No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law ("the Center") is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention to how prosecutors actually exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center's litigation program aims to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts, at all levels. The Center focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues.

The Center files this *amicus* brief out of concern that the Third Circuit's facial invalidation of 18 U.S.C. 48 overlooked important aspects of the ethical practice of prosecutorial discretion. While the

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[1] Respondent has filed a blanket consent to the participation of *amicus curiae* with the Court. Pursuant to Rule 37.3(a), a copy of petitioner's consent to the filing of this brief has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Center is concerned with the potential harms that attend unfettered prosecutorial discretion, the Center also has an interest in defending exercises of prosecutorial or governmental discretion from unfounded criticism, when — as here — the discretionary decisions comport with applicable law and standard practices and are consistent with law enforcement priorities.

STATEMENT

Section 48 of title 18 of the United States Code provides in pertinent part:

> (a) Creation, Sale, or Possession. — Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.
>
> (b) Exception. — Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.
>
> (c) Definitions. — In this section —
>
> (1) the term "depiction of animal cruelty" means 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, if such conduct is illegal under Federal law or 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 * * *

Although Section 48 was enacted in 1999, this case involves the first prosecution under that section that has proceeded to trial. Pet. App. 4a; Pub. L. 106-152, § 1(a), Dec. 9, 1999, 113 Stat. 1732. A jury found respondent guilty of three counts of knowingly selling depictions of animal cruelty with the intent to place those depictions in interstate commerce for commercial gain. Pet. App. 4a. The Third Circuit, sitting *en banc* and over the dissent of three of its members, held that Section 48 violates the First Amendment on its face. Pet. App. 32a, 34a.

1. The United States and all 50 states and the District of Columbia criminalize acts of animal cruelty. Pet. App. 8a-9a n.4. All classify dogfighting as a felony. *See* Br. of *Amicus Curiae* Humane Society in Support of Pet. for Cert. 5 & n.5. Even knowing attendance at a dogfight is criminalized in 48 states. *Id.* 5-6 & n.6. Section 48 is one plank of the federal government's effort to eliminate animal cruelty and the harmful effects of animal cruelty on humans. *See also, e.g.*, 7 U.S.C. 2156 (prohibiting animal fighting ventures). Congress enacted Section 48 upon becoming aware of a "growing market in videotapes and still photographs depicting" acts of animal cruelty. H.R. Rep. No. 397, 106th Cong., 1st Sess. (1999), at 2. Unlike statues outlawing the possession of child pornography, Section 48 does not

prohibit the simple possession of any material. Rather, Section 48 prohibits commerce (including possession with intent to distribute) in a "limited class of material," *id.*, including video and photographic (but not written) depictions where the activity depicted is unlawful and the depictions lack all "serious" artistic or other value.

2. Respondent sold videos of pit bulls engaging in violent dogfights and attacks on other animals. Pet. App. 3a. He operated a business trafficking in such videos, ran a website to promote the videos, and otherwise promoted his videos through an underground dogfighting publication. *Id.* A grand jury indicted respondent on three counts of knowingly selling depictions of unlawful animal cruelty in interstate commerce for commercial gain in violation of 18 U.S.C. 48. Pet. App. 4a.

Respondent moved to dismiss the indictment on the ground that Section 48 was facially unconstitutional under the free speech clause of the First Amendment. Pet. App. 4a, 64a. The district court denied respondent's motion. *Id.* 65a-71a. The court concluded that the speech prohibited by Section 48 fell into a narrow category not protected by the First Amendment. Pet. App. 66a, 67a, 69a, 71a. The court also rejected respondent's claims that Section 48 was unconstitutionally overbroad and vague. Pet. App. 72a-73a. Respondent proceeded to trial, was convicted on all counts, and was sentenced to (*inter alia*) 37 months of imprisonment. Pet. App. 4a.

3. The Third Circuit, acting *sua sponte*, sat en banc to hear respondent's appeal. Pet. 6. Respondent's appeal challenged Section 48 on its

face, and the court below recognized that it was confronted with a facial challenge. Pet. App. 25a n.13, 32a. A majority of the court held that Section 48 was facially unconstitutional and vacated respondent's sentence. Pet. App. 32a, 34a. The court explicitly declined to engage in First Amendment overbreadth analysis, terming invalidation on overbreadth grounds "strong medicine," and instead based its conclusion of facial invalidity on its findings that Section 48 regulates protected speech based on content and that it could not survive strict scrutiny. Pet. App. 32a-34a n.16.

Three judges dissented. Pet. App. 38a-47a. The dissent's analysis emphasized that the speech prohibited by Section 48 is "intrinsically related to the underlying crime of animal cruelty, most clearly because its creation is also predicated on a violation of criminal law." Pet. App. 51a. Critical to the dissent's conclusion was the "economic motive driving the production of depictions" of animal torture and cruelty. Pet. App. 55a. The dissent noted that a significant commercial market exists for depictions of animal cruelty and explained that the government's interest in Section 48 is therefore unusually great, because "no commercial market exists for depictions of run-of-the-mill criminal activities." Pet. App. 56a.

SUMMARY OF THE ARGUMENT

The Third Circuit erroneously concluded that upholding Section 48 would require the creation of a new category of speech unprotected by the First Amendment. Congress narrowly drafted Section 48 to reach only what amounts to crime-scene

photographs and videos that are exploited for commercial gain and lack any serious artistic or other value. This Court has long recognized that speech that furthers, proposes, or abets criminal activity is without First Amendment protection. If there were a large commercial market for depictions of criminal violence against humans (like so-called "snuff films" depicting murders) and if Congress found that the commercial exploitation of such depictions encouraged the underlying crimes, Congress surely would not hesitate to ban that commercial exploitation. And just as surely the First Amendment would not immunize the knowing sale of murder videos lacking any serious artistic or other value. The court below viewed Section 48 as an unprecedented prohibition of otherwise-protected speech that would require the invocation of a new category of unprotected speech to uphold. But, in reality, the only anomaly here is that a large commercial market has developed in the trafficking of the particular type of videos that Section 48 targets (and not for other types of crime-scene videos). Congress is not disabled from combating that commercial market, and upholding Congress' action does not require any innovation in First Amendment doctrine, but only the application of long-established principles to an anomalous market.

The Third Circuit's facial invalidation of Section 48 cannot be reconciled with this Court's decisions governing facial challenges. The court below did not find that no set of circumstances exists in which Section 48 could be constitutionally applied, and no such finding would be remotely plausible. Nor did the court below apply the substantial overbreadth

doctrine, which sometimes provides an alternative route to facial invalidation in the First Amendment context. Nonetheless, the Third Circuit struck down Section 48 on its face. That decision is doctrinally incoherent and plainly erroneous. Even if traditional overbreadth analysis should be applied in this context, Section 48 is narrowly targeted to prohibitable conduct. The sale of videos of dogfights and "crush videos" whose commercial exploitation abets the commission of animal cruelty crimes may be prohibited without offending the First Amendment. And Section 48's limitation to depictions that lack any serious value makes crystal clear that the statute covers a core of constitutionally proscribable conduct. If any protected speech is caught within Section 48's otherwise-legitimate sweep notwithstanding the exercise of prosecutorial discretion, the courts can address those cases on an as-applied basis, without resorting to "fanciful hypotheticals," *United States v. Williams*, 128 S. Ct. 1830, 1843 (2008), to strike down Section 48 prematurely and unnecessarily.

ARGUMENT

I. UPHOLDING THE CONSTITUTIONALITY OF SECTION 48 DOES NOT REQUIRE ANY FUNDAMENTAL RESHAPING OF FIRST AMENDMENT DOCTRINE.

The Third Circuit erroneously assumed that in order to uphold the constitutionality of Section 48, it would have to carve out "a new category of speech that is unprotected by the First Amendment." Pet App. 1a. From this faulty premise, the court essentially required the government to demonstrate

that the interest in preventing animal cruelty is as weighty as the interest in "safeguarding the physical and psychological well-being of a minor," *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (internal quotations omitted). But the constitutionality of Section 48 does not depend on some fundamental innovation in First Amendment doctrine, and the Third Circuit unnecessarily forced the statute into *Ferber*'s pigeonhole. Unlike bans on the mere possession of child pornography, which treat a class of images as contraband, Section 48 targets only the commercial trafficking in images that memorialize criminal conduct. Traditional First Amendment doctrine already recognizes lawful prohibitions on analogous speech that proposes, abets, or constitutes a crime.

A. Section 48 Essentially Prohibits Commercial Exploitation of Crime-Scene Videos and Photos.

Section 48 only prohibits the knowing creation, sale, or possession of "a depiction of animal cruelty, *with the intention of placing that depiction in interstate or foreign commerce for commercial gain*." 18 U.S.C. 48(a) (emphasis added). Section 48 does not criminalize simple possession of depictions of animal cruelty or even reach the purchase of such depictions for one's own use. In order to be a "depiction of animal cruelty," the particular photograph or video must depict "conduct [that] is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place . . . ." *Id.* § 48(c)(1). Written depictions are not covered by the statute at all, and videos or photos with "serious religious, political, scientific,

educational, journalistic, historical, or artistic value" fall outside Section 48's prohibition. *Id.* § 48(b). Section 48 is thus limited to the knowing commercial exploitation of images of criminal acts that lack any serious value.

Although the court below analogized Section 48 to prohibitions on child pornography, Section 48's narrow focus on commercial trafficking and other limits render it a much narrower statute than prohibitions on child pornography. For example, the New York statute the Court upheld in *Ferber* cut a far broader swath: it prohibited "promoting a sexual performance by a child," regardless of whether that particular performance had any social value or whether it appealed to prurient interests. 458 U.S. at 751 (quoting N.Y. Stat. 263.15); *id.* at 764-65, 765-67. Moreover, "promoting," was not limited, as it is in Section 48, to commercial exploitation; the statute defined "promote" to include, *inter alia*, "giv[ing] [and] lend[ing]." *Id.* at 751.

More recently, in *United States v. Williams*, the Court encountered a statute that prohibited the knowing "promot[ion], present[ation], [or] distribut[ion]," of either "an obscene visual depiction of a minor . . . [or] a visual depiction of an actual minor engaging in sexually explicit conduct." 128 S. Ct. 1830, 1836-37 (2008) (quoting 18 U.S.C. 2252A) (internal quotations omitted). The Court specifically acknowledged that the statute did not relate solely to commercial transactions, but rather that even the free "file sharing of child pornography" at issue in *Williams* fell within the legitimate sweep of the statute. *Id.* at 1840.

B. The Law Already Recognizes the Government's Ability to Prohibit Analogous "Speech" that is Closely Tied to and Furthers Criminal Activity.

The courts below analogized Section 48 to prohibitions of child pornography. In reality, however, Section 48's limitation to commercial exploitation of visual depictions of crimes makes it more closely analogous to prohibitions of speech that abets, proposes, or constitutes unlawful activity.

1. More than 50 years ago, this Court rejected the "suggest[ion] that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). The Court has recognized that "[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502. Congress accordingly has prohibited certain types of speech by classifying the speech itself as a crime, or by prohibiting speech that solicits or abets criminal conduct. Speech that is fraudulent can be the basis of civil or criminal liability for fraud. *E.g.*, 18 U.S.C. 1341 (mail fraud). Speech that solicits prostitution is unlawful. *E.g.*, 18 U.S.C. 2422 (solicitation of prostitution across state lines). Speech that constitutes perjury is a crime. *E.g.*, 18 U.S.C. 1621 (perjury). Speech that extorts, threatens, or bribes is prohibited. *E.g.*, 18 U.S.C. 871-877 (extortion, threats, and blackmail); 18 U.S.C. 201-227 (bribery).

It is neither novel nor controversial that the First Amendment is no defense in these situations. *See, e.g., United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) ("Speech is not protected by the First Amendment when it is the very vehicle of the crime itself."). "The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose." *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). "That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality." *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994). *See Barnett*, 667 F.2d at 842 ("Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction."). Because "[w]ords are not only the keys of persuasion, but the triggers of action," *Masses Pub'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (Hand, J.), they can form the basis of liability for aiding and abetting an underlying criminal activity. *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978).

In *Buttorff*, the defendants were prosecuted for aiding and abetting tax evasion by taxpayers who filed returns with fraudulent allowances after attending meetings where defendants described how to calculate sufficient allowances to block tax withholding. *Id.* at 623. Despite the fact that the "defendants had virtually no personal contact with the persons who filed false income tax returns," *Barnett*, 667 F.2d at 843, the court affirmed their convictions for aiding and abetting those false returns. *Buttorff*, 572 F.2d at 624. In *Barnett*, the Ninth Circuit followed *Buttorff* and held that the

First Amendment does not bar a search warrant issued on suspicion of aiding and abetting the manufacture of illegal drugs, even when the abetting was accomplished by means of speech. *Id.* at 842-43.

Similarly, "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protections." *Williams*, 128 S. Ct. at 1841. Just as "offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection," *id.*, Congress may proscribe the commercial exploitation of videos of conduct in which it is unlawful to engage. This is precisely what Section 48 does. Indeed, Congress took pains to avoid constitutional difficulties by requiring the government to prove that a given depiction lacks any serious value, by including a requirement that the violative conduct be "knowing," and by limiting the statute to commercial activity.

2. Selling videos of dogfights effectively abets the underlying crimes by providing a market for dogfighting while allowing actual dogfights to remain underground. These videos are part of a "lucrative market," Pet. App. 55a, where videos are produced by a "bare-boned, clandestine staff" in order to permit the actual location of dogfights and the perpetrators of these underlying criminal activities to go undetected, Pet. App. 53a. The Constitution does not prohibit the government from tackling this unlawful activity, including the collateral speech involved. The First Amendment allows the government to prohibit dogfighting, to prohibit the promotion of dogfighting, or to prohibit attendance at dog fights. Certainly video-taping all

of this unlawful activity does not confer any First Amendment immunity on the unlawful activity, and there is no reason the government cannot target the commercial exploitation of the resulting video-tapes.

In *Williams*, the Court approved targeting "the collateral speech" that introduces the underlying crime into the commercial distribution network. 128 S. Ct. at 1838-39. The statute at issue in *Williams* constitutionally prohibited "offers to provide and requests to obtain child pornography," but did not reach the underlying criminal activity itself. *Id.* at 1838.

Consistent with the targeted approach of the statute that the Court upheld in *Williams*, Congress enacted Section 48 to prevent animal cruelty for commercial purposes by prohibiting the knowing commercial exploitation of depictions of animal cruelty. Such videos "depict[] — and thus necessarily require[]" — commission of actual animal cruelty for their production; one cannot make a "crush video" without actually crushing and killing an animal. Pet. App. 49a-50a.

To be sure, while Section 48 requires the depicted activity to be criminal in the jurisdiction in which the primary conduct prohibited by the statute (such as distribution) occurs, it does reach depicted activity that was lawful where the depicted activity occurred. This is a concession to the limits of extraterritorial criminal jurisdiction, not a constitutional defect. The statutes at issue in *Ferber* and *Williams* reached depictions of activity without regard to whether the underlying activity was legal in the jurisdiction in which it occurred. The First

Amendment does not force the United States to accept a race to the bottom in which the United States must tolerate the distribution of videos depicting horrific cruelty to animals, just because some nations may not criminalize the underlying conduct.

Prohibiting the knowing commercial distribution of animal-cruelty videos is a valid means to root out the underlying criminal activity itself. And as this Court noted in *Ferber*, attacking a type of crime by prosecuting the commercial distribution of its depiction has no greater implications for free expression than banning the underlying criminal activity itself, for if the laws against dogfighting were as effective as we would like them to be, there would be no dogfights to videotape and sell and thus no need for Section 48. *See* 458 U.S. at 762. It is an odd form of protected speech that arises only because our criminal laws are too porous to prohibit all criminal activity.

Unfortunately, the laws against animal cruelty are notoriously difficult to enforce because of the underground nature of activity such as dogfighting. And the market for dogfighting videos is large: respondent alone made $20,000 in two-and-a-half years from selling nearly 700 videos. Pet. App. 55a. Moreover, it is not atypical for dogfights to be videotaped. Pet. App. 55a n.26. This "lucrative market" permits live dogfighting to remain underground and hidden from law enforcement and, ultimately, to remain commercially viable for those who subject animals to criminal cruelty for profit. Pet. App. 55a. The market "provides a powerful incentive to individuals to create videos depicting

animal cruelty," which in turn furthers the criminal activity depicted in the crime-scene videos. *Id.* In short, videos like those marketed by respondent are inextricably intertwined with the unlawful acts they depict and help to fund and encourage.

3. Where a market exists for videos of crimes and where that market feeds and furthers those crimes, the government may constitutionally proscribe the commercial sale of such videos. Although "snuff films" — films created for commercial exploitation that depict the actual murder of an individual — are exceedingly rare (if even extant), there is no doubt that their sale could be prohibited without running afoul of the First Amendment. The commercial exploitation of such a crime-scene video would aid and abet the underlying crime and could be prohibited without raising serious First Amendment objections. Or, if gangs typically filmed initiation rites (which are commonly reported to include rape, beatings, and other crimes) and a market developed for these films that Congress found was encouraging the crimes at issue, Congress no doubt could constitutionally ban the sale of those films.[2]

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[2] Some gang initiations may be taped, although it does not appear that there is yet a market for such activities. *See* Shannon Powell, *Video catches gang initiation beat-up*, Austin News, KXAN.com, *at* http://www.kxan.com/dpp/news/local/video_catches_gang_initiation_beat_up (describing video of middle school student who was beat-up allegedly as part of a gang initiation that was distributed at school for viewing among student's peers).

Fortunately, our society has not generated large commercial markets for videos of violent crimes against humans. But videos that depict dogfights and the sale of which facilitates unlawful dogfighting are far from hypothetical. The Third Circuit appeared to consider it anomalous that Congress has banned the sale of depictions of animal cruelty, which it viewed as a less significant problem than violence against humans. But if there is an anomaly, it is that a significant commercial market has developed for depictions of animal cruelty, while comparable crime-scene video markets have not developed for crimes against humans. *See* Pet. App. 55a. Section 48 was a measured and tailored response to the specific crime-scene video market that actually exists. The First Amendment does not require Congress to address problems that remain hypothetical. Congress has not made a conscious judgment to tolerate comparable markets for other types of crime-scene depictions, and nothing in the First Amendment disables Congress from acting if a similar problem develops in the context of other types of crimes.[3]

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[3] Because of the unusual nature of the symbiotic relationship between underground animal cruelty crimes and the commercial market for depictions of those crimes, this case does not implicate the Court's decision in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). New York's "Son of Sam" statute was intended to prevent criminals from profiting from their crimes and to ensure that any monies were available for restitution to victims. The Court did not suggest that the statute was necessary because a market for books about crimes encouraged the actual commission of crimes. In addition, the statute at

Nor would there be any basis to distinguish among markets for depictions of crimes based on the type of crime at issue. In the context of commercial speech — which is all that Section 48 addresses — the Court does not inquire into the seriousness of the underlying unlawful activity in evaluating the first prong of the *Central Hudson* test. *See Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002) ("Under that test we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment.") (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). Indeed, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), which was later cited as part of the foundation for the first prong of the *Central Hudson* test, the Court held that an advertisement that evinced intent to discriminate in employment was "illegal commercial activity" and not protected under the First Amendment. The Court further observed that although the "illegality in this case may be less overt" than in the context of clearly prohibitable advertisements selling narcotics or soliciting prostitutes, it saw "no difference in principle here." *Id.* In the commercial-speech context, unlawful activity is unlawful activity even if the illegality is civil only rather than criminal, *see id.*, and there

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issue in *Simon & Schuster* was far broader than Section 48, in that (for example) it covered written works that described crimes even in passing and did so without regard to whether the work had serious value. *See* 502 U.S. at 511.

would be no principled basis to distinguish for First Amendment purposes between the knowing sale of crush videos and the knowing sale of snuff films.

II. THE THIRD CIRCUIT ERRED BY STRIKING DOWN SECTION 48 ON ITS FACE.

Despite this Court's recent warning that "[f]acial challenges are disfavored" and difficult to sustain, *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008), the Third Circuit struck down Section 48 on its face. The court did so without applying either *Salerno* or the overbreadth doctrine, but opting instead for some barely adumbrated "third way" to facial invalidation. Indeed, the Third Circuit expressly declined to engage in overbreadth analysis, which it correctly explained was "strong medicine," without ever explaining why facial invalidation on some alternative, less doctrinally-rooted, basis was any easier to swallow. Pet. App. 34a n.16. And the court did all this despite evincing the view that respondent's conduct was protected by the First Amendment, *see* Pet. App. 26a, in which event a straightforward as-applied challenge would have resolved this case. The methodological confusion of the court below aside, Section 48 is not invalid on its face.

A. The Court of Appeals Erred in Applying an Unprecedented Approach to Facial Challenges.

1. Last Term, the Court reiterated that facial challenges are disfavored and difficult to sustain. *Washington State Grange*, 128 S. Ct. at 1191. That

decision built on a host of recent decisions noting that "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (internal quotation omitted); *see also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). As the Court reaffirmed last Term, absent overbreadth analysis, a statute may not be struck down on its face unless "'no set of circumstances exists under which the Act would be valid,' *i.e.,* . . . the law is unconstitutional in all of its applications." *Washington State Grange*, 128 S. Ct. at 1190 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This demanding standard is necessary because facial challenges invite speculation about potential applications of a statute and run contrary to established principles of judicial restraint. *Id.* at 1191. "[F]acial challenges 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." *Id.*; *see also Ayotte*, 546 U.S. at 329.

The court below stated that respondent's challenge to Section 48 was a facial challenge, Pet. App. 25a n.13, and the court framed its decision as concerning the facial constitutionality of Section 48, Pet. App. 32a. The court, however, did not cite *Washington State Grange* or *Salerno* and did not recite, let alone apply, the "no set of circumstances" standard. Indeed, the court suggested that Section 48 might be consistent with the First Amendment in at least one set of circumstances, *viz.*, as applied to a "crush video." Pet. App. 10a n.5. That

acknowledgment should have doomed respondent's facial challenge absent an application of overbreadth analysis.

2. The Third Circuit, however, expressly disclaimed applying First Amendment overbreadth analysis, Pet. App. 32a-34a n.16. But in the absence of either *Salerno* or overbreadth analysis, it is not entirely clear on what doctrinal basis the Third Circuit's facial invalidation of Section 48 rests. Despite its avowed restraint concerning the "strong medicine" of overbreadth, the Third Circuit's reliance on hypothetical cases rather than the facts of this case suggests that the court was applying overbreadth analysis after all. In all events, Section 48 is not substantially overbroad in violation of the First Amendment. The 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 1839. The "substantial overbreadth" requirement dovetails with (1) the availability of as-applied challenges, *id.* at 1844, and (2) the role of prosecutorial discretion to cabin potentially unconstitutional applications of a statute that has an otherwise "plainly legitimate sweep," *id.* at 1839. "The tendency of [the Court's] overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals" is not sufficient to invalidate a statute that reaches a core of constitutionally prohibitable conduct. *Id.* at 1843.

The Third Circuit's quick invalidation of Section 48 based on "fanciful hypotheticals" overlooked both the statute's plainly legitimate applications and the valuable role that prosecutorial discretion can play

in cabining statutes that could potentially be applied in unconstitutional ways. "The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 386 (2004). The Third Circuit assumed that the lack of significant numbers of prosecutions under Section 48 indicated the absence of a compelling interest to support the section's enactment, rather than the mindful exercise of prosecutorial restraint to target only clearly unprotected speech. Even if there are instances in which prosecutors fail to exercise that restraint in the future, those cases "of course could be the subject of an as-applied challenge." *Williams*, 128 S. Ct. at 1844. Moreover, in rushing to invalidate the statute on its face, the court below missed the opportunity to evaluate the specific facts and circumstances of this case, in which the prosecutors opted to go forward. The result was the invalidation of the statute not just in the circumstances presented here, and not just in fanciful hypotheticals, but in the context of crush videos and other clearly valid applications of the statute.

To be sure, prosecutorial discretion has its limits, especially when First Amendment values are at stake. Concerns that even the threat of criminal prosecution can chill legitimate First Amendment activities must be accommodated. In this regard, a necessary corollary of skepticism about facial challenges is the facilitation of pre-enforcement as-applied challenges, especially when the threat of prosecution chills potentially protected activity. *See Gonzales*, 550 U.S. at 168. But, by the same token,

concerns about chill vary with the activity being chilled. Where the only speech ever potentially chilled is some marginally protected speech concerning the commercial exploitation of what amounts to crime scene videos depicting the intentional mutilation or torture of animals, then concerns about chill are surely attenuated. *Cf. Williams*, 128 S. Ct. at 1844.

B. Section 48's Elements Ensure Its Facial Validity.

Congress carefully crafted Section 48 to require the proof of three elements that together ensure that it reaches only a core of conduct that is within the legitimate sweep of its prohibition. First, the burden is on the government to prove beyond a reasonable doubt that each depiction whose sale is prosecuted lacks "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b); *see also* Pet. 13 n.1 (explaining that "exception" clause should be treated as an element of the offense). Thus, the statute reaches only actual crime-scene images whose only "serious value" is as a source of profit in the commercial exploitation of animal cruelty. That element, with no analog in the broad prohibitions of child pornography, ensures that documentaries and other journalistic endeavors, the inclusion of which concerned some members of the Court in *Williams*, 128 S. Ct. 1830, 1848 (2008) (Souter, J., dissenting), are excluded from Section 48's reach.

Second, as in *Williams*, the statute contains a scienter requirement that appears to "appl[y] to [the] provision in its entirety." 128 S. Ct. at 1839. At the

very least, there is "no grammatical barrier" to reading the "knowingly" requirement to travel as far down the statute as necessary to ensure Section 48's constitutionality. *See id; see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994). To the extent that the government must prove beyond a reasonable doubt that the defendant knew that what he sold was a depiction of actual unlawful animal cruelty — rather than a mere simulation, or acts falling short of unlawful animal cruelty — that further confirms Section 48's narrow targeting of unprotected conduct.

Third, unlike the prohibition in *Ferber*, Section 48 does not apply to simple possession or even to purchases for one's own use. The statute only forbids possession of depictions of animal cruelty when the possessor has the intent "of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). This limiting language underscores that the statute targets the commercial distribution network that is inextricably tied to the underlying crime itself; the target of the statute is not "speech" but animal cruelty sustained and encouraged by the commercial market for its depiction. There is no reason that the First Amendment should provide greater protection to the sale of a video of a crime (where the video lacks serious value) than to speech proposing a crime, which is "categorically excluded from First Amendment protection." *Williams*, 128 S. Ct. at 1841. Both types of speech — offers to engage in illegal activities and the videos of criminal activity targeted by Section 48 — "have no social value." *Id.*

Both types of speech facilitate criminal activity and are undeserving of First Amendment protection.

Moreover, the marketplace targeted by Section 48 is literal, not figurative, and it has nothing to with the "uninhibited marketplace of ideas." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *cf. United States v. Mendelsohn*, 896 F.2d 1183, 1185 (9th Cir. 1990) (rejecting First Amendment defense to creation of computer program that would aid with bookmaking when "there was no evidence that any speech by Defendants was directed to ideas or consequences other than the commission of a criminal act"). The statute has been narrowly drawn to focus on commercial exploitation and to exclude from its reach those depictions of animal cruelty that may have social utility. As the dissenting judges observed below, "the presence of an economic motive driving the product of depictions of animals being tortured or killed is perhaps the critical consideration that distinguishes the speech at issue here . . . ." Pet. App. 55a.

C. Section 48 Is Not Overbroad.

Even assuming that Section 48 may reach some protected speech, the statute is not "*substantially*" overbroad. The primary depictions of animal cruelty targeted by the statute — dogfighting and crush videos — are clearly proscribable. Depictions that further the underlying criminal activity are also proscribable without running afoul of the First Amendment.

1. The First Amendment would not be violated by a ban on selling videos of illegal dogfights. As described in the Statement, promoting a dogfight is

criminalized across all United States jurisdictions. Pet. App. 39a-40a; Br. of *Amicus Curiae* Humane Society in Support of Pet. for Cert. 5. Selling tickets to a dogfight is prohibited. *E.g.*, Ill. Comp. Stat. 5/26-6(b). No one contends that those prohibitions offend the First Amendment. And in nearly all U.S. jurisdictions, even being a willing spectator at a dogfight is unlawful, Br. of *Amicus Curiae* Humane Society in Support of Pet. for Cert. 5-6 & n.6, and such bans on knowing-attendance have been upheld as well. *See, e.g.*, *Commonwealth v. Craven*, 817 A.2d 451, 454 (Pa. 2003) (rejecting overbreadth challenge to a statute that criminalized a "person's conscious decision to attend an illegal animal fight as a spectator"); *cf. People v. Bergen*, 883 P.2d 532, 544-46 (Colo. App. 1994) (holding that newspaper reporter had no First Amendment defense when she was knowingly present at dogfight to tape it for a news story).

Capturing an event on film that is unlawful to conduct, sell tickets to, promote, and even knowingly attend does not remove the unlawful taint. There is no reason for the First Amendment to distinguish between selling a ticket to a dogfight (one that is also, perhaps, taped for later commercial distribution) and selling a video of the same crime.

b. Similarly, as even the Third Circuit's decision suggests, a ban on selling crush videos for commercial gain would not run afoul of the First Amendment. Pet. App. 10a n.5. Such videos clearly aid and abet unlawful behavior. Some of these videos are even made-to-order, "in whatever manner the customer wished to see the animal tortured and killed." H.R. Rep. No. 397 at 3. Regardless of

whether these videos could be classified as obscene because they appeal to a prurient interest, they are videos that are illegal to make in the first instance. These videos are the animal equivalent of a snuff film. There is no serious argument that videotaping the torture and killing of an animal for commercial gain warrants First Amendment protection.

c. A final category of depictions is similarly unquestionably prohibitable: depictions whose sale aids or abets the underlying criminal activity. Where a person who holds a dogfight, films the fight, and sells the video, it is obvious that his sale of the video is as unprotected as his conduct captured on the video. As explained above, there is no principled distinction between selling the video and selling tickets to the event itself. Both are proscribable without raising serious First Amendment difficulties. Further, commercial distribution of the video fans interest in the underlying crime and may facilitate further crime. If, for example, the seller of a video covered by Section 48 obtains footage from a person who holds or promotes dogfights, the payment for such crime-scene footage may fund future dogfights. In other contexts, courts have recognized that the funding of criminal activity is not entitled to First Amendment protection. *Cf. Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 691-92 (7th Cir. 2008) (*en banc*) (concluding that charitable donors to known terrorist organizations could be civilly liable for violation of 18 U.S.C. 2333(a) for damages flowing from terrorist victim's death).

Moreover, given the nature of the underlying crime, the seller of the video abets the crime in a

very real sense even if the seller was not a participant in the specific instance of crime depicted on a particular video. The seller feeds the illegal dogfighting market and aids future unlawful acts — *e.g.*, future attendance at dogfights, future betting on a particular dog or dogfight promoter featured in a video — when he sells the video. Abetting liability may be imposed even when there is minimal personal contact (and no conspiracy) between the abettor and the primary perpetrator. *E.g.*, *Buttorff*, 572 F.2d at 624. If a seller knows that his videos will be used by the purchaser to carry out an unlawful act — promoting a dogfight, betting on a dogfight, training dogs for fighting — the sale of the videos aids and abets that criminal activity.

For these reasons, the core of what Section 48 covers may be prohibited consistent with the First Amendment. On this record, there is no reason to assume that prosecutors will stray from the clearly proscribable core of Section 48, and if close cases nonetheless arise, as-applied challenges can and should be considered on a concrete record, without resorting to "fanciful hypotheticals," *Williams*, 128 S. Ct. at 1343. Moreover, because Section 48 does not apply to the sale of depictions with serious artistic or other value, any protected speech that may come within its scope will be "marginal" speech of low value, and the Court therefore should resolve any doubt concerning Section 48's breadth in favor of upholding the statute against the facial attack. *See Ferber*, 458 U.S. at 781 (Stevens, J., concurring in judgment).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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