

Cr. No. 07-3221

**UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT**

FRANK CLARKSON,

Appellant,

v.

UNITED STATES,

Respondent,

ON APPEAL TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR THE APPELLANT

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STATEMENT OF ISSUES

1. Whether the Animal Enterprise Terrorism Act (“AETA”) is unconstitutional under the Free Speech Clause of the First Amendment when it criminalizes expressive conduct; and
2. Whether the expressive conduct of Frank Clarkson is protected by the Free Speech Clause of the First Amendment when his expression may have advocated illegal conduct; and
3. Whether the sentencing of Frank Clarkson was appropriate when sentences are increased under the Animal Enterprise Terrorism Act.

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STATEMENT OF FACTS

This Court is being asked to reverse the decision of the United States District Court for the District of Utopia. The District Court (*Marks, J.*) held that the Force, Violence, and Threats Involving Animal Enterprises Act, commonly known as the Animal Enterprise Terrorism Act (“AETA”) is not vague or overbroad, that the AETA is content and viewpoint neutral. The Court further held that the expressive conduct of Frank Clarkson constituted advocacy of illegal conduct and was not protected by the First Amendment.

The petitioner, Frank Clarkson, founded the Family Farmers United Against Factory Farms (“Family Farms”). Record 2. Family Farms is a national nonprofit organization opposing and working to halt the expansion of factory farms. Id. Family Farms believes that factory farming endangers the public health, the environment, rural communities, and animals. Id. As the founder of the organization, Frank Clarkson operates Family Farms’ website. Id.

“Eggceptional Eggs,” a factory farm, purchases smaller family farms. Id. After a family farm is purchased, Eggceptional Eggs assimilates them into a national assembly line, which streamlines production. Id. Eggceptional Eggs, as a multi-state corporation, owns over one-hundred factory farms, acquiring a new farm almost every month. Id. Eggceptional Egg had revenues surpassing \$100 million in 2006. Id. As a large and systematic corporation, Eggceptional Eggs has a 30% profit margin on their factory farms. Id.

As part of his work with Family Farms, Frank Clarkson traveled to investigate Eggceptional Eggs factory farms. Id. Frank was able to document such atrocities as vast manure lagoons, flies coating nearby homes, battery cages housing hundreds of thousands of birds, manure pits with dead and dying birds, and birds with serious health conditions. Record 2, 3.

Frank Clarkson posted these findings on Family Farms' website, as well as the contact information for Eggceptional Eggs and some of their officers and managers. Record 3. Family Farms is organized to allow its members to boycott and start letter writing campaigns to protest the conditions at factory farms, such as Eggceptional Eggs. Id. Demonstrations were conducted at some Eggceptional Eggs offices and at some of its employees' homes. Id. None of these demonstrations were planned by Frank Clarkson. Id.

In February of 2007, Family Farms' learned about Eggceptional Eggs planned expansion into East Carolina. Id. The information about the factory farm expansion was posted on Family Farms' website. Id. Information about any other factory farm expansion is also posted on the website when available. Demonstrations began at the East Carolina site. Id. Protestors carried signs asking Eggceptional Eggs to treat their animals more humanely. Id.

Frank Clarkson admits to changing an Eggceptional Eggs billboard, but he only did so after the billboards purchased by Family Farms' were defaced, when the slogan "Stop Factory Farms" was changed to "Bring More Jobs." Id. An Eggceptional Eggs regional manager admits to defacing Family Farms' billboard. Id.

Frank Clarkson's planned boycott of Eggceptional Eggs products has been working as restaurants and grocery stores have suffered a significant decrease in sales since the boycott launched. Id. Wildwing restaurant has suffered damage to their property due to protestors and the boycott, but Frank Clarkson is only involved in the boycott. Record 3, 4.

Frank Clarkson was charged with conspiring, attempting, and intentionally causing damage or loss of any real or personal property used by an animal enterprise, or any real or person property of a person or entity having a connection to, relationship with, or transactions with Eggceptional Eggs, an animal enterprise. Record 1. This activity is illegal under the

AETA. Additionally, Frank Clarkson was charged with conspiring to intentionally place Eggceptional Eggs employees and their immediate families in reasonable fear of death, or serious bodily injury, by engaging in conduct involving threats, harassment, and intimidation. Id. On September 10, 2007, Frank Clarkson was convicted of these crimes. Record 9. This court is being asked to reverse the decision of the United States District Court for the District of Utopia because the AETA is unconstitutional and Clarkson's speech is protected under the First Amendment.

SUMMARY OF ARGUMENT

The Force, Violence, and Threats Involving Animal Enterprises Act, also known as the Animal Enterprises Terrorism Act, or "AETA." is unconstitutional because it is vague, overbroad, and is content-based discrimination. The AETA is unconstitutionally vague because a reasonable person can not tell what speech is prohibited and what is permitted. The AETA possesses many obscure and vague words and phrases as well. The AETA punishes people for intentionally damaging real or personal property vaguely described as "used by an animal enterprise." Certainly damage to the animals themselves would fall under this provision, but in some instances, intentional damage by an employee might occur to a pen owned by a factory farm. Should that happen; the employee would have met the criteria of the AETA and thus potentially be sent to prison. This is not the purpose of the AETA and the statute is ambiguous as to whether this action truly should be covered by the AETA.

The AETA is unconstitutional because it is overbroad in restricting substantially more speech than the Constitution allows. The AETA applies to those who travel in interstate commerce "for the purpose of damaging or interfering with the operations of an animal

enterprise.” Protesting and the right for an opposition group to associate are protected rights under the First Amendment. The AETA is overbroad because the wording will chill legitimate protesting Eggceptional Eggs or other animal enterprises.

A statute is unconstitutional if it amounts to content-based discrimination that prevents citizens from exercising their First Amendment rights because of their ideology. AETA is unconstitutionally content-based because it applies only to the expression of speech that hopes to interfere with animal enterprises.

Notwithstanding the constitutionality of the AETA, Clarkson’s speech is protected by the Free Speech Clause of the First Amendment. Speech advocating the use of force or crime could only be proscribed when the advocacy is directed to inciting or producing imminent lawless action and the advocacy is likely to incite or produce such action. Clarkson’s speech is protected because it is neither directed at producing imminent lawless action, nor is it likely to incite or produce such imminent lawless action.

Finally, the sentencing under the AETA is inappropriate because it punishes crimes based on viewpoint. Under the AETA, a violation comes with a maximum punishment of life in prison. The Federal Sentencing Guideline involves only zero to six months imprisonment for trespass, even if it involves military installations. Clearly, the AETA is discouraging expression of a viewpoint by severely increasing the punishment for a crime.

ARGUMENT

I. AETA is unconstitutional because it is vague, overbroad, and is content-based discrimination.

Substantial doctrines of constitutional jurisprudence have found statutes unconstitutional because they are vague, overbroad, and content-based restrictions on protected speech. Justice Brennan summed up the importance of overbreadth and essentially all of these doctrines by saying that they are “necessary 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.” Goodling v. Wilson, 405 U.S. 518, 521 (1972). The AETA presents exactly the type of situation Brennan warned of in Wilson. The AETA is designed to chill speech and discourage the exercise of citizens First Amendment rights regarding factory farms.

a. The AETA is unconstitutionally vague because a reasonable person can not tell what speech is prohibited and what is permitted.

A law is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” Connally v. General Construction Co., 269 U.S. 385, 391 (1926). If a statute fails “to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits” or if a statute authorizes or encourages “arbitrary and discriminatory enforcement” the statute will fail for vagueness. City of Chicago v. Morales, 527 U.S. 41, 56 (1999). The AETA falls into this category because a reasonable person can not determine what conduct is

prohibited, that the statute did not put the appellant on notice, and that the statute can be arbitrarily enforced.

In Morales, the court held that a Chicago statute was unconstitutionally vague. Id. at 41. The anti-gang ordinance prohibited gang members from loitering in the streets and allowed the police to order the dispersal of any gang member loitering in a public place with one or more persons. Id. The court held that the definition of loitering and the actions needed to avoid arrest contributed to the ambiguity of the law. Id. at 55-56.

The AETA possesses many obscure and vague words and phrases as well. 18 U.S.C. § 43. The AETA punishes people for intentionally damaging real or personal property “used by an animal enterprise.” Id. at § 43(a)(2)(A). This definition of property covered by the statute is vague. Certainly damage to the animals themselves would fall under this provision, but there are many instances where intentional damage might occur to a pen owned by a factory farm. The statute is ambiguous as to whether this action should be covered by the AETA. For example, an employee may be frustrated with his boss at the factory farm and break the printer in the office. Under the vague definitions laid out in the AETA, that employee could be convicted of damaging the property of an animal enterprise. Although there was intent to break the printer, the AETA should not apply. The AETA is designed to protect the factory farm from eco-terrorists, not misdemeanor vandalism of a billboard that is not located on Eggceptional Eggs property.

Additionally, the AETA covers damage to the real or personal property of anyone with a connection to, relationships with, or transactions with an animal enterprise. Id. Having a connection or relationship an animal enterprise is an ambiguous statement, which could include a consumer who purchases Eggceptional Eggs products at the grocery store. Certainly, the AETA

was not intended to punish someone who vandalizes the house of an Eggceptional Eggs consumer. The cloudy language used in the AETA, however, leaves open the possibility of such a conviction. The AETA should draw a sharper distinction between which activity is covered and is not covered by the Act.

This vagueness in the wording of the AETA is particularly troubling considering the Supreme Court has observed that freedom of speech is “delicate and vulnerable, as well as supremely precious in our society...[and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.” NAACP v. Button, 371 U.S. 415, 433 (1963). This additional space given to speech requires that government legislate in this area only with “narrow specificity.” The narrow specificity required by the Supreme Court is not met in the AETA.

b. AETA is unconstitutional because it is overbroad in restricting substantially more speech than the Constitution allows.

A statute is overbroad if it prohibits protected free speech or expression, despite proscribing expression that can legitimately be prohibited. Coates v. City of Cincinnati, 402 U.S. 611 (1971). Additionally, a statute is unconstitutional if the defendant, who the law constitutionally applies to, is able to show that the law would be unconstitutional as applied to others or other situations. Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 392-93 (1988).

The AETA is overbroad because constitutionally protected freedom of speech and expression is barred by the statute. The AETA applies to those who travel in interstate commerce “for the purpose of damaging or interfering with the operations of an animal

enterprise.” 18 U.S.C. § 43(a)(1). Protesting and the right for an opposition group to associate are protected rights under the First Amendment. The AETA is overbroad because the wording will chill legitimate protesting Eggceptional Eggs or other animal enterprises.

Assuming, *arguendo*, that the AETA legally applied to vandalizing an Eggceptional Eggs billboard, it is overbroad in its effects on others. The intended effect of legitimate protesting outside Eggceptional Eggs is to interfere with its operations, clearly in violation of the AETA. The protesting outside Eggceptional Eggs and the intent to interrupt operations are protected forms of speech. By protesting and taking one step onto the property of Eggceptional Eggs, a person is subject to extensive prison time and fines. The AETA is overbroad because it would apply in these situations of legitimate protests whose intent is to interfere with Eggceptional Eggs operations, but in a legitimate manner. The fact that the AETA applies to constitutional protests, rendering them essentially illegal, renders the AETA overbroad and unconstitutional.

c. The AETA is unconstitutional because it constitutes content-based discrimination that prevents citizens from exercising their First Amendment rights because of their ideology.

The unconstitutionality of regulating speech based on its content is at the heart of the First Amendment. Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). The Supreme Court has gone as far as to declare that content based restrictions on speech are presumptively unconstitutional. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). The “most exacting scrutiny” is used to determine the constitutionality of content based restrictions on speech. Turner Broadcasting System v. FCC, 512 U.S. 622, 641 (1994).

The government is acting in a forbidden content-based manner rather than a content-neutral manner when it criminalized bias-motivated speech while not criminalizing other types of angry speech. See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Virginia v. Black, 538 U.S. 343 (2003). In R.A.V., the Supreme Court struck down a St. Paul ordinance banning hate speech, such as cross-burning, because it was impermissibly content-based. The Court reasoned that the law was invalid because it prohibited otherwise permitted speech solely on the basis of the subjects the speech addresses. Id. The Court upheld a cross-burning ban in Black, but only when it was done with the intent of intimidating. Virginia v. Black, 538 U.S. 343 (2003). In Black, the Court overturned the conviction of a defendant because there was no evidence cross-burning was used as a means of intimidation. Likewise, there is no evidence presented that Clarkson ever sought to post names and addresses on a website as a means of intimidation.

Further, the AETA is content-based discrimination because it applies only to the expression of speech that hopes to interfere with animal enterprises. In Renton, the court held that the justifications of a statute are important to determining whether the statute is content neutral or content based. Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). In Johnson, the Supreme Court went even further by saying the effects of a statute can determine if the statute is content based discrimination. Texas v. Johnson, 491 U.S. 397 (1989). The Supreme Court said that banning flag burning was unconstitutional because it allowed citizens to show patriotism by using the flag, but not to show dissent and thus was content based discrimination. Id. The AETA has the same effect as the flag burning ban, because it keeps citizens from exercising their right to protest factory farms.

The lower court took judicial notice of the fact that animal enterprises are facing increased threats and are vital industries in America. There are many vital industries in America,

from the technology sector, to the service industry, to manufacturing plants. Exercising one's First Amendment right to free speech outside one of those companies does not open the individual to potentially spending the rest of their life in jail. If they trespassed upon their property, they would face the same penalty as someone who trespassed onto private property, not forty times the punishment as the AETA potentially allows. The lower court has no valid reason to determine that animal enterprises deserve the special protection of the AETA as compared to any other sector in the American economy. Without this justification, their law is a content-based restriction on protected speech and is thus unconstitutional.

II. Clarkson's speech is protected by the Free Speech Clause of the First Amendment.

The First Amendment of the United States Constitution states that, "Congress shall make no law . . . 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. The AETA is unconstitutional because it chills speech that is protected by the First Amendment. Family Farms' speech is meant to promote reform in the treatment of animals through the legal means of a boycott and letter writing campaign. The Supreme Court has consistently noted the importance of free speech to democracy, especially in advocating reform. Indeed, "our political and cultural life rest upon this ideal." Turner Broadcasting, at 622. Clarkson's speech is protected because it amounts to political advocacy, and not incitement to produce violent or lawless action.

In Brandenburg, a Ku Klux Klan leader was charged with violating Ohio's criminal syndicalism statute, which forbade the advocacy of crime as a means of promoting political

reform. Brandenburg v. Ohio, 395 U.S. 444 (1969). In a unanimous decision, the Supreme Court struck down the statute. Id. The Court held that speech advocating the use of force or crime could only be proscribed when the advocacy is “directed to inciting or producing imminent lawless action” and the advocacy is “likely to incite or produce such action.” Id. at 447. The standard created in Brandenburg requires that speech both intends to produce lawless action, and is likely to produce such action. Clarkson’s speech is protected because it neither intends to produce lawless action, nor is it likely to produce such language.

a. Clarkson’s speech is protected by the Free Speech Clause of the First Amendment because it is not directed at inciting imminent lawless action.

To be criminalized for inciting lawless action, language must actually be directed at inciting such lawless action. Id. Clarkson never expressly advocated violence. He simply listed the names and addresses of individuals associated with Eggceptional Eggs. What other people intended to do with that information was out of his control. Under the standard set forth by the District Court, the publishers of an East Carolina phonebook would be subject to criminal prosecution because they also listed the names and addresses of individuals associated with Eggceptional Eggs.

Clarkson’s website consisted of the addresses of the headquarters of Eggceptional Eggs, the names and addresses of Eggceptional Eggs chief operating officers, a list of restaurants and grocery stores who use or sell Eggceptional Eggs, and video recordings and photographs depicting the treatment of chickens at Eggceptional Eggs. Nowhere on the website are directions listed of what should be done to the headquarters and officers homes. The District Court inferred that Clarkson was aware that the information posted on his website would be used to harass and

intimidate Eggeceptional Eggs, but no such evidence is presented. The record does not present one single call to perform violent or lawless action on the website, or otherwise said by Clarkson.

Even if he had advocated illegal action, which he did not, his language would still not rise to the level of language that could be permissibly proscribed under the First Amendment. Advocacy of the idea of illegal conduct, without more, is constitutionally protected. Only where such advocacy is directed at inciting or producing imminent lawless conduct and is likely to produce such actions may the speech be suppressed. As the Brandenburg Court held, “the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” Id. at 447.

b. Clarkson’s speech is protected by the Free Speech Clause of the First Amendment because it is not likely to incite or produce imminent lawless action.

Language aimed at inciting violence or lawless action must be likely to actually produce imminent lawless action to be proscribed. Id. at 444. Clarkson’s language, taken on its face, was never likely to produce imminent lawless action. In Hess, anti-war demonstrators blocked a street until moved by police. Hess v. Indiana, 414 U.S. 105 (1973). The Defendant then said “we will take the street later.” Id. The Supreme Court held that this speech was not an unprotected incitement to illegal action. Id. Even if construed in the manner least favorable to the defendant, the statement was “nothing more than advocacy of illegal action at some indefinite future time.” Id. at 108.. Under the Brandenburg standard, only words intended to produce *imminent* disorder can be punished.

The Court has applied the Brandenburg test rigorously. In Claiborne Hardware Co., the leader of an NAACP boycott of white merchants said that those blacks who violated the boycott would be “disciplined.” NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). The Supreme Court found that the speech did not constitute incitement. Id. While the speech may have been “strong language,” the Court held that an “advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause.” Id.

In the instant case, Clarkson’s language did not even rise to the level of “strong speech.” Clarkson never said the individuals should be “disciplined” or that any other type of violent action should take place. He merely presented the names and addresses of individuals in furtherance of a boycott and letter writing campaign. Clarkson’s speech was only intended to promote reforms in the industrial treatment of animals. He never intended to incite imminent lawless action, and no lawless action was likely to be incited by his language. The language, therefore, is protected under the Free Speech Clause of the First Amendment of the United States Constitution.

III. Sentencing is inappropriate because it discourages the expression of a viewpoint by severely increasing the punishment for a crime.

The sentencing guidelines under the AETA are unconstitutional because they severely punish someone for their viewpoint rather than the nature of their crime. Citizens are allowed to protest other employers or the government if they choose, but the AETA illegally elevates the punishment and discourages protesting animal enterprises. Protesting outside Eggceptional Eggs and trespassing upon their property will submit an individual to up to three years in prison. 18

U.S.C. § 43. Under the AETA, a violation comes with a maximum punishment of life in prison. Id. The Federal Sentencing Guideline involves only zero to six months imprisonment for trespass, even if the trespass occurs on sensitive military installations. U.S. Sentencing Guidelines Manual §2(B)(2). Clearly, the AETA is discouraging expression of a viewpoint by severely increasing the punishment for a crime. The federal penalties are given for trespassing on government property, which Eggceptional Eggs is not. The penalty for trespassing on private land is significantly less than the Federal Sentencing Guidelines, but the state sentences vary by state. Many people are willing to exercise their First Amendment right to express their dissatisfaction with factory farms under the old rules, but the new penalties, significantly increased, strangle any ability to associate and speak out against factory farms.

CONCLUSION

The Animal Enterprise Terrorism Act is unconstitutional because the statute is vague, overbroad, and constitutes content-based discrimination. The AETA is unconstitutionally vague because a reasonable person cannot tell what speech is prohibited and what is permitted. The AETA is also overbroad because it restricts substantially more speech than the Constitution allows. Additionally, the AETA is unconstitutional because it constitutes content-based discrimination that prevents citizens from exercising their First Amendment rights because of their ideology. Finally, Clarkson's expressive conduct is protected by the Free Speech Clause of the First Amendment, because it is not likely to incite or produce imminent lawless action. The sentencing under the AETA is inappropriate because it discourages the expression of a viewpoint by severely increasing the punishment for a crime. For the foregoing reasons, we respectfully

ask this Court to reverse the decision of the District Court, and find that the AETA is unconstitutional and Frank Clarkson's speech is protected by the First Amendment.