No. 08-769

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

ROBERT J. STEVENS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THIRTEEN NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
John Rory Eastburg
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209
(703) 807-2100

(Additional counsel for amici *listed in Appendix B.)*

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STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are The Reporters Committee for Freedom of the Press and thirteen news media organizations – The American Society of News Editors, The Association of Alternative Newsweeklies, Citizen Media Law Project, MediaNews Group, Inc., The National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The Newspaper Association of America, The Newspaper Guild-CWA, Outdoor Writers Association of America, The Radio-Television News Directors Association, The Society of Environmental Journalists, and The Society of Professional Journalists.

This case concerns an issue critical to the media specifically and the public in general: whether the Government can criminalize the possession and dissemination of a broad range of depictions involving animals. *Amici* often expose the abuse of animals, participate in the national debate over the proper treatment of them, and cover commonplace activities involving animals such as hunting and fishing. 18 U.S.C. § 48 compromises the news media's ability to perform any of these functions without fear of prosecution.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amici curiae* (aside from those who have given general consent to all *amici*) has been filed with the Clerk.

SUMMARY OF ARGUMENT

Section 48 of Title 18 of the United States Code ("Section 48") criminalizes a wide variety of valuable speech about the use and abuse of animals. Media *Amici* urge the Court to affirm the decision below and find Section 48 unconstitutional on its face.

The goal of preventing crush videos and other animal cruelty is certainly a worthy one.[2] It is this very interest in protecting animals from abuse that makes speech about their treatment so valuable. Press coverage serves the community by exposing animal cruelty such as crush videos, animal fighting and the mistreatment of animals at some puppy mills and slaughterhouses. At the same time, the press regularly covers fishing, hunting, and other broadly accepted activities which, in some cases, fall within the scope of the statute. And the news media has long contributed to debates about what treatment of animals – from fox hunting to circuses to factory farming – should be prohibited as unduly cruel.

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[2] *Amici* take no position on whether the interest in preventing animal cruelty is "compelling" in the First Amendment context. *But see* Pet. App. 16a (all compelling interests recognized by the Court have related "to the well-being of human beings, not animals"). *Amici* write to make clear that, whether or not the Court finds the interest in animal welfare to be compelling, speech about animal cruelty is significantly more valuable than the Government claims. This is relevant to Section 48's overbreadth as well as whether speech about animal cruelty should be categorically excluded from First Amendment protection.

But Section 48 provides that *anyone* who knowingly possesses or distributes a visual or auditory "depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain" faces up to five years in federal prison, unless the depiction has "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(a),(b). Such a broad prohibition imperils the media's ability to report on issues related to animals.

The Government assures this Court that Section 48 prohibits only speech that is devoid of value. But this is anything but assured with a statute that protects only "serious" journalism and does not, on its face, require that juries take a challenged work "as a whole" when determining its value. Nor does Section 48 protect newsgathering in *any* manner, since it criminalizes possession of a range of source materials no matter their intended purpose.

More broadly, the Government urges the Court to recognize its authority to criminalize speech any time it finds "the First Amendment value of the speech is 'clearly outweighed' by its societal costs." Br. 12. It also claims the authority to control crime by prohibiting *depictions* of criminal activities, an idea rejected by this Court in nearly every circumstance. Both of these rules would serve only to close off the "breathing space" that "First Amendment freedoms need … to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

ARGUMENT

I. News media coverage of the use and abuse of animals has long been recognized as valuable speech.

The Government asks the Court to categorically exclude depictions of animal cruelty from First Amendment protection on the grounds that such speech is entirely without value. The Government goes so far as to equate these depictions with child pornography and claim that any effect on valuable speech "exist[s] at the outer margins of the statute." Br. 9.

This Court ruled that child pornography could be categorically excluded from First Amendment protection because "the evil to be restricted *so overwhelmingly outweighs* the expressive interests, *if any*, at stake, that no process of case-by-case adjudication is required." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982) (emphasis added). This may be so in the particularly extreme case of child pornography, because preventing the sexual abuse of children "constitutes a government objective of *surpassing* importance." *Id.* at 757 (emphasis added).

But it is a mistake to take the analogy too far, assuming that speech about animal cruelty likewise is so devoid of value that it is "overwhelmingly outweigh[ed]" by an interest in protecting animals. As even the dissenters below agreed, animal cruelty is not "of the same order as the reprehensible behavior implicit in child abuse." Pet. App. 50a n.24.

A. The press plays an essential role in exposing and stopping animal abuse.

The press long has played a valuable role in exposing and ending the abuse of animals. In 1970, for example, Fund for Animals founder Cleveland Amory produced an early critique of bullfighting for CBS's *60 Minutes*, with the goal of telling "the bull's side of the story."[3] A scathing indictment of what was then a less controversial and more glamorous sport, the piece told its story with bloody behind-the-scenes footage of bullfighting.

This is not an unusual example. In the last few years, for example: HBO produced a film investigating the abusive practices of a company which allegedly bought stray and stolen dogs, butchered some for their organs, and re-sold others for institutional research;[4] CBS News produced an exposé on dog fighting in Houston using tapes seized by police, showing reluctant dogs forced to fight;[5] and NBC News aired coverage of a puppy mill raid, showing the deplorable conditions that resulted in 70 animal

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[3] *60 Minutes: Cruelty in the Bullring* (CBS television broadcast Feb. 03, 1970), *available at* http://www.cbsnews.com/video/watch/?id=4528974n.

[4] *Dealing Dogs* (HBO television broadcast Feb. 21, 2006); *see also* Chip Crews, *HBO's 'Dogs': A Gnawing Portrait of Despair*, WASH. POST, February 21, 2006, at C01.

[5] *CBS News: Dog Fighting: Up Close* (CBS television broadcast July 18, 2007), *available at* http://www.cbsnews.com/video/watch/?id=3071329n.

cruelty charges.[6] It would be difficult to produce these television investigations, and countless other pieces like them, without including footage of the practices being investigated.

Print media coverage likewise has focused public scrutiny on such varied subjects as: the continued popularity of cockfighting in Puerto Rico;[7] cruel and dangerous slaughtering practices that led to a huge beef recall, including "kicking sick cows and using forklifts to force them to walk";[8] starvation of domestic animals so severe that they chewed on the wood planks of their pens; [9] and the practice of stripping mares of their foals so the foals of thoroughbreds could nurse from them.[10] The Government's merits brief tacitly recognizes the value of reporting on animal cruelty, citing eighteen news articles exposing the persistence of animal fighting, crush videos, and related issues. *See* Br. XV-XVIII.

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[6] *NBC News: Cops rescue pups from purebred farm* (NBC television broadcast March 25, 2009), *available at* http://www.msnbc.msn.com/id/29865929.

[7] Johanna Tuckman, *Puerto Rico's $330-Million Obsession: Cockfighting*, L.A. TIMES, October 29, 2000, at A1.

[8] Andrew Martin, *Slaughterhouse Orders Largest Recall Ever of Ground Beef*, N.Y. TIMES, Feb. 18, 2008, at A10; Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse*, WASH. POST, Jan. 30, 2008, at A4.

[9] Terri Bryce Reeves, *Rescued Animals Find Greener Pastures*, ST. PETERSBURG TIMES, Jan. 17, 2008, at 5.

[10] T. Christian Miller, *Dirty little secret of horse industry*, ST. PETERSBURG TIMES, May 24, 1994, at 5.

B. Press coverage helps define the "fine line" between the use and abuse of animals.

The press helps society recognize what the dissent below called the sometimes "fine" line "between cruelty to animals and acceptable use of animals." *See* Pet. App. 44a n.21. Society's definition of proper and improper treatment of animals is constantly shifting. For example, it was not until last year that Louisiana outlawed cockfighting. *See* La. Rev. Stat. Ann. § 14:102.23 (2009). The practice is still legal, if controversial, in U.S. territories including Puerto Rico and Guam. *See*, *e.g.*, P.R. Laws Ann. tit. 15 §§ 292-300 (2006); Guam Code Ann. tit. 22 §§ 39101-39118 (2008).

Debates over the sometimes difficult distinction between the use and abuse of animals still occur in a variety of contexts. News media coverage of the treatment of animals has contributed to these debates. For example, *The Oklahoman*'s editorials and articles helped shape the public consensus against cockfighting in the run-up to Oklahoma's 2002 law banning the practice.[11] Other news organizations have covered: the debate over the treatment of circus animals;[12] contentious new laws to ban fox hunting

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[11] Editorial, *Ban Cockfighting; Oklahomans Should Say 'Yes' to SQ 687*, THE OKLAHOMAN, Oct. 27, 2002, at A4; Chris Casteel, *Cockfighting vote highlights urban/rural gap*, THE OKLAHOMAN, Oct. 30, 2002, at A1; John Greiner, *Cockfighting battle nears end, Bitter dispute culminates with vote over legality*, THE OKLAHOMAN, Oct. 27, 2002, at A9.

[12] David Stout, *Suit Challenges Image of Circus Elephants as Willing Performers*, N.Y. TIMES, Feb. 1, 2009, at A22.

in Great Britain;[13] novelty sports that involve riding animals such as "donkey ball";[14] the continuing need for classroom dissections in light of new teaching techniques;[15] and controversies over allegedly inhumane slaughtering practices. [16]

This fine line between acceptable and unacceptable treatment of animals means that the analogy to child pornography obscures more than it illuminates. Because society has so clearly condemned child abuse in all its forms, it is rarely (if ever) necessary to depict it when reporting on the issue. But where there is an ongoing public debate over the appropriate and inappropriate treatment of animals, it is often important to see and understand what practices are being discussed. Debates about practices on the borderline of animal cruelty – such as a particular slaughtering or circus training practice – present a closer question

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[13] Henry Fountain, *Fox Hunting's Supposed Benefits Dismissed*, N.Y. TIMES, October 8, 2002, at F3; *CBS News: Tally No More* (CBS television broadcast Feb. 20, 2005), *available at* http://www.cbsnews.com/video/watch/?id=675170n.

[14] Katie Thomas, *Donkey Ball Stubbornly Holds on Despite Criticism*, N.Y. Times, Apr. 18, 2009, at D1.

[15] Martha Groves, *Biology Class Rite Hits a Nerve*, L.A. TIMES, March 13, 2002, at B4.

[16] Alan Cooperman, *USDA Investigating Kosher Meat Plant; Advocacy Group's Grisly Video Sparked Outcry*, WASH. POST, Dec. 31, 2004, at A3; Marc Kaufman, *Ex-Pig Farm Manager Charged with Cruelty; Animal Rights Activists Supply Video Evidence for Oklahoma Felony Abuse Case*, WASH. POST, Sept. 9, 2001, at A2.

and often require actually seeing the controversial behavior.[17]

C. Reporting on hunting, fishing, and similar activities is also valuable.

Section 48 prohibits any depiction "of conduct in which a living animal is intentionally … killed" in violation of state or federal law. 18 U.S.C. § 48(c)(1). The statute, as drafted, lumps the worst kinds of animal cruelty together with normal, long-accepted behavior if that behavior is technically illegal under *any* federal or state law.

Even the smallest technical violation of hunting, fishing, or public health laws – such as hunting out of season, or catching a fish under the legal weight limit – may create felony liability for those who depict it. Pet. App. 33a. Some speech depicting these activities may be high-value, while some may fall in the "great spectrum between speech utterly without social value and high value speech." *See id.* at 26a.

For example, killing a deer in Oregon by crossbow is illegal, and can be prosecuted as a misdemeanor.[18]

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[17] Even in the child pornography context, Justice O'Connor noted that "pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of the *National Geographic*, might not trigger the compelling interests identified by the Court." *Ferber*, 458 U.S. at 775 (O'Connor, J., concurring). The opinion of the Court also worried that "some protected expression, ranging from medical textbooks to pictorials in the *National Geographic* would fall prey to the statute." *Id.* at 773.

Yet crossbow hunting is allowed in some cases in Washington State with a valid permit.[19] As broadly as Section 48 is worded, possessing a photograph in Washington of a deer being killed with a crossbow in Oregon becomes a federal felony, even though that type of hunting is sometimes permitted in Washington and the underlying harm is only a misdemeanor in Oregon. Worse yet, the reverse is also true because the statute reaches depictions of conduct prohibited by the state in which "possession takes place." 18 U.S.C. § 48(c)(1). It thus appears to be a felony for anyone in Oregon to possess depictions of legal, licensed crossbow hunting in Washington.

This endangers a range of hunting and fishing coverage. In addition to coverage in the mainstream media, popular specialty publications – *Sport Fishing Magazine*, *Field & Stream*, and *Hunting Illustrated*, to name three – are dedicated primarily to such coverage. The press often covers illegal poaching.[20] It also has covered hunting practices such as crossbow hunting[21] and shooting animals from helicopters[22]

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[18] Oregon Dep't of Fish and Wildlife, 2009 OREGON BIG GAME REGULATIONS at 24, 89 (2009).

[19] Washington Dep't of Fish and Wildlife, WASHINGTON'S 2009 BIG GAME HUNTING SEASON & REGULATIONS at 63 (2009).

[20] *See*, *e.g.*, Peter Fimrite, *Poaching for profit in tough economic times*, S.F. CHRON., June 9, 2009, at A-1.

[21] *See*, *e.g.*, Ari L. Goldman, *Taking Aim and Hitting the Mark With Legislators*, N.Y. TIMES, July 19, 1992, at A27 (discussing fight to exempt disabled hunters from crossbow hunting ban).

[22] *See*, *e.g.*, Samantha Henig, *Aerial Wolf Gunning 101*, SLATE, Sept. 2, 2008, http://www.slate.com/id/2199140.

that, if not animal cruelty by many definitions, are illegal in some jurisdictions and thus within Section 48's broad reach. The American press also routinely covers cultural events such as bullfights[23] and the running of the bulls at Pamplona.[24]

Section 48 perversely suggests that depicting the death of a bull at Pamplona may be a crime, while depicting the death of a person there would remain protected by the First Amendment. It also requires reporters to keep up with laws affecting animals in *every* American jurisdiction, lest they face felony prosecution.

II. Section 48 poses a significant risk to news organizations reporting on the treatment of animals.

Conceding the value of media coverage of animal treatment and mistreatment, the Government nonetheless claims that Section 48 is constitutional because it "expressly exempts any speech with serious … journalistic … value." Br. 8.

While it may have been possible to draft a statute narrow enough to exclude all or nearly all uses valuable to journalists, Congress did not do so. Rather, Section 48 ignores the rule that value must "be

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[23] *See*, *e.g.*, *60 Minutes: Bullfighting's Blood Brothers* (CBS television broadcast Apr. 19, 2009), *available at* http://www.cbsnews.com/stories/2008/10/16/60minutes/main4526581.shtml (feature on family of bullfighters).

[24] *See*, *e.g.*, Victoria Burnett, *Spain: Bull Kills Man at Pamplona*, N.Y. TIMES, JULY 11, 2009, at A8.

judged by considering the work as a whole," *see Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002), exempts only "serious" journalism, and criminalizes *all* possession of non-exempt source materials.

Given the wide variety of activities that technically violate the statute, "[t]he only possible protections … are prosecutorial discretion and the exceptions clause in section (b)." Pet. App. 33a. But the exceptions clause is not nearly broad enough to protect legitimate news coverage. Nor can speakers rely on prosecutorial discretion, because at least one private group has used Section 48 in combination with local consumer protection laws to sue Amazon.com and several publishers, demanding damages as well as injunctive relief. *See Humane Society of U.S. v. Amazon.com, Inc.*, No. 1:07-cv-623-CKK (D.D.C. Filed 03-30-2007).

A. Section 48 does not require that a challenged work be "taken as a whole," putting a range of journalism at risk.

Because Section 48 has no requirement that a work be "taken as a whole" when judging its value, it allows government intrusion into how media organizations cover newsworthy issues. This improperly allows prosecutors to target particular depictions within a report, even where the work as a whole is indisputably "serious."

In the obscenity context, the Court recognized an "essential First Amendment rule" that "the artistic merit of a work does not depend on the presence of a single explicit scene." *Ashcroft*, 535 U.S. at 248 (cit-

ing *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413, 419 (1966) (plurality opinion)). The Court reasoned that under the test laid out in *Miller v. California*, 413 U.S. 15 (1973), "the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive." *Id.* (citing *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (*per curiam*)).

There is an added interest in avoiding governmental interference with the manner in which a news story is covered. American courts are loath to "intru[de] into the function of editors" by interfering with "the exercise of editorial control and judgment," in part because "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973) ("we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial"); *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 488 (Cal. 1998)("[t]he courts do not, and constitutionally could not, sit as superior editors of the press").

Unlike the *Miller* test, Section 48 contains no requirement that a work be considered as a whole. In the absence of such a requirement, even otherwise "serious" pieces of journalism may be subject to at-

tack if a "scene in isolation might be offensive." *See Ashcroft*, 535 U.S. at 248. This allows a prosecutor to challenge a news media report not because the report as a whole lacks value, but because he or she objects to a particular image used in the report as sensationalistic or unnecessary to the report. The Government feeds this concern, claiming the authority to police how ideas about animal cruelty are expressed because "[t]he First Amendment ensures that a person may express any idea he wishes about animal cruelty, but does not protect his decision to do so by creating, selling, or possessing videos of live animals being tortured or killed in violation of law." Br. 26; *see also* Br. for Resp't 8 (describing testimony that one film "was valueless because a single one-minute scene in an hour-long movie went too long").[25]

In response to this patent constitutional infirmity, the Government relies on President Clinton's statement upon signing the law. Clinton pledged to construe Section 48 to "require a determination of the value of the depiction as part of a work or communication, taken as a whole." Br. 16 (quoting *Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty*, 35 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999) (*HR 1889 Statement*)). But courts dif-

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[25] The Government claims that the statute reaches little or no valuable speech because "if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal could be simulated." Br. 21 (quotation omitted). While simulations may be acceptable in some works of fiction, requiring the *news media* to rely on simulations would seriously hamper its ability to accurately and effectively report on animal cruelty.

fer widely in the extent to which they rely on statutory history. This Court has instructed that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (internal citations and quotation marks omitted).[26] The Government's assertion that Section 48 will be limited by its legislative history thus is questionable.

Indeed, if President Clinton's signing statement were controlling, the Government never would have prosecuted Mr. Stevens. The statement explicitly limits enforcement of Section 48 to depictions "designed to appeal to a prurient interest in sex," on the ground that other uses may "violate the First Amendment of the Constitution" and may "chill protected speech." *HR 1889 Statement* at 2258. But the Government ignored this aspect of the signing statement, even while urging the Court to rely its other limitations.[27]

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[26] Justice Scalia added that "the use of legislative history is illegitimate and ill advised in the interpretation of *any* statute — and *especially* a statute that is clear on its face." *Zedner v. U.S.*, 547 U.S. 489, 511 (2006) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

[27] *Amici* take no position on the authority of Presidential signing statements, though some circuits have relied on them. *See, e.g., U.S. v. Story*, 891 F.2d 988, 994 (2d Cir. 1989); *Berry v. Dep't of Justice*, 733 F.2d 1343, 1349-50 (9th Cir. 1984); *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661-62 (4th Cir. 1969).

B. Section 48's requirement of "serious" value threatens to exclude a great deal of journalism.

Section 48 exempts only work which is deemed to have "*serious* religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b) (emphasis added). The term is undefined in the statute, but the trial court below instructed the jury that only material of "significant and great import" is exempt. Opp. to Cert. 5.

Such a narrow and subjective exemption is especially problematic for the news media, because courts studiously refrain from deciding what "serious" journalism (or journalism of "significant and great import") might be. Indeed this Court repeatedly has refused to treat news and entertainment differently in the First Amendment context, noting that "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right," because "[w]hat is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U.S. 507, 510 (1948); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (quoting same); *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) ("[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all").

The obscenity test set out in *Miller v. California* avoids this chilling effect on the news media. In order to show material is legally obscene under *Miller*, the Government must prove three things: (1) "that the work, taken as a whole, appeals to the prurient interest"; (2) that it "is patently offensive in light of

community standards"; (3) and that it "lacks serious literary, artistic, political, or scientific value." *Ashcroft*, 535 U.S. at 246 (citing *Miller*, 413 U.S. at 24). Only those producing material that may be patently offensive and appeal to the prurient interest – which excludes all or nearly all press reports – need worry about whether a jury will see their work as "serious."

But Section 48 omits the first two *Miller* factors, and reporters thus are left to wonder whether their work is protected. Coverage of NFL quarterback Michael Vick's dog fighting prosecution may be "serious" journalism, or it may merely be unprotected sports and entertainment coverage.[28] Depictions of hunting or fishing out of season, or a report about a Spanish bullfight, create the same quandary. *See* Pet. App. 33a. It is difficult to know whether the exemption applies, or even who bears the burden of proof on the issue.[29] It is harder to predict what a particular jury might think. The only certainty is that a wide variety of news coverage will be chilled.

The Government assures the Court that the statute is explicitly limited, arguing that "Congress specifically stated its view that 'television documentaries about Spain which depict bullfighting' would be exempted by the clause." Br. 47 (citing H.R. Rep. No.

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[28] *See, e.g., ABC News: Michael Vick's Off-Field Hobby* (ABC television broadcast July 24, 2007), *available at* http://abcnews.go.com/video/playerIndex?id=3410931.

[29] Section 48's legislative history suggests that it is the *defendant's* burden to prove, by a preponderance of the evidence, that the challenged work has "serious" value. Pet. App. 25a.

397, 106th Cong., 1st Sess. (1999)). But not even the members of the House Judiciary Committee could agree on whether depictions of bullfighting and similar activities would fall within the exception, with two members dissenting from the committee report in part because "possessing or selling a film in Virginia which depicts a bullfight in Spain would, it seems, violate the act." H.R. Rep. No. 106-397, *supra*, 12 (Scott and Watt, dissenting).

Moreover, as discussed *supra*, Section II.A, courts are anything but unanimous in how they treat statutory history when interpreting a statute. The Government cannot claim that the statutory history is a realistic limit on the shadow that Section 48 casts over the news media and other speakers, particularly after disregarding the explicit limitations of President Clinton's signing statement. *See id.*[30]

C. Section 48 criminalizes possession of source materials for commercial gain by anyone, including the news media.

The statute also chills legitimate newsgathering, because it criminalizes possession of materials that do not fall within the exemption clause – even pos-

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[30] Nor do the other limitations cited by the Government mitigate the chilling effect on the media. The Government claims that the statute governs only speech with "little or no social utility" because it applies only to "depictions of illegal conduct" regarding "a living animal"). Br. 14, 15. Some of the most valuable coverage of animal cruelty will involve exactly this – depictions of illegal acts committed against living animals.

session for the purpose of creating "serious" journalism.

This Court has noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). But Section 48 provides that anyone who knowingly possesses "a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain" faces up to five years in prison, unless the depiction has "serious" value. 18 U.S.C. § 48(a),(b).

Reporters are in the business of intentionally placing such depictions "in interstate or foreign commerce for commercial gain."[31] And even the creation of indisputably "serious" journalism often will require the possession of source materials that are not exempt as "serious" works. For example, an investigation of animal fighting, or inhumane slaughtering

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[31] The same could be said of animal rights groups that possess graphic source material for use in their work. The Humane Society of the United States and People for the Ethical Treatment of Animals operate YouTube channels that feature explicit images of animal cruelty, often in combination with fund-raising appeals. *See* http://www.youtube.com/user/officialpeta; http://www.youtube.com/user/hsus. Anti-dog-fighting campaigns even used portions of Mr. Stevens' videos in their work. Opp. to Cert. 5. If fund-raising were construed as use for "commercial gain," their possession of source materials could constitute a felony. Such possession and use for the purposes of exposing acts of animal cruelty should be *encouraged*, not criminalized.

practices, often will be incomplete unless the reporter obtains documentation. But under Section 48, a reporter possessing such footage risks years in federal prison. The reports may even provide evidence of illegal possession of the source material.

Amici do not ask the Court to rule that Congress is barred from regulating possession of materials simply because they might be useful in creating a news report. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). Rather, criminalizing possession of these depictions removes the "breathing space" that reporters need in order to expose animal cruelty. *See Button*, 371 U.S. at 433. Unprotected source material *has value* for journalists and others, and Section 48 imposes an excessive burden on valuable speech in part because it criminalizes possession of these valuable source materials.

III. The Government's lax test for declaring speech unprotected threatens a wide variety of coverage.

Aside from the direct effect of Section 48 on the news media, adopting the Government's permissive test for categorically excluding speech from First Amendment protection would pose a more wide-ranging risk to news reporting.

The Government urges the Court to use a simple balancing test to determine whether an entire "class of speech" should declared beyond the reach of the First Amendment. Br. 12. "Where the First Amend-

ment value of the speech is 'clearly outweighed' by its societal costs," the Government suggests, "the speech may be prohibited based on its content." *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). But this Court has not excluded an entire category of speech from First Amendment protection in 25 years. *Id.* at 1a. Even then, it excluded child pornography only because "the evil to be restricted *so overwhelmingly outweighs* the expressive interests, *if any*, at stake, that no process of case-by-case adjudication is required." *Ferber*, 458 U.S. at 763-64 (emphasis added).

Moreover, the Government suggests that this permissive test be used to approve a ban on *speech* about animal cruelty as a means of suppressing the *activity*. But "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law," not suppression of speech about the violations. *Stanley*, 394 U.S. at 566-67 (quoting *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)); *see also Osborne v. Ohio*, 495 U.S. 103, 144 n.18 (1990) (Brennan, J., dissenting) ("the basic principles of a system of freedom of expression would require that society deal directly with the … action and leave the expression alone") (quoting T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 494 (1970)).

With the exception of *Ferber*'s treatment of child pornography – unique in part because of the "surpassing importance" of preventing the sexual abuse of children, *Ferber*, 458 U.S. at 757 – this Court consistently has refused to accept "the idea that we can constitutionally criminalize the depiction of a crime." Pet. App. 14a (quoting Amy Adler, *Inverting the First*

Amendment, 149 U. PA. L. REV. 921 (2001)). But the Government urges the Court to transform *Ferber*'s exception into the new rule, adopting a test in which speech about a broad range of objectionable behavior can be suppressed if Congress thinks suppressing speech is an efficient way to prevent the behavior.

The permissive standards urged by the Government would allow it to ban a variety of news coverage and other speech, simply because the Government found that the balance of interests weighs in favor of suppression. Compelling interests recognized by the Court in the past have "without exception" related "to the well-being of human beings, not animals." Pet. App. 16a. Thus, on the Government's rationale, Congress could draft a statute that criminalizes depictions of violence against *people* in the same manner that Section 48 suppresses depictions of violence against *animals*. This imperils a wide variety of news coverage, including both war reporting and crime coverage.

CONCLUSION

Congress could have regulated legally obscene crush videos in a manner that did not threaten news reporting and other high-value speech. But it chose to draft the statute broadly, criminalizing mere possession of a wide variety of materials, exempting only "serious" journalism, and failing to require that the value of challenged works be judged as a whole. In so doing, it drafted a statute that criminalizes a substantial amount of valuable speech, from investigative reporting to hunting and fishing coverage. The Government exacerbated the problem by choosing – in the first case it took to trial under Section 48 – to

enforce the statute far beyond the crush videos that motivated the statute.

Amici share the Government's concern that animal cruelty be prevented. But the press needs the ability to continue reporting on the treatment of animals, free of Section 48's chilling effects. *Amici* respectfully request that the Court uphold the decision below.

Respectfully submitted,

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
John Rory Eastburg
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Ste. 1100
Arlington, VA 22209-2211
(703) 807-2100

July 24, 2009

(Additional attorneys listed in Appendix B.)

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Association of Alternative Newsweeklies (AAN) is a not-for-profit trade association for 131 alternative newspapers in North America, including weekly papers like The Village Voice, Boston Phoenix and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7 million and a reach of over 20 million readers.

Citizen Media Law Project (CMLP) provides legal assistance, education, and resources for individuals and organizations involved in online and citizen me-

dia. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. CMLP has previously appeared as an *amicus* on legal issues of importance to the media, including in *Bank Julius Baer & Co. v. Wikileaks.org*, No. 08CV824 (N.D. Cal. Feb. 26, 2008), *Hatfill v. Mukasey*, No.08-5049 (D.C. Cir. March 28, 2008), *Maxon v. Ottawa Publishing Co.*, No. 2008-MR-125 (Ill. App. Ct. Mar. 24, 2009), and *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, No. 2009-0262 (N.H. June 30, 2009).

MediaNews Group is one of the largest newspaper companies in the United States. It operates 54 daily newspapers in 11 states, with combined daily and Sunday circulation of approximately 2.4 million and 2.7 million, respectively. Each of its newspapers maintains a Web site focused on local news content, hosted by MediaNews Group Interactive. MediaNews Group also owns a television station in Anchorage, Alaska, and operates radio stations in Texas. The MediaNews Group newspapers and broadcast stations report on a vast variety of subjects. News about animals and people's relationship to animals is a subject of enduring interest to the public, and many such stories gain national attention. Unfortunately, that relationship includes cruelty and neglect as well as love and admiration. Examples of the former abound, including Michael Vick's conviction for involvement in dogfighting, and Andrew Burnett,

whose callous killing of a dog named "Leo" during a road rage incident similarly resulted in national headlines – and a criminal conviction. There are innumerable others that never gain such widespread attention, but that nonetheless can and do generate intense local concern, and may motivate local action as well. These stories frequently include both textual and visual depictions of the suffering of the animals involved. Such depictions are provided not to enflame or to repulse, but to convey the truth of what has happened.

The National Press Photographers Association is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

National Public Radio, Inc. (NPR) is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

Outdoor Writers Association of America (OWAA) is the oldest and largest group of professional outdoor communicators in the nation. It was founded in 1927 and is now a Maryland not-for-profit corporation, with headquarters in Missoula, Montana. It functions as trade association for those who communicate professionally about a wide range of outdoors

subjects. Its approximately 1,300 members include writers, photographers, editors, newspaper columnists, artists, and radio, television, and video/film professionals. It generally refrains from any form of public advocacy except in service of its core values, which include protection of First Amendment rights. Its mission is to improve the professional skills of members, set the highest ethical and communication standards, encourage public enjoyment and conservation of natural resources, and mentor the next generation of professional outdoor communicators.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Environmental Journalists, with 1,500-plus members, is a U.S.- based group of working journalists, academics and students from around the world committed to advancing public understanding of widely diverse environmental issues including, for instance, livestock farming and ranching and management of wildlife and other natural resources. SEJ's First Amendment Task Force exists to respond to what its members describe as growing restrictions on their ability to report on and depict environmental issues.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism

organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

APPENDIX B

Additional counsel for *amici*:

Kevin M. Goldberg
Fletcher Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209
Counsel for The American Society of News Editors

David Ardia
Samuel Bayard
Citizen Media Law Project
Berkman Center for Internet & Society
23 Everett Street, Second Floor
Cambridge, MA 02138

Marshall W. Anstandig
Senior Vice President/General Counsel
MediaNews Group, Inc.
750 Ridder Park Drive
San Jose, CA 95190

Mickey H. Osterreicher
69 Delaware Avenue
Suite 500
Buffalo, NY 14202
Counsel for The National Press Photographers Association

Joyce Slocum
Denise Leary
National Public Radio, Inc.
635 Massachusetts Avenue N.W.
Washington, DC 20001

George Freeman
David McCraw
The New York Times Company
Legal Department
620 8th Ave.
New York, NY 10018

René P. Milam
Newspaper Association of America
4401 Wilson Blvd., Suite 900
Arlington, VA 22203

Barbara L. Camens
Barr & Camens
1025 Connecticut Avenue, NW, Ste. 712
Washington, DC 20036
Counsel for The Newspaper Guild

William Jay Powell
111 S. Ninth St., P.O. Box 918
Columbia, MO 65205
Counsel for Outdoor Writers Association of America

Kathleen A. Kirby
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
(202) 719-3360
Counsel for The Radio-Television News Directors Association

Andy Huntington
General Counsel & Director, Labor Relations
San Jose Mercury News
750 Ridder Park Dr.
San Jose, CA 95190

Bruce W. Sanford
Bruce D. Brown
Laurie A. Babinski
Baker & Hostetler LLP
1050 Connecticut Ave. NW, Suite 1100
Washington, DC 20036
Counsel for The Society of Professional Journalists