

No. 08-769

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IN THE  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

ROBERT J. STEVENS,  
*Respondent.*

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

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**BRIEF OF AMICI CURIAE SAFARI CLUB  
INTERNATIONAL AND CONGRESSIONAL  
SPORTSMEN'S FOUNDATION  
IN SUPPORT OF RESPONDENT**

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**INTEREST OF AMICI CURIAE <sup>1</sup>**

**Safari Club International ("SCI")**

SCI is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the

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<sup>1</sup> The following is provided pursuant to Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than named amici curiae made a monetary contribution to this brief. Counsel of Record for Petitioner consented to the filing of this brief. See attached letter. Counsel of Record for Respondent filed with the Court a notice that Respondent consented to the filing of all amicus curiae briefs.



Internal Revenue Code, with principal offices and places of business in Tucson, Arizona and Washington, D.C. and a membership of approximately 53,000. SCI's missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. SCI carries out its conservation mission through its sister organization, Safari Club International Foundation. SCI has long been involved in litigation and other advocacy efforts to promote hunting and conservation. SCI also uses media to communicate SCI's missions and achievements, to demonstrate the role that sustainable use and hunters play in wildlife management and conservation, and to entertain its members and others. SCI is concerned that 18 U.S.C. § 48 (1999) ("Section 48"), has chilled and will chill this media, including hunting videos. This chilling will have an adverse impact on SCI, SCI's members, other members of the hunting community, and beneficial wildlife management through hunting.

### **Congressional Sportsmen's Foundation ("CSF")**

CSF was founded in 1989 and is incorporated under § 501(c)(3) of the Internal Revenue Code, with principal offices in Washington, D.C. Its members and sponsors include organizations, businesses and individuals who promote and support hunting and angling for their recreational, wildlife management and conservation benefits. CSF serves as a conduit between these members and the legislators who comprise the bipartisan Congressional Sportsmen's Caucus ("Caucus"). CSF facilitates the flow of information on hunting and fishing issues among CSF members, among Caucus members, and between the two groups. CSF utilizes videos of hunting and fishing opportunities to promote sporting activities

and to generate funding to continue its efforts. CSF also is concerned about the chilling effect of Section 48.<sup>2</sup>

### **SUMMARY OF THE ARGUMENT/ INTRODUCTION**

Section 48, as written, is facially overbroad and unconstitutional. Despite good intentions, Congress drafted Section 48 too broadly. It not only encompasses the production and sale of so-called “crush videos” and human-staged animal fight videos, but potentially sweeps into its reach a substantial amount of legitimate hunting media. Section 48 can survive this constitutional infirmity only if this Court definitively narrows the reach of the statute to exclude the protected speech that currently falls within its reach, most notably hunting videos.

A. The Federal government, and the State and other amici who defend Section 48, base their defense on a narrow characterization of the statute’s reach, instead of on the plain terms of Section 48. While Congress’s intent may have been to criminalize only interstate commercial distribution of depictions of animal cruelty such as crush videos and possibly staged animal fighting videos – and SCI and CSF

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<sup>2</sup> Neither SCI nor CSF have an official position on “crush videos” or human-staged animal fighting, as such activities do not affect or implicate their purposes and missions. Suffice it to say, for purposes of this brief, that neither organization in any way condones or supports such activities. Instead, SCI and CSF are concerned about the overbreadth of Section 48 and its potential to chill the creation, sale, and possession of legitimate hunting media. Such depictions entertain their viewers, at least indirectly promote hunting and the associated benefits of hunting, generate funds for mission-related programs, and help with the recruitment of new hunters.

would prefer that the reach of Section 48 be interpreted in that manner – in reality Section 48 defines depictions of animal cruelty so broadly that it potentially reaches a wide range of protected speech, most significantly depictions of legal hunting activities.

B. The plain language of Section 48 does not limit the statute to acts of animal cruelty, much less to crush and animal fighting videos. Instead, Section 48's broad language criminalizes the depiction of the killing or wounding of a live animal, although legal where it is recorded, if the killing or wounding simply would be illegal under the laws of the state where the sale or possession of that depiction ultimately occurs. The definition of "depictions of animal cruelty" in Section 48 does not limit Section 48's coverage to state laws designed to address animal cruelty.

Because of its broad reach, Section 48 potentially criminalizes depictions of legitimate hunting activities. For example, a video of a completely legal killing or wounding of a live black bear during Pennsylvania's bear season by a fully licensed hunter would arguably violate Section 48 (assuming other requirements are present and exceptions are not present) if the sale or possession of that video takes place in New Jersey, where black bear hunting is illegal.

Section 48's exception clause does not necessarily exclude such videos because many are produced for entertainment, generating revenue, or hunter recruitment. None of these activities appear to be included within Section 48's exceptions. Similarly, a depiction may arguably have one of the values listed in the exception provision, but the value may nonetheless be deemed insignificantly "serious" – what-

ever that term means — and the owner or producer of the depiction may be subject to criminal liability.

Hunting activities promoted by this media have been widely recognized as beneficial, not only for recreation, but for wildlife management and as an economic boon in rural areas. Section 48, in many ways, harms the interests of both SCI and CSF in using such media. Concern over the reach of Section 48, particularly if Respondent Stevens' conviction is reinstated, could chill the production of hunting videos and other media and undermine these beneficial activities.

C. The broad reach of Section 48 makes it facially unconstitutional. The inconsistencies between the game laws of the fifty different states (not to mention the District of Columbia, where all hunting is illegal) pose too many scenarios where legal hunting activities in one state might constitute illegal conduct in another state. In addition, virtually all international hunting activities could be deemed illegal in the United States because most of the species hunted overseas cannot be legally hunted here. A nearly limitless number of hunting videos could depict the legally sanctioned wounding or killing of a live animal in a fashion that qualifies as illegal activity somewhere in the United States. Section 48 turns the depiction of legal activity into a product that can be illegal to sell or possess for a commercial purpose in many other states. Despite the unsavory nature of Congress's intended target with Section 48 — crush videos and possibly staged animal fighting videos — the Court should not shy away from holding Section 48 unconstitutional.

D. The Supreme Court can possibly avoid Section 48 being substantially overbroad and facially invalid

by interpreting Section 48 narrowly to require that the underlying depicted conduct be illegal for a reason related to state or federal anti-cruelty laws, which would exclude violations of hunting laws. The legislative history of Section 48 and precedent from this Court support limiting Section 48 so as to avoid at least this particular constitutional infirmity.

The question is not whether Congress can or should criminalize depictions of animal cruelty such as crush videos and staged animal fighting to aid the states in preventing this conduct and associated harms. The question is whether Congress has done so in a constitutional manner. If Section 48 is read as it is written, it is substantially overbroad and violates the First Amendment. If the Court cannot narrowly interpret Section 48 to its apparently intended scope, the Court should strike down the statute on this ground alone, thereby encouraging Congress to more carefully and narrowly tailor the reach of Section 48.<sup>3</sup>

## **ARGUMENT**

### **A. Section 48, By its Plain Terms, is Not Limited to “Crush Videos” and Videos of Human-Staged Animal Fighting**

Petitioner United States of America, and the various amici curiae in support of Petitioner, argue their case as if Section 48 only applied to so-called “crush videos” and depictions of human-staged animal fighting. They graphically describe these videos and

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<sup>3</sup> SCI and CSF generally support the other constitutional arguments advanced by Respondent Stevens in his merits brief, but do not in this brief attempt to supplement directly those arguments. Instead SCI and CSF focus on the overbreadth and related issues.

demonize those who create and sell them. The Petitioner and supporting amici variously characterize the targeted conduct as “extreme acts of animal cruelty” (Petitioner’s Merits Br. at 41), “graphic depictions of actual torture of a real animal” (*id.* at 42), “vile crimes” (Amici Br. of Florida, *et. al.* at 2), “lacking any value to society” (*id.* at 1), “depictions that lack any redeeming value” (Amicus Br. of American Society for the Prevention of Cruelty to Animals at 26-27), and other statements suggesting the law only applies to depictions of animal cruelty. Petitioner discusses the other criminal conduct (*e.g.*, gambling) associated with crush videos and animal fighting. Petitioner’s Merits Br. at 33-34. Petitioner and amici attempt to document the link between animal cruelty and acts of violence against humans. *See, e.g., id.* at 32-33; Amicus Br. of Humane Society of the United States at 8. In so doing, they largely ignore the broad definition of “depictions of animal cruelty” contained in Section 48 and the other depictions that potentially can be swept up within the statute’s prohibitions.

Section 48 defines “depictions of animal cruelty” so broadly that depictions of many activities – and hunting activities in particular – potentially fall within its reach. The problem is two-fold. First, the definition does not expressly limit the underlying activities to those depicted in crush videos or videos about human-staged animal fighting. The required illegality of the underlying conduct is not even limited to violations of state anti-cruelty statutes designed to protect animals. Second, the definition makes it a violation of Section 48 if the underlying conduct is “illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether [the underlying conduct] took place in the

State.” In other words, the underlying conduct depicted could be legal where it was filmed, but illegal where it is sold or possessed with the intent to place it in interstate commerce.

Petitioner’s and supporting amici’s arguments, directed solely at the need to stop the production of crush and animal fighting videos and the underlying conduct, are too narrowly directed. They are not persuasive because the statute they defend is not written as narrowly as they characterize it (at least unless this Court significantly narrows the reach of Section 48 with a definitive interpretation, see Section D below).

**B. Section 48 Potentially Reaches a Substantial Number of Hunting Videos and Other Depictions of Hunting Activities, Including those Created and Used by Amici Curiae SCI and CSF**

Although they do not involve animal cruelty, torture, or intentional maiming, hunting activities involve the wounding or killing of animals. Thus, a hunting video depicting the wounding or killing of a live animal, if created, sold, or possessed with the intent to place the video in foreign or interstate commerce for commercial gain, is potentially subject to Section 48. If the primary purpose of the video is entertainment, to generate funds or to recruit new hunters, it arguably would not qualify for any of the exceptions to Section 48 (*see infra*. subsection B.1.). The key question then becomes whether the video falls under the illegality component of the statutory definition of “depictions of animal cruelty.”<sup>4</sup> Section

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<sup>4</sup> Hunting videos should depict hunting activities that are legal where they are conducted (SCI and CSF do not support the

48 covers depictions of conduct that is legal where recorded, but illegal where sold or possessed for a commercial purpose.

For example, many common hunting activities could be perfectly legal in the state in which they occur, but illegal in other states. Black bear hunting is legal in Pennsylvania, New York, Georgia and many other states,<sup>5</sup> but illegal in New Jersey and Florida.<sup>6</sup> Videos of hunting that is legal in the former states would depict conduct that is illegal in the latter. Numerous other species in the United States are legal to hunt in one state, but illegal in another, including grizzly bear<sup>7</sup>, mountain lion<sup>8</sup>, and Columbian sharp-tailed

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production of hunting videos that depict hunting activities that are illegal where filmed, unless produced to educate about or discourage such activities).

<sup>5</sup> 58 PA. CODE § 139.4 (2009); N.Y. COMP. CODES R. & REGS. tit. 6 § 1.31 (2009); GA. CODE ANN. § 27-3-15 (2008).

<sup>6</sup> N.J. ADMIN. CODE § 7:25-5.6 (2007); FLA. ADMIN. CODE ANN. r. 68A-27.004 (2008).

<sup>7</sup> It is legal to hunt grizzly bears in Alaska, but nowhere else in the United States. ALASKA ADMIN. CODE tit. 5, § 85.020 (2008). With the exception of grizzly bears in the Yellowstone area, all lower-48 grizzly bears are listed as threatened under the ESA and thus it is illegal to hunt them. Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 14866-14938 (March 29, 2007). It is also legal to hunt grizzly bears in Canada. *See, e.g.*, 2008-2009 Yukon Hunting Regulation Summary at. 52-53, [http://www.environmentyukon.gov.yk.ca/pdf/hunting\\_regs\\_eng2008.pdf](http://www.environmentyukon.gov.yk.ca/pdf/hunting_regs_eng2008.pdf) (retrieved July 16, 2009).

<sup>8</sup> By State referendum, it is illegal to hunt mountain lion in California, but other states allow it, including South Dakota. CAL. FISH & GAME CODE §§ 4800-4809 (2009); South Dakota Mountain Lion Hunting Season <http://www.sdgifp.info/Wildlife/>



grouse.<sup>9</sup> Other examples of hunting activities legal in one state but illegal in others include crossbow hunting, hunting using bait, and hunting with hounds.<sup>10</sup>

Possibly even more numerous are example of depictions of legal international hunting activities that would be illegal if conducted in the United States. For example, the depiction of the fully legal hunting of a polar bear in Canada by a licensed non-native hunter would potentially violate Section 48 if the video was involved in a commercial transaction in Alaska, where federal and state law make it illegal for anyone other than an Alaskan Native to hunt polar bears.<sup>11</sup> Most African species would be illegal

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MountainLions/MtLionhuntingseason.htm (retrieved July 13, 2009).

<sup>9</sup> It is legal to hunt Columbian sharp-tailed grouse in Idaho, however Washington state does not have a sharp-tailed grouse hunting season. IDAHO ADMIN. CODE r. 13.01.09.606 (2005); WASH. ADMIN. CODE § 232-28-342 (2009).

<sup>10</sup> Hunting with a crossbow is illegal to all except the disabled in New Jersey; however, it is legal in Virginia. N.J. ADMIN. CODE § 7:25-5.24; 4 VA. ADMIN. CODE §15-40-21 (2005). Hunting black bear over bait is legal in Idaho but illegal in New York. IDAHO ADMIN. CODE r. 13.01.17.100 (1993); N.Y. COMP. CODES R. & REGS. tit. 6 § 1.31(c)(5) (2009). Hunting black bear with hounds is legal in Idaho but illegal in Montana. IDAHO ADMIN. CODE r. 13.01.15.100 (1993); 2009 Montana Black Bear Hunting Regulations at. 3, <http://fwp.mt.gov/content/getItem.aspx?id=37025> (retrieved July 15, 2009).

<sup>11</sup> See Northwest Territories, Summary of Hunting Regulations, July 1, 2009 – June 30, 2010, at 18 (detailing seasons, areas, and license and fee information for polar bear hunting), [http://www.enr.gov.nt.ca/\\_live/documents/documentManagerUpload/Hunting\\_guide.pdf](http://www.enr.gov.nt.ca/_live/documents/documentManagerUpload/Hunting_guide.pdf) (retrieved July 15, 2009); see Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout its Range; Final Rule, 73 Fed. Reg. 28212, 28238 (May 15, 2008) (in 1972, the United States banned sport hunt-

to hunt in the United States because they do not exist here. In addition to the polar bear, many foreign species have been listed under U.S. law and would be illegal to hunt here, but remain perfectly legal to hunt under the other countries' laws.<sup>12</sup>

An overseas activity unrelated to hunting provides another useful example of the overbreadth of Section 48. The Petitioner United States recognizes that depictions of bullfighting would fall under Section 48 because bullfighting is illegal in the United States, although it remains legal in Spain. Petitioner argues that a depiction of bullfighting would not be prosecuted under Section 48 because it would fall under the exception for depictions with educational, journalistic, or historical value. Petitioner's Merits Br. at 47. Thus, the Petitioner admits one of SCI and CSF's main contentions, that depictions with activities that are legal where they occur can still run afoul of Section 48 (putting aside the exception clause) if that activity is illegal where the video is sold or possessed

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ing of polar bears in Alaska, except by natives for subsistence purposes). Alaska does not authorize sport hunting of polar bears because of the federal prohibition. *See* Subsistence in Alaska: A Year 2000 Update, Division of Subsistence, Alaska Department of Fish and Game, at 4 (March 2000) (retrieved July 15, 2009) <http://www.subsistence.adfg.state.ak.us/download/subupd00.pdf>.

<sup>12</sup> For example, argali sheep are legal to hunt in Kyrgyzstan, Mongolia, and Tajikistan under the laws and hunting/conservation programs of those countries, but are not legal to hunt in the United States (assuming they existed in privately-owned herds on private lands) because they are listed as threatened under the ESA. *See Fund for Animals v. Norton*, 295 F. Supp. 2d 1, 6-8 (D.D.C. 2003) (citing evidence that U.S. hunters helped conservation in these three countries by paying the highest price for licenses, which helped conservation and decreased poaching).

within the terms of Section 48. As described in the next section, the exception clause does not save Section 48 in all circumstances.

**1. The Exceptions Clause Does Not Necessarily Exclude Legitimate Hunting Videos as Many are Produced for Their Entertainment or Other Non-exempted Value**

While it is possible that the exceptions clause will exclude the application of Section 48 to some hunting (or bullfighting) videos, the exceptions clause is narrowly drafted and does not comprehensively protect hunting videos.

First, it will not exclude those videos made for entertainment purposes and whose main value is entertainment. While some hunting videos may have an educational or even historical aspect to them, many would appear to have primarily entertainment value. For viewers of these videos, the value is in the thrill of the hunt, the sometimes exotic locations, the species being pursued, the personalities of the participants, and the recognition of a common passion. Similarly, depictions contained in advertising, created to generate income, or to increase hunter recruitment, likely do not fall under the exception. These values, based on entertaining the viewer, marketing hunting equipment, or increasing the hunting community, do not appear to neatly fall under the exception for depictions that have “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” Thus, if the creator or distributor cannot prove historical, educational, or some other qualifying value, he or she is subject to prosecution under Section 48.

Second, to exempt conduct, it is not enough that the depiction has one of the listed values, but that value must be “serious.” Whatever this term means exactly, it appears intended to exclude from the exception half-hearted or unsupported claims that the depiction contains the listed values. As Respondent Stevens discovered, even apparently legitimate claims of serious educational or historical value in a video is no guarantee that the producer, distributor or possessor of such a depiction will not be convicted and sentenced to a lengthy prison term. Respondent’s Merits Br. at 3-8. Thus, while hunting videos might have some inherent educational or historical value to go along with their predominant entertainment or advertisement value, such value provides no assurance of freedom from prosecution or conviction.<sup>13</sup>

## **2. Hunting Activities, Including those Depicted in Hunting Videos, are Beneficial for a Number of Reasons**

To allow Section 48 to encompass legal hunting activities would interfere with and jeopardize conduct that is of great value to society and to the environment, at least to the extent these depictions help encourage hunting. Hunting plays a strategic role in wildlife management and conservation throughout the world. Courts, presidents, state legislatures and federal agencies have acknowledged the benefits of hunting. If Section 48 discourages those legal practices, or prevents groups like SCI and CSF from generating support for and/or interest in hunting

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<sup>13</sup> SCI and CSF agree with Respondent Stevens that the so-called exception clause is unconstitutionally vague. Respondent’s Merits Br. at 29-31.

activities, the accomplishments of hunters and hunting could diminish.

Separate and apart from the fact that many states have adopted laws that guarantee the right to hunt, numerous state legislatures have codified statements about the social and environmental benefit that hunting brings to their human and wildlife populations and to state resources. Several states have adopted laws recognizing hunting as a recreational, wildlife management and conservation tool. Arkansas and Illinois, for example, describe hunting as “an essential component of effective wildlife management, in that it is an important tool for reducing conflicts between people and wildlife and provides incentives for the conservation of wildlife, habitats, and ecosystems on which wildlife depend[.]” ARK. CODE ANN. § 15-41-302(5) (2005); 520 ILL. COMP. STAT. 30/5(5) (2005); *see also* MD. CODE ANN., NAT. RES. § 10-212(a)(5) (2005). Colorado law directs that the state shall “[a]llow sport hunting, trapping, and fishing as a wildlife management tool and as the primary method of effecting a necessary wildlife management on lands under the control of the division of parks and outdoor recreation.” COLO. REV. STAT. ANN. § 33-10-101(2)(e) (2009). Louisiana’s Hunting and Fishing Advisory Education Council, established by state statute, is tasked “to promote the many benefits of hunting and fishing among Louisiana citizens and to educate the citizens of the state on those benefits.” LA. REV. STAT. ANN. § 56:699.21(A) (2008). Georgia law extols the “important role that hunting and fishing and the taking of wildlife play in the state’s economy and in the preservation and management of the state’s natural communities.” GA. CODE ANN. § 27-1-3 (2009).

State courts have similarly noted the beneficial value of hunting. For example, the Supreme Court of the State of Connecticut acknowledged hunting as a habitat and wildlife management tool:

Increased development in the state of Connecticut has resulted in an ecosystem that is no longer self-balancing. In particular, the deer population is not naturally controlled by predators, leaving regulated hunting as the most cost efficient, effective means of controlling the deer population, according to the collective experience of the fifty states. The control of the deer population, in turn, has a trickle down effect on many other areas of significant state interest. It prevents overbrowsing in state forests and on state residents' ornamental plantings. Indeed, a state biologist testified that an uncontrolled deer population could strip forests of their ground growth and young trees in a matter of decades. Hunting also helps to control the population of geese, coyotes and a variety of small game.

*State v. Ball*, 796 A.2d 542, 553 (2002). The benefits apply to international hunting as well. One federal district court in the District of Columbia acknowledged the value of trophy hunting by U.S. citizens in Asia, noting that the hunting of the species increases the value of the animals, brings conservation dollars into the countries and discourages poaching. *Fund for Animals v. Norton*, 295 F. Supp. 2d 1, 8 (D.D.C. 2003).

The executive branch has similarly recognized the significance of hunting. President Clinton designated hunting as a **priority** public use of the National Wildlife Refuge System. Exec. Order No. 12966, 61 Fed. Reg. 13647 (March 25, 1996). In addition to

being one of the priority wildlife-oriented recreational activities on hundreds of National Wildlife Refuges, hunting serves to control wildlife populations and to improve habitat. For example, hunting of deer and geese on Moosehorn National Wildlife Refuge (“NWR”) in Maine helps the U.S. Fish and Wildlife Service (“FWS”) improve habitat for a variety of the refuge’s migratory bird populations:

A lack of hunting on the refuge diminishes the Refuge’s ability to manage wildlife populations. Wildlife habitats susceptible to damage, such as native wetlands and marshes, would continue to be overgrazed by increasing numbers of resident Canada geese, resulting in increasingly degraded habitat for black ducks, green-winged teal, and other ducks, as well as sora, Virginia rail, and other waterbirds (Haramis and Kearns 2000). Likewise, an increased local deer population to a density of 15-20 deer per square mile would likely negatively affect forest regeneration, resulting in degradation of habitat for woodcock, chestnut-sided warbler, and other migratory birds that use regenerating forest; negative effects of deer browsing on forest regeneration have been demonstrated by numerous researchers (see review by Russell et al. 2001) when deer populations densities have reached 15-20 deer per square mile.

Amended Environmental Assessment, Public Hunting on Moosehorn NWR, April 2007, p. 28, <http://www.fws.gov/northeast/pdf/moosehorn.pdf> (retrieved July 16, 2009).

Federal law has also made hunting an essential component of the financial aspect of wildlife and habitat management and conservation throughout

the United States. The Federal Aid in Wildlife Restoration Act, 16 U.S.C. § 669 *et seq.* (1937), directs a portion of the excise tax on sporting arms and ammunition to the states to finance approved projects involving wildlife habitat, introduction of wildlife onto habitat, and wildlife research. Under the Federal Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. § 718a *et seq.* (1934), “duck stamps” serve as the license for hunting migratory waterfowl and the means of funding the conservation of those waterfowl. State of the Birds, p. 20 (2009) (duck stamps purchased primarily by hunters have generated over \$700 million for wetland conservation) [http://www.stateofthebirds.org/pdf\\_files/State\\_of\\_the\\_Birds\\_2009.pdf](http://www.stateofthebirds.org/pdf_files/State_of_the_Birds_2009.pdf) (retrieved July 15, 2009).

Legal hunting activities take place around the country and around the world. The images of hunting on which SCI, CSF and other groups rely, depict these legal activities to promote increased participation in hunting and the recruitment of new hunters. Hunting enhances the environment and brings joy to those who use the outdoors and should therefore be encouraged. Hunting media play a significant role in those efforts

### **3. Section 48 Could Infringe on the Substantial Interests of SCI and CSF in Using Hunting Media**

Section 48 not only undermines the general benefits of hunting, but harms SCI and CSF’s interests in particular. SCI’s members are hunters. They hunt in the United States and in countries around the world. They enjoy hunting and want hunting and the species they hunt to be available for generations to come. SCI’s support of hunting includes the support



of conservation through its sister organization, Safari Club International Foundation (“SCIF”).<sup>14</sup>

SCI routinely utilizes media, and in particular depictions of hunting activities and opportunities, for commercial purposes and often places such depictions into interstate commerce. SCI uses such depictions to reach at least three different audiences. The first is SCI’s own membership. To them SCI broadcasts its conservation and advocacy efforts, provides entertainment, advertises special opportunities available exclusively to members, solicits financial support for organizational programs, and generates interest and attendance at SCI functions. The second audience is composed of hunters who are not members of SCI. For them, SCI media is intended to encourage these individuals to join by communicating the benefits and opportunities of SCI membership, including the advocacy and conservation efforts and achievements of the organization. In addition, SCI solicits funding and sponsorships from non-member individuals and groups to finance SCI programs. The third audience is the non-hunting community. Media directed at them is intended to communicate SCI and SCIF’s missions and achievements and to demonstrate the

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<sup>14</sup> SCIF’s missions are to fund and manage worldwide programs dedicated to wildlife conservation, outdoor education and humanitarian services. A significant percentage of SCI and SCIF’s annual revenues, including a portion of the dues and fees paid by each member, goes to support SCIF’s conservation efforts around the world. For the year 2008, for example, SCIF allocated almost \$2 million of its annual budget for conservation projects and expenses. In addition, each of SCI’s over 180 chapters provides its own funding for conservation efforts locally and across the globe. SCI’s advocacy and conservation interests focus on the concept of “sustainable use” of wildlife, including well-managed hunting.

role that sustainable use and hunters play in wildlife management and conservation.

SCI publishes, produces and distributes a wide variety of media featuring depictions of hunting. Its newspaper Safari Times and magazine Safari Magazine are distributed to members throughout the United States and the world. These publications include photographic depictions of hunting to describe and advertise hunting opportunities. Other advertisements in these publications are aimed at selling hunting videos. SCI also operates a website, located at [www.safariclub.org](http://www.safariclub.org), that, on occasion, offers photographs and videos of hunting activities. At SCI's annual convention, SCI generates funding for its many advocacy and conservation programs by airing hunting videos at banquets, on the Convention floor, and on the televisions in many of the rooms of the local hotels. Many of the vendors, who purchase booth space from SCI in order to market their products and services at the SCI convention, show or sell videos of hunting trips and opportunities.

Each week, Expedition Safari, a television show co-produced by SCI, airs several times on the Outdoor Channel. SCI sponsors another show, Jim Shockey's Hunting Adventures, that also airs several times each week. Both of these television shows depict detailed hunting expeditions both in and outside the United States and both of these shows provide entertainment and help SCI retain members, solicit new members and generate funding for SCI programs. SCI has recently produced a new DVD series entitled "Wild Endeavors" that is being distributed worldwide to SCI members. SCI chapters around the country similarly use hunting videos at the banquets, sporting shows and other fund raising events, to entertain,

interest and recruit new members. In short, these depictions of hunting help SCI to carry out its missions, but are jeopardized by Section 48.

Similarly, CSF serves as a networking tool for U.S. Representatives and Senators, helping them to learn about the hunting and fishing legislation being drafted or promoted by their fellow Caucus members. CSF also relies on hunting media in its other efforts. In addition, numerous other hunting/conservation organizations use hunting media for similar purposes.

#### **4. Section 48 and Respondent Stevens' Sentence, if Reinstated, May Chill the Creation of Hunting Videos**

The overbreadth of Section 48, especially if the statute is upheld and Respondent Stevens is sent to prison for three years, will chill the production and distribution of hunting media, which help promote this beneficial and necessary activity. In this case, the concern over chilling protected speech is particularly great because Section 48 is a criminal statute. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (“We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.”). Presumably to address the underlying conduct on which Congress was focusing – crush videos and possibly human-staged animal fighting – the penalties for violating Section 48 are harsh. Respondent Stevens, who produced and distributed videos that extolled the virtues of pit bulls and contained historical and educational value, and who did not partake in any of the underlying

illegal conduct, nonetheless was sentenced to over three years in prison.

To avoid a similar fate, producers and distributors of hunting media (including not only SCI but many other hunting/conservation organizations) may (1) avoid making videos depicting hunting activities that are illegal anywhere in the United States, (2) avoid showing the act of killing the hunted animal, or (3) limit the distribution of the videos to certain states. In all cases, Section 48 will be chilling the free speech rights of not only the producers of such videos but those who enjoy viewing such legitimate depictions:

Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.

*Id.* (citation omitted).

### **C. Section 48, as Plainly Written, is Overbroad and Facially Unconstitutional**

Respondent Stevens has comprehensively addressed (and the other amici will address) the specifics of why Section 48 is overbroad and facially unconstitutional. *See, e.g.*, Respondent's Merits Br. at 22-25, 50-55. SCI and CSF have tried to assist the Court by focusing on the particular issue of hunting media and the adverse impact of chilling the production and distribution of such depictions. Opposing the constitutionality of Section 48 is undoubtedly controversial because the intent of the law – to help eliminate the production of crush and possibly staged animal

fighting videos – is laudable. SCI and CSF, as stated above, certainly are not defending the underlying conduct. At the same time, SCI and CSF must be vigilant to prevent a well-intended, but too broadly written law from chilling legitimate and protected speech.

Likewise, this Court has not shied away from striking down well-intended statutes and actions that violate the First Amendment. For example, this Court struck down a provision of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.* (1996) (“CPPA”). The provision “extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239 (2002). The Court considered the purposes behind this law:

Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. . . . Furthermore, pedophiles might “whet their own sexual appetites” with the pornographic images, “thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children.” . . . In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. . . . To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

*Id.* at 241-42 (citations to legislative history omitted). Nonetheless, the Court struck down this provision of the CPPA:

[T]he reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.

*Id.* at 256; *see also National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (because of First Amendment concerns, state court erred in not entering stay of lower court decision banning members of the National Socialists Party of America from marching, or taking other actions that would promote hatred against persons of Jewish faith or ancestry, in predominantly Jewish neighborhood).

The Court should conduct its First Amendment/overbreadth analyses with this principle in mind. This Court has not hesitated to send Congress back to the drawing board to craft a more narrow and constitutional statute, regardless of the importance of criminalizing the underlying conduct:

This Court held unconstitutional Congress's previous attempt to meet this new threat [of the proliferation of child pornography on the internet], and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

*United States v. Williams*, 128 S.Ct. 1830, 1846-47 (2008).

**D. This Court Can Reduce the Overbreadth by Definitively Interpreting Section 48 in a Way that Excludes Hunting Videos and Other Legitimate Media, and by Limiting the Statute to Depictions of Acts That Violate State Animal Cruelty Laws**

As demonstrated above and in Respondent's and other *amici's* briefs, Section 48 is substantially overbroad as written and as potentially applied (and is unconstitutional for a number of other reasons). But the Court can interpret Section 48 in such a manner to narrow its reach, exclude legitimate media such as hunting videos, and limit the statute to only underlying conduct that would be illegal under state animal anti-cruelty laws. As this Court has explained: "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 128 S.Ct. at 1838 (narrowing reach of statute and upholding it). This narrowing would also help frame many of the other constitutional arguments raised by Respondent Stevens, but not addressed in this brief. Several points suggest that this narrowing would be an appropriate step here.

First, the legislative history of Section 48 reveals that the law was not intended to reach hunting media, despite its broad definition of "depictions of animal cruelty." The legislative history largely focuses on the need to assist the states in prosecuting those who create and distribute "crush videos" and, less specifically, animal fighting videos. H. Rep. 397, 106th Cong., 1st Sess. at 2-3 (1999) ("1999 House

Report”).<sup>15</sup> The legislative history, as amply demonstrated by the parties and amici, is replete with gruesome descriptions of crush videos. *See, e.g.*, Petitioner’s Merit Brief at 17-18. Section 48 is alleged to be a way to fill the gaps in enforcement posed by the fact that most crush and animal fighting videos do not show the human perpetrators sufficiently to identify either them or when and where the video was created. 1999 House Report at 3. Thus, Congress criminalized the commercial transaction involving such videos to address these alleged prosecutorial problems.

The same concerns are not even arguably present with hunting videos. Nothing in the legislative history or the briefs in support of Petitioner suggests that there are criminal or undesirable activities associated with hunting under state game laws, much less illegal activities that are hard for states to prosecute. The Committee Report even asserts that “depictions of ordinary hunting and fishing activities do not fall within the scope of the statute.” 1999 House Report at 8.<sup>16</sup> While this legislative statement about depictions of hunting and fishing is contrary to possible applications of the plain words of the statute, it does reflect on Congress’ intent and helps guide the Court’s interpretation of the statute. As explained by the concurrence in *United States v. Williams*, “to the

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<sup>15</sup> This Report characterizes the reach of Section 48 as follows: “What is restricted is the commercial pandering of graphic depictions of actual torture of a real animal.” 1999 House Report at 5.

<sup>16</sup> The drafters of this Report assume that all hunting activity legal in one state is legal in all states. What they appear to fail to understand is that some hunting activities that are legal in one state may be illegal in another, as described above.



extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters.” 128 S.Ct. at 1847, Stevens, J., concurring.<sup>17</sup>

Second, the Court’s 2001 “SWANCC” case provides some further guidance for narrowing the reach of Section 48 through interpreting its definitional provision. *Solid Waste Agency of No. Cook Cnty. v. U.S. Corps of Engineers*, 531 U.S. 159 (2001). In that case, the Court was faced with the question whether the Corps of Engineers had exceeded its jurisdiction under the Clean Water Act (“CWA”) over “navigable waters” when it regulated “isolated waters.” *Id.* at 162-64, 166. The CWA provision at issue gave the Corps authority over “navigable waters” but defined that term in an expansive way, beyond what are commonly considered navigable-in-fact waters: “The term ‘navigable waters’ is defined under the Act as ‘the waters of the United States, including the territorial seas.’” *Id.* at 163.

The government argued that the regulatory reach of the agency would eliminate the “navigable water” nexus from the statute, as the regulations included waters unconnected to navigable-in-fact waters. The Court did not “agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute.” *Id.* at 172. Instead, the

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<sup>17</sup> The Court below used the legislative history of Section 48 for a different purpose. See *United States v. Stevens*, 533 F.3d 218, 222 (3rd Cir. 2008) (“Resort here to some legislative history is instructive, not as a device to help us construe or interpret the statute, but rather to demonstrate the statute’s breadth as written as compared to what may originally have been intended.”).

Court concluded that “[t]he term ‘navigable waters’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *Id.* In other words, this Court did not allow the statutory definition of the term to completely eviscerate the common meaning of the defined term. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 718 (1995), Scalia, dissenting (“if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of ‘take’ as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term ‘take’—the only operative term—out of the statute altogether.”).

Similarly, the Court can retain in the defined meaning of “depictions of animal cruelty” the notion that the underlying act must be illegal under state animal cruelty laws. Just as this Court refused to eliminate the need for a nexus to navigable-in-fact waters for “waters of the United States,” the Court here can rule that the defined meaning of “depictions of animal cruelty” must include some aspect of animal cruelty as determined under federal or state animal laws.

Third, if Congress designed Section 48 solely as a means to help states enforce their animal cruelty laws, then any application that interferes with hunting activities that are legal where they are filmed clearly misses the mark. Several state animal cruelty laws specifically exclude hunting. For example, Delaware’s law exempts “lawful hunting or trapping

of animals as provided by law.” DEL. CODE ANN. tit. 11 § 1325(f) (2009). Florida’s law against fighting or baiting animals excludes conduct involved in hunting regulated by the Fish and Wildlife Conservation Commission. FLA. STAT. ANN. § 828.122(9)(b) (2009); *see also* MONT. CODE ANN. § 45-8-211(4)(d) (2007); N.M. STAT. ANN. § 30-18-1 I.(1) (2009); TENN. CODE ANN. § 38-1-403(d)(1) (2009); W.VA. CODE ANN. § 61-8-19(f) (2009). Other state laws that do not specifically reference hunting, implicitly exempt hunting by referring only to unjustifiable conduct. CAL. PENAL CODE § 11199(d)(2) (2009); ME. REV. STAT. ANN. tit. 34 § 1901(1)(B) (2009).<sup>18</sup>

As state cruelty laws explicitly or implicitly exclude hunting activities from their reach, this limiting interpretation would substantially reduce the reach of Section 48. Without such a narrowing of the meaning of the phrase, the Court will face the difficult constitutional problems with Section 48 described above. In *SWANCC*, this Court interpreted the CWA section at issue so as to avoid ruling on asserted constitutional infirmities with the jurisdictional reach of the statute:

Where an administrative interpretation of a statute involves the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. . . . This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limits of congressional authority.

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<sup>18</sup> See Addendum D of Respondent Stevens’ Brief on the Merits, listing all state animal cruelty statutes.

SWANCC, 531 U.S. at 172-73. Similar concerns here support the Court definitively interpreting Section 48 in a narrow fashion to require that the underlying act be illegal under federal or state anti-cruelty laws.

### CONCLUSION

Amici Curiae SCI and CSF request that the Court affirm the Third Circuit and hold that Section 48 is substantially overbroad and facially invalid because of the real possibility that it will reach and chill a great number of hunting videos and other depictions of legitimate and important hunting activities. Alternatively, SCI and CSF request that the Court, as part of its overbreadth analysis, definitively interpret Section 48 to cover only acts involving the maiming, torturing, wounding, or killing of a live animal that are illegal under federal or state anti-cruelty laws, so as not to include hunting videos within the reach of Section 48, and to avoid at least some of the constitutional problems with the statute.

Respectfully submitted,

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July 27, 2009