

No. 08-769

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In The  
Supreme Court of the United States

United States,

*Petitioner,*

v.

Stevens,

*Respondent.*

**On Writ of Certiorari To The  
United States Court of Appeals  
For the Third Circuit**

**BRIEF FOR THE RESPONDENT**

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**QUESTION PRESENTED**

Whether Steven's conviction under 18 U.S.C § 48 based exclusively on the content of his films violates the Free Speech Clause of the First Amendment.

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## **STATEMENT OF THE CASE**

18 U.S.C. § 48 was passed by Congress for the purpose of outlawing “crush videos”, which are grotesque fetish films depicting the torture of young animals by women either barefoot or wearing heels. The statute defines depictions of animal cruelty as any recording of conduct “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale or possession takes place.” This law makes an exception for any depiction with “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”

Robert J. Stevens, hereinafter referred to as Stevens, is a 68-year-old published author and documentary producer whose work involves the history and unique assets of the Pit Bull breed. He opposes the practice of dog fighting and wishes to educate people about the raising and safe handling of the distinguished breed. Stevens compiled and distributed three films on these topics. His films show the historical traditions of the breed, their naturally sweet temperament, and how to safely train them to protect people and legally hunt wild boars.

The government indicted Stevens on three counts of violating § 48 based on the sale of these videos. Despite various experts testifying that his films had “serious value” as defined by the statute, the jury convicted him on all three counts. The U.S. Court of Appeals, sitting en banc, upheld Stevens’ First Amendment right to free speech and held that § 48 is an unconstitutional content-based prohibition on free speech. The government wishes to uphold the original conviction under the contradictory and overbroad § 48, threatening to make the First Amendment so vague as to not be interpretable by the American people.

## **I. 18 U.S.C § 48 Unconstitutionally Violates Free Speech Protected By The First Amendment.**

### **A. Congress Incorrectly Uses A Balance Test To Criminalize Stevens' Speech.**

The government's notion is true that the First Amendment is not absolute and does not allow every kind of speech. However, the First Amendment does not intend to create a balance test between costs to society and social benefits (which was created in *Chaplinsky v. United States (1942)*) as the government would like. The history of this court has indeed shows that certain kinds of speech can be banned, but also shows that "the constitution has created a very narrow category of unprotected speech." *Simon Shuster v. Member of the New York State Crime Victims Board (1991)*. The First Amendment is meant to be used as a shield, and this case is not extreme enough to warrant its' removal. Categories of unprotected speech have repeatedly been narrowed. "Most situations where the state has a justifiable interest in regulating speech fall within one or more established categories." *Cohen v. California (1971)*. These categories influence the banning of speech much more than a Chaplinsky balance test. In *Texas v. Johnson (1989)*, no separate category was created especially for flag burning, although there was not found to be significant social benefits. If this court favored a balance test, Johnson's flag burning would not have been protected.

The Government is knowingly creating a new category of unprotected speech that was not around when Stevens' videos were created. Thinking *Chaplinsky* allows speech to be easily prohibited based on a balance test threatens to transform the First Amendment from a shield into Big Brother allowing no speech at all.

## B. Depictions Of The Intentional Wounding Of Animals Have Long Been Protected Speech.

### 1. Images Protected By § 48 Support Animal Rights Efforts and Pervade American Culture.

The animal rights movement has been fueled by images of animals being intentionally harmed, and this court has never found such images to be obscene or present clear and present danger. These images have been broadcasted all across America by law enforcement, documentaries, and journalists to express an idea against animal cruelty. One of the government's points is that these videos appeal to only a small group of people, so they can be considered obscene. Contrarily, this court has found that "the hallmark of free speech is to allow 'free trade in ideas,' even ideas the overwhelming majority find disturbing or disconcerting." *Virginia v. Black* (2003). Just because these images may be unpleasant to watch does not make them unconstitutional.

The government fails to address that images falling into its new category of unprotected speech, animals being harmed, pervade American culture. Ernest Hemingway has graphic descriptions of bullfighting in his classic non-fiction book "Death in the Afternoon." Bullfighting is depicted much like baseball, as a sport and an art. Images of Phillipian cockfighting are also an example. Also, the Discovery Channel has broadcasted segments of boar hunting. None of these examples denounce the depictions of animals being harmed as despicable, and none have been found to be unconstitutional. If § 48 were such a vital law, perhaps it would have been utilized against these examples.

### 2. 'Serious Value' Exception Does Not Make § 48 Constitutional.

This clause, with its seven “serious value” exceptions, has many flaws. First, this law gives Congress permission to imprison those for speech that has value but not “serious” value. Second, “serious value” is all the government does to distinguish between legal and illegal speech. Thirdly, this clause allows the aforementioned images, which are all apart of American’s everyday lives, to be published, but not Steven’s. “Law cannot treat the press differently from other speakers.” *Arkansas Writer’s Project v. Ragland* (1987).

Neither in *Chaplinsky* nor any other case has this Court permitted Congress to outlaw a broad category of speech then say afterwards that it does not have “serious” value. “Serious” value does not have concrete meaning. This is contradictory to the decision in *City of Chicago v. Morales* (1999) that “no one may be required at peril of life, liberty or property to speculate as of the meaning of penal statutes.”

### C. Under Scrutiny, § 48 Is Not Effective Legislation.

#### 1. The Law Does Not Advance Any Governmental Interest.

##### a. Legislative History Does Not Show § 48 Has Any Intent To Ban Animal Fighting.

Congress’ aim with this law was strictly to ban crush videos, which are agreed to be obscene and only appeal to the prurient interest. Crush videos are not educational, unlike Stevens’ videos. Never in this law is animal fighting mentioned, only the vague descriptions of what it considers to be animal cruelty. If Congress could achieve its goal to ban crush videos with animal cruelty laws it has already passed, Stevens’ case would not exist. The First Amendment would not be in peril of another category or unprotected speech.

If Congress had as prevailing an interest in stopping animal cruelty as the government claims, it would not allow activities that advance it. For example, licenses are given out allowing the public to kill certain animals during their hunting season.

b. The Government's Desire to Correct Conduct through Speech Restriction is Unconstitutional and Unrealistic.

This court has said that in order to ban speech, "the harm must be in the speech itself." *First Nat'l Bank v. Bellotti (1978)*. The government contends that it must pass laws making speech portrayals of animal cruelty illegal because existing laws are hard to enforce because animal fighting is done in secret. Besides the fact that this law does not mention it, animal fighting, especially with dogs, is accessible to the public. It will be further shown below, through the discrediting of the government's use of *Ferber* as a precedent, that correcting conduct by banning Stevens' films is unrealistic.

c. *Ferber* is Inapplicable

*New York v. Ferber (1982)* makes speech illegal because of how it was made, not what is communicated. The government simply lists the five reasons for which this court made child pornography unprotected speech and fails to fully explain why they can be used to make Steven's videos illegal. Here, it will be shown why Steven's videos cannot be put in the same category as child pornography.

1. Congress does not have a compelling interest to banning animal cruelty, especially when compared to its interest in ending the child sexual abuse industry. Even dissenting judges in the Appeals court agreed. If interest in protecting animals was indeed on par with protecting

children, this law would not have so many exceptions, and as mentioned above, Congress would not allow activities that advance it.

2. While children can be negatively affected far into their future by child pornography, the same is not true for animals. Even if it was, there is no evidence provided that animal cruelty in general or dog fighting specifically is a widespread profitable market. Stevens' films are neither obscene nor pornographic.

3. Even if it was proven that there exists a widespread profitable market for dog fighting, there is no proof that film depictions provide enough profit to significantly impact the continuation of the conduct. If anything, gambling and spectator profits promote the conduct of dog fighting. Thus, there is no way that banning the speech will alleviate the problem to the "material degree" this court established in *Edenfield v. Fane (1993)*. Consequently, there is no economic motive to creating dog fighting films. Banning depictions only dries up speech, not crime.

4. Several experts have testified as to the usefulness of Stevens' films.

5. Thus, Ferber cannot be connected to Stevens' videos. Without this connection, the governments' entire case falls apart.

#### D. Conclusion

His films fall into the same category as speech that is already protected. If the government gets its way, vast amounts of speech will be under threat. The government is knowingly creating an entirely new category of unprotected speech, which is alien to this

court's history. The U.S. Court of Appeals holding that Stevens' conviction under 18 U.S.C. § 48 is unconstitutional should be upheld.

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