

**Measuring Brief
No. 07-3221**

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTHTEENTH CIRCUIT**

FRANK CLARKSON,

Appellant

v.

UNITED STATES,

Respondent

**ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTOPIA**

**BRIEF FOR RESPONDENT
UNITED STATES**

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STATEMENT OF THE CASE

Frank Clarkson was indicted by the Grand Jury on July 14, 2007 for violations of the Force, Violence, and Threats Involving Animal Enterprises Act, commonly known as the Animal Enterprise Terrorism Act (“AETA”). 18 U.S.C. § 43. (Briefing Order at 1.) After a bench trial where Appellant waived trial by jury, the District Court found that the AETA is constitutional. (Briefing Order at 1.) Additionally, the District Court found that Appellant’s conduct was not protected speech under the First Amendment, and found Appellant guilty on all counts. (Briefing Order at 1.) Clarkson appealed the District Court’s ruling arguing that the AETA is unconstitutional, and that his speech and conduct was protected by the First Amendment. (Briefing Order at 1.)

STATEMENT OF FACTS

In November 2006, President Bush signed into law, the “Animal Enterprise Terrorism Act,” (“AETA”) which expanded criminal prohibitions against the use of force, violence, and threats involving animal enterprises and increased penalties for violations of these prohibitions. (Mem. Op. at 1.) The AETA was enacted to counter the continued threat of “ecoterrorism” which causes economic damages to individuals and businesses associated with animal enterprises (Mem. Op. at 1.) The AETA resulted in tougher penalties for violations and extended the reach of the statute to third parties associated with animal enterprises. (Mem. Op. at 1.)

Defendant-Appellant Frank Clarkson (“Clarkson”) founded an organization called Family Farmers United Against Factory Farms (“Family Farms”) to protest the expansion of factory farms. (Mem. Op. at 2.) Clarkson and Family Farms focused their efforts on Eggceptional Eggs, a commercial enterprise that sells eggs and egg products from poultry. (Mem. Op. at 2-3.)

Wildwings Family Restaurant, an enterprise associated with Eggceptional Eggs, suffered economic damages because of protesting inticed by Clarkson. (Mem. Op. at 4.)

On July 14, 2007, the Grand Jury indicted Clarkson for violated the AETA. Specifically, Clarkson was charged with conspiring, attempting, and intentionally causing damage or loss of any real property or personal property 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 Eggceptional Eggs (Mem. Op. at 1.) Further, Clarkson was charged with conspiring to intentionally place Eggceptional Eggs employees and their immediate family in reasonable fear of death, or serious bodily injury, by engaging in conduct involving threats, harassment and intimidation. (Mem. Op. at 1.)

Clarkson communicated information to other activists using the Family Farms website (Mem. Op. at 2.) Starting on Dec, 5, 2006 Clarkson posted: (1) the address of the headquarters of Eggceptional Eggs, (2) names and home addresses of Eggceptional Eggs chief operating offices, (3) a list of restaurants and grocery stores who sell Eggceptional Eggs, and (4) video recordings and photographs depicting the treatment of chickens at Eggceptional Eggs. (Mem. Op. at 2.)

Once this information was posted, regular demonstrations were held at Eggceptional Eggs workplaces and employee's homes for the stated purpose of pressuring Eggceptional Eggs to stop expanding their operations. (Mem. Op. at 3.) This activity caused Eggceptional Eggs to hire a security firm and additional guards at all of its operational facilities. (Mem. Op. at 3.) Additionally, Defendant Clarkson admitted to painting promotional billboards which once stated "Support Eggceptional Eggs" to "Stop Eggceptional Eggs." (Mem. Op. at 3.) As a result of protests, Wildwings Restaurant has suffered economic damages totaling \$125,000. (Mem. Op. at

4.) Moreover, Wildwings has experienced broken windows, graffiti, and chain-linked locked doors, all believed to be the direct result of Family Farms' website campaigns. (Mem. Op. at 4.) Additionally, Eggsceptional Eggs lost profits totaling \$457,000, also believed to be a direct result of Family Farms' website campaigns. (Mem. Op. at 9.)

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by holding 18 U.S.C. § 43, the Force, Violence, and Threats Involving Animal Enterprises Act, commonly known as the AETA, constitutional?
2. Whether the District Court erred by finding that the Appellant's acts were not protected by the First Amendment, and whether sentencing imposed by the District Court was appropriate under the facts of this case?

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the United State District Court for the District of Utopia, holding that the AETA is constitutional for three reasons. First, the AETA is not unconstitutionally vague because its terms and definitions are sufficiently clear as to put a person of common intelligence on notice as to what actions it prohibits. Moreover, the AETA delineates clear guidelines to limit the discretion of law enforcement officials who apply the statute. Second, the AETA is not unconstitutional for overbreadth because the statute is not "substantially" overbroad. Furthermore, even if the statute were substantially overbroad, the court may construe it narrowly to avoid constitutional issues or sever the portions deemed broad. Third, the AETA does not unconstitutionally regulate speech based upon ideology, opinion, or perspective because it is facially content and viewpoint neutral.

This Court should also confirm the judgment of the United States District Court for the District of Utopia, holding that Appellant's speech and conduct were not protected by the First

Amendment and that Appellant is guilty of violating the AETA. Appellant's speech and conduct amounts to nothing more than criminal activity and incitement speech. Therefore, the activities are not afforded the protections of the First Amendment of the United States Constitution. Specifically, Appellant's argument that his internet postings on the Family Farms website are analogous to the protected activity of *peaceful* pamphleteering is invalid because the statements were directly aimed at Eggceptional Eggs employees' homes, a threat of privacy was shown, and criminal activity was immediately incited. Furthermore, any First Amendment protection that could be claimed by Appellant is outweighed by the employees' privacy interests because his actions directly interfered with their right to enjoy the tranquility and privacy of their own homes. Additionally, sentencing under the AETA was appropriate under the facts of this case and necessary to protect the people and facilities associated with animal enterprises and the economic welfare of the enterprises themselves. Therefore, the District Court's ruling in favor of the United States should be affirmed.

ARGUMENT

I. THE AETA IS CONSTITUTIONAL BECAUSE IT IS NARROWLY TAILORED AND HAS DEFINITE AND OBJECTIVE STANDARDS RESTRICTING FIRST AMENDMENT RIGHTS IN WHICH THE GOVERNMENT HAS A LEGITIMATE INTEREST.

The first issue in this case involves whether the AETA is unconstitutional for lack of due process. Whether a statute is unconstitutional on its face is a question of law and is reviewed *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). The right to freedom of speech is not an absolute right. Any statute that regulates actions protected by the First Amendment must be narrowly tailored to serve a legitimate government objective. *Carey v. Brown*, 447 U.S. 456, 461-462 (1980). Moreover, a statute which restricts a First Amendment right may be facially

attacked using two distinct doctrines – overbreadth and vagueness. *See, e.g., Chicago v. Morales*, 527 U.S. 41 (1999).

- A. The AETA is not unconstitutionally vague because its terms are sufficiently clear to provide adequate notice of what conduct is prohibited and to prevent selective prosecution and arbitrary arrests.

A law is unconstitutionally vague, and in violation of due process, if a reasonable person cannot tell what speech is prohibited and what is permitted. *Morales*, 527 U.S. at 56. The rationale behind the policy is to eliminate arbitrary and selective enforcement and requires the statute to define the criminal offense with specific and definite standards so that any reasonable person may understand what conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

There are two ways the vagueness doctrine may invalidate a criminal statute. First, the statute is void if it fails “to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Morales*, 527 U.S. at 56. Second, the statute is void if it “authorizes or encourages arbitrary and discriminatory enforcement.” *Id.*

- i. *The AETA is not vague because it explicitly states what activities are prohibited.*

The vagueness doctrine requires a statute to define the criminal offense with specific and definite standards so that a person of common intelligence may understand what conduct is prohibited. *Lawson*, 461 U.S. at 358. If the law is impermissibly vague it could trap a person because it provides no fair warning of what conduct is lawful and what is unlawful. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). For example, the Supreme Court citing due process violations invalidated a city gang ordinance which prohibited loitering. *Morales*, 527 U.S. at 41. The ordinance was deemed vague because it left uncertainty as to the conduct it prohibited. *Id.* at 58-60. Specifically, the Court noted the obscure definition of the offense

itself; to loiter, meaning, “to remain in any one place with no apparent purpose.” *Id.* at 47. The vagueness of the statute left uncertain specific actions which would allow a person to avoid arrest. *Id.* at 57-58. For example, Justice Stevens asked the following: “[After dispersal] if each loiterer walks around the block and they met again at the same location, are they subject to arrest or merely to being ordered to disperse again?” *Id.* at 59. This illustrates how a ordinary person might not understand what conduct is prohibited by the statute.

On the other hand, when a statute gives adequate notice of the conduct prohibited, it is not invalid under the vagueness doctrine. For example, the Ninth Circuit held a criminal statute not void for vagueness which prohibited the use of hazardous devices on federal land with the intent to obstruct or harass the harvesting of timber. *U.S. v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005). The court concluded that the statute provided fair warning to persons of common intelligence that it was a crime to hang ropes above a helicopter landing site with intent to obstruct or harass the harvesting of timber. *Id.* Because the purpose of the statute was to prevent injury to loggers, the court had no problem articulating how hanging ropes above the landing site met the general definition of “hazardous or injurious device.” *Id.* at 1261.

In this case, Appellant Clarkson challenges the AETA under the vagueness doctrine claiming the statute’s terms are not narrowly defined and that he had lack of notice. Specifically, Clarkson argues that he did not know what activities were illegal due to the lack of specificity in the statute. This argument is unpersuasive because any ordinary person can understand what conduct is prohibited by the AETA.

The term “animal enterprise” must be sufficiently broad to cover whatever means of harassment or destruction animal extremists use to harm others while being specific enough to give an ordinary person notice of what activities are prohibited. The new version of the law does

that by eliminating the purpose of “physical disruption” from section 2(a) and focusing on the “economic damages” that result from “a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation.” 18 U.S.C.A. § 43(a)(2)(B). The statute lets the reader understand where the line is drawn between lawful and unlawful conduct. In fact, the rules of construction in the statute itself state, “nothing in this section shall be construed – to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment of the Constitution.”

Id.

The AETA gives adequate notice of what conduct is permitted and what is forbidden because it distinguishes lawful protests from destructive threats of violence. Therefore, this court should not hesitate to affirm the lower court’s decision.

ii. The AETA will not be used as a tool for selective prosecution or arbitrary enforcement because it establishes minimal guidelines to govern law enforcement.

In conforming to due process standards, criminal statutes are required to maintain a level of guidance so that the law enforcement officials who apply them are not granted unfettered discretion. *See, e.g. Lawson*, 461 U.S. at 361. Where no minimal guidelines are established “the criminal statute may permit a standardless sweep that allows policeman, prosecutors and juries to pursue their personal predilections.” *Id.* at 358. (internal citations omitted). For example, the Supreme Court invalidated a law enacted by the City of Houston which made it illegal to interrupt police officers in the execution of their duty. *Houston v. Hill*, 482 U.S. 451, 467 (1987). Specifically, the Court took issue because the statute prohibited any speech, not just fighting words or obscene language, that “in any manner” interrupted a police officer. *Id.* at 466-67. Since the statute covered many forms of protected speech, and was often violated, it granted

the Houston police “the discretion to make arrests selectively on the basis of the content of the speech.” *Id.* Accordingly, the statute was declared void for vagueness. *Id.*

On the other hand, a statute does not encourage arbitrary enforcement provisions if it establishes “minimal guidelines to govern law enforcement.” *Morales*, 527 U.S. at 60. In *Morales*, the city ordinance, which made it unlawful to loiter after being dispersed by a police officer, was invalidated because it gave the police unfettered discretion to determine what action constituted “loitering” without minimal guidance from the legislature. Additionally, a scienter requirement can help eliminate an issue of vagueness. *Posters ‘N Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994).

The AETA gives clear guidelines that limits the amount of discretion available to prosecutors and law enforcers who apply the statute. The statute limits its scope to individuals who *intentionally* damage property or *intentionally* place reasonable fear of death or serious bodily harm using a *course of conduct* such as vandalism, trespass, harassment, or intimidation. 18 U.S.C. § 43. Thus, the statute excludes lawful protestors, unintentional trespassers, and anyone else whose action is limited to a single act or violation. Second, the statute is limited in its application only to those who place a *reasonable fear* of death or serious bodily harm. *Id.* This eliminates the prosecution of legitimate activists whose actions might scare an individual, that finds himself face to face with even the most aggressive, yet lawful, protest.

In both *Hill* and *Morales* a lack of minimal guidelines from the legislature gave the police complete discretion in determining whether the suspect in the case met the requirements of the statute. Unlike the statutes in those cases, the AETA gives strict guidelines and prohibits only unlawful interference with an animal enterprise – such as threats, vandalism, property damages, and criminal trespass. *Id.* Moreover, the statute eliminates the prosecution of mistaken

offenders by requiring a “course of conduct” defined as “a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.” 18 U.S.C.A § 43 (d)(2). The statute’s scienter requirement helps avoid any vagueness issues. The statute not only prohibits the destruction of property, but the *intentional* destruction of property. 18 U.S.C. § 43. The intent requirement further limits the discretion given to law enforcement officers by requiring evidence of purpose.

A clear and plain reading of the AETA gives sufficient clarity for ordinary people to understand. Moreover, it delineates guidelines for law enforcement. Thus, the statute at issue is not unconstitutionally vague and would not lead to selective enforcement.

B. The AETA is not unconstitutionally overbroad.

The possibility of overbroad application of AETA is eliminated since only unlawful acts that result in economic damage are prohibited. Other peaceful acts of expression, such as lawful boycotts and protests, fall outside of the scope of the act. In order to sustain a facial challenge on overbreadth, the petitioner must establish that: (1) the AETA is substantially overbroad, and (2) there is no narrower way of construing the statute so as to avoid declaring it unconstitutional.

See e.g., Broadrick v. Oklahoma, 413 U.S. 601 (1973).

i. The AETA is not substantially overbroad because it poses no realistic danger to constitutionally protected actions or speech.

Where conduct and not merely speech is concerned, “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick*, 413 U.S. at 615-16; *See also Board of Airport Comm’r of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (holding airport resolution banning all “First Amendment activities” unconstitutional.) In *Broadrick*, the Court upheld a state statute which banned political activity by state employees. 413 U.S. at 618. While the court indicated that the law was somewhat broad, it also stated “whatever overbreadth [existed] should be cured through

case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” *Id.* at 615-16. While a readily apparent definition of “substantial overbreadth” does not exist, “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render its susceptible to an overbreadth challenge.” *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984). The law requires the challenger to show a “realistic danger” that the statute could compromise a significant number of First Amendment protections not before the Court to be facially challenged. *Id.*

Not all forms of speech are protected by the First Amendment. Specifically, “true threats” that intimidate and place another in reasonable fear of death or bodily harm are not protected. *Virginia v. Black*, 538 U.S. 343 (2003). While speech may fall under the actions that violate the AETA, only speech that is used to intimidate, harass, or otherwise place a reasonable person in fear of death or bodily harm will violate the statute. This is distinguishable from the cases such as *Broadrick* where substantially overbroad statutes raised situations disturbing constitutionally protected rights.

In this case, Defendant Clarkson argues that the AETA is overbroad on its face because it prohibits speech that may be interpreted as interfering with an animal enterprise. This argument is unconvincing because the AETA does not in fact prohibit speech or any activity, even if it causes economic damage to an animal enterprise. It creates no new remedies that might infringe upon free speech. In fact, only *unlawful* actions such as harassment, intimidation, and vandalism that result in economic damage to the animal enterprise or associates are prohibited.

The amendments to the Animal Enterprise Protection Act (“AEPA”), including the most recent accomplished two goals, neither of which encroaches upon constitutionally protected speech. Specifically, the amendments increased penalties for violators and expanded the

statute's reach to protect third parties associated with animal enterprises. See Alyson B. Walke, *A Field of Failed Dreams: Problems Passing Effective Ecoterrorism Legislation*, 18 Vill. Envtl. L.J. 99, 113 (2007). Moreover, the amendment creates no penalty for peaceful protestors "engaging in obstructive conduct that intimidates an animal or plant enterprise employee." *Id.* The statute is specifically regarding punishable offenses and in no way creates a realistic threat to endanger First Amendment protections.

ii. The AETA is not overbroad because it can be narrowly construed to avoid infringing upon the constitutional rights of those not before the court.

If a statute is substantially overbroad, the doctrine of overbreadth will invalidate the entire statute. *Broadrick*, 413 U.S. at 615. Furthermore, anyone with standing may also use the doctrine to raise claims of someone else not before the court. *Id.* at 612. The doctrine of overbreadth is perceived as "strong medicine," and is to be used "sparingly" and "only as a last resort." *Id.* at 613. In addressing the severity of the doctrine, the Supreme Court has stated that it will avoid declaring a law unconstitutional by applying a narrow construction to an otherwise overbroad statute. *Osborne v. Ohio*, 495 U.S. 103 (1990). For example, in *Osborne*, the Court upheld a law which prohibited the possession of child pornography by restricting its application to materials showing minors "in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged. 495 U.S. at 113. This narrow construction thus avoided punishing those with innocuous pictures of children. *Id.* at 114

Additionally, the Supreme Court has avoided constitutional issues by applying a rule of partial invalidation declaring unconstitutional only the part of the statute that encroaches upon First Amendment protections. For example, the Court upheld Washington's "moral nuisance" statute while only severing the portion which defined the word "lust," as it was impermissibly

broad. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505-07. Thus, it struck only the portion which substantially restricted constitutionally protected rights.

Similar to Ohio's narrow construction in *Osborne*, the legislature has limited the scope of statute by placing in the text a rule of construction limiting its application: "Nothing in this section shall be construed – to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstrations) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 43(e). Thus, first Amendment activity is expressly excluded. Additionally, even if the Court finds the AETA impermissibly overbroad it could adopt a more narrow construction or strike specific portions as to avoid invalidating the statute in its entirety.

C. The AETA does not unconstitutionally regulate speech based on ideology, opinion or perspective.

When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates the legislation be finely tailored to serve substantial state interests. *Carey v. Brown*, 447 U.S. 455, 460-64 (1980). However, a law that regulates speech is content-neutral if it applies to all speech regardless of the message. *See e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (upholding an ordinance as content neutral because it banned all posters from utility poles regardless of subject matter.

In the event this Court finds the AETA is a content-based restriction, it should deem the restriction content-neutral because it is motivated by a permissible content-neutral purpose. The purpose of the AETA is to deter the harmful effects of eco-terrorism not to restrict free speech. The Supreme Court in *Renton v. Playtime Theaters, Inc.*, rejected the argument that a zoning ordinance violated the First Amendment. 475 U.S. 41, 47 (1986). The restriction was content based because it prohibited movie theaters displaying sexually explicit content from operating

within 1,000 feet of any residential zone, single, or multifamily dwelling, church, park, or school. *Id.* However, the Court ruled that the restriction was content-neutral because the purpose was to control the secondary effects of adult theaters (i.e. crime) and not to restrict speech. *Id.*

In this case, a facially content-based restriction can be treated as content-neutral if its purpose is to control harmful secondary effects of speech and not the speech itself. The purpose of enacting the AETA is not to restrain animal activist groups from protesting. Rather, it is to deter extremist from destroying property and placing fear into reasonable individuals. The regulation is justified because its purpose is to limit the secondary effects such as deterrence of crime, destruction of property, and injury to persons. The writers of AETA even described the purpose was to prevent the harm to animals enterprises, not to restrict expression.

Petitioner is mistaken in his belief that AETA increases penalties of existing criminal statutes based upon the “political beliefs” of animal rights activists. The reason behind the increased penalty is that the government has a legitimate interest in controlling extremist groups who intentionally destroy property and place fear into reasonable individuals associated with animal enterprises. Moreover, the cost spent on additional security and personnel to defend against animal activist is skyrocketing. The FBI estimates that animal extremists have committed more than 600 criminal acts in the United States since 1996, resulting in damages in excess of \$43 million dollars. <http://www.fbi.gov/congress/congress02/jarboe021202.htm>.

Petitioner argues that he is being attacked for political reasons. However, because the AETA only regulates unlawful conduct, this argument is unconvincing. Terrorism is terrorism, and violence is violence no matter if the victim is an animal enterprise or an individual associated with an animal enterprise. In closing, this Court should affirm the lower court’s

decision because the AETA does not unconstitutionally regulate speech based upon ideology, opinion, or perspective because it is facially content and viewpoint neutral.

II. APPELLANT’S ACTIONS ARE NOT PROTECTED UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND SENTENCING UNDER THE AETA IS APPROPRIATE.

De novo review is the appropriate standard of review for an appellate court that must determine whether a statement is beyond the protection of the First Amendment. *See Peel v. Attorney Registration & Disciplinary Comm’n of Illinois*, 496 U.S. 91 (1990). The First Amendment of the United States Constitution provides that “Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble....” U.S. CONST. amend. I. America’s political system and culture depends largely upon the ideals of the First Amendment “that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broad. Sys., Inc. v. Fed. Commc’n Comm’n*, 512 U.S. 622, 641 (1994). Thus, as a general rule, the government is prohibited from controlling what we say, read, or hear. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). However, freedom of speech is not an unlimited right, and a few types of speech, such as defamation, *incitement*, obscenity, and pornography with children, are not afforded the protections guaranteed by the First Amendment. *Id.* at 245-46. It is left to the courts to distinguish between unprotected speech and constitutionally protected speech. *See Watts v. United States*, 394 U.S. 705, 707 (1969).

A. The Appellant’s speech and conduct are not protected by the First Amendment because they simply constitute criminal acts and incitement speech.

The Supreme Court has repeatedly held that the First Amendment does not permit states “to forbid or proscribe advocacy of the use of force or of law violation *except* [1] where such advocacy is directed to inciting or producing imminent lawless action and [2] is likely to incite or

produce such action.” *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (quoting *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969)). In both *Bradenburg* and *Hess*, the Supreme Court held that the individual defendants’ speech was protected by the First Amendment. *See Bradenburg*, 395 U.S. at 448 (finding that the Ohio Criminal Syndicalism Act could not be sustained because, as applied, it did not distinguish mere advocacy from incitement to imminent lawless action); *Hess*, 414 U.S. at 108-09 (holding that there was no rational inference that protestor’s words were intended to produce or were likely to produce imminent disorder because they were not directed toward any person or groups of persons).

Here, the Appellant posted the names and home addresses of Eggceptional Eggs employees on the Family Farms website in order to communicate with other animal rights extremists. Once this information was posted on the website, it immediately incited regular demonstrations at Eggceptional Eggs offices and employees’ homes. Additionally, weekly protests were held at Wildwings restaurants after Appellant posted a list of businesses that use or sell Eggceptional Eggs products. The protest at Wildwings restaurants resulted in broken windows, graffiti, and chain-locked doors. Unlike the facts in *Hess*, the Appellant directed his statements and internet postings directly toward Eggceptional Eggs and Wildwings. Using the Appellant’s statements, protestors proceeded to engage in criminal activity in order to further both Appellant’s and their own agendas to economically harm Eggceptional Eggs and Wildwings. Accordingly, a rational inference can be made that Appellant’s words amount to incitement speech and are not protected by the First Amendment because those words: (1) were directed to inciting or producing imminent lawless action, and (2) were likely to incite or produce such lawless actions. In fact, the internet postings were not just likely to incite or produce lawless action—lawless action did occur.

B. Appellant's internet postings on the Family Farms website are not analogous to the protected activity of peaceful pamphleteering.

The Supreme Court often recognizes *peaceful* pamphleteering as a form of communication that falls under the protective veil of the First Amendment. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (emphasis added). The pamphlets at issue in *Keefe* “were not directed at the plaintiff’s home, so no threat of privacy was shown.” *Horizon Health Center v. Felicissimo*, 622 A.2d 891, 897 (N.J. Super. 1993); *Keefe*, 402 U.S. at 420 (in holding that the distribution of leaflets was not an invasion of privacy, the court made the important distinction that Keefe was not attempting to stop the flow of information into his own household, but to the general public). Additionally, there were no criminal acts committed while distributing the pamphlets. *Keefe*, 402 U.S. at 417. When a protest ensues that intimidates and harasses individuals, the Supreme Court’s ruling in *Keefe* is no longer applicable because a threat of privacy in one’s own household has been shown. *Felicissimo*, 622 A.2d at 213.

Appellant’s internet postings were directed specifically toward Eggceptional Eggs offices and employees’ homes and Wildwings offices. The posting included not only the addresses of the Eggceptional Eggs headquarters and a list of grocery stores and restaurants that use their products, but it also included the names and homes addresses of Eggceptional Eggs employees. Unlike the peaceful distribution of pamphlets in *Keefe*, the Appellant’s internet postings were responsible for inciting others to commit criminal activity, in causing over \$500,000 of economic harm to Eggceptional Eggs and Wildwings, and in invading the privacy of Eggceptional Eggs employees’ homes—including harassment and intimidation of those employees. The information on the Family Farms website was directed specifically at the employees’ private homes and, under the Supreme Court’s ruling in *Keefe*, represents an invasion of privacy once

the threat of privacy was shown when the information lead to angry protestors showing up at Eggceptional Eggs employees' homes.

The Appellant did not peacefully post information on a website. Appellant's acts threatened and directly lead to an invasion of privacy at employees' homes. Accordingly, this court should find that the Appellant's internet postings and other actions are not analogous to the protected activity of *peaceful* pamphleteering.

C. Appellant's actions interfered with the right of Eggceptional Eggs employees to enjoy the tranquility and privacy of their own homes.

The Supreme Court has recognized that “[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” *Carey v. Brown*, 447 U.S. 455, 471 (1980). Consequently, “[o]ne important aspect of residential privacy is protection of the unwilling listener.” *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). When determining whether speech is protected under the First Amendment, courts have routinely held that such residential privacy interests are weighed against any First Amendment interests. *Frisby*, 487 U.S. at 485-87; *Ne. Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 66 (3rd Cir. 1991); *Douglas v. Brownell*, 88 F.3d 1511, 1519 (8th Cir. 1996). In *Frisby*, the Supreme Court explained that “[t]here simply is no right to force speech into the home of an unwilling listener,” and “the government may protect this freedom.” *Frisby*, 487 U.S. at 485.

More specifically, when there is a “captive” audience, like the employees here who were trapped in their homes by angry and harassing protestors, the First Amendment allows the government to prohibit such offensive speech because the “captive” audience cannot avoid it. *Id.* at 487. *See e.g. Consol. Edison Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 541-42 (1980) (holding that where a single speaker communicates to many listeners, the First

Amendment does not permit the government to prohibit speech as intrusive unless the “captive” audience cannot avoid objectionable speech).

The District Court correctly found that, under the facts of this case, the employees’ right to privacy and tranquility in their homes outweighs any First Amendment interests the Appellant may have had in posting the private home addresses of Eggceptional Eggs employees on the Family Farms website. These employees were subjected to protesting, threats, and harassment while being “captive” in their own homes.

D. Sentencing under the Animal Enterprise Terrorism Act (“AETA”) was appropriate under the circumstances.

i. Appellant received a mere fraction of the maximum sentence allowable for his violation of the AETA.

The abuse-of-discretion standard of review applies to appellate review of all sentencing decisions. *Rita v. United States*, 127 S.Ct. 2456 (2007). Appellant was sentenced to repay reasonable economic damages to Wildwings and Eggceptional Eggs, and he was to be imprisoned for three years in a federal institution. However, under the terms of AETA, Appellant could have been imprisoned for a much longer period of time—up to 10 years. 18 U.S.C. § 43(b)(3). Appellant’s criminal acts and incitement speech caused Eggceptional Eggs and Wildwings a total of \$537,000 in economic damage.

Appellant does not deny that he is the author of the Family Farms website or that he was responsible for posting the videos, pictures, and home addresses of Eggceptional Eggs employees on the website. As such, one could reasonably infer that Appellant was involved in and conspired with others to harass employees of both Eggceptional Eggs and Wildwings Restaurants in violation of the AETA. *See Commonwealth v. Gazzola*, 17 Mass. L. Rep. 308 (2004) (explaining that evidence suggested that defendants were responsible for putting together

the SHAC website which published the home phone number and address of an employee who was associated with Huntingdon Life Sciences, and thus, it was reasonable to arrest these two defendants for criminal harassment).

There is sufficient evidence to find Appellant guilty of violating sections 43(a)(2)(A) and 43(a)(2)(C) of the AETA. Appellant admits to defacing Eggceptional Eggs' billboards, and thus is guilty under the AETA for traveling across state lines to interfere with Eggceptional Eggs operations and for intentionally damaging the property of this animal enterprise. Appellant admits to posting the names and addresses of Eggceptional Eggs business locations, employee addresses, and Wildwings Restaurant locations on his Family Farms website. This information immediately incited protests and criminal activity that lead to the harassment and intimidation of Eggceptional Eggs employees and caused substantial economic damage to both Eggceptional Eggs and Wildwings Restaurants. Therefore, a reasonable inference can be made that Appellant is guilty under the AETA for posting this information in an attempt to, and to conspire to, intentionally place persons in reasonable fear of serious bodily injury by a course of conduct involving harassment. Additionally, the facts support Appellant's guilt under the AETA for interfering with the operations of two animal enterprises and intentionally damaging the property of those enterprises when he caused a substantial amount of lost profits.

Under the facts of this case, the Appellant's sentence was both equitable and appropriate for the crimes he committed and incited. The AETA was designed not only to protect the facilities and people associated with animal enterprises, but also to protect the economic welfare of these companies. Eggceptional Eggs and Wildwings suffered a substantial amount of economic damage due to the Appellant's actions, and the Appellant's sentence appropriately

reflects that harm. Therefore, the District Court did not abuse its discretion in sentencing the Appellant.

- ii. *The penalties under the AETA are appropriate both for protecting people and facilities associated with animal enterprises and for protecting the economic welfare of the enterprises themselves.*

The AETA provides an array of penalties depending upon the severity of the criminal acts committed against an animal enterprise and the amount of economic damage suffered by that enterprise. *See* 18 U.S.C. § 43(b). The United States Department of Justice (“DOJ”) supported the 2006 Amendments to the AEPA, which increased the penalties and broadened the definition of “animal enterprise,” because the DOJ felt that “animal rights extremists have tailored their campaigns to exploit limits and ambiguities in the [prior version of the] statute by targeting individuals and businesses rather than the animal enterprise itself.” *Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcommittee on Crime, Terrorism, and Homeland Security*, 109th Cong. 5 (2006) (statement of Brent McIntosh, Deputy Assistant Attorney General, United States Department of Justice).

Prior to amending the AEPA, the DOJ was concerned about its ability to investigate and prosecute extremist organizations like Stop Huntingdon Animal Cruelty (“SHAC”) “who threaten violence and commit criminal acts in the name of protecting animals.” *Id.* When testifying before the Subcommittee on Crime, Terrorism, and Homeland Security, Mr. McIntosh of the DOJ described the activities of SHAC and other extremist organizations to include the following: “vandalizing—including fire-bombing homes, businesses and cars—fraud and ID theft; making bomb threats or threats to harm or kill targets, targets’ partners, targets’ children.” *Id.* Even more alarming, SHAC actually posted the following information on their website: employees’ home telephone numbers, names of employees’ spouses and children, and even the

schools where those children attend. *Id.* The DOJ recognizes, however, that the majority of animal rights activities do not employ illegal methods and do participate in lawful activities protected by the First Amendment. *Id.* at 6. The DOJ believed that the 2006 amendments to the AEPA would give prosecutors the necessary tools to prosecute those that “cross the line from free speech to criminal conduct.” *Id.*

Extremist animal rights groups like SHAC also participate in secondary and tertiary targeting where they single-out companies that have relationships with animal testing facilities and where they target individuals simply because they have a relationship with one of the secondary companies. *Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcommittee on Crime, Terrorism, and Homeland Security*, 109th Cong. 16 (2006) (statement of William Trundley, Vice President of Corporate Security and Investigations, GlaxoSmithKline). In the 21 months before the Subcommittee on Crime, Terrorism, and Homeland Security met to discuss the amendments, GlaxoSmithKline employees had experienced 150 incidents, including 75 “intimidating” home demonstrations and at least 10 cases of serious property damage.¹ *Id.* Mr. Trundley, speaking to the committee on behalf of GlaxoSmithKline, supported the 2006 amendments to AEPA because he believed the new law

¹ Some of the specific incidents that GlaxoSmithKline employees were required to endure are particularly disturbing because they were so vicious and specifically tailored toward the people they were targeting. Mr. Trundley testified that one incident included mail fraud that enabled the extremist group to learn of an employee’s spouse’s alcohol treatment program. *Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcommittee on Crime, Terrorism, and Homeland Security*, 109th Cong. 16 (2006) (statement of William Trundley, Vice President of Corporate Security and Investigations, GlaxoSmithKline). Once this information was available to the group, they left a bottle of beer at her door step with a note saying “Have a drink, bitch,” and then went to her son’s school to pass out a disgraceful flyer detailing this information to his classmates. *Id.* The group also left a message on the family phone saying, “We’ve been watching you, and we know you’re alone.” *Id.* Another incident in Philadelphia included an extremist yelling the following at an animal enterprise employee: “I have your license plate; we’ll track you down and we’ll kill your family.” *Id.* Yet another incident in Baltimore involved an extremist calling an employee in the middle of the night and asking them to come down to the city morgue to identify a relative who had died. *Id.* Not until the employee actually arrived at the morgue did she realize the call was a hoax. *Id.* Other employees have had their homes attacked at night and their windows smashed while they slept. *Id.* This was so disturbing to one employee’s 8-year-old son that he would wake up in the middle of the night and stare out the window because he was so scared that the terrorists would return. *Id.*

and penalties would “enable law enforcement to deal effectively with these crimes.” *Id.* at 17. Despite the incidents of terrorism that GlaxoSmithKline employees had experienced, Mr. Trundley testified that none of the acts had resulted in criminal conviction because the current laws were obviously inadequate to deal with the extreme situation. *Id.*

The recent increase in penalties under the AETA comes as a backlash against the campaigns of terror that extremist organizations impose upon businesses and individuals associated with animal enterprises. Additionally, animal enterprises, like Eggceptional Eggs, have spent vast sums of money to protect themselves against animal rights extremists like those detailed above.

The District Court did not abuse its discretion and properly disagreed with Appellant’s claim that the punishments available under the AETA are inappropriately severe. Accordingly, this Court should find that penalties imposed by AETA are not only appropriate but are necessary to protect the economic welfare of the animal enterprises themselves and to protect the people, and their families, that are associates with the enterprises. Failure to find sentencing under AETA as an appropriate criminal sanction will only encourage more shocking terrorist activity like that employed by the Appellant and by other extremist organizations such as SHAC.

CONCLUSION

The AETA is neither vague nor overbroad, and the AETA is content and viewpoint neutral because its application is based solely on the violator’s behavior and is not concerned with the content of the violator’s expression. Furthermore, Appellant engaged in a course of conduct not protected by the First Amendment of the United States Constitution, and the facts suggest that sentencing is appropriate under the AETA. For the foregoing reasons, Respondent

respectfully requests that this Court affirm the conviction of Appellant and uphold hold the AETA constitutional.

Respectfully submitted,

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