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 FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the First Amendment protects depictions of animal cruelty, as opposed to the (rightly criminalized) cruelty itself.

2. Whether balancing "Government interest" against "social value" is the proper way to identify whole new categories of constitutionally unprotected speech.

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The Cato Institute believes that cruelty to animals is reprehensible, and strongly favors the vigorous enforcement of the laws that already prohibit animal cruelty in every American jurisdiction. We submit this brief as *amicus curiae* in support of respondent Robert J. Stevens because we believe that the Government's attempt to exempt categorically all *expression* about those activities from the protections of the First Amendment poses a dangerous threat to Americans' freedom of expression.[1]

According to the Department of Justice, the Government is free to proscribe an entire class of previously lawful expression if it can merely show that the expression is "low value" and that the Government has a compelling interest in suppressing the conduct it depicts. See Gov. Br. 21. Until now, this power of categorical suppression has been countenanced by this Court only when applied to a "well-defined" class of historically unprotected speech: incitement, fighting words, defamation, obscenity, and child pornography—all of which were widely understood to fall outside the protections of the First Amendment long before this Court confirmed it.

The law at issue here is very different. Although animal cruelty is illegal in every U.S. jurisdiction, *depictions* of animal cruelty are not—and never have been. There is no history of valid government censor-

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[1] The parties have consented to the filing of this brief. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

ship of the images covered by 18 U.S.C. § 48. What the Government's brief therefore seeks is a broad new power to censor whole categories of *historically lawful expression*.

Of itself, that goal poses an alarming threat to Americans' most basic freedom. But the greater danger lies in the Government's proposed method for identifying new categories of speech it may proscribe: a balancing test that invites the judiciary to determine the "value" of the expression and weigh it against the Government's interest, not in suppressing a depiction, but in suppressing the conduct depicted. In the Government's view, the rigors of strict scrutiny do not apply: the Government may criminalize expression on an entire class of subject matter simply by designating it "low value" and pointing to existing laws proscribing the underlying subject matter.

It is not hyperbole to suggest that if the criminalization of depictions of animal cruelty survives such "balancing," then depictions of *any* unlawful or immoral conduct are vulnerable to Government prohibition. This Court has long rejected any such interpretation of the First Amendment's freedom of speech, and should reject it again.

Protection of the freedom of speech is of particular concern to the Cato Institute, which was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, pub-

lishes the annual *Cato Supreme Court* Review, and files amicus briefs with the courts.

STATEMENT OF THE CASE

Although acts of animal cruelty had been outlawed in many states, Congress in 1999 for the first time made it a federal crime simply to depict those acts. Congress was motivated principally by an effort to target prurient "crush videos," wherein women trample small animals with their feet for the sexual gratification of the viewer. *See* Gov. Br. 17-18; Statement of President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324 (noting the "types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex").

But the statute Congress actually enacted swept far more broadly, making it a felony to "knowingly create[ ], sell[ ], or possess[ ] a depiction of animal cruelty," if done "with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. § 48(a).[2]

That statute was soon used to indict Robert Stevens, a Pit Bull enthusiast who engaged in no acts of animal cruelty and long opposed dog fighting. He op-

[2] The statute defines "depiction of animal cruelty" as "any visual or auditory depiction . . . of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," as long as the act depicted "is illegal under Federal law" or under any "law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1). The statute excepts from prohibition any depiction that "has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b).

erated a business out of his home in which he produced and sold informational material about Pit Bulls. Stevens had produced three documentary films which contained footage of Pit Bulls engaged in dogfighting—footage he had not taken himself, and that depicted fighting that was legal at the time and place it was taken. One film educated its viewers about how to train the dogs for safe hunting practices, and it illustrated how dogs trained for fighting require retraining; another film expressly explained its aim to clear up "misconceptions" by showing "what historical pit dog fighting is – and is not"; and the third illustrated how pit fighting in Japan is conducted more humanely than in the United States. *See* Resp. Br. 3-5. Throughout, Stevens made clear that he "do[es] not promote, encourage, or in any way condone dog fighting." *Id*. at 4. Rather, for him, the images conveyed a historical perspective and communicated "what made our breed the courageous and intelligent breed that it is." *Id*.

For these films, the Government indicted Stevens, persuaded a jury that the videos did not have "serious . . . value," and convicted him of violating § 48. *Id*. at 6. He was sentenced to 37 months in prison and three years of supervised release.

On appeal, the Third Circuit declined the Government's invitation to recognize depictions of animal cruelty as a new category of speech unprotected by the First Amendment. Applying strict scrutiny instead, the court found no compelling government interest, and that, even if there could be such an interest, the statute was not narrowly tailored. The court vacated the conviction.

SUMMARY OF ARGUMENT

Historically, the Government's power to impose categorical restrictions on expression has been tightly cabined by the First Amendment: it extends only to "certain well-defined and narrowly limited classes of speech." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942). Depictions of the "wound[ing] or kill[ing]" of animals do not fall within those "well-defined" classes. Thus, to defend the constitutionality of its decision to make that expression a crime, the Government seeks to cast a wholly new "class of speech" completely outside the protections of the First Amendment—a category of speech that, until 1999, was legal under both state and federal law. As we explain in Part I, divining a new category of unprotected speech under these circumstances would mark a radical shift in this Court's First Amendment jurisprudence, one contrary to over six decades of decisions cautioning against suppressing speech based on its content.

Moreover, as we explain in Part II, this Court's traditional caution should continue. The "balancing test" proposed by the Government for identifying new classes of unprotected speech is an open invitation to sweeping encroachments on the freedom of speech. If adopted, it would permit the Government to enact speech-suppressive laws that—like the law at issue here—could not survive the rigors of strict scrutiny, simply by creating a new category of "unprotected speech." We urge the Court to reject the Government's position and re-affirm the vitality of strict scrutiny as the acid test of all laws, other than those falling within categorical exceptions recognized at the founding, that censor speech based upon its content.

ARGUMENT

I. Using A Balancing Test To Strip First Amendment Protection From Whole Categories Of Speech On Account Of Their "Low Value" Would Entail A Radical Break From Over Sixty Years Of Precedent.

This Court's jurisprudence on categorically unprotected speech spans more than 60 years, and remains firmly rooted in the historical principles on which it is based. The Government's attempt to define a wholly new category of unprotected speech represents a dramatic break with both precedent and tradition, and threatens to undermine the very principles that the First Amendment exists to protect.

A. To justify suppressing a new category of speech based on its content, the Government seeks to revive and expand dicta from *Chaplinsky*.

Nothing could be more sacred to the freedom of speech than the assurance that "above all else, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). Time and again, this Court has reaffirmed that first principle of the First Amendment. *See, e.g., Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear."); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed."); *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49

(1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment) (observing "government's lack of power to engage in content discrimination"). Because of the threat to freedom inherent in government control over the content of speech, "[c]ontent-based regulations are presumptively invalid" and ordinarily must meet strict scrutiny. *R.A.V.*, 505 U.S. at 382. Indeed, that threat is particularly acute where, as here, the Government seeks to suppress speech by making it a crime. *See Free Speech Coalition*, 535 U.S. at 244 ("[A] law imposing criminal penalties on protected speech is a stark example of speech suppression.").

In the Government's view, however, the longstanding rule against content-based suppression permits a generalized exception: "a categorical balancing analysis, comparing the expressive value of the speech with its societal costs." Gov. Br. 12. By way of this balancing test, the Government suggests that whole new categories of speech can be moved entirely outside the First Amendment on account of their content. That notion is based on dicta from *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942), which noted that certain categories of speech had historically been unprotected because "the social interest in order and morality" clearly outweighed whatever "slight social value" they contained. Yet, this Court has never taken so freewheeling an ap-

proach to identifying *new* categories of unprotected speech—not even in *Chaplinsky*.[3]

First, the categories of unprotected speech *Chaplinsky* listed—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"—had been rooted in history and tradition, and for that reason, "ha[d] never been thought to raise any Constitutional problem." *Id*. at 571-72. *Chaplinsky*'s balancing language thus did no more than explain those historic categories; it was not a fount for generating myriad new ones. *See R.A.V.*, 505 U.S. at 383 (observing that *Chaplinsky*'s "traditional limitations" on freedom of speech dated "[f]rom 1791"); *Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring in judgment) (noting the "historic and traditional categories long familiar to the bar").

Second, and relatedly, *Chaplinsky* emphasized the "well-defined and narrowly limited" nature of the unprotected categories. 315 U.S. at 571. And this Court has subsequently reiterated that those categories were meant to be "few" and "limited." *R.A.V.*, 505 U.S. at 383; *see also Cohen* v. *California*, 403 U.S. 15, 24 (1971) ("[W]e cannot overemphasize that . . . most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions."). For both of these reasons, then, *Chaplinsky* itself does not support the Government's expansive reliance on it.

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[3] Indeed. this Court has warned that "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Crawford* v. *Washington*, 541 U.S. 36, 67-68 (2004).

B. Since *Chaplinsky*, the Court has carefully limited the categories of unprotected subject matter and narrowly restricted the scope of each category.

Moreover, in the more than six decades since *Chaplinsky*, this Court has resisted creating new categories and has carefully narrowed existing ones. As the Court has acknowledged, and the following survey demonstrates, *Chaplinsky*'s dicta have typically been treated as a ceiling for the permissible suppression of speech—and not as a floor, or a springboard, for categorically suppressing new speech. *See, e.g.*, *R.A.V.*, 505 U.S. at 383.

Fighting Words and Incitement. Althoughthe Court has not expressly rejected *Chaplinsky*'s holding that "fighting words" are unprotected speech the Court has strictly cabined the Government's ability to suppress such speech. To constitute unprotected fighting words, it is now not enough for speech to be merely hurtful. Rather, it must also be likely to promote a violent response and directly targeted to a particular person. *See, e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 409 (1989).[4] And not since *Chaplinsky* has the Court upheld a fighting words conviction, instead reversing convictions for half a century in every subsequent case.

The same narrowing has been applied to incitement, a close cousin of the fighting words doctrine. In *Brandenberg* v. *Ohio*, the Court denied the Gov-

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[4] Although the related prohibition on threats of physical violence is "of an ancient vintage," *Watts v. United States*, 394 U.S. 705, 709 (1969) (Douglas, J., concurring), even such historically unprotected speech must constitute a "true 'threat'," *id.* at 708.

ernment carte blanche to prohibit general advocacy of law violation, and allowed such speech to be unprotected only in rare circumstances where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969).

Defamation. This Court has also carefully circumscribed the historically unprotected category of defamation. Where it involves public figures, the Court observed in *New York Times* v. *Sullivan*, 376 U.S. 254, 271-72 (1964), that false "statement is inevitable in free debate, and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" In declaring that such speech is protected only if it results from "actual malice," the Court noted a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id*. at 270.

Obscenity. The Court has likewise narrowed the scope of the obscenity category. Obscenity's traditionally unprotected status was deemed "implicit in the history of the First Amendment." *Roth* v. *United States*, 354 U.S. 476, 484 (1957). Yet, the Court limited the reach of that historic category in *Miller* v. *California*, 413 U.S. 15, 24 (1973), allowing prohibitions only on material that appeals to the prurient interest defined with reference to contemporary community standards; depicts patently offensive sexual conduct defined by the applicable state law; and lacks serious literary, artistic, political, or scientific value.

Profanity. Although *Chaplinsky* listed profanity as unprotected, this Court subsequently rejected efforts to suppress such speech in *Cohen* v. *California*, 403 U.S. 15 (1971). Affirming the fundamental First Amendment principle that the Government may not prohibit speech simply because others take offense, the Court reversed a defendant's conviction for wearing in court a jacket that said "F--- the Draft." This Court instructed that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id*. at 25. Despite allowing reasonable regulation of profanity in particular mediums, principally to protect children,[5] this Court has emphatically declined to deem profane speech categorically unprotected.

Child Pornography. In the decades since *Chaplinsky*, the Court has recognized only one other category of unprotected speech: child pornography. *Accord, e.g.*, *Johnson*, 491 U.S. at 417 (refusing to recognize a "separate juridical category" for flag burning). Like the others, however, this category was not new when it was recognized. For one thing, "sexually explicit visual portrayals that feature children" have a "related and overlapping" relationship to the traditional category of obscenity. *United States* v. *Williams*, 128 S.Ct. 1830, 1836 (2008). And for another,

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[5] *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (profanity in school); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (profanity over the broadcast media); *but see, e.g.*, *Sable Comm'ns v. FCC*, 492 U.S. 115 (1989) (prohibiting suppression of "indecent" telephone speech where not narrowly tailored); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (prohibiting suppression of "sexually-oriented" cable television programming where strict scrutiny was not met).

nearly every state had well-established laws on its books prohibiting the production or distribution of child pornography. *New York* v. *Ferber*, 458 U.S. 747, 749 (1982).

Nevertheless, the Court expressed concern over "the dangers of censorship inherent in unabashedly content-based laws" and indicated that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Id.* at 756. Despite these reservations, child pornography is unprotected principally because "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," *id.* at 757—indeed, a compelling interest "evident beyond the need for elaboration," *id.* at 756. Nor can there be any doubt that the prohibition is narrowly tailored, for distribution of child pornography "is intrinsically related to the sexual abuse of children" because it is "a permanent record of the children's participation and the harm to the child is exacerbated by [its] circulation." *Id.* at 759.

Though well-entrenched, this category too has been carefully limited. In *Ashcroft* v. *Free Speech Coalition*, the Court overturned a ban on "virtual child pornography" because it targeted the "content" of speech rather than harms resulting from "production of the work." 535 U.S. at 249. The Court reasoned that the statute at issue proscribed "the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages." *Id.* at 246. The Government could not

suppress such speech simply by characterizing its content as "low" in value. [6]

C. By proposing to create a broad new category of unprotected speech, the Government urges the abandonment of this Court's longstanding disfavor of categorical proscriptions on expression.

The decades of decisions since *Chaplinsky* demonstrate the persistent concern that a proliferation of broad categories of "unprotected" speech—enabling the Government to prohibit undesirable content—is to be resisted: The list of categories has been winnowed, the bounds of each have been drawn tight, and the Government's latitude to regulate content within each category has been curtailed. Far from a roving warrant to criminalize the content of any new speech the Government deems lacking in "value," *Chaplinsky* represents only a few narrow, historically grounded exceptions to the general principle that the Government may not proscribe speech based on its content. The exceptions have carefully been prevented from overwhelming the rule. And for reasons explained more fully below (*infra* Part II), this Court's traditional caution is amply justified.

The Government's effort to expand and reinvigorate *Chaplinsky*'s "balancing" language would mark a

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[6] There is one additional limit on the Government's ability to suppress categories of purportedly unprotected speech. As this Court has made clear, the Government may not use the "unprotected" status of a category of speech to discriminate between viewpoints within that category. *R.A.V.*, 505 U.S. at 383. Thus, for example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384.

sharp departure from this Court's decades-old approach. Visual depictions of animal cruelty fit into none of the existing categories of unprotected speech. And unlike those categories, there is no established historical basis for criminalizing this speech: The statute under which Stevens has been prosecuted, enacted in 1999, was, we believe, the first of its kind to prohibit *expression* about animal cruelty. That statute represents not the wisdom of inherited tradition, but rather the ambition of the Federal Government to proscribe a whole new swath of previously free expression.

Nor is the expression here substantially analogous to the existing categories of unprotected speech. Although the Government claims such depictions are like obscenity by virtue of their "low value," speech criminalized by the statute need not have any sexual or "prurient" content whatsoever. And to expand obscenity, as the Government suggests, into a wide category including any speech uncongenial to the Government's current view of "public morality" (Gov. Br. 23) would eviscerate the freedom of speech. This Court has repeatedly warned that the Government may not criminalize speech simply because its content may "offend" the "sensibilities" of some citizens. Gov. Br. 37. *See, e.g., Cohen, supra*; *Johnson, supra.*

Moreover, although the Government also suggests depictions of animal cruelty are like child pornography depicting the rape of a child, this can only be true at an absurdly high level of generality: Both, in a sense, involve "helpless victims." Gov. Br. 36. But the salient point, which in *Ferber* was "evident beyond the need for elaboration," was not that child pornography involved a "victim," but that the victim was an *abused child*. *See Ferber*, 458 U.S. at 756-60;

Free Speech Coalition, 535 U.S. at 249-50. And in that case, there could be no question that "a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *Ferber*, 458 U.S. at 756-57 (quotation omitted).

Though we condemn animal cruelty, the State's interest here is fundamentally different in kind. And because it involves animals rather than children, there can be no sensible claim, as there was in *Ferber*, that "[b]ecause the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place." *Id*. at 760 n.10.

Finally, there is no way to avoid prohibiting much meaningful speech—even anti-cruelty speech—depicting cruelty to animals without departing from this Court's recent holding in *R.A.V., supra,* that the Government may not discriminate against viewpoints within a category of unprotected speech. As much as visual depictions of animal cruelty may be used by some to express the exhilaration of a dogfight or a bullfight, such depictions have also been used by many to express disgust with the same acts. *See* Resp. Br. 18-25. Both are deeply human notions, the conveyance and receipt of which are core expressive activities—however one weighs the "value" of their different underlying ideas. Although the Government assures us that depictions of animal cruelty with "redeeming societal value" are not at risk, it cannot permissibly separate depictions used to convey disgust from depictions used to convey exhilaration. Where identical content is used to convey different viewpoints, the Government cannot stamp out one viewpoint without also stamping out the other.

II. By Permitting Courts To Balance The "Value" Of An Entire Class Of Depictions Against The State's Interest In Suppressing The Conduct Depicted, The Government's Approach Circumvents Strict Scrutiny And Invites Myriad New Content-Based Restrictions.

The "categorical balancing" proposed by the Government for identifying categories of proscribable content is an open attempt to end-run—and even subvert—the Court's traditionally rigorous scrutiny of content-based restrictions on speech. The Government's legitimate interest in prohibiting the already unlawful conduct of animal cruelty does not imply a concomitant interest in suppressing depictions of that conduct, and the proposed inquiry into the value of the proscribed expression is an invitation to the categorical suppression of disfavored speech.

A. The proposed balancing test would allow the Government to sidestep the rigors of strict scrutiny as to virtually any kind of expression.

This Court's jurisprudence on content-based restrictions on speech rests on a single, unassailable principle: that "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). For decades, this Court has effected that principle by subjecting content-based restrictions on speech to its most rigorous analysis: strict scrutiny.

Below, the *en banc* Third Circuit concluded that §48 could not survive strict scrutiny—and the Gov-

ernment has not challenged that conclusion. Seeking reversal here, the Government advocates—as it must—for a *less demanding* form of First Amendment analysis. In other words, the very purpose of the Government's proposed "categorical balancing" is to escape the rigors of strict scrutiny. And if this Court were to adopt that approach, it would not merely provide an end-around for avoiding strict scrutiny; it would all but obviate the doctrine. Under the Government's test, there is an almost limitless array of expression that could simply be balanced out of the First Amendment.

The requirements of strict scrutiny are well known: A law that proscribes speech based upon its content is invalid, unless the Government can demonstrate that the law furthers a "compelling" state interest and is "narrowly tailored" to advance that interest. *See, e.g.*, *Republican Party of Minn.* v. *White*, 536 U.S. 765, 774-75 (2002). The purpose of strict scrutiny is not merely to "ferret out" improper Government motives. More fundamentally, it is a mechanism for ensuring that, regardless of motive, the Government's power to restrict speech is tightly confined to those circumstances where it is genuinely required to enable and protect effective republican governance consistent with constitutional principles.

The Government's "balancing test" eviscerates *both* elements of strict scrutiny—and with them, their salutary limitation on the Government's power over expression. It offers no pretense of requiring "narrow tailoring," that is, the use of the least restrictive available means to serve the Government's interest. Less obviously, the Government's proposed test subtly diminishes the requirement that the suppressive law advance a "compelling" government interest.

And although the "balancing test" adds a requirement that the suppressed speech have "low value," even that amorphous and subjective requirement is effectively subsumed in the diluted "compelling interest" analysis. In the end, the Government's proposal for prohibiting whole classes of expression looks very much like rational-basis review.

1. The Government's analysis dramatically weakens the requirement of a "compelling interest."

As the Government acknowledges, its "categorical balancing" test shares one feature with traditional strict scrutiny: the requirement that the Government demonstrate that the suppressive law promote a "compelling" state interest. Gov. Br. 8, 24, 31. But the compelling interest analysis offered to defend §48 represents a radical expansion of this Court's compelling interest jurisprudence—one that clashes with established authority of this Court and greatly enlarges the scope of the interests that might be asserted to support restrictions on speech.

The Government identifies four interests that it claims are sufficiently "compelling" to justify the suppression of speech: "preventing the illegal torture, maiming, mutilation, and killing of animals"; "preventing the harms to humans that often attend and follow from acts of animal cruelty"; "preventing the erosion of public morality that attends acts" of animal cruelty; and "eradicating illegal acts of animal cruelty and preventing associated harms." Gov. Br. 24, 32-25.

Those four interests share a common feature: they all relate to the *conduct* of animal cruelty—not its depiction. And while it is certainly true, as the

Government says (at 24), that there is a broad "societal consensus" against the physical maltreatment of animals, it does not follow that any such consensus exists with regard to *depictions* of such conduct. Rather, the Government's claim of compelling interest rests on the *assumption* that the Government's legitimate interest in preventing undesirable conduct creates an equally legitimate interest in suppressing expression about that conduct.

That assumption is clearly valid in the case of obscenity and child pornography, where the depiction itself is the objectionable conduct. (Pornography is not the conduct of sexual activity, but the depiction of that activity.) It is also valid in the other traditionally unprotected categories of fighting words, threats, and incitements, in which the purpose and effect of the *utterance* is to achieve a result in the real world independent of its expressive content—where the utterance is, in effect, a verbal act.

But that assumption is not valid for the speech proscribed by §48. The depiction of the killing or wounding of an animal is not the killing or wounding of an animal; the nexus between the act and the expression is too attenuated to support the logical leap that the Government's position requires. And because it cannot support that leap, it flies in the face of decades of this Court's free speech jurisprudence. Time and again, this Court has reiterated a basic principle: that in the absence of some imminent threat, the Government cannot restrict speech merely because that speech relates to unlawful, immoral, or undesirable action. *See, e.g., Brandenburg* v. *Ohio*, 395 U.S. 444, 447-48 (1969)(stating that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of

the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

The Government's assertion of compelling interest in this case is flatly inconsistent with that principle. If adopted by this Court, it would open the door to an expansive array of content-based restrictions on speech. That danger is particularly acute here, because once a compelling interest is found, the only purported limitation on the Government's power to proscribe whole classes of expression is the requirement that the expression have "low social value"—and that, as we now show, is no limitation at all.

2. The only purported limitation on the Government's balancing test—the requirement that the suppressed speech have "low value"—offers no principled means for determining the boundaries of unprotected speech.

By the Government's own account, its "categorical balancing" approach has only two essential components: "the societal costs" of the targeted expression (and the resulting compelling government interest in restricting them) and the "expressive value of the speech." Gov. Br. 21. If the government's interest is compelling, and the value of the speech is "low" or "minimal," the analysis is over—the speech may be criminalized.

As we have shown, the Government's position attempts to leverage its interest in prohibiting unlawful or undesirable *conduct* into an interest in prohibiting speech *depicting* that conduct. Assuming for the sake of argument that this expansive view of "compelling

interest" is legitimate, then the only bulwark against Government proscription of expression depicting unlawful or undesirable conduct is the requirement that the speech fall into "the low-value category." Gov. Br. 14. But that requirement imposes no real limitation at all, because there is no principled basis for identifying "low value" speech—no constitutional or legal precept to guide a court's determination of which speech merits First Amendment protection, and which does not.

Certainly the Government has not offered one: its argument on the low value element consists largely of lurid descriptions (at 17-21) of the most vile kinds of animal cruelty—notably,"crush videos," which are not at issue here and which (because they are "designed to appeal to persons with a very specific sexual fetish," Gov. Br. 17) are obscene by any standard—and an ipse dixit claim that "the material reached by the statute is leagues distant from the 'free dissemination of ideas of social and political significance' that like at the core of the First Amendment." Gov. Br. 21-22 (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). But note the subtle shift in the Government's argument: it has juxtaposed "low value" speech against "core" First Amendment speech. Surely that is a false and pernicious dichotomy: If all speech save "ideas of social and political significance" is "low value" speech, then the marketplace of ideas is a much smaller place than this Court's jurisprudence has led us to believe.

This slippery slope from *non-"core"* speech to *unprotected* speech is inherent in the Government's value-based balancing test. That test offers no principled means for distinguishing speech that is genuinely "without redeeming social value" from speech

that is simply undesirable, disfavored, or misunderstood.

The absence of such a principle both explains and justifies this Court's longstanding refusal to expand upon the existing, historically validated categories of "low value" speech. If those historical boundaries were abandoned—as the Government urges here—courts would be free to make highly subjective judgment calls about the value of proscribed speech. In that environment of "free play," there is a substantial and unacceptable risk that "low-value" speech will become synonymous with *disfavored* speech—the very speech most likely to be proscribed by the social majority, and the very speech that the First Amendment exists to protect. *See, e.g., Schaefer* v. *United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting) (noting the role of the First Amendment in "preserv[ing] the right of free speech . . . from suppression by tyrannous, well-meaning majorities").

B. Applying the Government's proposed balancing test would open a Pandora's Box of new content-based speech restrictions.

The Government's position is so sweeping, and so unlimited by any cabining principle, that the question is not whether it portends a slippery slopw, but exactly how steep the slope.

As the following examples demonstrate, it is very steep indeed. Taken to its natural conclusion, the Government's "categorical balancing" analysis could be employed to proscribe wide swaths of expression that, until now, fell squarely within the bounds of the First Amendment.

"Defamation" of Religion. One example is speech alleged to "defame" a particular religion. The

Government plainly has a legitimate and compelling interest in protecting religion, and the many religious faiths, from discrimination and oppression. Indeed, the Free Exercise and Equal Protection Clauses gird that interest with constitutional weight. And expression that attacks, mocks, or vilifies a religious faith or denomination—particularly one that, like Islam or Judaism, is practiced primarily by a discrete and insular minority of Americans—surely "almost never could 'constitute an important and necessary part of a literary performance or scientific or educational work.'" Gov. Br. 21 (quoting *Ferber*, 458 U.S. at 762-63).

Thus, such expression—like, for example, the controversial editorial cartoons of the Prophet Mohammed published by the Danish newspaper Jyllands-Posten in 2005—could constitutionally be criminalized under the Government's categorical approach.

Nor is this an idle or abstract threat: The United Nations General Assembly has passed resolutions calling upon its members to enact legislation prohibiting the "defamation of religion." *See, e.g.*, United Nations, G.A. Res.62/154, U.N. Doc. A/RES/62/154 (Mar. 6, 2008) ("urging" member states "to take action to prohibit the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"). It is not difficult to imagine that Congress, facing significant international pressure, could enact such legislation. And if the Government's position in this case is viable, this Court would have to uphold it, without further inquiry into the danger of the speech, the Government's

interest in suppressing it, or possible less-restrictive alternatives.[7]

Racially-Motivated "Hate" Speech. Another example is the kind of racially charged "hate speech" that has been the subject of many (failed) attempts at censorship in recent years. There is no question that the Government has a compelling interest in preventing acts of racial discrimination, harassment, and violence. The Reconstruction Amendments, and decades of civil-rights legislation, are dedicated to advancing that interest. Nor is it controversial to suggest that depictions of, or expressions advocating, conduct motivated by racial animus are quintessentially "low value" speech.

Under the Government's "categorical balancing" approach, therefore, there is nothing to prevent Congress from enacting legislation proscribing not just racially motivated misconduct—such as workplace discrimination—but also the entire category of expression that depicts or describes that conduct. If the Government's theory is valid, then the mere possibility that such a depiction might encourage the underlying conduct is a sufficient basis for banning it.

Depictions of Violence By Or Against American Troops. The Government's balancing test would also support a categorical proscription of depictions of

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[7] This result demonstrates how dramatically the Government's approach breaks with precedent: in 1952, this Court struck down a New York state statute that effectively forbade "defamation of religion," concluding that "[i]t is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). Under the Government's proposed test, however, it is difficult to see how that ruling could be correct.

torture or violence committed either by or against American security forces abroad. Just a few months ago, the Government refused to release photographs documenting abuses committed by American interrogators at Iraq's Abu Ghraib prison, apparently because it feared that releasing the images "could set off a deadly backlash against American troops." Jeff Zeleny and Thom Shaker, "Obama Moves to Bar Release Of Detainee Abuse Photos," N.Y. Times, May 13, 2009.[8]

The Government undoubtedly possessed a compelling interest in withholding those photos; presumably, it would have an identical interest in censoring, banning, or confiscating the same photos in private hands. And surely if the "graphic depictions of the torture and maiming of animals . . . are no essential part of any exposition of ideas," and thus lacking in redeeming value, Gov. Br. 21, then equally graphic depictions of the torture and maiming of human beings are, too. There is little question, then, that under the Government's test, the Abu Ghraib photos could be banned categorically, and their possession, sale or display criminalized.

Depictions of Criminal Acts. In fact, the Government's approach would open the door to censorship of all expression depicting unlawful conduct—including most television shows based upon police work or criminal prosecutions. In its defense of §48, a primary basis for both the Government's assertion of "compelling interest" and its assertion of "low value" is the fact that the underlying conduct, *i.e.*,

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[8] Viewed July 23, 2009 at http://www.nytimes.com/2009/05/14/us/politics/14photos.html?_r=1&ref=middleeast).

animal cruelty, is illegal. But if the Government can legitimately claim a compelling interest in proscribing expression about any illegal conduct; and if, as we have described, such expression all but necessarily will be deemed "low value," then any depiction of an unlawful act becomes fair game for criminalization in its own right. (Indeed, if §48 is any guide, a depiction of criminal activity may legitimately be subjected to harsher punishment than the activity itself.)

Consider, for example, the "Cheech and Chong" films of the 1970s and 1980s, which earned tens of millions of dollars at the box office and which were largely dedicated to the glorification of marijuana use. Recreational marijuana use, like animal cruelty, is illegal under federal law and the laws of all 50 states; the Government thus has a compelling interest in preventing it. And Congress could plausibly conclude that the glorification of marijuana use in film, music, and fiction encourages that activity. If the Government is to be believed, then, because the depictions in Cheech & Chong films "feature—and in some instances, themselves cause—acts of" unlawful drug use, Congress could constitutionally "target those depictions as a way to deter the underlying conduct." Gov. Br. 35.

The same case could be made against any depiction of unlawful conduct. The documentary film about Philippe Petit's famous tightrope walk between the World Trade Center towers, for example, involves numerous depictions of an illegal act that could quite plausibly encourage other would-be daredevils to perform similar illegal acts. The Government surely has a compelling interest in preventing such highly dangerous stunts, and the value of the depictions is largely based on its voyeuristic entertainment

value—a consideration that is certainly "leagues distant from the free dissemination of social and political significance that lie at the core of the First Amendment." Gov. Br. 21-22 (internal quotation omitted). And surely if "some serious work were to demand a depiction" of Petit's illicit skywalk, the stunt could be simulated." Gov. Br. 21. But just as surely, the substitution of fake images for real ones would bleach the depiction of any value it had as a source of wonder and inspiration.

Finally, the Government's theory could also justify the categorical proscription of unlawful conduct routinely shown on popular television shows such as "24" or "Law and Order." A government could well conclude that the depiction of some kinds of criminal conduct should be banned because it not only is of "low value," but may also lead to "copycat" crimes. And such a finding, under the Government's theory, could justify strict censorship of all such programming.

There is no end to such examples. But we hope these few will suffice to prove the breadth and absurdity of the Government's radical approach to the categorical suppression of speech.

CONCLUSION

Animal cruelty is a vile and reprehensible practice, deserving of the legal and moral opprobrium it receives. Depictions of that practice are an unpleasant and sometimes shocking reminder of the evils that men do. The Government's attempt to criminalize those depictions is thus an understandable effort to achieve a more perfect justice. But that effort, however pure its motives, is deeply misguided under our Constitution—and any additional protection it

may achieve for America's animals is vastly outweighed by its costs to the basic freedoms of its people.

But even that danger pales by comparison to the startling legal theory the Government has advanced to defend §48 from Respondent's First Amendment challenge. The Government will always have a strong interest in suppressing unlawful, immoral, and indecent conduct; and the value of expression depicting or describing that conduct will almost never fall within the class of "high-value" First Amendment speech. To grant the courts free rein to "balance" necessarily strong interests against inherently non-"core" speech is an invitation to broad-based proscriptions of expression of a kind that, we respectfully submit, is exactly what the First Amendment exists to guard against. We ask that the Court affirm the decision of the Court of Appeals for the Third Circuit, and in so doing categorically reject the Government's approach.

Respectfully submitted,

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