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

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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The court of appeals took the extraordinary step of invalidating 18 U.S.C. 48 on its face without finding that the statute was substantially overbroad—and indeed, without even considering this question. Moreover, the court of appeals decided the facial challenge without attempting to determine whether the statute is constitutional as applied to respondent's own conduct. The court's invalidation of a statute in all of its applications merely because some applications (and not even the one in this case) would pose constitutional concerns fundamentally misconceives overbreadth doctrine. And the effect of the court's holding was to strip Congress of its authority to regulate depictions of depraved and gruesome criminal acts of animal cruelty. This sweeping invalidation of a federal statute warrants this Court's review.

Respondent suggests that this Court's review is unnecessary because the question presented is not of broad sig-

nificance and because the court of appeals merely applied settled law. Contrary to those contentions, Section 48 is an important part of the longstanding federal and state effort to eradicate depraved acts of animal cruelty. Review is warranted because the decision below invalidates an Act of Congress, because the decision raises a novel question about whether the depictions covered by Section 48 are entitled to constitutional protection, and because the court of appeals wholly failed to apply this Court's settled framework for evaluating facial challenges under the First Amendment. The petition for a writ of certiorari should therefore be granted.

1. The decision below declares an Act of Congress unconstitutional on its face. Pet. App. 25a n.13 (confirming that respondent "brings a facial challenge to the statute"); *id.* at 32a ("[W]e will strike down 18 U.S.C. § 48 as constitutionally infirm."); *id.* at 60a (Cowen, J., dissenting) (agreeing that respondent brought a facial challenge). Respondent agrees with that characterization of the Third Circuit's decision. Br. in Opp. 5 ("The court then ruled that Section 48 is a facially unconstitutional content-based prohibition on speech that violates the First Amendment."); see *id.* at 15, 16.

The court of appeals' decision warrants this Court's review for that reason alone. As this Court recently explained, "[f]acial challenges are disfavored for several reasons": they "often rest on speculation"; they "run contrary to [] fundamental principle[s] of judicial restraint"; and they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). Here, the court of appeals invalidated Section 48 in all of its applications without

even considering whether the case could be decided on an as-applied basis. That decision should not be allowed to stand without plenary review by this Court.

2. Respondent observes (Br. in Opp. 8, 12-15) that this Court does not invariably grant certiorari when an Act of Congress has been declared invalid, and he contends that this case is analogous to prior cases in which the Court has denied review of such a decision. Contrary to respondent's contention, significant differences exist between this case and those on which he relies. Unlike the certiorari petition in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), in which the government "d[id] not ask this Court to take up the underlying constitutional issue," Pet. at 12-13, *Valley Broad. Co.*, *supra* (97-1047), the government's petition in this case squarely raises the constitutional question. And unlike in *ACLU* v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009), in which the Court had passed on the validity of the challenged statute (the Child Online Protection Act) on two prior occasions, see *id.* at 185-186, this Court has never addressed the constitutionality of Section 48.

This Court often has reviewed lower court decisions striking down Acts of Congress even in the absence of an established record of prosecutions under the relevant federal law. Just last Term, this Court granted review and reversed the decision below in *United States* v. *Williams*, 128 S. Ct. 1830 (2008). The Court in *Williams* addressed the constitutionality of a federal statute criminalizing the pandering or solicitation of child pornography using virtual images, even though there was little evidence of prior trafficking in virtual child pornography. *Id.* at 1837; see *id.* at 1856-1858 & n.3 (Souter, J., dissenting).

Similarly, in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), this Court granted review to consider the constitutionality of the Federal Alcohol Administration Act's prohibition on displaying alcohol content on beer labels, even though there was little evidence that beer brewers were competing with one another based on alcohol content. *Id.* at 489-490 & n.4. And in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995), this Court reviewed the federal prohibition on receipt of honoraria by rank-and-file government employees, even though there was no record establishing that receipt of honoraria had regularly caused those employees to misuse or appear to misuse their official positions. *Id.* at 471-472; *id.* at 483 (O'Connor, J., concurring). The Court granted certiorari in *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993), to evaluate the constitutionality of a federal statute prohibiting broadcasting of lottery advertising by broadcasters licensed in States that do not allow lotteries, even though the vast majority of States permitted lotteries. *Id.* at 440-442 (Stevens, J., dissenting). Although no jurisdictional statute currently requires this Court to grant certiorari whenever an Act of Congress has been declared unconstitutional, the Court's usual practice is to grant review in such cases.

3. Contrary to respondent's contention (Br. in Opp. 9), the court of appeals' holding represents a novel resolution of a previously unsettled constitutional issue rather than simply an "application of well-settled First Amendment law." This Court has never considered whether graphic visual depictions of illegal acts of animal cruelty made for commercial gain and lacking serious value enjoy First Amendment protection. And because the depictions at issue share several salient characteristics with types of speech that the Court has held to be unprotected (see Pet.

16-17), the court of appeals' treatment of those depictions as protected speech was scarcely "ordained by this Court's precedent" (Br. in Opp. 9).

The threshold question whether depictions of this character are constitutionally protected has particular significance because the court of appeals made clear that it was "unwilling" to deem the depictions at issue unprotected "without express direction" from this Court. Pet. App. 14a. The court opened its opinion with the observation that this Court "has not recognized a new category of speech that is unprotected by the First Amendment in over twenty-five years." *Id.* at 1a. Its determination that the depictions at issue are entitled to First Amendment protection rested in large part on the fact that the depictions do not fit neatly within any *pre-existing* category of unprotected speech. *Id.* at 9a-27a. Respondent similarly suggests (Br. in Opp. 9-10) that Section 48 is unconstitutional because the harms caused by depictions of animal cruelty are not precisely the same as the harms caused by child pornography. This Court has made clear, however, that whether particular categories of speech are protected under the First Amendment depends on whether "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *New York* v. *Ferber*, 458 U.S. 747, 763-764 (1982). The recognition that the depictions at issue here do not fall into any established category of unprotected speech marks the beginning rather than the end of the constitutional analysis.

The court of appeals erred in affording constitutional protection to the depictions at issue in this case. Section 48's proscription is limited to a narrow class of materials having four distinct characteristics: (1) they are "visual or auditory depiction[s] * * * of conduct in which a living

animal is intentionally maimed, mutilated, tortured, wounded, or killed," 18 U.S.C. 48(c)(1); (2) they show activity that is "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place," *ibid.*; (3) they were "create[d], s[old], or possesse[d] * * * with the intention of placing [them] in interstate or foreign commerce for commercial gain," 18 U.S.C. 48(a); and (4) they do not have "serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. 48(b). Congress determined that, for those depictions, "the harm to be restricted so outweighs the expressive interest, if any, at stake, that the materials may be prohibited as a class." H.R. Rep. No. 397, 106th Cong., 1st Sess. 5 (1999) (*1999 House Report*).

Although the court of appeals rejected that determination, it did not identify any redeeming expressive content in the depictions covered by Section 48. Respondent likewise fails to explain what expressive value inheres in, for example, a video of a pit bull violently ripping out the bottom jaw of a pig or a woman in high-heeled shoes crushing a hamster to death. See Pet. 13-14; see also Pet. App. 60a (Cowen, J., dissenting) (finding it difficult "to imagine the circumstances that would have to coalesce for" material with redeeming social value "to come within the reaches of section 48, especially in light of its exceptions clause").

4. Even if the class of depictions encompassed by Section 48 enjoys constitutional protection, review would be warranted to correct the court of appeals' serious misunderstanding of the showing required to invalidate a statute on its face under the First Amendment. Under established constitutional principles, when a statute reaches both protected and unprotected speech, and a challenger seeks to invalidate the statute on its face under the First Amendment, the challenger is required to establish the statute's

real and substantial overbreadth in relation to its plainly legitimate sweep. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 118-119 (2003); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973). Indeed, this Court reiterated that principle in *United States* v. *Williams*, just two months before the court of appeals issued the decision at issue here. See 128 S. Ct. at 1838. The court of appeals nevertheless failed to conduct any overbreadth analysis before invalidating Section 48 on its face. Instead, it struck down the statute in *all* of its applications because it believed that *some* applications of the statute would not survive strict scrutiny. Pet. App. 27a-32a. The court reached that result even though it acknowledged that other applications of the statute, such as its application to so-called "crush videos," might survive First Amendment review. *Id.* at 10a n.5; see Br. in Opp. 13-14.

That was error. Facial invalidation is "strong medicine" that "is not to be casually employed," and the challenger bears the burden of showing real and substantial overbreadth. *Williams*, 128 S. Ct. at 1838 (internal quotation marks omitted). The court of appeals' rush to invalidate the statute on its face therefore warrants this Court's review. And while respondent is entitled to defend the judgment below on the alternative ground that Section 48 is unconstitutional as applied to his own conduct (see Br. in Opp. 15-17; pp. 8-10, *infra*), the court of appeals did not decide the case on that basis, and its decision effectively precludes the government from enforcing Section 48 within the Third Circuit as to any and all depictions of animal cruelty falling within its scope.

5. Contrary to respondent's suggestion (Br. in Opp. 12-15), the question presented is important, notwithstanding the relative dearth of federal prosecutions that have so far been brought under Section 48, because the statute is part

of the longstanding state and federal effort to prevent depraved acts of animal cruelty. See Pet. 23-25; cf. *Edge Broad. Co.*, 509 U.S. at 421 (reviewing constitutionality of federal statute designed "to assist the States in controlling lotteries"). Although all 50 States and the District of Columbia have enacted laws prohibiting animal cruelty, Congress identified barriers to enforcement of those laws that could be overcome by targeting commercial trafficking in depictions of animal cruelty. Pet. 24-25; see *1999 House Report* 3. Congress further determined that *federal* action was necessary because a significant portion of the trade in depictions of animal cruelty was "through interstate or foreign commerce." *1999 House Report* 3. Although respondent cites (Br. in Opp. 13) isolated instances of successful state prosecutions of animal cruelty, he cannot reasonably dispute the federal government's substantial interest in eradicating animal cruelty, which has been reflected in laws dating back to 1873, as well as in modern-day prohibitions on animal-fighting activities such as the dogfighting that features prominently in respondent's videos. Pet. 23-24.

6. Respondent suggests (Br. in Opp. 15-17) that review is not warranted because his own conviction is susceptible to reversal on other grounds. The court of appeals did not pass on any of those alternative grounds for setting aside the conviction, however, and its decision categorically precludes the government from enforcing Section 48 within the Third Circuit. In any event, respondent's arguments lack merit.

As the petition explains (at 19-20), Section 48 is constitutional as applied to depictions of vicious dogfighting such as respondent's videos. Dogfighting is criminal in every State and has long been regulated by the federal government because of the many harms it causes: injury to the dogs themselves, injury to humans attacked by vicious dogs, in-

creased gambling and other criminal activity, and debilitating effects on public mores. Pet. 20; Humane Soc'y Amicus Br. 10-13. Section 48 directly furthers the government's compelling interests in preventing those harms by drying up the market for videotapes of fights, which are an integral part of the dogfighting enterprise. Humane Soc'y Amicus Br. 14-15. Although respondent asserts that his videos have redeeming societal value, the jury in this case rejected that argument. C.A. App. 641, 675. Respondent's suggestion (Br. in Opp. 15-16) that the jury instructions given at his trial misstated that element of the offense simply underscores the court of appeals' failure to consider potential non-constitutional grounds of decision before striking down the statute in all of its applications. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501-505 (1985); *Broadrick*, 413 U.S. at 615-616.

Respondent's further contention (Br. in Opp. 16) that Section 48 is "unconstitutionally overbroad" is likewise flawed because respondent makes no meaningful effort to analyze the statute under the settled overbreadth framework articulated in this Court's decisions. See pp. 6-7, *supra*. As the government has explained previously, Section 48 is not substantially overbroad because it has any number of constitutional applications, to such materials as crush videos and dogfighting videos. Pet. 19-23. In any event, the possibility that the court of appeals' judgment might be affirmed under a correct articulation and application of overbreadth doctrine provides no basis for this Court to withhold review.

Finally, respondent contends (Br. in Opp. 16-17) that Section 48 is void for vagueness. See Pet. App. 74a-75a. That argument lacks merit. By limiting the statute's coverage to depictions of conduct that violate federal law or the law of the relevant State, Congress sought to define a dis-

crete category of visual or auditory material, identifiable by any person engaging in interstate commerce for commercial gain. That Section 48 incorporates state law to a degree does not mean that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," *Williams*, 128 S. Ct. at 1845, because people are presumed to know the law, see, *e.g.*, *Bryan* v. *United States*, 524 U.S. 184, 193 (1998). Although respondent asserts (Br. in Opp. 16) that state animal-cruelty laws are "less than crystalline," he provides no basis for concluding that such laws as a class are "so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement." *Williams*, 128 S. Ct. at 1845. Unless the particular animal-cruelty law on which respondent's own Section 48 conviction was premised is itself unconstitutionally vague—and respondent does not argue that it is—the purported imprecision of other such laws is irrelevant to the constitutional analysis.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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