

UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

FRANK CLARKSON,

Appellant

- against -

UNITED STATES,

Respondent

Cr. No. 07-3221

MEMORANDUM OF POINTS AND AUTHORITIES FOR APPELLANT, FRANK
CLARKSON, IN SUPPORT OF APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTOPIA

TEAM 10

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STATEMENT OF THE ISSUES

1. Is the Animal Enterprise Terrorism Act facially unconstitutional given its vagueness, overbreadth, content-based nature, and effect on the freedom of association?
2. Is the Animal Enterprise Terrorism Act unconstitutional as applied to Appellant given its punishment of speech protected under the First Amendment and its disproportionate sentencing?

STATEMENT OF THE FACTS

Frank Clarkson believes that industries killing and torturing animals are not only unethical, but harmful to human health, the environment, and communities. (Mem. Op. at 2.). To disseminate his views and educate others, Mr. Clarkson founded a non-profit organization, Family Farmers United Against Factory Farms (“Factory Farms”). (Mem. Op. at 2). Factory Farms’ transmits information through its website, which Mr. Clarkson runs. (Mem. Op. at 2). Mr. Clarkson followed Eggceptional Eggs’ industry practices closely and used the website to inform others about the affects of the business. (Mem. Op. at 2, 3).

Eggceptional Eggs is a nationally-leading conglomerate in the farming industry and egg production. (Mem. Op. at 2). Eggceptional Eggs operates over one-hundred egg-producing facilities all over the country and is continuously expanding its operations to different communities. (Mem. Op. at 2). Eggceptional Eggs projects its earnings will increase twofold in the next five years, bringing its steady annual growth to more than \$200 million dollars. (Mem. Op. at 2).

Factory Farms’ website became an informative forum for others about Eggceptional Eggs. (Mem. Opp. at 2, 3). The website contained videos and photographs taken by Mr. Clarkson documenting Eggceptional Eggs’ inhumane treatment of chickens, its potentially hazardous farming practices threatening communities and consumers. (Mem. Op. at 3). To further a boycott and letter writing campaign, Mr. Clarkson placed, on his website, the addresses of Eggceptional Eggs’ upper-ranking officers, and information about the corporation’s plan to

expand its operations in East Carolina. (Mem. Op. at 3). In addition, the website contained a list of Eggceptional Eggs' vendees, specifically, grocery stores and restaurants. (Mem. Op. at 2).

Following these postings, some website visitors began protesting at Eggceptional Eggs facilities and its employees' homes. (Memo. Op. at 3). Additionally, some visitors held various protest signs outside the company's expansion sight. (Memo. Op. at 3). As a result, Eggceptional Eggs decided to bolster its security by hiring guards for all its sites and offices. (Mem. Op. at 3). Following the boycotts and protests, local vendees carrying Eggceptional Eggs' products experienced a loss in revenues. (Memo. Op. at 4). Furthermore, Mr. Clarkson, did paint over an Eggceptional Farms' billboard, only after the company's regional manager, Joseph Whittle, superimposed his own slogan on the board. (Mem. Op. at 3). Mr. Whittle was cited with criminal mischief, and ordered to pay \$50 in restitutionary costs. (Mem. Op. at 3).

STATEMENT OF THE CASE

On this appeal, Appellant, Frank Clarkson, challenges the constitutionality and his actions under the Animal Enterprise Terrorism Act ("AETA") as protected by the First Amendment of the United States Constitution.

The AETA is a far-reaching federal statute that severely penalizes conduct that may threaten animal enterprises and their employees. (Mem. Op. at 1). On July 14, 2007, Mr. Clarkson was charged under AETA for interfering with the operations of an animal enterprise, damaging animal enterprise's property, and conspiring to place employees at a reasonable fear of harm. (Mem. Op. at 1, 8). The United States District Court for the District of Utopia found Mr. Clarkson guilty of all charges under AETA. (Briefing Order at 1). The District Court also found that AETA is constitutional and Mr. Clarkson's conduct was not protected under the First Amendment. (Briefing Order at 1). The District Court sentenced Mr. Clarkson imprisoned for five years and ordered him to pay \$537,000 in restitutionary costs. (Mem. Op. at 9).

This appeal followed. On November 19, 2007, this Court granted the appeal. (Briefing Order at 2).

STANDARD OF REVIEW

The constitutionality of federal criminal statutes is reviewed *de novo* by federal appellate courts. *U.S. v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007); *U.S. v. Bredimus*, 352 F.3d 200, 203 (5th Cir. 2003); *U.S. v. DiSanto*, 86 F.3d 1238, 1244 (1st Cir. 1996). Specifically, cases involving conduct and speech that may fall within the First Amendment’s parameters are also reviewed *de novo* by federal appellate courts. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1985). Furthermore, federal appellate courts review federal sentencing under a reasonableness standard. *Rita v. U.S.*, 127 S.Ct. 2456, 2459 (2007) (citing *U.S. v. Booker*, 543 U.S. 200, 261 (2005)).

ARGUMENTS

I. THE AETA IS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE IT IS VAGUE, OVERLY BROAD, CONTENT-BASED, AND OBSTRUCTIVE OF THE FREEDOM OF ASSOCIATION.

The First Amendment forms the bedrock of our country. It gave the founding fathers sure footing when embarking on the political and legal experiment that they called America. Two hundred years later, our country still reveres the rights encapsulated within the First Amendment. Indeed, “our political system and cultural life rest on this ideal.” *Turner Broadcasting v. F.C.C.*, 512 U.S. 622, 641 (1994). “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S CONST. amend. I. No matter how towering the government or special interests have become since our country’s inception, this one sentence has the power to safeguard Americans’ legal and political rights and keep our nation’s character consistent with our forefather’s vision. The First Amendment advances crucial public policies. It promotes self-governance¹ since speech is central to our democratic model. It fosters the discovery of truth since a “clash of ideas” lends itself to revealing a dominant truth. *Abrams v.*

¹ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 930 (2006).

United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). It advances autonomy by enabling people to “engage in self-definition or expression.” C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 994 (1978). Lastly, it promotes tolerance,² which underlies the purpose of a pluralistic democracy. Therefore, when the First Amendment comes under attack, it threatens not only the particular individuals whose speech has been targeted, but everything our country was based on and everything it has worked to become.

Accordingly, when a statute undermines, in all of its conceivable applications, a constitutional guarantee like the First Amendment, a litigant may raise a facial challenge in court. If the facial challenge is successful, the court will deem the entire statute invalid rendering it void.

A. The Court Should Void AETA as Unduly Vague and Broad.

1. AETA is unconstitutionally vague because a reasonable person cannot determine the type and extent of the prohibited conduct.

A statute is vague when a person “of common intelligence must necessarily guess at its meaning,” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926), by using “subjective judgment [] unaided by objective means.” *N.A.A.C.P. v. Button*, 371 U.S. 415, 466 (1963). Rooted in the desire for fairness and the avoidance of arbitrary and capricious interpretation, *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999), the vagueness doctrine necessitates the complete invalidation of a facially vague statute. *N.A.A.C.P.*, 371 U.S. at 466.

The AETA regulates activities of individuals in relation to animal enterprises. In pertinent part, it states:

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

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

² *Id.*

(2) in connection with such purpose - -

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

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

(C) conspires or attempts to do so.”

18 U.S.C. § 43 (2006).

The main provisions regulating conduct are unduly vague because a reasonable person cannot decipher which conduct is prohibited and which conduct is allowed. First, people are left to subjectively assess whether their conduct constitutes “damaging or interfering with an animal enterprise.” AETA § 43(a)(1). Since these words are not defined under the statute, actors are left to guess at its meaning. For example, “damage” within § 43(a)(1) or § 43(a)(2)(A) could mean a scuff mark on the door of an animal enterprise or the breaking of a lock, which results in only nominal monetary loss. Furthermore, “interference” could apply to any kind of advocacy or conduct by the actor. An animal enterprise could also manipulate AETA to target activists and crush dissent. For instance, if an animal enterprise, solely on its own volition, choose to add security measures such as fences, locks, or cameras to its facility, it could argue that it did so out of its fear of “interference” by animal activists, thereby triggering AETA. Most importantly, “interference” could include the sanctioning of protected First Amendment speech and conduct, such as symbolic speech.

Furthermore, AETA is impermissibly vague as to whether one’s actions triggers the application of AETA. “Fear” is yet another undefined term and thus a subjective malapropism within AETA. AETA § 43(a)(2)(B). An actor is left to guess as to what constitutes “fear” in a person. For instance, “fear” may mean nothing more than a C.E.O. of an animal enterprise

worrying about the loss of profits following a demonstration critical of its practices. As another example, “fear” could be measured against the emotional and psychological idiosyncrasies of one person, or objective communal understanding of “fear.” When “fear becomes an element of the offense, speakers have no way to determine how to conduct themselves or...alter the content of their speech so that sensitive listeners will not find it fearful.” Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorist*, 22 PACE ENVTL. L. REV. 261, 285 (2005). Thus, under AETA’s schema, the ‘egg-shell plaintiff’ theory of tort law is improperly imported into a criminal statute.

When AETA’s vague terms – “damage,” “interfere,” and “fear” – are compounded, one is hard pressed to discern what reasonable conduct means under the statute. The Supreme Court does not shy away from striking down statutes where conduct is not defined. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 362 (1964) (finding that a reasonable person cannot determine who a “subversive person” is in the context of a loyalty oath requirement). Notably, the Supreme Court is more likely to strike down criminal statutes with vague language regulating conduct and its potential affects on others. *See Morales*, 527 U.S. 41 (unclear use of “disperse” in an anti-gang ordinance); *Smith v. Goguen*, 415 U.S. 566, 569 (1974) (ambiguous use of “contemptuously” in a law protecting the flag); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (vague use of “annoying” in ordinance prohibiting “annoying” conduct); *Houston v. Hill*, 482 U.S. 451 (1987) (ill-defined use of “interrupt” in an ordinance seeking to protect police officers). Vague laws “trap the innocent by not providing fair warning, impermissibly delegate[e] basic policy matters to policemen, judges, and juries for resolution on an ad hoc...subjective (and possibly “arbitrary and discriminatory”) basis,” and “inhibit” the exercise of free speech. *Graynard v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Accordingly, courts must carefully scrutinize criminal

statutes such as AETA for vagueness in light of these concerns and especially given their potentially devastating affects on a defendant.

2. AETA is unconstitutionally broad because it punishes protected speech.

A law is facially overbroad if it prohibits constitutionally protected activities, both speech and conduct that communicates, alongside those that may be “forbidden.” *Gooding v. Wilson*, 405 U.S. 518 (1972). More specifically, if a law punishes a “substantial amount” of protected speech “judged in relation to the regulation’s plainly legitimate sweep,” it will not survive a facial challenge. *Virginia v. Hicks*, 539 U.S. 113 (2003). By prohibiting speech that “interfer[es]” with, “damage[es],” AETA § 43(a)(1), or “caus[es] the loss of...real or personal property” of an animal enterprise, AETA § 43(a)(2)(A), AETA reaches all forms of constitutionally protected speech that is critical of animal industries. For instance, speech such as letter writing, making donations to organizations, conducting investigations, orchestrating media campaigns, boycotting, protesting, or whistle-blowing are all activities that seek to “interfere[e]” with animal enterprises by educating the public and changing patterns of behavior. By definition, pro-animal speech seeks to effect change, whether on small or grand scales. There is no “plainly legitimate sweep” of speech under AETA by which to judge its constitutional transgressions. *But see Graynard v. City of Rockford*, 408 U.S. 104 (1972) (the Court holding that the phrase “materially disrupts class work” is not overbroad). Therefore, this Court should use the overbreadth doctrine to invalidate AETA as facially unconstitutional. For, strong censorship requires “strong medicine.” *Broadrick v. Oklahoma*, 413 U.S. 600, 613 (1973).

3. The Court should nullify AETA as an unlawful content-based restriction on speech.

Under First Amendment jurisprudence, when the government regulates speech, its regulations must be content-neutral. *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 641 (1994). This rule stems from the language of the First Amendment, which instructs that “Congress shall make no law...abridging the freedom of speech.” U.S CONST. amend. I. To satisfy this constitutional requirement, a regulation must be both viewpoint and subject matter neutral. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Therefore, the government cannot regulate speech based on a speaker’s ideology or the speech’s topic, respectively. *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 391 (1992). A content-based regulation must be narrowly tailored to serve a compelling state interest to satisfy strict scrutiny. *Turner Broadcasting System*, 512 U.S. at 642.

In *Rosenberger v. Rector & Visitors of the University of Virginia.*, 515 U.S. 819 (1995), the Court struck down an ordinance that prompted a university to withhold school funds from a student publication that promoted an evangelical Christian viewpoint. Similarly, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court invalidated an ordinance that prohibited the display of symbols likely to “arouse anger, alarm or resentment in others” based on certain biases such as race and religion since it disfavored only certain categories of hate speech. In both cases, the Court protected the outer boundaries of speech – evangelical religious convictions in a state-run university and invective speech characterized as fighting words.

The Court should adhere to the Supreme Court’s commitment to protecting free speech. Much like the content-based restriction in *Rosenberger* denying funding to an evangelical Christian student publication, and that in *R.A.V.* punishing certain categories of hate speech,

AETA is also a content-based restriction. Several points illustrate how AETA regulates constitutionally protected content. First, AETA regulates viewpoint rather than conduct. The statute shields a single industry from *any* form of ideologically driven speech opposed to it. More specifically, if an individual “travels in interstate or foreign commerce for the purpose of damaging or interfering with the operations of an animal enterprise” and “intentionally damages or causes the loss of any real or personal property” of the animal enterprise, or “a person or entity having a connection to, relationship with, or transactions with an animal enterprise,” and causes no economic damage, she will face a fine, a year in prison, or both. AETA § 43(a)(1)-(2)(A). The statute fails to define “interfere[ence],” “damag[e],” and “caus[ing] the loss of...real or personal property.” This imprecision has drastic consequences. Since these undefined terms can be construed broadly, any lawful speech critical of animal enterprises, whether letter writing, making donations to an organization, conducting investigations, organizing media campaigns, boycotting, protesting, or whistle-blowing, would all fall within the ambit of prohibited conduct.³ Not only does AETA punish this protected speech but it calls it terrorism - a label carrying dangerous social and practical implications in our post 9/11 world. Aside from regulating viewpoint, AETA does not regulate conduct since the conduct it proscribes is already covered by existing criminal statutes. For instance, trespass, breaking and entering, criminal mischief, vandalism and arson are all punishable under current state criminal laws. Andrew N. Ireland Moore, *Caging Animal Advocates’ Political Freedoms*, 11 *Animal L.* 255, 270-71 (2005).

Second, AETA’s statutory history underscores how the government and animal industries targeted the pro-animal viewpoint. The American Legislative Exchange Council (“ALEC”) was

³ Will Potter, *Analysis of Animal Enterprise Terrorism Act*, GreenIsTheNewRed.com/blog/aeta-analysis-109th (last visited Jan. 14, 2008).

responsible for drafting a “model” version of AETA and ultimately pushing it through Congress. Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorist*, 22 PACE ENVTL. L. REV. 261, 285 (2005). ALEC is a self-identified “public-private partnership” where corporate interests pay to work alongside influential legislators as “equals” and fashion policies “that will define the American political landscape well into the 21st century.” American Legislative Exchange Council, www.alec.org (last visited Jan. 14, 2008). With members like the National Pork Producers Association funding ALEC,⁴ member legislators were quite receptive to endorsing this statute.

How AETA became law also suggests that its supporters targeted pro-animal speech. AETA’s passage departed from typical House procedures. On November 13, 2006, Representative Sensenbrenner moved to suspend typical House enactment rules and put AETA on a “fast track.” Equal Justice Alliance, <http://www.noaeta.org/> (last visited Jan. 14, 2008). Normally reserved for “non-controversial bipartisan legislation,” these “fast track” rules limit debate to forty minutes, prohibit bill amendments, and require the approval of only two thirds of members present on the floor. Marjorie A. Berger, *2006 Legislative Review*, 13 *Animal L.* 299, 303 (2007). Stripped of the procedural safeguards that accompany all other “controversial” bills, and with only six House representatives present due to a last minute scheduling change, AETA became law when five out of the 435 members of the House voted to approve it. Equal Justice Alliance, <http://www.noaeta.org/>. Thus, an economically and politically powerful minority of animal enterprises and legislators evaded scrutiny under the IRS for violating lobbying rules as a

⁴ Defenders of Wildlife & Nat. Resources Def. Council, *Corporate America’s Trojan Horse in the States: The Untold Story behind the American Legislative Exchange Council* 39, available at <http://www.alecwatch.org/11223344.pdf> (last visited Jan. 14, 2008) .

non-profit⁵ and scrutiny under the watch of the entire House to then control the debate on animal rights and, as predicted, “define the American political landscape well into the 21st century.”⁶

This “bald economic protectionism”⁷ should not, however, pass the strict scrutiny of the Court.

Lastly, AETA singles out one group (that is defined by non-violence even at its fringes⁸) and protects one industry (when adequate criminal statutes already exist) when other groups constitute a true threat and other industries arguably need the protection that existing criminal statutes can not provide. For example, the pro-life movement is responsible for seven murders since 1977 and seventeen attempted murders.⁹ Its other tactics include acid attacks, anthrax threats, death threats, kidnapping, and burglary, tactics which are not employed in the animal rights movement.¹⁰ Also, right wing militias orchestrated the bombings in Oklahoma City and Olympic Park in Atlanta. Will Potter, *McCarthyism 2.0*, LANTERN BOOKS (2007). Neither of these dangerous groups has been statutorily targeted for the speech they espouse despite the true threats they pose. Therefore, AETA impermissibly targets and punishes protected speech based on content as evidenced by its statutory language and history and a comparison to the treatment of other more threatening movements. Once a restriction is determined to be content-based, it can only survive if it passes strict scrutiny. *Turner Broadcasting System*, 512 U.S. 622. Indeed, “criminal statutes must be scrutinized with particular care.” *Houston v. Hill*, 482 U.S. 451, 459 (1987).

⁵ Michael Satchell, “Right-wing ALEC Lobbyists Turning Animal Activists into Domestic Terrorists” (Nov. 14, 2006), available at <http://www.indybay.org/newsitems/2006/11/14/18329693.php> (last visited Jan. 14, 2008).

⁶ American Legislative Exchange Council, www.alec.org (last visited Jan. 14, 2008).

⁷ Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorist*, 22 PACE ENVTL. L. REV. 261, 285 (2005).

⁸ The Animal Liberation Front, http://animalliberationfront.com/ALFront/alf_credos.htm (last visited Jan. 14, 2008).

⁹ The National Abortion Federation, Statistics on Violence, http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf (last visited Jan. 14, 2008).

¹⁰ *Id.*

The AETA is not narrowly tailored to a compelling government interest. In *Rector* and *R.A.V.*, the Supreme Court did not adopt the compelling interests propounded by the University and petitioner, respectively. *Rector*, 515 U.S. at 846; *R.A.V.*, 505 U.S. at 396. The University’s interest was to avoid an Establishment Clause violation on campus and St. Paul’s interest was to eliminate hate speech directed towards certain classes. *Rector*, 515 U.S. at 846; *R.A.V.*, 505 U.S. at 396. The Court determined that the University’s interest lacked merit since its program was neutral towards religion and that St. Paul’s interest, while compelling, could not pass the narrow tailoring prong of strict scrutiny. *Rector*, 515 U.S. at 846; *R.A.V.*, 505 U.S. at 396. Here, the government’s interest behind AETA is to allegedly combat terrorism against animal enterprises or their tertiary affiliates (although significantly, there is no “purpose” section in the statute). However, as previously discussed, this interest is unfounded since numerous criminal statutes already capture illegal tactics, such as trespass and vandalism, that may confront an animal enterprise. Furthermore, the interest in preventing “terrorism” does not line up with the legal activities AETA punishes such as letter writing, outreach and education, and protests. Lastly, there is a dearth of historical support for the proposition that “terrorism” plagues animal enterprises.¹¹ If the Supreme Court did not find it “compelling” to punish hate speech articulated through “burning crosses and swastikas” in *R.A.V.* then this Court should not find the hallow interests of AETA, which targets not hate speech but protected speech, compelling either.

Assuming, *arguendo*, that AETA has a compelling interest, the statute is not narrowly tailored to achieve it. In *R.A.V.*, the Supreme Court held that St. Paul could have prevented hateful speech in other ways without “displaying...special hostility” to certain groups with a discriminating message. *R.A.V.*, 505 U.S. at 396. AETA more starkly conveys “hostility” to

¹¹ In fact, seven animal activists have already been convicted under an earlier and less stringent version of AETA – The Animal Enterprise Protection Act. The SHAC7, www.shac7.com (last visited Jan. 14, 2008).

individuals with a pro-animal message. Whereas the restrictions in *Rector* and *R.A.V.* prevented reimbursement to a student publication and hateful speech by those holding discriminatory views, respectively, the restrictions in AETA and their effects are staggering by comparison. AETA chills protected speech by capitalizing on the current climate of societal fear present since 9/11. Also, it stifles dissent and “manipulate[s] the public debate through coercion rather than persuasion.” *Turner Broadcasting System*, 512 U.S. at 641. Accordingly, the impact on the debate about the use of animals in our society is severely skewed: pro-animal messages are muted before they can be heard, and pro-industry messages are amplified so that is all we can hear.

AETA’s drafters had several means at their disposal to tailor the statute narrowly. They could have defined the undefined terms mentioned earlier so as not to encroach upon lawful protected speech. They could have only punished conduct that was not covered by existing criminal statutes. They could have minimized the statute’s breadth by not including effects on any person or entity have a connection to an animal enterprise since this comprises almost all of the businesses in the United States. They could have also created less draconian punishments. For instance, those who violated *R.A.V.*’s ordinance were subject to a misdemeanor under state law. Comparatively, those who violate AETA are subject to a conviction under a federal statute and face imprisonment up to ten years as well as fines for causing or conspiracy to cause \$100,000 in economic damage to an animal enterprise. 18 U.S.C. § 43 (2006). Therefore, because AETA is a content-based restriction that is not justified by a compelling interest and not narrowly tailored, this Court should strike it down as facially unconstitutional.

B. The Court Should Strike Down AETA As Violative of the Freedom of Association.

Although the freedom of association is not enumerated within the First Amendment, the Supreme Court has characterized it as “inseparable” from the freedom of speech. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The exercise of freedom of speech is realized when individuals associate in groups to make their voices stronger both in number and increased resources. Because AETA infringes on the protected speech of a circumscribed group, it correspondingly violates that groups’ right to associate with one another. Therefore the Court should strike AETA down on this ground as well.

C. Even If AETA is Deemed Content-Neutral, the Court Should Invalidate it Because it Cannot Pass Intermediate Scrutiny.

Content-neutral time, place, and manner regulations must meet intermediate scrutiny by advancing an important interest (unrelated to the suppression of speech) and not burdening substantially more speech than necessary to further that interest. *Turner Broadcasting System*, 512 U.S. at 676. However, if a content-based restriction seeks to advance a content-neutral purpose such as preventing secondary effects, it will be characterized as content-neutral. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986). In *Renton*, the Supreme Court upheld a zoning ordinance that restricted where theaters could show sexually explicit material because the law sought to control the harmful “secondary effects” of the content rather than content itself. *Id.* at 48. Similarly, in *Colorado v. Hill*, 530 U.S. 703 (2000), the Supreme Court upheld a state law that limited where those “protest[ing], educat[ing], or counseling” could locate in relation to incoming and outgoing patients when situated within 100 feet of a health care facility. Both laws targeted speech based on its content – sexual and anti-abortion – yet, the Court found that the prevention of secondary effects justified them.

First, AETA is not a time, place, or manner regulation since all speech is prohibited if it “interferes” with an animal enterprise regardless of the time of day (“interference” can happen at any hour), location (“interference” can occur anywhere) or manner in which the speech occurs (“interference” can happen in any form). Second, AETA does not seek to avoid secondary effects. The only secondary effects it reaches are those that would trigger economic damage to animal enterprises. However, as aforementioned, existing criminal statutes cover the unlawful subset of pro-animal speech. This means that AETA is superfluous and can not be squeezed into the *Renton* doctrine.

Third AETA is distinguishable from the laws in *Renton* and *Hill*. *Renton*’s ordinance was enacted to prevent crime and blight, but the crimes under AETA are already covered. *Renton*, 475 U.S. at 51. *Renton*’s ordinance was enacted to “maintain property values” and the “quality of life,” but many animal enterprises such as slaughterhouses, fur farms, and research facilities are located far away from residential districts. *Id.* *Renton*’s ordinance relied on “a long period of study and discussion of the problems of adult theaters in residential areas,” but AETA was created to insulate the financial interests of animal enterprises rather than address needs identified in extensive studies. *Id.* *Hill*’s ordinance was enacted to prevent anti-abortion activists from impeding the receipt of contraceptive and abortion services, but AETA is unnecessary to restrain animal advocates already reigned in by existing criminal statutes. *Hill*, 530 U.S. at 703. *Hill*’s ordinance minimized the infringement on speech by allowing protestors to come within eight feet of someone entering or exiting a clinic, but AETA prohibits speech that could occur hundreds of miles away from an animal enterprise. *Id.*

Lastly, *Boos v. Berry*, 485 U.S. 312 (1988), held that “listeners’ reactions to speech” are not the type of secondary effects that *Renton* had in mind. Since AETA’s conception of

“interference” could extend to those “hearing” the pro-animal message through protected forms of speech such as boycotts or media campaigns, it contradicts *Boos v. Berry*. Therefore, AETA can not be characterized as targeting *Renton*-like secondary effects to trigger intermediate scrutiny. Additionally, it does not advance an important interest because it is not a time, place, or manner restriction, and it burdens substantially more speech than necessary.

II. AETA IS UNCONSTITUTIONAL AS-APPLIED TO MR. CLARKSON SINCE HIS ACTIONS WERE PROTECTED BY THE FIRST AMENDMENT.

A. The Court Should Find AETA Unconstitutional As-Applied To Mr. Clarkson Because it Restricts his Protected Speech Based on Content.

An as-applied constitutional challenge argues that a statute is unconstitutional as-applied to a particular individual. As discussed above, this Court should strike down AETA as facially unconstitutional. Alternatively, it should narrow AETA to rectify its unconstitutional application to Mr. Clarkson. A content-based restriction on speech must survive strict scrutiny by being narrowly tailored to a compelling state interest.

Mr. Clarkson engaged in lawful speech protected by the First Amendment. More specifically, he: posted information on the Factory Farms’ website, including the addresses of Eggceptional Eggs’ headquarters and the names and addresses of its upper level managers and officers, a list of grocery stores which use or sell the company’s eggs, and video recordings and photographs depicting the treatment of chickens used by the company. (Mem. Op. at 2). Mr. Clarkson also engaged in unlawful conduct unprotected by the First Amendment, including trespassing on Eggceptional Eggs’ property to document conditions, thereby violating the criminal trespass statute, and painting an Eggceptional Eggs’ billboard, thereby violating the criminal mischief statute. (Mem. Op. at 3). However, AETA criminally punishes Mr. Clarkson’s legal First Amendment activities as well as his illegal conduct, which should be governed by state criminal statutes.

Mr. Clarkson’s constitutionally protected speech is swept up in AETA because the statute is impermissibly content-based. AETA requires that an individual “trave[l] in interstate

commerce...or us[e] or caus[e] to be used the mail or any facility of interstate...commerce.” AETA § 43(a). As an initial matter, the facts do not affirmatively state that Mr. Clarkson left state lines. Additionally, the statute is ambiguous as to whether using the internet is akin to using the mail, or whether it is considered a “facility of interstate...commerce.” *Id.* Thus, it is unclear whether AETA even applies to Mr. Clarkson. Assuming that it does, the statute captures his activity because Mr. Clarkson “travel[ed] in interstate commerce...for the purpose of...interfering with the operations of an animal enterprise; and...in connection with such purpose—intentionally cause[d] the loss of ...personal property.” AETA § 43(a)(2)(A). Translated, this means that if Mr. Clarkson documented conditions at Eggceptional Eggs’ and disseminated this information on the Family Farms’ website to raise awareness, encourage a boycott, and/or generate the support for a protest, his actions would fall within AETA’s reach since these activities could reduce Eggceptional Eggs’ and/or Wildwings’ property in the form of profits. This would be the case whether Mr. Clarkson caused ten individuals to boycott Eggs’ products or ten thousand. Moreover, the fact that Mr. Clarkson is being charged \$432,000 for Eggceptional Eggs’ lost sales and increased security for engaging in protected speech shows that AETA’s assurance that it is in conformity with the First Amendment is simply untrue.¹² For engaging in constitutionally protected speech under an unconstitutional content-based statute, Mr. Clarkson faces imprisonment for three years, egregious “restitution” costs (Mem. Op. at 9), and the culturally-loaded name of terrorist, which will brand him for the rest of his life.

Aside from being impermissibly content-based as applied to Mr. Clarkson, AETA is loosely rather than narrowly tailored to the government’s interest of curbing alleged animal enterprise terrorism. For instance, Mr. Clarkson and Mr. Whittle, Eggceptional Eggs’ regional manager, both vandalized a billboard by painting different letters over existing ones to change the message displayed. (Mem. Op. at 3). Although both men engaged in the exact same activity, Mr. Whittle was fined \$50 dollars under a criminal mischief statute while Mr. Clarkson has been

¹² “Nothing in this section shall be construed to prohibit any expressive conduct protected...by the First Amendment.” 18 U.S.C. § 43 (2006).

fined \$25,000 dollars under a federal criminal statute. (Mem. Op. at 3, 9). In other words, Mr. Clarkson must pay \$24,550 more than Mr. Whittle just for believing in something different.

This tragic and illegal state of affairs will destroy Mr. Clarkson's life as he knows it. Upholding AETA will also set American on a course doomed to alter its fundamental character. The speech emitted from a single person who has only information at his disposal is just as valuable under the First Amendment as the speech coming from a nation-wide industry with a 100 million dollar budget (Mem. Op. at 2) and the backing of the United States government. When an individual's coveted free speech is silenced just because he or she can't compete with another's power, our cherished American experiment is shattered.

B. The Court Should Render AETA Unconstitutional As-Applied Because Mr. Clarkson's Conduct and Speech is Protected by the First Amendment.

1. The First Amendment protects Mr. Clarkson's symbolic speech and the posting of information on the internet, which communicates a specific message.

Not all speech is verbal, therefore the First Amendment protects symbolism that is used in lieu of actual verbal expression. In *Spence v. Washington*, 418 U.S. 405 (1974), the Supreme Court adopted a two-prong approach to evaluate whether conduct falls within the First Amendment's purview. First, the messenger must have an "intent to convey a particularized message." *Id.* at. 410-11. Second, "in the surrounding circumstances, the likelihood [must be] great that the message would be understood by those who viewed it." *Id.* at 411. The Supreme Court has upheld a sundry of symbolic expression. *See, e.g., West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (saluting the flag); *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1969); (wearing black armbands in protest of the Vietnam War); *Spence*, 418 U.S. 405 (taping a peace sign onto an American flag); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning a flag); *U.S. v. O'Brien*, 391 U.S. 367 (1968) (burning a selective service registration card).

Mr. Clarkson posted the address of Eggceptional Eggs' headquarters, the names and addresses of company's officers, and information about the company's planned expansion. (Mem. Op. at 2). Viewed as a whole, Factory Farm's internet postings are symbolic speech akin to pamphleteering, boycotting, and protesting, and thus should be similarly protected. *See, e.g., Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that pamphleteering is communicative speech); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (upholding the defendant's non-violent boycotting activities); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 301 (2007) (ruling that protesting homelessness by sleeping on park benches constitutes symbolic speech).

By posting information about Eggceptional Eggs and its officers, Mr. Clarkson intended to convey a message about its farming practices and their affects on communities, the environment, and the chickens it houses. Falling in line with the Supreme Court precedent previously cited, Mr. Clarkson's conduct is "communicative in nature." *Johnson*, 491 U.S. at 404. Furthermore, a reasonable person would understand that the videos, photographs, names and address of Eggceptional Eggs' officers and their vendees, communicates information about Eggceptional Eggs' farming practices and its consequences.

Moreover, the Government cannot regulate such communicative conduct, because "it has expressive elements," *Johnson*, 491 U.S. at 406, that are related to the Government's interest in suppression of the protected activity. *Id.* at 407 (citing *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968)). The Government stresses that the privacy interests of Eggceptional Eggs' officers and their families must be vindicated. *See, e.g., Frisby v. Shultz*, 487 U.S. 474 (1988); *Northeast Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57 (3rd Cir. 1991); *Douglas v. Brownell*, 88 F. 3d 1511 (8th Cir. 1996). However, privacy interests cannot outweigh conduct by website visitors, which Mr. Clarkson could not control. Moreover, because the Government cannot punish the Mr. Clarkson for third person conduct, it lacks a "sufficiently important governmental interest in

punishing the non-speech element.” *Johnson*, 491 U.S. at 407 (quoting *O’Brien*, 391 U.S. at 376). Since the Government bears the burden of explaining how Mr. Clarkson’s conduct is unprotected under the *O’Brien* test, its failure to explain how posting information on the internet is distinguishable from pamphleteering further protects Mr. Clarkson’s conduct from scrutiny. *See NYSE Euronet v. Atwood*, No. 07-0438 Civ. (S.D. Fl. May 25, 2007) (finding that the posting of addresses by an animal rights organization was protected by the First Amendment.). *But see, U.S. v. Stop Huntington Animal Cruelty USA, Inc., et al*, Criminal No. 04-373 (D.N.J. 2006) (arriving at the opposite conclusion).

2. The First Amendment protects Mr. Clarkson’s conduct and speech, neither of which incited illegal activity.

Fundamentally, the First Amendment cannot regulate speech and conduct to inhibit the “free trade of ideas.” *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., Dissent). Therefore, speech cannot be trampled on just because of its “advocacy of the use of force or of law violation.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). However, courts may regulate advocacy if it “is directed at producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 448.

By posting information on Factory Farms’ website, its visitors used the information to establish protests and boycotts, damage vendees’ property, and intimidate Eggceptional Egg officers. (Mem. Op. at 3, 4). But such actions must be viewed separately from what Mr. Clarkson intended. In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 866 (1982), the Court ruled that a large-scale civil rights boycott of white merchant businesses was protected activity even if “advocacy of the use of force or violence may have contributed to the overall success of the boycott.” *Id.* at. 927-28. Applying the *Brandenburg* test, the Court found that only those who carried out the illegal activity were outside the protection of the First Amendment. *Id.* at 931-933. Much like the boycotters in *Claiborne*, Mr. Clarkson did not commit lawless actions. In fact, internet posting has been protected by some courts as symbolic speech. *See infra* p. 20.

Furthermore, in posting information on the internet, there is no evidence that Mr. Clarkson directed people towards lawless action. “The prospect of crime . . . does not justify laws suppressing protected speech.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). *See Watts v. U.S.*, 394 U.S. 705, 706-08 (1969) (finding that, in context, uttering “‘If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.’” is a protected political hyperbole); *Brandenburg*, 395 U.S. at 448-49 (the assembling of the Ku Klux Klan to spread hateful messages about African Americans and Jews is “mere advocacy.”). Furthermore, there is not evidence or proof that Mr. Clarkson’s conduct was driven at producing lawless action. Conduct that advocates “illegal action at some indefinite future” is nothing more than advocacy. *Hess v. Indiana*, 414 U.S. 105, 108 (1973). At worst, Mr. Clarkson website was directed towards communities affected by Eggceptional Eggs,’ but the Government fails to show that people were actually incited to take imminent lawless action based on the subject matter of the website. By punishing a speaker for the actions of others, the Government is permitted to take “arbitrary and discriminatory” actions against persons expressing unpopular opinions. *See, e.g., Graynard, supra* at 108-09.

3. Mr. Clarkson’s conduct does not constitute fighting words; however, even if the Court characterizes his conduct as such, Mr. Clarksons’ Convictions should still be overturned, as established by Supreme Court precedent.

The breadth of the First Amendment is not impenetrable. *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Supreme Court carefully carved out a narrow exception to the First Amendment’s protections. *See Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942) (stating that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”). Fighting words are one such category. *Chaplinsky*, 315 U.S. at 572.

Fighting words are conduct or verbal speech, “which by their very utterance inflict injury or tend to incite immediate breach of the peace.” *Id.* at 572. Such utterances may be personal insults directed towards a listener or towards a group to arouse hostility against a third party. *Cohen v. California*, 403 U.S. 15, 20 (1971). Mr. Clarkson is charged with arousing hostility in visitors of his website, who in turn directed hostility towards Eggceptional Eggs.

Mr. Clarkson posted video footage and photographs of the corporation’s farming practices on Factory Farm’s website. (Mem. Op. at 2). Furthermore, the website contained address of Eggceptional Eggs’ executives. (Mem. Op. at 2). The posted information was for boycott and letter-writing purposes. Website visitors used the information to invalidate Eggceptional Eggs’ practices vis-à-vis demonstrations and boycotts of business using its products. (Mem. Op. at 3). Unfortunately, some website visitors used the information to intimidate Eggceptional Eggs’ officers and cause property damage to businesses using its products. (Mem. Op. at 3, 4).

The Government failed to prove that Mr. Clarkson intended for his website to arouse hostility against Eggceptional Eggs’ officers and its vendees. *See, e.g., Cohen*, 403 U.S. 15 at 20 (finding that the defendant, by wearing a jacket denoting an unfavorable opinion of the draft, did not intend violent arousal.). Much like the defendant’s jacket in *Cohen*, Mr. Clarkson’s information on Factory Farms’ website, though unfavorable to some, bears no stated or inferred purpose of inciting arousal. The Government simply has no basis of finding intent, and the actions of website visitors alone cannot be imputed onto Mr. Clarkson.

4. Mr. Clarkson’s conduct does not constitute a true threat; however, even if the Court characterizes his conduct as such, it should still overturn Mr. Clarkson’s convictions, as established by Supreme Court precedent.

Another form of proscribed speech is true threats. *Watts v. U.S.*, 394 U.S. 705, 708 (1969). True threats are expressive conduct whereby the “speaker means to communicate a

serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia*, 538 U.S. at 359. Much like fighting words, the true threats doctrine is protective. Its purpose is to “protect[] individuals from the fear of violence, from the disruption that fear generates, and from the possibility that the threatened violence will occur.” *R.A.V.*, 505 U.S. at 388.

There is no evidence that Mr. Clarkson used, threatened to use, intended to use, or participated in the use of violence or intimidation. His website did not contain explicitly threatening or conditional remarks regarding Eggceptional Eggs’ officers, *U.S. v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007) (holding that explicitly and conditionally threatening employers with bodily harm falls within the true threats doctrine); make disparaging comments about the officers or their families; or contextualize the officers names and addresses in a format that would lead a reasonable visitor to conclude that the featured persons were wrongdoers and criminals deserving of punishment. *See, e.g., Planned Parenthood of Columbia/Wilamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (finding that featuring abortion doctors’ names on “Guilty” and “Wanted” posters in the context of the Nuremburg Trials constituted true threats).

This case is most akin to *Planned Parenthood* where anti-abortion activities posted names and addresses of doctors performing abortions, thus giving the anti-abortion activists an opportunity to locate the doctors. *Id.* at 1013. Furthermore, the website contained the names of doctors who had been victimized by anti-abortion activists by marking the names of wounded and murdered doctors. *Id.* Because the website did not expressly contain explicit threats against the doctors and there was insufficient evidence that the activities intended to harm the named doctors, the Ninth Circuit ruled that such conduct did not constitute true threats. *Id.* at 1015-16. Mr. Clarkson’s conduct is less egregious than that of anti-abortion activists. His website merely

contained the address of Eggceptional Eggs' headquarters and the names and home address of its officers. Unlike the anti-abortion activists, Mr. Clarkson, did not provide the officers' names and addresses against the backdrop of encouraging harm or threat. Indeed, nothing in the evidence points to the fact that Mr. Clarkson "authorized, ratified, or directly threatened acts of violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982) (holding a black boycott organizer's use of potentially threatening language did not constitute an actual true threat).

Mr. Clarkson's convictions under AETA must be vacated if this Court finds AETA unconstitutional. Supreme Court doctrine struck down conduct or language that may constitute true threats, because the statutes under which the appellants were charged were ruled as unconstitutional. *R.A.V.*, 505 U.S. 377 (cross-burning statute is facially invalid).

C. The Court Should Deem AETA Unconstitutional As-Applied to Mr. Clarkson Since the Sentencing Provisions Are Inappropriate.

The AETA's penalty provision sanctions violent and non-violent behavior by imposing a prison sentence upon the actor. AETA § 43(b). Particularly, the actor will receive a "imprisonment for no more than 1 year . . . if the offense does not instill in other the reasonable fear of serious bodily injury or death." AETA § 43(b). And the gradation of the penalty increases up to twenty years; five years, "if no bodily injury occurs," AETA § 43(b)(2), ten years if "the offense results in substantial bodily injury," AETA § 43(b)(3)(B), and twenty years if there is bodily injury and substantial economic damage, AETA § 43(b)(4). The Supreme Court will overturn sentencing convictions if the sentence imposed by the lower courts is unreasonable. *Rita*, 127 S.Ct. 2456.

The AETA sanctioning provisions are unreasonable. *See Freedom of Access to Clinic Entrance Act* ("FACE"), 18 U.S.C. § 248 (2000) (imposing less serious punishment for violations of access and destruction of abortion clinics). Whereas under AETA, the purpose of the sanctions is to protect persons, facilities, and economic welfare of animal enterprises, (Mem. Op. at 8), FACE sanctions actions which protect persons who have a constitutional right to an

abortion, *see Roe v. Wade*, 410 U.S. 113 (1973). Sanctions should be more severe when an actors actions and behaviors infringe upon the constitutional rights of others.

CONCLUSION

AETA violates the First Amendment of the United States Constitution on its face and as applied to Appellant, Frank Clarkson. Furthermore, Appellant's speech and conduct falls within the protections of the First Amendment. Therefore, the Court should strike down AETA as an unconstitutional statute and dismiss Mr. Clarkson's prison sentence and restitutionary costs.

CERTIFICATION

We hereby certify that our brief is the product solely of the undersigned and that the undersigned have not received outside assistance of any kind in connection with the preparation of the brief.

DATED: January 14, 2008

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