Case No. 11-11223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES
RESPONDANT/CROSS-APPELLANT

v.

LOUIS WHEATLEY
APPELLANT/CROSS-RESPONDENT

On appeal from the
United States District Court for the
Central District of California

BRIEF FOR THE APPELLANT/CROSS-RESPONDENT

Team #18

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2. Whether public policy, or alternatively, the necessity defense, requires overturning Mr. Wheatley's conviction for Count 1?

3. Whether 18 U.S.C. § 43, as applied to Mr. Wheatley, violates the Commerce Clause of the United States Constitution?

4. Whether the District Court properly overturned the convictions under Counts 2 and 3 on the grounds that 18 U.S.C. § 43 does not apply to Mr. Wheatley's conduct?

STATEMENT OF THE CASE

Mr. Wheatley was indicted on one count for a violation of § 999.2(3) of the Agriculture Products Protection Act ("APPA") and on two counts for violations of the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43, in February 2011. He subsequently filed a motion to dismiss the indictment in the District Court for the Central District of California on the grounds that these statutes violated the First Amendment and Commerce Clause of the United States Constitution. The court denied the motion in its entirety. The case went to trial and Mr. Wheatley was convicted on one count of Damage or Destruction of an Animal Facility under APPA § 999.2(3), and two counts of Force, Violence, and Threats Involving Animal Enterprises under 18 U.S.C. § 43(a)(1), (2)(A). Mr. Wheatley then filed a motion for judgment of acquittal, which was granted on Counts 2 and 3 and denied on Count 1.

Mr. Wheatley now appeals the district court's denial of both motions with respect to Count 1. The government cross-appeals the district court's granting of the motion for judgment of acquittal for Counts 2 and 3. The case is now on appeal before this Court.

STATEMENT OF FACTS

Mr. Louis Wheatley is a dedicated journalism student enrolled in a California college. (R. at 2.) In order to help pay for his education, Mr. Wheatley began to work for Eggs R Us, an egg production company, as a "poultry care specialist." (R. at 2.) His job duties entailed providing food and water for the chickens. (R. at 2.) While performing his duties, Mr. Wheatley observed brutal and violent behaviors amongst his coworkers towards the animals. (R. at 3.) One such worker tormented living baby male chicks, crushing the chicks himself before dumping them into the grinder. (R. at 3.) A grinder is a large contraption commonly used in the egg production industry to grind to death just-hatched male chickens as a means of hasty disposal of birds that cannot bear eggs. (R. at 2-3.) This worker laughed and joked throughout his vicious behaviors. (R. at 3.) On or about June 17, 2010, Mr. Wheatley captured evidence of these cruel actions by filming a 4 minute video of this incident. (R. at 3.) As is common amongst his generation, he posted the video to his personal Facebook profile to display the torment he faces in his everyday work experience. (R. at 3.) Journaling his personal thoughts in a comment to the video post, Mr. Wheatley stated: "This is what happens everyday – business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." (R. at 3.) The video does not disclose the identity of that particular individual worker or of Eggs R Us. (*See* R. at 3.) A Facebook "friend" of Mr. Wheatley, acting on her own behalf and without Mr. Wheatley's involvement, posted the video to YouTube, where it has received over 1.2 million hits and some media attention. (R. at 3.)

The grinding to death of baby male chickens was not the only animal abuse Mr. Wheatley witnessed at Eggs R Us. In spite of Mr. Wheatley's title as a "care" specialist, the conditions at Eggs R Us provided little care for the chickens. The chickens were squished together inside

industrial grade battery cages. *Id*. Battery cages are 16 in. wide wire entrapments, arranged in rows piled one on top of the other. *Laying Hens*, FARM SANTUARY, www.farmsanctuary.org/issues/factoryfarming/eggs/ (last visited Jan. 21, 2012). Hens are so packed within these cages that they cannot spread their wings and, when attempting movement, are forced to rub against the wires, causing feather loss, bruising, and abrasions. *Id*. To abide by United States Department of Agriculture (USDA) regulations, only four chickens can be kept in such a cage. *Id*. At Eggs R Us, six chickens were typically forced into one cage. (R. at 3.) This resulted in the chickens having an average of 19 in^2 less space than the already miniscule guidelines recommended by national egg organizations. (*See* R. at 3.) (the space per chicken allotted by the national guidelines is less than the size of a typical loose leaf sheet of paper).

Mr. Wheatley, having followed the Prop 2 campaign, Cal. H&S Code §§ 25990(a) and 25991(f), asked his supervisor about the chicken's horrific living conditions. *Id*. The supervisor responded that Mr. Wheatley "needn't be concerned." (R. at 3.) Some time thereafter, Mr. Wheatley made another video, this time even shorter, of the battery cages. (R. at 3.) Mr. Wheatley also posted this video to his personal Facebook profile, but has since removed it. (R. at 3.) There is nothing to suggest this video found its way to YouTube. (R. at 3.) Mr. Wheatley wrote about the interaction with his supervisor in his personal blog that he maintains as a journalism student. (R. at 3–4.) He also reported the injustice he observed at Eggs R Us to a farmed animal protection organization, in which he was an inactive member, having joined after the Prop 2 campaign but was never actively involved. (R. at 2, 4.)

On the same day that Mr. Wheatley posted his video, he also bravely rescued a doomed, newly hatched male chick. (R. at 4.) While on the job, Mr. Wheatley's eye caught sight of one particular chick, which was awaiting death on top of a pile of chicks, living and already dead,

ready to be tossed into the grinders. (R. at 4.) He couldn't walk away from him and leave him to be ripped and crushed by the machine. (R. at 4.) Heroically, Mr. Wheatley hid the chick in his coat pocket and carried him to safety to keep as a loving pet to be named George. (R. at 4.) The zoning laws of his residence permit him to keep farm animals, such as George. (R. at 4.) Mr. Wheatley, to this day, still gives George the love and care every household pet deserves. (R. at 4.)

Two weeks after adopting George, Mr. Wheatley was fired by Eggs R Us' manager. (R. at 4.) Eggs R Us had been receiving increased negative media attention and was forced to release a public statement denying the illegal activities which had been documented by Mr. Wheatley. (R. at 4.) Promptly upon learning of Mr. Wheatley's Facebook videos, the manager fired him and accused him of violating APPA and AETA to the federal authorities. (R. at 4.) These accusations underlie the convictions that are the subject of this appeal.

SUMMARY OF THE ARGUMENT

Mr. Wheatley's conviction for Count 1 should be overturned and the granting of his motion for a judgment of acquittal should be affirmed. Count 1 should be overturned because the district court improperly denied Mr. Wheatley's motions to dismiss the indictment and for a judgment of acquittal because APPA § 999.2(3) unconstitutionally violates the First Amendment on its face and as applied to Mr. Wheatley's conduct. Eggs R Us should be considered a public forum because it receives significant funding from the government and is subject to USDA oversight in its daily treatment of the chickens. The government may not ban speech based on viewpoint in a public forum. However, even if Eggs R Us is a nonpublic forum, APPA § 999.2(3) still cannot pass constitutional muster. The statute discriminates on the basis of viewpoint by prohibiting all speech about animal conditions and is not reasonable in light of the

forum's intended purpose because the purpose is to raise and care for chickens in a legal fashion. Thus, APPA's prohibition on the use of recording devices in a nonpublic forum violates the First Amendment. In the alternative, APPA § 999.2(3) is unconstitutionally overbroad because a substantial number of its applications are unconstitutional.

The district court also erred in denying Mr. Wheatley's motions with respect to Count 1 because public policy demands that Mr. Wheatley's conviction be overturned. Public policy is inherent in the First Amendment, which especially protects social and political speech. Mr. Wheatley's speech solely concerned animal welfare, a topic of social and political debate. Further, Mr. Wheatley's speech brought to light the horrific animal abuse and violations of state law occurring at Eggs R Us. If APPA § 999.2(3) is permitted to shield these actions, then the public may have never learned of them. Count 1 should also be overturned because Mr. Wheatley successfully made out the defense of necessity through an act of direct civil disobedience.

The Court should affirm the court below's order overturning Counts 2 and 3 because AETA is unconstitutional under the Commerce Clause as applied to Mr. Wheatley. First, AETA is designed to protect animal enterprises against violence and terrorism. Mr. Wheatley's personal Facebook use to voice his opinion of the harsh conditions of Eggs R Us is far removed from terroristic acts this statute seeks to punish. Second, in order to fall within the scope of AETA, the regulated activity must "substantially" affect interstate commerce. As the evidence indicates, there is no substantial connection between Mr. Wheatley's personal, individualized Facebook posts and interstate commerce. It would be poor public policy to make this connection. Finally, Mr. Wheatley's specific use of the Internet is entirely distinguishable from the type of Internet use properly regulated under the Commerce Clause in other federal statutes. Mr. Wheatley did

not intentionally damage or interfere with an animal enterprise, which are required elements in order to fall within the scope of AETA.

The district court also correctly overturned Mr. Wheatley's conviction under Counts 2 and 3, since AETA is inapplicable to his conduct. Under the statute, the damage to an animal enterprise or its operations must be intentional. As the evidence clearly indicates, Mr. Wheatley never intended to cause any type of economic damage to Eggs R Us. His personal use of Facebook is simply not terrorism. A plain reading and application of the statutory language in AETA cannot support his conviction under Count 2. As for Count 3, Mr. Wheatley's taking of George is not a loss of property under AETA. Property damage is measured by the replacement cost, and the monetary value of this male chick is too trivial to measure. Since George would have become a waste product, there is simply no property loss to Eggs R Us. Therefore, the statute is inapplicable and these convictions cannot be justified.

ARGUMENT

I. STANDARD OF REVIEW

When analyzing a motion to dismiss the indictment, a court must review whether the indictment states the offenses charged, sufficiently apprises the defendant of the facts to be used to support those offenses, and whether the record shows to what extent he may plead a former acquittal or conviction. *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976). In reviewing a motion for judgment of acquittal under FRCP Rule 29, a court must consider all the evidence as a whole in the light most favorable to the government to determine if the trier of fact could have found guilt beyond a reasonable doubt. *United States v. Smith*, 680 F.2d 255 (1st Cir. 1982).

II. THE DISTRICT COURT ERRED WHEN IT DENIED MR. WHEATLEY'S MOTIONS TO DISMISS THE INDICTMENT AND FOR A JUDGMENT OF CONVICTION FOR COUNT ONE BECAUSE APPA § 999.2(3) UNCONSTITUTIONALLY VIOLATES THE FIRST AMENDMENT ON ITS FACE AND AS APPLIED TO DEFENDANT'S ACTIONS.

Under the First Amendment, Congress lacks the power to limit speech "because of its messages, 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*, 533 U.S. 564, 573, 122 S. Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotations omitted). Although there is an exception for regulating speech on government-owned property, speech made in public forums is entitled to First Amendment protections. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). The level of protection afforded to speech depends on the type of forum. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). These levels include traditional public forums, limited public forums, and non-public forums. *Id*.

a. Eggs R Us should be considered a public forum because the company receives significant government funding and is subject to USDA oversight.

Eggs R Us should be treated as a public forum under the First Amendment. The court below agreed Eggs R Us receives significant government funding and is overseen by the U.S. Department of Agriculture ("USDA") and the California State Government's regulations. Although the government is not involved in the daily activities of the business aspect of Eggs R Us, government regulations oversee the daily activities of how the animals are treated: the subject of the speech in question. *See* Animal Welfare Act, 7 U.S.C. § 2146 (1990); Cal. H&S Code §§ 25990, *et seq.*; West's Ann. Cal. Penal Code § 597 (2011). Because of the significant oversight, Eggs R Us should be treated as a public forum. As such, APPA should be subject to heightened scrutiny.

The government may only limit speech in a public forum if it is content-neutral and the limit is narrowly tailored to a compelling interest and leaves open ample alternative channels of communication. *Bolbol v. City of Daly City*, 754 F. Supp. 2d 1095, 1108 (N.D. Cal. 2010). And, as a California district court has previously ruled, the government may not prohibit videotaping of animal facilities to expose unsafe conditions under this standard. *Id*.

b. APPA § 999.2(3) discriminates based on viewpoint, and is thus unconstitutional whether animal facilities are a public, limited, or nonpublic forum.

If the Court finds that animal facilities are not a public forum, then APPA is still unconstitutional under the First Amendment. In order for Congress to regulate speech in a limited or non-public forum, the regulation must be viewpoint neutral and reasonable in light of the forum's purpose. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07, 121 S. Ct. 2093, 150 L.Ed.2d 151 (2001). In *Good News Club*, the Supreme Court had to decide if a school's refusal to permit a religious group from meeting after hours on school grounds was viewpoint discrimination. *Id*. The standard for the school, a limited public forum, is the same standard courts use for a non-public forum. *Id*. The Court found that, even though the school did not inquire to the specific messages or views promoted by the organization, the school's actions was still viewpoint discrimination because the school's denial was based on the religious nature of the organization. *Id.* APPA § 999.2(3) is similarly discriminatory. Even though the language of APPA § 999.2(3) applies regardless of the specific message or view taken in the video and audio recordings, it applies to a certain nature of speech: speech damaging to animal facilities. The language of APPA § 999.2(3) reveals that the prohibition is viewpoint discrimination on its face.

APPA § 999.2(3) is further viewpoint discriminatory because the prohibition only serves one purpose: to ban speech favorable to animal activism. Section 999.2 defines actions that constitute damage or destruction to an animal facility. An animal facility is defined not as the business or enterprise, but as the physical structures and places where animals are kept. *See* APPA § 999.1(2). The speech prohibition in APPA is not concerned with business competition, intellectual property rights, defamation, or other legal wrongs, but only with the conditions of the housing and confinement of animals. Prohibiting visual and audio documentation of animal facilities is viewpoint discrimination because it is only applied to animal rights and welfare activism.

c. APPA § 999.2(3) is not reasonable in light of the forum's intended purpose and, as such, violates the First Amendment if animal facilities are found to be nonpublic fora.

The ban on speech in APPA § 999.2(3) is not reasonable. A "restriction on speech in a nonpublic forum is 'reasonable' when it is consistent with the government's legitimate interest in preserving the property for the use to which it is *lawfully* dedicated." *Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 688 (internal quotation marks omitted) (emphasis added); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1983). APPA's ban on speech is also unreasonable to protecting the property for its lawful uses. The speech itself does not cause damage or destruction to animal enterprises. The goal of APPA § 999.2 is to protect against damage and destruction to animal facilities. APPA does not define "damage" or "destruction." Black's Law Dictionary definition of "destruction" invokes images of physical or monetary harm. *See* BLACK'S LAW DICTIONARY, "Destruction," (9th ed. 2009) ("1. The act of destroying or demolishing; the ruining of something. 2. Harm that substantially detracts from the value of property, esp. personal property. 3. The state of having been destroyed."). The natural meaning of damage has a similar denotation. The ban on video- and audio-recordings is simply

not reasonable for protecting the use of animal facilities for animal enterprises. This prohibtion on speech does not serve to preserve the animal facilities for its lawful use in maintaining an animal enterprise, but does the opposite by protecting animal enterprises from exposure of their unlawful actions. Because APPA § 999.2(3) is not reasonable, it unconstitutionally violates the First Amendment.

d. In the alternative, APPA § 999.2(3) is overbroad because a substantial number of its applications are unconstitutional.

In the alternative, if the Court finds that APPA § 999.2(3) ban on speech is content-neutral, than the prohibition is necessarily overbroad. In the First Amendment context, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Assuming the ban on recordings and photography is content-neutral, than any video, photograph, or audio recording made in an animal facility without the express permission of the owner, even those made by persons who otherwise have permission to be on the property, is a criminal act. This includes, but not limited to, lawful speech made by employees for personal uses, news reporters and journalists covering stories, veterinarians and maintenance workers in the course of work.

Further, the ban on speech under APPA § 999.2(3) does not require the prohibited speech actually cause damage or destruction to an animal facility. The United States Supreme Court found a similar prohibition unconstitutional in *Stevens*. In *United States v. Stevens*, the Court considered a federal act that banned depictions of animal cruelty but did not require the depicted conduct actually be cruel. *United States v. Stevens*, 130 S. Ct. 1577 (2010). The Court found this prohibition violated the overbreadth doctrine under the First Amendment because a substantial

numbers of its applications were not cruel. *Id*. Under this precedent, APPA § 999.2(3) is unconstitutionally overbroad because it does not actually require the speech to cause damage or destruction to the animal facility, which Mr. Wheatley's speech did not.

Although courts are sometimes hesitant to apply the overbreadth doctrine, *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008), the *Stevens* Court considered the overbreadth doctrine first and decided the case on that issue. *Stevens*, 130 S. Ct. 1577. Accordingly, this Court may strike down § 999.2(3) as unconstitutionally overbroad.

III. THE DISTRICT COURT ERRED WHEN IT DENIED MR. WHEATLEY'S MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT ONE BECAUSE PUBLIC POLICY AND THE NECESSITY DEFENSE JUSTIFY THE DEFENDANT'S ACTIONS IN EXPOSING EGGS R US'S STATE LAW VIOLATIONS.

When Mr. Wheatley videotaped the activities and conditions within Eggs R Us, Mr. Wheatley memorialized as evidence criminal acts of animal cruelty and other violations of California state law. The public policy inherent in the First Amendment protects Mr. Wheatley's actions. Further, the defense of necessity also justifies Mr. Wheatley's conduct.

a. Count 1 should be overturned because the First Amendment, as a matter of public policy, protects speech regarding social and political change.

In discussions of public policy, the First Amendment affords the broadest protection to the interchange of ideas regarding social and political change. *National Org. for Marriage v. McKee*, 649 F.3d 34, ___, 2011 WL 3505544 at *51 (1st Cir. 2011); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Roth v. United States*, 354 U.S. 476, 484 (1957). In California, animal welfare is an area of public debate falling into the category of social and political speech. *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty, U.S.A., Inc.*, 129 Cal. App. 4th 1228 (2005). APPA § 999.2(3) suppresses speech on animal welfare issues by criminalizing recordings of the

actual treatment of animals in agribusiness. APPA violates public policy under the First Amendment by stifling speech in the public debate on animal welfare in animal enterprises.

b. Count 1 should be overturned because Mr. Wheatley's actions exposed Eggs R Us's violations of Prop 2 and California Penal Code sections 597 and 597t.

The conduct that Mr. Wheatley recorded of Eggs R Us activities is in violation of several California state laws. Prop 2 provides minimum standards for the confinement of animals. *See* Cal. H&S Code § 25990. Eggs R Us violated these minimum standards by confining the chickens in battery cages too small for them to spread their wings. *See* Cal. H&S Code §§ 25990, 25991 (banning the keeping of egg-laying hens in a facility, such as Eggs R Us, in confinement too small to allow the full extension of wings for a majority or all of any day).

California Penal Code criminalizes confinement of animals without adequate exercise and the cruel killing of animals. West's Ann. Cal. Penal Code §§ 597(b), 597t (2011). The use of battery cages violates the provisions requiring adequate exercise. The use of grinders and the worker's crushing of the male chicks violate constitute cruel killing of animals. Were it not for Mr. Wheatley's exposure of these violations, Eggs R Us could continue to violate these provisions in secrecy indefinitely. It defies justice and public policy to uphold Mr. Wheatley's conviction when such conviction is based on actions taken to prevent future cruel and criminal acts.

c. Mr. Wheatley's conviction should be overturned because he has successfully made out the defense of necessity.

In order to make out the defense of necessity, a defendant must show that he was faced with the choice of two evils and chose the lesser evil, acted to prevent imminent harm, reasonably anticipated a direct causal relationship between his conduct and the harm to be averted, and there were no legal alternatives to violating the law. *See United States v. Schoon*,

971 F.2d 1935 (9th Cir. 1992). Wheatley had the choice to use recording equipment to document the abuses he wished to expose or permit the ongoing animal abuse occurring at Eggs R Us. The existence of California's laws protecting animals verifies that Eggs R Us's animal abuses, and not the mere use of recording equipment that caused no physical pain, damage, destruction, or death, were the greater evils. Eggs R Us's harm to the animals was ongoing and therefore imminent. Wheatley reasonably anticipated his exposure of Eggs R Us's violations of California law would directly cause the harm to end. His anticipation was more reasonable because, by using recording equipment, he created hard proof of the violations, making it more likely for the abuses to end, either out of public outcry or to aid in prosecution of the crimes. Wheatley did not have alternatives to gaining evidence to expose Eggs R Us' unlawful activity.

Wheatley's violation of APPA was made in an act of direct civil disobedience. Direct civil obedience involves breaking a law in order to prevent a particularized harm resulting from that law from following. *See id*. Wheatley created the videos to prevent the harm of the everyday use of battery cages, inhumanely confining six chickens crammed into one cage, and the cruel murdering of baby chickens—abuses that APPA § 999.2(3) would otherwise forever shield from public view and permit to continue.

IV. 18 U.S.C. § 43 EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE AS APPLIED TO MR. WHEATLEY'S CONDUCT.

The proper standard of review a Court must use in assessing the constitutionality of a statute under the Commerce Clause is the rational basis test. *Hodel v. Virginia Min. and Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel v. U.S.,* 379 U.S. 241, 262 (1964). Therefore, for the AETA to pass muster, it must be found that Congress used a rational means in order to come to a legitimate end. *Heart of Atlanta Motel,* 379 U.S. at 262.

A statute can violate the Commerce Clause of the United States Constitution either on its face or as applied to the specific circumstances of the case. On its face, the Animal Enterprise Terrorism Act (AETA) does not exceed Congressional authority under the Commerce Clause. This is due to the fact that under the Commerce Clause, Congress has a broad power to regulate commercial activity. U.S. Const. art. I, § 8, cl.3. The AETA is a criminal statute that punishes persons who damage animal enterprises or those associated with animal enterprises. 18 U.S.C. § 43 (2006). Eggs R Us is an animal enterprise whose activity in producing animal food products brings it into the realm of federal regulation. (R. at 15.) AETA thus protects facilities such as Eggs R Us against "terrorism" that causes economic damage that can have a devastating effect on the interstate sales of animal food products.

Challenging AETA on its face would require a showing that the act is invalid in every possible set of circumstances. *United States. v. Salerno*, 481 U.S. 739, 745 (1987). It is very likely that this task is not possible since AETA has previously been constitutionally challenged and upheld. *See generally United States v. Buddenberg,* No. CR-09-00263RMW, 2009 WL 2337372 (N.D. Ca. Oct. 28, 2009) (where AETA withstood a facial challenge under the "void for vagueness" and over breadth doctrines). However, a statute may successfully be challenged as applied where there are unusual circumstances that may make an exception to the challenged statute. *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). Under this guidance Mr. Wheatley challenges AETA as unconstitutional as applied to him since the unique set of circumstances in this case reveal that his activity cannot possibly be an offense punishable by the AETA. Congress may not regulate activities that are far too remote, and this is a perfect example of such. *See United States v. Morrison*, 529 U.S. 598, 608 (2000).

a. Mr. Wheatley's personal Internet use does not constitute an activity that "substantially affects" interstate commerce so as to be an activity falling within the scope of AETA.

In order for Congress to regulate an activity under the Commerce Clause, the activity itself must "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). The three types of activity that are regulated include the use of channels of interstate commerce, instrumentalities of interstate commerce, and activities that have a substantial relation to interstate commerce. *Id.* at 558. In *Lopez*, the Supreme Court determined that the Gun-Free School Zones Act exceeded Congress' authority under the Commerce Clause. *Id.* Applying the test, the Court reasoned that possession of a gun, which was the activity regulated in the statute, had no connection whatsoever to interstate commerce. *Id*. Furthermore, the activity itself had no nexus with interstate commerce. *Id.*

In Mr. Wheatley's case, the activity regulated by AETA is not as clear. AETA's language includes the phrase "whoever travels in interstate or foreign commerce, or uses . . . any *facility* of interstate or foreign commerce." 18 U.S.C. § 43(a) (2006) (*emphasis added*). This could imply any number of activities. At issue then is what constitutes "facility" under the statute. The government seeks to convict Mr. Wheatley under AETA because of his Internet use exposing Eggs R Us. Under the *Lopez* test, this means that Mr. Wheatley's two anonymous Facebook posts must "substantially affect" interstate commerce in order to be an activity properly regulated by Congress. *Lopez*, 514 U.S. at 559. Drawing this conclusion is a far stretch. Therefore, applying AETA to Mr. Wheatley's Internet use, and convicting him under AETA in this instance, is an improper extension of Congressional authority. These Facebook posts have no connection to economic activity, in the same way that the sole possession of a gun on school property did not in *Lopez*.

When analyzing a statute for its validity under the Commerce Clause, legislative and congressional findings have to be considered. *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990). This

analysis will show that Mr. Wheatley's Internet use is not an activity that substantially affects interstate commerce, nor is AETA, as applied to Mr. Wheatley, constitutional. According to AETA's Congressional Record, the statute was designed to protect against violence and harassment by extremists. 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006) (statement of Sen. Sensenbrenner). In fact, the record itself focuses on protecting individuals from terrorism. *Id*. The record specifically states, "that nothing in this bill shall be construed to prohibit any expressive conduct protected by the first amendment, *nor shall it criminalize nonviolent activities designed to change public policy or private conduct*." *Id.* (*emphasis added*).

If AETA is applied to Mr. Wheatley, then it is clear that he will be punished for voicing his opinion on public policy, given that his blog and Facebook videos portrayed alleged Prop 2 violations. (R. at 3.) This is not activity that AETA regulates. This activity is nothing but nonviolent; here is a young man appalled at what he sees as bad practices by Eggs R Us. Drawing the conclusion that such a nonviolent expression of opinion has a connection to interstate commerce is far-reaching and inapplicable.

b. Although generally Internet use is an instrumentality of interstate commerce, Wheatley's use of the Internet is completely distinguishable from the type of Internet use that is punishable and properly regulated under the Commerce Clause in other federal statutes.

As a fairly recent issue, courts are beginning to recognize that use of the Internet may be an instrumentality of interstate commerce. *United States v. Sutcliffe* 505 F.3d 944, 953 (9th Cir. 2007). In these cases, the trend of Internet usage tends to show that the defendants used the Internet in a heinous, wrongful way, and that such use had far reaching consequences. *See generally*, *United States v. Trotter*, 478 F.3d 918 (8th Cir. 2007) (where the defendant damaged the Salvation Army's computer network by hacking into it); *United States v. Hornaday*, 392 F.3d 1306 (11th Cir. 2004) (defendant used an internet chat room called "Loving Families" in order to

connect with and find children to have sexual encounters with); *United States v. MacEwan*, 445 F.3d 237 (3rd Cir. 2006) (defendant downloaded and possessed numerous images of child pornography). In each of these cases, the defendant challenged the statutes for which they were convicted as an unconstitutional expansion of Congress's authority under the Commerce Clause. All of them failed because the type of Internet use these defendants participated in fell exactly within the scope of the statute they were convicted under. For example, in *Hornaday* the defendant used the Internet to do exactly what the statute prohibited – using the Internet to "knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity" under 18 U.S.C. § 2422(b). *Hornaday*, 392 F.3d at 1308. Given this, there can be no comparison made between these defendants' damaging use of the internet and Mr. Wheatley's Facebook posts and blog. Mr. Wheatley did not use the Internet to intentionally damage or interfere with Eggs R Us, which are required elements of AETA. 18 U.S.C. § 43(a) (2006). Unlike the cases discussed, the only inconvenience suffered by Eggs R Us as a result of Mr. Wheatley's Internet use was negative media attention. (R at 4.) Mr. Wheatley's behavior is completely distinguishable from the behavior exhibited in these cases. It is therefore appropriate to draw the conclusion that under his circumstances, AETA should not withstand an applied constitutional challenge under the Commerce Clause. The AETA is simply not meant to regulate Mr. Wheatley's activity.

V. THE DISTRICT COURT PROPERLY OVERTURNED MR. WHEATLEY'S CONVICTION UNDER COUNTS 2 AND 3 SINCE HIS CONDUCT DOES NOT FALL WITHIN THE MEANING OF AETA AND THERE IS AN ABSENCE OF EVIDENCE SUGGESTING THAT EGGS R US SUFFERED ECONOMIC DAMAGE.

The District Court properly overturned Mr. Wheatley's conviction on Counts 2 and 3. Mr. Wheatley's use of the internet to reveal Eggs R Us's illegal conduct did not "damage or

interfere" with the company's operations under the AETA, as stated in Count 2. Furthermore, Mr. Wheatley's saving George, the male chick, from the grinder does not establish that he damaged or caused the loss of animal enterprise property so as to convict him on Count 3. Public policy dictates that Mr. Wheatley must not be convicted because his peaceful, expressive conduct cannot possibly be the type of terroristic offense that supports a conviction under AETA.

a. As a matter of policy, the District Court correctly overturned the convictions because the AETA is not designed to punish people such as Wheatley, who do not intend to cause, or actually cause, any type of harm to an animal enterprise.

In enacting the AETA, Congress did not intend to punish people like Mr. Wheatley. The 2006 Congressional Record reveals that the AETA is a federal law designed to punish offenders who intimidate, harm, assault, threaten, and cause substantial economic and property damage to animal enterprises. 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006) (statement of Sen. Sensenbrenner). AETA not only protects all types of employees of animal enterprises, but also their family members and anyone connected to the industry. 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006) (statement of Sen. Petri). The statute is designed to protect the animal enterprise industry and its people from terroristic acts committed by extremist groups. *Id*.

The Congressional Record states, "To violate the provision of the bill, one must travel or otherwise engage in interstate activity with the *intent* to cause damage or loss to an animal enterprise. While the losses of profits, lab experiments or other intangible losses are included, it must be proved that *such losses were specifically intended* for the law to be applied." 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006) (statement of Sen. Scott)(emphasis added). The record reveals that Mr. Wheatley did not intend for his Facebook posts to cause any type of damage to Eggs R Us. He took the job at Eggs R Us in order to earn money for college. (R. at 2.) As a journalism student, he saw this as an opportunity to write and blog about a controversial issue.

Mr. Wheatley simply had a genuine interest in farm animal issues given the recent Proposition 2 campaign. He never even participated in activism groups. (R. at 2.) The videos and blogs Mr. Wheatley posted were never meant for anything other than awareness.

The type of behavior that is punishable under AETA is evidenced in a recent Third Circuit case. *United States. v. Fullmer*, 584 F.3d 132 (3rd Cir. 2009). An organization known as "Stop Huntingdon Animal Cruelty" (SHAC) utilized tactics such as targeting individuals and committing acts of vandalism in order to prove its point. *Id*. Among several other charges, the defendants were charged with conspiracy to violate the AETA, and the conviction was upheld. *Id.* at 137. SHAC kept a website about its activity and protest, and the website contained statements condoning and encouraging illegal protest activity, including a "Top 20 Terror Tactics" list. *Id.* at 140. It also encouraged "electronic civil disobedience" despite acknowledging the illegal nature of such a protest tool. *Id.* The case explains the group's campaign against four individuals who were associated in some way with Huntingdon. *Id.* at 142. These individuals suffered from threats, harassment, and protests in their very own front yards brought on by SHAC defendants. They were also targeted on the SHAC website. *Id.* at 142-146.

The defendants attempted to have their convictions overturned, stating that the AETA was unconstitutional as applied to them. *Id.* at 153. However, the Court reasoned that the First Amendment did not protect the type of speech employed by these defendants against the Huntingdon victims since they actually used direct action. *Id.* They were convicted of conspiring to violate the AETA, and were found to have caused economic damage greater than $10,000. *Id.* at 160. The type of action that the defendants in this case were proven to have committed is entirely distinguishable from the type of action Mr. Wheatley undertook. First, as indicated by the case, the harm that occurred in *Fullmer* was intentional as evidenced by the scare tactics used

and the remarks made on the website. Mr. Wheatley never threatened anyone at Eggs R Us, nor did he ever stage a campaign against either individuals or the animal enterprise itself. He never intended for his blog or videos to harm anyone. (R. at 2.) Second, the SHAC website cannot possibly be compared to Mr. Wheatley's Facebook posts or blog. The SHAC website arguably encouraged violence against an animal enterprise, whereas Mr. Wheatley's internet posts were simply for awareness. Finally, the defendants in *Fullmer* took direct action in the form of electronic civil disobedience. *Fullmer*, 584 F.3d at 140. Mr. Wheatley did nothing other than blog about Eggs R Us's alleged violations. This analysis, coupled with the support from the Congressional Record, clearly indicates that as a matter of policy, Mr. Wheatley's conduct cannot be possibly be punishable under AETA.

b. In terms of statutory interpretation, AETA's language itself suggests that the evidence in this situation will not support Mr. Wheatley's conviction.

Taking the statute as a whole, Mr. Wheatley's actions do not fall within the applicable offenses criminalized by AETA. The Court must look plainly at the language in the statute while also considering the context that language comes within. *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). To be convicted of an offense under AETA, a defendant, through the means of interstate commerce, must intentionally "damage" or "interfere" with animal enterprise operations or cause the loss of property. 18 U.S.C. § 43(a)(1)(2)(A) (2006). AETA specifically defines "economic damage" to mean "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." 18 U.S.C. § 43(d)(3)(B) (2006). In the Rules of Construction section, AETA further states that it cannot be read to "prohibit any expressive conduct" protected under the First Amendment. 18 U.S.C. § 43(e)(1)(2006).

The reading of these provisions demonstrates that AETA is not designed to criminalize people who, though expressive conduct, cause an economic disruption. *See* 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006) (statement of Sen. Scott) (stating that "first amendment freedoms of expression cannot be defeated by statute" and that engagement in lawful advocacy for animals is not an offense AETA seeks to punish). These provisions, when read in context, shine further light on the fact that Mr. Wheatley's Facebook posts and blog were nothing but expressive conduct. The "disclosure of information" that resulted from Mr. Wheatley's conduct did nothing but expose Eggs R Us's alleged violation of Prop 2 and California Penal Code sections 597(b) and 597t. (*see* R. at 3.) The government has presented no evidence showing that Eggs R Us has suffered an economic damage due to the public's viewing of Mr. Wheatley's internet materials. The government erroneously suggests that Mr. Wheatley's genuine concern for the welfare of the chickens at Eggs R Us caused economic harm to the facility. (R. at 17.)

Mr. Wheatley's taking of George exposes a further flaw in the government's argument that Eggs R Us suffered a loss of property under AETA. The district court properly concluded that there is no connection between Mr. Wheatley's saving the life of a small chicken and intent to interfere with Eggs R Us's operations. (R. at 19.) The government attempted to use the law of abandonment to establish that George was abandoned out of utility, and therefore Mr. Wheatley was not justified in taking the chicken. *See State Mutual Life Assurance Co. of Worcester, Mass. v. Heine*, 141 F.2d 741 (6th Cir. 1944). However, this argument is very weak considering the trivial significance that Eggs R Us attributes to George, that is, a mere waste product abandoned for kill. (R. at 3.) This property loss is not the type of loss contemplated by AETA. *See* 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006) (statement of Sen. Scott). Referring back to the statute, the property damage is measured by the replacement cost of the property. 18 U.S.C. §

43(d)(3)(A). Given that George would have been disposed of because he had no utility or value to Eggs R Us, there can be no significant cost attributed to George, if any. This shows that the government's abandonment argument is inapplicable; there is simply no loss of property to the facility under AETA.

The record, coupled with the plain reading of the statute, clearly indicates that Mr. Wheatley's use of the Internet is simply not the type of conduct that AETA is designed to punish.

CONCLUSION

For the foregoing reasons, the denial of the motions for dismissal of the indictment and judgment of acquittal for Count 1 should be reversed and the granting of the motion for judgment of acquittal for Counts 2 and 3 should be granted.

Respectfully Submitted,
Team #18
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