Case No. 11-11223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,
Respondent/Cross-Appellant,

v.

LOUIS WHEATLEY,
Appellant/Cross-Respondent

On Appeal from The United States District Court
for the Central District of California

BRIEF FOR THE APPELLANT/CROSS RESPONDENT, LOUIS WHEATLEY

Team 1

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This brief is in support of an appeal filed in the United States Court of Appeals for the Ninth Circuit from a judgment of conviction entered in the action of United States of America v. Louis Wheatley, Case No. CV 11-30445 WMF (ABCx) by the United States District Court for the Central District of California (Hon. Wilma M. Frederickson) by the defendant. A timely notice of appeal was filed on January 25, 2011. Jurisdiction in the District Court was pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as this is an appeal from a final decision in the United States District Court for the Central District of California.

STATEMENT OF ISSUES PRESENTED

I. Does Wheatley's conviction of Count 1 under Federal Law § 999.2(3) require it to be overturned when the statute unconstitutionally violates the First Amendment Free Speech Clause on its face and as applied by being content and viewpoint based, overbroad, and vague?

II. Does Wheatley's conviction of Count 1 under Federal Law § 999.2(3) require reversal because his conviction violates public policy and his actions fall under the defense of necessity?

III. Does 18 U.S.C. § 43 exceed Congress' interstate commerce authority by its design and in its implementation to Wheatley's conduct in this case?

IV. Did the District Court properly grant Wheatley's FRCP Rule 29 Motion for Acquittal based on the necessary elements of intent and unprotected expressive conduct in 18 U.S.C. § 43, and was his removal of a chick from the facility not unlawful based on abandonment principles?

STATEMENT OF THE CASE

Appellant/Cross-Respondent Louis Wheatley was convicted in the United States District Court for the Central District of California on one count in violation of Federal Law § 999, entering an animal facility and using or attempting to use a camera, video recorder, or recording

equipment in violation of § 999.2(3), one count in violation of 18 U.S.C. § 43(a)(1), using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise, and one count in violation of 18 U.S.C. § 43(a)(1). (MO 4:20-5:2). Wheatley filed a timely Rule 29 motion for acquittal, which the District Court denied as to Count 1 but granted as to Counts 2 and 3. (MO 5:13-17). Wheatley appeals the Count 1 conviction. (BO 1). The United States cross-appeals the District Court's grant of Wheatley's motion for Counts 2 and 3 and order vacating his conviction for Counts 2 and 3. (BO 1).

STATEMENT OF FACTS

A. Introduction

Louis Wheatley was charged with one count of violating the Federal Agricultural Products Protection Act ("APPA"), and two counts of violating the Animal Enterprise Terrorism Act ("AETA"), following his employment at Eggs R Us in early 2011. (MO 1:16-20). A jury convicted Wheatley on all three counts. (MO 5:13). The District Court acquitted Wheatley of the AETA counts following his Rule 29 motion. (MO 5:13-17). Wheatley now appeals his conviction under Count 1, while the United States cross-appeals the Court's decision to acquit Wheatley of Counts 2 and 3. (BO 1).

B. Wheatley's Employment

Wheatley, a journalism student, developed an interest in the conditions of harvested animals in 2008, initially refraining from activism. (MO 2:8-12). This changed in May 2010 when Wheatley, seeking employment to support his college education, applied to and was hired by Eggs R Us as a "poultry care specialist" for a summer job. (MO 2:12-15). Eggs R Us has existed since 1966. The government provides a substantial source of its revenue to supply eggs to California schoolchildren for the National School Lunch Program. (MO 2:21-23).

Wheatley started on June 1, 2010. (MO 2:18). His duties included feeding, watering and cleaning housed chickens and their cages. (MO 2:15-17). While he maintains that he never intended to harm the company by taking the job, Wheatley admits to having planned on possibly documenting his experience on the internet and through an article for a class. (MO 2:19-20).

C. Industry Description

Male chicks, a waste product in the egg industry, are disposed of after being deposited into piles whereupon those that are still alive are killed by being ground or macerated. (MO 2:24-3:3). Wheatley recorded a four minute video of this process on or about June 17, 2010, which included a worker laughing as he intentionally killed some chicks himself before throwing them into the grinder. (MO 3:5-8). The employee's conduct violates California's anti-cruelty laws. Cal. Pen. Code §§ 597, 597(t). Wheatley posted the video online on his personal Facebook page and editorialized in the comment section that "This is what happens every day—business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." (MO 3:8-11). Wheatley's Facebook friends quickly appropriated the video and posted it on the video-sharing site YouTube before he had the chance to determine what he wanted to do with the video, where it quickly gained 1.2 million views and widespread media attention. (MO 3:11-14).

Additionally, Wheatley observed the egregiously cramped conditions of the "battery cages" in which egg laying hens were stored at approximately 48 square inches of floor space for each hen, severely below the national minimum standard of 67 square inches per hen. (MO 3:15-20). Wheatley knew this violated California's Proposition 2 that sets a minimum standard through which animals cannot be stored in a space too small to prevent their being able to spread their limbs or wings. Cal. H&S Code § 25990, *et. seq.* Wheatley went to his supervisor about this violation, but the supervisor dismissed him and his concerns. (MO 3:21-24). Wheatley made

a shorter recording of these conditions and posted it to Facebook, but removed it before it reached YouTube. (MO 3:24-28). Wheatley also blogged about the experience and discussed it with an animal protection organization to which he belonged. (MO 3:28-4:2).

Finally, Wheatley procured a male chick that he found sitting atop a pile of chicks awaiting maceration and removed the chick from the facility and took it home to raise. (MO 4:7-11). Wheatley still cares for the chick at his home. (MO 4:11-12).

When Wheatley's employers became privy to his social media postings he was promptly fired and later arrested for violating AETA and APPA, and later charged with the unlawful taking of company property as a result of his procurement of the male chick. (MO 4:13-17). Eggs R Us has since had to engage the media to respond to the negative attention and, while it denies the resulting allegations, it has taken measures to revise its current practices. (MO 4:3-6).

D. Indictment

Wheatley was indicted by a grand jury in the Central District of California on three-counts: (1) entering an animal facility and using a video recorder, in violation of § 999.2(3) of the APPA; (2) using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise, in violation of the AETA, 18 U.S.C. § 43(a)(1); and (3) in connection with such purpose, intentionally damaging or causing the loss of any real or personal property (including animals or records) used by an animal enterprise, in violation of the AETA, 18 U.S.C. § 43(a)(2)(A). (MO 4:20-5:2).

E. The Trial

Wheatley moved to dismiss the indictment on several grounds. He argued that § 999.2(3) of the APPA constitutes a First Amendment violation, the AETA is unconstitutional under the Interstate Commerce Clause, and finally that he should not be punished for exposing the

company's illegal actions, specifically the violations of Prop 2 and California's anti-cruelty provisions. (MO 5:3-9). The Court denied Wheatley's motion, whereupon a jury convicted him on all counts. (MO 5:11-13). Wheatley then filed a Rule 29 motion for judgment of acquittal, which was denied as to Count 1 and granted as to Counts 2 and 3. (MO 5:13-17).

SUMMARY OF THE ARGUMENT

Wheatley's conviction of Count 1 should be overturned because it was based on an unconstitutional statute. Federal Law § 999.2(3) violates the Free Speech Clause of the First Amendment of the United States Constitution on its face and as applied by being viewpoint discriminatory, as well as overbroad and vague. The statute is based solely on the viewpoint held by those who may violate it. Speech cannot be proscribed based on the expressed viewpoint, no matter the forum of regulation. A statute, such as Federal Law § 999, is unconstitutional if it is content-based and viewpoint discriminatory, prohibiting the viewpoint of animal welfare and animal advocates. A statute that is overbroad by prohibiting protected speech or vague by allowing discriminatory enforcement violates the Free Speech Clause. Federal Law § 999.2(3) is both overbroad and vague, by detrimentally suppressing protected speech and by encouraging discriminatory enforcement against a certain viewpoint or idea.

Furthermore, Wheatley's conviction of Count 1 should be overturned as a matter of public policy and because his behavior is subject to the defense of necessity. It goes against public policy to punish Wheatley for exposing Eggs R Us' legal violations. The public has a right to know what goes on behind the facility's doors, and Wheatley's actions benefitted society by exposing the truth. Wheatley also acted out of defense of necessity when he violated the law. He had no other choice and there was no other avenue through which to express this information. He acted out of necessity and chose the lesser evil. Based on these policies and the principles

behind them, Wheatley's conviction under Count 1 is undeserved and should be overturned.

While Congress is entitled to create any law that involves interstate commerce, there are certain inherent limitations prescribed by the Constitution by which this power is constrained. Most prominent, is that despite Congress' ultimate power as found in the Interstate Commerce Clause, First Amendment freedoms may not be abridged in the name of regulation. The AETA's overbreadth and vagueness present this problem as the law exceeds Congress' commerce power by granting the government license to essentially chill any expressive conduct it chooses so long as an animal enterprise is involved. Congress does not have an unlimited license to regulate all conduct, yet the AETA is written in a way to be misunderstood to do exactly as much.

Additionally, the government's desired enforcement of AETA exceeds both Congress' Commerce power and the language of the statute. While the intentions of the AETA are sound, they fall short of the enforcement against benign expressive conduct sought here. The AETA is limited in its language as applied to the Supreme Court's Constitutional construction in regards to the Commerce Clause, and therefore it may not be applied to Wheatley's conduct. Furthermore, the District Court fails to recognize the internet's presence as an expressive medium and approaches the issue in an archaic manner contrary to constitutional guidance.

Notwithstanding the AETA's invalidity under Congress' commerce power, Wheatley's conduct does not meet the elemental requirements of the AETA, and therefore creates more than a reasonable doubt by which the grant of acquittal was proper. In addition, Wheatley's conduct was protected, inherently under the Constitution and by the statute, thereby absolving him of any wrongdoing. Finally, Wheatley's procurement of the male chick was not unlawful based on abandonment principles, and therefore such conduct may not provide a nexus between Wheatley's videos and his taking of abandoned property needed to secure a conviction.

STANDARD OF REVIEW

The constitutionality of a statute is reviewed by an appellate court *de novo*. *United States v. Fullmer*, 584 F.3d 132, 151 (3d Cir 2009) (citing *United States v. Weatherly*, 525 F.3d 265, 273 (3d Cir. 2008). A reviewing court reviews a district court's conclusions of law *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). The district court's decision to preclude a defendant's proffered defense is reviewed *de novo*. *See United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008). Whether a district court's grant of a Rule 29 motion was proper is reviewed *de novo* on appeal. *United States v. Coté*, 544 F.3d 88, 98 (2d Cir. 2008). A reviewing court applies the same standard as to the sufficiency of the evidence.

ARGUMENT

I. Wheatley's Conviction Of Count 1 Should Be Overturned Because The Statute Is Viewpoint-Based, Overbroad, And Vague, Violating The Free Speech Clause.

The United States Constitution's First Amendment Free Speech Clause imparts on citizens the right not to have Congress make laws that abridge the freedom of speech. U.S. Const. amend. 1. The government cannot therefore obstruct the freedom of speech "because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010). The Agricultural Products Protection Act ("APPA") does just that. A regulation, like Federal Law § 999.2(3), that is overbroad by restricting protected speech or vague by being discriminatorily enforced, either on its face or in application, is unconstitutional because it violates the Free Speech Clause. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 51 (1st Cir. 2011); *United States v. Fullmer*, 584 F.3d 132, 152 (3d Cir. 2009).

A. The APPA Violates The Constitution Because It Is Viewpoint-Discriminatory.

Speech generally cannot be proscribed based on a disagreement with the view expressed. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Content-based regulations are presumptively

invalid. *Id.* Content-based restrictions "suppress, disadvantage, or impose differential burdens upon speech because of its content," and are subject to strict scrutiny. *Golan v. Gonzalez*, 501 F.3d 1179, 1196 (10th Cir. 2007) (citation omitted). A regulation "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). It is content-neutral, subject to intermediate scrutiny, only if it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). If the regulation serves purposes unrelated to content, it is neutral. *Id.* The government's purpose in regulating is the controlling factor. *Id.*

In a public forum, a regulation must pass strict scrutiny, narrowly tailored to a compelling state interest. *Int'l Soc'y for Krishna Consciousness, Inc. v Lee*, 505 U.S. 672, 676-79 (1992) (citation omitted). In a non-public forum, the regulation need only be reasonable, but may not be an effort to suppress speech due to a disagreement with the speaker's view. *Id.* at 678-79.

Here, the government is attempting to regulate conduct that occurs on private property, and is doing so based solely on the content of that speech, which is impermissible. Even if the company is considered a non-public forum, the government still cannot base its regulations on an idea or message with which it disagrees. The APPA has a disparate impact on people who want to reveal conditions about animals, based on their specific viewpoint of caring about animal welfare. Thus, the government is not permitted to do this here because it blatantly infringes on free speech protection and silences speech that is fundamental to the First Amendment.

1. *The Government Cannot Regulate A Non-Public Forum Based On Viewpoint-Discrimination.*

The government may control free speech to different degrees depending on the forum. In order to regulate a public forum, the exclusion must be necessary to serve a compelling interest

and must be narrowly tailored to that interest. *Cornelius*, 473 U.S. at 800. If a forum is non-public, then the government can make restrictions, but only if they are "reasonable" and not implemented because the government intends to curb the viewpoint of the speaker. *Id.* The government has the authority to restrict speech when it would cause a disruption to the purpose of the forum. *Id.* at 807. The restriction must be reasonable in regards to the forum's purpose. *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 49 (1983).

In light of Eggs R Us' operation of providing eggs to schoolchildren, this restriction of speech is not reasonable because it is viewpoint-based and does not serve the company by allowing the concealment of its legal violations. Although Eggs R Us is a private company and should not be regulated by the government unless under heightened scrutiny, even if the Court considers it a non-public forum because of governmental involvement, the Constitution is still violated because the regulation is implemented to curb a particular viewpoint.

When the government attempts to regulate speech and there is a resulting disparate treatment of a particular view, it is viewpoint-based discrimination and therefore proscribed. *See NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984). "[H]owever neutral the government's intentions in enacting a law, the operation of that law may have a vastly uneven impact." *Id.* This disparate treatment may appear when the statute targets a specific viewpoint or if only that viewpoint is affected when the statute is put into practice. *Id.* In this case, only Wheatley's viewpoint is being targeted and therefore punished. Violators of the statute hold Wheatley's view, and those who do not may never even be implicated because they may be unlikely to ever participate in the proscribed behavior. This severe restriction, in effect, is viewpoint discrimination because a specific view is targeted, amounting to a ban on speech that is inherently antagonistic to First Amendment principles.

2. *The APPA Does Not Pass Constitutional Scrutiny Because The Regulation Is Impermissibly Content-Based By Regulating Wheatley's Speech Based On His Particular Viewpoint.*

Federal Law § 999.2(3) unconstitutionally restricts conduct based on its particular message and viewpoint. The APPA was created to protect agriculture production and animal production facilities. *See* Fed. L. § 999.1-4. In banning the videotaping of these facilities, the government is attempting to stifle speech that may negatively affect these enterprises. The government's motivation to silence this particular viewpoint is impermissible, even under a reasonableness test. Although the government may have more discretion in regulating speech in a non-public forum, it must still comport with the requirement that the restriction not be based on the speaker's viewpoint. In attempting to protect the company, the government does in fact base its restriction on a view contrary the company's asserted interests. This however, is unreasonable under the circumstances, because the company's affected interest is not reasonable, namely, an interest in concealing its own illegal activities. Keeping lawbreaking behavior under the radar is not a reasonable justification to severely restrict the right of free speech.

Because the APPA in practice disfavors a viewpoint and was created to suppress that particular viewpoint, it is unconstitutional. Videotaping at a facility does not go against the purpose of the company. The intended purpose of Eggs R Us is to produce eggs for schoolchildren, which is not hindered by a video that may expose unhealthy and law violating conditions. This purpose, in fact, is best served by highlighting these violations so that they may be corrected, thereby producing healthier eggs. Also, there are no reasonable alternative channels through which this information can or would be exposed. Thus, the APPA results in the censorship of speech. In an effort to suppress this particular viewpoint, the government conducts viewpoint-discrimination. Because this statute is aimed at people who want to uncover

violations of law regarding animal welfare, it is based on a particular viewpoint. In practice, the only people who would be subject to this law are the people with a certain viewpoint, thus making the law unacceptable under the Free Speech Clause. The APPA singles out and suppresses animal advocates based on their viewpoint, which is in violation of the Constitution.

B. The APPA Is Unconstitutionally Overbroad And Vague, Which Violates The First Amendment's Free Speech Clause.

A statute may be overturned as overbroad if a substantial number of its applications are unconstitutional. *United States v. Stevens*, 130 S. Ct. at 1587. A statute is overbroad if it inhibits protected speech. *Nat'l Org. for Marriage*, 649 F.3d at 51. The overbreadth must be substantial. *New York v. Ferber*, 458 U.S. 747, 769 (1982). The overbreadth doctrine is used "sparingly and only as a last resort" as it is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). An overbroad statute "has the potential to repeatedly chill the exercise of expressive activity by many individuals." *Ferber*, 458 U.S. at 772. A statute that is "broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however even-handed its terms appear. Its mere existence could well freeze out of existence all such activity on behalf" a particular group. *NAACP v. Button*, 371 U.S. 415, 436 (1963).

A statute may be unconstitutionally vague if it "authorizes or even encourages arbitrary and discriminatory enforcement." *Fullmer,* 584 F.3d at 152. The review is undertaken on a case-by-case basis, as applied to the party in question. *Id.* A requirement of intent in a criminal statute will clarify concerns regarding vagueness because "a mens rea element makes it less likely that a defendant will be convicted for an action that he or she committed by mistake." *Id.* The "objectionable quality of vagueness and overbreadth" depends "upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. at 433. "These freedoms

are delicate and vulnerable, as well as supremely precious in our society." *Id.* "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* (citation omitted).

1. *The APPA Is Unconstitutionally Overbroad Because It Precludes Protected Speech And Its Applications Are Unconstitutional.*

The APPA seeks to inhibit constitutionally protected speech. Concern for animal welfare is a valid viewpoint that is vital to public debate and the exchange of ideas. The right to express that view is protected by the Free Speech Clause. The APPA is overbroad because it regulates protected speech. Federal Law § 999.2(3) does not require intent to harm or hinder the enterprise when it prohibits videotaping. There is also an exception in the APPA for the actions of a governmental agency carrying out its duties. Because the APPA includes conduct done to hurt the enterprise and conduct done intentionally but with no resulting harm, its sweep is overbroad. It creates a significant threat to chill speech by not allowing conduct that is otherwise protected. It may prevent whistleblowers from coming forward when this is the only avenue in which to complain or to expose a company's unlawful practices. The substantial disturbance to speech here threateningly encroaches on First Amendment rights. Thus, the government prohibits too much speech in an attempt to curtail a particular message, which is unconstitutional.

2. *The APPA Is Unconstitutionally Vague Because It Encourages Discriminatory Enforcement.*

The APPA is unconstitutionally vague because it permits and encourages application to an attempt to expose animal welfare issues, but not enforcing it against someone who, for example, took a video-message while eating lunch at work to send to a friend. The potential for discriminatory enforcement is high, especially because no intent element is included in the subsection and there is an exception for governmental employees, who could even themselves

choose to harm the company. In effect, the government can enforce the statute when a violator holds a view relating to animal welfare, and then choose not to apply it to other violators who do not hold that view. The purpose of the law is to single out and suppress a view, which it in fact does in application. Here, the statute was applied to Wheatley because of his viewpoint. In such instances, the statute greatly encourages discriminatory enforcement based on a view that the government does not want to be expressed. The lack of intent in subsection three allows this to occur without repercussion. An accurate application of the First Amendment would prohibit this infringement on speech that the First Amendment was designed to protect. Thus, the APPA is unconstitutional, as the government cannot arbitrarily pick to whom the statute is applied, based on what viewpoint they are expressing. If allowed to do so, the government may unlawfully oppress people with certain views and damage the integrity of the Constitution.

II. Wheatley's Conviction Of Count 1 Should Be Overturned Because Upholding The Conviction Goes Against Public Policy And Wheatley's Actions Are Justified Under The Defense Of Necessity.

Wheatley's conviction of Count 1 should be overturned because his punishment under the law is not appropriate considering the circumstances. It goes against public policy to convict someone for revealing the illegal conduct of others, especially when there is no other reasonable way to uncover such violations. Wheatley's conduct was the only way to reveal that Eggs R Us was violating Prop 2 and the California anti-cruelty statutes. Uncovering these wrongdoings serves society better than any harm caused by Wheatley's actions of taking short videos while at work. This conduct and information is imperative to correct harm and to gather evidence to enforce the law. Wheatley's actions are also justified under the defense of necessity, as he had no other choice and chose the lesser evil when put in a situation of facing two evils, where he had to break the law in order to prevent wrongdoing.

A. Wheatley's Conviction Of Count 1 Should Be Overturned Because His Actions Serve Public Policy.

Wheatley's conviction goes against public policy because his acts exposed animal cruelty and violations of state law. Wheatley should not have been convicted under the APPA considering the reasons for his actions and the effects of upholding his conviction. His actions exposed necessary information regarding violations of the law that otherwise would go uncovered. It would be against public policy to allow a conviction to stand based on a statute that essentially serves to cover up illegal actions of companies within the industry.

1. *Public Policy And The Interests Of Free Speech Entitle The Exchange Of Ideas And Public Debate Regarding Animal Welfare.*

Wheatley's speech is the type that is at the core and foundation of the Free Speech Clause's protections. The "guarantee of free speech applies with special vigor to discussion of public policy." *Nat'l Org. for Marriage*, 649 F.3d at 51. The concept of free speech is served when Wheatley's speech is protected under the circumstances in this case. The Free Speech Clause provides for an "unfettered interchange of ideas for the bringing about of political and social changes" that people want. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The "debate on public issues should be uninhibited, robust, and wide-open." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Animal welfare is a topic of public interest warranting protection so that public debate may occur with access to information and fully informed participants. It is an "issue of political, moral, and ethical importance in today's society." *Fullmer*, 584 F.3d at 154. "[T]he viewpoint of animal rights activists contributes to the public debate." *Huntingdon Life Scis., Inc., v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1246 (2005). As a matter of public concern, it is "a classic form of speech that lies at the heart" of the Free Speech Clause. *Id.* The APPA intends to choke speech so the

public is kept in the dark about what actually occurs behind closed doors of enterprises like Eggs R Us. This impermissible censorship prevents the free flow of ideas in the marketplace, the central component of the Free Speech Clause.

2. *Public Policy Does Not Permit The Complete Suppression Of Speech When It Exposes Violations of Law And There Is No Alternative Avenue For The Speech.*

The Free Speech Clause ensures that a wide spectrum and variety of ideas and viewpoints will be available and uncensored. Speech is especially valuable when it "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Huntingdon*, 129 Cal. App. 4th at 1249 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). The social costs of selectively silencing the kind of speech in this case are too severe because the APPA allows for violations of the law to persist and go unpunished. Keeping this vital information from the public impedes investigation into animal cruelty claims because there is no other avenue to prove these kinds of behavior and policies without such evidence. A punishment of conviction is unwarranted where, as here, the reason for the violation of the APPA was to expose the wrongdoings of the company so that the public will know the truth and Eggs R Us can no longer conceal their legal violations by censoring this information. Shielding these facilities from punishment and correction only deprives the public of information regarding health standards of the company and animal welfare issues. The statute only hinders exposure and does not do anything to try to correct any violations of the law. It is against public policy to significantly chill the efforts of whistle-blowers when a company breaks the law. Public policy dictates that it cannot be that the only avenue to uncover these violations gets punished, while the actual violations of the company remain unseen.

Here, Wheatley should not be convicted because he was only trying to expose that Eggs R Us was breaking the law. There was no other outlet with which to do so. Wheatley went to his supervisor to discuss what was happening, but was told not to worry about it. Because the company was not correcting its violations on its own, and there was no other way to communicate what was going on, violating the APPA was the only way to relay this information. Wheatley acted in a non-violent way in order to expose the truth. His short videos did more good than evil to society by exposing the truth, which in fact led Eggs R Us to improve its practices. He should not be convicted for this. Wheatley was only exposing the Prop 2 and California anti-cruelty statute violations by Eggs R Us, who needs to be held accountable. His conviction only further prevents whistleblower activities and, in effect, chills protected speech and allows companies like Eggs R Us to continue to break the law.

B. Wheatley's Conviction Of Count 1 Should Be Overturned Because His Actions Are Justified Under The Defense Of Necessity.

The defense of necessity is used to "justify criminal acts taken to avert a greater harm" where the "social benefits of the crime outweigh the social costs of failing to commit the crime." *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1992). The promotion of greater values at the expense of lesser values underlies the defense. *Id.* The four elements that must be satisfied in a defense of necessity are 1) the defendant chose the lesser evil when faced with a choice between two evils, 2) the defendant acted in order to prevent harm that was imminent, 3) the defendant reasonably anticipated a direct causal relationship between their conduct and the harm, and 4) the defendant had no reasonable legal alternatives to violate the law. *Id.* at 195.

1. *The Defense Of Necessity Applies To Wheatley's Violation Of The APPA.*

The defense of necessity applies to Wheatley because his conduct in violating the APPA, although breaking a law, promotes the greater value of exposing Eggs R Us' violations.

Although the defense of necessity has not applied to indirect civil disobedience where the law being violated was not the subject of protest, it may apply to direct civil disobedience where the violated law is directly being protested. *See id.* Here, Wheatley could be participating in direct civil disobedience because he may have known about and had been protesting the APPA. He also could be participating in a form of indirect civil disobedience for which, although defense of necessity is not applied, it should be applicable as a defense. Either way, an act of civil disobedience by breaking the law should be entitled to the defense of necessity because of the reasoning behind the defense and because of the applicable public policy.

Eggs R Us was breaking the law and participating in animal cruelty and other behavior that could have a possible negative impact on the quality of eggs schoolchildren consume. The "policy underlying the necessity of defense is the promotion of greater values at the expense of lesser values." *United States v. Dorrell*, 758 F.2d 427, 432 (9th Cir. 1985). This policy is served by Wheatley's conduct. Under the circumstances here, Wheatley's conduct yielded social benefits that significantly outweighed a failure to obey the APPA. The harm from two short videos of the facility is miniscule when compared to allowing society's ongoing ignorance of an industry's systematic practices involving violations of the law and animal cruelty. If not videotaped, such practices would continue unnoticed and unpunished. In the interests of justice and of the underlying purpose and intent of the defense of necessity, the defense should apply here. This case demonstrates an example of where the necessary evil done far outweighs any harm done, and therefore the crime is justified under the defense of necessity.

2. *Wheatley's Count 1 Conviction Should Be Overturned Because He Meets All Four Requirements To Show A Defense Of Necessity.*

Wheatley's actions demonstrate that he successfully fulfilled all the requirements necessary for the defense of necessity. First, Wheatley satisfied the first factor of choosing the

lesser of two evils with which he was faced when he chose to violate the APPA in order to expose and hopefully prevent Eggs R Us' legal violations and their practices of animal cruelty. Wheatley's harm by taking a four-minute video and a shorter video depicting violations of Prop 2 and the anti-cruelty laws was significantly less than the harm potentially inflicted upon society had this information remained hidden. Wheatley's conduct prevented a more serious harm and achieved a greater good in the eyes of justice for society.

Wheatley satisfied the second requirement of acting to prevent imminent harm because the harm was occurring at the moment and was an ongoing threat. He had no choice but to immediately act in an attempt to stop the crimes he was witnessing as soon as possible. The urgency of the harm was apparent to Wheatley and he wanted to let the people know the truth.

The third requirement of anticipating a link between the action and the harm to be averted was met because Wheatley knew that his actions would allow other people to see the harm and violations that were occurring at Eggs R Us, and bring them to a stop. He knew this was the only way to get this information, and he knew it would have an effect on the company's policies. His attempt was successful, given Eggs R Us' policy reevaluation following the disclosure of its cruel and unlawful practices. Wheatley's conduct therefore did have the intended effect and was the link to the harm to be averted.

And finally, Wheatley satisfied the final criteria of having no legal alternatives to violating the law because this was his only outlet to capture this information so that it could be relayed to the public. This was the exclusive means to expose the company's wrongdoings so that they would not continue their unlawful and cruel practices behind closed doors. Wheatley had tried alternative means to attempt to stop these violations, but to no avail. He went to his supervisor to discuss these violations, but was told not to worry about them. Even now, after the

violations have been exposed, Eggs R Us is still not charged with breaking the law. No other alternative existed and breaking the law was Wheatley's only reasonable option.

To satisfy this last requirement, there must not be a "reasonable" legal alternative. *Dorrell*, 758 F.2d at 431. Here, no other reasonable option existed. If the company will not change its appalling practices on its own and only attempts to cover them up, there is no other option but to obtain and expose evidence of the crimes. Because nothing would be done, nor has been done, to prevent the harm Eggs R Us caused, the only reasonable avenue to abate this harm was, and continues to be, through Wheatley's necessary violation of the APPA.

This violation thus constituted a significantly lower amount of harm than would have existed had Wheatley not broken the law and allowed Eggs R Us' violations to continue unpunished and unknown. Therefore, Wheatley's conviction on Count 1 should be reversed because his action falls under the rules and the policy reasons behind the defense of necessity.

III. While The Commerce Clause Permits Congress To Essentially Create Any Laws It Sees Fit In Regulating Interstate Commerce And Therefore Authorizing Its Creation Of 18 U.S.C. § 43, Application Of The Statute As It Applies To The Present Case Reaches Beyond This Authority As Wheatley's Internet Activity Is Not Within Interstate Commerce.

As stated by the District Court, under Article I, Section 8, Clause 3 of the United States Constitution, Congress is vested with the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 2. As the District Court correctly points out, the Supreme Court has organized Congress' commerce power into "three broad categories of activity": the "use and channels of interstate commerce," the "instrumentalities," "persons or things in interstate commerce," and "those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The District Court also points out that Congress may regulate commodities that are

either "in" or "have a substantial relation" to interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

The AETA exists to prevent economic damage and threats to animal enterprises and "associated persons." 18 U.S.C. § 43(2). The portion relevant to this matter makes it an offense for "[w]hoever travels in interstate or foreign commerce, or uses [ ] any facility of interstate or foreign commerce . . . for the purposes of damaging or interfering with the operations of an animal enterprise" and in "connection with such purpose, [to] intentionally damage[] or cause[] the loss of 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)(1),(2)(A). The statute thereby grants the government wide latitude with which to prosecute individuals who malign interstate animal enterprises in a limitless number of ways.

A. <u>While Congress May Regulate Conduct That Affects Interstate Commerce, Extending Its Authority To Regulate Virtually Any Channel Of Expression Is Overbroad And Risks Creating Numerous Other Constitutional Violations.</u>

The Interstate Commerce Clause is a seemingly endless grant of power to Congress to regulate activities within an individual's own property and ostensibly non-commercial behavior. *See generally Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). However, while "[t]he power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations," it remains subject to the "limitations that are prescribed by the constitution.'" *U.S. v. Darby*, 312 U.S. 100, 114 (1941) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)). These limitations are implicated when considering the AETA's potential logistical application to nearly any conduct taken against an animal enterprise. The fatal characteristic of the AETA, which is explored again below, is its inclusion of "economic damage" as an almost default result of the conduct § 43 prohibits. *See* 18 U.S.C. § 43(b)(1)-(5). § 43(d)(3)(A) defines economic damage as including the

"loss of profits, or increased costs" resulting from among other causes "harassment, or intimidation." While § 43(d)(3)(B) takes care to exclude "lawful economic disruption" from this definition, the inherent vagueness of the statute still can be interpreted to the extent that it could encompass a vast variety of non-commercial individual behaviors protected elsewhere by the Constitution. For reasons explained above, such vagueness severely implicates First Amendment principles, a clear, conspicuous and unequivocal limitation prescribed by the Constitution.

The vagueness of terms like "interfere" and "damage" create even broader Due Process implications that further highlight the overbreadth of Congress' power as provided by the AETA, the implications of which are highlighted above. Furthermore, crucial to a criminal or regulatory statute is that persons it affects have notice of what conduct is or is not prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). § 43(d)(3)(B) is hardly a sufficient clarification. Notwithstanding the serious Due Process and First Amendment implications created by the AETA, the statute remains irredeemably broad to the extent that Congress can essentially regulate whatever conduct it chooses, so long as it relates in some way to an animal enterprise. This issue is not novel, as it was raised against the same terms regarding the AEPA, the AETA's predecessor. *Fullmer*, 584 F.3d at 151-52. The Supreme Court has recently been diligent in curbing Congress' exploitation of the Commerce Clause in areas like firearms and sexual assault that, while easily linked to interstate commerce, fall outside the ambit of the original Constitutional grant of power. *See generally Lopez*, 514 U.S. at 565-66; *United States v. Morrison*, 529 U.S. 598, 617-18 (2000). A similar approach should be applied to the AETA.

Notwithstanding whether the AETA is unconstitutional on its face, the government's desired enforcement of 18 U.S.C § 43 here is unconstitutional as it exceeds even the language of the statute, highlighting how easily the AETA is misunderstood. Few would doubt Congress'

authority to prohibit the actual industrial sabotage of a factory responsible for helping to feed a nation's schoolchildren or the physical intimidation of its workforce. The situation becomes more precarious when the law is enforced against the benign advocacy of private individuals calling for more humane industrial methods without having directly interfered with the actual company operations. The government here seeks a uniform application to either scenario.

Semantically, Congress may have in fact prevented such an application. *Lopez* clarified the three broad categories of how the Commerce Clause may be implemented, and that Congress carries with it "a specialized set of linguistic tools that enable it to clearly express just what type of commerce authority it is asserting." *United States v. Ballinger*, 395 F.3d 1218, 1231 (11th Cir. 2005); *Lopez*, 514 U.S. at 558-59. The words "substantially related," inherent to the third *Lopez* category, "'signal the broadest permissible exercise of Congress' Commerce Clause Power,'" while the words "in commerce" and "channels of commerce" are far more limited in scope covering only those persons actually "within the flow of interstate commerce." *Ballinger*, 395 F.3d at 1232 (quoting *Citizens Bank v. Alafabco, Inc.* 539 U.S. 52, 56 (2003); *Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 273 (1995)). § 43(a)(1) conspicuously employs the latter two categories while "substantial relation" or "affecting commerce" remain absent. Applying the canon *expressio unius est exclusio alterius,* it seems that the term giving Congress the most power possible was excluded deliberately and "not by inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). This further undermines the government's already dismissed "substantial relation" argument. (MO 15:5-7). Wheatley's conduct thereby has to take place in a channel of commerce, as punishing him for the mere effect of his conduct would be excessive. Taken with § 43(d)(3)(B), it is clear that to apply the AETA any further than direct involvement with a facility of interstate commerce is excessively unconstitutional, as is the case

with a civilian expressing impassioned observations over what must be considered to be a neutral medium. The only possible facility used in interstate commerce here is the internet.

B. The Internet Is A Channel Of Interstate Commerce In The Conventional Sense Of The Word, But Wheatley's Use Of The Internet Here Does Not Rise To Being In Or Having A Substantial Relation To Interstate Commerce, And Therefore Enforcement Of The AETA In This Context Would Exceed Congressional Authority.

The District Court takes great care to demonstrate that the internet is a "channel" or "instrument" of interstate commerce. (MO 15:9-24). While it is true that the logistics of the internet require the passage and storage of information on servers throughout the world for even the most basic functions, thereby obscuring geography, the Court falls short of characterizing the internet's contemporary import. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp 160, 169 (S.D.N.Y. 1997). While the authority and theory used by the Court is sound, it is also dated. In the United States at least, the internet is arguably the most ubiquitous communicative medium today. With the advent of cloud computing, people's entire private lives now exist online. Legislation like the Stored Communications Act has acknowledged this and demonstrates a presumptive expectation of privacy that it and other laws have existed to protect for several decades despite the now common practice of consumers turning over even private information to third parties. *See* 18 U.S.C. § 2701. As people transfer their entire lives and much of their expressive conduct onto the internet, this calls forth the impossibility of regulating every little function within an established and widespread institution, a concern Justice Rehnquist contemplated in *Lopez*. *Lopez*, 514 U.S. at 565. This sentiment largely defines current Commerce Clause jurisprudence. A statute should not be able to reach each and every facet of the internet. Whether a specific use of the internet is enough to constitute a facility of interstate commerce needs to be determined.

Most people's daily activities and expressions, online or not, are decidedly intrastate. While much of the internet does undoubtedly involve some facet of interstate commerce, an

equal amount of use is neither commercial nor meant to be shared at large. Wheatley's conduct should be considered as much, as it existed within his own privately accessed forum. As stated, it would be archaic to continue supporting the inference that the internet as a forum can be regulated without limitation because of the technical apparatus on which it relies. The internet is essentially a "place," albeit a virtual one, where activity can either be intra or interstate, much like a house or building. To entertain an analogy, the Supreme Court has stated the "proper" Commerce Clause inquiry as to whether a place is within interstate commerce is to determine its function "and whether that function affects interstate commerce." *Jones v. United States*, 529 U.S. 848, 855 (2000). Wheatley was using his personal Facebook page, a place that principally functions neither as a facility nor instrument of interstate commerce, and is by design usually available to others by invitation only. His use of this page was not commercial but expressive. The government here via the AETA exploits the technicalities of the internet to flex its muscles of enforcement while decidedly ignoring the realistic implications of the government's ability to implement that statute in a way that would regulate the vastness of the internet without limit. That the AETA's blanket authority to regulate whatever conduct "interferes" with an animal enterprise existing because of the internet's technical logistics expands far beyond the permissible reach of the Commerce Clause and treads on the "limitations" discussed above.

Turning to an obvious limitation, speech is protected most in traditional forums commonly used for "the free exchange of ideas*." Cornelius,* 473 U.S. at 800-02. While more timeless forums like sidewalks and parks have more regularly been alluded to as traditional forums for this purpose, the overwhelming ubiquity of the internet suggests that it is as deserving as anywhere to be considered as such a forum. While courts may be apprehensive to declare as much in the near future, they should be wary of regressing on such a rapidly evolving matter.

The AETA's ability to use commerce power to suppress internet speech severely undermines both notions just explained and therefore is an impermissible expanse of Congress' Commerce Clause power as applied to the internet as it is here.

IV. The Court's Decision To Overturn The Jury Verdict For Counts 2 And 3 Was Proper Because Wheatley's Conduct Is Not Applicable Under 18 U.S.C. § 43 As His Actions Are Inconsistent With The Punishable Conduct Under The Statute, Not Carried Out With The Requisite Intent Required By The Statute, And Are Constitutionally And Statutorily Protected.

Federal Rule of Criminal Procedure 29(c)(2) states that "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c)(2). The District Court correctly states in its Memorandum Opinion that in deciding to grant a Rule 29(c)(2) acquittal, the court must determine whether in "viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992) (citing *United States v. Merriweather*, 777 F.2d 503, 507 (9th Cir. 1985). If there is substantial evidence supporting the jury's verdict in "the view most favorable to the Government," it must be sustained. *Id.* (quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)).

"Reasonable doubt" as a standard, possesses no consistent definition beyond its superlative strictness, although the Supreme Court has "repeatedly approved" one "formulation" that it is "a doubt that would cause a reasonable person [a juror] to hesitate to act." *Victor v. Nebraska*, 511 U.S. 1, 20 (1994). Therefore, if a fact gives the jury some hesitation in determining a criminal defendant's guilt, this doubt is reasonable and a conviction is improper.

A. Wheatley Did Not Possess The Requisite *Mens Rea* Necessary To Be Found Guilty Under The AETA And Therefore The Court's Dismissal Of Counts 2 And 3 Was Proper.

Scienter requirements are crucial in criminal statutes "because a *mens rea* element makes it less likely that a defendant will be convicted for an action" by mistake. *Fullmer*, 584 F.3d at

151 (citing *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007)). Therefore the redundant language that the offender "intentionally damage or cause the loss of" or commit an act "for the purpose of damaging or interfering with" an animal enterprise is by design to ensure such intent actually exists. Wheatley at no point showed an intent to damage the operations of the animal enterprise itself, and therefore a necessary element was absent that would create a reasonable doubt as to Wheatley's guilt, making his Rule 29 acquittal proper.

The court correctly points out that the first step in statutory construction is to take words at their regular meaning. (MO 17:16-18) (citing *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)). This serves two important purposes. First, so judges do not themselves legislate, and second, so that for criminal statutes, potential offenders have sufficient and understandable notice of the law. *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 544 (1940). The Court applies this canon to the term "damaging," while incorrectly stating as "fact" that Wheatley "violated the statute by his actions." While this claim is easily negated by the statute itself as is discussed in below, the Court neglects to apply the same rule of construction to "intentionally," the word it presumably felt justified Wheatley's 29(c) acquittal. (MO 17:18-26, 18:11-12). The Supreme Court's automatic method for determining a word's plain meaning remains simply turning to the dictionary. *Stevens*, 130 S. Ct. at 1588. The Merriam Webster Online Dictionary defines "intentionally" as "with full awareness of what one is doing." Reasonable minds could easily disagree that Wheatley was fully aware that his actions would lead to any kind of damage to Eggs R Us' operation or whether his actions cannot be seen as anything more than benign activism against a grotesque company method for which there are more humane alternatives. With the element of intent in doubt, his acquittal was proper.

The inclusion of the word "and" in § 43(a)(1) makes the criteria in § 43(a)(2) a required element to complete the offense. As a matter of basic statutory reading, one element is not complete without the other. Indeed, past readings of the AETA, in conjunction with Federal Rule of Criminal Procedure 7(c) and broader Fifth Amendment Jurisprudence, require that an indictment sufficiently contain the elements of the offense charged. *United States v. Buddenberg*, 2010 WL 2735547 No. CR-09-00263 RMW, 2-3 (N.D. Cal. 2010); *see also United States v. Cecil,* 608 F.2d 1294, 1296 (9th Cir. 1979). Therefore, basic criminal law requires that all elements be proven before a person can be convicted of an offense, including the *mens rea* requirement here, that Wheatley "intentionally" sought to cause the loss of Eggs R Us or its affiliates' real or personal property. Assuming in a light most favorable to the government, as the District Court does, that Wheatley did use the internet for the purpose of damaging or interfering with Eggs R Us' operations, there is still a reasonable doubt, included among logical doubts, that the Facebook video posting also aimed to "intentionally damage or cause the loss of [Egg R Us' property]." Therefore, there are sufficient doubts that Wheatley's alleged offense violated the necessary elements under § 43(a) and thus the Court's grant of acquittal was proper.

B. Wheatley's Taking Of The Chick Does Not Establish A Nexus Through Which The § 43(a)(2)(A) Elements Can Be Proven As He Cannot Be Charged Under § 43(a) For This Action Nor Can He Be Charged For Any Offense As The Chick Was Abandoned.

For Wheatley's taking of the chick to fall within the AETA's scope, he would have had to remove the chick with the purpose of damaging or interfering with Eggs R Us' operations. Notwithstanding abandonment principles, the chick did not initially belong to Wheatley. Viewing this in a light most favorable to the government, a jury could reasonably decide that this was Wheatley causing the loss of "real property (including animals . . .) used by an animal enterprise" thereby rendering him in violation of § 43(a)(2)(A). Eggs R Us or the government

could have charged Wheatley with basic theft for taking the chick, an option they declined. However, because this conduct had nothing to do with his videos aside from mutually reflecting Wheatley's sentiment for the male factory chicks, and no purpose aside from sympathy, reasonable doubts exist as to whether this falls within the scope of § 43(a).

Additionally, Wheatley could not have illegally appropriated the chick, as it was abandoned by Eggs R Us as a waste product. "Abandonment is the voluntary relinquishment of one's rights in a property" that is proven by "(1) intent to abandon, and (2) physical acts carrying that intent into effect." *Zych v. Unidentified, Wreck and Abandoned Vessel, Believed to be SB Lady Elgin*, 755 F. Supp. 213, 214 (N.D. Ill. 1990) (citing *Mucha v. King,* 792 F.2d 602, 610 (7th Cir. 1986); *Chemical Sales Co. v. Diamond Chemical Co.,* 766 F.2d 364, 368 (8th Cir.1985)). The law awards possession over the next person that finds the abandoned property. *Id.* The District Court explains that male chicks are considered a "waste product" in the egg industry. (MO 2:24-3:3). Upon discovery of their gender, male chicks are summarily dispatched to a fast moving grinding mechanism, the purpose of which is to presumably reduce them, while alive, to a consistency more manageable for disposal. George, the chick Wheatley procured, since deemed nothing more than waste, was awaiting this process atop a pile being ground when Wheatley removed him from the plant. George was cast into a process whereby had Wheatley not intervened, he would have been killed, removed and discarded from the premises just like a person would physically take out their garbage with the intent of relinquishing the rights to own and possess that garbage. The government's charge was to punish Wheatley for taking a small part of what would have been cast out and abandoned to the world as garbage within a short time. Reasonable minds could thereby find that Eggs R Us met the required elements of having abandoned George, making Wheatley's acquisition of the chick lawful.

C. Wheatley's Actions Constitute Protectable Expressive Conduct Under The First Amendment And Are Therefore Both Constitutional And Expressly Permitted By The Statute, Legitimizing His Acquittal.

Assuming *arguendo* and in a light most favorable to the government, that even if Wheatley did act with the intention to effect any type of publicity or economic damage against Eggs R Us, his conduct would still be legal under the AETA. As stated above, § 43(d)(3)(B) conspicuously excepts "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." To the point of exhaustion, the AETA augments the point even further in its concluding section, stating that "[n]othing in this section shall be construed . . . to prohibit any expressive conduct [ ] protected from legal prohibition by the First Amendment . . . [or] to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment . . . regardless of the point of view expressed." § 43(e)(1),(2). Breaking down the statute, Wheatley's conduct, however effective in reaching the goals alleged by the government, rests plainly within the situations contemplated by § 43(d)(3)(B). Indeed, "picketing and political protest are at the very core of what is protected by the First Amendment." *Buddenberg*, No. CR-09-00263 RMW at 6. Wheatley's conduct was nothing more. If his postings harbored any nefarious purpose, the only plausible end to that purpose was to stir up public reaction by exposing an unfortunate industry practice. The effect on the company after widespread media attention was a reevaluation of its methods and an implementation of a damage control strategy. Wheatley may have very well not even intended the effect of his actions to go that far. Perhaps he was merely advocating the self-denial of consuming industrially harvested animals. Nevertheless, by the plain meaning of § 43(d)(3)(B), this was the kind of "lawful economic disruption" contemplated by the statute, and therefore the District Court was proper in ruling that such factors, among others, contributed to a significant reasonable doubt.

The government must argue that Wheatley's conduct and his expression was indeed unlawful to overcome the application of § 43(d)(3)(B) and § 43(e)(1)-(2). They may argue that the AETA exists given the sensitive and crucial role national food producers possess in sustaining a growing society that must employ certain necessary evils as a matter of utility, hence the exceptional statute that enhances prohibition of conduct normally allowed elsewhere. First Amendment freedoms have indeed been limited in special situations where normally permissible expression in certain contexts amounts to inciting "imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969). Likewise, speech that constitutes a "true threat" rather than "political hyperbole" is generally not protected. *Fullmer*, 584 F.3d at 154 (citation omitted). While the AETA certainly contemplates such situations, hence the re-labeling of § 43 with the word "terrorism," Wheatley's conduct neither rises to the level of incitement or that of a true threat. Reasonable minds may disagree on whether "I'll never be able to eat another egg again" and "the public has to see this to believe it" rise to the level of inciting *imminent* lawless action or are threatening at all. (MO 3:8-10). Indeed, the only result of Wheatley's videos, which reasonable minds may doubt that he purposefully publicly dispersed but for his intervening Facebook friends, was increased media attention and the subsequent public relations efforts. Therefore, Wheatley's conduct is all but certain to be covered by the § 43(d)(3)(B) and § 43(e)(1)-(2) exceptions, further enhancing the propriety of his acquittal.

CONCLUSION

For the foregoing reasons, Louis Wheatley respectfully requests the judgment of the District Court of denial of his acquittal as to Count 1 be REVERSED, and its granting of his acquittal as to Counts 2 and 3 be AFFIRMED.