

MEASURING BRIEF
Cr. No. 07-3221

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

FRANK CLARKSON,

Appellant

v.

UNITED STATES,

Respondent

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

BRIEF FOR APPELLANT
FRANK CLARKSON

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STATEMENT OF THE CASE

This is an appeal from a criminal case in which the District Court found plaintiff Frank Clarkson guilty of violating 18 U.S.C. § 43, the Animal Enterprise Terrorism Act (“AETA”), and upheld the constitutionality of AETA.

AETA makes it a federal offense to interfere with the operation of any animal related enterprise. Mr. Clarkson appeals from his conviction under 18 U.S.C. § 43, claiming the Act is unconstitutional because it is overbroad, impermissibly vague and unconstitutionally regulates speech based on advocates’ opinions, perspectives and ideologies.

After a bench trial, the court upheld the constitutionality of the Act and determined that Mr. Clarkson’s speech in connection with the charges was not constitutionally protected. Therefore, he was convicted and sentenced to three years in a federal institution, and ordered to pay restitution totaling \$537,000. He appealed, advancing the argument that this Act is unconstitutional, and that under the facts of this case, his actions were protected under the First Amendment of the United States Constitution and that the resulting sentencing was inappropriate and disproportionate to the charged offense.

STATEMENT OF FACTS

In an effort to protect the public and end suffering of innocent animals, Frank Clarkson founded Family Farmers United Against Factory Farms (“Family Farms”), an organization that advocates an end to the expansion of factory farms. Mr. Clarkson operates a website devoted to this cause. (Mem. Op. at 2). Eggceptional Eggs, a monolithic corporation which seeks to maximize corporate profits over public health at all costs, is a main target of Family Farms’ campaigns. In an effort to feed its ever growing corporate till, Eggceptional Eggs engages in practices that place the health and welfare of innocent citizens and animals in peril. In fact, this

corporation has generated millions of dollars in profit over the past few years and expects even larger growth over the next five years. (Mem. Op. at 2).

In its effort to maximize profits, Eggceptional Eggs has engaged in questionable practices which were discovered through an investigation performed by Mr. Clarkson at Eggceptional Eggs facilities. During the course of his investigation, Mr. Clarkson discerned immense manure lagoons, dead and dying birds, birds harboring serious health conditions and battery cages packed with thousands of birds. (Mem. Op. at 2-3). He also learned that flies were covering nearby homes as a consequence of the conditions perpetuated by Eggceptional Eggs. (Mem. Op. at 3). Upon discovering these reprehensible conditions, Mr. Clarkson posted images and video of these conditions on his website. In an effort to generate a letter writing campaign that would persuade the executives at Eggceptional Eggs to adopt more healthy and humane alternatives to their egg-raising techniques, Mr. Clarkson also posted the names and addresses of high ranking Eggceptional Eggs officials on his website.

Members of Family Farms also staged peaceful and informative protests to convince Eggceptional Eggs to cease plans for expansion. (Mem. Op. at 3). For reasons which are not entirely clear, Joseph White, an Eggceptional Eggs Regional Manager, defaced a billboard erected by Family Farms, and was subsequently cited for criminal mischief and was given a \$50 fine. (Mem. Op. at 3). In response to Mr. White's criminal vandalism, Mr. Clarkson painted an Eggceptional Eggs billboard. (Mem. Op. at 3).

During the course of their peaceful protests, Family Farms' members also protested several grocery stores and restaurants that sold Eggceptional Eggs' products. (Mem. Op. 4). As a result, several customers made independent choices to stop patronizing these establishments, and the profits of these establishments have suffered. One of these establishments, Wildwing

Restaurant, experienced graffiti, broken windows and chain locked doors. However, these actions have not been definitively linked to Eggceptional Eggs or Mr. Clarkson.

Mr. Clarkson engaged in peaceful protests of Eggceptional Eggs because this factory farm wreaked unhealthy and deplorable injuries on unsuspecting citizens and innocent animals. He felt the public was entitled to the truth, and he conveyed this truth via his website and peaceful protests. He utilized his First Amendment right to free speech to educate the public and publicize his opinion regarding the horrors of factory farms. While utilizing his First Amendment right, Mr. Clarkson never realized the consequences of his actions would be so egregious or disproportionate to his conduct. Undoubtedly, Mr. Clarkson also never believed his conduct would be likened to that of a terrorist. Mr. Clarkson was unjustly convicted and sentenced pursuant to 18 U.S.C. § 43(b) to three years of imprisonment and was ordered to pay restitution totaling \$537,000 for his role in educating the public about the atrocities of factory farms, and in particular, Eggceptional Eggs- a company that appears to value corporate profits over public safety and welfare. Conversely, Joseph White, an Eggceptional Eggs employee, received a *much* smaller court inflicted punishment for defacing billboards.

ISSUES PRESENTED FOR REVIEW

- I. Is an Act constitutional when the language is vague, it overbroadly prohibits First Amendment protected activity and regulates conduct based on the actor's viewpoint?
- II. Is Defendant's conduct within First Amendment protection when he disseminated information over the internet which caused people to boycott certain businesses, and is his sentence appropriate when he was given a much stiffer penalty than another person who engaged in similar conduct?

STANDARD OF REVIEW

Issues of statutory interpretation and questions regarding a statute's constitutionality are subject to a plenary standard of review. United States v. Sanders, 165 F.3d 248, 250 (3d Cir. 1999); United States v. Rodia, 194 F.3d 465, 269 (3d Cir. 1999).

Federal appellate courts also review the constitutionality of a federal statute *de novo*. See, e.g., Groome Resources LTD., L.L.C. v. Parish of Jefferson, 234 F.3d 192, 198-99 (5th Cir. 2000).

SUMMARY OF THE ARGUMENT

AETA is unconstitutional because it is vague, overbroad and prohibits activity based on the actor's point of view. Main statutory provisions in AETA are undefined, and these unclear terms fail to put ordinary people on notice of what conduct is prohibited and what is permitted. The same vague terms also render the statute impermissibly overbroad because its sweeps within its prohibitions both protected and unprotected conduct. The effect of AETA's vagueness and overbreadth will undoubtedly have a chilling effect, discouraging others to refrain from engaging in protected First Amendment activities. The statute also regulates activity based on the viewpoint of the actor which is exemplified in the disproportionate punishment of people who act for the purpose of damaging or interfering with the operations of animal enterprises and those who do not. For these reasons, AETA is facially unconstitutional and should be struck down.

Frank Clarkson engaged in a course of conduct that was protected by the First Amendment of the United States Constitution when he peacefully protested the egregious conditions at the Eggceptional Eggs Factory Farm. A primary foundation of citizens' rights in the United States is their ability to profess their beliefs regarding various issues. Mere economic damages and subsequent violent actions are not enough, in and of themselves, to remove conduct

and speech from First Amendment protections. Further, Mr. Clarkson's actions did not fall within well defined exceptions to First Amendment protections because his speech did not amount to fighting words or direct threats. Consequently, Mr. Clarkson's speech is protected by the First Amendment, and the sentence inflicted on Mr. Clarkson was disproportionate to the offense, as is evident in the disparate punishment imposed on another for similar activities.

ARGUMENT

I. 18 U.S.C. § 43 IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE, OVERBROAD AND IMPERMISSIBLY REGULATES CONDUCT BASED ON THE ACTOR'S VIEWPOINT

A. AETA's vague language does not give ordinary people notice of what conduct is prohibited and what is permitted.

Vagueness will invalidate a law when it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits," or if it "encourage[s] arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999). It is also "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). To put people on notice of what conduct is prohibited, reasonable people are not required to "guess at the meaning of the statute's language." Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). Clarity of language in a statute is vital to avoid a chilling effect because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 521 (1972). The Supreme Court has made it clear that the "standards of permissible statutory vagueness are strict in the area of free expression." NAACP v. Button, 371 U.S. 415, 432 (1963). Further, when "the line...between the permitted and prohibited

activities...is an ambiguous one,” the court must “not presume that the statute curtails constitutionally protected activity as little as possible.” *Id.* at 432.

Courts examining statutes for vagueness look at whether the terms in question are defined or whether their meaning is narrowly construed by the juxtaposed language in the statute. For example, the court in *Dorman v. Satti*, 862 F.2d 432 (2nd Cir. 1988), examined the Hunter Harassment Act’s use of the term “interfere with.” The court ultimately struck down the Act as facially vague because it “fail[ed] to define the nature of the interference it proscribes,” and in general, the statute was “so imprecise and indefinite that it [was] subject to any number of interpretations.” *Id.* at 435-36. Some other courts examining the use of the term “interfere” have concluded its meaning was clear because it was either defined or limited by the statute itself. The Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, is not vague because it defined its key terms, such as “interfere with.” *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 646 (4th Cir. 1995). Furthermore, in *Cameron v. Johnson*, 390 U.S. 611, 616 (1968), the Supreme Court held that “unreasonably interfere” was not vague because unreasonably “is a widely used and well understood word and clearly so when juxtaposed with...‘interfere.’”

In the case at hand, AETA is unconstitutionally vague because some of its key terms are undefined, leaving a reasonable person questioning what conduct is permitted and what is prohibited under the statute. The relevant section states that a person is subject to punishment if

(1) for the purpose of damaging or *interfering with* the operations of an animal enterprise; and (2) in connection with such purpose—
(A) intentionally damages or *causes the loss of any real or personal property* (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise.

18 U.S.C. § 43(a)(2)(A) (emphasis added). Unlike Reno and Cameron, the phrase “interfering with” is not narrowly defined by the statute, nor it is juxtaposed with a well understood word that would limit its meaning to fairly put people on notice of what conduct is prohibited. Conversely, AETA is more similar to the Hunter Harassment Act, which was struck down because it did not “define the nature of the interference it proscribes.” Dorman, 862 F.2d at 435-36. Since AETA also does not define the nature of the interference it proscribes, it has the potential to chill virtually all actions taken by concerned citizens. While AETA criminalizes the phrase “interfering with,” the term has a far less menacing meaning. In fact, the plain meaning of interfere is “to come into collision or opposition, so as to affect the course of,” The Oxford English Dictionary, 1101-02 (2nd ed., Oxford University Press 1989), and “to enter into or take a part in the concerns of others: intermeddle, interpose, intervene.” Webster’s Third New Intl. Dictionary, 1178 (3d ed., Merriam Webster, Inc. 1993).

The vast majority of people who oppose the operations of animal enterprises act with the express purpose of interfering with such operations in order to improve the way animals are currently being treated and used. By “interfering with” animal enterprise operations, concerned citizens are trying to affect the current course of conduct in factory farms and laboratories and meddle with the current, cruel standards to improve the welfare of innocent animals. Given the vague nature of this phrase, AETA has the potential to criminalize virtually all actions directed at improving the welfare of animals.

The term “loss of any real or personal property” is also vague. It is unclear whether the loss of real or personal property would encompass the loss of intangible property such as future profits or business goodwill.¹ It is highly likely that concerned citizens, acting with the purpose

¹ 18 U.S.C. § 43 exempts from the definition of “economic damage” “any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information

of interfering with an animal enterprise, will cause a loss of profits or business goodwill to some degree. When the concerned shopper forgoes purchasing eggs from a battery cage facility, with the purpose of affecting the course of the business, or in terms of the Act, with the purpose of interfering with the animal enterprise, that person is causing a loss of future profits and violating 18 U.S.C. § 43(a)(1)(A). Similarly, when a leafletter, with the intent of interfering with the practices of a particular farm, distributes information about the treatment of the farm's animals, there will likely be a loss of business goodwill among the public.

While fringe activists have taken activism to extreme and dangerous limits, the vast majority of concerned citizens act peacefully to inform the public about the treatment of animals behind closed doors. Public policy encourages the dissemination of this information because it affects public health, animal welfare and environmental well-being. Because the language in AETA is drafted so unclearly, concerned citizens will cease to gather information and inform the public out of fear of criminal prosecution. Not only will this hinder the practice of First Amendment rights, but it will also serve a disservice on the general public. Because AETA is plagued with vagueness, it must be struck down on its face.

B. AETA's reach is overbroad because it criminally sanctions protected activity.

A “statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.” Gooding, 405 U.S. at 522. When examining a statute for overbreadth, “[t]he crucial question...is whether the

about an animal enterprise,” 18 U.S.C. § 43(d)(3)(B). However, this exemption does not pertain to the undefined term “loss of real or personal property.” 18 U.S.C. § 43XXX.” “Because the phrase ‘economic damage’ appears only in the penalty provisions of the bill, the exemption for ‘lawful economic disruption’ may not function as an exemption from the bill’s broad prohibition on ‘the loss of any real or personal property.’” (emphasis added). exemption only applies to the term “economic damage.” Ltr. from Caroline Fredrickson, Dir., Am. Civil Liberties Union, to The Hon. F. James Sensenbrenner, Jr., Chairman House Jud. Comm., & The Hon. John Conyers, Jr., Ranking Member, House Jud. Comm., *ACLU Urges Needed Minor Changes to AETA, But Does Not Oppose Bill (S. 3880, the “Animal Enterprise Terrorism Act” 1-3 (Oct. 30, 2006) (available at http://www.aclu.org/images/general/asset_upload_file809_27356.pdf).*

ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.” Grayned, 408 U.S. at 114-15. When the overbreadth of a statute is “not only...real, but substantial,” the chilling effect on protected expression is significant. Broadrick v. Okla., 413 U.S. 601, 615 (1973). In fact, “the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” Id. at 612.

Some statutes may be saved from overbreadth, by construing them narrowly. However, these statutes must be “readily susceptible” to be subject to a limiting construction. Va v. Am. Booksellers Assn, Inc., 484 U.S. 383, 397 (1988). Some statutes even include rules of construction, which attempt to narrow the statute by prohibiting only speech and conduct not protected by the First Amendment. However, “statutes ‘narrowed’ merely by an assertion that they reach only as far as the Constitution permits, without citation of more specific limitations, remain functionally overbroad.” Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 907 (1991). In fact, some statutes are not susceptible to limiting or narrowing constructions at all and courts “will not rewrite a [] law to conform it to constitutional requirements.” Am. Booksellers, 484 U.S. at 397.

For example, in Dorman, the court affirmed that the Hunter Harassment Act “was ‘not susceptible to curative construction’” because “the Act fail[ed] to define the nature of the interference it proscribes,” and “its language implicitly sweeps...broadly.” 862 F.2d at 435. The court went on to say that asking “the Connecticut Supreme Court to consider construing the statute to apply only to ‘core criminal conduct,’ as defendants would have it, would be tantamount to asking the Connecticut court ‘if it would care in effect to rewrite [the] statute.’” Id. at 436 (citing Houston v. Hill, 482 U.S. 451, 471 (1987)).

In the case at hand, AETA is overbroad because it seeks to prohibit the protected activities that concerned citizens participate in everyday. It is well-settled that “the right to distribute pamphlets and leaflets is afforded constitutional protection.” Concerned Consumers League v. O’Neil, 371 F.Supp. 644, 647 (Dist. Ct. Wis. 1974). When concerned citizens engage in disseminating information, they are acting for the purpose of “interfering with” the operations of animal enterprises. As a result, animal enterprises may experience a loss of future profits or business goodwill which is prohibited under the 18 U.S.C. § 43a(2)(A). According to NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982), boycotts which involve constitutionally protected activity may legitimately result in economic damage. In fact, it is well known that lawful economic disruption has been the cornerstone of many successful movements, including the civil rights movement. In order to impact change in the operations of animal enterprises, many activists have the intent of dissuading consumers from purchasing products from certain enterprises. By drafting the language of AETA so vaguely, key terms may be interpreted overbroadly to punish people for engaging in protected activity, such as peacefully disseminating information and engaging in a boycott which causes a loss of profits. The overbreadth of AETA will also generally deter concerned citizens from engaging in animal activism out of fear of criminal sanctions.

As previously noted, the exception for “any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise,” may not adequately protect effective activism that causes a loss of profits through legitimate means. As William Potter noted in his Congressional testimony, “[c]orporations could argue that undercover investigators and whistleblowers hurt profits beyond public reaction. Those activists may cause a financial loss

because they received a salary or prompted extensive employee background checks or prompted additional security measures.” H.R. Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. on the Jud. H.R., *Hearing on H.R. 4239, The Animal Enterprise Terrorism Act*, 109th Cong. 20-21 (May 23, 2006).

As the Hunter Harassment Act in Dorman, which was not “susceptible to curative construction” because the “language implicitly sweeps...broadly,” AETA is not susceptible to a curative construction because its language also sweeps too broadly. 862 F.2d at 435. AETA, on its face, threatens to criminally punish virtually all the activities concerned citizens and animal activists participate in on daily basis. To ask courts to construe AETA to “apply only to ‘core criminal conduct,’” would, in effect, be asking the court “‘if it would care in effect to rewrite [the] statute.’” Id. at 436 (citing Houston v. Hill, 482 U.S. 451, 471 (1987)). Because AETA prohibits unprotected and protected activity and threatens to chill virtually all actions of concerned citizens and animal activists, it is overbroad and must be struck down on its face.

C. AETA impermissibly regulates conduct based on the actor’s viewpoint.

It is a well known principle that “the government may not regulate speech based on its substantive content or the message it conveys.” Rosenberger v. Rector and Visitors of U. of Va., 515 U.S. 819, 828 (1995). Viewpoint discrimination is “an egregious form of content discrimination” and “[t]he government must abstain from regulating [the] speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” Id. at 829. Furthermore, the Supreme Court has “long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses-so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the

flag is not. R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992). A content or viewpoint based regulation will be upheld only if it is narrowly tailored to accomplish a compelling governmental interest, and the existence of “adequate content-neutral alternatives thus ‘undercut[s] significantly’ any defense” of a content based regulation. Id. at 395 (citing Boos v. Barry, 485 U.S. 312, 329 (1988)).

AETA impermissibly regulates both non-protected and protected activity based upon the viewpoint of the message. Specifically, AETA constitutes viewpoint based regulation because it proscribes acts when they are committed “for the purpose of damaging or interfering with the operations of an animal enterprise,” but permits the very same acts if committed for other reasons. 18 U.S.C. § 43(a)(1). The Court in R.A.V. used the example that “the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.” 505 U.S. at 384. Similarly, in this case, Congress can proscribe all acts which damage or cause a loss to an animal enterprise, but it may not proscribe those acts done *for the purpose* of damaging or interfering with the animal enterprise. For example, if a person breaks into a fur farm and releases all the minks with the intention of interfering with the animal enterprise, that person will be liable under AETA for the loss of that property. If another person breaks into the farm and releases the minks as a practical joke, that person will be liable under state criminal laws such as trespass. By imposing different punishments for committing the same criminal act, AETA is punishing people based on their point of view.

While the government’s interest in combating the growing threat of ecoterrorism is compelling,² the First amendment requires protective measures to be narrowly tailored to serve the alleged compelling interest. R.A.V., 505 U.S. at 385. AETA is not narrowly tailored because

² “H.R. 4239 was introduced in response to a growing threat commonly referred to as ecoterrorism.” H.R. Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. on the Jud. H.R., *Hearing on H.R. 4239, The Animal Enterprise Terrorism Act*, 109th Cong. 1 (May 23, 2006).

a viewpoint neutral statute would have the same beneficial effect, thus significantly undercutting any defense of AETA. *Id.* at 395. Therefore, AETA should be struck down as impermissibly regulating conduct based on the actor's point of view.

II. FRANK CLARKSON ENGAGED IN A COURSE OF CONDUCT THAT WAS PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN HE PROTESTED THE EGREGIOUS CONDITIONS AT THE EGGCEPTIONAL EGGS FACTORY FARM

Frank Clarkson's actions fall within forms of speech and conduct that are ordinarily entitled to protection under the First Amendment of the United States Constitution. The American political system rests on the notion that its citizens possess the right to First Amendment protections, and "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *NAACP*, 458 U.S. at 907. Therefore, under the First Amendment, subject to few exceptions, American citizens enjoy the freedom to engage in "uninhibited, robust, and wide open debate" that may, on occasion, include attacks and criticisms of existing practices. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Our nation's profound commitment to this ideal supports Mr. Clarkson's actions in connection with his protest of Eggceptional Eggs, the protest which formed the basis of this litigation. Those actions were clearly protected by the First Amendment to the United States Constitution.

C. Actions and speech proffered by Mr. Clarkson comport with the requirements for constitutionally protected speech.

The most important feature of free speech protection is that it allows "free trade of ideas that the overwhelming majority of people might find distasteful or discomforting." *Va. v. Black*, 538 U.S. 343, 359 (2003). The government may not prohibit speech merely because large facets of the population may regard the speech as offensive or unpleasant. *Id.* Further, the First

Amendment encompasses more than actual speech and extends to expressive or symbolic behavior. Id. Therefore, people with alternate view points may freely express their opinions without fear of reprisal. Under the First Amendment, Americans have the right to voice opinions, disseminate pamphlets, hold weekly demonstrations, persuade others to join their mission, educate the public, associate with organizations with similar missions, and utilize a variety of other peaceful methods to circulate their message. In sanctioning Mr. Clarkson for his involvement in Family Farms, the court's decision was solely based on political motivations and Mr. Clarkson's personal beliefs. Mr. Clarkson's actions and expressions were protected speech that is encompassed by the First Amendment.

1. Speech Causing Mere Economic Damage Is Protected By the First Amendment.

The Supreme Court has routinely upheld First Amendment protection in cases where individuals and groups worked to convey their viewpoints and opinions to society, even when these viewpoints were contrary to society's popular view and resulted in economic damage. In NAACP, a group of African American citizens organized a boycott of local white owned businesses in an attempt to lobby for social change and justice. 458 U.S. 885. Consequently, several white owned businesses sustained severe economic losses and subsequently brought actions against the NAACP and boycott participants.

During the course of the boycott, participants refrained from patronizing white owned businesses, encouraged others to avoid these establishments, distributed literature regarding the cause, and disseminated lists of local African-Americans that failed to adhere to the boycott. The business owners claimed that the conduct and speech should not receive First Amendment protection and urged the Court to consider the economic impact the boycott had on the local economy. However, the Court "recognized that expression on public issues has always rested on

the highest rung of the hierarchy of First Amendment values.” *Id.* at 913 (citing Carey v. Brown, 447 U.S. 455, 467 (1980)). Therefore, although states have a right to regulate economic activity, they do not possess “a comparable right to prohibit peaceful political activity” as presented in the boycott. *Id.* The businesses also argued that the speech advanced by the NAACP was violent in nature because speakers openly threatened that those people violating the boycott “would have their necks broken by their own people.” *Id.* at 900 n. 28. Further, names of boycott violators were read aloud at meetings, and these people were socially ostracized and verbally insulted.

Mr. Clarkson’s actions in protesting the business practices of Eggceptional Eggs fall within the ambit of First Amendment protection. In protesting the actions of this business, Mr. Clarkson utilized peaceful means to effect change. He established a website to disseminate information regarding the cruel treatment of chickens at Eggceptional Eggs’ facilities. He used the website to post addresses of Eggceptional Eggs’ headquarters, its directors, and retailers for the purpose of encouraging people to write letters urging better conditions for chickens and alternatives to Eggceptional Eggs’ harmful operation. The group also staged peaceful protests outside of Eggceptional Eggs and boycotted retailers that chose to carry Eggceptional Eggs’ products. All of these peaceful actions are protected by the First Amendment despite any resultant economic impact.

2. Violent Incidents Occurring Weeks After Protected Speech Are Too Remote to Remove First Amendment Protection.

In NAACP, violence did occur several weeks after such occurrences and speeches, but the Court found these incidents too remote in time to meet the elements for the “fighting words” exception. *Id.* at 928. Instead the Court recognized a speaker’s need to employ strong and effective rhetoric, stating that “an advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause.” *Id.* These types of

appeals must be regarded as protected speech in instances when the rhetoric does not incite imminent illegal actions. Id. When imminent acts of violence do not follow a speech or gathering, mere association with the group cannot result in punishment, absent clear proof that the person specifically intended “to accomplish [the aims of the organization] by resort to violence.” Id. at 929. Intent is determined by the strictest law to avoid the danger that a person who merely sympathizes with an organization would be punished for violent actions by the group that the person did not intend or condone. Id.

Further, the fact that the group intended “the expressions . . . to exercise a coercive impact . . . does not remove them from the First Amendment.” Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). This is akin to the purpose of a newspaper in exercising influence over the public. Id. If the means of distributing the speech are peaceful in nature, “the communication need not meet standards of acceptability.” Id. It is well-settled that peaceful pamphleteering is protected by the First Amendment. Therefore, when a group of citizens launched a campaign to distribute information regarding the unsavory practices of a local realtor in Keefe, they were protected by the First Amendment. Id.

Mr. Clarkson had no intent to incite illegal behavior. In fact, he merely sought to facilitate the dissemination of such information in hopes of better educating the public regarding the actions of Eggceptional Eggs. Further, he cannot be held liable for the actions of group members merely because of his affiliation with the group. As stated in NAACP, when imminent acts of violence do not follow a speech or gathering, mere association with the group cannot result in punishment, absent clear proof that the person specifically intended “to accomplish [the aims of the organization] by resort to violence.” 458 U.S. at 919. No proof exists that any violent actions occurred directly after Mr. Clarkson’s speech or conduct. Further, the law requires clear

evidence that he intended to effectuate his purpose via violent means. No proof exists to this effect. On the contrary, Mr. Clarkson spread information with the intent of educating the public and encouraging peaceful means of challenging the actions of Eggception Eggs to effect social change, actions that fall squarely within his First Amendment rights.

Surely there is great social value in deterring practices that pose environmental and human health hazards. The operations that take place in Eggceptional Eggs' facilities place humans, animals, and the environment in peril, and the actions taken by Mr. Clarkson were reasonably calculated to inform the public of this fact and prompt change that would preserve the health of humans and animals. In doing so, he employed peaceful and relevant means.

It is well-settled that peaceful distribution of pamphlets is protected by the First Amendment, and "the right to distribute pamphlets and leaflets is afforded constitutional protection." Concerned Consumers League, 371 F.Supp. at 647. In this case, Mr. Clarkson utilized the internet to circulate his organization's message. This type of distribution is analogous to pamphleteering, and is similarly protected when done peacefully. In Mahaffey ex rel. Mahaffey v. Aldrich, the court found that a student's website listing names of students he wished would die was protected by the First Amendment. 236 F.Supp.2d 779 (E.D. Mich. 2002). Although the site urged viewers to "stab someone for no reason then set them on fire throw them off a cliff," the court found that the speech disseminated through his personal website was protected by the First Amendment. Id. at 782. This language, which was surely more likely to incite violence or illegal activity than Mr. Clarkson's peaceful activity in speaking out against Eggceptional Eggs, was protected by the First Amendment. Clearly any information disseminated by Mr. Clarkson is equally protected.

D. Actions and speech proffered by Mr. Clarkson do not fall within exceptions to First Amendment protections, and are therefore, protected by the First Amendment.

The First Amendment only allows restrictions on speech in an extremely limited context, denying First Amendment protections only in limited scenarios “which are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* at 359 (citing *R.A.V.*, 505 U.S. at 382-83). Instances of speech that do not receive First Amendment protection include fighting words and true threats, neither of which were perpetuated by Mr. Clarkson in his mission to save innocent animals from inhumane conditions, protect public health, and safeguard the environment and rural communities by spreading information regarding the atrocities of factory farms like Eggeptional Eggs. Because Mr. Clarkson’s speech does not fall within one of the few exceptions to a person’s near absolute right to free speech in this country, his actions in publicizing Eggeptional Eggs’ questionable business practices is protected by the First Amendment.

3. Mr. Clarkson’s speech did not amount to “fighting words.”

In circulating information and his opinions regarding Eggeptional Eggs, Mr. Clarkson did not utilize “fighting words.” Fighting words consist of “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, likely to provoke violent reactions.” *Black*, 538 U.S. at 359. States do not have authority to forbid or limit advocacy on the part of citizens unless that advocacy is calculated to produce imminent lawless action and is likely to incite such action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Mr. Clarkson’s actions in maintaining Family Farms’ website and circulating information about Eggeptional Eggs and its directors falls short of the requisite requirement for the “fighting words” exception to First Amendment protection.

Even threats of violence and weapons possession during demonstrations have been afforded First Amendment protection. Id. at 449. In Brandenburg, the Court held that it could not uphold a statute that punished Klu Klux Klan members for assembling, holding a rally, and publicizing a speech laced with race based epithets. Id. A Klan member contacted a local news station which recorded portions of the event, in which Klan members burned a cross and stated it would “be possible that there might have to be some ‘revengeance’ taken” if the government continued to “suppress the white.” Id. at 446.

Similarly, the Court struck down a state’s disorderly conduct statute that punished a man for speech he uttered at an anti-war demonstration. Hess v. Ind., 414 U.S. 105 (1973). After police officers ordered Hess and other protesters off the street, he used a loud voice to vow “we’ll take the fucking street again later.” Id. He was arrested for violating the disorderly conduct statute by making these utterances, and he later challenged the statute as violating the First Amendment. The Court held that the statute impermissively limited the man’s right to free speech and stated that his conduct and speech “amounted to nothing more than advocacy of some illegal action at some indefinite future time.” Id. at 108. This alone was not enough to permit the limitation on speech. The speech did not amount to “fighting words” so as to be deemed an exception to the general prohibition to limits on free speech. This was in spite of the fact that Hess made his comments in the midst of 100-150 protesters urging actions that directly contradicted the recent police instruction to vacate the roadway.

The aforementioned scenarios are much more likely to incite violent reactions in their audience than Mr. Clarkson’s conduct and speech in opposing Eggceptional Eggs. In doing so, he merely disseminated information regarding the locations of the headquarters, retailers, and directors to facilitate a peaceful letter writing campaign. He also posted pictures of the

deplorable conditions at Eggceptional Eggs in order to better educate the public regarding the treatment of chickens at the facilities.

4. Mr. Clarkson's speech did not contain direct threats.

True and direct threats are statements when a speaker intends "to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, 538 U.S. at 360. A speaker does not need to intend to carry out the threat. It is enough that the speaker directs a threat at an individual or group with the "intent of placing the person or group in fear of bodily harm or death." Id. In Black, the pernicious and egregious history of cross burning coupled with the feelings such action could invoke in spectators placed this context outside the confines of First Amendment protections.

Mr. Clarkson's actions in connection with maintaining the Family Farm website contained no direct threats, nor did he intend to place anyone in fear. Instead, he sought to advance his message regarding the horrors of factory farming. The record is void of any reference that he either intended to threaten anyone or that anyone felt threatened as a result of his action. His actions contained no direct threats, and thus, do not fall within the direct threat exception. Therefore, Mr. Clarkson's speech is protected by the First Amendment.

III. THE SENTENCE INFLICTED ON MR. CLARKSON WAS DISPROPORTIONATE TO THE OFFENSE, AND THIS IS EVIDENT IN THE DISPARATE PUNISHMENT IMPOSED ON OTHERS FOR SIMILAR ACTIVITY

Mr. Clarkson's sentence is grossly disproportionate to his alleged actions. Even assuming *arguendo* that Mr. Clarkson's actions in painting Eggceptional Eggs' billboard fell outside of First Amendment protection, his sentence was extremely inappropriate. Mr. Clarkson was sentenced to three years of imprisonment and was ordered to pay restitution in excess of \$537,000 while Joseph Whittle, an Eggceptional Eggs regional manager who engaged in

vandalism of Family Farms' billboard, received only a \$50 fine. In fact, Mr. Whittle defaced Family Farms' billboards well before Mr. Clarkson is alleged to have painted Eggceptional Eggs' billboards.

In imposing these disparate sentences, the court focused on the ideas and beliefs that motivated each man's actions rather than the action itself. In doing so, it violated the First Amendment. In R.A.V., the city enacted an ordinance that penalized cross burning if this action was motivated by a person's race. 505 U.S. 377. This bias motivated hate crime legislation was struck down as unconstitutional because it affected cross burners based on their viewpoints rather than the action itself. Therefore, someone burning a cross for no reason would not be penalized under the ordinance, while a person doing so with racist motives would be punished. The city was capable of addressing the conduct by means other than viewpoint regulation, and imposing disparate punishments was inappropriate when the city already had other methods for punishing the conduct in effect.

In this case, Mr. Clarkson and Mr. Whittle engaged in similar behavior. However, Mr. Clarkson's punishment was undoubtedly more severe, despite the fact that Mr. Whittle instigated the conduct. This demonstrates a severe discrepancy in punishment based on viewpoint alone. Under the First Amendment, this is improper and inappropriate, and Mr. Clarkson's sentence cannot stand.

CONCLUSION

The Animal Enterprise Terrorism Act is unconstitutional as it is impermissibly vague, overbroad and regulates conduct based on the actor's point of view. Further, the conduct and speech Mr. Clarkson engaged in while protesting the business practices of Eggceptional Eggs clearly falls within the ambit of First Amendment protection. For the aforementioned reason, the

court should reverse the District Court's ruling that AETA is constitutional and that Mr. Clarkson's conduct was not protected free speech activity.

Respectfully submitted,

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