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Before the Subcommittee on Crime, Terrorism & Homeland Security of the House Committee on the Judiciary

United States House of Representatives

Hearing On:

"United States v. Stevens: The Supreme Court's Decision Invalidating the Crush Videos Statute"

PRESENTED ON MAY 21, 2010

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Evaluating The Supreme Court's Decision in *United States v. Stevens*:
Ramifications for Revisions to 18 U.S.C. § 48

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Good morning, Mr. Chairman and Members of the Subcommittee. It is an honor to appear today and assist in this important discussion of the Supreme Court's recent decision in *United States v. Stevens*, 130 S. Ct. 1577 (2010), and the continuing need for federal legislation to combat the evils of depictions of extreme animal cruelty.

By way of introduction, I am a partner in the Supreme Court and Appellate practice at the law firm of Latham & Watkins LLP. Prior to joining Latham & Watkins, I clerked for the Honorable J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit and, during the October 1997 Term, for the Honorable Antonin Scalia, Associate Justice of the United States Supreme Court. I then served as Senior Counsel to the Assistant Attorney General in the Antitrust Division of the Department of Justice. My practice now focuses on appeals in the Supreme Court of the United States and the federal circuit courts, including numerous cases posing difficult constitutional questions. I briefed and argued two cases in the Supreme Court this Term, and represented the Humane Society of the United States in filing an *amicus curiae* brief in support of the government's position in *Stevens*. I am, however, speaking today only for myself at the Committee's invitation, and not as a representative of the Humane Society.

I. THE DECISION IN *UNITED STATES V. STEVENS*

A. Procedural and Factual Summary

In *United States v. Stevens*, the Supreme Court held that 18 U.S.C. § 48 is overbroad and facially violates the free speech guarantee of the First Amendment. Section 48 criminalizes the "creation, sale, or possession" of depictions of animal cruelty "with the intention of placing that

depiction in interstate or foreign commerce for commercial gain." *Id.* § 48(a). The statute defines "animal cruelty" to include cruelty that "is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." *Id.* § 48(c)(1). Congress passed the law in 1999 after learning of the proliferation of so-called "crush videos," which show small animals being slowly tortured and crushed to death by women "with their bare feet or while wearing high heeled shoes." H.R. Rep. No. 106-397, at 2 (1999). Congressional testimony revealed that crush videos were made to "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *Id.* at 2-3. Although the states' respective animal cruelty laws prohibited the actual acts shown in these videos, Congress deemed § 48 necessary because of the difficulty local law enforcement had in identifying and timely prosecuting the persons involved in the acts. *Id.* at 3.

Federal prosecutors indicted Mr. Stevens under § 48 for three videos depicting animal fighting—two showing pit bull dogfighting and a third depicting pit bulls hunting wild boar and attacking domestic farm pigs. *Stevens*, 130 S. Ct. at 1583. A jury convicted him on all counts, and he was sentenced "to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release." *Id.* The Third Circuit took the case *en banc* and reversed the conviction. *Id.* It held that dogfighting videos are fully protected speech and that the government lacks any "compelling interest" in protecting animals from cruelty. *Id.* at 1583-84.

Following the Third Circuit's ruling, the government petitioned for and obtained a writ of certiorari from the Supreme Court. The Supreme Court affirmed the decision in an 8-1 opinion written by Chief Justice Roberts, but not for the reasons relied on by the Third Circuit. Instead the Court held § 48 facially invalid under the "overbreadth" doctrine, under which a court may strike down a statute if it finds that the statute prohibits a substantial amount of protected speech.

Id. at 1587 (law is "overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008))). The Court rejected the government's arguments that § 48 should be construed as limited to depictions of conduct that would be unlawful under state and federal *animal cruelty* laws, and focused on various hypotheticals proposed by Stevens and his *amici* under which the statute might be understood to criminalize videos of hunting or slaughterhouse practices that are lawful in some states but not others. *Id.* at 1588-90. The Court also strongly rejected the government's argument that particular speech could be subject to lesser First Amendment protections under a balancing test derived from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

Justice Alito alone dissented from the majority opinion, concluding that a facial attack was inappropriate under the circumstances and that the case should be remanded for consideration of whether the statute would be unconstitutional as applied to Mr. Stevens's materials. *Id.* at 1592-93 (Alito, J., dissenting). Justice Alito also disagreed with the majority's overbreadth analysis. *Id.* at 1594-1602. He concluded that "crush" videos and videos of animal fights are not constitutionally protected, by analogy to the Court's analysis of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982), and would have interpreted § 48 in a manner that would not reach depictions of hunting or slaughterhouse practices.

B. Important Implications Of the *Stevens* Decision

The Court's decision in *Stevens* was certainly quite critical of the breadth and vagueness of § 48 as presently drafted, and made clear that the Court is not inclined to recognize new categories of low-value speech on an *ad hoc* case-by-case basis. But in several respects the Court's decision was strikingly, and deliberately, narrow. The overall message, I believe, is that the Court remains quite receptive to a more narrowly drawn statute but is not inclined to give

Congress the benefit of any interpretive doubt. I will briefly touch on three aspects of the decision that I think are particularly relevant to Congress's consideration of any new legislation.

1. First, the principal disagreement between the majority and Justice Alito concerns how statutes that might pose First Amendment overbreadth concerns should be interpreted. In most contexts, the rule is that statutes should be construed to avoid constitutional issues when at all possible. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). The government argued in *Stevens* that the troublesome hypotheticals forwarded by Stevens and his *amici* could be avoided by construing § 48's requirement that the depicted conduct be "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place" to require that the depicted conduct must be illegal *under an animal cruelty law* as opposed to laws regulating hunting or slaughterhouse practices (which tend to differ more from State to State). Since the relevant language appears in the statute's definition of "depiction of animal cruelty," that would not have been a particularly unreasonable interpretive leap. And the statute's express exception for depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value" might also have been interpreted to protect hunting or slaughterhouse videos from prosecution. Justice Alito found both of those arguments persuasive.

The *Stevens* majority, however, was not inclined to adopt limiting constructions that it could not find in the plain language. It read § 48 very broadly, and then used that breadth to hold the statute facially unconstitutional. That approach reflects a very robust version of the overbreadth doctrine, and indicates that the Court is more concerned about protecting potential defendants from the "chilling" effect of arguably vague statutes than with preserving the potentially constitutional core application of those statutes through a narrower reading.

2. Second, the fact that the Court applied the overbreadth doctrine at all in *Stevens* underscores its hostility to broadly drafted laws but also, I believe, contains a message about the Court's receptivity to a narrower law that would encompass depictions of animal cruelty and animal fighting.

The traditional role of the overbreadth doctrine in First Amendment law has been to permit a defendant whose own conduct is *unprotected* to argue that the statute should be held invalid in all its applications (i.e., "facially") because it might infringe on the constitutionally *protected* conduct of others. The overbreadth doctrine is therefore an exception both to the general principle that a statute is not facially invalid if it has any legitimate applications, *see United States v. Salerno*, 481 U.S. 739, 745 (1987), and to "traditional rules governing constitutional adjudication," which generally forbid litigants from challenging statutes that "may conceivably be applied unconstitutionally to others, in other situations not before the Court," *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). It reflects a value judgment that the "chilling" effects of an overbroad law are so undesirable that the courts will incentivize litigants to challenge such laws even if the litigant's own speech is unprotected. *See United States v. Williams*, 553 U.S. 285, 292 (2008); *Broadrick*, 413 U.S. at 612. The Court has aptly characterized the overbreadth doctrine as "strong medicine" and has applied it only sparingly since its formalization in 1973. *Williams*, 553 U.S. at 293 (internal quotation marks omitted).

Prior to *Stevens*, there seemed to be good authority for the proposition that a defendant whose own conduct is constitutionally *protected* cannot raise an overbreadth claim—because, of course, a holding that the statute is unconstitutional "as applied" would be sufficient to protect his rights. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (where the party is engaging in protected speech, "[t]here is … no want of a proper party to challenge the

statute, [and] no concern that an attack on the statute will be unduly delayed or protected speech discouraged"); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989) (declaring a statute facially overbroad after finding a party's own speech protected "would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws"). Justice Alito would have held, on the basis of that precedent, that the Court should not reach any facial overbreadth issues prior to deciding whether Stevens's own dogfighting videos were constitutionally protected.

The majority of the Court sidestepped that issue by asserting that Stevens failed to preserve an as-applied challenge and that it granted certiorari to review the Third Circuit's *facial* holding. *See* 130 S. Ct. at 1587 n.3. Leaving aside whether the majority's position or Justice Alito's is more persuasive as to the procedural record of the case, I think it is fair to say that the majority was not compelled, even on its own terms, to approach the case this way. The Court is always entitled to expand the issues that it believes to be encompassed by its grant of certiorari. And if the majority had genuinely believed (with Justice Alito) that a litigant with a valid "as applied" challenge simply is not entitled to raise a facial overbreadth claim, then the fact that Stevens arguably waived his "as applied" challenge would be a curious basis for disregarding that limitation. The majority also would have been justified in dismissing the writ as improvidently granted, if it believed that a litigation waiver prevented it from approaching the case in the correct way.

At a bare minimum, the Court certainly would have been entitled to factor the law's potential application to animal fighting into its overbreadth analysis. Stevens and his *amici* seemed to concede, for the most part, that § 48 would be constitutional as applied to prurient

"crush" videos—and animal fighting videos are by far the most likely real-world setting where this statute is likely to be applied outside of the "crush video" context. Instead, the Court scrupulously avoided offering any opinion about whether animal fighting videos are constitutionally protected. As Justice Alito explained, "the Court has taken pains not to decide whether section 48 would be unconstitutional as applied to graphic dogfight videos, including those depicting fights occurring in countries where dogfighting is legal." *Id.* at 1597 n.5 (Alito, J., dissenting).

I come away from the *Stevens* opinion with the impression that the majority carefully avoided that question at least in part because they found it genuinely difficult. In the overall context of the arguments made by the parties and *amici*, it would have been easy for the Court to hold that § 48 can constitutionally be applied to "crush" videos that satisfy the traditional obscenity standard of *Miller v. California*, 413 U.S. 15 (1973), but that the statute is unconstitutional because it sweeps in plenty of speech that would not satisfy that standard—including the dogfighting videos for which Stevens himself was prosecuted. The Court did not do so, I believe, because there was no consensus among the Justices that Congress's hands should be bound that tightly.

3. Finally, the Court's overbreadth analysis also allowed it to sidestep the Third Circuit's unfortunate holding that the government had no "compelling interest" in preventing animal cruelty for purposes of strict scrutiny analysis. The Court also expressly distanced itself from that reasoning. *See* 130 S. Ct. at 1593 ("Today's decision does not endorse the Court of Appeals' reasoning … ."). It unanimously recognized the long history of animal cruelty laws dating back to before the founding of this country and assumed for purposes of decision that a law targeting depictions only of extreme animal cruelty may be constitutional. *Id.* at 1585

(majority opinion). Indeed, nothing in the majority opinion disagrees with Justice Alito's remarks that "[t]he animals used in crush videos are living creatures that experience excruciating pain," and that "the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals." *Id.* at 1600 (Alito, J., dissenting).

In my opinion, the Court's unanimous unwillingness to embrace the Third Circuit's reasoning reflects a recognition that there is an important and legitimate role for legislation in this area. As the Humane Society's brief explains, there have been prohibitions against needless cruelty to animals in this country dating back to (at least) the Massachusetts Bay Colony. There are, I believe, actually very few public policy issues about which Americans are more consistently united than this one—even if we sometimes disagree about the details.

In short, the Court plainly did not like § 48 as drafted but it went out of its way not to close the door to more narrowly drafted substitute legislation.

II. POTENTIAL REVISIONS TO SECTION 48

The *Stevens* decision has left room for Congress to revise § 48 in several different ways. I will briefly discuss two potential approaches, involving different degrees of risk that the new law will be successfully challenged in the courts.

A. Option 1: Limit § 48 Solely to "Obscene" Crush Videos

The narrowest, and most surely constitutional, approach to revising § 48 would be to limit the statute to materials that satisfy the traditional *Miller* test for obscenity. That test asks "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lack serious literary, artistic, political, or scientific value." *Miller,* 413 U.S. at 24 (internal quotation marks and citations omitted). It

could be implemented into legislation either by spelling out those requirements or by using the word "obscene," which at this point has become a legal term of art. *See, e.g.*, *Hamling v. United States*, 418 U.S. 87, 105, 113 (1974); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505 n.13 (1985).

In my view, a statute limited that way clearly would be constitutional and could be used to prosecute, at a minimum, the "crush" videos that provided the principal impetus for § 48's original enactment. Congress found in 1999 that crush videos "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." H.R. Rep. No. 106-397, at 2-3. Testimony during the 1999 hearings on § 48 revealed that "[m]any videos are produced wherein defenseless animals are tortured and crushed to death for the sole purpose of sexually exciting men."[1] President Clinton directed his Department of Justice to interpret § 48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." Statement of President William J. Clinton upon signing H.R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999). Although these videos would not appeal to a normal person's prurient interests, the Supreme Court had made clear that fetish materials are not insulated from obscenity scrutiny simply by virtue of being deviant. Expert testimony may be used to establish prurience "where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

It is also hard to imagine the average jury having any difficulty finding that a crush video is "patently offensive" and lacks any "serious literary, artistic, political, or scientific value." The

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[1] *Punishing Depictions of Animal Cruelty and Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 41, 53 (1999).

depictions of torture and cruelty in crush videos are some of the most vile, repugnant images imaginable. *See, e.g.*, 145 Cong. Rec. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum) ("I do not believe in my entire time in Congress, I have ever seen anything … as repulsive as [crush videos]. And I doubt anyone else who had to watch it would say anything [differently].").

The great majority of the *amici* in *Stevens* who wrote against § 48 conceded that a law prohibiting crush videos alone would pose no First Amendment problem. *See, e.g.*, Brief of Amici Curiae Association of American Publishers, Inc., et al. Supporting Respondent, at 17, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769) ("Had Congress sought to proscribe only 'crush videos,' it could have done so, and this would be a much different case."); Brief Amici Curiae of The Reporters Committee for Freedom of the Press and Thirteen News Media Organizations in Support of Respondent, at 22, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769) ("Congress could have regulated legally obscene crush videos in a manner that did not threaten news reporting and other high-value speech."); Brief of Amicus Curiae National Rifle Association of America, Inc. in Support of Respondent, at 34-35, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769) ("Congress could have drafted a statute that more precisely aimed at its objectives. For example, Congress could have defined and criminalized 'crush videos.'"). I believe there is little doubt that Congress could draft a statute that would be constitutional under the *Miller* test and that would permit prosecution of the great majority, if not all, crush video purveyors.

B. Option 2: A Statute That Criminalizes Trafficking In Both Animal Fighting and Crush Videos, But Excludes The Hunting Videos And Similar Materials The Court Found Problematic In *Stevens*

Of course that narrowest approach would leave defendants like Stevens free to engage in the interstate trafficking, for profit, of videos of illegal animal fighting that do not appeal to

prurient interests and therefore do not clearly satisfy the *Miller* obscenity test. The Supreme Court's opinion in *Stevens* goes out of its way not to decide whether animal fighting videos are constitutionally protected, and there are good reasons to believe that they should not be—many of which are discussed in Justice Alito's dissenting opinion. A law that extended to non-prurient animal fighting videos would surely be challenged on First Amendment grounds, and for that reason it might be wise to avoid the issue for now or (at a minimum) divide the statute into severable sections. But in my view the Supreme Court's opinion clearly leaves room for a good faith belief that videos of illegal animal fighting are not constitutionally protected.

As the Humane Society's brief in *Stevens* explains, dogfighting and other animal fighting is a national plague and the market for these videos plays a crucial role in sustaining the underlying activity, which is illegal under federal law and the laws of every State. Congress originally enacted § 48 to eliminate the incentive driving the production of crush videos. *See* 145 Cong. Rec. 31,217 (1999) (statement of Sen. Kyl). And it worked. By 2007, Representative Gallegly, an original sponsor of Section 48, declared the crush video industry dead. Press Release, Elton W. Gallegly, *Beyond Cruelty*, U.S. Fed. News, Dec. 16, 2007. Similarly, dogfighting videos are often produced to facilitate dogfighting operations by documenting important fights, conferring a significant revenue stream, serving as "training" videos for other fight organizers, and providing marketing and advertising materials. Congress was aware of these facts in 1999 and sought to inhibit the promotion and documentation of dogfights, undermine the financial motive for them, and ultimately reduce occurrences of the underlying act. *See* 145 Cong. Rec. H10,267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum).

Those facts suggest, as Justice Alito's dissent argues, that animal fighting videos share many of the characteristics that led the Court to conclude in *Ferber* that child pornography is

completely unprotected by the First Amendment. They also suggest that a ban on such videos might survive strict scrutiny even if that test applies. And I personally believe that a strong case can be made that the legal concept of "obscenity" should be broadened to include materials that are not "prurient" as heretofore defined but that similarly appeal only to base instincts and do not contribute anything meaningful to the marketplace of ideas. The Supreme Court has already recognized that "prurience" for obscenity purposes can encompass a "morbid interest ... in excretion" as well as sex, *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) (quotation omitted), and that the usual meaning of "obscenity" in the English language is not limited to sex, *see Miller*, 413 U.S. at 19 n.2. Several lower court decisions have recognized that depictions of actual violence raise similar constitutional issues. The Seventh Circuit has suggested, for example, that "violent photographs of a person being drawn and quartered could be" "described as 'obscene,'" and could even be "included within the legal category of the obscene" under *Miller*, "even if they have nothing to do with sex." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 575 (7th Cir.) (Posner, J.), *cert. denied*, 534 U.S. 994 (2001); *see also State v. Henry*, 732 P.2d 9 (Or. 1987).

Indeed, the focus of present obscenity law on *sexual* materials is a mid-20th century artifact that is inconsistent with both prior views (which were hospitable to a much wider scope of regulation) and contemporary attitudes—which tend to regard even sexually explicit materials as obscene only if they involve deviant violence. The Oregon Supreme Court in *Henry* explained that in a 1985 survey 73% of the population supported a ban on *violent* sexual material, whereas only 47% supported a ban on other sexual material. 732 P.2d at 16 n.7. Most recent federal obscenity prosecutions bear this out. *See United States v. McDowell*, 498 F.3d 308, 311 (5th Cir. 2007) (prosecution for videos showing sadistic and masochistic "sexual

torture"); *United States v. Davidson*, 283 F.3d 681 (5th Cir. 2002) (prosecution for, *inter alia*, snuff videos and depictions of rape and torture); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (images depicting, *inter alia*, bestiality and sadomasochistic torture).

There is something quite incongruous about the fact that under present First Amendment doctrine "crush" videos are clearly unprotected because they appeal to a recognized sexual fetish, while animal fighting videos may be entitled to the same First Amendment protection as core political debate merely because they do not. Given the nature of sexual deviance, how exactly is a judge or jury supposed to ascertain that a video of a foot crushing a kitten appeals to the "prurient interest," but a video of two dogs (or two people) forced to tear each other to pieces does not? And why should it matter? In my view a First Amendment that allows society to regulate the distribution and sale of sadistic video depictions of actual gruesome death-matches between coerced living beings *only* if there happens to be a scantily clad woman involved makes little sense, and is completely unmoored from the real values (either traditional or contemporary) that ought to inform constitutional adjudication.

Of course this is uncharted ground, but as noted above the Supreme Court seems to have gone out of its way in *Stevens* to leave these issues open. If Congress *were* inclined at this point to draft a law that goes beyond simply banning obscene crush videos, I believe several steps would improve the chances of such a law surviving constitutional challenge.

First, Congress should receive evidence and make findings about the role of video documentation in the animal fighting industry, to support the empirical points that Justice Alito relied on his dissent.

Second, it should carefully limit the statute to make clear that the hunting and slaughterhouse hypotheticals that troubled the Court in *Stevens* are excluded. That means, at a

minimum, making clear that the conduct depicted must violate state or federal laws *prohibiting extreme and intentional animal cruelty*, as opposed to hunting laws and general regulatory provisions governing ordinary slaughterhouse practices. *See Stevens*, 130 S. Ct. at 1588-90. It would also be wise, in my view, to include an explicit exclusion for hunting videos.

Third, the law should do what it can to address the Court's concerns about depictions of conduct that may be lawful in one state but unlawful in another. Limiting the law to depictions of conduct that violate *animal cruelty* laws would go a long way toward solving that problem since, as the majority recognized, every state has a prohibition against extreme animal cruelty and the content of such laws is reasonably consistent. Congress might also consider limiting prosecutions under a new § 48 to depictions of conduct that is illegal everywhere in the United States, or which is illegal as a matter of *federal* law.

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The Supreme Court has left this Subcommittee a number of options to consider in revising Section 48. It is my belief that "crush" videos may be proscribed within the existing *Miller* standard for obscenity, and that (if properly drafted) a law limited to crush videos would need not pose serious constitutional issues. Any statute that goes further and attempts to address depictions of illegal animal fighting will likely trigger a First Amendment challenge. But if Congress is inclined to address that problem at this point I do not believe the *Stevens* opinion is necessarily an obstacle. The Court carefully left open whether a law against depictions of unlawful animal fighting would be constitutional.

Thank you, Mr. Chairman, for the opportunity to testify on these important matters. I look forward to answering the Committee's questions.