***UNITED STATES* v. *STEVENS*:**
THE SUPREME COURT'S DECISION INVALIDATING THE CRUSH VIDEO STATUTE
Hearing Before the House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
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Mr. Chairman, Ranking Member Gohmert, and distinguished members of the Subcommittee:

Thank you for inviting me to testify today on the Supreme Court's decision last month in *United States* v. *Stevens*,[1] and its implications with regard to federal bans on depictions of animal cruelty going forward. As you know, the Court in *Stevens* invalidated on its face 18 U.S.C. § 48, which in its present form makes it a federal crime to "create[], sell[], or possess[] a depiction of animal cruelty . . . for commercial gain" in interstate or foreign commerce.[2] Writing for an 8-1 majority, Chief Justice Roberts held that (1) depictions of animal cruelty are not categorically beyond the scope of the First Amendment; and (2) § 48 is unconstitutionally overbroad under traditional First Amendment analysis. Only Justice Alito dissented.

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1. 130 S. Ct. 1577 (2010).

2. The relevant language of § 48 provides as follows:

> Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 48(a).

Putting aside the more general implications of the *Stevens* opinion for the Supreme Court's First Amendment jurisprudence (a point I'd be happy to address in response to your questions), I want to focus in my testimony today on three specific lessons that the case has to offer with regard to legislative attempts to prohibit the distribution of so-called "crush videos" and other depictions of animal cruelty, including dog-fighting. *First*, the Court specifically declined the Government's invitation to hold that depictions of animal cruelty are—like child pornography—categorically outside the scope of First Amendment protection. As Chief Justice Roberts explained, the Court's decision in *New York* v. *Ferber*[3] exempting child pornography from the First Amendment "grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding." These cases, Roberts noted,

> cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them.[4]

Whatever the merits of the *Stevens* majority's analysis of this point, it is perhaps the most important takeaway with regard to continuing congressional attempts to prohibit the sale or transfer of depictions of animal cruelty—or even of a more narrowly defined category that included only "crush videos" and certain forms of animal fighting. If such depictions are *not* categorically beyond the scope of the

3. 458 U.S. 747 (1982).

4. *Stevens*, 130 S. Ct. at 1586.

First Amendment, as *Stevens* holds, then attempts to proscribe their sale and transfer will constitute "content-based" restrictions on speech. Such restrictions, the Supreme Court has repeatedly held, are "presumptively invalid," and can only withstand constitutional scrutiny if they are narrowly tailored to achieve a compelling government interest.[5] In plain English, Mr. Chairman, any such law must be precisely drafted, and neither over- nor under-inclusive.

That brings me to the second takeaway point from the *Stevens* opinion: the Court's un-hesitating application of traditional First Amendment overbreadth doctrine. I don't mean to delve into the academic weeds, but suffice it to say that the Roberts Court, especially in the first few years of the Chief Justice's tenure, has shown noticeable skepticism toward so-called "facial" challenges to statutes—where litigants argue that the constitutional defects in particular legislation are so substantial as to preclude *any* valid application of the law. In cases like *United States* v. *Georgia*,[6] *Ayotte* v. *Planned Parenthood of Northern New England*,[7] and *Wisconsin Right-to-Life* v. *FCC*,[8] among any number of others, the Court has avoided controversial rulings on topics including Congress's power to enforce the Fourteenth Amendment, the right to choose under *Roe* v. *Wade*, and campaign finance reform by rejecting "facial" challenges in favor of narrower "as-applied"

5. *See, e.g.*, Ysursa v. Pocatello Ed. Ass'n, 129 S. Ct. 1093, 1098 (2009); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816–17 (2000).

6. 546 U.S. 151 (2006).

7. 546 U.S. 320 (2006).

8. 546 U.S. 410 (2006).

challenges, holding that, in those specific cases, the plaintiffs simply hadn't met their burden for invalidating the entire legislative regime.

Numerous academic commentators—including Professor Persily—have stressed the unprecedented nature of these decisions and their (sometimes) dubious reliance on the distinction between "facial" and "as-applied" challenges,[9] and I'd be more than happy to elaborate on this trend and its potential implications if it would be helpful to the subcommittee.

This discussion bears mentioning here because of the sharp and marked contrast presented by the *Stevens* decision. There (to some, rather surprisingly), the Chief Justice himself embraced a more traditional (which I might phrase as "pre-Roberts Court") understanding of First Amendment overbreadth doctrine. Under that approach, as Chief Justice Roberts wrote in *Stevens*, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[10] Thus, even if Congress could constitutionally prohibit the transfer or sale of crush videos, the language of the statute swept way too broadly, and included too much protected speech within its scope.

9. *See, e.g.*, Nathaniel Persily & Jennifer Rosenberg, *Defacing Democracy? The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009); *see also* David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689 (2009); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773 (2009).

10. *Stevens*, 130 S. Ct. at 1587 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

Indeed, the majority's acceptance of this methodological approach spelled doom for § 48, because the Government made no effort (nor, to be fair, could it) to defend such a broadly worded ban as constitutional. Instead, the Government's entire defense of § 48 rested on interpreting the statute as being narrowly limited to specific types of "extreme" material, a result that was inconsistent with the plain text of § 48, or, in the alternative, on its selective enforcement of the statute, an argument belied by the facts of *Stevens* itself. Thus, *Stevens* is significant not just for *how* it applied traditional First Amendment overbreadth analysis, but also for the fact *that* it applied traditional First Amendment overbreadth analysis, in contrast to what had been a growing departure from doctrine.

Finally, the third key point to take away from the *Stevens* decision is *why* the Court concluded that § 48 was substantially overbroad, and therefore in violation of the First Amendment. First, although § 48 requires that the depicted act of animal cruelty be unlawful under state or federal law, it does not require that the act be unlawful *because it is cruel*. Thus, as Chief Justice Roberts observed, "[t]he text of [the statute] draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow."[11]

Second, the statute includes no intent requirement. As was pointed out during the oral argument before the Supreme Court, the statute as written might actually prohibit informational videos or documentaries produced and distributed

11. *Id.* at 1588.

by groups advocating *against* such conduct.[12] Third, the Court concluded that the statute's "exceptions" clause, which exempts from prosecution "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," was far too narrow, since it (1) required that the value be "serious"; and (2) does not include within its enumerated categories any number of types of protected speech, including hunting videos that are not meant to educate. As the Court succinctly summarized, "There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban."[13]

That leaves us with the question before this subcommittee today: How might Congress seek to amend § 48 to ameliorate the quite profound constitutional difficulties identified by the Court in *Stevens*? Although I cannot vouch for the constitutionality of the following suggestions, there are three specific revisions that I think would go a long way toward a statute that would not raise comparable overbreadth concerns.

First, any such legislation should include a requirement that the depicted animal cruelty have been carried out *for the purpose* of creating the depiction. This will substantially mitigate overbreadth concerns with regard to surveillance cameras, advocacy videos by animal rights groups, depictions that were never intended to perpetuate the market for these kinds of materials, and so on.

12. *See, e.g.*, Transcript of Oral Argument at 9–10, United States v. Stevens, 130 S. Ct. 1577 (2010) (No. 08-769), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-769.pdf.

13. *Stevens*, 130 S. Ct. at 1590.

Second, any such legislation should require that the underlying act of animal cruelty be a violation of a state or federal law that specifically prohibits animal cruelty *as such*. This, too, will substantially mitigate the concerns that hunting videos or other depictions of the treatment of animals that is criminal in some jurisdictions, but not *cruel*, might be included within the sweep of the statute.

Third, and finally, any such legislation should carefully but clearly expand the scope of the exceptions clause, and should specifically eliminate the existing requirement that the depiction have "*serious* religious, political, scientific, educational, journalistic, historical, or artistic value." It should be enough, I suspect, that the depiction has no more than minimal value in one of those fields.

Of course, I cannot speak to whether a statute with these added requirements is normatively desirable as a policy matter. It would certainly be substantially narrower than the original § 48 enacted by Congress in 1999, and would potentially not include certain depictions that the drafters of § 48 might initially have intended to cover. But that narrowing would also go a long way toward alleviating the overbreadth concerns identified by the Supreme Court in *Stevens*, and toward such a statute surviving constitutional challenge in the future.

Let me thank you again, Mr. Chairman, for the invitation to share these thoughts with you and your colleagues, and I very much look forward to your questions.