

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: UNITED STATES, Petitioner, v. ROBERT J. STEVENS.
CASE NO: No. 08-769
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear first, this morning, Case 08-769, United States v. Stevens.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

Ten years ago, in section 48 of title 18, Congress crafted a narrowly targeted restriction against certain depictions of actual animal cruelty. Yet the Third Circuit struck the statute down on its face without even attempting to apply substantial overbreadth analysis. The statute has four critical features and, just as the Court last year in *United States v. Williams* began with statutory construction, analysis should begin there.

First, like the statute at issue in *United States v. Ferber*, this statute only reaches depictions of cruelty to actual living beings -- animals, not simulated ones or the written word.

Second, the statute only applies to commercial messages, ones that Congress found drove the market for animal cruelty.

1 Third, the statute examines the work as a
2 whole --

3 JUSTICE SOTOMAYOR: What record was there
4 of that fact?

5 MR. KATYAL: Before Congress?

6 JUSTICE SOTOMAYOR: Yes.

7 MR. KATYAL: Before Congress -- Congress had
8 a bunch of testimony that showed that there were
9 extensive -- there was a robust market in animal cruelty
10 videos, largely focusing on crush videos -- 2 to 3,000
11 crush videos that were in -- that were -- that were
12 being sold at the time.

13 JUSTICE SOTOMAYOR: That I understand, but
14 crush videos is only one species of cruelty to animals.
15 What evidence was there that, for example, dogfighting
16 had as large and robust a market or that hunting videos
17 in those States in which hunting was illegal had a
18 robust market, et cetera?

19 MR. KATYAL: Well, hunting we think is
20 excluded -- and I could talk about that in a moment -- from
21 the reach of the act. Congress spoke in general terms, and
22 I don't think that Mr. Stevens's statement at page 13 of
23 his merits brief, which is to the effect that
24 Congress repeatedly disavowed any attempt to regulate
25 animal fighting -- dogfighting -- I don't think that is

1 correct and the record does not support that.

2 Congress spoke in general terms. They had a
3 for-profit commercial market about animal cruelty, and
4 the statute dealt with it in general terms. And they
5 reasoned that by -- by punishing the sale of these
6 videotapes, they would get at the underlying clandestine
7 market --

8 JUSTICE SCALIA: What do you mean by a
9 "for-profit commercial market"? You mean anything that
10 is sold, right?

11 MR. KATYAL: That is -- that is correct.

12 JUSTICE SCALIA: Okay.

13 MR. KATYAL: Yes.

14 And the Third Circuit's decision in this
15 case struck down the statute with respect to crush
16 videos, with respect to the sale of video -- the
17 creation of dogfighting videotapes, because, remember,
18 the statute, section 48, doesn't just encompass the --
19 the sale of videotapes. It also encompasses the
20 creation of dogfighting videotapes. And, yet, the --
21 the Third Circuit struck that down as well. That, I
22 think, was a fundamental error under this Court's
23 principles, most particularly, *United States v.*
24 *Williams*, which says that the statute should only be
25 struck down if there is a substantial -- if there is

1 substantial overbreadth and only if it is a last resort
2 of the court, not the first.

3 CHIEF JUSTICE ROBERTS: What would you -- if
4 you could do it in one sentence, what is your test for
5 determining which categories of speech are unprotected
6 by the First Amendment?

7 MR. KATYAL: In one sentence, if -- if
8 Congress sees a compelling interest in regulating the
9 means of production and does not target the underlying
10 content, they can -- they can regulate a depiction, so
11 long as it leaves alternative mechanisms for that
12 expression in -- in place, and that is I think what
13 Ferber --

14 JUSTICE KENNEDY: Okay. And what case --
15 what case do you have for that proposition?

16 MR. KATYAL: United States v. Ferber -- excuse
17 me -- New York v. Ferber. In Ferber, the Court -- the
18 Court dealt -- and as modified or as glossed by your
19 decision in Free Speech Coalition, because what Ferber and
20 Free Speech Coalition together say is that Congress was
21 not -- or the legislature was not targeting the
22 contents of a depiction; rather, it was trying to get at
23 and dry up the underlying market, child exploitation in
24 that case. Ferber --

25 JUSTICE GINSBURG: Mr. Katyal, the Court

1 summarily dealt with a case some years ago, American
2 Booksellers v. Hudnut, where cities attempted to make
3 not even a criminal offense, but the subject of a civil
4 suit, a violent depiction -- depictions of women as
5 sexual objects enjoying pain and humiliation and
6 degradation.

7 The Seventh Circuit said that that was a
8 blatant violation of the First Amendment, to go after
9 purveyors who show these women in the shocking,
10 degrading photographs, and I believe we summarily
11 affirmed.

12 MR. KATYAL: And this case is fundamentally
13 different from all of those because here Congress is not
14 aiming at the underlying communicative impact. It's not
15 saying, as it was -- the legislature --

16 JUSTICE SCALIA: Well, of course it is. I
17 mean, you can't separate the means from the end and say,
18 since its end is simply to prevent the -- the activity,
19 the means, which is to prevent the communication, is
20 okay. It is targeting the communication of videos that
21 depict this conduct.

22 MR. KATYAL: Quite to the contrary, Justice
23 Scalia. The bona fides of this statute are evident
24 right on its face, because the very same depictions that
25 Mr. Stevens or anyone else swept up under the statute

1 wants to portray, they can -- they can do it, so long as
2 they use simulated or images.

3 CHIEF JUSTICE ROBERTS: Well, but to say
4 that they are not concerned with the content, I -- I
5 think is contradicted by the exceptions. You have to
6 look at the content and make a decision, is this bona
7 fide scientific, journalistic, educational, historical?
8 So you have to look at the content to determine whether
9 or not the speech is prohibited.

10 MR. KATYAL: I don't think so, for two
11 reasons. I think what Congress is dealing with, with the
12 exemptions clause in this statute, was just reflecting
13 the underlying nature of the market that they saw in
14 1999, a for-profit commercial market in cruelty.

15 And so they exempted educational depictions,
16 religious, and so on, because that wasn't what was
17 driving the underlying market for crush videos --

18 CHIEF JUSTICE ROBERTS: How can you tell
19 these aren't political videos? You do have, with
20 organizations, PETA and others, depictions of the same
21 sort of animal cruelty that is used to generate support
22 for efforts to prohibit it. Why aren't these videos the
23 exact opposite, you know, efforts to legalize it, and,
24 in each case, it would fall under the political
25 exemption?

1 MR. KATYAL: And often they will fall under
2 that exemption. My point is that Congress carved a
3 broad exemption in section 48 precisely to make sure
4 that expressive messages aren't swept up.

5 JUSTICE SOTOMAYOR: Could you -- could you
6 tell me what the difference is between these video and
7 David Roma's documentary on pit bulls? I mean, David
8 Roma's documentary had much, much more footage on the
9 actual animal cruelty than the films at issue here,
10 greater sections of the film, and more explicit.

11 In this film, the -- the Respondent didn't
12 let the video show the actual tearing of the jaw. David
13 Roma's did much more than that, showed much more than
14 that. So isn't -- doesn't there have to be a judgment
15 inherent in this statute?

16 MR. KATYAL: The line will sometimes be
17 difficult to draw, just as it's difficult to draw in
18 child pornography --

19 JUSTICE SOTOMAYOR: But it's not in child
20 pornography because, there Congress says the very
21 act -- it doesn't matter how artistic it is -- that very
22 act of child pornography is illegal.

23 MR. KATYAL: Quite to the contrary, Justice
24 Sotomayor. In this -- this Court approved, in Osborne
25 v. Ohio, a statute on child pornography that had

1 the following exemption: For a, quote, "bona fide
2 artistic, educational, religious, governmental,
3 judicial, or other purpose by or to a physician,
4 psychologist, sociologist, person pursuing bona fide
5 research studies, judge or other person having a
6 proper interest in the material or performance."

7 And this Court pointed to that exemptions
8 clause to make the statute constitutional at two -- at
9 two pages in that opinion. And so this Court has
10 already gone down the path of saying these decisions are
11 tough to make on a case-by-case basis, but nonetheless
12 the legislature should have a freer hand to act when it
13 is regulating, not the expressive message, but targeting
14 the underlying contents, the -- targeting the underlying
15 production, not the content.

16 JUSTICE SCALIA: Child -- child pornography
17 is obscenity as far as I am concerned, and it has been
18 treated as part of that same traditional classification
19 which there has always been permission for the
20 government to prohibit. This is something quite
21 different.

22 I mean, you know, what if -- what if I -- I
23 am an aficionado of bullfights and I think, contrary to
24 the animal cruelty people, I think it -- they ennoble
25 both beast and man, and I want to persuade people that

1 bullfights are terrific and we should have them?

2 I would -- I would not be able to -- to
3 market videos showing people how exciting a bullfight
4 is. Right? I would be able to talk and say, oh, you
5 should really allow bullfights, but I cannot make the
6 most significant point that I want to make, get people
7 to watch it.

8 MR. KATYAL: I want to answer your
9 hypothetical, but if I could just have 20 seconds or so
10 to -- to respond more generally to all of these
11 hypotheticals which I think are going to reoccur in the
12 course of our conversation.

13 We believe that section 48 will have
14 as-applied constitutional challenges that will be
15 inferred from case to case. But what this Court has
16 said is that -- in your decision, Justice Scalia, in
17 *United States v. Williams*, is that we should be careful
18 about that endless stream of fanciful hypotheticals
19 precisely because the test under substantial
20 overbreadth, which knocks an entire act of Congress out
21 on its face, is that there must be a realistic danger
22 that the statute will be applied in -- in the manner the
23 hypothetical suggests.

24 With respect to your bullfighting
25 hypothetical, there is no realistic danger.

1 We have had 10 years of experience under the statute.
2 Congress itself said -- the legislative history, which I
3 know will not be of relevance to you but may to others
4 on the Court -- they explicitly exempted Spanish
5 bullfighting and said that's the paradigmatic case of
6 what is educational and artistic and the like.

7 JUSTICE ALITO: What if I made --

8 JUSTICE SCALIA: Well, wait. Wait. I don't
9 understand that. Any depiction of bullfighting is
10 educational?

11 MR. KATYAL: Spanish depictions of
12 bullfighting --

13 JUSTICE SCALIA: And that's true because
14 Congress said so?

15 MR. KATYAL: Well, that's true because it
16 is educational, and -- and a prosecutor would bear the
17 burden of proof.

18 JUSTICE SCALIA: Well, I guess a dogfight is
19 educational, too.

20 MR. KATYAL: And some dogfights certainly
21 are, which is my answer to Justice Sotomayor's question.

22 JUSTICE BREYER: Well, look what you have
23 done, and this is what is bothering me. You take these
24 words, which are a little vague, some of them serious --
25 "religious, political, scientific, educational,

1 journalistic, historical, or artistic value," and you
2 say that's a standard that a judge or prosecutor will
3 apply. And people have to understand it because they
4 have to know what to do to avoid the risk of being
5 prosecuted.

6 Now, as I have gotten out of these briefs,
7 you then require people to apply that standard, not
8 simply to the crush videos or to the dogfighting, but
9 also to, as Justice Scalia pointed out, bullfighting,
10 sheep hunting, bear hunting, deer hunting, fox hunting,
11 humane slaughter, and for, I think somewhere I found,
12 the stuffing geese for pâté de foie gras.

13 All right, so there is a whole long -- quail
14 hunting. There's a whole long list in here of things
15 that people might want to do. They won't know if it
16 falls within this exemption. Nobody in every State
17 wants to forbid these things. Sometimes they are,
18 sometimes they are not. They won't know whether or not
19 they can make this particular film, picture, or other.
20 That's the overbreadth argument. And I would like to
21 hear your response.

22 MR. KATYAL: We have had 10 years of
23 experience, Justice Breyer, under the statute, and we
24 haven't seen those -- those things being chilled. Indeed,
25 Respondent's --

1 JUSTICE KENNEDY: Can you give me an example
2 of a case where we said a statute which might otherwise
3 be overbroad is not overbroad because prosecutors have
4 been restrained? Can you give me one case where we've
5 said that?

6 MR. KATYAL: Last year in *United States v.*
7 *Williams*, an opinion that virtually every member of this
8 Court joined, including you, Justice Kennedy, this Court
9 said that it would look to the experience, the
10 post-Ferber experience, in prosecuting cases to decide
11 whether or not a -- two terms in the statute, "promotes"
12 and "presents," were vague and would raise unrealistic
13 hypotheticals.

14 JUSTICE KENNEDY: But that -- but that was a
15 case where we knew what the content was. The content was
16 not subject to an -- to an overbreadth challenge. The
17 content was not.

18 MR. KATYAL: Well, actually, Justice
19 Kennedy, the reason that came up in the case is because
20 there were hypotheticals being advanced such as
21 police -- a man who wants to call the police that says
22 the child pornography arrived in my -- in the mail and
23 so on. And what the Court said is that even though the
24 words in the statute, just as the words in this statute,
25 could be read broadly or narrowly --

1 JUSTICE KENNEDY: Well, but that -- that
2 went to the intent. It seems to me that -- let me tell you
3 what I think your framework is and if it's wrong, tell
4 me that it's wrong. This statute without the
5 exceptions clause would be wildly overbroad. So you say
6 it's not overly broad because of the exception or the
7 savings clause. I will call it the exceptions. But it
8 seems to me that the exceptions must be then tested as
9 to whether or not they are vague.

10 MR. KATYAL: We do think that the --

11 JUSTICE KENNEDY: And you have you to show
12 that they are not vague.

13 MR. KATYAL: We do think that the exceptions
14 clause does some of the constitutional work to exclude
15 some of the hypotheticals like bullfighting and the
16 like. We do think the statute itself has a number of
17 restrictions built into it on its face to target --

18 JUSTICE GINSBURG: But what is -- what is
19 "and the like"? How about cockfighting? What is the
20 difference between -- perhaps I missed something a few
21 moments ago -- between bullfighting, cockfighting,
22 dogfighting? You say dogfighting is included, but
23 bullfighting -- and I don't know where you put
24 cockfighting.

25 MR. KATYAL: Dogfighting and cockfighting

1 are illegal in all 50 States and therefore would be
2 swept up. Some certain depictions of dogfighting and
3 cockfighting would be swept up, not all.

4 JUSTICE GINSBURG: But what about
5 bullfighting? Isn't that illegal in some --

6 MR. KATYAL: It may or may not be. There
7 aren't, at least, specific statutes generally dealing
8 with it, but --

9 JUSTICE STEVENS: What about hunting with a
10 bow -- what about hunting with a bow and arrow out of
11 season?

12 MR. KATYAL: Okay. So --

13 (Laughter.)

14 MR. KATYAL: In hunting, as well as --

15 JUSTICE GINSBURG: Can we -- have we
16 finished with the category of fights?

17 MR. KATYAL: So let me just -- to Justice
18 Ginsburg's question. Not all dogfighting videos are
19 swept up by section 48. There may be educational
20 videos, along the lines that Justice Sotomayor said --
21 raised which are not swept up. Bullfighting is the same
22 basic thing. It's not that there is a categorical -- a
23 categorical exemption on bullfighting; it is rather that
24 there are certain ones that are educational and not,
25 just like in child pornography.

1 JUSTICE GINSBURG: What's the --

2 JUSTICE SCALIA: So noneducational
3 bullfighting would be prohibited? If I market this just
4 because I think, boy, bullfighting is really exciting?

5 MR. KATYAL: If it meets the other terms in
6 the statute, right. So commercial and things like that.

7 JUSTICE SCALIA: Okay. It is covered.

8 MR. KATYAL: Now, with respect to hunting,
9 hunting is generally not considered animal cruelty. And
10 it doesn't --

11 JUSTICE STEVENS: No, but hunting with a bow
12 and arrow, and some depictions of hunting are pretty --
13 are pretty gruesome.

14 MR. KATYAL: That's correct. And to the
15 extent that it's -- that it's something that resembles the
16 terms in the statute, the language of which is "maimed,
17 mutilated, tortured, wounded, or killed" --

18 JUSTICE SCALIA: "Or killed." How do you
19 limit "killed" to cruel -- you say in your brief that
20 it's noscitur a sociis. But that's a doctrine that
21 says when you have a string of words, one of which has
22 various meanings, which meaning it has depends upon the
23 words with which it's associated. So if you speak of
24 staples, staples -- what, thumb tacks, nails, and other
25 fasteners, "nails" obviously doesn't mean toenails. It

1 means a nail that is a fastener, the word "nail" having
2 various meanings.

3 "Kill" has one meaning, which is kill. And
4 you can --

5 (Laughter.)

6 JUSTICE SCALIA: you cannot limit that meaning
7 just because in addition to killing you also prohibit
8 torturing and other things. Do you have a single case
9 where -- where that doctrine is used not to give meaning to
10 an ambiguous word, but to limit the meaning of a word which
11 on its face is absolutely clear?

12 MR. KATYAL: Yes, Your Honor. I do.

13 JUSTICE SCALIA: What is that?

14 MR. KATYAL: And that is the decision you wrote
15 last year in United States v. Williams, which interprets
16 the words "promotes and presents," which you yourself in
17 the opinion said are capable of a wide variety of meanings.

18 JUSTICE SCALIA: Exactly.

19 MR. KATYAL: And -- and here the word "killed"
20 in context is a term that the statute --

21 JUSTICE SCALIA: No, it's not susceptible to
22 a wide -- that's my whole point. It means kill.

23 MR. KATYAL: It means killed in the context
24 of a statute that is defining the words "animal
25 cruelty," and this Court has consistently said that the

1 definition that is being defined by the legislature --

2 JUSTICE SCALIA: Some people think killing an
3 animal is animal cruelty. These people don't eat meat
4 because it is the product of killing animals.

5 MR. KATYAL: And the legislature under no
6 way, shape, or form was targeting that.

7 JUSTICE SCALIA: Well, it shouldn't have
8 said that, then.

9 MR. KATYAL: Well, I think that it basically
10 did say that by using the words "animal cruelty" in the
11 statute. Now, if there's a disagreement about that --

12 JUSTICE SCALIA: You don't have a single
13 case in which a -- an absolutely clear word like "kill"
14 is given a more narrow meaning because of other words
15 that are different from that word.

16 MR. KATYAL: Justice Scalia, in *Leocal*, this
17 Court defined the term "crime of violence," which the
18 INA had -- that the INA interpreted wrongly.

19 JUSTICE BREYER: So you want to say "cruelly
20 kill"?

21 MR. KATYAL: That's correct.

22 JUSTICE BREYER: Now, "cruelly kill" is not
23 exactly crystal clear. And therefore my question is
24 why, given the need for you to save this statute, to read
25 so many words that are so general, those contained here

1 that I've read, "cruelly kill", "cruelly wound" as
2 opposed to just "wound" or "kill" -- you are doing that
3 in order to prevent chilling people who are engaging in
4 activities that aren't intended to be covered by this
5 statute.

6 Why not do a simpler thing? Rather than let
7 the public guess as to what these words mean, ask
8 Congress to write a statute that actually aims at those
9 frightful things that it was trying to prohibit. Now,
10 that can be done. I don't know why they couldn't do it.

11 MR. KATYAL: And it could have been done in
12 Williams. It could have been done in the child
13 pornography cases, which also have vague terms. But
14 what this Court has said is that using the substantial
15 overbreadth doctrine to do that leaves gaping holes in
16 place. If we followed your invitation, Justice Breyer,
17 we would leave crush videos unprotected --

18 JUSTICE BREYER: Why? Why? You say a crush
19 video, my description that I read of it, you would have
20 a very strong case. I'm not saying you would win it, I
21 don't have to decide that. But you have a very strong
22 case. So you say to Congress, write a statute that
23 focuses on that. You are worried about dogfighting,
24 write a statute that focuses on that, and moreover, talks
25 about something unlawful in every State. I am not
26 giving Congress advice, though I seem to be.

1 (Laughter.)

2 JUSTICE BREYER: I'm just saying why -- why
3 can't you here write a statute that does not force the
4 courts into the work of interpreting these very vague
5 words to prevent the statute from being held
6 unconstitutional?

7 MR. KATYAL: Well, here I think we should
8 give Congress some credit, because what it actually did
9 in the exemptions clause was borrow this Court's own
10 jurisprudence from the obscenity context on exceptions
11 like literary, artistic, political, and scientific. It
12 had found that --

13 CHIEF JUSTICE ROBERTS: Counsel, would
14 this -- would a statute like this applied to humans be
15 constitutional? You can't depict videos of, say,
16 violent muggings or things of that sort?

17 MR. KATYAL: Well, I think it would be
18 complicated because Congress would have to find that by
19 targeting the underlying videos but leaving alternative
20 simulated mugging videos in place, somehow it would have
21 reduced the market for muggings or something like that.
22 I think that's very hard. And it goes to Justice
23 Ginsburg's question about whether this statute is -- is
24 aimed at the communicative impact, which we don't think it
25 is, or is aimed at just reducing the first-order

1 problem, which is --

2 JUSTICE SCALIA: But the first-order problem
3 occurs in States where it is not illegal. These videos
4 are taken in States where bullfighting or dogfighting
5 or cockfighting is entirely legal. So, I don't know
6 how you distinguish a -- a movie which -- many people think
7 that violence in movie brutalizes people and causes
8 violence in people's action.

9 Why couldn't Congress, persuaded by these
10 people say, you know, you can't have -- cannot depict
11 torture? You know, these horror films that come out
12 around Halloween, you can't depict that anymore. What
13 is the difference between that and what you have done
14 here?

15 MR. KATYAL: So dogfighting is illegal in
16 all 50 States along with crush videos. And I don't think
17 that -- there may be some as-applied challenge --

18 JUSTICE GINSBURG: But it isn't -- it
19 isn't illegal in Japan, and part of the video here
20 were dogfights in Japan; legal where it occurred, no
21 different from bullfighting.

22 MR. KATYAL: Right. This Court has dealt
23 with that in footnote 19 of Ferber in which it said that
24 just because something is legal somewhere else, it's
25 often very hard to figure out where the underlying

1 material was made. It doesn't have a GPS --

2 JUSTICE SOTOMAYOR: But that wasn't -- that
3 wasn't filmed here.

4 JUSTICE ALITO: Justice Scalia spoke about
5 the aficionados of Spanish bullfighting. Suppose that I
6 am an aficionado of the sort gladiatorial contests that
7 used to take place in ancient Rome, and suppose that
8 some -- that Rome or some other place decides that it wants
9 to make money by staging these things and selling videos of
10 them or broadcasting them live around the world. Do you
11 have any doubt that that could be prohibited?

12 MR. KATYAL: This is -- I'm sorry if I'm not
13 following the hypothetical. This is historical --

14 JUSTICE ALITO: A gladiatorial contest
15 where the gladiators fight to the death.

16 MR. KATYAL: Right.

17 JUSTICE ALITO: Do you have any doubt that
18 that could be prohibited?

19 MR. KATYAL: Well, it sounds like it would
20 fall under the historical exemption, at least under the
21 hypothetical as you have raised it. So, it wouldn't be
22 prohibited by section 48 --

23 JUSTICE SCALIA: Who knows?

24 JUSTICE ALITO: No, no, not under this
25 statute, under a different statute.

1 MR. KATYAL: Well, I think that -- I think
2 that there again, it would raise some First Amendment
3 interest in suppressing historical -- historical
4 information.

5 Now, Justice Scalia, you said "Who knows?" I
6 think the answer to that is that this statute places the
7 burden of proof on the government in order to -- in
8 order to prove that there is no historical or
9 educational value.

10 JUSTICE SCALIA: If you dress up like an
11 ancient Roman, the whole thing is of historical
12 interest?

13 (Laughter.)

14 MR. KATYAL: Well, I --

15 JUSTICE SCALIA: Is that it?

16 MR. KATYAL: Justice Scalia, I do think that
17 is the Court's own jurisprudence with respect to, for
18 example, obscenity and child pornography, both of which
19 this Court has accepted precisely those types of
20 exceptions.

21 JUSTICE SCALIA: A different category. That
22 is traditional First Amendment law that obscenity is not
23 protected. And child pornography, as far as I am
24 concerned and I think as far as the Court is concerned,
25 is obscenity.

1 MR. KATYAL: Well, I don't believe the Court
2 has actually read child pornography to be obscenity.
3 The rationale of Ferber --

4 JUSTICE GINSBURG: Mr. Katyal, there is
5 something quite different between Ferber, because the
6 abuse of a child is occurring at the very time. As I
7 understand it, Mr. Stevens was not a promoter of dogfights.
8 He was just filming them. And so the -- the --
9 the simultaneous abuse of the child, it occurs only
10 because the picture is being taken. The dogfight goes
11 on whether Mr. Stevens is there with his camera or not.

12 MR. KATYAL: Let me say two things about
13 that. First Mr. Stevens, of course, even in the Japan
14 videos you mentioned, he sent his dogs to Japan to -- to
15 fight. And this statute encompasses real-time
16 transmissions of --

17 JUSTICE GINSBURG: Where it was legal for
18 him to do that.

19 MR. KATYAL: It was, just -- again, like
20 child pornography and the like. The second --

21 JUSTICE GINSBURG: It isn't that -- what I
22 would like you to confront is that the very taking of the
23 picture is the offense. That's the abuse of the child.
24 The abuse of the dog and the promotion of the fight is
25 separate from the filming of it.

1 MR. KATYAL: I agree with that. And I don't
2 think that's what underlay either this Court's Ferber
3 decision or Free Speech Coalition. The move that
4 Ferber makes is to say that the legislature can target
5 the underlying mode of production, so long as it leaves
6 alternative mechanisms for that same exact message to be
7 spoken. And this statute does that. Mr. Stevens can
8 produce the exact same message, just as long as he
9 doesn't involve the torture or mutilation to an actual
10 living animal. And to compare this --

11 JUSTICE SCALIA: His message is that getting
12 animals to fight is fun. That's his message.

13 MR. KATYAL: And Congress hasn't stamped
14 that out.

15 JUSTICE SCALIA: To say he -- you know, he
16 can convey that message in some other way, how else does
17 he do it?

18 MR. KATYAL: With simulated messages, the
19 written word. He has written an entire book about that.
20 He can -- he has a whole variety of --

21 JUSTICE SCALIA: Simulated dogfights would
22 be okay under this statute?

23 MR. KATYAL: Simulate -- absolutely. This
24 statute leaves that in place, Justice Scalia. That's
25 the key to understanding why this statute is not like

1 the traditional statutes that come before this Court in
2 which the government asserts some paternalistic interest
3 and says viewers can't see this because of the offense
4 of the message.

5 This statute has nothing to do with the
6 offense of the message. It has to do with trying to dry
7 up an underlying market for animal cruelty.

8 If there are no other questions, I would
9 like to reserve the balance of my time.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Ms. Millett.

12 ORAL ARGUMENT OF PATRICIA A. MILLETT

13 ON BEHALF OF THE RESPONDENT

14 MS. MILLETT: Mr. Chief Justice, and may it
15 please the Court:

16 It is not the exact same message, if you are
17 forced in a popular debate that is going around this
18 country now about the treatment of animals, to require
19 one side to engage -- to use simulated images, which is
20 exactly what the government's reply brief at page 3
21 insists upon, while those who want to ban conduct are
22 allowed to use real images. That puts the government's
23 censorial thumb on the scale of public debate.

24 JUSTICE ALITO: What about crush videos,
25 which apparently were the focus of Congress's attention

1 when it drafted these? Now, I suppose by analogy to
2 what Justice Scalia just said about the message of dog
3 fighting videos, the people who produce crush videos
4 think they have a message, and the message is that this
5 is -- this is sexually exciting or it's exciting in some
6 way to see a woman in high-heeled shoes crushing a
7 little animal to death.

8 Do you think that is constitutionally
9 protected?

10 MS. MILLETT: I think -- I think there's
11 a -- that a properly drawn law could very well, at least
12 in my humble opinion, this Court would have to decide,
13 survive strict scrutiny.

14 There is also, I suppose, some argument
15 whether it would fit into -- you wouldn't need strict
16 scrutiny, you would fit it into an unprotected category
17 of speech like obscenity or it would be the production
18 issue that would -- like you have in Ferber.

19 But what -- beyond that I do think we need
20 to keep in mind a couple of things --

21 JUSTICE ALITO: You are not -- you are not
22 even willing to say that that could be prohibited?

23 MS. MILLETT: No, no. I think -- I'm saying
24 that there are three alternative ways in which to get to
25 it. My first one is that -- not this statute, but under

1 a properly drawn statute --

2 JUSTICE ALITO: Under a properly drawn
3 statute --

4 MS. MILLETT: -- that it may well -- that might
5 survive strict scrutiny. I'm not sure you would need to -
6 -

7 JUSTICE ALITO: Might. I would really like
8 you to tell me whether it would; whether you are willing
9 to concede -- because we are trying to determine whether
10 this is overly broad. And this is the category of
11 activity that Congress particularly targeted. So to me
12 at least it's important to know whether at least as
13 applied to what Congress principally had in mind, the
14 statute could -- could pass constitutional muster. If
15 it were, you know, as applied.

16 MS. MILLETT: I don't -- I don't want to
17 say this statute, because I don't think this statute could.
18 If the statute said, this -- I think this Court
19 could disagree -- it disagrees with me sometimes -- but I
20 think this could pass constitutional muster: a statute
21 that says the patently offensive intentional torture and
22 killing of an animal for -- designed to appeal to the
23 prurient interest for the purpose of producing the
24 image. I think that would satisfy -- I think it would
25 satisfy strict scrutiny. The Court might also decide

1 that it's close enough to obscenity or it's like the
2 Ferber production rationale. That's my position. There
3 are sort of three ways it could be analyzed, a statute
4 like that.

5 That's not this statute, and I don't think we
6 can say that this statute, because Congress has the
7 authority to reach something, that when it throws a
8 blanket net as wide as this one has that that means this
9 statute is the mechanism, a lawful mechanism for getting
10 at videos.

11 JUSTICE KENNEDY: I have one more -- one
12 more question along the lines of Justice Alito. Forget
13 this statute. Under a properly drawn statute, suppose
14 that bullfighting -- or pit bull fighting is unlawful in
15 every State. Could a theater have a live broadcast of a
16 pit bull fight in Japan and charge 10 dollars? And
17 let's add the hypothetical fact that a lot of the
18 revenue goes back to Japan and promotes more
19 bullfighting. Could a properly drawn statute prohibit
20 that? And then perhaps Justice Scalia -- Alito has a
21 follow-up question on his own hypothetical. Could a
22 properly drawn statute prohibit that -- that speech?

23 MS. MILLETT: A properly drawn statute with
24 the requisite congressional findings or record of a need
25 to attack -- it sounds to me like this is a need to

1 attack production. As in child pornography, the fact
2 that the image taking is legal overseas does not mean
3 that it can't be prohibited here. And if you had the
4 type of record of a statute that says we want to stop
5 the production; it's not the content, it is the
6 production, as this Court explained in Free Speech
7 Coalition for child pornography.

8 But that is a statute that then wouldn't
9 have -- either you would have to decide which things are
10 in and out -- if you started saying animal cruelty
11 production, but we will let the bullfights in but the
12 pit bull fights out and the cockfights, then you'd have
13 problems.

14 JUSTICE KENNEDY: We are asking whether or
15 not that specific instance could be prohibited under a
16 properly drawn statute, just like Justice Alito's
17 hypothetical was under a properly drawn statute you
18 could prohibit the conduct, the speech broadcasting that
19 conduct.

20 MS. MILLETT: The theory -- I mean,
21 ultimately this Court would have to decide whether
22 Ferber is limited to an obscenity thing that's historically
23 unprotected by the First Amendment. If it --

24 JUSTICE SCALIA: Before you had --

25 JUSTICE KENNEDY: So your answer to my

1 hypothetical is yes, it could be prohibited under a
2 properly drawn statute?

3 MS. MILLETT: If this Court -- two things: A
4 properly -- it would have to be a very, very narrowly drawn
5 statute, I think going to the production theory like
6 Ferber; and the question I think before this Court would
7 be, given the nature of the harm that presumably would be
8 found, the nature of the market, the synergistic effect,
9 where the -- I am assuming the findings here would be that
10 the crime and the image are one and the same, inextricably
11 intertwined -- then maybe, although I still think it
12 would be a bit harder because we are dealing with the
13 First Amendment here. We don't make it up as we go
14 along. At the time the First Amendment was written
15 dogfighting was legal in this country.

16 JUSTICE BREYER: But the point -- the point
17 I guess is when you say yes to this, what you are
18 thinking is that, just as real obscenity when depicted
19 does nothing communicative but rather appeals to the
20 instinct of lust, so Congress could find a category of
21 things that do not communicate but appeal to the
22 instinct of sadism; and that is true when other
23 creatures are killed for the pleasure of the people who
24 want to see them killed.

25 Now, that's what you are saying. Now -- and

1 I think maybe that's true. We don't have to decide
2 that, perhaps. But the government says that is this
3 statute, that is this statute read in light of its basic
4 intent, and it is up to the Court to interpret it so as
5 it achieves that objective. And you say that's not
6 possible. Why not?

7 MS. MILLETT: Two things: First of all,
8 There's interpreting and then there's alchemy, and I
9 think this statute requires alchemy. This is Reno
10 versus --

11 JUSTICE SCALIA: Requires?

12 MS. MILLETT: Alchemy, alchemy.

13 JUSTICE SCALIA: Oh.

14 MS. MILLETT: There's construction of --

15 JUSTICE SCALIA: It's such an unusual word.
16 I haven't heard it in a legal argument in a long time.

17 (Laughter.)

18 MS. MILLETT: We don't often get statutes
19 that are so far off base that we're going, I think in my
20 opinion, so far beyond construing ambiguity and doing
21 instead what was asked of this Court and the Court
22 declined in Reno v. ACLU, and that is to write the
23 statute for Congress.

24 The ambiguity, as, Justice Scalia, you
25 explain -- there's -- I don't -- you would have to excise

1 this statute in/out, sever so many things. I don't know
2 what you'd have left unless it's the statute I posited to
3 Justice Alito, which might have a couple of words that
4 overlap with this statute. But that's not statutory
5 construction. This Court's job is not to write the
6 statute for Congress.

7 And also keep in mind, in the past this
8 Court consistently under the First Amendment has
9 required not just the right words, but a record from
10 Congress. In the First Amendment area, we can't just
11 posit the problem; we have to really have confidence
12 in the process --

13 JUSTICE GINSBURG: Does this -- would this
14 record support any ban? I mean, there was a real
15 concentration on crush videos. So there is that. Is
16 there anything else in the current record other than the
17 crush videos?

18 MS. MILLETT: No, there is not. And in fact
19 there -- they spent their time, as we said in our brief --
20 and this is perfectly accurate -- members of Congress, to
21 the extent they discussed other things, kept saying in the
22 floor debates: That's not in; bullfighting is not in;
23 dogfighting is not in; hunting is not in. These things
24 are not in. So they mentioned them in the context of
25 saying these are not in. They were focused on --

1 CHIEF JUSTICE ROBERTS: Counsel, I think --
2 I think Ferber analytically is the hard case for you,
3 because the Court in Ferber did said -- and I am quoting
4 from page 763: "The evil to be restricted so
5 overwhelmingly outweighs the expressive interest at
6 stake." That was their articulation of the test. Now,
7 why shouldn't we apply that test to this statute?

8 MS. MILLETT: I don't think that's a legal
9 test that is adopted under the First Amendment. I think
10 that is a description of the types of categories that by
11 history and tradition had been outside the First
12 Amendment and the rationale for why Ferber came in,
13 which was, yes, there's overlap with obscenity, but I think
14 it actually bridges the world of obscenity and virtual
15 incitement because you have the crime and the image one and
16 the same wrapped up together.

17 There is in this instance -- there are about
18 five different ways that this is different from child
19 pornography. The first is that there has never been any
20 finding, any assertion, even by the government, that
21 creating the image is the primary or sole motive for
22 creating these images. It's not if you lock Mr. Stevens
23 up -- if you throw away every dogfighting video in the
24 country tomorrow, dogfighting will continue. It -- no
25 one thinks that it will go away. Now, that's --

1 JUSTICE GINSBURG: I think the government
2 does. It says that is how you dry up the market.

3 MS. MILLETT: But you don't dry up the
4 market by having a sweeping value exception like they
5 have here. If Congress wants to dry up the market, what
6 Ferber says is there's two things that have to happen:
7 One, you've got to prove causation. You can't simply
8 say, we got a problem, let's go first to the speech and
9 cut that off as our first prosecutorial tool when we are
10 not even ready to make the crime itself a felony, but we
11 will make the speech a felony.

12 You've got to prove causation, that these
13 images cause the harm, they are one and the same with
14 the harm as they are with child pornography. You also
15 have got to prove that Congress is acting in an
16 evenhanded way. It is not leaving, as Justice Scalia
17 said, appreciable damage to the interests that its
18 asserting uncovered by its many, many exceptions.

19 JUSTICE STEVENS: May I ask you a question
20 about your view of the breadth of the statute? I didn't
21 yet really get an answer out of your opponent. Do you
22 think the statute would prohibit depictions of hunting
23 if it involved killing in the District of Columbia,
24 because hunting, as I understand it, is not allowed in the
25 District of Columbia; it's prohibited. Does that mean

1 that any depictions of hunting that show the killing and
2 cruelty are prohibited by this statute?

3 MS. MILLETT: Well, they are prohibited
4 subject to the value police and the value trial like we
5 had here, which I think is antithetical to the First
6 Amendment. It's a very different rule under the
7 obscenity statute. So it would all depend on whether a
8 jury decided that that had serious value, which was
9 defined as significant and great import in this
10 particular case. That would decide whether --

11 JUSTICE SCALIA: And it's just not significant
12 value; significant artistic, educational. What are the
13 others? Scientific?

14 MS. MILLETT: Scientific, social, artistic,
15 journalistic --

16 JUSTICE SCALIA: Serious entertainment
17 value doesn't count, does it?

18 MS. MILLETT: No, it does not.

19 JUSTICE SCALIA: And most of the hunting
20 videos I have seen, people watch for the entertainment.
21 They like to see a hunt.

22 MS. MILLETT: I think that's exactly right,
23 and that's what the Safari Club and the NRA have told
24 us.

25 CHIEF JUSTICE ROBERTS: Well, but I mean,

1 this definition or these exceptions are not drawn out of
2 thin air. They are drawn from Miller, and the Court in
3 Miller recognized that they were significant in causing
4 the restriction of obscenity to pass constitutional
5 muster.

6 MS. MILLETT: First of all, this is about
7 -- this is Miller doubled -- there's a lot more here
8 -- categories here. But it's a very different role
9 that value plays under Miller in obscenity. First of
10 all, this Court made quite clear again in Reno v. ACLU
11 that Miller only works if you have all three prongs.
12 You can't just use the serious value prong to take
13 care of your constitutional problem. Second, you were
14 dealing in an area that by history and tradition is
15 unprotected speech. Miller did not --

16 JUSTICE ALITO: But in determining whether
17 this is over -- overly broad, do we -- do we think of all
18 of the hypotheticals that we possibly can think of that
19 might fall within this statute -- somebody hunting in the
20 District of Columbia, somebody producing foie gras with
21 a goose and -- say, well, we've thought of a lot of
22 hypothetical situations where this statute might apply
23 and therefore it's overly broad? Or do we look at
24 what's going on in the real world?

25 MS. MILLETT: I think what you do is you

1 look at text of the statute, and then you ask yourself,
2 how much of a strain is it to come up with a factual
3 pattern that will fit into it? In Williams, you had to
4 first of all read the --

5 JUSTICE ALITO: So we really -- we really think
6 of all the hypotheticals. That's how you think we
7 determine the constitutionality of this under the
8 overbreadth doctrine?

9 MS. MILLETT: I think at some level, Congress
10 has a job to write with a scalpel and not a buzz saw in
11 the First Amendment area, and the only way to ensure
12 that happens is to look at the text and say, does this
13 text fit the purpose, does it fit what the Constitution
14 will allow? And when the --

15 JUSTICE ALITO: If it's -- if it's the fact
16 that during the 10 years when this statute has been in
17 effect there has been no decrease in hunting videos and
18 hunting shows on TV, and all of the rest -- the only
19 perceptible change in the real world is that these -- is
20 that the market for crush videos dried up, at least until
21 the Third Circuit's decision, does that have any relevance?

22 MS. MILLETT: I don't -- I don't think it
23 does for this reason: People -- and this gets a little
24 bit to Justice Kennedy's vagueness concern. People have
25 a right to know how to -- outside the courtroom how to

1 conform their conduct to the law. If I got a call from
2 the general counsel of Outdoor Channel or someone making
3 hunting videos and they said, does this fall within
4 this statute, I wouldn't have to come up with a
5 strained factual scenario. I would say yes, it falls
6 squarely in, subject to a prosecutor or jury anywhere
7 where you market in this country, deciding that it has
8 serious -- one of the adjectives -- value. I would have
9 to say that to that person, and that would be accurate
10 legal advice.

11 JUSTICE SCALIA: It could be that the reason
12 hunting videos are still out there is that producers
13 were quite confident that this Court would not allow
14 them to be prohibited on the basis of a statute such as
15 this.

16 MS. MILLETT: One would hope, and I think
17 quite frankly the NRA has been quite honest in it's brief
18 and said, you know, this -- this is not an actively
19 enforced statute. People were shocked to learn -- to
20 become aware of it.

21 Now, maybe everyone's supposed to know the
22 existence of laws, but I think the reality is that once
23 people looked at what this said, they became very, very,
24 very concerned, and I think when you're talking about a
25 criminal prohibition here -- this is not a civil suit;

1 this is criminal prohibition with severe penalties. The
2 penalties for speech are higher than most animal cruelty
3 statutes. And just the whole point of the criminal law is
4 to deter conduct and to make people stay wide of the
5 margins here, wide of the borders.

6 CHIEF JUSTICE ROBERTS: But I --

7 MS. MILLETT: You can't do that in the First
8 Amendment.

9 CHIEF JUSTICE ROBERTS: I understood your
10 answers to Justice Alito to acknowledge that there would
11 be situations where this statute could be
12 constitutionally applied or, as you put it, you could
13 draft a statute.

14 MS. MILLETT: Not this statute.

15 CHIEF JUSTICE ROBERTS: Not this statute.

16 But --

17 MS. MILLETT: That's different. I think
18 that's very different.

19 CHIEF JUSTICE ROBERTS: But if in fact there
20 were situations where we thought a narrowly drafted
21 statute could be applied to particular instances,
22 perhaps the crush videos, perhaps others, why isn't that
23 enough to say that this statute is valid on its face and
24 then we will consider as-applied challenges?

25 MS. MILLETT: I think in the First

1 Amendment -- I'm not talking -- if I heard you right, we
2 were not talking about this statute. If you have
3 another statute --

4 CHIEF JUSTICE ROBERTS: I guess I am just
5 trying to get at what your understanding of what the
6 test is for overbreadth in this area. How much of an
7 area of constitutional application is necessary before
8 you decide that the statute is not unconstitutional on its
9 face, but will consider as-applied challenges?

10 MS. MILLETT: Right. And this Court has
11 been clear that the overbreadth has to be both
12 quantitative and qualitative. It hasn't set a
13 particular ratio. I think this one is easy. We are
14 talking about 2,000 crush videos and tens if not
15 hundreds of thousands of other images that are captured
16 by this statute. I think normally when this Court says
17 it wants to -- to apply overbreadth, it has been dealing
18 with situations for the most part in two contexts. One
19 where Congress has already regulated in an area that is
20 unprotected under the First Amendment, unprotected in
21 the sense that they are allowed to ban, regulate
22 heavily. They are already there, and then the question is
23 did they draw the margins too broad?

24 That's not this case. We are dealing in an
25 area that was never until December 1999 barred by

1 anybody, never considered to be outside the conception
2 of the First Amendment's freedom of speech.

3 The other scenario where we see substantial
4 overbreadth is when Congress is regulating conduct. And
5 then we're trying --

6 JUSTICE ALITO: Well, isn't that -- isn't
7 that due to changes in technology? Before people could
8 show -- could watch videos at home, this sort of thing
9 would -- would be very difficult.

10 MS. MILLETT: This covers photographs, so
11 this would go back as far as photographs. I'm not sure
12 it wouldn't cover a sketch artist or a hieroglyphic, for
13 all I know. All it requires is that it be a depiction
14 in some form.

15 JUSTICE ALITO: And is there -- in the real
16 World, is there a market for sketches of dogfights?

17 MS. MILLETT: I don't know if there's a
18 market --

19 JUSTICE ALITO: People get a thrill from
20 seeing that?

21 MS. MILLETT: With respect, I can't answer
22 that. I'm not -- I don't know if there's a market for
23 dogfighting videos. There's a few, but it depends on
24 what you mean by a market. Will somebody buy something?
25 I guess somebody in this world will buy anything. But --

1 JUSTICE GINSBURG: Is there any indication
2 that there has been any dry-up of the market for dogfights
3 as a result of this statute?

4 MS. MILLETT: There --

5 JUSTICE GINSBURG: Justice Alito suggested
6 that until the Third Circuit's decision, that there were
7 fewer crush videos produced. But with respect to
8 dogfights, animal fights, is there any indication that
9 there has been -- there have been fewer animal fights as
10 a result of this statute?

11 MS. MILLETT: None whatsoever, and in fact
12 what we've seen is robust enforcement, and we cite the
13 article in our case. There has been robust enforcement;
14 there was just an arrest a few weeks ago for I think a
15 couple hundred people involved in dogfighting rings.
16 So the dogfighting rings are going on unabated, and they
17 are getting found and discovered and prosecuted
18 successfully, and in fact the images sometimes help with
19 the prosecution.

20 This is a place -- to keep -- when we start
21 talking we are going to take something outside the First
22 Amendment, one of the other things that unifies the
23 categories of speech outside the First Amendment is a
24 judgment that more speech doesn't work. This is an area
25 where we know speech works powerfully. Speech about these

1 ugly images produced this statute. It informed people.
2 Unlike children and child pornography, people need to see
3 images to understand what's going on with animals, and
4 to make these important decisions and engage in these
5 important debates that our society is having.

6 JUSTICE KENNEDY: Suppose an argument --
7 excuse me.

8 Suppose an argument had been made to the
9 Court in *Ferber*, that, you know, it's really good for
10 people to see molestation of children because then they
11 will be outraged and they will enforce the statute more.
12 I just can't see the Court accepting that argument for a
13 single -- for a minute.

14 MS. MILLETT: I -- I agree. I --

15 JUSTICE KENNEDY: But that's your -- that's the
16 argument you are making here.

17 MS. MILLETT: No, no, I think it's -- I
18 think it's -- I'm trying to point out that this is in
19 fact a contrast. First of all --

20 JUSTICE KENNEDY: A?

21 MS. MILLETT: A contrast between the two
22 situations, between dealing with the subject, a very
23 topical subject that --

24 JUSTICE KENNEDY: Well, it seems to me that
25 we ought -- if there is a significant chance that

1 Congress can affect an illegal market, an illegal
2 activity by a statutory regulation, we ought to defer to
3 the Congress on that ground. I think you still have speech
4 arguments.

5 MS. MILLETT: I --

6 JUSTICE KENNEDY: On this economic
7 causation, I think we have to defer to Congress largely.

8 JUSTICE SCALIA: I really think you should
9 focus, not on the educational value for -- to make
10 people hate bullfighting and things, but on quite the
11 opposite, it seems to me -- on the right, under the First
12 Amendment, of people who like bullfighting, who like dog
13 fighting, who like cockfighting, to present their side
14 of the -- of the debate.

15 And unless it's a subject like obscenity,
16 which from the beginning has not been considered
17 protected speech, it seems to me that side of the debate
18 is entitled to make its point as -- as forcefully as
19 possible. That's, it seems to me, what the problem is
20 here. Not --

21 MS. MILLETT: I think that is 100 percent
22 right, and that's --

23 JUSTICE ALITO: Well, if that's 100 percent,
24 then what about the people who -- who like to see human
25 sacrifice? Suppose that is legally taking place

1 someplace in the world. I mean, people here would
2 probably love to see it. Live, pay per view, you know,
3 on the human sacrifice channel.

4 (Laughter.)

5 JUSTICE ALITO: They have a point of view
6 they want to express. That's okay?

7 MS. MILLETT: The problem with this statute
8 is that presumably that statute would be evenhanded and
9 would it not say if the sacrifices were religious, or
10 journalistic, or historic, or --

11 JUSTICE SCALIA: You can create a lot of
12 First Amendment horrors. What about -- what about a
13 new Adolf Hitler? Can we censor any depiction of that
14 new Adolf Hitler and the horrible things that he is
15 proposing, including extermination of a race? Is that
16 proscribable under the First Amendment? Is that any
17 less horrible than the human sacrifice contemplation?

18 MS. MILLETT: No, Justice Scalia. Again, I --
19 I agree, because what the First Amendment says is we
20 allow --

21 CHIEF JUSTICE ROBERTS: I'm sorry. You agree
22 you can prohibit it, or not?

23 MS. MILLETT: I agree that, just because
24 something is repulsive, incredibly offensive, or maybe
25 even involves some harm to people does not mean that --

1 depictions of it that do not cause that harm, that are
2 not integrally tied to it, that are not the purpose and
3 animating motivation for that harm cannot be proscribed.

4 JUSTICE SCALIA: You mean --

5 JUSTICE KENNEDY: What was your answer to
6 Justice Alito's hypothetical about human sacrifice?

7 MS. MILLETT: The -- if -- at a minimum,
8 Congress has got to be evenhanded. If the point there
9 is you are trying to say, we are concerned about the
10 creation for purposes of the image. We are concerned
11 about what the government calls the "snuff video
12 situation."

13 The sole reason that this is created is
14 for purposes of creating the image. If you establish
15 the causation -- and I don't think we -- the Court does
16 just defer to Congress on these things. It looks carefully
17 at factual records in -- as it has in the child pornography
18 area under the First Amendment, Justice Kennedy. If
19 Congress proves the causation and shows that it is -- it's
20 the least restrictive means -- compelling interest and
21 least restrictive means, the strict scrutiny that Congress
22 -- the government never wanted this statute to march
23 through.

24 JUSTICE ALITO: And what if there is no
25 chance of drying up the activity? Suppose you have the

1 ethnic cleansing channel on cable TV, and there is no --
2 this is taking place in a country that's beyond our
3 power to influence. Congress couldn't prohibit that?

4 MS. MILLETT: The -- the fact that conduct
5 is repulsive or offensive does not mean we automatically
6 ban the speech. You would have to have -- it would have
7 to follow this Court's patterns, either it would be an
8 evenhanded ban on production under the Ferber theory,
9 or you would have to establish if those images were
10 never within the --

11 JUSTICE BREYER: I think what he's -- I think
12 what's going on is -- is not -- you're conflating two
13 things. One is you are trying to produce education
14 about something that has no communicative value.

15 In so far as you are trying to make an
16 argument or educate, of course, it's protected, but the
17 government, here, is saying I think the statute is
18 intended to forbid a different thing entirely, and it's
19 hard to draw a line.

20 Maybe it's impossible; but promoting a thing
21 which communicates nothing, but appeals to people's
22 worst instinct, that is not to advocate it or not to
23 advocate it. It is to try to make money out of it, and
24 that's what they think, I believe, the statute is aimed
25 at.

1 MS. MILLETT: Well --

2 JUSTICE BREYER: So that's why they have the
3 journalistic exception.

4 MS. MILLETT: The -- when it comes to
5 promoting illegal conduct, we have the Brandenburg test,
6 and, if you are close enough to be inciting it, to be
7 causing it -- which I think is where Ferber largely
8 is. They are just intertwined. That's one thing. But
9 if it's not -- just because we have the really
10 disgusting, despicable channel doesn't mean that we
11 automatically ban it. Maybe it will be educational.
12 Maybe we will learn from it.

13 I think Congress is going to have to show,
14 before it goes to speech as its first tool of repression
15 to attack conduct with, very specialized, narrow
16 circumstances consistent --

17 JUSTICE BREYER: We are going to advertise a
18 drug that is known to kill people.

19 MS. MILLETT: That is commercial --

20 JUSTICE BREYER: We are advertising --

21 MS. MILLETT: That is commercial speech.
22 The fact that you want to get paid for speaking does not
23 make it commercial speech.

24 Samuel Johnson, himself, said that no one
25 but a blockhead ever wrote, except for money. I don't

1 necessarily agree with that, but it is -- it would be a
2 shock to him, to Thomas Paine, who sold his tracts of
3 "Common Sense," that the First Amendment would go all --
4 leap all the way from commercial speech and say, just
5 because you are doing it for money, you need to make a
6 buck.

7 Your Honor --

8 JUSTICE SCALIA: I would have thought that
9 your response to Justice Breyer's comment about catering
10 to people's worst instincts in the area of the First
11 Amendment, at least, would have been that it's not up to
12 the government to decide what are people's worst
13 instincts.

14 If -- if the First Amendment means anything,
15 that's what it means.

16 MS. MILLETT: Well, it means --

17 JUSTICE SCALIA: It's not up to the
18 government to tell us what our worst instincts are.

19 MS. MILLETT: It means --

20 JUSTICE SCALIA: Except for those areas that
21 have traditionally been outside the area of -- of
22 protected speech, and -- and once you allow this one,
23 what other -- what other base instincts do people have,
24 besides this one?

25 One can contemplate a lot of other areas,

1 where government could say, You are appealing to
2 people's worst instincts, and, therefore, the -- the
3 movies cannot be made.

4 MS. MILLETT: I agree, Justice Scalia. The
5 answer to bad instincts is more speech under the First
6 Amendment. The answer --

7 CHIEF JUSTICE ROBERTS: So -- I'm sorry. I'm
8 still looking for your answer to Justice Alito's
9 hypotheticals.

10 Can Congress ban the human sacrifice channel
11 or not?

12 MS. MILLETT: I -- the -- I think -- I -- I'll
13 will start by saying I -- no. Let's start with that and
14 see. Maybe -- maybe it won't work, but I think --

15 CHIEF JUSTICE ROBERTS: You are unwilling --
16 you are unwilling to say Congress can pass a law,
17 evenhanded, straightforward, you cannot have a human
18 sacrifice channel.

19 MS. MILLETT: If it did, it would have to be
20 evenhanded and have narrow the tailoring, but a problem
21 is keep in mind --

22 JUSTICE SOTOMAYOR: What do you mean by
23 "evenhanded," please? I'm not -- you are using those
24 words. What do you mean about "evenhanded and narrowly
25 tailored"?

1 MS. MILLETT: When -- when the attack --
2 Justice Sotomayor, when the attack is on the
3 production -- if it -- I don't mean to be -- I want to
4 be direct in answering.

5 It depends on two things: If the theory is
6 we don't like the content, we don't want people to see
7 the content, I don't think Congress can do it. I think
8 the answer is more speech --

9 JUSTICE GINSBURG: So that goes with snuff
10 movies -- snuff movies. I don't know if they really
11 exist, but they have been described.

12 MS. MILLETT: No one has ever found one,
13 but the point I'm trying to get -- there are two
14 theories --

15 JUSTICE SCALIA: Adolf Hitler, can we keep
16 him off the screen, too?

17 MS. MILLETT: It's a dangerous proposition.
18 That's what the First Amendment says we won't do. There
19 is -- so if it's just that we don't like the content,
20 outside obscenity, we -- Congress doesn't get to ban it.
21 The answer is more speech.

22 If you have got --

23 CHIEF JUSTICE ROBERTS: So we don't like --
24 we don't like human sacrifice, and so Congress passes a
25 law saying you cannot have a channel that shows human

1 sacrifice -- real human sacrifice. You think that's
2 unconstitutional?

3 MS. MILLETT: I think, if the point is that
4 we don't like the content, we don't -- we want to
5 protect people from these images, the First Amendment
6 says a lot about that.

7 If it's a different -- snuff video, because,
8 like child pornography -- if instead it is not the
9 content that we are concerned about, where obscenity is
10 a pure content baseline, it is -- we got to stop -- we
11 can't stop the conduct. The conduct and the speech are
12 inextricably intertwined. The only way we can stop
13 human sacrifice is to stop the image because the
14 sacrifice is solely for the image.

15 CHIEF JUSTICE ROBERTS: Well, right, but, I
16 mean, the hypothetical is we can't do anything about it.
17 It is beyond our reach to stop the human sacrifice
18 taking place wherever in the world, so that that
19 argument -- the Ferber argument is off the table.

20 In that situation, you think it's
21 unconstitutional for Congress to pass a law saying there
22 can be no human sacrifice channel.

23 MS. MILLETT: I -- I think the fact that --
24 I think it would be a lot harder under the First
25 Amendment to say why Congress is doing that.

1 If it's not something -- if it's not conduct
2 it has any authority to regulate, I don't -- then the
3 only compelling interest is -- I'm trying -- I mean, I
4 don't want to watch this channel, and people should
5 fight with their wallets and their votes and not support
6 these things, but -- sorry. May I finish?

7 CHIEF JUSTICE ROBERTS: No. Go ahead.

8 MS. MILLETT: But, under the First
9 Amendment, if the only rationale Congress is giving is
10 we are here to shield your eyes for you, we will make
11 this censorial decision, it has got to find some basis
12 to think that was never freedom of the speech under the
13 First Amendment, in the way that obscenity was.

14 You don't get to make it up as you go along.
15 We are interpreting a constitution.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Katyal, you have 3 minutes
18 remaining.

19 REBUTTAL ARGUMENT OF NEAL K. KATYAL

20 ON BEHALF OF THE PETITIONER

21 MR. KATYAL: There is one analytic move
22 Congress made in section 48, which is simple and
23 obvious, and it explains why both the human sacrifice
24 channel is constitutional, as well as section 48 itself.
25 That is the logic of Ferber. When Congress

1 tries to dry up a market for underlying cruelty by
2 targeting depictions and leaves alternative mechanisms
3 for that expression in place, the legislature has
4 latitude.

5 When the statute is not aimed at the
6 communicative impact of the message, like the Hitler
7 video but, rather, is aimed at reducing underlying acts
8 of exploitation, that is an area which Congress has
9 great leeway.

10 JUSTICE SCALIA: I don't understand. Are
11 you saying, since there is no human sacrifice in this
12 country and no market to be dried up, the videos would
13 be okay?

14 MR. KATYAL: I'm saying that, if Congress
15 identified a market and if a video -- if the snuff video
16 market was driving, somehow, people to get killed,
17 Congress would be fully within its powers to regulate it.

18 JUSTICE SCALIA: Yes, but we don't have any
19 human sacrifice. Nobody's doing that stuff. So you
20 could not proscribe the human sacrifice channel.

21 MR. KATYAL: That's precisely correct, but
22 here Congress did find an overwhelming market in animal
23 cruelty, and the State attorneys general have filed a
24 brief before you saying that section 48 is a success
25 story, that it dried up 3,000 crush videos, that it has

1 reduced the market for animal --

2 JUSTICE GINSBURG: How many prosecutions
3 have there been for crush videos?

4 MR. KATYAL: There -- there haven't been any
5 prosecutions for crush videos, and I think the reason is
6 because the market dried up very quickly after the
7 enactment of section 48.

8 CHIEF JUSTICE ROBERTS: Did I just
9 understand you to agree with your colleague on the other
10 side, that Congress could not ban the human sacrifice
11 channel because there would be no connection between
12 drying up the underlying activity?

13 MR. KATYAL: Oh, no. If there is an
14 underlying argument --

15 CHIEF JUSTICE ROBERTS: No. I'm saying there
16 is no connection. We can't reach the activity where it
17 is taking place.

18 MR. KATYAL: I think that does start to
19 reach into questions about obscenity and expressive
20 impact on viewers, which is not before this Court.
21 Congress is not resting its judgment here on something
22 saying these images are repulsive and can't be seen.

23 Rather, it is saying --

24 CHIEF JUSTICE ROBERTS: So if Congress is --
25 and we will give you sufficient rebuttal time.

1 So, if Congress is saying, look, we just
2 don't like what -- is being shown on the human sacrifice
3 channel, we don't want people to see it, they can't do
4 that?

5 MR. KATYAL: Again, that raises a whole
6 different set of questions under obscenity and
7 expressive impact that isn't before the Court here.

8 Now, if I could return to Justice Stevens,
9 you had it wasn't clear our position on hunting. I
10 want to be very clear about this.

11 Hunting, like the other hypotheticals, is
12 not covered by section 48 for two reasons: First, the
13 statute -- the statute's term "animal cruelty" should be
14 defined to encompass torture, mutilation and the like,
15 and not simple acts of ordinary hunting, most of which,
16 by the way, are legal anyway under animal cruelty --

17 JUSTICE SCALIA: What about the statute's
18 term "kill"?

19 MR. KATAYAL: Yes. And, again --

20 JUSTICE SCALIA: What should that be
21 interpreted to mean?

22 MR. KATYAL: And, again, Justice Scalia, as I
23 said before, I think that comes within a definition of
24 animal cruelty. That's the term being defined. And
25 just as this Court has defined, for example, crimes of

1 violence to exclude certain things that otherwise would
2 be within the statute, such as drunk driving offenses in
3 the context of the INA, a similar result is possible
4 here, particularly because of the doctrine of
5 constitutional avoidance.

6 And, so, we are saying that if this Court
7 were to write an opinion that made clear that these
8 things are outside of the purview of section 48, there
9 would be no chilling effect, and you wouldn't have to wait
10 for the --

11 JUSTICE STEVENS: I want to -- let me just be
12 sure I understand you. Even if the hunting depiction is
13 very offensive and cruel and all the rest, and it's the
14 cruelty to the animal using bow and arrows or knives or
15 something, you say it's not -- and even if it's illegal
16 in this particular jurisdiction, you say the statute
17 still does not apply at all?

18 MR. KATYAL: It would have to be for a
19 reason of animal cruelty or something like torture,
20 mutilation, and the like. So there may be certain
21 hunting examples that fall within it --

22 JUSTICE STEVENS: But the hunting would
23 never qualify, because the hunter's motive is benign; is
24 that what you are saying?

25 MR. KATYAL: No, it has nothing to do with

1 the motive; it has to do with what happens to the
2 animal. And, so, there could be images of hunting which
3 are not really hunting, like the images in this case.

4 JUSTICE SCALIA: If you shoot a little low
5 and wound the animal, that is cruelty even though you
6 didn't intend that.

7 MR. KATYAL: Justice Scalia, with all due
8 respect, I think the images in this case and what
9 Congress was getting at was not shooting a little low.
10 These are the most horrific images that you can imagine
11 of cruelty to living animals. And that's what
12 Congress has --

13 JUSTICE SCALIA: But what about your
14 response to Justice Stevens on the hunting matter? I
15 understand Congress wasn't directed at that.

16 MR. KATYAL: And my point is if those -- =
17 there are those cases at the area -- at the gray areas,
18 that is perfect for an as-applied challenge, but it's not
19 what this Court -- this Court shouldn't be blessing the
20 Third Circuit's decision to in toto invalidate an entire
21 statute which has produced -- which has reduced 3,000
22 crush videos and the like.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel,
24 both counsel, for very able presentation. The case is
25 submitted.

1 (Whereupon, at 11:06 a.m., the case in the
2 above-entitled matter was submitted.)

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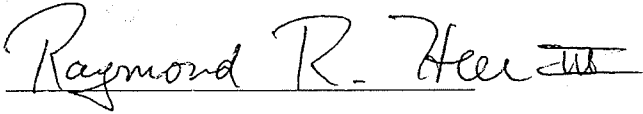
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CERTIFICATION

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Handwritten signature of Raymond R. Heer in cursive script, written over a horizontal line.

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