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 U.S. Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 48 – which prohibits the knowing creation, sale, or possession of certain depictions of animal cruelty with the intention of placing the depictions in interstate or foreign commerce for commercial gain – is facially unconstitutional.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States.[1] It regularly appears in this and other federal courts in cases raising First Amendment issues.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are particularly concerned by the Third Circuit's analytic approach to the First Amendment issues raised by this case. If the appeals court believed that Respondent's criminal prosecution under 18 U.S.C. § 48 violated his constitutional rights, its appropriate response should have been a ruling overturning the conviction and declaring the statute unconstitutional as applied in this case. Instead, the court declared the statute facially invalid and struck it down in all its applications. *Amici* are concerned that the appeals court's action creates a major void in the federal

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

government's enforcement powers, thereby impeding the government's ability to take effective action against acts of cruelty to animal undertaken for commercial purposes.

STATEMENT OF THE CASE

Respondent Robert J. Stevens was convicted in the U.S. District Court for the Western District of Pennsylvania in 2005 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. The case is before the Court on review of a Third Circuit judgment overturning the conviction.

The facts surrounding Stevens's conviction are largely undisputed; he contends that the conviction violated his rights under the First Amendment. Evidence introduced at trial indicated that Stevens advertised pit bull-related videos for sale in *Sporting Dog Journal*, an underground publication featuring articles on illegal dogfighting. Law enforcement officers arranged to purchase from Stevens three videos, described by the appeals court as follows:

> The first two tapes, entitled "Pick-A-Winna" and "Japan Pit Fights," show circa 1960s and 70s footage of dog fights that occurred in the United States and involved pit bulls, as well as footage of more recent dog fights, also involving pit bulls, from Japan. The third video, entitled "Catch Dogs," shows footage of hunting excursions in which pit bulls were used to "catch" wild boars, as well as footage of pit bulls being trained to

> perform the function of catching and subduing hogs or boars. This video includes a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig.

Pet. App. 3a. A later search of Stevens's home in Virginia disclosed additional copies of the three videos as well as other dogfighting merchandise. *Id.* at 4a.

The statute under which Stevens was charged makes it a crime to "create[], sell[], or possess[] 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). The statute further provides that § 48(a) "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." § 48(b). It defines "depiction of animal cruelty" as "any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession take place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1).[2]

On appeal, the Third Circuit (sitting *en banc*) reversed Stevens's conviction and declared 18 U.S.C.

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[2] In appealing his conviction, Stevens did not dispute that the three videos at issue included "depictions of animal cruelty" within the meaning of § 48(c)(1).

§ 48 facially invalid on First Amendment grounds. Pet. App. 1a-77a. First, the court determined that § 48 "regulates protected speech" and thus is subject to strict scrutiny. *Id.* at 9a-27a. The court examined the factors this Court has considered in determining that child pornography is unprotected by the First Amendment. *Id.* (citing *New York v. Ferber*, 458 U.S. 747 (1982)). The appeals court concluded that the government's "attempted analogy to *Ferber* fails because of the inherent differences between children and animals." *Id.* at 26a-27a.

The appeals court then ruled that § 48 cannot survive heightened scrutiny. *Id.* at 27a-32a. It ruled that § 48 serves no compelling government interest, is not narrowly tailored to achieve such an interest, and does not provide the least restrictive means to achieve that interest. *Id.* at 28a. Because it determined that § 48 was facially invalid, the appeals court had no occasion to examine specifically whether the statute was unconstitutional as applied to Stevens's possession and sale of the three videos at issue. In *dicta*, the court opined that § 48 "might also be constitutionally overbroad." *Id.* at 32a n.18. The Court ultimately decided against reaching the overbreadth issue, stating, "because voiding a statute on overbreadth grounds is 'strong medicine' and should be used 'sparingly and only as a last resort,' we are satisfied to rest our analysis on strict scrutiny grounds alone." *Id.* at 34a n.16 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Judge Cowen, joined by Judges Fuentes and Fisher, dissented and would have affirmed Stevens' conviction. *Id.* at 34a-63a. He would have ruled that depictions of animal cruelty of the sort prohibited by

§ 48 are not protected by the First Amendment because "the social value of the speech is so minimal as to be plainly outweighed by the Government's compelling interest in its regulation," and because the Government had demonstrated an "inextricable connection" between "the evil sought to be prevented and the speech sought to be proscribed." *Id.* at 36a-37a.

SUMMARY OF ARGUMENT

The appeals court erred in considering a facial challenge to 18 U.S.C. § 48. This Court has made clear that a plaintiff can succeed in a facial challenge to a statute only by demonstrating that the statute is unconstitutional in all of its application, or by demonstrating at the very least that it does not have any legitimate sweep. The appeals court explicitly conceded that § 48 might well have a plainly legitimate sweep: it conceded that an animal cruelty statute focused solely on so-called "crush videos" might withstand First Amendment scrutiny. *Id.* at 10a n.5. In light of that concession, the appeals court should not have considered Stevens's facial challenge to the statute.

Although the normal rule is that a plaintiff may challenge a statute only as it is applied to him or her, the appeals court correctly noted that the overbreadth doctrine permits a slight relaxation of that rule in the First Amendment context. *Id.* at 32a-34a n.16. But the appeals court explicitly declined to undertake an overbreadth analysis in this case, acknowledging that voiding a statute on overbreadth grounds is "strong medicine" that should be used "sparingly and only as a last resort." *Id.* at 34a n. 16. Of course, declaring a

statute facially invalid outside the overbreadth context is even *stronger* medicine, so it is difficult to comprehend the appeals court's willingness to adopt its chosen path given its unwillingness to employ overbreadth analysis. *Amici* respectfully request that this Court not engage in an overbreadth analysis of its own until after the Third Circuit addresses the issue in the first instance. Should the Court decide to address the issue, *amici* believe it reasonably clear that § 48 is not unconstitutionally overbroad.

Nor is the statute unconstitutional as applied to Stevens. As Judge Cowen persuasively argued in dissent, the videos distributed by Stevens are of exceedingly slight, if any, social value. Because Congress justifiably determined that regulating speech of the sort engaged in by Stevens is necessary to effectively regulate the illegal conduct depicted by the videos, his speech is not entitled to First Amendment protection. The Third Circuit majority asserted that the Supreme Court decisions on which the government relies make clear that speech loses its First Amendment protection only when it is inextricably linked to conduct that poses a serious risk to human safety. *Id.* at 16a. That assertion is demonstrably incorrect. For example, the Court recently explained that the First Amendment does not protect speech consisting of an offer to engage in an illegal transaction (*e.g.,* an offer to engage one's dog in an illegal fight with another's dog), regardless whether the proposed transaction poses a threat to human health or safety. *United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008). Accordingly, the government interests furthered by § 48 cannot be dismissed (as the Third Circuit attempted to do) on the ground that its primary beneficiaries are animals, not

humans.

ARGUMENT

I. THE APPEALS COURT ERRED IN CONSIDERING A FACIAL CHALLENGE TO 18 U.S.C. § 48

Generally speaking, when confronting a constitutional flaw in a statute, the Court "tr[ies] to limit the solution to the problem." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2005). The Court "prefer[s], for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact." *Id.* (internal citation omitted).[3] Accordingly, "the 'normal rule' is that 'partial, rather than facial invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* (quoting *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 504 (1985)).

The Third Circuit failed to adhere to the normal rule. Instead, it considered Stevens's facial challenge to § 48 and struck down the statute in its entirety. *See* Pet. App. 2a ("we agree with Stevens that 18 U.S.C. § 48 is an unconstitutional infringement on free speech rights"); *id.* at 25a n.13 (recognizing that Stevens raised

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[3] As the Court explained in *Williams,* "invalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that had been made criminal – has obvious harmful effects." *Williams*, 128 S. Ct. at 1838.

a "facial challenge to the statute"); *id.* at 32a ("[W]e will strike down 18 U.S.C. § 48 as constitutionally infirm because it constitutes an impermissible infringement on free speech.").

The appeals court provided no explanation for its failure to adhere to the normal rule, nor is there any justification for that failure. A plaintiff is entitled to pursue facial invalidation of a statute only "by 'establish[ing] that no set of circumstances exist under which the [statute] would be valid,' *i.e.*,, that the law is unconstitutional in all or its applications." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[4] The majority opinion makes no assertion that § 48 could not be validly applied.

To the contrary, the majority explicitly acknowledged that the First Amendment might not be an impediment to congressional efforts to prohibit depictions of a particularly vile form of cruelty to animals, known as "crush videos," that all agree were the principal impetus behind Congress's adoption of § 48 in 1999.[5] The appeals court stated:

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[4] Some members of the Court have criticized the *Salerno* formulation. Nonetheless, the justices unanimously agreed in *Washington State Grange* that a plaintiff seeking facial invalidation of a statute must, at a minimum, demonstrate that the challenged statute does not even have a "plainly legitimate sweep." *Id.*

[5] The appeals court described crush videos as follows:

> A crush video is a depiction of "women inflicting . . . torture [on animals] with their bare feet or while wearing high

> We do not address the constitutionality of a hypothetical statute that would only regulate crush videos. . . . [S]uch a hypothetical statute might target obscenity under the *Miller* test because crush videos appeal to a prurient interest.

Pet. App. 10a n.5.

The appeals' courts admission that crush videos might not be entitled to First Amendment protection is a clear indication that it recognized that § 48 may well have a "plainly legitimate sweep." Under those circumstances, the appeals court was required to follow the "general rule" and to refrain from entertaining a facial challenge to § 48. Instead of considering that challenge, the court should have required Stevens to show that § 48 was unconstitutional as applied to him or, alternatively, to show that it was substantially overbroad and thus likely to chill a substantial amount of constitutionally protected speech.

II. THE APPEALS COURT DID NOT UNDERTAKE AN OVERBREADTH

> heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." H.R. Rep. No. 106-397, at 2 (1999). Testimony presented at a hearing on the Bill, and referenced in the House Committee Report, indicates that "these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *Id.* at 2-3.

Pet. App. 5a-6a.

ANALYSIS, AND THIS COURT SHOULD NOT DO SO IN THE FIRST INSTANCE

The "general rule" against facial challenges is relaxed somewhat in cases raising First Amendment issues. In the First Amendment context, due to the risk that "enforcement of an overbroad law" may "deter[] people from engaging in constitutionally protected speech" and may "inhibit[] the free exchange of ideas," the court will strike a law on its face "if it prohibits a substantial amount of protected speech," both "in an absolute sense" and "relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838; *see also Broadrick,* 413 U.S. at 615.

The appeals court made very clear that it would not subject § 48 to an overbreadth analysis, however. The court expressed doubts that § 48 could survive an overbreadth analysis, stating, "The statute potentially covers a great deal of constitutionally protected speech, and prosecutions that stray far from crush videos may chill this type of speech." Pet. App. 33a n.16. But the Court ultimately concluded, "However, because voiding a statute on overbreadth grounds is 'strong medicine" and should be used 'sparingly and only as a last resort,' we are satisfied to rest our analysis on strict scrutiny grounds alone." *Id.* at 34a n.16 (quoting *Broadrick*, 413 U.S. at 613).[6]

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[6] Of course, declaring a statute facially invalid outside the overbreadth context (as the Third Circuit did) is even *stronger* medicine, so it is difficult to comprehend the appeals court's willingness to adopt its chosen path given its unwillingness to employ overbreadth analysis.

Particularly in light of the appeals court's failure to undertake an overbreadth analysis, *amici* respectfully request that the Court not engage in such an analysis in the first instance. Rather, *amici* suggest that it would be more appropriate for the Court to confine its analysis to whether § 48 was constitutionally applied to Stevens's conduct. At the very least, the Court should defer considering whether § 48 is constitutionally overbroad until after it has determined that Stevens's as-applied challenge lacks merit. As this Court has explained:

> It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily – that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the [litigant's] own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth doctrine is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial*, not merely as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep."

Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 484-85 (1989).

The appeals court's decision well illustrates the problems created when a court reaches out to strike down a statute in all its applications. The decision below creates a major void in the federal government's

ability to take effective action against acts of cruelty to animals undertaken for commercial purposes. For example, it leaves the government powerless to bring criminal charges against those who peddle crush videos, despite the Third Circuit's acknowledgment that a law focused solely on such videos may well be constitutionally permissible. Pet. App. 10a n.5, 33a n.16. On the other hand, a decision that § 48 cannot constitutionally be applied to Stevens's activities would still leave the government with the authority to prosecute purveyors of crush videos and similarly gruesome and gratuitous depictions of cruelty to animals.

It would be particularly premature to undertake an overbreadth analysis in this case given that, as the appeals court acknowledged, "Stevens' case is the first prosecution in the nation under § 48 to proceed to trial." Pet. App. 4a. The Court has explained that "[a]s-applied challenges are the basic building blocks of constitutional analysis." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007). It makes much more sense to wait until at least a few building blocks are in place before determining whether § 48 deters a substantial amount of constitutionally protected speech. *Amici* note that there have not been any prosecutions even remotely resembling some of the fact patterns cited by Stevens as examples of potentially unconstitutional applications of § 48 – *e.g.,* videos depicting sportsmen illegally hunting and fishing out of season, Pet. App. 60a. Given the federal government's denial that such videos would subject individuals to prosecution under § 48, it makes much more sense to defer an overbreadth analysis until a determination can be made that the statute is actually threatening to deter any such speech activity.

In any event, it is reasonably clear that § 48 is not substantially overbroad. First, even the Third Circuit appears to concede that crush videos – which provided the principal impetus for Congress to adopt § 48 in 1999 – are not protected by the First Amendment. As the appeals court recognized, crush videos generally qualify as unprotected obscene speech under the definition set forth in *Miller v. California*, 413 U.S. 15 (1973). Pet. App. 10a n.5.[7]

Second, the Court will have no reason to reach the overbreadth issue unless it determines that § 48 is not unconstitutional as applied to Stevens, and dog-fighting videos of the type at issue here form another substantial portion of § 48's coverage. If the Court concludes that both crush videos and the videos at issue here do not qualify for constitutional protection, there is little basis for concluding that § 48 prohibits substantial amounts of other forms of speech that is protected by the First Amendment. Section III below explains why § 48 is not unconstitutional as applied to Stevens.

Third, § 48(b) states that the statute does not apply to "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," and thereby provides some assurance that the statute does not seek to criminalize a substantial amount of constitutionally protected

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[7] In particular, a crush video is by definition one that, taken as a whole, is designed primarily to appeal to prurient interests in sex.

speech.[8] The Third Circuit erred in concluding that § 48(b) (which it referred to as the "exceptions clause") had little, if any, constitutional significance. Pet. App. 25a-26a. The appeals court viewed § 48(b) as "a variation of the third prong of the *Miller* obscenity test, [which asks] 'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'" *Id*. at 25a (quoting *Miller*, 413 U.S. at 24). The court asserted:

> This type of exceptions clause has not been applied in non-prurient unprotected speech cases, and taking it out of this context ignores the essential framework of the *Miller* test. . . . [O]utside of patently offensive speech that appeals to the prurient interest, the First Amendment does not require speech to have serious value in order for it to fall under the First Amendment umbrella.

Id. at 26a. The appeals court's assertion is incorrect. Even outside the obscenity context, this Court has

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[8] The trial court (with the concurrence of federal prosecutors) instructed the jury that the government bore the burden of demonstrating § 48(b)'s inapplicability, *i.e.,* the government was required to show that the three videos in question lacked any "serious religious, political, scientific, educational, journalistic, historical, or artistic value." The jury's verdict indicates that it determined that the government met that burden. The government's reasonable construction of § 48(b) is entitled to deference for purposes of overbreadth analysis. *See Williams*, 128 S. Ct. at 1847 (Stevens, J., concurring) ("'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'")(quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

deemed the "serious value" of a work to be a relevant factor in determining whether the work was entitled to First Amendment protection. For example, child pornography case law, which (for reasons explained by the government) bears a much closer relationship to this case than it does to obscenity case law, deems the "serious value" of a work to be relevant to the First Amendment analysis. Thus, in the course of discussing the constitutionality of a hypothetical law criminalizing the depiction "of atrocities being committed in foreign countries, such as soldiers raping young children," the Court observed in *Williams*:

> [In] an as-applied challenge, . . . [t]he courts presumably would weigh the educational interest in the dissemination of information about the atrocities against the government's interest in preventing the distribution of materials that constitute a "permanent record" of the child's degradation whose distribution increases "the harm to the child."

Williams, 128 S. Ct. at 1844 (quoting *Ferber,* 458 U.S. at 759).

The appeals court is correct, of course, that the First Amendment does not permit the government to ban all speech lacking serious value. But *Williams* illustrates that even outside the pornography context, whenever the government provides compelling reasons why denying First Amendment protection to a type of speech serves a strong governmental interest, the court's First Amendment analysis appropriately considers whether the speech has serious value. By excepting from § 48's coverage all works having any

serious value, Congress significantly limited the statute's scope and thereby reduced considerably its potential overbreadth. Section 48(b) eliminates a "Romeo and Juliet" problem of the sort identified in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002); it eliminates all danger that the producer of a Shakespeare play could be prosecuted under § 48 for including a scene that depicted cruelty to animals.

In sum, the Court should follow the appeals court's lead in declining to address whether § 48 is unconstitutionally overbroad. Instead, the Court should confine its analysis to determining whether the statute is unconstitutional as applied to Stevens.

III. SECTION 48 IS CONSTITUTIONAL AS APPLIED TO STEVENS

As Judge Cowen persuasively argued in dissent, the videos distributed by Stevens are of exceedingly slight, if any, social value. The Third Circuit majority nonetheless held that the videos depicting illegal acts animal cruelty are entitled to substantial First Amendment protection, and that Stevens' conviction cannot stand because the government failed to demonstrate that § 48 serves a compelling interest, is narrowly tailored to achieve such an interest, and provides the least restrictive means to achieve that interest. Pet. App. 28a.

Underlying the majority's holding was its conclusion that the conduct depicted in the videos in question simply is not as worthy of condemnation as the conduct associated with other types of speech to which

the Court has refused to accord First Amendment protection. *Amici* respectfully suggest that the majority's conclusion was based on an insufficient appreciation of the importance that American society has placed throughout our history on preventing unnecessary cruelty to animals. That history is thoroughly documented in the brief in the United States and will not be repeated here, except that we note that the conduct depicted in the dog-fighting videos sold by Stevens is illegal in all 50 States. U.S. Br. at 24-28.

The appeals court concluded, in direct conflict with Congress's determination when adopting § 48, that society's interest in preventing acts of animal cruelty cannot be deemed sufficiently weighty to justify withdrawing First Amendment protection for depictions of such acts:

> When [the Supreme Court has identified interests that trump First Amendment values], the interest has – without exception – related to the well-being of human beings, not animals. When looking at these cases, as well as the interests at issue in the unprotected speech categories, it is difficult to see how § 48 serves a compelling interest that represents "a government objective of surpassing importance."

Pet. App. 16a (quoting *Ferber*, 458 U.S. at 757). *See also id.* at 10a ("The common theme among these cases [that define categories of unprotected speech] is that the speech at issue constitutes a grave threat to human beings or, in the case of obscenity, appeals to the prurient interest."); *id.* at 26a-27a ("The attempted analogy to *Ferber* fails because of the inherent

differences between children and animals.").

This Court's case law does not support the sharp First Amendment distinction that the appeals court attempted to draw between speech that constitutes a "grave threat to human beings" and speech that does not. For example, *Williams* rejected a criminal defendant's assertion that one could not constitutionally be convicted of "pandering child pornography"[9] in the absence of evidence that child pornography actually existed and/or changed hands or that the defendant offered to *sell* child pornography. *Williams,* 128 S. Ct. at 1841-42. The Court explained that "offers to engage in illegal transactions are categorically excluded from First Amendment protection" regardless whether the offers constitute commercial speech, because "offers to give or receive what it is unlawful to possess have no social value." *Id.*[10]

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[9] 18 U.S.C. § 2252A(a)(3)(B) makes it a crime for one to knowingly:

> advertise[], promote[], present[], distribute[], or solicit[] through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material is, or contains –
>
> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct. . . .

[10] Based on that principle, the Court ruled that "offers to provide or requests to obtain child pornography are categorically

Of course, not every offer to engage in an illegal transaction constitutes "a grave threat to human beings." For example, if A and B are both owners of pit bulls and A offers to engage his dog in an illegal fight with B's dog, it is difficult to argue that A's offer constitutes a grave threat to any human being. Nonetheless, *Williams* makes clear that A's offer is not protected by the First Amendment. Thus, the Third Circuit erred in concluding that categories of speech to which the First Amendment is inapplicable are limited to speech that poses a grave threat to humans.

Ferber makes clear that, in determining whether a depiction of illegal conduct is entitled to First Amendment protection, the key issue is whether there is an intrinsic relationship between the distribution of the depiction and the underlying conduct. *Ferber*, 458 U.S. at 759. While the relationship perhaps is not as strong for dog fighting as it is for child pornography, the United States has nonetheless demonstrated a strong relationship in this case. The widespread sale of dog-fighting videos suggests that it is a lucrative business, and a substantial portion of the profit inevitably makes its way into the hands of dog-fight promoters. By cutting off the profit from video sales, the United States is making illegal dog-fighting considerably less profitable and thereby reducing its prevalence.[11]

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excluded from the First Amendment" regardless whether the offeror actually possesses any child pornography. *Id.* at 1842.

[11] The relationship is even stronger in the case of crush videos. There is no evidence that there is a market for live demonstrations of animal crushing by women wearing high heels. Accordingly, the occurrence of such animal cruelty is 100% driven

Section 48 makes it illegal to sell or possess a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce so long as the underlying cruelty is illegal in the State in which the sale or possession takes place, even if the cruelty occurred in a jurisdiction in which it was not illegal. When the cruelty occurs in a jurisdiction in which it is not illegal, the intrinsic relationship between the cruelty and the distribution of the depiction is somewhat weakened; it is less clear that banning such distribution will lead to a decrease in the illegal act of animal cruelty. That is not an issue for depictions of dog-fighting in the United States, given that dog-fighting is illegal in all 50 States. But some of the dog-fighting in one of the three videos at issue apparently occurred in Japan, where dog-fighting may not be illegal.

Accordingly, the First Amendment issue is a somewhat closer question with regard to "Japan Pit Fights," the video that includes pit bull fights that apparently occurred in Japan. Ultimately, the First Amendment issue may come down to whether requiring prosecutors to demonstrate that the dog-fighting was illegal in the jurisdiction in which it occurred would, as a practical matter, make it exceedingly difficult for the federal government to obtain convictions. In the child pornography context, the purveyors of the pornography often go to great lengths to hide the identities and location of those depicted, and when prosecuted claim that the images are computer generated. The Court has recognized those logistical problems and the need to accommodate First Amendment doctrine to them. For

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by the market for videos depicting such conduct.

example, Justice Thomas has explained:

> [T]echnology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. . . . [I]f technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children.

Free Speech Coalition, 535 U.S. at 259 (Thomas, J., concurring in the judgment).[12]

Given the uncontested evidence that most of the video footage at issue in this case involved dog-fighting that occurred in the United States (where the fighting was illegal), Stevens's as-applied challenge to his conviction should be rejected. The intrinsic relationship between the sale of dog-fighting videos and the occurrence of illegal dog-fighting in this country is not open to serious question. Denying substantial video-sales income to those engaged in dog-fighting inevitably will further the government's compelling interest in reducing such activity.

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[12] Indeed, it was Congress's determination that it was becoming increasingly difficult to prove that pornographic material contained images of actual children that led to adoption of the statute challenged in *Williams*. 128 S. Ct. at 1837.

CONCLUSION

Amici curiae request that the Court reverse the decision of the court of appeals.

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