NATIONAL
ANIMAL LAW
COMPETITIONS

2012
Appellate Moot Court Competition

Memorandum Opinion

*Do not risk disqualification! Competitors are not allowed to receive ***ANY*** help on the problem before their brief is submitted (Briefs are due January 25, 2012.) Prior to the deadline, competitors may ***ONLY*** discuss the problem with their teammate and ***NO ONE ELSE***, including professors, coaches, students, colleagues, or any other individual.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff, v. LOUIS WHEATLEY, Defendant.	Case No. CV 11-30445 WMF (ABCx)

Defendant Louis Wheatley ("Wheatley") was charged and convicted for violation of the Animal Enterprise Terrorism Act ("AETA") and the Federal Agricultural Products Protection Act ("APPA") in connection with activities that allegedly occurred while he was employed by *Eggs R Us* (the "Company"), a mid-sized egg producing business with facilities in California, Nevada and North Dakota. The charges stem from Wheatley (i) making a video recording of working conditions and activities at the Company's California facility, which he posted on his personal Facebook page and which ended up on YouTube; and (ii) allegedly "rescuing" a baby male chick by placing the chick in his pocket and bringing the chick to his home.

Briefly, the AETA prohibits any person from engaging in certain conduct "for the purpose of damaging or interfering with the operations of an animal enterprise." 18 U.S.C. §43. The APPA prohibits videotaping within an agricultural animal facility ("facility") unless expressly authorized by an owner, proprietor or manager of the facility. Federal Law §999.2(3).

This matter is now before this Court on Wheatley's motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure ("FRCP") Rule 29.

I. Relevant Law

Given the length of the statutes at issue, they are set forth in full in Addendum A to this Opinion.

II. Factual Background

The following facts are taken from the parties' briefs and the evidence presented at trial. Wheatley is a journalism student who first learned about the conditions of farmed animals during the California voter campaign for "Proposition 2" in 2008.[1] From that time until May of 2010, Wheatley read about farmed animal issues on the internet and joined a farmed animal protection organization, but did not do anything further. He did not become involved in any animal activist activities. In May of 2010, Wheatley needed a job to help pay for college and he thought it would be an opportunity to find out for himself how accurate the claims about poor and cruel conditions customary in the industry really were. He applied for and was hired to be a "poultry care specialist" at the Company during his summer vacation from college. A poultry care specialist's principal duties include feeding and watering the chickens housed in industrial grade battery cages, and cleaning out the cages when time permits.

Wheatley started his employment on June 1, 2010. Wheatley contends that he did not take the job to harm the Company in any way, but he did hope to write an article for class and possibly "blog" about his experiences on the internet from an unbiased journalistic perspective.

The Company has been in business since 1966. It receives substantial compensation from the federal government to provide eggs for school children in California through the National School Lunch Program.

Male chicks are a byproduct and "waste product" of the egg industry. Evidence at trial revealed that a customary industry practice is to dispose of these baby chicks by tossing them into

[1] Proposition 2, also known as "Prop 2," was passed by the voters and enacted as California Health & Safety Code sections 25990, *et seq.* (also known as the "Prevention of Farm Animal Cruelty Act").

piles and grinding, or macerating, the chicks. At the point of maceration, the chicks may be alive or already dead. In 1998, 219 million chicks were killed by the commercial egg industry. Fraser D, Mench J, & Millman S, Farm Animals and Their Welfare in 2000, in State of the Animals 2001 89, 90 (2001).

On or about June 17, 2010, Wheatley made a four minute video of an unidentified co-worker at the Company throwing living and dead male chicks born at the facility into the grinder to be macerated. The worker was laughing and joking and intentionally squashing some of the living chicks himself as he dumped them into the grinder. Wheatley posted this video on his personal Facebook page that evening with the comment: "This is what happens every day -- business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." Before Wheatley had a chance to decide what forum he would use to write about it or whether he would post the video clip to a wider audience, one of his Facebook "friends" posted the video on YouTube. To date, more than 1.2 million people have viewed it, and it has prompted local news reports and increased media attention on this issue.

During his employment, Wheatley saw that the Company kept an average of six egg-laying hens in a cage with a floor area approximately 16 inches by 18 inches -- providing an average of 48 square inches of floor space for each hen. The evidence presented by Wheatley at trial indicated that the guidelines recommended by national egg producer trade organizations were for at least 67 square inches per hen -- still less than a typical 8½ by 11 inch piece of paper and not enough space for hens to flap their wings. Such cages are commonly referred to as "battery cages." From his internet research, Wheatley was familiar with the requirements of Prop 2, which prohibits confining farm animals in a manner that prevents them from spreading their limbs or wings. (Cal. H&S Code §§ 25990(a) and 25991(f).) He asked his supervisor about it and he was told he "needn't be concerned." Wheatley made a second, shorter video of the hens in the battery cages, which he also posted on Facebook. The evidence presented indicates that by the time of trial, Wheatley had removed this video from his Facebook page and there is no evidence indicating this video was ever posted on YouTube. He blogged about the alleged violation of Prop 2 and the

allegedly cavalier attitude of his supervisor, and informed the farmed animal protection organization he had previously joined.

The negative media attention focused on the Company as a result of the YouTube video and his blogging about the battery cages and alleged attitude of Company workers has resulted in public statements from the Company denying all allegations regarding violations of Prop 2, but stating that it is looking into the feasibility of modifying some of its practices in its California facility.

The same day that Wheatley posted the videos on Facebook, he also "rescued" a male chick that was on top of the pile of living and dead chicks at the grinder. Wheatley testified that this one chick in particular caught his eye and he just couldn't walk away from him. So he placed the chick in his coat pocket and took the chick to his home outside city limits where the zoning allows for possession of a limited number of certain farm animals, including chickens. Wheatley named him "George" and continues to raise and care for him.

A manager at the Company was alerted to Wheatley's Facebook postings two weeks after they were posted and promptly fired him. The Company also notified federal authorities and Wheatley was arrested and charged with violations of the APPA and the AETA. Authorities later learned that Wheatley had taken the chick and added to the charges based on the unlawful taking of Company property.

Wheatley has never denied any of the factual allegations against him.

III. Procedural Background

In February of 2011, a federal grand jury sitting in the Central District of California returned a three-count indictment against Wheatley, a resident of California, charging him with (1) entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment, in violation of section 999.2(3) of the APPA; (2) using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise, in violation of the AETA, 18 U.S.C. §43(a)(1); and (3) in connection with such purpose, intentionally damaging or causing the loss of any real or personal

property (including animals or records) used by an animal enterprise, in violation of the AETA, 18 U.S.C. §43(a)(2)(A).[2]

In this Court, Wheatley filed a motion to dismiss the indictment,[3] asserting the following defenses. First, he contended that section 999.2(3) of the APPA unconstitutionally violates his First Amendment rights. Second, he contended the AETA is unconstitutional because it exceeds congressional power under the Commerce Clause. Finally he asserted that, as a matter of law and public policy, he should not and cannot be convicted for conduct that brings to light illegal conduct of others -- namely, alleged violation of Prop 2 (Cal. H&S Code §§ 25990, *et seq.*)[4] and California's state anti-cruelty statutes (California Penal Code sections 597 subsection (b) and 597t).[5]

Though this Court expressed some concerns about the possible validity of his First Amendment argument, the Court denied Wheatley's motion on all counts and allowed the case to proceed to the jury. At trial, the jury convicted Wheatley on all three counts. Wheatley has now filed an FRCP Rule 29 motion for judgment of acquittal, asserting anew all of the arguments he previously raised on his motion to dismiss the indictment, and also presenting arguments on the evidence as well. For the reasons explained below, this Court denies the motion as to Count 1 but grants it as to Counts 2 and 3.

IV. Analysis

A. LEGAL STANDARDS

When the Court ruled on Wheatley's previous motion to dismiss an indictment, the Court assumed, as it must, that all allegations in the charges were true. FRCP, Rule 12(b), provides that

[2] While the government noted that it could have brought additional charges against Wheatley, these are the only charges that the government elected to pursue. Therefore, these are the only charges currently at issue.

[3] A motion to dismiss an indictment is comparable to a motion to dismiss based on the pleadings in civil cases or a demurrer in California state court civil cases. It is not often used, but Wheatley contended it was an appropriate vehicle here to address the constitutionality of the statutes at issue.

[4] For purposes of this case, Prop 2 is assumed to have become operative January 1, 2010 rather than to become operative January 1, 2015.

[5] The District Attorney's office has not charged the Company with violation of any state laws.

"[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the "general issue." The "general issue" is "evidence relevant to the question of guilt or innocence." *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005) (internal citation omitted) (While "[t]here is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context," the court upheld the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds where the government failed to object and there were no material facts in dispute). *See also U.S. v. Phillips*, 367 F.3d 846, 855, n.25 (9th Cir. 2004) (upholding pre-trial motion to dismiss where the motion raised is a pure issue of law and the government did not object). The most common reason for filing a motion to dismiss an indictment is to raise constitutional challenges to a criminal statute.

In deciding a motion for judgment of acquittal, the court views the evidence in the light most favorable to the government, and decides whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir.1992); *United States. v. Ward*, 274 F.3d 1320, 1322 (11th Cir. 2001) (interpreting FRCP, Rule 29(c)).

B. The Parties' Contentions

Wheatley first argues that the jury's verdict on Count 1 must be overturned because section 999.2(3) of the APPA is unconstitutional both facially and as applied to him, in violation of the First Amendment free speech clause. He further argues that as a matter of public policy he should not be convicted for conduct that revealed the Company's violation of state laws -- namely, Prop 2 and California Penal Code sections 597(b) and 597t -- that otherwise would continue behind closed doors. In conjunction with his public policy argument, Wheatley also asserts the defense of "necessity."

Wheatley argues that the jury verdict on Count 2 must be overturned because the AETA exceeds congressional authority under the Commerce Clause under Article I, Section 8 of the U.S. Constitution. Wheatley goes on to argue that even if the Court disagrees, the AETA does not apply to him because his only alleged tie to a "facility of interstate commerce" is his use of the internet for his Facebook postings and blogging. In this regard, he points to recent case law

holding that certain activities on the internet cannot be analogized to crossing state lines. He also points out that none of his conduct was undertaken for commercial gain or profit.

Finally, Wheatley asserts that even if the AETA is found to be constitutional and disseminating video clips or blogging on the internet is determined to be "use of a facility of interstate commerce," the jury's verdict on Counts 2 and 3 nonetheless must be overturned the AETA was not intended to apply to the type of conduct for which he was convicted. More specifically, he asserts that he did not use the internet "for the purpose of damaging or interfering with the operations" of the Company within the meaning of 18 U.S.C. §43(a)(1) of the AETA; and because the chick he took was only a "waste product" to the Company, about to be ground up as trash, he did not "cause the loss of any real or personal property" within the meaning of 18 U.S.C. §43(a)(2)(A) of the AETA.[6]

The government counters each of these arguments and urges that the jury's verdict not be overturned. On the First Amendment claim, the government asserts that it has met its burden of showing that the challenged section of the APPA is reasonable in light of the statute's purpose and congressional intent, and that the statute's language is not overly broad. The government counters Wheatley's public policy argument by stressing that if the California legislature had intended to protect individuals who reveal potentially illegal actions at an animal facility, it would have included whistleblower provisions in the relevant sections of the California Penal Code. The absence of such provisions demonstrates legislative intent, to which this Court must defer. *United States v. Bestfoods,* 524 U.S. 51, 62 (1998) ("against this venerable common-law backdrop, the congressional silence is audible").

On the Commerce Clause claim, the government urges the Court to recognize that the AETA protects the instrumentalities of interstate commerce and regulates conduct that has a substantial effect on interstate commerce, thereby meeting the Supreme Court's standard for acceptable regulation. Additionally, the government argues that the Court should recognize a

[6] The parties have stipulated that, for purposes of this case, the chick is an "animal" and the Company is an "animal enterprise" within the meaning of the AETA.

judicial trend to view Facebook postings as any other internet activity, which is an acknowledged tool of interstate commerce.

With regard to the AETA's applicability and scope relative to Counts 2 and 3, the government asserts that Wheatley's actions, particularly his commentary with the video posts and his involvement with an activist group, coupled with his purposeful actions, evidence his purpose to interfere with the Company's operations. As to Wheatley's taking of the chick, the government maintains that waste, while still on the facility's premises, is still property of the facility; thus validating Count 3.

For the reasons explained below, the Court denies Wheatley's motion as to Count 1 but grants it as to Counts 2 and 3.

C. The First Amendment

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010), quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted).

This prohibition does not strip the government of all control, however, and courts have carved out exceptions for restricting speech on government-owned property, with different standards of review depending on the character of the forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Where speech is restricted on private property owned by a company receiving significant funding from the government, application of the traditional forum analysis becomes more complicated.

Although the facility is owned by the Company, a private entity, and not by the government, it does receive government funding and is overseen by the U.S. Department of Agriculture ("USDA"). Thus, as a starting point for the analysis, the Court will briefly summarize the forum doctrine. This doctrine divides government-owned property into three categories: (1) *public forums*, as "places which by long tradition or by government fiat have been devoted to

assembly and debate;" (2) *limited public forums*, as public property which the state has opened for use by the public for expressive activity; and (3) *non-public forums*, as public property that is not by tradition or designation a public forum. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45 (1983); *Hague v. CIO*, 307 U.S. 496, 515 (1939).

In a public forum, the government may not prohibit the videotaping of animal facilities to expose unsafe conditions. *Bolbol v. City of Daly City*, 754 F. Supp. 2d 1095, 1108 (N.D. Cal. 2010). This stems from the fact that in such a forum, the government may not prohibit all communicative activity and for the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Perry*, 460 U.S. at 45.

In a non-public forum, however, the government may prohibit viewpoint-neutral restrictions on speakers who would disrupt and hinder the forum's effectiveness for its intended purpose. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 811 (1985). Accordingly, the government can overcome a First Amendment challenge in a non-public forum by showing that the restriction is reasonable in light of the purpose of the statute. *Id*. Notably, however, the mere existence of reasonable grounds for limiting access to a non-public forum will not save a regulation that is in reality a facade for viewpoint-based discrimination. *Id*; *see also Perry*, 460 U.S. at 49.

As noted above, Eggs R Us is a private organization, although it receives government funding and is subject to USDA oversight. Thus, it could be argued that restrictions of speech on the Company's property are subject to heightened scrutiny. Given the government's limited involvement in the day to day operations, however, this Court concludes that it is nonetheless a non-public forum, in which the government can regulate speech if the restriction is reasonable in light of the statute and is content-neutral.

Wheatley argues that the restriction here is not reasonable because it is, in effect, view-point discriminatory. He asserts that photography or video or audio recordings prohibited under section 999.2(3) of the APPA generally would have only one purpose – to raise awareness of

facility practices that do not take into account animal welfare or interests; the statute is not intended to protect against competitors in the egg production industry. With no congressional record to support (or contradict) his position in this regard, Wheatley urges the Court to look to any legislative history in those states that have enacted or considered enacting a state version of the APPA or a similar statute. *See, e.g.,* Kan. Stat. Ann. § 47-1827. Wheatley refers the court not only to the Kansas statute, but also to North Dakota (N.D. Cent. Code 12.1-21.1-02 (enacted in 1991)), New York (S.5172, which was pending in June of 2011) and Iowa (S.F.341, which was pending in May of 2011), but has not provided the Court with legislative history relative to any of the foregoing.

In any event, this Court deems it too far a leap to look to the intent of other legislative bodies regarding other, albeit similar, statutes or statutory proposals at the state level when applying the federal statute at issue here, and declines Wheatley's invitation to do so. While there might be some validity to Wheatley's theory, without a congressional record to back it up, it is just that -- a theory -- which provides an insufficient basis to overturn the statute on constitutional grounds.

In the alternative, Wheatley argues, if the Court does not agree that the statute is impermissibly viewpoint based, then it is overly broad. *See, e.g., United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577 (2010) (holding that a statute prohibiting depictions of animal cruelty was overly broad because a number of its applications were unconstitutional). Invoking *Stevens*, Wheatley also contends that the APPA is overly broad because it serves to prevent procurement of evidence of wrongdoing in animal facilities if federal or state government agencies do not adequately investigate and/or act to enforce existing statutes and regulations and prevent such wrongdoing. Furthermore, in states with whistleblower protections encouraging the reporting of unlawful activity in the workplace, these provisions might have a chilling effect and directly compete with the whistleblower statutes.

The government counters that the APPA's goal of protecting animal facilities from terrorist activities and a loss of business and property is a valid government interest. It contends that given the forum in which the government is regulating speech and given the government's substantial interest and limited means, prohibiting clandestine video recordings of activities and

operations at such facilities meets the requisite standard and that, therefore, section 999.2(3) of the APPA does not violate the First Amendment.

It is well established that "a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008) (internal citations omitted). However, "[t]he traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" *Id.*, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Although Wheatley's arguments raise some interesting points, the Court agrees with the government. Moreover, Wheatley has not met the standard of establishing that a "substantial number" of the APPA's applications are unconstitutional or that the "strong medicine" of the overbreadth doctrine should be applied here. The Court concludes that the APPA meets constitutional muster, both as applied to Wheatley and on its face.

D. Public Policy and the Necessity Defense: Disclosure of Alleged Unlawful Conduct

Wheatley argues that as a matter of public policy he should not be convicted for conduct that revealed the Company's violation of state laws, namely Prop 2 and California Penal Code section 597(b) and 597t, that otherwise would continue behind closed doors. He further argues the defense of "necessity." In response, the government urges judicial deference to the congressional intent in protecting animal enterprises such as the Company, and argues that any public policy debate should be left to Congress and that the "necessity" defense does not apply here.

1. The First Amendment and Public Policy

Public policy is inherent in the First Amendment. "The First Amendment's guarantee of free speech applies with special vigor to discussion of public policy." *National Org. for Marriage v. McKee*, 649 F.3d 34, __, 2011 WL 3505544 at *51 (1st Cir. 2011). "The First Amendment affords the broadest protection to such political expression in order 'to ensure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (constitutional challenge to a statute regulating funding for political candidates) (internal citation omitted). In the context of animal testing in particular, at least one California state appellate court has noted that animal welfare "is an area of widespread public concern and controversy, and the viewpoint of animal rights activists contributes to the public debate." *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty, U.S.A., Inc.*, 129 Cal. App. 4th 1228, 1246 (2005) (animal testing laboratory and employees sued protesters for trespass and harassment; trial court's denial of defendants' motion to strike the complaint under an anti-SLAPP statute was affirmed in part and reversed in part).

2. The California Statutes

Penal Code section 597t provides that "[e]very person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area." There is no carve-out for agribusiness operations. Wheatley contends the Company's battery cages violate this provision. Penal Code section 597, subsection (b), prohibits the mutilation and cruel killing of any animal. Wheatley contends that grinding up massive numbers of live baby male chicks daily as a byproduct of the Company's operations violates this provision.

Prop 2, as enacted, provides that "a person shall not tether or confine any covered animal [which is defined to include egg-laying hens], on a farm [defined to include operations such as the facility here], for all or the majority of any day, in a manner that prevents such animal from….fully extending his or her limbs [defined to mean, "in the case of egg-laying hens, fully spreading both wings without touching the side of an enclosure or other egg-laying hens"]. Cal. H&S Code §§ 25990, 25991. Wheatley contends the Company's battery cages clearly violate this statute. He further contends that without someone on the inside taking photographs or making a

video recording, such violations would continue unfettered. He argues that it must necessarily be against the public policy of the State of California and the federal government to prohibit conduct that may be the only means, as a practical matter, of bringing such information to the attention of the appropriate government enforcement agencies.

In arguing for judicial deference to the congressional intent in protecting animal enterprises, the government asserts that if Congress had wanted to carve out acts intended to disclose illegal activity by an animal enterprise, it could have drafted the APPA accordingly. But there is no such exemption in the statute. Nor does Prop 2 or the referenced penal statutes contain a whistleblower provision or a private prosecutor or citizen suit provision. The government also points out that the State has not filed any charges against the Company for violation of any of these statutes; thus, it remains an open question (which is not before this Court) as to whether the Company is indeed violating any of the referenced statutes as Wheatley contends.

This Court does not disagree with the California court in *Huntingdon* that animal welfare is an issue of public concern, and the Court appreciates the public policy concerns raised by Wheatley in this regard. This Court also recognizes the importance of the First Amendment in fostering debate over issues of public and societal concern. However, it is not for this Court to second guess congressional or state legislative intent and rewrite these statutes. These issues are for the "court of public opinion" and legislative discourse and action if the statutes are to be amended. It is simply outside the realm of the judiciary to do so.

3. The "Necessity" Defense

To invoke the necessity defense, defendants "colorably must have shown that: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law." *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992). The "necessity" defense may apply in cases of "direct civil disobedience." As used by the Ninth Circuit in *Schoon*, "'civil disobedience' is the willful violation of a law, undertaken for the purpose of social or political protest." *Id.* at 195-96. "Direct civil disobedience … involves protesting the existence of a law by breaking that law or preventing the

execution of that law in a specific instance in which particularized harm would otherwise follow." *Id.* "Indirect civil disobedience involves violating a law or interfering with a government policy that is not, itself, the object of the protest." *Id.* In *Schoon*, the Ninth Circuit concluded that the necessity defense is inapplicable to cases involving indirect civil disobedience. *Id.*

Here, Wheatley's "necessity" defense fails for several reasons. First, there is no evidence in the record that Wheatley knew about the APPA; thus, his violation of that statute was not a protest of the APPA's existence and his actions were not acts of "direct civil disobedience." Second, even if they could reasonably be deemed acts of "direct civil disobedience," Wheatley cannot meet all four prongs to avail himself of the "necessity" defense. Accordingly, this claim has no merit.

E. The Commerce Clause

Under the Commerce Clause**,** Article I, Section 8, Clause 3, the United States Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." With this authority, the government can regulate a commodity that has a substantial effect on supply and demand in the national market for that commodity. *Gonzales v. Raich*, 545 U.S. 1, 2 (2005). In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court recognized the following "three broad categories of activity" that Congress may regulate under its commerce power: (1) "Congress may regulate the use of the channels of interstate commerce"; (2) "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *Id.* at 558–59. Thus, the Supreme Court has expressly acknowledged that Congress maintains the authority to regulate and protect instrumentalities of interstate commerce.

Wheatley argues that because the AETA is designed to protect "animal enterprises," the relevant question is whether the Company is an "instrumentality" of interstate commerce so as to fall within the second category set forth in *Lopez.* Wheatley asserts that the answer is no. In response, the government points out that Congress may punish conduct that "interferes with,

obstructs or prevents" interstate commerce. *United States v. Dinwiddie,* 76 F.3d 913, 919 (8th Cir. 1996), quoting *United States v. Coombs*, 12 Pet. 72, 77, 9 L. Ed. 1004 (1838). The government argues that Wheatley's conduct interfered with and obstructed the interstate commerce activity of the Company in its production and sale of animal food products, an industry unquestionably regulated by the federal government. Taking this argument one step further, the government also asserts that Wheatley's conduct has a "substantial relation to interstate commerce" under the third category set forth in *Lopez.* For the reason discussed below, however, the Court need not reach this issue.

Wheatley contends that because the AETA is not designed to regulate the internet it would strain the bounds of congressional authority to construe it as a congressional regulation of the internet. The Court disagrees. In the Court's view, and as argued by the government, if the internet is a "channel" or "instrumentality" of interstate commerce then it is within Congress' authority to regulate its use under the AETA. Courts in other jurisdictions that have addressed this issue generally have held that the internet is an instrumentality of interstate commerce. *See, e.g., American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 172-73 (S.D.N.Y. 1997) ("The inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations."). *See generally United States v. Panfil*, 338 F.3d 1299 (11th Cir.2003) (taking as a given that internet "chat room" activities fell within the scope of a statute applying to use of "any facility or means of interstate or foreign commerce"); *Planned Parenthood of the Columbia/Willamette, N.C. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001) (anti-abortionist postings on a webpage; no discussion of Commerce Clause issues). This Court agrees that the internet is appropriately regulated by Congress and that, therefore, the AETA does not exceed congressional authority.

Wheatley asserts that even if the Court accepts the government's argument that the statute itself does not exceed congressional Commerce Clause authority, the AETA does not apply to his use of the internet here. He relies on the Ninth Circuit decision in *United States v. Jason Wright*, 625 F.3d 583 (9th Cir. 2010), to assert that this is an exceptional circumstance where his mere use

of the internet is not sufficient to invoke a statute regulating interstate commerce. His reliance on *Wright*, however, is misplaced. In *Wright*, the Ninth Circuit held that the defendant's use of the internet to transport images of child pornography, standing alone, was insufficient to establish that images traveled across state lines, as required to satisfy "interstate commerce" requirement of a statute criminalizing transportation of child pornography. In that case, however, the government did not dispute that the images were sent from the defendant in Arizona directly to the client in Arizona, and did not pass through a server so as to cross state lines. Thus, *Wright* is inapposite to the present case.

Finally, Wheatley argues that because his postings were not for profit or commercial gain they were not used in "commerce." This argument ignores the plain statutory language, which applies to the "use of a facility of interstate commerce." As discussed above, the internet is a "facility of interstate commerce" that was used by Wheatley for his postings. Therefore, whether or not his actions were for commercial gain is not relevant to the analysis here. *See generally United States v. Larry G. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) (rejecting the defendant's claim that crossing state lines for noncommercial purposes was not "interstate commerce" under a Commerce Clause analysis and noting that neither the district court nor the defendant had cited to a single case so holding).

In sum, the use of Facebook and YouTube in the context of this case presents a case of first impression for this Court. While there is a flurry of litigation regarding these instruments of today's internet, there is no authority controlling in this Court as to whether they constitute a "facility of" "interstate commerce" under the federal Commerce Clause. Given the broad governmental powers under the Commerce Clause, however, the Court concludes that Wheatley's posting of the video clips on his Facebook page and his blogging about operations and activities at the Company constitute usage of a facility of interstate commerce within the meaning of the AETA, 18 U.S.C. § 43(a).

///

///

///

///

F. Statutory Interpretation of the AETA and Application to Wheatley

1. Whether Wheatley Acted "For the Purpose of Damaging or Interfering with the Operations of an Animal Enterprise"

As to Counts 2 and 3, Wheatley contends he did not do anything "for the purpose of damaging or interfering with the operations of an animal enterprise." There is no dispute that the Company is an "animal enterprise" within the meaning of AETA. The issue here is what constitutes "damaging" or "interfering" with the operations of an animal enterprise. The government asserts that Wheatley damaged the Company's operations by causing the media attention that may now require expenditures by the Company to change certain conditions and procedures at its California facility, at the risk of losing business to other companies if it does not. The government further asserts that this was precisely Wheatley's purpose in posting the video clips and blogging about the Company. Wheatley counters that the common understanding of the verb "to damage" is to cause physical harm, and that he did not cause any physical harm to the Company.

In construing a statute, a court must take each word into account in the context in which it is used and without making any words mere surplusage. *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Here, the term "damaging" is used in conjunction with "operations" rather than any particular property. Certainly, operations can be damaged by economic loss, which is what may happen here as a result of Wheatley's actions. Although Wheatley did not contact the media or post the video clip on YouTube himself, his posting on Facebook set into action a chain of events that resulted or potentially may result in economic loss to the Company. When he posted and blogged about conditions at the Company, he did so with the purpose of changing those conditions. While his intentions may have been for what he perceived as a greater good for the egg-laying hens and baby chicks, this does not negate the fact that he violated the statute by his actions.

For the same reasons, this Court concludes that Wheatley also "interfered" with the Company's operations. Although day-to-day operations continue, if and to the extent operations

have to be modified to address the public reaction and media focus -- even though the Company was fully complying with industry standards, though arguably not with state statutes such as Prop 2 -- there is an interference with operations. Again, while Wheatley may not have taken the job with this purpose in mind, the evidence establishes that it was his purpose in creating and posting the video clips and in blogging about the Company.

Accordingly, while Wheatley's motives and conduct may not have been the most egregious contemplated by Congress when it enacted the statute to protect animal enterprises against "terrorism," the Court concludes nonetheless that the jury properly found that Wheatley acted for the purpose of damaging or interfering with the operations of an animal enterprise within the meaning of 18 U.S.C. §43(a)(1). Notwithstanding this conclusion, however, the conviction on Count 2 must be overturned because violation of 18 U.S.C. §43(a)(1) alone is not sufficient to constitute a violation of, and conviction under, the AETA.

2. Whether Wheatley's Taking of the Chick Falls Within the Scope of the AETA

The government contends that Wheatley's taking of the chick caused the loss of property (including animals) within the meaning of 18 U.S.C. §43(a)(2). Wheatley counters that under the facts and circumstances here, taking the chick (that, within minutes, would have been ground up live into garbage) simply is not "terrorism" as contemplated by the statute.

The government focuses on the law of abandonment of property to argue that even though the chick was a waste product of the Company's operations, the Company had not "abandoned" the property at the point when Wheatley took it and, therefore, his action is within the scope of the statute. Abandonment, as applied to property and property rights, has long had a generally accepted and a well-defined meaning. *See, e.g., St. Peter's Church v. Bragaw*, 144 N.C. 126, 56 S.E. 688 (1907) (discussing the "well-defined" meaning of "abandonment" of property). What constitutes an "abandonment" of property has been defined by the Fifth Circuit and other courts as "a voluntary intention to abandon, or evidence from which such intention may be presumed." *The No. 105, Belcher Oil Co. v. Griffin*, 97 F.2d 425, 426 (5th Cir. 1938). The doctrine of abandonment does not apply unless the owner completely deserts the property without being pressed by any necessity, duty or utility to himself, but simply because he no longer desires to

possess it and willingly abandons it to whoever wants it. *See, e.g., State Mutual Life Assurance Co. of Worcester, Mass. v. Heine*, 141 F.2d 741 (6th Cir. 1944).

The government asserts that the Company did not abandon the chick because it was going to destroy the chick only out of necessity and utility. The idea that living beings can be discarded in such a fashion and in such numbers and be considered "waste" may not be a pleasant concept, but it is a reality of the industry that neither this Court nor the law of property can change. Property law cannot be manipulated to justify seizure of an employer's possession, even in this context.

This conclusion does not end the analysis, however. As noted above, in undertaking statutory interpretation, all words in a statute must be considered. Here, the AETA does not apply simply to conduct that causes the loss of property. It applies to the usage of a facility of interstate commerce for the purposes of damaging or interfering with the operations of an animal enterprise and "*in connection with such purpose*" intentionally causing the loss of property. Here, the evidence establishes that Wheatley did not take the chick in connection with any purpose of damaging or interfering with the Company's operations. Rather, he took "George" for the purpose of saving that one chick's life and for no other purpose. Construing the statute as a whole, although the taking of the chick caused loss of property to the Company, it did not constitute a violation of the statute. Accordingly, this Court grants Wheatley's motion as to Counts 2 and 3, as the AETA, while constitutional, is inapplicable here.

V. Conclusion

For the reasons set forth herein, this Court DENIES the Defendant's motion on Count 1, upholding the conviction; but GRANTS the motion as to Counts 2 and 3, vacating the conviction, not because of any constitutional violation but because the Defendant's conduct here does not fall within the scope of the AETA.

IT IS SO ORDERED this 29th day of August, 2011.

Hon. Wilma M. Fredericks
United States District Judge

ADDENDUM A to MEMORANDUM OPINION

Agriculture Products Protection Act, Federal Law §§ 999.1-4

§ 999.1. Definitions

In this chapter, unless the context otherwise requires:

1. "Animal" means any living organism that is used in food, fur, or fiber production, agriculture, research, testing, or education. The term does not include a human being, plant, or bacteria.

2. "Animal facility" means any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale.

3. "Deprive" means to:

a. Withhold an animal or other property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the animal or property is lost to the owner;

b. Restore the animal or property only upon payment of a reward or other compensation; or

c. Dispose of an animal or other property in a manner that makes recovery of the animal or property by the owner unlikely.

4. "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if:

a. Induced by force or threat;

b. Given by a person the offender knows is not legally authorized to act for the owner; or

c. Given by a person who by reason of age, mental disease or defect, or influence of drugs or alcohol is known by the offender to be unable to make a reasonable decision.

5. "Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the actor.

6. "Possession" means actual care, custody, control or management.

7. "Research facility" means any place at which any scientific test, experiment, or investigation involving the use of any living animal is carried out, conducted, or attempted.

§ 999.2. Animal facility--Damage or destruction

No person who uses or causes to be used the mail or any facility of interstate or foreign commerce may without the effective consent of the owner may:

1. Intentionally damage or destroy an animal facility, an animal or property in or on the animal facility, or any enterprise conducted at the animal facility.

2. Acquire or otherwise exercise control over an animal facility or an animal or other property from an animal facility with the intent to deprive the owner and to damage the enterprise conducted at the facility.

3. Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.

4. Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section.

5. Enter an animal facility and remain concealed with intent to commit an act prohibited by this section.

6. Enter an animal facility and commit or attempt to commit an act prohibited by this section.

This section does not apply to lawful activities of a governmental agency carrying out its duties under law.

§ 999.3. Entry forbidden--Notice

No person may without the effective consent of the owner, and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility, if the person had notice that the entry was forbidden or received notice to depart but failed to do so. Notice includes communication by the owner or someone with apparent authority to act for the owner, fencing or other enclosures designed to exclude intruders or to contain animals, or a sign posted on the property or at the entrance to the animal facility indicating that entry is forbidden.

§ 999.4. Penalty

Any person who violates section 999.2 or section 999.3 shall be fined under this title, imprisoned for not more than 7 years, or both.

Animal Enterprise Terrorism Act, 18 USC § 43

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘‘Animal Enterprise Terrorism Act’’.

SEC. 2. INCLUSION OF ECONOMIC DAMAGE TO ANIMAL ENTERPRISES AND THREATS OF DEATH AND SERIOUS BODILY INJURY TO ASSOCIATED PERSONS.

(a) IN GENERAL.—Section 43 of title 18, United States Code, is amended to read as follows:

‘‘§ 43. Force, violence, and threats involving animal enterprises

(a) OFFENSE.—Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce—

(1) for the purpose of damaging or interfering with the operations of an animal enterprise; and

(2) in connection with such purpose—

(A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;

(B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family (as defined in section 115) of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or

(C) conspires or attempts to do so; shall be punished as provided for in subsection (b).

(b) PENALTIES.—The punishment for a violation of section (a) or an attempt or conspiracy to violate subsection (a) shall be—

(1) a fine under this title or imprisonment not more than 1 year, or both, if the offense does not instill in another the reasonable fear of serious bodily injury or death and—

(A) the offense results in no economic damage or bodily injury; or

(B) the offense results in economic damage that does not exceed $10,000;

(2) a fine under this title or imprisonment for not more than 5 years, or both, if no bodily injury occurs and—

(A) the offense results in economic damage exceeding $10,000 but not exceeding $100,000; or

(B) the offense instills in another the reasonable fear of serious bodily injury or death;

(3) a fine under this title or imprisonment for not more than 10 years, or both, if—

(A) the offense results in economic damage exceeding $100,000; or

(B) the offense results in substantial bodily injury to another individual;

(4) a fine under this title or imprisonment for not more than 20 years, or both, if—

(A) the offense results in serious bodily injury to another individual; or

2

(B) the offense results in economic damage exceeding $1,000,000; and

(5) imprisonment for life or for any terms of years, a fine under this title, or both, if the offense results in death of another individual.

(c) RESTITUTION.—An order of restitution under section 3663 or 3663A of this title with respect to a violation of this section may also include restitution—

(1) for the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense;

(2) for the loss of food production or farm income reasonably attributable to the offense; and

(3) for any other economic damage, including any losses or costs caused by economic disruption, resulting from the offense.

(d) DEFINITIONS.—As used in this section—

(1) the term ‘animal enterprise’ means—

(A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;

(B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or

(C) any fair or similar event intended to advance agricultural arts and sciences;

(2) the term ‘course of conduct’ means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose;

(3) the term ‘economic damage’—

(A) means the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs, including losses and increased costs resulting from threats, acts or vandalism, property damage, trespass, harassment, or intimidation taken against a person or entity on account of that person’s or entity’s connection to, relationship with, or transactions with the animal enterprise; but

(B) does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise;

(4) the term ‘serious bodily injury’ means—

(A) injury posing a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(5) the term 'substantial bodily injury' means—

(A) deep cuts and serious burns or abrasions;

(B) short-term or nonobvious disfigurement;

(C) fractured or dislocated bones, or torn members of the body;

(D) significant physical pain;

(E) illness;

(F) short-term loss or impairment of the function of a bodily member, organ, or mental faculty; or

(G) any other significant injury to the body.

(e) RULES OF CONSTRUCTION.—Nothing in this section shall be construed—

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, regardless of the point of view expressed, or to limit any existing legal remedies for such interference; or

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this action, or to preempt State or local laws that may provide such penalties or remedies.

California Penal Code § 597. Cruelty to animals

* * *

(b) Except as otherwise provided in subdivision (a) or (c), every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for every such offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony and by a fine of not more than twenty thousand dollars ($20,000).[7]

* * *

California Penal Code § 597t**. Confined animals**

Every person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area. If the animal is restricted by a leash, rope, or chain, the leash, rope, or chain shall be affixed in such a manner that it will prevent the animal from becoming entangled or injured and permit the animal's access to adequate shelter, food, and water. Violation of this section constitutes a misdemeanor.

This section shall not apply to an animal which is in transit, in a vehicle, or in the immediate control of a person.

[7] The remainder of section 597 is not at issue and therefore is not set forth herein. Note that section 597 does not contain an exclusion relating to the treatment of farmed animals or customary agricultural practices.

Prevention of Farm Animal Cruelty Act (Prop 2)

California Health & Safety **Code**

§ 25990. Prohibitions

<Section operative Jan. 1, [2010]>

In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

(a) Lying down, standing up, and fully extending his or her limbs; and

(b) Turning around freely.

§ 25991. Definitions

<Section operative Jan. 1, [2010]>

For the purposes of this chapter, the following terms have the following meanings:

(a) "Calf raised for veal" means any calf of the bovine species kept for the purpose of producing the food product described as veal.

(b) "Covered animal" means any pig during pregnancy, calf raised for veal, or egg-laying hen who is kept on a farm.

(c) "Egg-laying hen" means any female domesticated chicken, turkey, duck, goose, or guinea fowl kept for the purpose of egg production.

(d) "Enclosure" means any cage, crate, or other structure (including what is commonly described as a "gestation crate" for pigs; a "veal crate" for calves; or a "battery cage" for egg-laying hens) used to confine a covered animal.

(e) "Farm" means the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber; and does not include live animal markets.

(f) "Fully extending his or her limbs" means fully extending all limbs without touching the side of an enclosure, including, in the case of egg-laying hens, fully spreading both wings without touching the side of an enclosure or other egg-laying hens.

(g) "Person" means any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate.

(h) "Pig during pregnancy" means any pregnant pig of the porcine species kept for the primary purpose of breeding.

(i) "Turning around freely" means turning in a complete circle without any impediment, including a tether, and without touching the side of an enclosure.