

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - x
3 UNITED STATES, :
4 Petitioner :
5 v. : No. 08-769
6 ROBERT J. STEVENS. :
7 - - - - - x
8 Washington, D.C.
9 Tuesday, October 6, 2009
10
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 a.m.
14 APPEARANCES:
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16 Department of Justice, Washington, D.C.; on behalf of
17 the Petitioner.
18 PATRICIA A. MILLETT, ESQ., Washington, D.C.; on behalf
19 of the Respondent.
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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 the 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 do you have
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, dog fighting
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,
22 and I don't think that Mr. Stevens's statement at page
23 13 of his merits brief, which is to the effect that
24 Congress repeatedly disavowed any attempt to regulate
25 animal fighting -- dog fighting -- 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 dog fighting 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 dog fighting 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 -- 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 -- New
17 York v. Ferber. In Ferber, the Court -- the Court
18 dealt, as modified or as glossed by your decision in
19 Free Speech Coalition, because what Ferber and Free
20 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.

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 in the --

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 its 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 that's 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, persons pursuing bona fide
5 research studies, a judge or other persons 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 content, 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 enoble
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 ten 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 is the paradigmatic case of
6 what is educational and artistic and the like.

7 JUSTICE BREYER: 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 is true because
14 Congress said so?

15 MR. KATYAL: Well, that is 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 pate de fois 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 ten years of
23 experience, Justice Breyer, under the statute, and we
24 haven't seen those things being chilled. Indeed,
25 Respondents --

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 the --

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

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

25 JUSTICE KENNEDY: Well, but that -- that

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

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

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

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

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

24 MR. KATYAL: Dogfighting and cockfighting
25 are illegal in all 50 States and therefore would be

1 swept up. Some certain depictions of dogfighting and
2 cockfighting would be swept up, not all.

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

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

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

11 MR. KATYAL: Okay. So --

12 (Laughter.)

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

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

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

25 JUSTICE GINSBURG: What's the --

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

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

6 JUSTICE SCALIA: Okay. It is covered.

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

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

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

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

1 various meanings.

2 "Kill" has one meaning, which is kill. And
3 you can -- you cannot limit that meaning just because in
4 addition to killing you also prohibit torturing and
5 other things. Do you have a single case where -- where
6 that doctrine is used not to give meaning to an
7 ambiguous word, but to limit the meaning of a word which
8 on its face is absolutely clear?

9 MR. KATYAL: Yes, sir, Your Honor. I do.

10 JUSTICE SCALIA: What is that?

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

16 JUSTICE SCALIA: Exactly.

17 MR. KATYAL: And -- and here the word "kill"
18 in context is a term that the statute --

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

21 MR. KATYAL: It means killed in the context
22 of a statute that is defining the words "animal
23 cruelty," and this Court has consistently said that the
24 definition that is being defined by the legislature --

25 JUSTICE SCALIA: Some people think eating an

1 animal is animal cruelty. These people don't eat meat
2 because it is the product of killing animals.

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

5 JUSTICE SCALIA: Well, it shouldn't have
6 said that, then.

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

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

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

17 JUSTICE BREYER: So you want to say "cruelly
18 kill"?

19 MR. KATYAL: That's --

20 JUSTICE BREYER: Now, "cruelly kill" is not
21 exactly crystal clear. And therefore my question is
22 why, given the need for you to save this statute to read
23 so many words that are so general, those contained here
24 that I've read, cruelly kill, cruelly wound as opposed
25 to just wound or kill. You are doing that in order to

1 prevent chilling people who are engaging in activities
2 that aren't intended to be covered by this statute.

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

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

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

24 (Laughter.)

25 JUSTICE BREYER: I'm just saying why -- why

1 can't you here write a statute that does not force the
2 courts into the work of interpreting these very vague
3 words to prevent the statute from being held
4 unconstitutional?

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

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

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

25 JUSTICE SCALIA: But the first order problem

1 occurs in states where it is not illegal. These videos
2 are taken in states where bullfighting or dog fighting
3 or cock fighting is entirely legal. So, I don't know
4 how you distinguish a -- a movie which many people think
5 that violence in movie brutalizes people and causes
6 violence in people's action.

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

13 MR. KATYAL: So dog fighting is illegal in
14 all 50 states along with crush videos. I don't think
15 that -- there may be --

16 JUSTICE GINSBURG: But it isn't -- it
17 isn't -- illegal in Japan, and part of the video here
18 were dog fights in Japan; legal where it occurred, no
19 different from bull fighting.

20 MR. KATYAL: Right. This Court has dealt
21 with that in footnote 19 of Ferber in which it said that
22 just because something is legal somewhere else, it's
23 often very hard to figure out where the underlying
24 material is made. It doesn't have a GPS component.

25 JUSTICE GINSBURG: But that wasn't --

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

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

11 JUSTICE ALITO: A gladiatorial contests
12 where the gladiators fight to the death.

13 MR. KATYAL: Right.

14 JUSTICE ALITO: Do you have any doubt that
15 that could be prohibited?

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

20 JUSTICE SCALIA: Who knows.

21 JUSTICE ALITO: No, no, not under this
22 statute, under a different statute.

23 MR. KATYAL: Well, I think that -- I think
24 that there again, it would raise some First Amendment
25 interest in suppressing historical -- historical

1 information.

2 Now, Justice Scalia, you said who knows. I
3 think the answer to that is that this statute places the
4 burden of proof on the government in order to -- in
5 order to prove that there is no historical or
6 educational value.

7 JUSTICE SCALIA: If you dress up like an
8 ancient Roman, the whole thing is of historical
9 interest?

10 (Laughter.)

11 JUSTICE SCALIA: Is that it?

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

17 JUSTICE SCALIA: A different category. That
18 is traditional First Amendment law that obscenity is not
19 protected. And child pornography, as far as I am
20 concerned, and I think as far as the Court is concerned
21 is obscenity.

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

25 JUSTICE GINSBURG: Mr. Katyal, there is

1 something quite different between Ferber, because the
2 abuse of a child is occurring at the very time. As I
3 understand it, Mr. Stevens was not a promoter of dog
4 fights. He was just filming them. And so the -- the --
5 the simultaneous abuse of the child, it occurs only
6 because the picture is being taken. The dog fight goes
7 on whether Mr. Stevens is there with his camera or not.

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

13 JUSTICE GINSBURG: Where it was legal for
14 him to do that.

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

17 JUSTICE GINSBURG: It even -- what I would
18 like you to confront is that the very taking of the
19 picture is the offense. That's the abuse of the child.
20 The abuse of the dog and the promotion of the fight is
21 separate from the filming of it.

22 MR. KATYAL: I agree with that. And I don't
23 think that's what underlay either this Court's Ferber
24 decision or the free speech coalition. The move that
25 Ferber makes is to say that the legislature can target

1 the underlying loaded production, so long as it leaves
2 alternative mechanisms for that same exact message to be
3 spoken. And this statute does that. Mr. Stevens can
4 produce the exact same message, just as long as he
5 doesn't involve the torture or mutilation to an actual
6 living animal. And to compare this --

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

9 MR. KATYAL: And Congress hasn't stamped
10 that out.

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

14 MR. KATYAL: With simulated messages, the
15 written word. He has written an entire book about that.
16 He has a whole variety --

17 JUSTICE SCALIA: Simulated dog fights would
18 be okay under this statute?

19 MR. KATYAL: Simulate -- absolutely. This
20 statute leaves that in place, Justice Scalia. That's
21 the key to understanding why this statute is not like
22 the traditional statutes that come before this Court in
23 which the government asserts some paternalistic interest
24 and says viewers can't see this because of the offense
25 of the message.

1 This statute has nothing to do with the
2 offense of the message. It has to do with trying to dry
3 up an underlying market for animal cruelty.

4 If there are no questions, I would like
5 to reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Ms. Millett.

8 ORAL ARGUMENT OF PATRICIA A. MILLETT

9 ON BEHALF OF THE RESPONDENT

10 MS. MILLETT: Mr. Chief Justice, and may it
11 please the Court:

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

20 JUSTICE ALITO: What about crush videos,
21 which apparently were the focus of Congress's attention
22 when it drafted these? Now, I suppose by an analogy to
23 what Justice Scalia just said about the message of dog
24 fighting videos, the people who produce crush videos
25 think they have a message, and the message is that this

1 is -- this is sexually exciting or it's exciting in some
2 way to see a woman in high heeled shoes crushing a
3 little animal to death.

4 Do you think that is constitutionally
5 protected?

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

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

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

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

19 MS. MILLETT: No, no. I think -- I'm saying
20 that there are three alternative ways in which to get to
21 it. My first if one is that not this statute, but under
22 a properly drawn statute --

23 JUSTICE ALITO: Under a properly drawn
24 statute --

25 MS. MILLETT: -- that might survive

1 scrutiny. I'm not sure you would --

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

11 MS. MILLETT: I don't -- I don't want to,
12 say this statute, because I don't think this statute --
13 but if the statute said, this -- I think this Court
14 disagree -- it disagrees with me sometimes -- but I
15 think this could pass constitutional muster. A statute
16 that says the patently offensive intentional torture and
17 killing of an animal for -- designed to appeal to the
18 prurient interest for the purpose of producing the
19 image, I think that would satisfy -- I think it would
20 satisfy strict scrutiny. The Court might also decide
21 that it's close enough to obscenity or it's like the
22 Ferber production rationale. That's my position; there
23 are sort of three ways it could be analyzed, a statute
24 like that.

25 That's not this statute and I don't think we

1 can say that this statute, because Congress has the
2 authority to reach something, that when it throws a
3 blanket net as wide as this one has that this means this
4 statute is the mechanism, a lawful mechanism for getting
5 --

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

18 MS. MILLETT: A properly drawn statute with
19 the requisite congressional findings or record of a need
20 to attack -- it sound to me like this is a need to
21 attack production. As in child pornography, the fact
22 that the image taking is legal overseas does not mean
23 that it can't be prohibited here. And if you had the
24 type of record of a statute that says we want to stop
25 the production; it's not the content, it is the

1 production, as this Court explained in Free Speech
2 Coalition for Child Pornography.

3 But that is a statute that then wouldn't
4 have -- either you would have to decide which things are
5 in and out -- if you started saying animal cruelty
6 production, but we we'll let the bullfights in but the
7 pitbull fights out and the cock fights, then you'd have
8 problems.

9 JUSTICE KENNEDY: We are asking whether or
10 not that specific instance could be prohibited under a
11 properly drawn statute, just like Justice Alito's
12 hypothetical was under a properly drawn statute you
13 could prohibit the conduct, the speech broadcast in that
14 conduct.

15 MS. MILLETT: The theory -- I mean,
16 ultimately this Court would have to decide whether
17 Ferber is limited to an obscenity that's historically
18 unprotected by the First Amendment.

19 JUSTICE KENNEDY: So your answer to my
20 hypothetical is yes it could be prohibited under a
21 properly drawn statute?

22 MS. MILLETT: If this Court -- two things.
23 It would have to be a very, very narrowly drawn statute,
24 I think going to the production theory like Ferber; and
25 the question I think before this Court would be, given

1 the nature of the harm that presumably would be found,
2 the nature of the market, the synergistic effect, where
3 the -- I am assuming the findings here would be that the
4 crime and the image are one and the same, inextricably
5 intertwined -- then maybe, although I still think it
6 would be a bit harder because we are dealing with the
7 First Amendment here. We don't make it up as we go
8 along. At the time that the First Amendment was written
9 dog-fighting was legal in this country.

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

19 Now, that's what you are saying. Now -- and
20 I think maybe that's true. We don't have to decide
21 that, perhaps. But the government says that is this
22 statute, that is this statute read in light of its basic
23 intent, and it is up to the Court to interpret it so as
24 it achieves that objective. And you say that's not
25 possible. Why not?

1 MS. MILLETT: Two things. First of all,
2 there is interpreting and then there is alchemy, and I
3 think this statute requires alchemy. This is Reno
4 versus --

5 JUSTICE SCALIA: Requires?

6 MS. MILLETT: Alchemy, alchemy.

7 JUSTICE SCALIA: Oh.

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

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

11 MS. MILLETT: We don't often get statutes
12 that are so far off base that we're going, I think in my
13 opinion, so far beyond construing ambiguity and doing
14 instead what was asked of this Court and the Court
15 declined in *Reno v. ACLU*, and that is to write the
16 statute for Congress.

17 The ambiguity, as, Justice Scalia, you
18 explained -- you would have to excise this statute in
19 and out, sever so many things. I don't know what you'd
20 have left unless it's the statute I posited to Justice
21 Alito, which might have a couple of words that overlap
22 with this statute. But that is not statutory
23 construction. This Court's job is not to write the
24 statute for Congress.

25 And also keep in mind, in the past this

1 Court consistently under the First Amendment has
2 required, not just the right words, but a record from
3 Congress. In the First Amendment area we can't just
4 posit the problems; we have to really have confidence
5 that --

6 JUSTICE GINSBURG: Does this -- would this
7 record support any ban? I mean, there was a real
8 concentration on crush videos. So there is that. Is
9 there anything else in the current record other than the
10 crush videos?

11 MS. MILLETT: No, there is not. And in fact
12 they spent their time, as we said in our brief -- and
13 this is perfectly accurate. Members of Congress, to the
14 extent they discussed other things, kept saying in the
15 floor debates: That's not in; bull-fighting's not in;
16 dog-fighting's not in; hunting's not in; these things
17 are not in. So they mentioned them in the context of
18 saying these are not in.

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

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

10 There is in this instance -- there are about
11 five different ways that this is different from child
12 pornography. The first is that there has never been any
13 finding, any assertion, even by the government, that
14 creating the image is the primary or sole motive for
15 creating these images. It's not if you lock Mr. Stevens
16 up -- if you throw away every dog-fighting video in the
17 country tomorrow, dog-fighting will continue. It -- no
18 one thinks that it will go away.

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

21 MS. MILLETT: But you don't dry up the
22 market by having a sweeping value exception like they
23 have here. If Congress wants to dry up the market, what
24 Ferber says is there's two things that have to happen:
25 One, you've got to prove causation. You can't simply

1 say, we got a problem, let's go first to the speech and
2 cut that off as our first prosecutorial tool when we are
3 not even ready to make the crime itself a felony, but we
4 will make the speech a felony.

5 You've got to prove causation, that these
6 images cause the harm, they are one and the same with
7 the harm as they are with child pornography. You also
8 have got to prove that Congress is acting in an
9 evenhanded way. It is not leaving, as Justice Scalia
10 said, appreciable damage to the interests that its
11 asserting uncovered by its many, many exceptions.

12 JUSTICE STEVENS: May I ask you a question
13 about your view of the breadth of the statute. I didn't
14 yet really get an answer out of your opponent. Do you
15 think the statute would prohibited depictions of hunting
16 if it involved killing in the District of Columbia,
17 because hunting as I understand it is not allowed in the
18 District of Columbia, it's prohibited. Does that mean
19 that any depictions of hunting that show the killing and
20 cruelty are prohibited by this statute?

21 MS. MILLETT: Well, they are prohibited
22 subject to the value police and the value trial like we
23 had here, which I think is antithetical to the First
24 Amendment. It's a very different rule under the
25 obscenity statute. So it would all depend on whether a

1 jury decided that that had serious value, which was
2 defined as significant and great import in this
3 particular case. That would decide whether --

4 JUSTICE SCALIA: It's just not significant
5 value; significant artistic, educational. What are the
6 others? Scientific?

7 MS. MILLETT: Scientific, social, artistic,
8 journalistic --

9 JUSTICE SCALIA: Strictly entertainment
10 value doesn't count, does it?

11 MS. MILLETT: No, it does not.

12 JUSTICE SCALIA: And most of the hunting
13 videos I have seen people watch for the entertainment.
14 They like to see a hunt.

15 MS. MILLETT: I think that's exactly right
16 and that's what the Safari Club and the NRA have told
17 us.

18 CHIEF JUSTICE ROBERTS: Well, I mean, but
19 this definition or these exceptions are not drawn out of
20 thin air. They are drawn from Miller, and the Court in
21 Miller recognized that they were significant in causing
22 the restriction of obscenity to pass constitutional
23 muster.

24 MS. MILLETT: First of all, this is about
25 -- this is Miller doubled -- there's a lot more here

1 -- categories here. But it's a very different role
2 that value plays under Miller in obscenity. First of
3 all, this Court made quite clear again in Reno v. ACLU
4 that Miller only works if you have all three prongs.
5 You can't just use the serious value prong to take
6 care of your constitutional problem. Second, you were
7 dealing in an area that by history and tradition is
8 unprotected speech. Miller --

9 JUSTICE ALITO: But in determining whether
10 this is over -- overly broad, do we -- do we think of all
11 of the hypotheticals that we possibly can think of that
12 might fall within this statute: somebody hunting in the
13 District of Columbia, somebody producing fois gras with
14 a goose and say, "Well, we've thought of a lot of
15 hypothetical situations where this statute might apply
16 and therefore it's overly broad"? Or do we look at
17 what's going on in the real world?

18 MS. MILLETT: I think what you do is you
19 look at text of the statute, and then you ask yourself,
20 how much of a strain is it to come up with a factual
21 pattern that will fit into it? In Williams you had to
22 first of all read the --

23 JUSTICE ALITO: So we really think of all
24 the hypotheticals. That's how you think we determine
25 the constitutionality of this under the overbreadth

1 doctrine?

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

8 JUSTICE ALITO: If it's the fact that during
9 the ten years when this statute has been in effect there
10 has been no decrease in hunting videos and hunting shows
11 on TV, and all of the rest -- the only perceptible
12 change in the real world is that these -- is that the
13 market for crush videos dried up, at least until the
14 Third Circuit's decision, does that have any relevance?

15 MS. MILLETT: I don't -- I don't think it
16 does for this reason. People -- and this gets a little
17 bit to Justice Kennedy's vagueness concern. People have
18 a right to know how to -- outside the courtroom how to
19 conform their conduct to the law. If I got a call from
20 the general counsel of Outdoor Channel or someone making
21 hunting videos and they said, "Does this fall within
22 this statute," I wouldn't have to come up with a
23 strained factual scenario. I would say yeah, it falls
24 squarely in, subject to a prosecutor or jury anywhere
25 where you market in this country, deciding that it has

1 serious -- one of the adjectives -- value. I would have
2 to say that to that person, and that would be accurate
3 legal advice.

4 JUSTICE SCALIA: It could be that the reason
5 hunting videos are still out there is that the producers
6 were quite confident that this Court would not allow
7 them to be prohibited on the base of a statute such as
8 this.

9 MS. MILLETT: One would hope, and I think
10 quite frankly the NRA has been quite honest when it
11 recently said you know, this -- this is not an actively
12 enforced statute. People were shocked to learn -- to
13 become aware of it.

14 Now maybe everyone's supposed to know the
15 existence of laws, but I think the reality is that once
16 people looked at what this said, they became very, very,
17 very concerned, and I think when you're talking about a
18 criminal prohibition here -- this is not a civil suit,
19 this is criminal prohibition with severe penalties. The
20 penalties for speech are higher than most animal cruelty
21 statutes. And the whole point of the criminal law is to
22 deter conduct and to make people stay wide of the
23 margins here, wide of the borders.

24 CHIEF JUSTICE ROBERTS: I --

25 MS. MILLETT: You can't do that in the First

1 Amendment.

2 CHIEF JUSTICE ROBERTS: I understood your
3 answers to Justice Alito to acknowledge that there would
4 be situations where this statute could be
5 constitutionally applied, or as you put it, you could
6 draft a statute.

7 MS. MILLETT: Not this statute.

8 CHIEF JUSTICE ROBERTS: Not this statute.

9 But --

10 MS. MILLETT: That's different. I think
11 that's very different.

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

18 MS. MILLETT: I think in the First
19 Amendment -- I'm not talking -- if I heard you right we
20 were not talking about this statute. If you have
21 another statute --

22 CHIEF JUSTICE ROBERTS: I guess I am just
23 trying to get at what your understanding of what the
24 test is for overbreadth in this area. How much of an
25 area of constitutional application is necessary before

1 you decide that a statute is not unconstitutional on its
2 face, but will consider as-applied challenges?

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

17 That is not this case. We are dealing in an
18 area that was never until December 1999 barred by
19 anybody, never considered to be outside the conception
20 of the First Amendment's freedom of speech. The other
21 scenario where we see substantial overbreadth is when
22 Congress is regulating conduct.

23 JUSTICE ALITO: Well, isn't that -- isn't
24 that due to changes in technology? Before people could
25 show -- could watch videos at home, this sort of thing

1 would -- would be very difficult.

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

7 JUSTICE ALITO: And is there -- in the real
8 world is there a market for sketches of dog fights?

9 MS. MILLETT: I don't know if there's a
10 market --

11 JUSTICE ALITO: People get a thrill from
12 seeing that?

13 MS. MILLETT: With respect, I can't answer
14 that. I'm not -- I don't know if there is a market for
15 dog fighting videos. There is a few, but it depends on
16 what you mean by a market. Will somebody buy something?
17 I guess somebody in this world will buy anything.

18 JUSTICE GINSBURG: Is there any indication
19 that there has been any dry-up of the market for dog
20 fights as a result of this statute?

21 MS. MILLETT: There --

22 JUSTICE GINSBURG: Justice Alito suggested
23 that until the Third Circuit's decision, that there were
24 fewer crush videos produced. But with respect to dog
25 fights, animal fights, is there any indication that

1 there has been -- there have been fewer animal fights as
2 a result of this statute?

3 MS. MILLETT: None whatsoever, and in fact
4 what we've seen is robust enforcement, and we cite the
5 article in our case, we have seen robust enforcement;
6 there was just an arrest a few weeks ago for I think a
7 couple hundred people involved in dog fighting rings.
8 So the dog fighting rings are going on unabated and they
9 are getting found and discovered and prosecuted
10 successfully, and in fact the images sometimes help with
11 the prosecution.

12 This is a place, when we start talking we
13 are going to take something outside the First Amendment,
14 one of the other things that unifies the categories of
15 speech outside the First Amendment is a judgment that
16 more speech doesn't work. This is an area where we know
17 speech works powerfully. Speech about these ugly images
18 produced this statute. It informed people. Unlike
19 children and child pornography, people need to see
20 images to understand what's going on with animals, and
21 to make these important decisions and engage in these
22 important debates that our society is having.

23 JUSTICE KENNEDY: Suppose an argument --
24 excuse me.

25 Suppose an argument had been made to the

1 Court in Ferber, that, you know, it's really good for
2 people to see molestation of children because then they
3 will be outraged and they will enforce the statute more.
4 I just can't see the Court accepting that argument for a
5 single -- for a minute.

6 MS. MILLETT: I -- I agree. I --

7 JUSTICE KENNEDY: But that's the argument
8 you are making.

9 MS. MILLETT: No, no, I think it's -- I
10 think it's -- I'm trying to point out that this is in
11 fact a contrast.

12 First of all -- a contrast between the two
13 situations between dealing with the subject, a very
14 topical subject that --

15 JUSTICE KENNEDY: Well, it seems to me that
16 we ought -- if there is a significant chance that
17 Congress can affect an illegal market, an illegal
18 activity by a statutory regulation we ought to defer to
19 Congress on that ground. I think you still have speech
20 arguments.

21 MS. MILLETT: I --

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

24 JUSTICE SCALIA: I really think you should
25 focus, not on the educational value for -- to make

1 people hate bull fighting and things, but on quite the
2 opposite, it seems to me. On the right under the First
3 Amendment of people who like bull fighting, who like dog
4 fighting, who like cock fighting, to present their side
5 of -- of the debate.

6 And unless it's a subject like obscenity,
7 which from the beginning has not been considered
8 protected speech, it seems to me that side of the debate
9 is entitled to make its point as -- as forcefully as
10 possible. That's it seems to me what the problem is
11 here. Not --

12 MS. MILLETT: I think that is 100 percent
13 right.

14 JUSTICE ALITO: Well, if that's 100 percent,
15 then what about people who --who like to see human
16 sacrifices? Suppose that is legally taking place
17 someplace in the world. I mean, people here would
18 probably love to see it. Live, pay per view, you know,
19 on the human sacrifice channel.

20 (Laughter.)

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

23 MS. MILLETT: The problem with this statute
24 is that presumably that statute would be even-handed and
25 would it not say if the sacrifices were religious, or

1 journalistic, or historic. Or --

2 JUSTICE SCALIA: You can create a lot of
3 First Amendment horrors. What about -- what about a
4 new Adolf Hitler? Can we censor any depiction of that
5 new Adolf Hitler and the horrible things that he is
6 proposing, including extermination of a race? Is that
7 proscribable under the First Amendment? Is that any
8 less horrible than the human sacrifice contemplation?

9 MS. MILLETT: No, Justice Scalia. Again, I
10 agree, because what the First Amendment says is we
11 allow --

12 CHIEF JUSTICE ROBERTS: I'm sorry; you agree
13 you can prohibit it, or not?

14 MS. MILLETT: I agree that, just because
15 something is repulsive, incredibly offensive or maybe
16 even involves some harm to people does not mean that --
17 depictions of it that do not cause that harm, that are
18 not integrally tied to it, that are not the purpose and
19 animating motivation for that harm cannot be proscribed.

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

22 MS. MILLETT: The -- if -- at a minimum,
23 Congress has got to be evenhanded. The point there is
24 that you are trying to say we are concerned about the
25 creation for purposes of the image. We are concerned

1 about what the government calls the "snuff video
2 situation."

3 This whole reason that this is created is
4 for purposes of creating the image. If you establish
5 the causation -- and I don't think we -- the Court does
6 just defer to Congress on these things.

7 It looks carefully at factual records in --
8 as it has in the child pornography are under the First
9 Amendment, Justice Kennedy. If Congress proves the
10 causation and shows that it is -- it's the least
11 restrictive means -- compelling and least restrictive
12 means, the strict scrutiny that Congress -- the
13 government never wanted this statute to march through.

14 JUSTICE ALITO: And what if there is no
15 chance of drawing up the activity? Suppose you have the
16 ethnic cleansing channel on cable TV, and there is no --
17 this is taking place in a country that's beyond our
18 power to influence. Congress couldn't prohibit that?

19 MS. MILLETT: The -- the fact that conduct
20 is repulsive or offensive does not mean we automatically
21 ban the speech. You would have to have -- it would have
22 to follow this Court's patterns, either it would be an
23 even-handed ban on production, under the Ferber theory,
24 or you would have to establish if those images were
25 never within the constraints.

1 JUSTICE BREYER: I think what -- I think
2 what's going on is -- is not -- your conflating two
3 things. One is you are trying to produce education
4 about something that has no communicative value.

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

10 Maybe it's impossible; but promoting a thing
11 which communicates nothing, but appeals to people's
12 worst instinct, that is not to advocate it or not to
13 advocate it.

14 It is to try to make money out of it, and
15 that's what they think, I believe, the statute is aimed
16 at.

17 MS. MILLETT: Well --

18 JUSTICE BREYER: So that's why they have the
19 journalistic exception.

20 MS. MILLETT: The -- when it comes to
21 promoting illegal conduct, we have the Brandenburg Test,
22 and, if you are close enough to be inciting it, to be
23 causing it -- which I think is where Ferber, largely,
24 is. They are just intertwined. That's one thing. But
25 if it's not -- just because we have the really

1 disgusting, despicable channel doesn't mean that we
2 automatically ban it. Maybe it will be educational.
3 Maybe we will learn from it.

4 I think Congress is going to have to show,
5 before it goes to speech as its first tool of repression
6 to attack conduct with, very specialized, narrow
7 circumstances.

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

10 MS. MILLETT: That is commercial --

11 JUSTICE BREYER: We are advertising --

12 MS. MILLETT: That is commercial speech.

13 The fact that you want to get paid for speaking does not
14 make it commercial speech.

15 Samuel Johnson, himself, said that no one
16 but a blockhead ever wrote, except for money. I don't
17 necessarily agree with that, but it is -- it would be a
18 shock to him, to Thomas Payne, who sold his tracks of
19 "Common Sense," that the First Amendment would go all --
20 leap all the way from commercial speech and say, just
21 because you are doing it for money, you need to make a
22 buck.

23 Your Honor --

24 JUSTICE SCALIA: I would have thought that
25 your response to Justice Breyer's comment about catering

1 to people's worst instincts in the area of the First
2 Amendment, at least, would have been that it's not up to
3 the government to decide what are people's worst
4 instincts.

5 If -- if the First Amendment means anything,
6 that's what it means.

7 MS. MILLETT: Well, it means --

8 JUSTICE SCALIA: It's not up to the
9 government to tell us what our worst instincts are --

10 MS. MILLETT: It means --

11 JUSTICE SCALIA: Except for those areas that
12 have traditionally been outside the area of -- of
13 protected speech, and -- and once you allow this one,
14 what other -- what other base instincts do people have,
15 besides this one?

16 One can contemplate a lot of other areas,
17 where government could say, You are appealing to
18 people's worst instincts, and, therefore, the -- the
19 movies cannot be made.

20 MS. MILLETT: I agree, Justice Scalia. The
21 answer to that instance is more speech under the First
22 Amendment. The answer --

23 CHIEF JUSTICE ROBERTS: So I'm sorry. I'm
24 still looking for your answer to Justice Alito's
25 hypotheticals.

1 Can Congress ban the human sacrifice channel
2 or not?

3 MS. MILLETT: I -- the -- I think -- I -- I
4 will start by saying -- no. Let's start and see.
5 Maybe -- maybe it won't work, but I think --

6 CHIEF JUSTICE ROBERTS: You are unwilling --
7 you are unwilling to say that Congress can pass a law,
8 even-handed, straightforward, you cannot have a human
9 sacrifice channel.

10 MS. MILLETT: If it did, it would have to be
11 even-handed and have narrow tailoring, but the problem
12 is --

13 JUSTICE SOTOMAYOR: What do you mean by
14 "even-handed," please? I'm not -- you are using those
15 words. What do you mean about "even-handed and narrowly
16 tailored"?

17 MS. MILLETT: When -- when the attack --
18 Justice Sotomayor, when the attack is on the
19 production -- if it -- I don't mean to be -- I want to
20 be direct in answering.

21 It depends on two things. If the theory is
22 we don't like the content, we don't want people to see
23 the content, I don't think Congress can do it. I think
24 the answer is more --

25 JUSTICE GINSBURG: So that goes with snuff

1 movies -- snuff movies. I don't know if they really
2 exist, but they have been described.

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

6 JUSTICE SCALIA: Adolf Hitler, can we keep
7 him off the screen, too?

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

13 If you have got --

14 CHIEF JUSTICE ROBERTS: So we don't like --
15 we don't like human sacrifice, and so Congress passes a
16 law saying you cannot have a channel that shows human
17 sacrifice -- real human sacrifice. You think that is
18 unconstitutional?

19 MS. MILLETT: I think, if the point is that
20 we don't like the could content, we don't -- we want to
21 protect people from these images, the First Amendment
22 says a lot about that.

23 If it's a different -- snuff video, because,
24 like child pornography, like I said, it's not the
25 content that we are concerned about, where obscenity is

1 a pure content baseline.

2 It is -- we got to stop -- we can't stop the
3 conduct. The conduct and the speech are inextricably
4 intertwined. The only way we can stop human sacrifice
5 is to stop the image because the sacrifice is solely
6 for the image.

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

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

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

18 If it's not something -- if it's not conduct
19 it has any authority to regulate, I don't -- then the
20 only compelling interest is -- I'm trying -- I mean, I
21 don't want to watch this channel, and people should
22 fight with their wallets and their votes and not support
23 these things, but -- I'm sorry.

24 May I finish?

25 CHIEF JUSTICE ROBERTS: No. Go ahead.

1 MS. MILLETT: But, under the First
2 Amendment, if the only rationale Congress is giving is
3 we are here to shield your eyes for you, we will make
4 this censorial decision, it has got to find some basis
5 to think that was never freedom of the speech under the
6 First Amendment, in the way that obscenity was.

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

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
10 Mr. Katyal, you have three minutes
11 remaining.

12 REBUTTAL ARGUMENT OF NEAL K. KATYAL
13 ON BEHALF OF THE PETITIONER

14 MR. KATYAL: There is one analytic move
15 Congress made in Section 48, which is simple and
16 obvious, and it explains why both the human sacrifice
17 channel is constitutional, as well as Section 48 itself.

18 That is the logic of Ferber. When Congress
19 tries to dry up a market for underlying cruelty by
20 targeting depictions and leaves alternative mechanisms
21 for that expression in place, the legislature has
22 latitude.

23 When the statute is not aimed at the
24 communicative impact of the message, like the Hitler
25 video, but, rather, is aimed at reducing underlying acts

1 of exploitation, that is an area which Congress has
2 great leeway.

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

7 MR. KATYAL: I'm saying that, if Congress
8 identified a market and if a video -- if the snuff video
9 market was driving, somehow, people to get killed,
10 Congress would be fully within its power to regulate it.

11 JUSTICE SCALIA: Yeah; but we don't have any
12 human sacrifice. Nobody's doing that stuff. So you
13 could not proscribe the human sacrifice channel.

14 MR. KATYAL: That's precisely correct, but,
15 here, Congress did find an overwhelming market in animal
16 cruelty, and the State attorney's general that filed a
17 brief before you saying that Section 48 is a success
18 story, that it dried up 3,000 crush videos, that it has
19 reduced the market for animal --

20 JUSTICE GINSBURG: How many prosecutions
21 have there been for crush videos?

22 MR. KATYAL: There -- there haven't been any
23 prosecutions for crush videos, and I think the reason is
24 because the market dried up very quickly after the
25 enactment of Section 48.

1 CHIEF JUSTICE ROBERTS: Did I just
2 understand you to agree with your colleague on the other
3 side, that Congress could not ban the human sacrifice
4 channel because there would be no connection between
5 drying up the underlying activity?

6 MR. KATYAL: Oh, no. If there is an
7 underlying argument --

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

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

16 Rather, it is saying --

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

19 So, if Congress is saying, Look, we just
20 don't like what -- is being shown on the human sacrifice
21 channel, we don't want people to see it, they can't do
22 that?

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

1 Now, if I could return to, Justice Stevens,
2 you had he wasn't clear on the position on hunting. I
3 want to be very clear on this.

4 Hunting, like the other hypotheticals, is
5 not covered by section 48 for two reasons: First, the
6 statute -- the statute's term "animal cruelty" should be
7 defined to encompass torture, mutilation and the like,
8 and not simple acts of ordinary hunting, most of which,
9 by the way, are legal anyway under animal cruelty.

10 JUSTICE SCALIA: How about the statute's
11 term, "kill" --

12 MR. KATAYAL: And again --

13 JUSTICE SCALIA: -- what should that be
14 interpreted to mean?

15 MR. KATYAL: And again, Justice Scalia, as I
16 said before, I think that comes within a definition of
17 animal cruelty. That's the term being defined. And
18 just as this Court has defined, for example, crimes of
19 violence to exclude certain things that otherwise would
20 be within the statute, such as drunk driving offenses in
21 the context of the IMA, a similar result is possible
22 here, particularly because of the doctrine of
23 constitutional avoidance.

24 And, so, we are saying that if this Court
25 were to write an opinion that made clear that these

1 things are outside of the purview of section 48, there
2 would be no chilling effect, and you wouldn't have to --

3 JUSTICE STEVENS: Wait, I want to just be
4 sure I understand you. Even if the hunting depiction is
5 very offensive and cruel and all the rest, and that the
6 cruelty to the animal using bow and arrows or knives or
7 something, you say it's not -- and even if it's illegal
8 in this particular jurisdiction, you say the statute
9 still does not apply at all?

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

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

17 MR. KATYAL: No, it has nothing to do with
18 the motive, it has to do with what happens to the
19 animal. And, so, there could be images of hunting which
20 are not really hunting, like the images in this case.

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

24 MR. KATYAL: Justice Scalia, with all due
25 respect, I think the images in this case and what

1 Congress was getting at was not shooting a little low.
2 These are the most horrific images that you can imagine
3 of cruelty to living animals. And that's what
4 Congress --

5 JUSTICE SCALIA: But what about your
6 response to Justice Stevens on the hunting matter? I
7 understand Congress wasn't directed at --

8 MR. KATYAL: And my point if those -- if
9 there are those cases at the area -- at the gray areas,
10 that is perfect for as applied challenge, but it's not
11 what this Court -- this Court shouldn't be blessing the
12 Third Circuit's decision to in toto invalidate an entire
13 statute which has produced -- which has produced 3,000
14 crush videos and the like.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel,
16 both counsel, for very able presentation. The case is
17 submitted.

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

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