Case No.: 11-11223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES
Respondent – Cross-Appellant

v.

LOUIS WHEATLEY
Defendant – Appellant – Cross-Respondent

Appeal from the United States District Court for the Central District of California

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BRIEF FOR UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT & STANDARD OF REVIEW

Jurisdiction over this appeal is proper pursuant to 28 U.S.C. § 1291 (2006), whereby the Court of Appeals has jurisdiction over a final ruling of judgment of acquittal by the District Court. An appeals court reviews a district court's decision of constitutionality of a statute and applicability of the necessity defense *de novo*. *See, e.g.*, *United States v. Bibbins*, 637 F.3d 1087, 1090 (9th Cir. 2011); *American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052

(9th Cir. 2009). In reviewing a judgment of acquittal, an appeals court must view the evidence in the light most favorable to the government and overrule the judgment if "a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Lanoy Alston, D.M.D., P.C.,* 974 F.2d 1206 (9th Cir. 1992); *see also Glasser v. United States*, 315 U.S. 60, 80 (1942) ("The verdict of a jury must be sustained of there is substantial evidence, taking the view most favorable to the Government, to support it.").

STATEMENT OF THE CASE

The United States of America, respondent–cross-appellant, responds to an appeal by Mr. Wheatley, appellant–cross-respondent, of an order from the United States District Court for the Central District of California, Honorable Wilma M. Frederickson, United States District Court Judge, denying Mr. Wheatley's motion for judgment of acquittal as to Count 1, and granting as to Counts 2 and 3. Both parties timely appealed.

STATEMENT OF FACTS

In the summer of 2010, Mr. Louis Wheatley ("Wheatley"), a journalism student familiar with animal farming practices and a member of a farmed animal protection organization, became an employee of Eggs R Us. *United States v. Wheatley*, Case No. 11-30445 WMF (ABCx), slip op. at 2 (C.D. Cal. 2011). Eggs R Us is a mid-sized company with locations in three states, including California, whose consumers include school children in the National School Lunch Program. *Id.* at 1–2. In business since 1966, Eggs R Us is a well-established part of the United States egg-producing industry. *Id.* at 2. Wheatley's employment as a poultry care specialist exposed him to internal company operations. *Id.* Wheatley claims his intentions in taking the job were not necessarily to harm Eggs R Us, but to personally experience industry conditions and defray college costs. *Id.* He hoped to use his insider's perspective to write and blog for class. *Id.*

After being employed for a mere seventeen days, Wheatley made two videotapes of internal company practices and posted these to the Internet. *Id.* at 3. One of the videos depicted customary industry practice of male chick disposal, and was ultimately viewed on YouTube by more than 1.2 million people. *Id.* The second video, less widely viewed, showed the living conditions for hens. *Id.* The same day Wheatley posted these videos he misappropriated company property—a male chick. *Id.* at 4. The negative publicity generated by Wheatley's postings has required Eggs R Us to expend considerable resources in response. *Id.*

As a result of these actions, Wheatley was charged with violating the Agriculture Products Protection Act ("APPA"), Federal Law §§ 999.1–.4 (2011), and the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43 (2006). *Id.* at 1. Under the APPA, he was charged with unlawfully videotaping in an animal facility. *Id.* Under the AETA, his charges included using the Internet 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. *Id.* The federal grand jury convicted him on all three counts. *Id.* at 4.

SUMMARY OF THE ARGUMENT

The APPA is not unconstitutional for its restrictions on free speech. The statute is not a content-based restriction, but is instead a reasonable time, place, or manner restriction on speech because it targets conduct and not the viewpoint or message of an expression. Further, the speech occurs in a non-public forum. The Eggs R Us facility constitutes a non-public forum because it is not traditionally a forum for debate nor is it compatible with such use. Therefore, because the APPA's restrictions are reasonable, the statute is constitutional. Moreover, the statute is not overbroad, facially or as applied, because there are contexts to which it clearly applies in a lawful manner, including Wheatley's situation, and it does not reach a substantial amount of speech.

Wheatley's conviction under the APPA should not be excused as a matter of public policy or with regard to a necessity defense, even with the First Amendment's strong protections against governmental interference with freedom of expression. While animal welfare is an issue of public concern, Congress determined that the APPA's restriction on speech is outweighed by the importance of protecting the national food supply. Furthermore, the necessity defense does not apply in this case because Wheatley did not seek lawful alternatives or show imminent harm.

The AETA is a valid exercise of Congress's Commerce Clause authority. The AETA regulates conduct that falls well within two of the three broad categories the Supreme Court recognizes Congress may validly regulate under the Commerce Clause. The statute regulates and protects instrumentalities of commerce, both animal enterprises and the Internet. Further, it regulates conduct that has a substantial effect on interstate commerce—the disruption of certain industries. Finally, Ninth Circuit case law makes clear that Wheatley's use of the Internet in facilitating his conduct establishes a sufficient link to interstate commerce to satisfy the Constitution.

Wheatley's conduct meets the elements of an offense under the AETA. Wheatley used the Internet to damage or interfere with the operations of Eggs R Us, an animal enterprise, by posting videos and blogging about company practices that resulted in increased scrutiny of the company. Eggs R Us was forced to expend resources in dealing with this increased attention. In addition, Wheatley intentionally caused the loss of real property by taking a male chick from Eggs R Us, which had not abandoned the property. Finally, his conduct satisfies the "in connection with" element because taking the chick was logically related to Wheatley's Internet posts, there was continuity in time, and possessing physical "proof" of Wheatley's contentions likely emboldened Wheatley in his actions.

ARGUMENT

I. THE APPA DOES NOT VIOLATE THE FIRST AMENDMENT AND WHEATLEY'S CONVICTION UNDER COUNT 1 SHOULD STAND.

Wheatley is charged with violating the APPA, which prohibits a person, without consent, from "[e]nter[ing] an animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment." Federal Law § 999.2(3). The APPA implicates the First Amendment, which provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. 1. The First Amendment "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). However, the limit on government is not "absolute." *Id.*

The First Amendment analysis requires a determination of the type of speech restriction imposed by the statute—whether viewpoint-based, content-based, or time, place, or manner. The APPA constitutes a reasonable time, place, or manner restriction because of its general application to all users of photographic, video or audio recorders in an animal facility. First Amendment analysis also requires a determination of whether the forum is public or non-public. Because Eggs R Us is non-public, the government can impose greater restrictions on speech. The restrictions under the APPA are content-neutral and reasonable, and are therefore constitutional. Wheatley challenges the law facially and as applied; both challenges fail in this case.

A. The Statute Is Not a Content-Based Restriction and Properly Invokes the Authority of the Federal Government to Regulate Speech in a Reasonable Time, Place, or Manner in a Non-Public Forum.

In order to properly frame the First Amendment analysis, two important elements must be established: the type of restriction on speech and the forum in which the restriction occurs. First, the statute is not a content-based restriction. Rather, it is a reasonable time, place, or manner

restriction on speech. Second, Eggs R Us is a non-public forum and therefore subject to greater impositions on free speech.

1. The Restriction on Speech Is Not Content-Based, but Instead a Proper Time, Place, or Manner Restriction.

Viewpoint-based restrictions are subject to the highest level of scrutiny and rarely pass muster. A viewpoint restriction is exemplified as "deterring the expression of a particular viewpoint." *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir. 1998). Because the APPA does not discriminate against expressions related to any specific message, anti-animal cruelty or otherwise, but bans all photography and video and audio recording in animal facilities, the APPA does not seek to prevent a particular viewpoint.[1]

The APPA's restrictions also do not require the examination of the content of speech. In *United States v. Stevens*, the Supreme Court found a content-based restriction on the basis that the statute explicitly prohibited depiction of animal cruelty, which was defined as "any visual or auditory depiction . . . in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 130 S. Ct. 1577, 1582 (2010) (quoting 18 U.S.C. § 48 (2006)). Thus, because the statute targeted specific content, it was unconstitutional. Unlike the statute at issue in *Stevens*, which restricted the speech itself, the APPA targets underlying conduct. It does not prohibit all forms of communication or speech, but instead the act of video or audio recording. In

[1] Wheatley suggests that the legislative history of other states' version of the statute at issue here contemplate a viewpoint restriction. However, legislative history is used only when statutory text is unclear. *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). The statute here unambiguously implements a blanket prohibition on the use of photographic and recording equipment to protect animal facilities. Even if the statute were ambiguous, the legislative history of other similar statutes in different jurisdictions would carry no persuasive value here: "It is never easy to use legislative history to decipher legislative intent because members of Congress may vote for a statute for varying reasons and may expect the courts to apply the statute in differing manners. For this reason, we must first decipher Congressional intent from a statute's language, not from legislative history." *Perera v. Siegel Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992). The intent of the legislative body in one state simply cannot be understood by the intent of a separate legislative body, even in enacting similar statutes.

this sense, the statute is comparable to the one at issue in *United States v. Williams*. 553 U.S. 285 (2008). The *Williams* Court found that a statute banning the offering of child pornographic material did not violate the First Amendment. *Id.* at 293 ("Rather than targeting the underlying material, this statute bans the collateral speech . . . ."). As long as "the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory [or otherwise disfavored] idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). Even the court in *Bolbol v. City of Daly City*, which found unconstitutional a restriction on videotaping circus animal treatment, noted that a barricade restriction was content neutral. 754 F. Supp. 2d 1095, 1106 (N.D. Cal. 2010).

Furthermore, a disparate impact on one group does not invalidate a statute. For example, that "the majority of those whose conduct the statute punishes [which criminalizes actions against reproductive health facilities] probably oppose abortion does not call the statute's neutrality into question." *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C. Cir. 1996). In *United States v. O'Brien*, although the statute was likely to affect draft protestors, it was not designed to target the content of the speech and was therefore constitutional. *United States v. O'Brien*, 391 U.S. 367 (1968); *see also United States v. Dinwiddie,* 76 F.3d 913, 923 (8th Cir. 1996) ("[T]here is no disparate-impact theory in First Amendment law."). Thus, while restricting individuals from video and audio recording in animal facilities may impose a greater burden on animal activists, this fact alone does not make the APPA unconstitutional. In sum, the APPA does not impose any content-based restrictions.

While content-based restrictions must survive strict scrutiny to be constitutional, if a statute is content-neutral, it is subject only to intermediate scrutiny. Since the APPA's restrictions are focused on time, place, or manner, they must therefore be content neutral, be

narrowly tailored, serve a significant governmental interest, and leave open ample alternative channels for communication. *O'Brien*, 391 U.S. at 377. As explained, the restrictions are content neutral. The restrictions are narrowly tailored. While they prohibit photography and audio and video recording, the statute does not prohibit picketing, or other forms of communication. Moreover, upon the consent of an owner, audio and video recording can occur. The governmental interests at stake—national food production and animal research—are significant. Lastly, the APPA does not preclude communication in other fashions. In fact, Wheatley himself utilized other avenues, like blogging, which are lawful under the APPA. *Wheatley*, slip op. at 3. Thus, the statute is a reasonable time, place, or manner restriction.

2. Eggs R Us Qualifies as a Non-Public Forum and Speech Can Therefore Be Subjected to Viewpoint-Neutral, Reasonable Restrictions.

"[P]rotected speech is not equally permissible in all places and at all times [and n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799–800 (1985). Since greater impositions on speech can occur in non-public forums, this determination drives the analysis.

A non-public forum is characterized as "public property which is not by tradition or designation a forum for public communication." *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Conversely, public forums are typically characterized as "government-owned property or a government program [] capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Pleasant Grove City v. Summum*, 555 U.S. 460, 478 (2009). Public forums are those properties which have "immemorially been held in trust for the use of the public and, time out of mind,

have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Org.*, 307 U.S. 496 (1939).

Examples of public forums include a public university's student activity fund or buildings, a school system's internal mail facilities, and the traditional public park or street corner. *See Pleasant Grove City*, 555 U.S. at 478 (listing various forms of public fora). Eggs R Us is distinguishable from all of these locations. The facility itself is private and day-to-day operations are at the discretion of company management. *Wheatley*, slip op. at 9. Despite that Eggs R Us receives federal funding and is subject to federal oversight, it does not ultimately rise to the level of governmental influence to qualify as a public forum. *Id.*

Eggs R Us is more like the Combined Federal Campaign, an annual charity drive targeted at federal government employees, which is a non-public forum. 473 U.S. at 805. The *Cornelius* Court considered factors including "policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate" and "the nature of the property and its compatibility with expressive activity to discern the government's intent." 473 U.S. at 802. Because Eggs R Us is not traditionally open to public assembly and debate—its very nature limits its compatibility for expressive activity—it is a non-public forum.

Because Eggs R Us qualifies as a non-public forum, speech restrictions will be upheld so long as they are reasonable and content neutral. *Perry Educational Ass'n*, 460 U.S. at 46. Generally, a regulation that serves to completely ban all First Amendment activities is not reasonable, even in a non-public forum "because no conceivable governmental interest would justify such an absolute prohibition of speech." *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987). However, the restriction need only be "reasonable" and "need not be the most reasonable or the only reasonable limitation." *Cornelius*,

473 U.S. at 808. As discussed above, the statute's restrictions are content neutral. Furthermore, they are reasonable. Recording is prohibited only in the absence of an owner's permission and, otherwise, the prohibitions are limited only to photography and audio and video recording, which by no means preclude all forms of speech.

Even if Eggs R Us were found to constitute a public forum, the restriction imposed by the APPA satisfies heightened scrutiny. Restrictions in a public forum must be narrowly tailored to serve a compelling state interest and the restricted speech must be strictly incompatible with the purposes of the forum. *United States v. American Library Ass'n*, 539 U.S. 194, 207 (2003). The *Bolbol* court's holding of unconstitutionality was based largely on a finding that "the placement of the barricades . . . was not narrowly tailored to achieve the government's interest in public safety" because there was contradictory evidence suggesting that the placement could be less restrictive. 754 F. Supp. 2d at 1107–08. Furthermore, photography and video recording were not incompatible with normal activity in the barricaded area, which was "sparsely populated" and at one time even contained a baby stroller. *Id.* at 1106. Thus, individuals desiring to videotape behind the barrier would not have affected circus activities or caused harmful interference.

The APPA protects governmental interests in national food production and animal research. To protect these compelling interests, the federal government has determined that it is important to restrict specific activities, namely photography and video and audio recording, which are, moreover, strictly incompatible with the forum. Unlike the circus in *Bolbol*, photography and videotaping within the Eggs R Us facility would be incompatible with the facility's goals of egg production. Moreover, these activities are only restricted in the absence of permission by the owner of an animal facility. Therefore, the restriction is narrowly tailored and withstands even heightened scrutiny if Eggs R Us constitutes a public forum.

B. The APPA Is Not Facially Overbroad Under the First Amendment.

"[F]acial challenges to legislation are generally disfavored." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990). The overbreadth doctrine will find that "a statute is facially invalid if it prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 292. The requirement for "substantial amount" is measured "relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003). To succeed, Wheatley must establish that "no set of circumstances exists under which [the statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Alternatively, he would need to show that the APPA lacks a "plainly legitimate sweep." *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurrence). Criminal statutes are, however, scrutinized with particular care. *Winters v. New York*, 333 U.S. 507, 515 (1948).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293. The statute at issue here targets all forms of recorded speech occurring in an animal facility. The statute defines animal facility as "any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale." Federal Law § 999.1(2). The definition reaches a number of facilities used in animal husbandry; however, it is not unlimited in its scope and specifies its application to those facilities connected with animals.

Unlike in *Stevens*, where the criminal prohibition was found to have "alarming breadth," the statute here delineates the facilities wherein video and audio recording are unlawful. 130 S. Ct. at 1588. Further, the APPA permits individuals to seek the permission of facility owners, allowing for lawful photography and recording. This statute does not apply to a substantial amount of speech—there are numerous circumstances in which speech is permitted. Because the

APPA is viewpoint- and content-neutral, and there is no evidence that the statute will chill particular speakers or ideas, the statute is not substantially overbroad.

Furthermore, Wheatley has not demonstrated the APPA is invalid under all circumstances. He contends that the only way in which to enforce California statutes pertaining to animal welfare involve capturing images of the operations of animal facilities. *Wheatley*, slip op. at 13. However, this allegation does not mean that the statute is without lawful application. Instead, the APPA is designed to protect operations of animal facilities. In this way, the statute has a "plainly legitimate sweep." In prohibiting certain activities in animal facilities, and clearly delineating an animal facility as well as the prohibited activity, the statute has valid applications and therefore survives a facial challenge.[2]

C. The APPA Does Not Violate the First Amendment as Applied to Wheatley.

For the reasons expressed above, the APPA is constitutional. In addition to surviving a facial overbreadth challenge, the APPA is also valid as applied to Wheatley because his conduct falls well within the activities prohibited by the statute. Federal Law § 999.2 prohibits anyone "without the effective consent of the owner . . . [from e]nter[ing] an animal facility [defined as

[2] The overbreadth doctrine often goes hand-in-hand with the void for vagueness doctrine. The void for vagueness doctrine invalidates statutes if they fail either to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . [or to] provide explicit standards for those who apply them." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). When criminal liability hinges on a subjective determination, then it is impermissibly vague. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 360–61 (1983) (identification requirement unconstitutional because police given "full discretion"); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (unconstitutional to hold individuals criminally liable for "annoying" or "indecent" conduct); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (vagrancy ordinance unconstitutional because applicable to "vagabonds," an indeterminate phrase). Here, the statute does not suffer from such "indeterminacy." The prohibited conduct is clear. Moreover, the discretion of the police officers is properly cabined—there is no "unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Houston v. Hill*, 482 U.S. 451, 465 (1987). Instead, Wheatley and others will be aware of their violation of the statute should they choose to use video or audio recording equipment and no subjective determination is required of enforcing officers.

any building where an animal is housed] and us[ing] . . . a camera, video recorder, or any other video or audio recording equipment."

Wheatley successfully made video recordings at Eggs R Us, which qualifies as an animal facility because it is a building keeping and housing animals. Since Eggs R Us falls within the intended scope of the statute, it cannot be overbroad as applied to Wheatley.[3] Furthermore, because the statute reflects a narrow tailoring of a restriction to protect a significant government interest, it does not violate the First Amendment as applied to Wheatley.

II. NEITHER PUBLIC POLICY NOR THE DEFENSE OF NECESSITY REQUIRES OVERTURNING WHEATLEY'S CONVICTION ON COUNT 1.

Even with the First Amendment's strong protections against governmental interference with freedom of expression, the restrictions under the APPA should not be found unconstitutional as a matter of public policy or with regard to a necessity defense. The status of the animal facility as a non-public forum permits greater intrusion on the right of free speech and the content-neutral restrictions imposed under the law are warranted in this case in light of the importance of protecting the national food supply as well as enabling important research. Furthermore, the necessity defense does not apply in this case.

A. Public Policy Considerations Do Not Preclude Wheatley's Conviction.

Because of the importance of ideas involving public awareness or political expression, "commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997). 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*

[3] For the same reasons that the void for vagueness doctrine does not apply in the facial challenge, it also fails in the as applied challenge.

Animal Cruelty, 129 Cal App. 4th 1228, 1246 (2005). Moreover, the First Amendment itself has prescribed a balancing test that strongly favors free speech. Even so, the circumstances of this case present an example for when speech is properly restricted.

Situations where public policy have weighed heavily in favor of allowing restrictions on speech appear in the context of protecting minors from exposure to certain speech. In *United States v. Playboy Entertainment Group, Inc.*, the Court upheld a content-based restriction designed to protect minors from viewing harmful materials. 529 U.S. 803 (2000); *see generally American Library Ass'n*, 539 U.S. 194 (2003) (allowing federal funding restrictions to libraries conditional upon restricting Internet access to block images from minors and images that constitute obscenity or child pornography). While Wheatley's scenario does not rise to the level of need demonstrated in those cases in favor of restrictions, the APPA neither restricts speech based on its content nor prevents Wheatley from communicating his concerns in a different manner.

Further, the competing governmental interests at stake under the APPA include protection of our food supply and important medical research. These interests are significant. *See McHenry v. Agnos*, 1993 U.S. App. LEXIS 1356 (9th Cir. 1993) (noting substantial government interest in food safety regulations); *Lesser v. Espy*, 34 F.3d 1301, 1306-08 (7th Cir. 1994) (noting substantial government interest in regulation of sale of rabbits for research). In drafting the APPA, Congress determined that these interests outweigh the public's interest in communicating certain forms of speech and made the policy choice to restrict photography or video and audio recording in certain limited circumstances.

Congress has made clearer its intent with the fact that the APPA does not have a whistleblower exemption or otherwise provide protection for those wishing to disclose unlawful

activity. Had Congress desired to encourage this behavior, it could have drafted the statute to allow it. The First Amendment does not provide remedies or protection to whistleblowers. *Winder v. Erste*, 566 F.3d 209, 216 (D.C. Cir. 2009). In the absence of a congressionally granted exception to the statute, Wheatley's actions, even as a matter of public policy, violate the law. Given that the restriction is imposed in a limited, reasonable fashion in a non-public forum, the balance shifts in the other direction to allow a restriction on speech in this case.

Wheatley also asserts that his behavior is exempt because it brought to light alleged violations of California law. *See, e.g.*, CAL. PENAL CODE § 597(b), 597t (2011). However, these statutes do not suggest that in promoting animal welfare, federal laws can be violated without consequence. California's legislature has thus decided that violation of the APPA, even where motives include identifying violations of California's own statutes, should stand because the legislature did not create an exception. Furthermore, these statutory schemes are not inconsistent. The United States Department of Agriculture has the authority to regulate entities such as Eggs R Us and it can ensure compliance with animal welfare requirements while still preventing interference with operations and California can enforce its laws without conflict with the APPA.

B. The Necessity Defense Does Not Apply to Wheatley's Conduct.

In order to establish the "necessity" defense, Wheatley "colorably must have shown that: (1) [he was] faced with a choice of evils and chose the lesser evil; (2) [he] acted to prevent imminent harm; (3) [he] reasonably anticipated a direct causal relationship between [his] conduct and the harm to be averted; and (4) [he] had no legal alternatives to violating the law." *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992). The application of this defense has been limited to circumstances involving direct civil disobedience. Wheatley cannot avail himself of a

necessity defense in this case because he neither meets all of the elements of the defense nor does the defense apply under these circumstances.

1. Wheatley Cannot Show That His Actions Are the Intended Beneficiary of the Necessity Defense.

In the absence of any one element, since the "test for admissibility of a necessity defense is a conjunctive one, a court may preclude invocation of the defense." *Id.* Wheatley cannot prove all elements and therefore the necessity defense does not apply.

Most glaringly, Wheatley cannot show that there were no other legal alternatives. In cases where the necessity defense has applied, there has been a clear lack of alternatives, not simply a choice between less ideal solutions. For example, in *United States v. Bibbins*, the Ninth Circuit found that a man's choice to prevent bodily injury to himself did not mean that resisting officers was his only alternative because he could have "vocalized his need for medical help or proposed an alternative way to comply with the rangers' instructions." 637 F.3d 1087, 1094 (9th Cir. 2011); *see also United States v. Perdomo-Espana*, 522 F.3d 983, 988 (9th Cir. 2008) (holding border crossing illegal because medical care was available in Tijuana).

From the record, there is no evidence that Wheatley sought the advice of federal agency oversight. Prior to recording images within the animal facility in violation of Federal Law 999.1, Wheatley could have requested an inspection or reported the alleged violations to the United States Department of Agriculture. In the absence of evidence that he pursued these other, lawful alternatives and found no success, Wheatley cannot use the necessity defense.

Furthermore, Wheatley does not sufficiently establish imminent harm. In *United States v. Aguilar*, the court questioned whether reference to "general atrocities committed by Salvadoran, Guatemalan, and Mexican authorities" proved a danger of imminent harm and found that it failed for lack of specificity. 883 F.2d 662, 693 (9th Cir. 1989). Medical emergencies must also present

objective, imminent harm. *See Perdomo-Espana*, 522 F.3d at 988. Wheatley's actions did not seek to avert any imminent harm that rises to the level intended for protection by the necessity defense—either in attempting to promote animal welfare generally or in protecting a single male chick. Thus, as Wheatley's case fails under at least two of the four requirements for the necessity defense, it cannot apply in this case.

2. Wheatley's Actions Were Not Direct Civil Disobedience in Protest of Federal Law 999.1 and Therefore the Necessity Defense Does Not Apply.

Not only does Wheatley fail to satisfy all elements of the test, but also the "necessity" defense cannot apply under circumstances of indirect civil disobedience. In *Schoon*, the court clarified that direct civil disobedience involves "protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow" whereas indirect civil disobedience occurs when "protestors were not challenging the laws under which they were charged." 971 F.2d at 196. Wheatley's behavior was not the result of a direct protest of the APPA. As the district court found, it was not clear Wheatley was even aware of the APPA. *Wheatley*, slip op. at 14. Thus, the necessity defense does not apply in this case.

Moreover, the necessity defense should not be extended to apply in this case. As a first matter, it is not clear from the record that Wheatley was trying to effect change. The necessity defense is designed to protect those protestors who are knowingly violating a law as a comment about the law or to avoid imminent harm. Neither applied to Wheatley. Thus, the necessity defense should not be applied to Wheatley's circumstance.

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III. THE AETA IS A VALID EXERCISE OF CONGRESS'S COMMERCE CLAUSE AUTHORITY AND WHEATLEY'S CONVICTIONS UNDER COUNTS 2 AND 3 SHOULD BE REINSTATED.

The Commerce Clause of the United States Constitution endows Congress with the power "[t]o regulate commerce . . . among the several states." U.S. CONST. art. 1, § 8, cl. 3. The Supreme Court has interpreted this power to regulate to include "three broad categories of activity." *United States v. Lopez*, 514 U.S. 549, 558 (1995). First, "Congress may regulate the use of the channels of interstate commerce." *Id.* Second, Congress may "regulate and protect the instrumentalities of interstate commerce . . . even though the threat may come only from intrastate activities." *Id.* Finally, Congress may regulate "those activities that substantially affect interstate commerce." *Id.* at 559.

The AETA regulates instrumentalities of interstate commerce because it protects animal enterprises, businesses engaged in interstate commerce. Further, it regulates the use of the Internet, a facility of interstate commerce, in committing certain acts. The AETA also regulates conduct that has a substantial effect on interstate commerce, thus satisfying a second category of acceptable regulation. Finally, Ninth Circuit case law makes clear that under the language of the AETA, use of the Internet in effectuating the prohibited activity is enough to satisfy the interstate jurisdictional requirement, thus placing Wheatley's conduct well within the regulatory authority of Congress. *See United States v. Wright*, 625 F.3d 583 (9th Cir. 2010)

A. The AETA Regulates Instrumentalities of Interstate Commerce.

The Commerce Clause authorizes Congress to "protect persons or things in interstate commerce" and to do so Congress may regulate conduct that "interferes with, obstructs or prevents" interstate commerce. *Dinwiddie*, 76 F.3d at 919 (quoting *United States v. Coombs*, 12 Pet. 72, 77 (1838)). In *Dinwiddie*, the court found that Congress could protect Planned Parenthood clinics, its staff, and its patients from certain disruptive activities because they were

instrumentalities of interstate commerce, defined as "persons or things in interstate commerce." *Dinwiddie*, 76 F.3d at 919. The court noted that staff and patients were likely to travel interstate, and in fact, many did cross state lines to travel to the clinic. *Id.* Further, the court found that Planned Parenthood could be protected as a business engaged in interstate commerce because it "directly engage[d] in the production, distribution, or acquisition of goods or services in interstate commerce." *Id.* Because Planned Parenthood provided reproductive and health services in interstate commerce, Congress could regulate conduct directed at the clinic consistent with the Constitution. *Id.*

Similarly, Eggs R Us is an instrumentality of interstate commerce because it is a business engaged in interstate commerce. Eggs R Us is a mid-sized company with facilities in three states that supplies eggs to the national food market. *Wheatley*, slip op. at 1. Eggs R Us likely hires employees from a variety of states to staff its various locations.[4] In addition, it is probable that employees cross state lines to travel to work and that materials and supplies for the various facilities also cross state lines. *See United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) ("[T]he Supreme Court has repeatedly said crossing state lines is interstate commerce regardless of whether any commercial activity is involved.") (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–56 (1964)). Thus, because Eggs R Us is an instrumentality of interstate commerce, actions interfering with its operation may be regulated by Congress.

Further, the AETA is a valid exercise of Congress's Commerce Clause authority because it regulates the use of facilities in interstate commerce used to commit certain acts. The facility in question in this case is the Internet. Several courts have recognized the Internet as an instrumentality of interstate commerce. *See, e.g., United States v. MacEwen*, 445 F.3d 237, 245

[4] The record indicates that although Wheatley is a resident of California, he is also a college student, possibly attending college out of state. *Wheatley*, slip op. at 2, 4.

(3rd Cir. 2006) ("It is difficult to find an act more intertwined with the use of the channels and instrumentalities of interstate commerce than that of downloading an image from the Internet."); *United States v. Panfil*, 338 F.3d 1299, 1300 (11th Cir. 2003) (assuming without discussion that an Internet chatroom is "an instrument of interstate commerce"). The Ninth Circuit, citing *MacEwen*, concluded that because the Internet serves "as both the means to engage in commerce and the method by which transactions occur," it can be both an instrumentality and channel of interstate commerce, and is therefore regulable under the Commerce Clause. *Wright*, 625 F.3d at 593.

B. The AETA Regulates Conduct Having a Substantial Effect on Interstate Commerce.

When evaluating whether a statute regulates conduct that has a substantial effect on interstate commerce, a court's review is limited. The court must determine simply "whether a rational basis existed for concluding that [the] regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 556. Here there is a rational basis for concluding that protecting animal enterprises from disruptive activities involving the use of interstate facilities substantially affects interstate commerce. Protecting Eggs R Us's operations from disruption is important for interstate commerce in food products. Further, Eggs R Us provides eggs for school children in California through the National School Lunch Program, a federally funded program. Even where the activity in question is local, "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). Congress need not establish that a specific instance will have a substantial effect on interstate commerce to be able to validly regulate it under the Commerce Clause. *Raich*, 545 U.S. at 17. The Supreme Court has established that "when a general regulatory statute bears a substantial relation to commerce, the

de minimus character of individual instances arising under that statute is of no consequence." *Id.* (internal citations and quotations omitted).

This case is distinguishable from other cases involving federal criminal statutes that the Supreme Court has struck down as exceeding Commerce Clause authority. In *Lopez*, for example, Congress sought to regulate the "mere possession" of firearms because of the negative effects associated with the presence of guns in schools, eventually resulting in a "less productive citizenry." 514 U.S. at 562, 564. The Supreme Court rejected the government's argument in *Lopez* based on four considerations: (1) the statute at issue in *Lopez* was a criminal statute having "nothing to do with 'commerce' or any sort of economic development," (2) the statute had no express jurisdictional requirement establishing a connection to interstate commerce, (3) the absence of legislative findings about the regulated conduct's impacts on interstate commerce strongly indicated no substantial effects were "visible to the naked eye," and (4) the government's argument was too attenuated because to find a substantial effect on interstate commerce required "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 559–67; *see also United States v. Morrison*, 529 U.S. 598, 609–13 (2000).

The AETA is a valid exercise of Commerce Clause authority because it protects against the disruption of animal enterprises that have a substantial affect on interstate commerce. The four considerations that cautioned hesitation in *Lopez* and *Morrison*, favor a finding of substantial effect on interstate commerce for the AETA. Although the AETA is a criminal statute, it has a connection to commerce because it protects commercial animal enterprises that supply goods and services in interstate commerce. In *Raich*, the Court noted that the statute at issue regulated

activities that were "quintessentially economic" defined to include "the production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Here, the AETA regulates conduct that seeks to disrupt the uninterrupted production, distribution, and consumption of commodities. Although the regulated conduct itself may not be economic in nature, it directly affects economic activity and thus falls within Congress's Commerce Clause authority. *See Raich*, 545 U.S. at 18 ("Congress can regulate purely intrastate activity that is not itself 'commercial,' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.")

There is an explicit jurisdictional requirement in the AETA that further establishes the link to interstate commerce. *See* 18 U.S.C. § 43(a) (2006). Jurisdictional requirements often serve to "limit the reach" of a statute to a discrete set of actions that "have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Thus, a jurisdictional requirement can help ensure that the actions regulated are within Commerce Clause authority. The AETA contains a specific jurisdictional hook, ensuring that the activity prohibited is connected to interstate commerce through the use of a facility of interstate commerce like the mail system or, as in this case, the Internet. 18 U.S.C. § 43(a).

There are no explicit congressional findings in the AETA. However, legislative findings are neither required nor dispositive in finding that an act substantially affects interstate commerce. *Lopez,* 514 U.S. at 563. The legislative history of the AETA and its precursor statutes indicate a substantial connection to interstate commerce. Congress perceived there to be a strong need for federal protection of animal enterprises from disruptive acts because of the substantial impact on interstate commerce from both the national actors involved and the interruption of

economic production. Representative Scott noted that the "interstate nature of the planning and execution of the criminal harassment tactics used by some individuals or groups skilled at exploiting gaps or weaknesses in the laws have made it difficult for States . . . . That is why this bill is deemed necessary." 152 Cong. Rec. H8590-01, H8591, 2006 WL 3289966, 5 (daily ed. Nov. 13, 2006) (Statement of Rep. Scott). This sentiment is present in the various precursors to the AETA as well. *See, e.g.,* Opening Statement of Congressman Charles W. Stenholm Regarding H.R. 3270, Farm Animal and Research Facilities Protection Act (July 17, 1990), at 2. ("Federal legislation is justified because, even though the acts are local, those groups which have claimed credit in the past are national. They cross state lines and therefore it is not just a local crime . . . . To ignore this threat to agricultural productivity and science is to place that productivity in jeopardy, with consumers both here and abroad as much victims as the farmers and ranchers who are under attack.").

Finally, this Court need not pile inference upon inference to find the link between interstate commerce and the prohibited actions here. Where animal enterprises like Eggs R Us are disrupted by actions involving the use of interstate facilities to damage or interfere with their operations and result in loss of real property, these enterprises cannot function as well in the economy and supply their goods to the national market. These individual disruptions and resulting loss of supply have a substantial effect on interstate commerce in the aggregate. *See Raich*, 545 U.S. at 19 (discussing that in *Wickard* the Court had "no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving [certain actions] outside the regulatory scheme would have a substantial influence on . . . market conditions."). The AETA bears a substantial relation to commerce because it protects a sector of industry that is important to the national economy. *See* Kevin R. Grubbs, *Saving Lives or*

Spreading Fear: The Terroristic Nature of Eco-Extremism, 16 ANIMAL L. 351, 370 (2010) ("While radical members of the eco-extremist movement do not pose the same external threat to national security that come from other, more violent organizations such as Al Qaeda, members . . . still constitute a threat to a large number of Americans, as well as to industries important to the U.S. economy.").

C. The Language of the AETA Supports a Finding that it is Constitutional as Applied to Wheatley's Conduct.

The AETA punishes those who use or cause to be used "any facility of interstate or foreign commerce" for purposes prohibited by the Act. 18 U.S.C. § 43(a). This language indicates that Congress intended Internet usage alone in committing the prohibited actions to be sufficient to meet the jurisdictional requirements necessary to make the application of the AETA to Wheatley's conduct constitutional. In *Wright*, the Ninth Circuit made a critical distinction between those statutes that use the phrase "in interstate commerce" to modify the noun "facility" rather than the verb "uses." 625 F.3d at 594. In a case involving the Travel Act, 18 U.S.C. § 1952(a), the court recognized that because the act "prohibited the use of 'any *facility* in interstate or foreign commerce' with the intent to further certain unlawful activity . . . it was sufficient that the defendant's illegal conduct involved a '*facility* in interstate commerce.'" *Id.* (citing *United States v. Nader*, 542 F.3d 713, 716 (9th Cir. 2008)) (emphasis in the original). "[I]t was not necessary for that facility itself to be 'used' in interstate commerce." *Id.* Thus, because the telephone was a facility of interstate commerce, the use of the telephone alone in committing the crime was sufficient to satisfy the jurisdictional nexus making the application of the Travel Act constitutional. *Id.* In the statute at issue in *Wright*, however, the court noted that the "jurisdictional element is focused not on the means the defendant uses . . . and its connection to interstate commerce. Rather, it requires that the defendant mail, transport, or ship child

pornography interstate." *Id.* Thus, to satisfy the statute in *Wright*, the child pornography itself had to be shown to cross state lines and use of the Internet alone was not enough.

Here, it is likely that the videos Wheatley posted crossed state lines, as more than 1.2 million people viewed them. *Wheatley*, slip op. at 3. However, as Ninth Circuit case law indicates, the posts themselves need not cross state lines as long as Wheatley used the Internet in engaging in the prohibited conduct. Because Wheatley's conduct meets the elements of an offense under the AETA, as discussed further below, and because Wheatley used the Internet in facilitating his conduct, the AETA is constitutional as applied.

IV. WHEATLEY'S CONDUCT VIOLATED THE AETA BECAUSE HE USED THE INTERNET TO INTERFERE WITH THE OPERATIONS OF EGGS R US AND INTENTIONALLY CAUSED THE LOSS OF PROPERTY.

The AETA punishes those individuals who use a facility of interstate commerce "for the purpose of damaging or interfering with the operations of an animal enterprise; and in connection with such purpose intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or . . . entity having a connection to, relationship with, or transactions with an animal enterprise." 18 U.S.C. § 43(a)(1), (2)(A). Wheatley's conduct falls squarely within this definition. Wheatley economically damaged and interfered with the operations of the company through his Internet posting of videos taken inside Eggs R Us, satisfying Count 2. One video was eventually viewed by 1.2 million people, causing the company unwanted attention and increased scrutiny. *Wheatley*, slip op. at 3. In addition, Wheatley's taking of company property in the form of a male chick constitutes intentionally causing the loss of property in connection with his other activities under the AETA, satisfying Count 3. Together these actions constitute a violation of the AETA.

A. Wheatley Used the Internet to Damage and Interfere with the Operations of Eggs R Us by Generating Increased Media Scrutiny.

To establish Count 2, the government must show that Wheatley (1) used or caused to be used any facility of interstate commerce (2) for the purpose of damaging or interfering with the operations of an animal enterprise. 18 U.S.C. § 43(a). The AETA defines "economic damage" to include "loss of profits, or increased costs." *Id.* § 43(d)(3)(A). Further, in discussing when restitution is required under the Act, the AETA cites "any other economic damage, including any losses or costs caused by economic disruption, resulting from the offense." *Id.* § 43(c)(3).

Wheatley used the Internet, a facility of interstate commerce, to post videos he took inside Eggs R Us for the purpose of showing the public "business as usual" inside the facility. *Wheatley*, slip op. at 3. These initial postings prompted increased news reports and media attention on company practices resulting in increased scrutiny for Egg R Us. *Id.* at 3. Eggs R Us was forced to respond to the increased attention, devoting resources to considering altering its practices. *Id.* at 4. Shifting resources to these new concerns likely required Eggs R Us to disrupt their normal operations, possibly affecting profits. As the district court correctly noted, Wheatley's postings "set into action a chain of events that resulted or potentially may result in economic loss to [Eggs R Us]." *Id.* at 17. Thus, Wheatley's actions caused increased costs for Eggs R Us, resulting in economic damage as defined by the AETA.

Further, Wheatley hoped to interfere with the operations of Eggs R Us by informing the public about the company's practices. Wheatley seemed to believe that Eggs R Us was not in compliance with all California laws. *Id.* at 3. When Wheatley's supervisor at Eggs R Us told him not to worry about the alleged violations, a reasonable inference can be made that Wheatley hoped to cause a change in practices through his actions, whether directly or indirectly. *Id.* at 3. Thus, Wheatley intended to and did interfere with the operation of an animal enterprise under the

meaning of the AETA when he posted on the Internet about his experience at Eggs R Us.

B. Wheatley Intentionally Caused the Loss of Real Property by Taking a Male Chick from Eggs R Us in Connection with His Other Activities.

To establish Count 3, the government must prove that (1) Wheatley intentionally caused the loss of real property, (2) in connection with the purpose of damaging or interfering with the operations of an animal enterprise. 18 U.S.C. § 43(a)(2). Wheatley admits to intentionally removing a male chick on the same day that he posted information on the Internet pertaining to Eggs R Us practices, thus satisfying the requirements of the AETA.

1. The Chick was Not Abandoned by Eggs R Us, Meaning that Wheatley Caused the Loss of Company Property.

Wheatley argues that the male chick he took from Eggs R Us's premises was abandoned property, thus permitting him to take the chick lawfully. However, "'abandonment' has a well-defined meaning in the law . . . . It is the giving up of a thing absolutely without reference to any particular person or purpose, and includes both the intention to relinquish all claim to and dominion over the property, and the external act by which this intention is executed." *St. Peter's Church v. Bragaw,* 56 S.E. 688, 689–90 (N.C. 1907); *see also Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1341 (9th Cir. 1990) (noting common-law abandonment requires the present intent to abandon, and physical acts evidencing that intent). Abandonment, however, "has no application unless there is a total desertion by an owner without being pressed by necessity, duty or utility to himself, but simply because he no longer desires to possess the thing and willingly abandons to whoever wishes to possess it." *State Mut. Life Assur. Co. of Worchester, Mass. v. Heine*, 141 F.2d 741, 744 (6th Cir. 1944).

Eggs R Us did not intend to abandon male chicks within the common law understanding. The company only discarded male chicks out of "necessity" and "utility," pursuant to industry practice. Male chicks are a "byproduct" of the industry, necessitating their removal from egg

producing facilities. *Wheatley*, slip op. at 2. Further, there was no external action of abandonment. It is true that employees at Eggs R Us were instructed to discard male chicks; however, it is not at all clear that the company had "totally deserted" the chicks and were ready, at that point, to allow possession to "whoever wishes." The record is silent on what happens to the chicks next, but they may still have value. It is likely that Eggs R Us had contracts with disposal specialists who might remove the male chicks or take them offsite for other purposes.

The district court was incorrect to focus the inquiry solely on the loss to the animal enterprise, Eggs R Us. While the government maintains that Wheatley did cause a loss of real property to Eggs R Us by taking the chick, which was not abandoned property, Wheatley also caused the loss of real property to any entity connected or having transactions with Eggs R Us for removal of the male chicks. Because the AETA covers these entities as well, Wheatley's interference constitutes a crime under the statute. *See* 18 U.S.C. § 43(a)(2) (causing the loss of property "used by an animal enterprise, or any . . . entity having a connection to, relationship with, or transactions with an animal enterprise.").

2. Wheatley Took the Chick in Connection with the Purposes of Damaging or Interfering with the Operations of an Animal Enterprise.

The AETA does not define "in connection with;" however, the plain meaning of "connection" is the act of connecting, or being connected, which in turn means "having the parts or elements logically related or continuous." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 480 (1971). The Ninth Circuit has tackled similarly undefined language in the context of sentence enhancements for guns possessed "in connection with" felony offenses. *See United States v. Routon,* 25 F.3d 815, 818 (9th Cir. 1994). In *Routon*, the court concluded that the "in connection with" language required the government to show "that the firearm was possessed in a manner that permits an inference that it facilitated or potentially facilitated—*i.e.,*

had some potential emboldening role in—a defendant's felonious conduct." *Id.* at 819. In some circumstances, simply the physical proximity of the gun to drugs, or other activities, could satisfy the "in connection with" language. *Id.* at 817; *see also United States v. Polanco*, 93 F.3d 555, 567 (9th Cir. 1996) (finding that where a gun was stashed in the defendant's car, parked around the corner from where he conducted drug deals, he possessed the gun "in connection with" his felonious activities).

Translating this definition to Wheatley's conduct indicates that taking the male chick was "in connection with" his other prohibited activities. Wheatley posted a video about the disposal of male chicks on the Internet and the same day stole the male chick from Eggs R Us. *Wheatley*, slip op. at 4. There is an association between these events, both logically and with continuity in time. A strong inference can be drawn that stealing the chick further facilitated Wheatley's interference with Eggs R Us's operations. By having a physical piece of the very Eggs R Us practices Wheatley challenged in his Internet postings, it likely emboldened his disruptive activities. Wheatley claims to have taken the male chick solely for the purpose of saving the chick's life. *Wheatley*, slip op. at 19. However, this does not excuse his actions. A defendant would not be excused under the sentencing provision mentioned in *Routon* for claiming that a gun found with drugs was there only because he was keeping it away from his kid sister. Because "in connection with" can include simply physical proximity of prohibited items or actions, it is likely that this low threshold is established here.

The legislative history also supports that the AETA was meant to cover Wheatley's conduct. In clarifying the AETA's scope, Congress struck a contradictory provision that would have recognized an offense for loss of property resulting from nonviolent physical obstruction causing no physical harm. 152 Cong. Rec. S10793-05, S10793, 2006 WL 2797200, (daily ed.

Sept. 29, 2006) (Statement of Sen. Leahy). Senator Leahy worried that the only way to reconcile this provision with the rest of the act "would be by watering down the criminal prohibition to extend to peaceful conduct that the bill was never intended to cover." *Id.* Thus, the final version of the AETA excludes the provision and clarifies that "the substantive offense created by the bill requires proof of intentional damage to real or personal property, not simply a loss of profits." *Id.* This is what Congress hoped to convey by requiring that, "in connection with" the intentional interference a defendant brought out, there must also be a loss of real property; nothing more.[5] The AETA simply requires the government to show that, in connection with the other activities prohibited by the act, there was a loss of real property that was caused intentionally by the defendant. Thus, Wheatley's conduct satisfies the elements of an offense under the AETA and this Court should reinstate the jury's verdict.

CONCLUSION

For the foregoing reasons, Wheatley's conviction under Count 1 should be upheld. Furthermore, the jury's verdict should be reinstated, convicting Wheatley under Counts 2 and 3.

Respectfully submitted,

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[5] The rule of lenity has no application in this case as it only applies "when the equipoise of competing reasons cannot otherwise be resolved." *United States v. Johnson*, 529 U.S. 694, 713 n.13 (2000). The AETA is not ambiguous, and to the extent it is, the legislative history helps to resolve any competing interpretations. *See also Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) ("The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree. To invoke the rule, we must conclude that there is a 'grievous ambiguity or uncertainty' . . . [T]his Court has never held that the rule of lenity automatically permits a defendant to win.").