www.gettyimages.com/detail/CB3913-001/Stone	26
http://www.gettyimages.com/detail/81168478/Gallo-Images	26
http://www.gettyimages.com/detail/920-301/AP-Archive	26
Humane Society of the United States, <i>Fact Sheet on Hound Hunting</i> , http://www.hsus.org/wildlife_abuse/campaigns/bears/hounding/hound_hunting.html	26, 27
JacobImages, <i>Philippine Cockfighting</i> , http://www.jacobimages.com/v/images-stock-photos-culture-travel/philippines-cockfighting	23
Steven H. Madoff, <i>Wham! Blam! How Pop Art Stormed The High-Art Citadel And What The Critics Said</i> in POP ART: A CRITICAL HISTORY xiv–xvi (Steven H. Madoff ed., 1997)	14
Phillip Matier & Andrew Ross, <i>Plans Twist And Turn for Olympic Torch's S.F. Route</i> , S.F. CHRON., March 26, 2008.....	17, 28

TABLE OF AUTHORITIES—continued

	Page(s)
Glenn McNatt, <i>The Troublesome Definition Of Art; Abstraction: Drama Raises Persistent Question About Modern Art</i> , BALT. SUN, March 2, 2000.....	12, 13
Hermann Nitsch, http://en.wikipedia.org/wiki/Hermann_Nitsch	16
Martyn Palmer, <i>SOHO's Old Devils: Interview; Adrian Lyne</i> , TIMES (U.K.), May 25, 2002	34
Elisabetta Povoledo, <i>Exhibition With Disturbing Videos Of Animals Leads To Protests In Italy</i> , N.Y. TIMES, Feb. 28, 2009	35, 36
<i>Readers' Platform: Artists vs. Art</i> , S.F. CHRON., Apr. 4, 2008.....	29, 30
Regine, <i>Solo Exhibition of Adel Abdessemed Postponed, We Make Money Not Art</i> , Feb. 13, 2009, http://www.we-make-money-not-art.com/archives/2009/02/and-the-ridiculous-news-of.php	17, 28, 35
Steven Rosen, <i>Odd Pairing Basic Angle For "Lolita": Former Coloradan Wrote Screenplay</i> , DENVER POST, Oct. 7, 1998	34, 35
1 Karl Ruhrberg et al., <i>ART OF THE 20TH CENTURY</i> (1998).....	19
Jerry Saltz, <i>Adel Abdessemed's Fighting-Animal Video Sparks Art-World Uproar</i> , Vulture, May 4, 2009, http://nymag.com/daily/entertainment/2009/05/saltz_adel_abdessemed_creates.html	17

TABLE OF AUTHORITIES—continued

	Page(s)
Margaret Samu, <i>Impressionism: Art and Modernity</i> , http://www.metmuseum.org/toah/hd/imml/hd_imml.htm	15
<i>Should Urinal Have Topped Modern Art Poll?</i> , http://www.bbc.co.uk/2/hi/talking_point/4061491.stm	14
Sebastian Smee, <i>An In-Your-Face Provocateur: Adel Abdessemed Displays Things We Don't Normally See</i> , BOSTON GLOBE, Oct. 19, 2008.....	29
Laura Sweet, <i>Inked Oinkers: Tattooed Pigs by Wim Delvoye</i> , <i>If It's Hip It's Here</i> , Oct. 27, 2007, http://ifitshipitshere.blogspot.com/2007/10/inked-oinkers-or-tattooed-pigs-by-wim.html	17, 18
Laura Sweet, <i>More Swine Art by Wim Delvoye: Tattooed Pigs & Pigskins</i> , <i>If It's Hip It's Here</i> , May 3, 2008, http://ifitshipitshere.blogspot.com/2008/05/wim-delvoyses-swine-art-own-your-own.html	17
Bob Van Voris, * * * <i>Coming Soon</i> * * * “ <i>Lolita</i> ,” <i>The Lawyer’s Cut: A First Amendment Lawyer Played Censor To The Classic</i> , NAT’L L.J., Aug. 17, 1998.....	34, 35
Monica Villavicencio, <i>A History of Dogfighting</i> , NPR.org, July 19, 2007, http://www.npr.org/templates/story/story.php?storyId=12104472	23

TABLE OF AUTHORITIES—continued

	Page(s)
Susan Wloszczyna, <i>Much More Than One In-</i> <i>decent Proposal</i> , U.S.A. TODAY, May 9, 2002	34

**BRIEF OF THE NATIONAL COALITION AGAINST
CENSORSHIP AND THE COLLEGE ART ASSO-
CIATION AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENT**

INTEREST OF THE *AMICI CURIAE*

The National Coalition Against Censorship (“NCAC”) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression.¹ Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of artists, authors, teachers, students, librarians, readers, museum-goers, and others around the country. NCAC produces legal and scholarly analyses of important free-speech cases and controversies; educates policy-makers, scholars, professional groups, and the general public on a wide range of free-expression issues; assists individuals and community organizations dealing with censorship; and promotes discussion and dialogue among diverse stakeholders in free-speech debates. To further its interest in protecting artistic expression, NCAC has established the Arts Advocacy Project, which works with visual artists around the country.

NCAC has tracked countless incidents in which protected expression has been targeted for criminal

¹ Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. The parties’ letters consenting to the filing of this brief have been filed with the Clerk’s office.

prosecution by overzealous prosecutors applying vague, overbroad statutes like the one at issue here. Because such prosecutions chill protected expression and thus subvert the First Amendment, NCAC presents this brief to assist the Court in understanding the dangers posed by the statute under review.²

The College Art Association (“CAA”) is a membership organization representing 14,000 practitioners and interpreters of visual art and culture, including artists, art historians, scholars, curators, conservators, collectors, educators, art publishers and other visual arts professionals, who join together to cultivate the ongoing understanding of art as a fundamental form of human expression. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA. CAA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching. CAA has a longstanding interest in issues relating to freedom of artistic and scholarly expression because its members create art, write about art, display art and use art in the classroom and in published works. Because the statute under review could deter, and even criminalize, the work of CAA members, CAA joins this brief to explicate those dangers.

SUMMARY OF ARGUMENT

The government contends that the criminalization of “depiction[s] of animal cruelty” effected by 18 U.S.C. § 48 is constitutional because it outlaws only

² The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

a narrow category of expressive material emanating from the “netherworld of animal cruelty” that is forbidden in this country. Gov’t Br. 9. But in fact, as we will show through practical examples throughout this brief, Section 48 criminalizes, and thus chills, numerous forms of protected expression in the service of a government interest—the prevention of animal cruelty—that, by the government’s own admission, already is comprehensively served by State and Federal statutes that directly target the objectionable conduct. See Gov’t Br. 25–28 & nn.7–11.

I. By its plain terms and in its practical application, Section 48 extends far beyond “depictions of illegal acts of extreme cruelty.” Gov’t Br. 8.

A. In fact, Section 48 criminalizes *any* depiction (intended to be placed in interstate commerce for commercial gain) that shows an animal being wounded or killed by a person acting in violation of *any* Federal or State law, including laws intended to conserve natural resources, ensure public safety, or regulate the use of dangerous weapons. The statute thus criminalizes depictions of people engaged in acts ranging from hunting with weapons (such as crossbows) that are allowed in some States but not in others, to hunting out of season, to bullfighting.

B. The government’s confidence that depictions having “serious value” will not be subject to prosecution under Section 48 is misplaced. The history of conceptual and avant-garde art, for example, is replete with instances in which the public scorned work later deemed to be groundbreaking and influential.

C. The inadequacy of the protection purportedly afforded by Section 48’s “serious value” exception is

compounded by the fact that the statute does not require that the value of a depiction of animal cruelty be assessed in the context of the entire work in which it appears. Viewed in isolation and without context, a depiction of violence to an animal might easily be judged to have no “serious value,” although the larger work within which it is embedded possesses such value.

As written, the statute poses a particular threat to participants in the stock photography industry, who do not create, sell, or possess their images for any “serious religious, political, scientific, educational, journalistic, historical, or artistic” purpose (18 U.S.C. § 48(b)), but rather for an exclusively commercial reason, namely, for sale to third-parties. Stock images depicting violence to animals—for example, images of bullfighting, cockfighting, and dogfighting—thus fall squarely within the ambit of Section 48 yet enjoy no protection under the “serious value” exception.

II. Section 48 does not define the statutory term “serious value.” As a result, criminal liability under Section 48 depends on prosecutors’ and jurors’ subjective, *ad hoc* assessments of whether a depiction of animal cruelty has such value. That unavoidable subjectivity invites not only inconsistent application of the law, but viewpoint discrimination as well.

III. Section 48 chills protected expression. Criminal liability under Section 48 encompasses *anyone* who, for commercial gain, “knowingly creates, sells, or possesses” a work containing a depiction of animal cruelty. 18 U.S.C. § 48(a). The reach of the statute thus extends to the many layers of participants involved in the production, distribution, and display of artistic and other works, such as motion pictures,

magazines, photographs and video art. If just one necessary but risk-averse participant in the process decides, out of an abundance of caution, not to join in the production, distribution, or display of a work that includes statutorily defined depictions of animal cruelty for fear that it might subsequently be found by a prosecutor or jury to lack “serious value,” the dissemination of protected expression could be deterred. That danger flows directly from the absence of any criteria in Section 48 to guide the application of the “serious value” exception, which makes it impossible for any of these participants to determine prospectively and with any reasonable certainty whether a particular work will be found by a prosecutor or jury to violate Section 48.

The government conflates conduct and expression. No one disputes that the government may penalize acts of animal cruelty. But that does not mean that the government may also penalize speech *about* or images *of* animal cruelty. It is axiomatic that the Constitution does not allow the government to punish people for their thoughts, beliefs, or ideas. Indeed, a chief purpose of the First Amendment is to protect the right to express ideas that challenge social, moral, and legal norms.

Contrary to what the government suggests (cf. Gov’t Br. 21-23), the First Amendment’s protection is not limited to expression that advances the “exposition of ideas” (*id.* at 21) and serves a “high purpose[]” (*id.* at 22). In fact, more than half a century ago—in *Winters v. New York*, 333 U.S. 507 (1948)—this Court refused to

accede to appellee’s suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line be-

tween the informing and the entertaining is too elusive for the protection of that basic right. * * * 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.

Id. at 510.

It follows that the reach of the First Amendment does not depend on whether jurors find “serious value” in controversial speech or expression. To the extent that it does so—for reasons of history and tradition—in the realm of obscenity, that exception to standard First Amendment principles should not be extended beyond its narrow historical boundaries. To conclude otherwise would eviscerate an important constitutional protection against majoritarian sentiment and governmental censorship.

The concrete examples presented below demonstrate that Section 48 threatens a wide range of artistic and other protected expression. We urge the Court to affirm the decision below.

ARGUMENT

I. THE “SERIOUS VALUE” EXCEPTION DOES NOT SAVE SECTION 48 FROM SUBSTANTIAL OVERBREADTH.

According to the government, Section 48 is “[b]y its terms * * * limited to depictions of illegal acts of extreme cruelty.” Gov’t Br. 8. The government further contends that “the exclusion from Section 48 of speech with serious value ensures that Section 48 will not have a significant number of unconstitutional applications.” *Id.* at 38. Neither assertion is correct. Section 48 criminalizes far more than the depiction of extreme cruelty, and the “serious value”

exception does not save the statute from its substantial overbreadth.

A. Section 48 Criminalizes Far More Than Depictions Of Extreme Animal Cruelty.

By its plain terms, Section 48 reaches depictions of acts that violate laws unrelated to animal cruelty, as well as depictions of conduct that is entirely legal in various jurisdictions.

Section 48 defines a “depiction of animal cruelty” to include “any visual or auditory depiction * * * of conduct in which a living animal is intentionally * * * wounded, or killed, if 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.” 18 U.S.C. § 48(c)(1). Thus, under Section 48, a depiction of “animal cruelty” includes any depiction that shows an animal being wounded or killed by a person acting in violation of *any* Federal or State law. Nothing in Section 48 limits the type of Federal or State law that could trigger criminal liability. Accordingly, Section 48 criminalizes not only depictions of people violating laws that prohibit animal cruelty (cf. Gov’t Br. 25–28 & nn.7–11), but also depictions of people wounding or killing animals in violation of laws intended to conserve natural resources, ensure public safety, or regulate the use of dangerous weapons.

Furthermore, for its depiction to be criminalized by Section 48, the underlying conduct need only be 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). A depiction is therefore subject to prosecution under Sec-

tion 48 even if it depicts conduct that is legal where it occurred.

Consider, for example, a photograph of a deer being shot by a hunter in Montana that is later sold in New York. Assume that New York limits deer hunting to specified days of the year and to persons who qualify for and actually possess a valid hunting license. If the deer was shot by a hunter who not only possesses a valid Montana license but could lawfully obtain a license in New York, and was shot on a day that is in-season in both Montana and New York, then—and only then—is the depiction immune from prosecution under Section 48. That same depiction, however, is subject to prosecution under Section 48 if the deer was shot by a hunter who was not licensed in Montana, was shot by someone who is licensed in Montana but would not qualify for a license in New York, or was shot on a day that although in-season in Montana is out-of-season in New York.

The fact that the depiction could be prosecuted under any of these scenarios shows that Section 48 is not “limited to depictions of illegal acts of extreme cruelty.” Gov’t Br. 8. Whether the depiction is criminalized by Section 48 does *not* depend on whether the deer was subjected to extreme cruelty; the deer was treated identically in each instance. Nor does the criminalization of the depiction depend on the illegality of the conduct where it occurred; by its plain terms, Section 48 criminalizes depictions of acts that were legal in the State where they occurred if those same acts are illegal in another State where the depictions are sold. Thus, contrary to the government’s assertion, Section 48 reaches depictions of conduct that is neither extremely cruel nor illegal in “[a]ll 50 States and the District of Columbia.” Gov’t Br. 25.

Although the foregoing illustration was hypothetical, Section 48's broad sweep is not. States do in fact maintain different licensing requirements (compare, *e.g.*, Ala. Code § 9-11-44(e) (West, Westlaw through 2009 legislation) (exempting all Alabama residents under 16 years and over 65 years of age from licensing requirement), with Cal. Fish & Game Code §§ 3031-3031.2 (West 1998) (requiring a hunting license for all residents of any age) and Conn. Gen. Stat. § 26-38 (2008) (requiring that all minors between 12 and 16 years of age who wish to hunt possess a junior license)) and different hunting seasons (compare, *e.g.*, Kan. Stat. Ann. § 32-946 (West, Westlaw through 2008 Regular Session) (hunting season for game birds extends from September 1 through March 31 of each year) with 09-137 Me. Code R. § 4.01(D) (Weil 2009) (hunting season for several game birds extends from October 1 through December 31 of each year)). Indeed, there are many ways in which some States regulate the killing of animals differently than others.

Some States, for instance, ban or restrict the use of particular hunting methods that other States allow to be used without limitation. The use of crossbows, for example, is prohibited in Connecticut, Hawaii, and Oregon, restricted in Alabama, Maryland, and Washington, but permitted in Colorado and Texas. See Ala. Admin. Code r. 220-2-.02(2)-(4), (6)-(7) (2008); 2 Colo. Code Regs. § 406-2 #203A.5 (2009); Conn. Agencies Regs. § 26-66-1(b) (2009); Haw. Code R. § 13-123-22(b)(10) (2008); Md. Code Regs. 08.03.04.05(A)(2) (2009); Or. Admin. R. 635-065-0725 (2009); 31 Tex. Admin. Code § 65.11(3) (2009); Wash. Admin. Code 232-12-054(1)(e) (2009). Thus, under Section 48, a person who photographs the killing of a mountain lion with a crossbow in Colorado, where

crossbow hunting is legal, will be a federal felon if he sells the photograph in Connecticut, where crossbow hunting is illegal.

Many other examples of inconsistent State regulation of hunting activities could be given.³ However, the effect of the statute also is readily illustrated by an example having nothing to do with animals. Assume that, rather than criminalizing depictions of animal cruelty, Section 48 outlawed depictions of gambling. Assume further that gambling is illegal in Utah but legal in Nevada. Under these circumstances, it would be a federal crime for a sports bar in Provo to play for its patrons a video of a high-stakes poker game that was filmed in Las Vegas. Indeed, it would be a federal offense for the bar owner even to possess the video with the intention of showing it to his patrons.

In short, when coupled with Section 48's expansive definition of a "depiction of animal cruelty," the variation in State law means that Section 48 criminalizes depictions of conduct that is neither universally condemned as animal cruelty nor illegal in all States. While there may be "a broad societal consensus [that] supports treating animals humanely" (Gov't Br. 2), Section 48 reaches far beyond that common ground and is not "narrowly drawn to pro-

³ Compare, *e.g.*, Ala. Code § 9-11-238 (West, Westlaw through Act 2009-580) (prohibiting the use of dogs to hunt wild turkey), and Nev. Rev. Stat. § 503.150(g) (West, Westlaw through 2008 Special Session) (prohibiting the use of dogs to hunt big game animals other than mountain lions), with N.C. Gen. Stat. § 113-291.1(a)(4) (2007) (expressly permitting the use of dogs to hunt all wild game).

scribe only a limited class' of depictions of cruel, illegal acts" (*id.* at 3).⁴

Equally troubling is the precedent that Section 48 threatens to establish. If this Court holds that Congress can criminalize the creation, sale or possession of depictions of criminal acts, which is effectively what Congress did in Section 48, that holding could open the door to statutes outlawing the creation, sale and possession of a whole range of expressive material that depicts unlawful activity, such as films depicting acts of terrorism, drug use, or torture. Of course, the government contends that there is a safe harbor created by Section 48 that ensures that works of "serious value" are not subject to criminal liability. As we next show, however, that exception cannot carry the weight that the government places upon it.

B. There Is A Real Risk That Prosecutors And Jurors Will Fail To Recognize The "Serious Value" Of Conceptual And Avant-Garde Art.

The government argues that "Section 48 does not reach any speech that advances the exposition of ideas" because the statute "expressly exempts any speech with serious religious, political, scientific, educational, journalistic, historical, or artistic value." Gov't Br. 8. That purported safe harbor is illusory, however, because Section 48 neither defines nor provides any criteria for identifying works that possess "serious value." The government posits that the exemption protects works that have "redeeming socie-

⁴ This is not to suggest that Section 48 would survive constitutional scrutiny even if it were so limited, but merely to explain that the statute's scope is not nearly as narrow as the government asserts.

tal value” (Gov’t Br. 16), *i.e.*, works that serve “the social interest in order and morality” (*id.* at 12) and do not “offend[] the sensibilities’ of most citizens” (*id.* at 37). In the jury instructions given in this case, the district court defined “serious” to mean “significant and of great import.” JA 132. These purported definitions of “serious value” incorrectly suggest that the First Amendment permits the government to favor “good speech” over “bad speech.” See *Winters*, 333 U.S. at 510. What is more, the history of modern art, to take just one example, demonstrates that the prosecutors and jurors who are entrusted to determine whether a work has “serious value” are ill-suited to that task.

Often, it is only through hindsight, and the inclusion of works in museum collections, that some initially controversial forms of expression are ultimately recognized as art. As one commentator has observed:

[O]ne of art’s major functions [is] to teach us to see reality in new ways. But precisely because art presents us with things that we have never seen before, we often cannot recognize it for what it is, at least not in the beginning.

Glenn McNatt, *The Troublesome Definition Of Art: Abstraction: Drama Raises Persistent Question About Modern Art*, BALTIMORE SUN, March 2, 2000, at E1. Indeed, “[a]s a practical matter, even experts rely as much on history, context and prior experience to determine what is art as on any innate quality of the object itself.” *Ibid.* Ultimately,

art is in large measure a set of visual conventions that are completely arbitrary and that

vary widely according to time and place. Since there can be no single, universal definition of what art is, it follows there also can be no hard and fast rules about what it is not.

Ibid.

Given the inherent difficulty in identifying art, particularly new art, as such, there is—the government’s reassurances to the contrary notwithstanding (cf. Gov’t Br. 47–49)—no reason to assume that the statute will not be used to criminalize art that has “serious value.” Indeed, the reception of modern art demonstrates that people often misunderstand and deride works that are only later recognized as seminal, and indeed sometimes only later accepted as even art.

Consider, for example, Marcel Duchamp’s “Fountain”—a urinal mounted on a platform. In 2004, the Dadaist piece, replicas of which are now displayed in museums around the world, was voted “the most influential modern art work of all time” by a panel of 500 experts. *Duchamp’s Urinal Tops Art Survey*, <http://www.bbc.co.uk/2/hi/entertainment/4059997.stm>. But in 1917, when Duchamp first submitted the piece for inclusion in an exhibit, it was scorned and rejected. A 1917 article identified the following objections to the piece: “1. Some contended it was immoral, vulgar. 2. Others, it was plagiarism, a plain piece of plumbing.” *The Blind Man No. 2* 5 (Henri-Pierre Roche et al. eds., May 1917), <http://sdrc.lib.uiowa.edu/dada/blindman/2/index.htm>.

More recent commentators report that it was rejected “with the comment that whatever incarnation his object was, it had no darn place in an exhibition of art.” Philip Hensher, *The Loo that Shook the*

World, THE INDEPENDENT (Feb. 20, 2008), <http://www.independent.co.uk/arts-entertainment/art-and-architecture/features/the-loo-that-shook-the-world- Duchamp-man-ray-picabia-784384.html>. Indeed, as reactions to its selection as the most influential modern art work attest, even today some people still deny that Fountain has any—let alone “serious”—artistic value. See, e.g., *Should Urinal Have Topped Modern Art Poll?*, http://www.bbc.co.uk/2/hi/talking_point/4061491.stm (“How the Hell can something that I wee in be considered art?”; “It’s simply the emperor’s new clothes.”). Yet, as “a great classic of modern art” (Hensher, *supra*), Fountain and other Dadaist works “cleared the air for the experiments and innovations of the postwar period,” and informed later artistic movements, including the Abstract Expressionism of Jackson Pollock and the Pop Art of Andy Warhol, Robert Rauschenberg and Roy Lichtenstein. William Fleming, ARTS & IDEAS 605–606 (9th ed. 1995).

Duchamp’s Fountain is merely one example of now-iconic works that were initially dismissed as “not art.” Others include Warhol’s Campbell Soup cans and Lichtenstein’s comic-strip inspired paintings. See, e.g., Steven H. Madoff, *Wham! Blam! How Pop Art Stormed The High-Art Citadel And What The Critics Said*, in POP ART: A CRITICAL HISTORY xiv–xvi (Steven H. Madoff ed., 1997).

One notable instance of a public official’s failure to recognize modern art as such occurred in the late 1920s. An original bronze work titled “Bird in Flight” by Romanian sculptor Constantin Brancusi was initially classified by a United States customs officer as “an article of metal,” not a work of art, and a customs duty was levied based on that assessment. *Miniature*

Fashions, Inc. v. United States, 55 Cust. Ct. 154, 158 (1965). Brancusi challenged that classification and prevailed in a decision in which the Customs Court expressly recognized the work as modern art. See *ibid.* (discussing *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928)); see also *Ebeling & Reuss Co. v. United States*, 40 Cust. Ct. 387, 394 (1958) (same).

The long history of modern art not being recognized as art highlights the significant risk that prosecutors and jurors will, when applying Section 48, fail to recognize the “serious * * * artistic value” of conceptual and avant-garde art. Given that Impressionism—which evolved in the late 19th Century and included among its practitioners Monet, Degas, Pissarro, and Renoir—was initially “panned * * * for its unfinished, sketchlike appearance,” it is likely that a jury instructed to apply that standard would at the time have found early Impressionist works to be without “serious value,” even though Impressionism became “the springboard for later avant-garde art in Europe.” Margaret Samu, *Impressionism: Art and Modernity*, http://www.metmuseum.org/toah/hd/imml/hd_imml.htm.

Contrary to the government’s suggestion, the danger posed by Section 48 is neither “isolated” nor “hypothetical[].” Gov’t Br. 47. In fact, as discussed immediately below, there are a number of contemporary artists whose creations contain depictions that could run afoul of Section 48. Their work is no more likely to be immediately appreciated than that of Duchamp or Warhol.

Take, for example, the Austrian performance artist Hermann Nitsch, whose “ritualistic performance actions[] often combin[e] fake crucifixion with the

disemboweling of lambs and other animals.” *Blood Orgies: Hermann Nitsch in America*—Summary, <https://mmm1932.dulles19-verio.com/slough/store> (search for *Blood Orgies: Hermann Nitsch in America*); see also, e.g., Michael Archer, ART SINCE 1960 102–103 (2d ed. 2002); Demeter Galéria, <http://www.demetergaleria.hu/album/nitsch/4e.html>. Nitsch has described his performances as “an aesthetic way of praying.” Archer, *supra*, at 103. He also has proclaimed his belief “that natural human instincts have been repressed by the social norms and conventions,” and that “[t]he ritualized acts of killing animals and physical contact with blood are supposed to be a mean[s] of releasing that repressed energy as well as an act of purification and redemption through suffering.” Eugene Gorny, *Bloody Man: The Ritual Art of Hermann Nitsch*, <http://www.zhurnal.ru/staff/gorny/english/nitsch.htm>.

Whatever one may think about Nitsch’s performances, and putting aside the issue of whether those acts are lawful where they take place, there is no doubt that the distribution in this country of visual depictions of those performances is an expressive act entitled to the protections of the First Amendment. Indeed, Nitsch’s performances have been widely photographed and filmed. See, e.g., Hermann Nitsch, http://en.wikipedia.org/wiki/Hermann_Nitsch; Demeter Galéria, *supra*; Gorny, *supra*. In fact, a book and DVD set containing “photo and video documentation of [Nitsch’s] ritualistic performances” was recently published in this country. *Blood Orgies: Hermann Nitsch in America*—Summary, *supra*.

Nitsch is by no means the only contemporary artist to produce works that depict actual violence to actual animals. Adel Abdessemed—who has been de-

scribed as “a big deal on the international circuit” after having been “included in the last Venice Biennale” and having “had numerous solo museum exhibitions” (Jerry Saltz, *Adel Abdessemed’s Fighting-Animal Video Sparks Art-World Uproar*, Vulture, May 4, 2009, http://nymag.com/daily/entertainment/2009/05/saltz_adel_abdessemed_creates.html)—is another.

Abdessemed’s *Don’t Trust Me* video installation shows footage of various animals, including a pig, an ox, a horse, and a goat, being slaughtered using a sledgehammer. Regine, *Solo Exhibition of Adel Abdessemed Postponed, We Make Money Not Art*, Feb. 13, 2009, <http://www.we-make-money-not-art.com/archives/2009/02/and-the-ridiculous-news-of.php>; Kenneth Baker, *Show’s Cancellation A Rare Case Of Artists Advocating Censorship*, S.F. CHRON., Apr. 1, 2008, at E1; Phillip Matier & Andrew Ross, *Plans Twist And Turn for Olympic Torch’s S.F. Route*, S.F. CHRON., March 26, 2008, at B1. Another Abdessemed video, shown at a New York gallery in 2009, depicts lizards, snakes, tarantulas, scorpions, roosters, and pit bulls placed together in a single enclosure and occasionally engaging in explosive territorial battles. Saltz, *supra*.

Wim Delvoye is yet another contemporary artist who depicts actual animals in his art. Delvoye has been tattooing pigs since the 1990s, and photographs of him doing so can be viewed on various websites. See Laura Sweet, *More Swine Art by Wim Delvoye: Tattooed Pigs & Pigskins*, If It’s Hip It’s Here, May 3, 2008, <http://ifitshipitshere.blogspot.com/2008/05/wim-delvoyes-swine-art-own-your-own.html>; Laura Sweet, *Inked Oinkers: Tattooed Pigs by Wim Delvoye*, If It’s Hip It’s Here, Oct. 27, 2007, <http://>

ifitshipitshere.blogspot.com/2007/10/inked-oinkers-or-tattooed-pigs-by-wim.html; Fabrik Project, Wim Delvoye, June 12, 2009, <http://fabrikproject.com.mx/blog/?p=5904>; Wim Delvoye—Images, <http://images.google.com> (search Wim Delvoye). Delvoye's tattooed pigs have been shown at the San Francisco Art Institute and the Moscow Art Fair, while other of Delvoye's works have been shown at the Venice Biennale and the Museum of Contemporary Art in Antwerp. Els Fiers, *A Human Masterpiece*, <http://www.artnet.com/magazine/reviews/fiers/fiers1-9-01.asp>.

Because Abdessemed's work consists of video depictions of "conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" (18 U.S.C. § 48(c)(1)), he and anyone who possesses or sells his works are at risk of prosecution under Section 48. The same is true of anyone who "creates, sells or possesses" depictions of the works of Nitsch and Delvoye. Although each of these artists has achieved a degree of recognition within the art world, there is no assurance that a prosecutor or jury would recognize the "serious * * * artistic value" of their work. *Ibid.*

The risk of prosecution is enhanced not only by the potentially off-putting subject matter of their work, but also by the fact that such artists often may refuse to explicate the intended meaning of their art, leaving it up to the viewers to take from the work whatever meaning they wish. For example, Massimiliano Gioni, artistic director of the Nicola Trussardi Foundation in Milan and the director of special exhibitions at the New Museum in New York, writes that Abdessemed's "explicit program is to offer no program and no answers." Ben Davis, *Animal Spir-*

its, <http://www.artnet.com/magazineus/reviews/davis/davis4-30-09.asp>.

Although likely to obscure their work’s meaning, the artists’ refusal to articulate an explicit message is a hallmark of modern art. Duchamp—whose “ready-made” art included not only the “Fountain” urinal but also a bicycle wheel mounted on a stool—believed that all works of art were, at best, fragmentary and incomplete, and that the viewer had to “enter into a dialogue with the work, completing it with his imagination by giving mental associations free rein.” 1 Karl Ruhrberg et al., *ART OF THE 20TH CENTURY* 131 (1998); see generally *id.* at 127–131.

By declining to publicly ascribe any message to their creations, contemporary conceptual artists leave viewers free to ponder and debate the meaning and purpose of their work and of art generally, thereby generating ideas in others without explicitly stating any message themselves. That fact does not deprive their work of First Amendment protection. As this Court recognizes:

[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a “particularized message,” * * * would never reach the *unquestionably shielded* painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (emphasis added). But, precisely because its creators often offer no explanation of its intended meaning, there is a significant danger that prosecutors and jurors will

not apprehend the “serious * * * artistic value” of modern conceptual art. 18 U.S.C. § 48(c)(1).

C. The Risk Of Prosecution And Conviction Is Compounded Because Section 48 Does Not Require That Works Be Considered As A Whole.

Even if prosecutors and jurors could be relied on to recognize the serious value of conceptual art and other work potentially subject to prosecution under Section 48, the “serious value” exemption does not remedy the statute’s unconstitutional overbreadth.

Aware that this Court has declared obscenity to be outside the zone of First Amendment protection, the government expressly analogizes Section 48 to the regulation of obscenity. See, *e.g.*, Gov’t Br. 10. But recognizing “the inherent dangers of undertaking to regulate any form of expression” and the corresponding imperative that such regulations be “carefully limited,” this Court has held that the only works that may be prosecuted as obscene are those “which, *taken as a whole*, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 23–24 (1973) (emphasis added).

Nothing in Section 48, however, requires that a work be considered as a whole. Thus, even if the government’s analogy to obscenity were apposite, this Court’s obscenity doctrine merely highlights Section 48’s unconstitutional overbreadth.

According to the government, “depictions cannot be reached by the statute” if “the work in which they appear has redeeming societal value when taken as a whole.” Gov’t Br. 16. Although it cites some legislative history to suggest that had been Congress’s in-

tent, the government does not—and cannot—identify any language in Section 48 as actually enacted that so limits the statute’s reach.

In fact, as enacted, Section 48’s “serious value” exception applies only to “*depiction[s]* that ha[ve] serious * * * value.” 18 U.S.C. § 48(b) (emphasis added). It does not by its terms extend to depictions *in works* that have serious value. Thus, to be exempt from prosecution under Section 48(b), the particular depiction at issue must itself have “serious * * * value” apart from any larger work in which it may be embedded.⁵ That allows the prosecution of journalists, artists, television and film producers, scientists, academics, and others if their works—despite having “serious value” when considered as a whole—contain depictions of animal cruelty that juries may find lack such value when viewed in isolation.

Consider, for example, video footage of bullfighting that is incorporated in a Travel Channel documentary on cultural practices around the world. Considered as a whole, the documentary would almost certainly be found to have serious journalistic

⁵ The jury instructions in this case suggest how narrowly the “serious value” exception can be read. Although the district court at one point instructed the jury to consider “the work taken as a whole” (JA 132), the court generally directed the jury’s attention to “the depictions” as such and specifically instructed the jury that it had to “determine whether * * * *the depictions contained in the videotape* at issue * * * have no serious religious, political, scientific, educational, journalistic, historical or artistic value.” JA 131 (emphasis added). Because it directed the jury to base its determination on the depictions *in* the video, rather than on the video that contained the depictions, the court’s instruction allowed the jury to base a conviction on the particular depictions considered in isolation without regard for the value of the video taken as a whole.

or educational value. Taken in isolation, however, the bullfighting footage could well fall within the prohibitions of Section 48. The footage would certainly satisfy the statutory definition of a “depiction of animal cruelty” because it shows “conduct in which a living animal is intentionally * * * tortured, wounded, or killed” and such conduct is illegal in this country. 18 U.S.C. § 48(c)(1); see, *e.g.*, Cal. Penal Code § 597m (West 1999); Fla. Stat. Ann. § 828.121 (West, Westlaw through June 30, 2009); P.R. Laws Ann. tit. 15, § 261 (2006); R.I. Gen. Laws § 5-22-25 (West, Westlaw through July 2009); Wis. Stat. Ann. § 951.08 (West 2005). The footage would also clearly satisfy the statute’s jurisdictional prong because it was knowingly created, sold, or possessed “with the intention of [being] plac[ed] * * * in interstate * * * commerce for commercial gain.” 18 U.S.C. § 48(a). Thus, criminal liability will attach to the bullfighting footage unless that depiction, on its own, is found to satisfy the “serious value” exception.

But satisfying that test could be a daunting hurdle. In the broader context of a discussion of bullfighting’s cultural significance, footage of the various stages of what is by its nature a bloody spectacle might serve the journalistic or educational function of illustrating the style, technique, and courage that are considered by bullfighting aficionados to be the essence of the sport. However, an American jury considering that footage in isolation from the broader cultural exposition of the documentary might be appalled at the violence being shown and find nothing of value within that depiction.

Documentaries that include footage of dog fights in Japan or cock fights in the Philippines, where those events are legal, run the same risk. See, *e.g.*,

Monica Villavicencio, *A History of Dogfighting*, NPR.org, July 19, 2007, <http://www.npr.org/templates/story/story.php?storyId=12104472>; JacobImages, *Philippine Cockfighting*, <http://www.jacobimages.com/v/images-stock-photos-culture-travel/philippines-cockfighting>. As the government points out, these activities are illegal in all fifty States and the District of Columbia, thus bringing depictions of them within the ambit of Section 48. See Gov't Br. 26–27 & nn.8, 10. Other examples of serious work that might be subject to prosecution because it contains depictions that violate Section 48 include:

- An investigative news report showing footage of wildlife being hunted out of season or using a prohibited weapon or trap. See Section I.A., *supra*.
- A wildlife documentary showing footage of poachers trapping or killing a protected animal. Many, if not all, States prohibit such acts. See, e.g., Alaska Stat. §§ 16.20.190 - .200 (West, Westlaw through 2009 legislation); Cal. Fish & Game Code § 2080 (West, Westlaw through 2009 legislation).
- A travel documentary on unusual regional practices around the United States that includes video footage of “noodling,” *i.e.*, fishing catfish by hand. See, e.g., Yancey Hall, *Using Hands As Bait, “Noodlers” Stalk Giant Catfish*, NAT'L GEO. NEWS, Sept. 8, 2005,

http://news.nationalgeographic.com/news/2005/09/0908_050908_noodling.html.⁶

In each of these examples, footage of the taking of the animal—if created, sold, or possessed in a State where the conduct shown is illegal—would satisfy Section 48’s definition of a depiction of animal cruelty. See Section I.A., *supra*. And if a jury were instructed to assess the value of such a depiction in isolation—as the plain language of Section 48 permits and as the district court did in this case—then the jury may be hard pressed to find any value in the depiction at all.

Participants in the stock photography industry are at particular risk of prosecution under Section 48. Stock photographers and stock photography agencies compile libraries of images and video footage of people, places, and events which they license to third parties for use in printed material or video productions. See Michael Heron, *Digital Stock Photography 2* (2007) (excerpt available at <http://books.google.com/books>). Stock photographs and video are not created, sold, or possessed by the stock photographer or agency for any “serious religious, political, scientific, educational, journalistic, historical, or artistic” purpose. 18 U.S.C. § 48(b). Rather, a stock image is created solely for a commercial reason, namely, for sale to someone who is willing to pay a fee for its use. Thus, stock photography necessarily falls outside of the “serious value” exception of Section 48(b). Moreover, because stock images are, by defini-

⁶ Noodling is legal in only 11 States. See Dan Eggertsen, *Is Noodling To Catch Catfish Legal Or Illegal*, <http://www.askcatfishfishing.com/is-noodling-to-catch-catfish-legal-or-illegal.html>.

tion, created and maintained entirely apart from the larger works in which they might ultimately be incorporated, there would never be anything to consider “as a whole” other than the depiction itself when determining whether a stock image has “serious value.” Accordingly, stock photographers and stock agencies are especially vulnerable to prosecution and conviction for any “depictions of animal cruelty” (*id.* § 48(c)(1)) contained in their collections.

A search of two of the world’s largest stock photography libraries—both of which are headquartered in Seattle, Washington—demonstrates that this is a genuine danger. Getty Images is the largest provider of video content in the world, with an archive of 60 million still images and more than 30,000 hours of stock film footage. See Getty Images—Profile, <http://www.answers.com/topic/getty-images-inc>; see also <http://www.gettyimages.com>. Corbis, which is owned by Microsoft Corp. founder Bill Gates, maintains a collection of more than 100 million still images as well as video footage. See Corbis Corp.—Profile, <http://www.answers.com/topic/corbis-corporation>; see also <http://pro.corbis.com>. Both the Getty and Corbis libraries contain depictions of numerous acts toward animals that are unlawful in one or more States and thus violate Section 48, including:

- Cockfighting. See <http://www.gettyimages.com/detail/920-304/AP-Archive>; <http://www.gettyimages.com/detail/200162337-001/The-Image-Bank>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-21804358&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=NN002288&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42->

21977530&caller=search; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-21804307&caller=search>).

- Dogfighting. See <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002677&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002674&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-18909885&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002676&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002675&caller=search>.
- Bullfighting. See <http://www.gettyimages.com/detail/dv298006/Photodisc>; <http://www.gettyimages.com/detail/CB3913-001/Stone>; <http://www.gettyimages.com/detail/81168478/Gallo-Images>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-22639190&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-16919604&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-19830308&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-22642880&caller=search>; <http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-20447858&caller=search>.
- Bear hunting with dogs, which is illegal in all but 17 States. See <http://www.gettyimages.com/detail/920-301/AP-Archive>; Humane Society of the United States, *Fact Sheet on Hound Hunting*, <http://www.hsus.org/wild>

life_abuse/campaigns/bears/hounding/hound_hunting.html.

- Removing a shark’s fin from its back at sea, which is prohibited by Federal law. See <http://www.gettyimages.com/detail/200112574-001/Photographers-Choice>; cf. 16 U.S.C. § 1857(1)(P).

According to the government, Section 48’s “broad exceptions clause” ensures that Section 48 “could not possibly have a substantial number of impermissible applications.” Gov’t Br. 9–10. But, as the foregoing discussion shows, the statute’s “serious value” exception is not only subject to highly subjective application by prosecutors and jurors ill-equipped for the task, but far narrower than the government acknowledges and far narrower than this Court has required in the obscenity context. In sum, Section 48’s “serious value” exception cannot bear the considerable weight that the government places on it.

II. SECTION 48 INVITES VIEWPOINT DISCRIMINATION.

The government conceded below that Section 48 is a content-based restriction on expression because it targets only depictions of animal cruelty as defined by the statute. See *United States v. Stevens*, 533 F.3d 218, 223 (3d Cir. 2008). As such, it is “presumptively invalid” (*R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)), because “content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace” (*id.* at 387 (internal quotation marks omitted)). That danger is particularly acute here, because only those depictions that a prosecutor or jury find to have “serious value” will escape criminal liability.

As noted above, Section 48 does not define what constitutes a work of “serious value,” and does not provide any criteria to govern a prosecutor’s or jury’s application of the “serious value” test. Consequently, Section 48 not only allows but actually requires that prosecutors and juries make subjective, *ad hoc* assessments when determining whether particular depictions of animal cruelty possess “serious value.” What is more, because the statute does not indicate whether a community or a national standard should govern the “serious value” determination, the same expression could be found protected in some jurisdictions and unprotected in others. In this way, Section 48 threatens to become a vehicle for viewpoint discrimination, permitting prosecutors and juries to use the “serious value” standard as a proxy for punishing the expression of ideas that are unpopular, unwelcome, or unfamiliar.

Consider, for example, Abdessemed’s *Don’t Trust Me* video, which comprises footage of livestock being killed with sledgehammers. Cf. *supra* at 16-17. Although Abdessemed chose not to inform viewers of its factual context, the footage depicts animals that were raised for their meat and slaughtered in Mexico in the traditional manner of Mexican butchers. See Regine, *supra*; Baker, *supra*; Matier and Ross, *supra*. If the footage were used in a film by advocates of vegetarianism to illustrate the moral basis for such a lifestyle, a prosecutor or jury could—and likely would—find that it had “serious religious, political, [or] * * * educational * * * value” (18 U.S.C. § 48(b)) and was therefore outside Section 48’s reach. In another context, without an explanation of the artist’s purpose, that very same footage could well result in prosecution and conviction under Section 48.

In his video, Abdessemed does not take a position on the method of slaughter or on the broader issue of using animals for food. He simply provides a visual experience, the import and impact of which will vary according to each viewer’s perspective. That of course leaves viewers free to conclude—as many in fact did—that Abdessemed intended to do nothing more than shock, titillate, and generate publicity for himself. See Baker, *supra*. If those viewers were prosecutors or jury members, Abdessemed could easily have been charged with and convicted of violating Section 48, on the ground that his work, even taken as a whole, lacks any “serious value.”

Given popular sentiment, it is by no means fanciful to suppose that Abdessemed is at significantly greater risk of prosecution under Section 48 than those who would use identical depictions to expressly condemn the killing of animals. In March 2008, the San Francisco Art Institute (“SFAI”) cancelled its showing of *Don’t Trust Me* when animal rights activists threatened SFAI staff members with bodily harm. See Sebastian Smee, *An In-Your-Face Provocateur: Adel Abdessemed Displays Things We Don’t Normally See*, BOSTON GLOBE, Oct. 19, 2008, at 6; *Readers’ Platform: Artists vs. Art*, S.F. CHRON., Apr. 4, 2008, at E4; Baker, *supra*. The San Francisco Society for the Prevention of Cruelty to Animals “condemned the exhibit, noting that ‘there is *no artistic merit* in cruelty to, and suffering of, living creatures.’” Denise Flaim, *Animal House*, NEWSDAY, Apr. 3, 2008 (emphasis added). Other opponents of the exhibit expressed similar viewpoints, stating for example:

- “The majority of contemporary ‘art’ is gratuitously offensive and utterly worthless.”

- “Bludgeoning animals to death is not a free-speech issue, it is a cruelty issue.”
- “[T]his guy wouldn’t know art if it hit him on the head with a sledgehammer. But we all know his name now, don’t we? He wins.”
- “[W]hat the heck the SFAI is doing exhibiting a sick display of animal cruelty in the name of art? Are they fresh out of real art to exhibit?”
- “Displays of sadism, cruelty or anything else for the sole purpose of shocking people are not art.”

Readers’ Platform: Artists vs. Art, supra. If these views were shared by members of a jury, Abdessemed could easily have been convicted under Section 48, as might a museum or gallery displaying the work, if it charges an admission fee or offers artwork for sale.

The risk that Section 48 will be applied in a viewpoint discriminatory fashion is compounded by the fact that Section 48 penalizes only those individuals who create, sell, or possess a depiction of animal cruelty with the intention of placing it in interstate commerce “for commercial gain.” 18 U.S.C. § 48(a). Given the “commercial gain” requirement, an animal-rights activist who purchases a dogfight video with the intention of showing it free-of-charge to illustrate what happens in a dogfight is immune from prosecution under Section 48. But someone else, say a dogfight enthusiast, who purchases the very same video with the intention of charging admission to its viewing, would be criminally liable under the statute.

Because it incorporates an inherently subjective “serious value” standard, and because it criminalizes only those depictions that are created, sold, or possessed for commercial gain, Section 48 is an open invitation to viewpoint discrimination. As such, Section 48 is unconstitutional. See, *e.g.*, *R.A.V.*, 505 U.S. at 391–394.

III. SECTION 48 WILL CHILL PROTECTED EXPRESSION BY DISSUADING RISK-AVERSE INDIVIDUALS WHO ARE NECESSARY TO THE CREATION AND DISSEMINATION OF EXPRESSIVE WORKS FROM PARTICIPATING IN PROJECTS THAT INCLUDE ANY DEPICTIONS OF ANIMAL CRUELTY.

In its brief, the government declares that prosecutors and juries called upon to apply Section 48 will be able to identify depictions with serious value “enough of the time to make wholesale invalidation of the statute a profound error.” Gov’t. Br. 48–49. That assertion is cold comfort to artists, journalists, educators, historians, and myriad others who must decide on a forward-looking basis whether to participate in the creation of works that include depictions of the type that, but for the “serious value” exception, plainly fall within the ambit of Section 48.

By its terms, Section 48 subjects to prosecution “[w]hoever knowingly creates, sells, or possesses a depiction of animal cruelty * * * for commercial gain.” 18 U.S.C. § 48(a). In other words, *anyone* who for monetary gain participates knowingly in the creation, sale, distribution or exhibition of a work containing a depiction of animal cruelty is subject to prosecution and conviction under Section 48. The potential sweep of that liability is extremely broad

given the numerous participants involved at various stages in the creation, distribution, and display of artistic and other works.

For example, the production and public exhibition of a film requires a director, camera operators, sound engineers, lab technicians, editors, producers, distributors, and exhibitors, to name just a few. A magazine piece or book will involve photographers, art directors, editors, layout staff, printers, and retailers. Similarly, a museum exhibition involves not only the artist who creates the work, but also (among others) the publishers of the exhibition catalogue that is produced for sale to the museum's patrons. So long as these participants create, sell, or possess the work with the intention of placing it in interstate commerce for commercial gain, they fall squarely within the scope of Section 48. For that reason, any number of these participants might, out of an abundance of caution, refuse to join in the production, sale, or display of artistic and other works of any kind that contain statutorily defined depictions of animal cruelty.⁷

The problem confronting these individuals is that the statute provides no standards for determining *ex ante* whether their depictions would satisfy the “serious value” exception necessary to avoid criminal liability under Section 48. Rather, as already discussed, criminal liability will turn on prosecutors’ and jurors’ subjective, *ad hoc* assessments of whether the specific depictions at issue possess “serious val-

⁷ As noted above (see *supra* at 7-9), the statutory definition of “animal cruelty” encompasses conduct—such as shooting a deer out of season—that does not constitute animal cruelty as that term is generally used in everyday conversation.

ue.” This inherent vagueness of Section 48 renders the statute facially unconstitutional, because it leads people to “steer far wider of the unlawful zone’ * * * than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (citation omitted). Specifically, those “sensitive to the perils posed by * * * indefinite language, avoid the risk * * * only by restricting their conduct to that which is unquestionably safe.” *Ibid.* And as this Court recognizes, the potential of a “vague law” to chill otherwise protected expression is not “neutralize[d]” by “[w]ell-intentioned prosecutors and judicial safeguards.” *Id.* at 373.

The chilling effect of Section 48 is likely to be strongest on those—such as editors, printers, and distributors—for whom the particular work in question is merely one of many works they help produce. Because the work represents only a small percentage of their income, and because they are unlikely to identify with the work as closely as does the originating artist, the threat of prosecution is especially likely to deter them. Thus, even if the originating artist is confident that the depiction in question possesses “serious value,” the originating artist is nonetheless hostage to the most risk-averse link in the production and distribution chain. The result is a constriction in the free communication of ideas that the First Amendment is intended to preserve and promote.

This danger is illustrated by the experience of British filmmaker Adrian Lyne in the late 1990’s with his film adaptation of Vladimir Nabokov’s novel *Lolita*, a story about a middle-aged man’s infatuation and sexual relationship with an underage girl. The film, which starred Jeremy Irons and 15-year-old French actress Dominique Swain, originally con-

tained nude shots of Ms. Swain's adult body-double and implied sex between Mr. Irons and Ms. Swain. See Steven Rosen, *Odd Pairing Basic Angle For "Lolita": Former Coloradan Wrote Screenplay*, DENVER POST, Oct. 7, 1998, at F1; Bob Van Voris, * * * *Coming Soon * * * "Lolita," The Lawyer's Cut: A First Amendment Lawyer Played Censor To The Classic*, NAT'L L.J., Aug. 17, 1998, at A1.

All major American studios rejected the film out of fear that it might violate the 1996 Child Pornography Prevention Act ("CPPA"), which criminalized any picture that "is, or appears to be, of a minor engaging in sexually explicit conduct" (18 U.S.C. § 2256(8)(A) (2002)), even if the apparent minor depicted was actually an adult body-double or a computer simulation. See Susan Wloszczyna, *Much More Than One Indecent Proposal*, U.S.A. TODAY, May 9, 2002, at D5; Terry Diggs, *Not A Love Story: Lyne's Lolita Spins Nabokov's Web Of Sex, Love And Control For Our Newly Stultifying Times*, S.F. RECORDER, Oct. 14, 1998, at 4; Colin Covert, *Lolita: A Surprisingly Chaste, Heartfelt Drama*, MINNEAPOLIS-ST. PAUL STAR TRIB., Oct. 9, 1998, at E1; Van Voris, *supra*. Even the Paramount film studio, where Lyne's prior films had made \$500 million, "said they loved the film but weren't prepared to go anywhere near it." Martyn Palmer, *SOHO's Old Devils; Interview; Adrian Lyne*, TIMES (U.K), May 25, 2002.

This Court later held that simulated depictions of children engaged in sexual activity—such as those originally included in *Lolita*—are a form of protected expression (see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)), but by that time the damage to *Lolita's* chances for commercial success had been

done.⁸ In the end, *Lolita* was not released in the United States until two years after its completion, and even then only after all of the potentially objectionable scenes, including those involving the body-double, had been edited out of the film under the supervision of a lawyer. See Diggs, *supra*; Rosen, *supra*; Van Voris, *supra*; Ed Bark, *Restraint Creates A Classy “Lolita”*: *Suggestion Replaces Tawdriness In This Version Of Nabokov’s Tale*, DALLAS MORNING NEWS, Aug. 2, 1998, at 1C.

There can be little doubt that Section 48 will—like the since-invalidated provisions of the CPPA—chill the dissemination of protected expression. Consider once again Abdessemed’s *Don’t Trust Me* video. After the SFAI cancelled its exhibition in the face of protests by animal-rights activists, other would-be exhibitors—including an Italian gallery and the 2008 Glasgow International Festival—yielded to similar pressure and decided not to show the video. See Regine, *supra*; Elisabetta Povoledo, *Exhibition With Disturbing Videos Of Animals Leads To Protests In Italy*, N.Y. TIMES, Feb. 28, 2009, at C3. Indeed, the

⁸ This Court invalidated the challenged provisions of the CPPA on the ground that they were overbroad, and therefore did “not address respondents’ further contention that the provisions [were] unconstitutional because of vague statutory language.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002). In the decision below, the Ninth Circuit had found that the statute was indeed unconstitutionally vague because it did “not ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,’ and * * * fail[ed] to provide explicit standards for those who must apply it, ‘with the attendant dangers of arbitrary and discriminatory application.’” *Free Speech Coalition v. Ashcroft*, 198 F.3d 1083, 1095 (9th Cir. 1999) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972)). Much the same can be said of Section 48.

curator of the Italian exhibition, who also is the chief curator for the March 2010 Whitney Biennial in New York, “said the outcry had made him think twice about inviting Mr. Abdessemed to show at the Whitney Museum of American Art, because he does not ‘want to terrify the institution.’” Povoledo, *supra*. If, as in Abdessemed’s case, free expression can be deterred by the public protests of an interest group with no official power, it is likely that free expression will be chilled to an even greater degree by the threat of criminal sanctions—particularly when avoidance of such sanctions depends entirely on prosecutors’ and jurors’ arbitrary, *ad hoc* assessment of whether the expressive depiction at issue possesses “serious * * * value.” 18 U.S.C. § 48(b).

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted.

EUGENE VOLOKH*
*405 Hilgard Avenue
Los Angeles, CA 90095
(310) 206-3926*

JOAN E. BERTIN*
*National Coalition
Against Censorship
275 Seventh Avenue
Suite 1504
New York, NY 10001
(212) 807-6222*

ANDREW E. TAUBER*
Counsel of Record
CRAIG W. CANETTI
*Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000*
**Counsel for National
Coalition Against
Censorship*

JEFFREY P. CUNARD†
*Debevoise & Plimpton
LLP
555 13th Street, NW
Suite 1100 East
Washington, DC 20004
(202) 383-8043*
†*Counsel for College Art
Association*

JULY 2009