No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-63a) is reported at 533 F.3d 218. The decision of the district court denying respondent's motion to dismiss (App., *infra*, 64a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2008. On October 4, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 15, 2008. On November 6, 2008, Justice Souter further extended the

time to and including December 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." Section 48 of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 76a-77a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, respondent was convicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing them in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release. The en banc court of appeals vacated his conviction on the ground that Section 48 is facially unconstitutional. App., *infra*, 1a-63a.

1. In 18 U.S.C. 48, Congress made it a criminal offense to create, sell, or possess certain depictions of animal cruelty in interstate commerce. In particular, Section 48 prohibits "knowingly creat[ing], sell[ing], or possess[ing] a depiction of animal cruelty," done "with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). The statute covers "any visual or auditory depiction * * * in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct "is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." 18 U.S.C. 48(c)(1). The statute specifically exempts any

depiction that "has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b).

Section 48 was designed to stop persons from profiting from the unlawful torture and killing of animals. Congress recognized that, although animals "have long been used, and valued, for their utility," a broad societal consensus exists that animals are entitled to humane treatment. H.R. Rep. No. 397, 106th Cong., 1st Sess. 3-4 (1999) (*1999 House Report*). Laws in all 50 States and the District of Columbia prohibit persons from engaging in acts of animal cruelty, as do various federal laws. *Id.* at 3; App., *infra*, 8a n.4. Those laws are premised on the view that "animals, as living things, are entitled to certain minimal standards of treatment," as well as on the recognition that animal cruelty leads to violence against human victims and erodes public mores. *1999 House Report* 4.

Congress enacted Section 48 after learning of a substantial and growing market for videotapes and photographs depicting the gruesome torture and killing of animals. See *1999 House Report* 2-3. No laws prohibited the production or sale of such depictions, and the States were unlikely to enact such laws because the depictions were "almost exclusively distributed for sale through interstate or foreign commerce." *Id.* at 3. Congress therefore enacted Section 48 to remove the commercial incentives for depictions of animal cruelty and thereby deter the underlying acts. *Id.* at 3-4.

Congress carefully crafted Section 48 to reach only a narrow category of depictions that have no redeeming social value. As enacted, the statute covers only depictions of acts of animal cruelty that are illegal, 18 U.S.C. 48(c)(1), that are created, sold, or possessed for commer-

cial gain, 18 U.S.C. 48(a), and that lack any "serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. 48(b). For those depictions, Congress concluded, "the harm from the continued commercial sale of the material so outweighs the value of the material that it is appropriate to prohibit the creation, sale, or possession of such material in [its] entirety." *1999 House Report* 5.

2. Respondent operated a business called "Dogs of Velvet and Steel" and a website called Putbulllife.com, through which he sold videos of pit bulls participating in dog fights and attacking other animals. App., *infra*, 3a; C.A. App. 467. He advertised those videotapes and other pit bull-related merchandise in *Sporting Dog Journal*, an underground publication that carries the results of illegal dogfights. App., *infra*, 3a; C.A. App. 464.

State law enforcement agents purchased three videos from respondent through the mail. App., *infra*, 3a; C.A. App. 446-452, 458-459. Those videos include scenes of savage and bloody dog fights and of pit bulls viciously attacking other animals. App., *infra*, 3a; C.A. App. 120-121. The videos are narrated by respondent. App., *infra*, 3a. Agents searched respondent's residence pursuant to a warrant and found other videos and dogfighting merchandise, as well as sales records establishing that respondent sold videos throughout the United States and to recipients in foreign countries. *Id.* at 4a; C.A. App. 464-465.

3. Respondent was indicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. App., *infra*, 4a. He moved to dismiss the indictment on the

ground that the statute is facially invalid under the Free Speech Clause of the First Amendment and is void for vagueness under the Due Process Clause of the Fifth Amendment. *Id.* at 4a, 64a.

The district court denied the motion. App., *infra*, 64a-75a. It first determined that Section 48 regulates a narrow category of speech that is not protected by the First Amendment. *Id.* at 65a-71a. The court explained that "[t]he speech prohibited by Section 48 has exceedingly little, if any, social value" because the statute "applies only to the depictions of conduct that would itself be illegal in the state in which the creation, sale, or possession takes place" and that "lack[] serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* at 66a. That minimal value, the court determined, is "greatly outweighed" by the government's compelling interests in "insuring that animals, as living beings, be accorded certain minimal standards of treatment" and in "preventing a criminal from profiting from his or her crime." *Id.* at 67a, 69a, 71a.

In the district court's view, Section 48 is "akin to laws prohibiting possession and distribution of child pornography," because "all fifty states have enacted laws prohibiting animal cruelty"; "the distribution of depictions of animal cruelty is intrinsically related to the underlying conduct"; "the creation, sale, or possession of depictions of animal cruelty for profit provides an economic incentive for such conduct"; and "the value of the depictions * * * is de minimis at best." App., *infra*, 70a-71a.

The court then rejected respondent's overbreadth and vagueness claims. App., *infra*, 71a-75a. As relevant here, it determined that Section 48 is not substantially overbroad because it applies only to depictions of cruelty

to live animals that are illegal and lack societal value. *Id.* at 72a-73a.

A jury found respondent guilty on all counts, and the district court sentenced him to concurrent sentences of 37 months of imprisonment on each count, to be followed by three years of supervised release. App., *infra*, 4a; Judgment 1-4.

4. Respondent appealed. After the case was argued to a three-judge panel, the court of appeals sua sponte set the case for en banc argument.

a. The en banc court of appeals vacated respondent's conviction. App., *infra*, 1a-63a. The court first rejected Congress's view that the depictions at issue are so valueless that they lack First Amendment protection. *Id.* at 7a. Although the court recognized that the existing categories of unprotected speech may be supplemented, *id.* at 10a, it was "unwilling" to do so based on the rationales offered in this case "without express direction" from this Court, *id.* at 14a.

The court rejected a proposed analogy to child pornography. It acknowledged that, as with child pornography, all 50 States have laws prohibiting animal cruelty, and animal cruelty offenses are often difficult to prosecute because of their clandestine nature. App., *infra*, 6a, 8a-9a & n.4. But it decided that the government's interest in preventing animal cruelty is not compelling because it is not "of the same magnitude as protecting children," *id.* at 18a-19a, and it rejected Congress's conclusion that animal cruelty often leads to human violence, *id.* at 22a. The court also observed that, unlike with child pornography, there is no continuing harm to animals after a depiction of animal cruelty is captured on film. *Id.* at 22a-23a. Finally, the court stated that "[t]he exceptions clause cannot on its own constitutionalize

§ 48" by exempting speech with any serious social value. *Id.* at 25a-26a.

The court then applied strict scrutiny and invalidated the statute on its face. App., *infra*, 27a-32a. It presumed that the statute was invalid because it is a content-based restriction on speech. *Id.* at 27a. It then repeated its view that the government's interests are not compelling, *id.* at 28a, and stated that the statute does not further those interests because Section 48 merely "aid[s] in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime," *id.* at 29a. The court also decided that the statute is underinclusive, because it does not criminalize depictions of animal cruelty made for personal use, *id.* at 29a-30a, and overinclusive, because it covers depictions sold in places where the underlying conduct is illegal but made in places where the underlying conduct is legal, *id.* at 30a. The court then observed, in a footnote, that the statute "might also be unconstitutionally overbroad," but it decided to "rest [its] analysis on strict scrutiny grounds alone" because "voiding a statute on overbeadth grounds is 'strong medicine.'" *Id.* at 32a-34a n.16 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

b. Three judges dissented. App., *infra*, 34a-63a (Cowen, J., dissenting). They observed that Section 48 regulates only a "narrow subclass" of depictions of "depraved acts committed against an uniquely vulnerable and helpless class of victims." *Id.* at 57a. In their view, the First Amendment does not protect those depictions, because the governmental interests in preventing animal cruelty are compelling, *id.* at 38a-47a, and the depictions are "no essential part of any exposition of ideas," *id.* at 49a (internal quotation marks and citation omitted).

The dissenting judges traced the long history of state and federal laws prohibiting animal cruelty, App., *infra*, 39a-40a (Cowen, J., dissenting), and observed that those laws are "powerful evidence of the importance of the governmental interest at stake," *id.* at 41a. They also noted the longstanding and widespread belief that "cruelty to animals is a form of antisocial behavior that erodes public mores and can have a deleterious effect on the individual inflicting the harm." *Id.* at 42a.

The dissenting judges determined that the depictions covered by Section 48 have "little or no social value," both because "depictions of animals being intentionally tortured and killed" generally appeal only to "those with a morbid fascination with suffering," and because the statute's exceptions clause "circumscribe[s] the scope of [the] regulation to only this category's plainly unprotected portions." App., *infra*, 47a-49a (Cowen, J., dissenting). And they analogized the depictions at issue to child pornography, noting that the depictions are "intrinsically related" to the underlying criminal acts, *id.* at 51a; that the "harms suffered by abused animals * * * extend far beyond that directly resulting from the single abusive act depicted," *id.* at 52a; that the statute was designed to dry up the "lucrative market for depictions of animal cruelty," *id.* at 53a-55a; and that, because of the statute's exceptions clause, "there is simply no potential that [it] will reach any work that plays an important role in the world of ideas," *id.* at 56a.

Finally, the dissenting judges also concluded that the statute is neither substantially overbroad nor impermissibly vague. App., *infra*, 57a-63a (Cowen, J., dissenting). They determined that respondent failed to demonstrate substantial overbreadth "relative to the statute's plainly legitimate sweep," *id.* at 58a (citation omitted),

and concluded that any depictions that might have redeeming value should be addressed "through case-by-case analysis," *id.* at 61a (citation omitted).

REASONS FOR GRANTING THE PETITION

The court of appeals, sitting en banc, ruled that 18 U.S.C. 48 is facially unconstitutional. That holding is both incorrect and warrants this Court's review. Congress crafted Section 48 to apply only to a narrow and particularly harmful class of speech: depictions of unlawful acts of animal cruelty, done for commercial gain, that have no serious societal value. Like other forms of unprotected speech, such as child pornography, depictions of the intentional infliction of suffering on vulnerable creatures play no essential role in the expression of ideas. Indeed, Section 48 explicitly exempts any depictions with serious societal value. And Congress has compelling reasons to regulate the depictions at issue, because, in addition to requiring harm to animals, the depictions debase the persons who seek to profit commercially from them, lead to other crimes, and erode public mores. Congress therefore reasonably concluded that "the harm to be restricted so outweighs the expressive interest, if any, at stake, that the materials may be prohibited as a class" consistent with the First Amendment. *1999 House Report* 5.

Even if the statute reached any protected speech, the court of appeals erred in striking down the statute on its face. That is because at least a significant class of depictions covered by Section 48—including dogfighting videos and so-called "crush videos"—may be prohibited consistent with the First Amendment. And even if, despite the exceptions clause, the statute reached some protected speech, that speech would be minimal in relation to the statute's plainly legitimate sweep and would

not justify the most severe step of invalidating an Act of Congress on its face.

The question presented is important. Section 48 is a vital measure in the federal government's ongoing efforts to prevent acts of animal cruelty. Laws prohibiting the wanton torture and killing of animals date back to the earliest days of this Nation, and all 50 States, the District of Columbia, and the federal government now have such laws. As the dissenting judges in the court of appeals explained, that "expansive regulatory framework * * * developed by state and federal legislators" to address the problem of animal cruelty demonstrates the importance of the government's interests in regulating depictions of animal cruelty. App., *infra*, 38a (Cowen, J., dissenting). Section 48 fills a significant gap in state and federal law enforcement efforts by targeting the commercial production and distribution of depictions of animal cruelty in order to dry up the market for such depictions and deter the underlying acts. The court of appeals' nullification of those efforts and invalidation of the Act at issue on its face warrants this Court's review.

I. THE COURT OF APPEALS' INVALIDATION OF AN ACT OF CONGRESS WARRANTS THIS COURT'S REVIEW

Review by this Court is warranted because the en banc court of appeals has invalidated an Act of Congress on its face. App., *infra*, 25a n.13 (confirming that respondent "brings a facial challenge to the statute"); *id.* at 33a ("[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).

Any decision invalidating an Act of Congress on constitutional grounds is significant. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (noting that judging the constitutionality of an Act of Congress is "the gravest and

most delicate duty that this Court is called upon to perform") (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). This Court has often reviewed holdings that a federal law is invalid under the First Amendment. See, *e.g.*, *United States* v. *Williams*, 128 S. Ct. 1830 (2008); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001). This case equally warrants review. Section 48 is an important part of the longstanding state and federal efforts to prevent brutal and depraved acts of animal cruelty. See pp. 23-24, *infra*. Section 48 supplements those efforts in an important respect by targeting the substantial interstate market for depictions of the torture and wanton killing of live animals. The court of appeals' decision fundamentally undermines Congress's effort to assist the States in stopping a unique and reprehensible type of criminal acts. A decision that strips Congress of that authority under the Constitution deserves this Court's immediate review.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT SECTION 48 IS FACIALLY UNCONSTITUTIONAL

A. Section 48 Captures No Protected Speech

This Court has long recognized that "certain well-defined and narrowly limited classes of speech" are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that they may be regulated based on their content consistent with the First Amendment. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942); see *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383-384 (1992). Those categories include fighting words, *Chaplinsky*, 315 U.S. at 572; speech inciting imminent lawless activity, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam); certain types of defamation, *Beauharnais* v. *Illinois*, 343 U.S. 250, 266

(1952); obscenity, *Roth* v. *United States*, 354 U.S. 476, 485 (1957); child pornography, *New York* v. *Ferber*, 458 U.S. 747, 754-763 (1982); and offers or solicitations to engage in illegal activity, *Williams*, 128 S. Ct. at 1841-1842. For each of those categories, "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." *Ferber*, 458 U.S. at 763-764.

Congress made that same judgment here. Citing this Court's unprotected-speech precedents, Congress indicated that Section 48 was "narrowly drawn" to reach only those depictions for which "the harm to be restricted so outweighs the expressive interest, if any, at stake, that the materials may be prohibited as a class." *1999 House Report* 4-5.

The court of appeals erred in rejecting Congress's judgment. Graphic depictions of the torture and maiming of animals, like each of the other types of speech this Court has deemed unprotected, have little or no expressive content or other redeeming societal value, and Congress has compelling reasons for prohibiting them.

1. The images of animal cruelty covered by Section 48 do not have any redeeming expressive content. Tellingly, the court of appeals made no effort to explain what value they have.

Four features of the statute ensure that its reach is narrowly circumscribed to encompass only depictions that have profound social harms, while having little or no expressive value. First, the statute covers only those depictions in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 18 U.S.C. 48(c)(1). Second, all of the depictions covered by the statute depict activity that is "illegal under Federal

law or the law of the State in which the creation, sale, or possession takes place." 18 U.S.C. 48(c)(1). Third, Section 48 encompasses only those images "create[d], s[old], or possesse[d]" for "commercial gain." 18 U.S.C. 48(a). Fourth, Congress expressly exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b).[1]

Among the types of depictions targeted by the statute are "crush videos," which are designed to "appeal to persons with a very specific sexual fetish." *1999 House Report* 2; 145 Cong. Rec. 10,685 (1999) (statement of Rep. Gallegly). In those videos, "women inflict[] * * * torture [on small animals] with their bare feet or while wearing high heeled shoes," while "talking to the animals in a kind of dominatrix patter" and listening to the animals "cr[y] and squeal[] * * * in great pain." *1999 House Report* 2. Although those videos typically utilize "mice, hamsters, and other small animals," Congress noted evidence of videos involving "dogs, cats, and even monkeys," as well as videos "ma[de] * * * to order, in whatever manner the customer wished to see the animal tortured and killed." *Id.* at 2-3.

The videos at issue here are also illustrative of the material encompassed within the statute. They include

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[1] The exceptions clause designates an element of the Section 48 offense, rather than an affirmative defense, so that the statute does not "impose on the defendant the burden of proving his speech is not unlawful." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 255 (2002). The government took that view at respondent's trial and established the videos' lack of serious value in its case in chief. See C.A. App. 131 n.4, 649-650. To the extent the exceptions clause is ambiguous, it should be interpreted as an element of a Section 48 offense in order to avoid the serious constitutional questions that might otherwise arise. See App., *infra*, 72a-73a; see, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (constitutional avoidance canon).

footage of pit bulls fighting in an enclosed pit with blood on the floor and the walls. The dogs are "bitten, ripped, and torn," noticeably fatigued, and "screaming in pain." C.A. App. 511-514 (testimony of expert witness in veterinary medicine). In addition to illegal dogfighting, the videos depict "gruesome" images of a pit bull attacking a pig. App., *infra*, 3a. The pig is in "a great deal of pain and stress" and its "bottom jaw [i]s pretty much removed." C.A. App. 546 (testimony of hog industry executive); see *id.* at 547 (noting that, despite his many years in the hog industry, he had never before seen a pig attacked in such a manner).

Those examples illustrate that any speech reached by the statute is nowhere near the "free dissemination of ideas of social and political significance" that lies at the core of the First Amendment. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). Indeed, those images at issue do not evidence any "intent[] * * * to express an idea" at all. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). Congress reasonably concluded that "no reasonable person would find any redeeming value in" those depictions. *1999 House Report* 5.

2. The court of appeals erred in determining that the governmental interests furthered by Section 48 do not outweigh the minimal value of the depictions. As the court of appeals acknowledged, all 50 States and the District of Columbia have laws prohibiting animal cruelty. App., *infra*, 8a n.4 (citing statutes); see pp. 23-24, *infra*. Those laws confirm the importance of the government's interests in eradicating animal cruelty. See *Ferber*, 458 U.S. at 757-758 (fact that "virtually all of the States and the United States have passed legislation" banning child pornography demonstrates "a government objective of surpassing importance"); see also *Simon &*

Schuster, Inc. v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). And those laws reflect the societal consensus that animals, as living beings, are entitled to certain minimal levels of treatment. *1999 House Report* 4.

The court of appeals erred in discounting the government's interest in eradicating animal cruelty as supporting the limited ban on depictions in Section 48. The court observed that animal cruelty "does not implicate interests of the same magnitude as protecting children from physical and psychological harm." App., *infra*, 19a. But society's understandably greater concern for children than for animals in no way detracts from the fact that the abuse of both is "so antisocial that it has been made criminal." *Williams*, 128 S. Ct. at 1838.[2]

The court also erred in failing to acknowledge the numerous harms to humans that follow from illegal acts of animal cruelty, and the consequent interests in banning commercial sale of depictions of animal cruelty. It discounted the substantial body of research "which suggests that humans who kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals." *1999 House Report* 4; see Humane Soc'y C.A. Amicus Br. 4 & n.10 (citing various studies). And it overlooked the fact that organized acts of animal cruelty, such as dogfights,

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[2] The court of appeals also incorrectly believed that *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), holds that preventing cruelty to animals is not a compelling interest. See App., *infra*, 15a-16a. The *Lukumi* Court did not hold that the city's interest in preventing animal cruelty can never be compelling; rather, it faulted the city for "restrict[ing] only conduct protected by the First Amendment" rather than enacting a generally applicable animal cruelty law. 508 U.S. at 546-547; see *id.* at 580 (Blackmun, J., concurring in the judgment).

encourage other crimes and pose serious risks to the public. Dogs bred and trained to kill pose an acute public safety risk, and dogfighting is part of an underground criminal subculture that includes gang activity, drug-dealing, and illegal gambling. See Humane Soc'y C.A. Amicus Br. 5-11; H.R. Rep. No. 801, 94th Cong., 2d Sess. 9 (1976) (*1976 House Report*); Jamey Medlin, Comment, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DePaul L. Rev. 1285, 1304 (2007).

Section 48 also furthers the substantial interest in preventing the erosion of public mores. Cruelty to animals "is a form of antisocial behavior" that has no place in a civilized society. App., *infra*, 42a (Cowen, J., dissenting). Animal cruelty laws, in particular, have long been justified as prohibiting "offense[s] * * * against the public morals." *Commonwealth* v. *Turner*, 14 N.E. 130, 132 (Mass. 1887); see, *e.g.*, *Waters* v. *People*, 46 P. 112, 113 (Colo. 1896); *Johnson* v. *State*, 36 Tenn. (4 Sneed) 614, 621-622 (1857); see *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment) (noting that "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered * * * immoral," and providing "cockfighting" as an example of such an activity).

3. The depictions of animal cruelty at issue here share several salient characteristics with other types of unprotected speech. Those similarities confirm that the depictions covered by Section 48 do not enjoy First Amendment protection.

Like obscenity, the depictions "offend[] the sensibilities" of most citizens and have appeal only at the most base level. *Miller* v. *California*, 413 U.S. 15, 18-19 (1973). Like child pornography, there is a widespread

consensus that the underlying acts are reprehensible, see *Ferber*, 458 U.S. at 757-758; depictions of animal cruelty are premised on the commission of a crime, *id.* at 759; the commercial market for depictions of animal cruelty "provide[s] an economic motive for" production of such materials, *id.* at 761; and the value of the depictions is "exceedingly modest, if not *de minimis*," *id.* at 762. And like the offers to engage in illegal transactions at issue in *Williams*, depictions of illegal acts of animal cruelty may be prohibited because they "have no social value" and because they are premised on an illegal act. See 128 S. Ct. at 1841-1842; see also, *e.g.*, *Simon & Schuster, Inc.*, 502 U.S. at 119 ("The State * * * has an undisputed compelling interest in ensuring that criminals do not profit from their crimes.").

In short, the depictions of animal cruelty regulated in Section 48 are unworthy of First Amendment protection because of their overwhelming lack of value relative to the myriad harms associated with them.

B. Section 48 Is Not Substantially Overbroad

Even if this Court believes that Section 48 covers some protected speech, the court of appeals' facial invalidation of the statute would still be incorrect and would still warrant review. After rejecting the argument that the depictions covered by Section 48 are wholly unprotected under the First Amendment, the court of appeals applied strict scrutiny and held the statute facially unconstitutional. The court thus concluded that *none* of the depictions prohibited by Section 48 could be reached based on the government interests asserted. But that was error, because, at a minimum, a significant class of depictions prohibited by Section 48 can be constitutionally proscribed. Respondent's burden in that situation, in order to establish facial invalidity, is to show that the

statute is substantially overbroad. That burden was not carried here.

1. Because Section 48 is a content-based regulation of speech, to the extent that it reaches speech that is not categorically unprotected, see pp. 11-17, *supra*, the law is subject to judicial scrutiny to ensure that it does not unduly restrict free expression. Normally, strict scrutiny applies to content-based regulations of speech, requiring the government to justify the regulation. See, *e.g.*, *United States* v. *Playboy Enter. Group, Inc.*, 529 U.S. 803, 813, 816-817 (2000). Where a statute reaches both unprotected and arguably protected speech, however, and a challenger seeks to invalidate the law on its face, *i.e.*, in all applications, the challenger must carry the burden of establishing real and substantial overbreadth. See, *e.g.*, *Williams*, 128 S. Ct. at 1838; *Virginia* v. *Hicks*, 539 U.S. 113, 118-119 (2003); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973). The overbreadth doctrine balances a law's potential to chill protected speech with the "obvious harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional." *Williams*, 128 S. Ct. at 1838. To ensure that invalidation for overbreadth is not "casually employed," *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999), this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," *Williams*, 128 S. Ct. at 1838.

2. In this case, respondent brought a facial challenge to Section 48, see, *e.g.*, App., *infra*, 25a n.13, and the court of appeals, applying strict scrutiny, found it facially invalid. But even applying strict scrutiny, many of the applications of Section 48 are clearly valid.

As discussed above, see pp. 14-16, *supra*, the government has three central interests that support Section 48. First, the law serves to reinforce the prohibitions against animal cruelty in all 50 States and in federal law by removing a financial incentive to engage in that egregious and illegal conduct. That interest in drying up the commercial market for the depraved depictions at issue is enhanced because of the difficulties of direct enforcement of animal cruelty laws. Second, the government has an interest in preventing the additional criminal conduct that is associated with gruesome images of the torture and mutilation of animals. Third, the government has a moral interest in suppressing depictions that have no social value and that are created solely to depict suffering by animals. As the dissenters concluded, those interests are compelling. App., *infra*, 38a-45a (Cowen, J., dissenting). Section 48 is narrowly tailored to further those interests in many, if not all, of its applications.[3]

For example, Section 48 is plainly constitutional as applied to respondent's videos and similar depictions of animal fighting. Congress has long prohibited ani-

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[3] In *Free Speech Coalition*, this Court stated that "[t]he prospect of crime * * * does not justify laws suppressing protected speech," 535 U.S. at 245, but that principle is not applicable here because Section 48 does not cover depictions that raise the mere "prospect" of a future crime; an illegal act of animal abuse is an essential prerequisite under the statute. 18 U.S.C. 48(c)(1); see pp. 13, 17, *supra*. The Court's statement that "speech may not be prohibited because it concerns subjects offending our sensibilities," 535 U.S. at 245, likewise does not call Section 48 into question, because the statute does not regulate the depictions simply because they are offensive. Instead, the statute regulates the depictions because of deep-seated values of our culture and the additional harms to animals and harms to humans that follow from them.

mal-fighting ventures in interstate commerce, and it strengthened that prohibition in recent years in response to growing societal concern about the specific problem of dogfighting. See pp. 23-24, *infra*. Dogfighting is not only criminal in every State, see p. 24, *infra*, but it is a felony in all but two States, see Humane Soc'y C.A. Amicus Br. 7-8 & n.17 (citing state statutes); *id.* at 1 ("Dogfighting is one of the most violent and depraved acts that persists in our society.").

Those laws are powerful evidence of the importance of the government's interests in preventing dogfighting. See *Ferber*, 458 U.S. at 757-758. Those interests include preventing grotesque harms to the dogs before, during, and after fights; the interest in stopping the evils that often accompany live dogfights, such as gang activity, drug dealing, and gambling; avoiding the significant public safety risk posed by dogs that are trained to kill; and enforcing contemporary standards of decency. See pp. 14-16, *supra*; see also *1976 House Report* 9 (concluding that "the practice of dog fighting, and the setting of one dog upon another or upon other animals as bait, etc, in the training of dogs for fighting [is] dehumanizing, abhorrent, and utterly without redeeming social value"); Humane Soc'y C.A. Amicus Br. 2-3 (explaining that "animals forced to participate in dog fighting are tormented and brutalized for their entire lives" and "[d]ogs that don't show enough blood lust are routinely executed in sadistic ways such as drowning, hanging, or being set on fire"). Section 48's prohibition on the commercial trade in depictions of dogfights furthers those interests by deterring persons from participating in dogfighting enterprises.

Section 48 is narrowly tailored to serve the government's numerous compelling interests. Dogfighting

rings are extremely difficult to detect and infiltrate; organizers typically keep the locations of fights secret until the last minute, screen potential spectators before admitting them to the event, and rarely use their real names. See James C. McKinley, Jr., *Dogfighting Subculture, Illegal and Secretive, Is Taking Hold in Texas*, N.Y. Times, Dec. 7, 2008, at A29. As a result, it is difficult for law enforcement officials to prosecute directly those who train dogs for fights and participate in fights as handlers. See Humane Soc'y C.A. Amicus Br. 9-10. And drying up the market for videos of fights is an effective way to reach the underlying conduct, because dogfighting generates significant revenues from videotapes of fights. Dogfights are routinely videotaped to produce "training" videos for other handlers and to document a dog's fights, because a dog that prevails in five fights generates greater revenues at live events. See *id.* at 10-11; see also App., *infra*, 55a n.26 (Cowen, J., dissenting). Targeting distributors of videos, rather than the persons portrayed in the videos, is necessary to stamp out animal cruelty, because it is often difficult to identify the persons or places depicted in the videos. See, *e.g.*, App., *infra*, 54a (Cowen, J., dissenting) (noting that in the videos at issue here, respondent "purposefully edited out the faces of the handlers involved in the fights occurring in the United States").

Section 48 is also plainly constitutional with respect to crush videos. The only appeal of such videos is to "persons with a very specific sexual fetish who find" the portrayal of pain and suffering "sexually arousing." *1999 House Report* 2-3. As the dissenting judges in the court of appeals explained, such videos have little or no social value because their only possible appeal is "to those with a morbid fascination with suffering." App.,

infra, 48a (Cowen, J., dissenting). Moreover, the government has a surpassing interest in preventing the acts of animal cruelty necessary to create them. See pp. 14-16, *supra*.

And Section 48 is narrowly tailored to further those compelling governmental interests. As the dissenting judges in the court of appeals explained, the "police struggle to prosecute those involved in crush videos because the videos are generally created by a bare-boned, clandestine staff; the woman doing the crushing is filmed in a manner that shields her identity, and the location of the action is imperceptible." App., *infra*, 53a (Cowen, J., dissenting); see *1999 House Report* 3. A prohibition on the interstate trade in such videos is therefore a necessary supplement to the state and federal laws that prohibit the conduct depicted. *1999 House Report* 3. And because crush videos are often "ma[d]e * * * to order, in whatever manner the customer wished to see the animals tortured and killed," *ibid.*, prohibiting the trade in such videos directly prevents the underlying acts of animal cruelty.

3. In light of those examples of valid applications of Section 48, the statute could not be found invalid even if some hypothetical applications of the statute were constitutionally vulnerable. See *Hicks*, 539 U.S. at 122 ("The overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists.") (internal quotation marks and citation omitted; alteration in original). Here, even if the court of appeals correctly identified some hypothetical situations that could be problematic, App., *infra*, 32a-33a n.16, that would not come close to satisfying respondent's burden to justify facial invalidation. Because of the statute's exceptions clause for de-

pictions that have value, which requires the government to show an absence of value as an element of its proof, see note 1, *supra*, it is extremely unlikely that the statute reaches any materials where the interest in free expression outweighs the government's compelling interests furthered by Section 48, see App., *infra*. at 60a (Cowen, J., dissenting) (finding it difficult "to imagine the circumstances that would have to coalesce for such a video to come within the reaches of section 48, especially in light of its exceptions clause"). But even if there are any depictions that would raise constitutional concerns, the proper course is to assess those concerns "through case-by-case analysis of the fact situations" at issue. *Broadrick*, 413 U.S. at 615-616; see *Crawford* v. *Marion County Election Bd.*, 128 S. Ct. 1610, 1621-1623 (2008); *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-331 (2006). The court of appeals' decision to instead invalidate Section 48 in all its applications was error.

III. THE QUESTION PRESENTED IS IMPORTANT

Section 48 is an important part of Congress's and the States' ongoing efforts to eradicate despicable acts of animal cruelty. All 50 States and the District of Columbia have enacted prohibitions on animal cruelty. App., *infra*, 8a n.4 (citing statutes). Those prohibitions are deeply ingrained in our culture and laws: animal cruelty laws were first enacted in the United States during the colonial period, and every State had a law prohibiting animal cruelty by 1913. *Id.* at 39a (Cowen, J., dissenting). The first federal animal cruelty law was enacted in 1873,[4] and Congress has repeatedly acted to prohibit the

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[4] See Act of Mar. 3, 1873, ch. 252, 17 Stat. 584 (codified as amended at 49 U.S.C. 80502) (animals being transported may not be confined for

mistreatment of animals.[5] Dogfighting, the specific conduct at issue here, is illegal in all 50 States and the District of Columbia, see Humane Soc'y C.A. Amicus Br. 7-8 & n.17 (citing statutes), and has been prohibited by federal law since 1976.[6] In 2007 and 2008, Congress twice strengthened the penalties for persons who engage in animal-fighting ventures such as dogfighting.[7]

Congress passed Section 48 in order to supplement the States' efforts to eradicate animal cruelty. See *1999 House Report* 3. By barring trade in depictions of animal cruelty, Congress sought to deter the underlying crimes, which Congress and the States had already concluded have no place in a civilized society. See *id.* at 3-4; *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House*

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more than 28 consecutive hours without unloading for feeding, water, and rest).

[5] See, *e.g.*, 7 U.S.C. 1901, 1902 (ensuring humane methods for slaughtering of livestock); 7 U.S.C. 2131 (ensuring humane handling of animals for sale in interstate commerce and for use at government research facilities); 7 U.S.C. 2142 (ensuring humane treatment of animals for purchase and sale at auction); 7 U.S.C. 2156 (prohibiting animal-fighting ventures); 7 U.S.C. 2158 (protecting pets in pounds and shelters); 15 U.S.C. 1821 *et seq.* (preventing cruel and inhumane practice of "soring" horses); 16 U.S.C. 1331 *et seq.* (protecting free-roaming horses and burros from capture, branding, mistreatment, and death).

[6] See Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 421 (codified at 7 U.S.C. 2156) (prohibiting animal-fighting ventures in interstate commerce).

[7] See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. 2223; Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

Comm. on the Judiciary, 106th Cong., 1st Sess. 6 (1999) (statement of Rep. Scott).

Congress chose to prohibit trade in depictions of animal cruelty in order to overcome the barriers to enforcement of state and federal anti-cruelty laws, such as difficulties in identifying the perpetrators and locations of acts of animal cruelty. See *1999 House Report* 3 ("The statute is intended to augment * * * State animal cruelty laws by addressing behavior that may be outside the jurisdiction of the States, as a matter of law, and appears often beyond the reach of their law enforcement officials, as a practical matter."); see also *Ferber*, 458 U.S. at 759-760 (Congress may target the "visible apparatus of distribution" in order to stop abuse that is "difficult, if not impossible, to halt" solely through laws prohibiting abuse). And, at a minimum, Congress's choice was reasonable in light of the growing demand for such depictions and the fact that the depictions are "almost exclusively distributed for sale through interstate or foreign commerce." *1999 House Report* 3.

Because the court of appeals' decision nullifies an important Act of Congress designed to assist the States in addressing the serious nationwide problem of animal cruelty, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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