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 PROFESSIONAL OUTDOOR MEDIA ASSOCIATION, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, PENNSYLVANIA OUTDOOR WRITERS ASSOCIATION, SOUTHEASTERN OUTDOOR PRESS ASSOCIATION, AND TEXAS OUTDOOR WRITERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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July 27, 2009

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Amici curiae respectfully submit this brief in support of Respondent pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to affirm the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Professional Outdoor Media Association ("POMA") is an organization of outdoor writers, photographers, broadcasters, videographers, illustrators, artists, editors, producers, firms, and organizations dedicated to hunting, shooting, fishing, trapping, and other traditional outdoor sports. POMA is considered the premier journalists' organization in the outdoor industry. Through their work, members communicate vital educational, recreational, and issue-based information to the nation's more than 50 million hunters and anglers and the general public. POMA believes that 18 U.S.C. § 48 threatens the livelihood of its members, and the ability of the public to see images of hunting and fishing that are protected by the First Amendment.

The American Society of Media Photographers ("ASMP") was founded in 1944 to protect and promote the interests of professional photographers who earn their livings by making photographs for publication. With over 7,000 members in 39 chapters and approximately 40 countries, it is the largest and

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

oldest organization of its kind in the world. Its membership roles contain many of the world's best and best-known photographers. ASMP joins this *amicus curiae* brief to ensure that its members have the freedom to capture and sell photographs without fear of prosecution under 18 U.S.C. § 48.

The North American Nature Photography Association ("NANPA") is a not-for-profit corporation that promotes the art and science of nature photography as a medium of communication, nature appreciation, and environmental protection. Its members are photographers and others interested in nature photography. NANPA supports the broad dissemination of all kinds of nature images, including images that depict the killing of animals. NANPA believes that 18 U.S.C. § 48 inhibits the ability of all persons to exercise their First Amendment rights to make and use images of animals.

The Pennsylvania Outdoor Writers Association ("POWA") is an organization of professional writers, artists, photographers, broadcasters, telecasters, lecturers, and other communicators with a common interest in the outdoors. Formed in 1950, POWA is the largest state outdoor writer organization in the country. POWA is dedicated to communicating the outdoor message to a broad audience all across America.

The Southeastern Outdoor Press Association ("SEOPA"), organized in May 1964, is the nation's leading regional outdoor communicator's organization, with over 500 members. The SEOPA is a nonprofit organization of magazine and newspaper writers, book authors, photographers, radio and television personalities, lecturers, editors, artists,

industry representatives, and others in the outdoor communications field.

The Texas Outdoor Writers Association ("TOWA"), founded in the late 1950's, is a group of Texas-based journalists and outdoor industry members. The TOWA is designed to promote quality writing, broadcasting, photography, and teaching relating to hunting, fishing, and the outdoors generally.

POWA, SEOPA, and TOWA join this *amicus curiae* brief to protect the rights of photographers, journalists, and others to engage in outdoor communications without fear of prosecution under 18 U.S.C. § 48.

SUMMARY OF THE ARGUMENT

18 U.S.C. § 48 is overbroad and therefore unconstitutional. By its plain terms, the statute sweeps broadly: it criminalizes images "where an animal is wounded or killed" even if the underlying conduct, as with lawful hunting and fishing, is legal where it occurred. Under the statute, outdoor photographers and journalists who engage in their livelihood do so at their peril. These members of the media capture images of hunting and fishing for publication in the many outdoor sports magazines and other materials that are widely distributed and read throughout the United States. Their otherwise lawful conduct falls squarely within the zone of conduct that the statute criminalizes.

This Court has long recognized that a statute affecting a substantial amount of lawful speech is facially invalid under the First Amendment. Here, the statute covers images of hunting and fishing. It is of no consequence that the statute reaches only

images captured, sold, or possessed where the activity is unlawful. Given the wide variations in hunting and fishing laws across the country, the statute therefore encompasses countless images. And the vast majority of these images represent lawful speech depicting conduct that was lawful where it occurred, simply because such conduct was unlawful where the image was sold.

The United States attempts to downplay the statute's broad sweep by focusing on dogfighting and crush videos. However, this is not a case where a statute incidentally affects some small measure of lawful speech. Rather, the basic application of the statute includes images of any harm to any animal – without restriction on the kind of animal or the nature of the harm.

Finally, the exception for depictions with serious value cannot save the statute. The exception is a narrow one, because it does not include a great deal of speech that, while protected, may lack "serious value," nor does it apply to the work as a whole. Moreover, the "serious value" issue will almost always be a jury question, and one where the jury's determination is very hard to predict, thereby significantly chilling protected speech.

ARGUMENT

I. THE STATUTE AFFECTS A SUBSTANTIAL AMOUNT OF LAWFUL SPEECH

The statute at issue in this case criminalizes a wide range of speech that plainly is legitimate. The United States and its supporting *amici* characterize the statute as "encompassing an extremely narrow category." Pet. Br. at 16. In support of its claim, the United States provides two examples of "the kinds of

materials that Congress intended to reach": so-called "crush videos," and "animal-fighting ventures, namely dogfighting, hog-dog fighting, and cockfighting." *Id.* at 17-18. But the statute's coverage does not turn on the fact that Congress may have intended to reach these "kinds of materials." *Id.*

Indeed, the statute does not mention crushing or dogs at all. Rather, it encompasses essentially all forms of harm to any animal. This broad scope thereby makes a felony of countless images that represent lawful speech. Specifically, the statute covers any depiction where an animal is wounded or killed, and such conduct is illegal where the image is created, sold, or possessed. *See* 18 U.S.C. § 48(c)(1) ("visual or auditory depiction . . . in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" and such conduct is "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place").

Thus, by its terms, the statute criminalizes any picture or video of hunting or fishing where an animal is killed or wounded so long as the image is sold in a place where the killing is illegal. For instance, there is no question that hunting is illegal in the District of Columbia.[2] *See* D.C. Mun. Regs. tit. 19, § 1560.1 ("All wildlife in the District is protected, and none shall be killed . . . ."). But in Texas, for example, hunting of white-tailed deer is lawful in open seasons that vary by particular location. *See* Texas Parks and Wildlife Dep't, 2008-2009 Texas Hunting Season Dates by Animal, at

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[2] The District of Columbia is considered a "State" under the statute. *See* 18 U.S.C. § 48(c)(2).

http://www.tpwd.state.tx.us/huntwild/hunt/season/animal_listing (last visited July 24, 2009). A published photo of a hunter shooting a deer in Texas, sold in the District of Columbia, clearly violates the statute, despite the fact that the hunting was lawful at the place where it occurred.

The following pictures and videos are therefore felonious under the statute if sold in the District of Columbia: a photo in Outdoor Life Magazine of a man shooting a coyote;[3] a video of a hunter shooting a Spanish Ibex on the homepage of Petersen's Hunting Magazine; [4] videos of deer being hunted on the websites of Buckmasters Magazine and Bowhunter Magazine;[5] and a video of hunters at a turkey shoot in American Hunter Magazine.[6] In addition, there are countless images of hunting, made illegal by the statute, on TV networks such as Sportsman Channel and ESPN Outdoors. Despite the government's focus on dogfighting and crush videos, it presents no limiting construction that would take images of ordinary hunting sold in the District of Columbia, for example, outside the scope of the statute.

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[3] *See* http://www.outdoorlife.com/photos/gallery/hunting/2009/01/coyote-showdown?photo=0 (last visited July 24, 2009).

[4] *See* http://www.huntingmag.com/index.html (last visited July 24, 2009).

[5] *See* http://www.buckmasters.com/bm/VideosMedia/VideoLibrary/VideoPlayer/tabid/147/VideoId/134/Default.aspx (last visited July 24, 2009); http://www.bowhunter.com/bowhuntermagtv/BHTV_descriptions/index.html (last visited July 24, 2009).

[6] *See* http://www.americanhunter.org/ Video.aspx?vid=1708 (last visited July 24, 2009).

Simply put, even if the hunting or fishing was legal where it occurred, publication of the image itself can become unlawful because it is sold in a state where the hunting or fishing laws make the conduct illegal. The District of Columbia examples present just one problem. In fact, the state-by-state differences in hunting and fishing laws can make an image unlawful in several different ways.

First, there are wide variations state by state regarding whether particular animals can ever be killed. *See, e.g.*, Michigan Dep't of Natural Resources, The Mourning Dove in Michigan, at http://www.michigan.gov/documents/dnr/Dove_factsheet_2007_191772_7.pdf (last visited July 24, 2009) (noting that dove hunting is legal in 40 states, but not, for instance, in Michigan). The different laws sometimes reflect a need to protect a particular animal population, or to limit a particular animal population. Other laws address the damage caused by certain species in certain areas of the country. Still others arise from different communities' views on animal rights. Indeed, there are several jurisdictions, including the District of Columbia, that ban hunting entirely. And even where the law is uniform – e.g., our national endangered species laws – there are, of course, many other countries that do not protect the same animals.

Second, there are differences state by state as to whether a particular method of hunting or fishing can be used. For instance, in California, hunting with a crossbow is lawful; in New York, it is not. *See* Cal. Fish & Game Code § 10500; N.Y. Envtl. Conserv. Law § 11-901(3). Similar discrepancies by state are common for many other weapons. *See, e.g.*, N.Y.

State Dep't of Environmental Conservation, Deer and Bear Hunting Regulations, at http://www.dec.ny.gov/outdoor/8305.html (last visited July 24, 2009) (outlining legal hunting weapons in New York); Ohio Dep't of Natural Resources, Allowable Hunting Equipment, at http://www.dnr.state.oh.us/Home/tabid/20829/Default.aspx (last visited July 24, 2009) (outlining legal hunting weapons in Ohio); Texas Parks and Wildlife, Means and Methods, at http://www.tpwd.state.tx.us/publications/annual/hunt/means (last visited July 24, 2009) (outlining legal hunting weapons in Texas).

Third, there are differences state by state in whether hunting or fishing is lawful at a particular time. The hunting seasons vary widely by location and by particular animal. *See, e.g.*, Texas Parks and Wildlife, 2008-2009 Texas Hunting Season Dates by Animal, at http://www.tpwd.state.tx.us/huntwild/hunt/season/animal_listing (last visited July 24, 2009) (outlining the different hunting seasons for each animal in Texas); WoodyBobs Squirrel Recipes, at Squirrel Hunting Season State By State, at http://www.woodybobs.com/ blog/?p=7 (last visited July 24, 2009) (listing squirrel hunting seasons by state).

These three categories do not present possible extensions of the statute; rather, each is directly implicated by the plain text of the statute. An image is prohibited where the "*conduct* is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." 18 U.S.C. § 48(c)(1) (emphasis added). Thus, if the "conduct" of hunting or fishing "is illegal" in a particular state – because it involves a particular animal, a particular

method of hunting, or hunting at a particular time – then the image is plainly covered.

The examples of pictures and videos covered by the statute are countless: a TV program that shows hunting with a weapon that is illegal in some jurisdictions; a magazine with photographs of people killing animals in a foreign country, where the animals are considered endangered species in the United States; or a newspaper with photographs of people hunting deer, sold in a location that prohibits deer hunting across the board or where deer hunting is at the time of sale out of season.

The images covered by the statute are not some small, insignificant set. Over 60 million people participated in hunting and fishing during 2008. *See* National Sporting Goods Ass'n, 2008 Participation, at http://www.nsga.org/files/public/2008ParticipationRankedbyAlpha_4Web_080415.pdf (last visited July 24, 2009). Hunters and anglers spend $76 billion annually on hunting and fishing. *See* Nat'l Shooting Sports Foundation, Hunting and Fishing: Bright Stars of the American Economy, at http://www.nssf.org/07report/CompleteReport.pdf (last visited July 24, 2009).

Specifically, there is a major industry in publishing and selling outdoor photography that includes images of harm to animals – e.g., a pheasant being shot or a fish wriggling on a line. Magazines like Field and Stream, American Hunter, and Outdoor Life each have circulation numbers of over 900,000. *See* Advertising Age, Magazine Circulation Rankings 2006, Data Center, at http://adage.com/datacenter/datapopup.php?article_id=115101 (last visited July 24, 2009). Television networks showing

hunting and fishing, including Sportsman Channel and ESPN Outdoors, are seen in many millions of homes. Moreover, modern communications – especially the Internet – allow pictures and video to travel almost instantaneously around the world. Thus, the "interstate commerce" element of the statute will be satisfied in virtually every situation where a journalist or photographer sells an image to any kind of publication.

Furthermore, this speech is a real and important part of the marketplace of ideas. These pictures and videos are used for education in hunting and fishing technique, artistry in showing hunters and fishers practicing their trade, telling a story of how particular hunters and fishers work, and simple entertainment. Moreover, they are a valuable part of the legal debate itself over what kinds of hunting or fishing should be allowed or prohibited.

The United States suggests that there is a compelling interest in preventing illegal conduct, *see* Pet. Br. at 43, and that the statute "only applies to depictions of illegal conduct," *id.* at 15. However, this statement is demonstrably false. All of the covered images discussed above are of wholly lawful conduct. And there is no government interest – let alone a compelling one – in stopping hunting and fishing that is perfectly legal where it is practiced.

II. THE STATUTE'S OVERBREADTH RENDERS IT UNCONSTITUTIONAL

Under the overbreadth doctrine, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not

before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This doctrine stems from the understanding that "the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Id.* at 611-12. Thus, it is well established that a statute is overbroad and unconstitutional if it prohibits a "substantial amount of protected speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002). This standard is plainly satisfied here.[7]

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[7] The Washington Legal Foundation et al. suggests that this Court should not address overbreadth because it was not decided by the Third Circuit in the opinion below. *See* Brief of the Washington Legal Foundation et al. as *Amici Curiae* in Support of Petitioner at 11. However, neither party has asked this Court to put off deciding the issue. And with good reason: The issue was fully briefed in the district court, in the court of appeals, and in this Court. And while the Third Circuit did not expressly determine that the statute is overbroad, it addressed the issue at length. *See* Pet. App. 33a-34a. Thus, there is no reason to allow the harm that comes from chilling protected speech to continue during the course of a remand and further litigation only to once again bring the issue to this Court. In any event, this Court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

A. The Numerous Examples of Lawful Speech Covered By The Statute Establish Overbreadth.

As discussed above, the statute covers countless images that are plainly lawful speech. By any measure, this quantity of images is "substantial." In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-77 (1987), this Court determined that the quantum of protected speech at issue there occurring in a single airport was "substantial." Likewise, in *Ashcroft*, 535 U.S. at 256, this Court found that there was a substantial amount of lawful speech that involved virtual child pornography. The Court recognized that "teenage sexual activity and the sexual abuse of children . . . have inspired countless literary works" and "[c]ontemporary movies," *id.* at 247, which constitute lawful speech covered by the statute. Certainly, the quantity of speech involving lawful hunting or fishing, where such conduct is unlawful anywhere the image is sold, dwarfs the amount of speech in the single location of one particular airport or involving virtual child pornography.[8]

Indeed, the significant quantity here is especially evident when the unconstitutional applications are

[8] Moreover, in *Virginia v. Black*, 538 U.S. 343 (2003), this Court found unconstitutional a statute that criminalized cross burning where the act itself was considered prima facie evidence of an intent to intimidate. While the plurality did not specifically discuss the "substantial amount of speech" standard, it appeared to strike down the statute on overbreadth grounds. *See id.* at 365-67 (plurality opinion). And the amount of lawful speech affected by a cross burning statute obviously is much smaller than the amount of lawful speech affected in the instant case.

considered "relative to the statute's plainly legitimate sweep." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). The *only* images that the government identifies as within the statute's legitimate scope are images of crush videos, dogfighting, hog-dog fighting, and cockfighting. Even assuming these images are not constitutionally protected, they represent a small industry. For example, the government cites an article claiming that "$1 million" of crush videos are sold every year. Pet. Br. at 44 (internal quotation marks omitted). But one million dollars is very minor in comparison to the outdoor photography and video industry that is affected by the statute. *See supra* Part I.

Furthermore, the broad statute will cause enormous chilling effects. As this Court has recognized, "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited *or chilled* in the process." *Ashcroft*, 535 U.S. at 255 (emphasis added). Here, as discussed above, there is an incredibly wide range of hunting and fishing laws in different states and localities. It would be virtually impossible for any journalist or photographer to be sure that the hunting or fishing captured in a particular image is lawful in every single location in the United States. Thus, as in *Ashcroft*, "[w]ith these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law." *Id.* at 244.

The United States does not expressly deny that the statute covers the images discussed above in Part

I. Rather, it attempts to minimize the importance of this broad coverage and the attendant chilling effects by claiming that the intended reach of the statute is limited to crush videos, dogfighting, and similar activities. *See* Pet. Br. at 17-21. However, the supposedly limited focus of the statute does not mitigate the reality of its very broad application.

While to our knowledge the statute has not yet been applied broadly, that could certainly change if the law were upheld in this case. It makes sense that prosecutors did not begin with a photograph of hunters or fishers in a major magazine as a case to test the statute's constitutionality. But if the statute is found constitutional, there is nothing to prevent prosecutions for any or all of the examples described above. And the members of our organizations will have serious reservations about continuing to sell these kinds of photographs and videos.

In any event, the likelihood of actual prosecutions is irrelevant. In *Ashcroft*, the lower court had refused to consider certain examples of speech subject to the statute because it was "highly unlikely that any adaptations of sexual works like 'Romeo and Juliet' will be treated as criminal contraband." 535 U.S. at 243 (internal quotation marks omitted). Nonetheless, this Court considered 'Romeo & Juliet,' along with other similar speech, in deciding that the statute was overbroad. *Id.* at 247-48. Similarly, it seems doubtful that the statute prohibiting First Amendment activities in Los Angeles airport would have been used to prevent people from reading books, but since it was within the coverage of the statute, it had to be considered in deciding overbreadth. *See Bd. of Airport Comm'rs*, 482 U.S. at 574-75 ("The

resolution . . . prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing."). In short, overbreadth concerns the coverage of the statute, not the number of actual prosecutions that have been or are likely to be brought.

Finally, an *amicus* supporting Petitioner suggests that prosecutorial discretion provides sufficient safeguards against improper use of the statute. *See* Brief of the Center on the Administration of Criminal Law as *Amicus Curiae* in Support of Petitioner at 20-22. However, prosecutorial discretion is insufficient protection in the context of the First Amendment. Just as an overly vague statute "allows policemen, prosecutors, and juries to pursue their personal predilections," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)), an overbroad statute does the same. Laws governing speech are unconstitutional where they are "subject to the uncertainties and vagaries of prosecutorial discretion." *New York v. Ferber*, 458 U.S. 747, 771 n.26 (1982). Indeed, the reasoning behind an overbreadth challenge is that chilling effects will occur even without prosecutions. *See, e.g., City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1983) ("The requirement of substantial overbreadth is directly derived from" the idea that "a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals." (internal quotation marks omitted)). Simply put, people should not have to rely on the magnanimity of the prosecutor or otherwise silence themselves.

B. The Notion That The Statute Covers Some Small Amount Of Unprotected Speech Does Not Save The Statute From An Overbreadth Challenge.

The United States argues that the statute's overlap with obscenity for some small number of images (*i.e.*, crush videos) is enough to make the statute facially valid, *see* Pet. Br. at 42-43, but that is plainly incorrect. In *Ashcroft*, this Court recognized that the Child Pornography Prevention Act ("CPPA") covered some pictures that "might be obscene." 535 U.S. at 240. However, the CPPA "is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute." *Id.* And the CPPA "makes no attempt to conform to the *Miller* standard." *Id.*[9] Thus, this Court recognized that coverage of some obscene images is insufficient to save a statute that does not follow the obscenity standard. If an overlap with obscenity were enough, then a statute that banned *all* speech would be exempt from an overbreadth challenge simply because some of the banned speech is obscene. There is no justification for such an absurd approach to overbreadth.

The situation here is essentially the same as in *Ashcroft*. The statute is not aimed at obscenity, and its language does not remotely follow the three-prong

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[9] By contrast, the speech prohibited by the child pornography statute in *Williams* "precisely track[ed] the material held constitutionally proscribable in *Ferber* and *Miller*." *United States v. Williams*, 128 S. Ct. at 1839. And *Williams* is the only case the government cites to support the argument regarding overlap with obscenity as a defense to overbreadth. *See* Pet. Br. at 42.

test of *Miller v. California*, 413 U.S. 15 (1973). Specifically, it does not require that the image appeal to the prurient interest or involve patently offensive sexual conduct. Thus, just as in *Ashcroft*, the statute "is much more than a supplement to the existing federal prohibition on obscenity." 535 U.S. at 246. And the fact that the statute might cover some obscene images does not protect it from an overbreadth challenge. *Id.*

The United States also argues that the statute survives strict scrutiny as applied to dogfighting, and that this constitutional application of the statute belie overbreadth. *See* Pet. Br. at 43-44. However, given the statute's broad scope, it is not "narrowly tailored" to prevent dogfighting, and therefore does not satisfy strict scrutiny. *See* Resp. Br. at 50-51. The Court has recognized this confluence of narrow tailoring and overbreadth. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) ("Quite obviously, the rule employed in as-applied analysis that a statute . . . must be 'narrowly tailored' . . . prevents a statute from being overbroad.").

In any event, isolated examples that might survive strict scrutiny do not render the statute facially valid. Indeed, the government concedes that isolated examples are not important. *See* Pet. Br. at 47-48. But the government erroneously treats dogfighting and similar activity as the primary applications of the statute, while treating the broad scope of the statute as isolated examples. Such an approach has no merit for a statute that says nothing at all about dogfighting.

Moreover, the enormous amount of protected speech covered by the statute dwarfs the amount of

speech that the government has a compelling interest in preventing. In short, isolated examples for which the government must carry the heavy burden of surviving strict scrutiny cannot suffice as a defense to overbreadth. If the rule were otherwise, facial challenges would be almost impossible, regardless of the serious First Amendment implications.

C. The Exception For Speech Of Serious Value Is Insufficient To Save The Statute.

The United States argues that the exception for speech of "serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. § 48(b), provides sufficient assurance that legitimate speech is not criminalized. *See* Pet. Br. at 48-49. However, as explained by respondent, such a limited exception has never been allowed to save an otherwise unconstitutional statute, and it fails to do so here as well. *See* Resp. Br. at 25-34. Indeed, the exception's deficiencies are especially pronounced in the context of overbreadth.

To begin with, the exception by its terms fails to protect a substantial amount of lawful speech. Even speech without "serious" value is protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons."). Indeed, one major purpose of the First Amendment is to ensure that the government, including the courts, does not decide what counts as serious or important speech. *See, e.g.*, *id.* at 25 ("[O]ne 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.").

To be sure, the courts do make a serious value determination in the context of obscenity. *See Miller*, 413 U.S. at 24. However, this prong of the obscenity test cannot be separated from the other two prongs to become an independent test of First Amendment protection. For obscenity, the "serious value" prong simply acts as a final level of protection for speech that has already been shown – based on the first two prongs – to have little or no value in the vast majority of cases. Here, in contrast, the fact that the images involve harm to animals does not establish that they are categorically unworthy of protection.

Furthermore, unlike the serious value prong of the obscenity test, the statute here does not require that the work be taken as a whole in making the "serious value" determination. *See* Resp. Br. at 33. This distinction is critical because it can be very difficult to appreciate an image's true value outside the context of the work as a whole. *See Ashcroft*, 535 U.S. at 235 ("[A]n essential First Amendment rule" is that a "work's artistic merit does not depend on the presence of a single explicit scene."). For example, a picture of an animal being shot might, on its own, seem to have little value, but it has great value as part of an article explaining how to hunt properly. Thus, the exception for the statute in this case is significantly narrower than the exception for obscenity.

Finally, even if the exception were considered broad, it still would not mitigate the chilling effects created by the statute. The "serious value" determination will almost always be a factual

question for the jury. In addition, it is impossible to predict what some jury will view as having serious value. This uncertainty is exacerbated by the fact that the jury can be located anywhere in the country where the image is sold. Just as in *Board of Airport Commissioners*, "it is difficult to imagine that the" coverage of the statute "could be limited by anything less than a series of adjudications, and the chilling effect of the [statute] on protected speech in the meantime would make such a case-by-case adjudication intolerable." 482 U.S. at 575-76.

Indeed, the result here is that photographers and journalists will have to take the risk of a trial to prove the value of their speech. More likely, of course, is that they will not sell any images that might be covered by the statute, regardless of their value. This result is precisely what the overbreadth doctrine was designed to prevent.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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