No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

v.

ROBERT J. STEVENS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecution of an individual filmmaker under 18 U.S.C. § 48 violates the First Amendment, facially or as applied, where the statute broadly criminalizes depictions of "animal cruelty," as defined by any one of more than fifty different laws, unless the images have "serious" value.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT

1. Section 48 of Title 18, United States Code, criminalizes the "knowing[] creat[ion], [sale], or possess[ion] [of] a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce," but only when done so "for commercial gain." 18 U.S.C. § 48(a) (2006). The statute defines "depiction of animal cruelty" as "any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Ibid.* The prohibition applies whenever the depicted conduct is "illegal under Federal law" or is illegal under "the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1). Section 48 excepts "religious, political, scientific, educational, journalistic, historical, or artistic" material only if it has "serious * * * value." 18 U.S.C. § 48(b).

As the court of appeals explained (Pet. App. 5a-6a), Section 48's primary target was "crush videos," which "feature women crushing small animals with their feet" in a manner designed to incite sexual arousal. 145 CONG. REC. E1067-01 (May 24, 1999) (Rep. Gallegly); H.R. Rep. No. 397, 106th Cong., 1st Sess. 3 (1999); 145 CONG. REC. S15220-03 (Nov. 19, 1999) (Sen. Smith); Pet. 3-4, 13.

"[T]o ensure that the Act does not chill protected speech," President Clinton's signing statement explained that he would "broadly construe the Act's exception" and would "interpret * * * the Act

[to] prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex." Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324.

2. Robert J. Stevens is a sixty-nine-year-old published author and documentary producer. Other than the conviction vacated by the Third Circuit, Mr. Stevens has no criminal record. He specializes in promoting the qualities and unique characteristics of the Pit Bull breed of dogs. His book, DOGS OF VELVET AND STEEL: PIT BULLDOGS: A MANUAL FOR OWNERS (1983), has been purchased and marketed by major retailers such as Amazon.com and Barnes & Noble. C.A. App. 662; Resp. C.A. Br. 6. He does not promote illegal dogfighting and, in fact, advocates in his book that "pit fighting should remain illegal." VELVET AND STEEL, *supra* at 464; C.A. App. 685. He "would like the Pit Bull to be recognized, not as an outlaw, but a respected canine." VELVET AND STEEL, *supra*, at 466.

Mr. Stevens lives in Virginia where he operates his own small business called "Dogs of Velvet and Steel," which sells informational materials and dog-handling equipment for Pit Bulls. Resp. C.A. Br. 6. As part of his business, Mr. Stevens produced a number of films about Pit Bulls. As relevant here, one film, "Catch Dogs and Country Living," documents the use of Pit Bulls to help catch prey during hunting expeditions, as well as the training of dogs for such hunting purposes. C.A. App. 542-548, 461. Throughout the film, Mr. Stevens describes the correct way to train a dog to hunt and catch prey, and shows footage of some poorly trained

dogs to demonstrate improper hunting techniques. A portion of the film includes a Pit Bull fight from Japan, where such fighting is legal, as a means to distinguish dogs trained for hunting from those trained for fighting. Resp. C.A. Br. 7; Pet. App. 31a-32a. In "Pick-A-Winna: A Pit Bull Documentary," Mr. Stevens edited footage filmed by others documenting modern-day pit fights in Japan and fights in the United States from the 1960s and 1970s. Pet. App. 3a; C.A. App. 453, 685. Mr. Stevens' accompanying materials explain that, while he "do[es] not promote, encourage, or in any way condone dog fighting," such images demonstrate "what made our breed the courageous and intelligent breed that it is." C.A. App. 685. Mr. Stevens explains at the beginning of the film his desire to give a "historical perspective" on Pit Bulls, and "in no way [to] promote[] dog fighting." In a film entitled "Japan Pit Fights," Mr. Stevens documented three Pit Bull fights in Japan and explained how, in his view, pit fighting in Japan is conducted more humanely than in the United States, with no gambling or other illegal activities, and "quality veterinarians that attend to each dog immediately following each match." C.A. App. 701; *see id.* at 520, 523.

3. In January 2003, the government purchased from Mr. Stevens copies of the films "Catch Dogs and Country Living," "Pick-A-Winna: A Pit Bull Documentary," and "Japan Pit Fights." Pet. App. 3a; C.A. App. 450. After searching Mr. Stevens' home in Virginia and seizing additional copies of the films, the government indicted Mr. Stevens in Pennsylvania. Pet. App. 4a.

The district court denied Mr. Stevens' motion to dismiss the indictment on First Amendment

grounds. Pet. App. 64a-75a. The court reasoned that the government's "compelling interest" in preventing the underlying conduct of cruelty to animals justified its prohibition of Mr. Stevens' films. *Id.* at 69a.

At trial, the government did not contend that Mr. Stevens engaged in dog fighting or any act of animal cruelty himself, or was even present at any of the fighting scenes depicted in his films. C.A. App. 24. Instead, the government argued only that Mr. Stevens' production and sale of the three films was criminal. *Ibid.*

At trial, Mr. Stevens presented expert testimony that each of the documentaries has substantial educational or historical value. Dr. I. Lehr Brisbin, a fellow of the American Association for the Advancement of Science and a Senior Ecologist and Adjunct Professor at the University of Georgia, testified that each of the documentaries has serious educational value. C.A. App. 563, 579, 580, 582. Dr. Brisbin stated that he would use "Japan Pit Fights" and "Pick-A-Winna: A Pit Bull Documentary" in his teaching and testimony before governmental bodies to demonstrate that Pit Bulls can be trained to relate to humans even after they have participated in hunting or fighting. *Id.* at 582. Dr. Brisbin also testified that "Catch Dogs and Country Living" teaches Pit Bull owners the "responsibility to do things right" if they choose to train their dogs for hunting. *Id.* at 582.

Michael Riddle, a recognized expert in large-game hunting, C.A. App. 599-600, stated that he thought "Catch Dogs and Country Living" was "very educational" because it informs hunters how to train their dogs for hunting and prepares them for the errors that dogs can make. C.A. App. 604-605.

Glen Bui, acting Vice-President of the American Canine Foundation, an organization working to "end[] animal cruelty," Bui Dep. at 13:19-20, testified that Mr. Stevens' films were "extremely educational" and had serious historical value documenting the history of dog fighting and its cultural role in Japan. *Id.* at 13:32-34.[1] He also explained that images from Mr. Stevens' films had been extracted and used by animal rights organizations to campaign against dog fighting. *Id.* at 14:12-13.

After hearing that testimony, the jury was instructed, over Mr. Stevens' objection, that the statutory exception for images with "serious" religious, political, scientific, educational, journalistic, historical or artistic value applies only to images that are "significant and of great import." C.A. App. 641, 647.

The jury then convicted Mr. Stevens on three counts of violating 18 U.S.C. § 48. Pet. App. 4a. Mr. Stevens was sentenced to 37 months of imprisonment to be followed by three years of supervised release. *Ibid.*

4. a. On appeal, the United States Court of Appeals for the Third Circuit *sua sponte* heard the case *en banc*. The court then ruled that Section 48 is a facially unconstitutional content-based prohibition on speech that violates the First Amendment. Pet. App. 1a-63a.

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[1] This recorded deposition was shown to the jury. C.A. App. 619. All citations are to the time stamp on the recording.

The court first rejected the government's argument that depictions of animal cruelty fall completely "outside First Amendment protection," like obscenity and child pornography. Pet. App. 8a. Because Congress and every state government already criminalize the underlying acts of animal cruelty, the court found no compelling interest in banning speech to compensate for the "under-enforcement of state animal cruelty laws." *Id.* at 19a-20a.

The court further ruled that the link between animal cruelty and subsequent acts of criminality was too "contingent and indirect" a basis for regulating speech, rather than the acts themselves. Pet. App. 21a-22a (internal quotation omitted). In addition, the court explained, while marketing and broadcasting the images of child pornography compound the harm to the child victims, animals suffer no additional harm attributable to the depiction of mistreatment itself. *Id.* at 23a.

With respect to the government's argument that the ban was necessary to "dry[]-up-the-market" for dogfighting, the court explained that "there is no empirical evidence in the record to confirm that the theory is valid in this circumstance." Pet. App. 23a, Evidence before the court showed, instead, that gambling revenue, not income from videos, is "the primary economic motive" for dogfighting contests. *Id.* at 24a & n.10 (citing Humane Society fact sheet).

Lastly, the court noted that the numerous statutory exceptions underscored that the speech itself is not inherently of *de minimis* value and, in fact, "[t]he statute potentially covers a great deal of constitutionally protected speech." Pet. App. 26a, 33a n.16. Excising speech of "serious" value from the

statutory prohibition did not suffice, the court explained, because the First Amendment "does not require speech to have serious value in order for it to fall under the First Amendment umbrella." *Id.* at 26a.

Having concluded that the speech enjoys First Amendment protection, the court held that Section 48's broad prohibition on depictions could not survive the strict scrutiny required to sustain such content-based criminalization of speech. The court reiterated that the ban on speech, as opposed to the ban on the underlying acts of cruelty, does not advance a compelling governmental interest. Pet. App. 29a.

The court further held that the statute was neither narrowly tailored nor the least restrictive means of serving the government's interest in combating acts of animal cruelty. Pet. App. 28a. The court explained that Section 48 is both under- and overinclusive. It is underinclusive because Section 48 permits a broad swath of animal cruelty images as long as they are for personal use and not for "commercial gain." *Id.* at 29a-30a. And Section 48 is overinclusive because it bans depictions of acts that are lawful in the jurisdiction where they are recorded and where the participants' identities are not concealed. *Id.* at 30a-31a. The statute's terms, the court explained, would encompass images of hunting or fishing out of season or bullfights in Spain. *Id.* at 33a n.16.

Finally, the court of appeals left open the question of "the constitutionality of a hypothetical statute that would only regulate crush videos." Pet. App. 10a n.5.

b. The three-judge dissent argued that the statute passed strict scrutiny because "[o]ur nation's aversion to animal cruelty is deep-seated," Pet. App. 39a, and such acts are "a form of antisocial behavior," *id.* at 42a.

ARGUMENT

Because there is no conflict in the circuits or even another ruling by *any* court addressing Section 48's constitutionality and because the statute has languished in relative desuetude for most of its life, the government's sole argument for an exercise of this Court's discretionary review is that a federal law has been held unconstitutional. While that can be a weighty factor in this Court's certiorari decision, it is not alone sufficient. *See* Pub. L. No. 352, 100th Cong., 2d Sess., 102 Stat. 662 (1988) (codified at 28 U.S.C. 1254 (2006)) (repealing congressional mandate that the Court review all cases in which a federal statute is declared unconstitutional). This Court, in fact, has denied review of similar constitutional rulings when the court of appeals' analysis simply applies well-settled constitutional law and the court's ruling has limited practical implications for the government.[2] Both of those factors warrant a denial of certiorari here.

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[2] *See, e.g., ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998); *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

1. The Third Circuit's holding that Section 48 is unconstitutional rests on the proper application of well-settled First Amendment law. The court's decision broke no new ground and, as a result, further review by this Court would not materially contribute to First Amendment jurisprudence.

a. The court of appeals' holding that depictions of animal cruelty (however defined by any one of the 50 States) are not a category of speech entirely walled off from First Amendment protection was ordained by this Court's precedent. This Court's decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), settled that Section 48's content-based prohibition on a category of speech is "presumed invalid," *id.* at 660. And the factors identified by this Court in *New York v. Ferber*, 458 U.S. 747 (1982), for creating categories of unprotected speech are not satisfied here.

First, while the government may well have a significant interest in combating *acts* of animal cruelty, it has not established a compelling interest in prohibiting speech – visual or aural depictions – about such conduct. In fact, the numerous statutory exceptions for journalists, artists, scientists, and others underscore that such images have First Amendment value. Child pornography and fighting words, by contrast, have no parallel exceptions for the artistic, journalistic, religious, or political creation and marketing of such images.

Second, and relatedly, Section 48 does not prohibit images that are "intrinsically related to the * * * abuse." *Ferber*, 458 U.S. at 759. The harm to animals is completed by the prohibited act. The depiction itself has no distinct effect on the animal, nor is there evidence that market demand for images

of dogfighting itself motivates the commission of such acts.

Third, the government has not demonstrated that "[t]he most expeditious * * * method of law enforcement may be to dry up the market for this material." *Ferber*, 458 U.S. at 760. No empirical evidence corroborates the government's claim that the sale of such images increases or even synergistically motivates dogfighting. Pet. App. 23a-24a. Whatever the nexus between crush videos and the market for such prurient material, that is too thin a reed on which to rest Section 48's broad prohibition of all images of animal mistreatment.

Fourth, the statute prohibits speech that has more than "*de minimis*" value. *Ferber*, 458 U.S. at 762. The statute prohibits *all* commercial depictions of unlawful animal mistreatment except those that a jury, after the fact, concludes have "serious" religious, political, scientific, educational, journalistic, historical, or artistic value. The government's position is that material has "serious" value only if its value is "significant and of great import." U.S. C.A. Br. 49-50. But the First Amendment does not require speech to be of "great import" before it is protected.[3]

b. For those same reasons, the court of appeals' holding that Section 48 does not survive strict scrutiny reflects a straightforward application of

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[3] Of course, should the Solicitor General reconsider and conclude that the statute does not require proof that the speech has "great import," then certiorari review would be doubly inappropriate because that acknowledgment would confess the invalidity of the judgment of conviction for which review is sought.

established precedent. In addition to the absence of a compelling reason for this broad criminalization of speech, Section 48 is neither narrowly tailored nor the least restrictive means of combating either crush videos or animal cruelty generally.

As this case demonstrates, the statute is so broad that it criminalizes speech where there is no claim that the defendant was himself involved in acts of animal cruelty or was even present at their commission, and where many, if not all, of the acts documented were lawful in the jurisdictions in which they were filmed. Compounding that direct content-based prohibition, moreover, is a layer of viewpoint discrimination in which Mr. Stevens faces incarceration just because his documentary purposes were deemed not to be of "great import," C.A. App. 641, while dogfighting protestors, educators, and historians remain free to use those *same images* for their own purposes, 18 U.S.C. § 48(b); C.A. J.A. 563, 580, 582, 604-605; Bui Dep. 14: 12-13.

In short, established precedent exposes the fatal constitutional flaws in Section 48. This Court's review would simply re-apply the same law that the court of appeals already applied correctly. That exercise does not merit certiorari review. *See ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009) (denying Solicitor General's petition seeking review of a court of appeals decision holding the Child Online Protection Act unconstitutional, where the court of appeals simply applied established First Amendment law); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) (denying Solicitor General's petition for review of a decision striking down a prohibition on advertising of casino

gambling on First Amendment grounds where the court of appeals' ruling followed established precedent).

2. The court of appeals' decision not only tracks settled law, but also has limited practical impact for the government.

First, while the government claims (Pet. 23) that Section 48 is an "important part" of its effort to combat animal cruelty, the government's actions do not match its words. To respondent's knowledge, Mr. Stevens is one of only three Section 48 prosecutions ever undertaken in the statute's decade-long life. *See* Gov't Omnibus Response to Pre-Trial Mot. at 6 (Oct. 5, 2004). And even if there have been sporadic additional threats of enforcement, the petition's own failure to advocate the practical prosecutorial utility of this statute is telling. *Cf.* U.S. Cert. Br. 11, *Small v. United States*, No. 03-750, 2004 WL 349912, at *11 (2004) (Solicitor General suggests that review of decision concerning the scope of criminal prohibition could be postponed given the infrequency with which the issue arises).

Second, if the government suddenly decided that it wished to start prosecuting the creators of crush videos – even though it has *never* brought a crush video prosecution under Section 48 – the government remains free to do so in other jurisdictions. Moreover, the Third Circuit itself left open whether a federal law targeted at such images would be constitutional, Pet. App. 10a n.5, so review

is not necessary to protect Congress's legislative prerogative.[4]

Beyond that, the States' own animal-cruelty laws have been used successfully to prosecute the makers of crush videos. *See People v. Thomason*, 101 Cal. Rprt. 2d 247 (App. Ct. 2000); Zachary R. Dowdy, *Around the Island Crime & Courts/Law and Order/Conviction Applauded By Animal Activists*, NEWSDAY, Dec. 19th 2001, at A27 (discussing other successful crush video prosecutions); Tim Nelson, *A 3-Foot Skinny*, ST. PAUL PIONEER PRESS, May 10, 2000, at 1E (Florida prosecution for crush videos).

Third, to the extent that crush videos are deemed to be a patently offensive form of sexual conduct that are "designed to appeal to a prurient interest in sex," Pres. Signing Stmn., 1999 U.S.C.C.A.N. 324, the government may be able to prosecute such images under its general obscenity statute, 18 U.S.C. § 1466 (2006); *see generally Miller*

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[4] Amicus's contention (Br. 10 & n.7) that the Third Circuit's decision has put crush videos "back online" is curious. As evidence, they cite only two clips, and then amicus's own website containing those same two clips. The government, for its part, makes no such claim for review. The statute, after all, remains enforceable in 47 States and all but one federal territory. Nor does amicus explain how a statute that was never enforced at all by the government against crush videos managed to cleanse the Internet by mere dint of its existence, even overseas beyond the federal government's prosecutorial power (Amicus Br. 9-10), when other actively enforced criminal prohibitions have had far more modest success policing the Internet. Instead, the decline in crush videos is better explained in amicus's own words by "heightened scrutiny" by the public, *id.* at 10, something that the court of appeals' decision will not impair.

v. California, 413 U.S. 15, 24-25 (1973). Indeed, in enacting Section 48, Members of Congress never explained nor analyzed why the possession and distribution of crush videos could not be reached by federal obscenity law. Dissenting Members of Congress, however, reasoned that the government could use already existing federal laws to prosecute crush video offenders, H.R. REP. No. 397 at 13, a point the majority never rebutted. *See also United States v. Thomas*, 726 F.2d 1191, 1200 (7th Cir. 1984) (indicating that, perhaps with "expert guidance as to how such violence appeals to the prurient interest of a deviant group," "depictions of torture and deformation" might be considered "obscene").

When, as here, the practical impact of a constitutional ruling invalidating a law is so limited, this Court has denied certiorari. For example, in *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), this Court denied review after the Sixth Circuit held that part of the National Labor Relations Act violated the First Amendment. The Solicitor General himself argued against review on grounds that apply with equal force here, reasoning that "[t]his is a case of first impression and, at least to this point, does not appear to be of recurring significance." U.S. Br. in Opp., *Wilson*, *supra*, at 16 (No. 90-1362). Likewise here, as there, "there is no court of appeals conflict on this issue and, indeed, no other court of appeals decisions on the subject." *Ibid.*[5]

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[5] Respondent was able to identify only two other cases that ever even cited Section 48, neither of which purported to apply it. *See Moore v. Garner*, No. Civ.A.6:04CV79, 2005 WL 1022088

Similarly, in *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997), this Court denied review after the Fifth Circuit struck down the federal Lead Contamination Control Act as unconstitutional. Again, the government itself advocated against review because the decision "had no further practical consequences for the federal effort to address lead contamination in schools." U.S. Br. in Opp., *ACORN*, *supra*, at 9 (No. 96-174). Here as well, the fact that the government itself, for more than a decade, has not employed Section 48 with any frequency indicates that the "practical consequences" for the government's law enforcement interests are not sufficient to merit this Court's review. Should the government suddenly employ Section 48 as an "important" tool, then other courts will address the constitutional question presented here and other opportunities for this Court's review will arise.

3. Finally, as the Solicitor General argued in *Wilson*, *supra*, review of a decision invalidating a statute on constitutional grounds is not warranted when "resolution of the constitutional issues [would] have very little effect on the resolution of the underlying dispute." U.S. Br. in Opp., *Wilson*, *supra*, at 17. That is this case. The multiple infirmities from which this prosecution suffers cannot be cured by this Court's review.

First, apart from its facial invalidity, the statute is also unconstitutional as applied to Mr. Stevens because he did not participate in or even attend the

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(E.D Tex. 2005) (civil case); *People v. Thomason*, 101 Cal. Rptr. 2d 247, 252 n.3 (App. Ct. 2000) (noting enactment of the law).

events he documents and his films have sufficient educational and historic value to merit constitutional protection.

Second, the jury was instructed (with the government's acquiescence) that they could not find that Mr. Stevens' films have "serious" value, for purposes of Section 48's exceptions, unless the films were of "great import." C.A. App. 641, 646-647; U.S. C.A. Br. 49-50. That definition of "serious" far exceeds the permissible grounds of governmental regulation of speech, and thus reinforces the unconstitutionality of Mr. Stevens' conviction. At a minimum, principles of constitutional avoidance would dictate a more speech-protective definition of "serious" value.

Third, beyond its facial invalidity, the statute is unconstitutionally overbroad, prohibiting and chilling a wide swath of protected speech, ranging from pictures of Spanish bullfights to hunting videos. *See* Pet. App. 32a-33a n.16 ("The statute potentially covers a great deal of constitutionally protected speech.").

Finally, Section 48's terms are unconstitutionally vague, a problem compounded by the fact that no other court has had occasion to interpret or apply this statute because the government virtually never uses it. Section 48 requires prospective speakers to forecast not only whether a jury will deem the speech to have "serious" value, but also whether the depiction might transgress any one of more than 50 different definitions of animal cruelty spanning the Nation with less than crystalline delineations of what "animals" are covered (cockroaches, mosquitoes, rats), and what constitutes proscribed "cruelty" in a society that routinely slaughters animals for food,

adornment, and "pest" control, and broadly authorizes the recreational killing of wildlife through hunting. Indeed, even the three dissenting judges acknowledged that "the line between cruelty to animals and acceptable use of animals may be fine." Pet. App. 44a n.21. The First Amendment requires that, when it comes to criminalizing speech, such fine lines must be navigated with a scalpel, not a blunderbuss like Section 48.[6]

In sum, certiorari review on the grounds sought by the government cannot salvage this prosecution or save this statute. For that reason, one court's application of established constitutional law to a statute that has never been analyzed by any other federal court and has virtually never been used by the government does not warrant an exercise of this Court's certiorari jurisdiction.

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[6] Mr. Stevens raised other challenges to his conviction and sentence in the court of appeals that would provide additional bases for reversing the district court judgment on any remand from this Court. *See* Resp. C.A. Br. 72-79, 82-96.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 20, 2009