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
United States District Court for the Central District of California

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BRIEF FOR APPELLANT/CROSS-RESPONDENT

Competition Number 3

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STATEMENT OF ISSUES PRESENTED

1. Does Section 999.2(3) of the Agricultural Products Protection Act violate the First Amendment by regulating expressive conduct that is inextricably linked to the communicative impact of that conduct and by infringing on a substantial amount of protected speech?

2. Should Wheatley's conviction under § 999.2(3) of the Agricultural Products Protection Act be overturned in order to preserve individual expressive liberties on animal facilities regarding matters of public concern?

3. Does the Animal Enterprise Terrorism Act exceed Congressional authority under the Commerce Clause by criminalizing wholly intrastate violence with no connection to a larger regulation of a commodity?

4. Did the District Court properly overturn the jury verdict convicting Wheatley under the Animal Enterprise Terrorism Act when the Government failed to present evidence to establish all of the elements of the crime?

STATEMENT OF THE CASE

In February 2011, a federal grand jury in the United States District Court for the Central District of California issued a three-count indictment charging Louis Wheatley for violations under the Federal Agricultural Products Protection Act ("APPA") and the Animal Enterprise Terrorism Act ("AETA"). Wheatley moved to dismiss the indictment, which the District Court denied. Wheatley was convicted by a jury on all three counts. The District Court granted Wheatley's FRCP Rule 29 Motion for Judgment of Acquittal with respect to the convictions under the AETA, Counts 2 and 3, and vacated those convictions. The District Court denied his motion with respect to the convictions under the APPA, Count 1. Wheatley now appeals to this Court the District Court's denial of his Motion to Dismiss the Indictment and his FRCP Rule 29 Motion for Acquittal with regard to Count 1.

STATEMENT OF FACTS

Louis Wheatley is a journalism student living in California. (R. at 2). In 2010, he took a summer job at Eggs R Us ("the Company") as a poultry care specialist. (R. at 2). One night after

work he posted a video-clip on his personal Facebook page of a worker at the Company tossing living and dead male chicks into an industrial grinder. He commented to his Facebook friends 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 it to believe it." (R. at 3). Two weeks later, Wheatley was arrested and charged with violations of the APPA and the AETA. (R. at 4.)

Wheatley's research into the treatment of farmed animals

Wheatley discovered the plight of farm animals during the California voter initiative to enact the Prevention of Farm Animal Cruelty Act ("Prop 2"). (R. at 2). He broadened his knowledge with online research and joined an animal welfare organization. (R. at 2). Wheatley ultimately realized that he had to work for a commercial farming operation to discover if the claims about inhumane industry standards were actually true. (R. at 2). For example, one of these standard industry practices is to dispose of male baby chicks by grinding, or macerating, them. (R. at 2-3). Animal welfare organizations claim that these male chicks may still be alive when disposed of in this manner. (R. at 3). In June 2010, Wheatley took a job at the Company to learn about these claims. He hoped to write an article about such common industry practices from an unbiased journalistic perspective. (R. at 2).

Wheatley exposes the Company's violations of Prop 2

As an employee, Wheatley observed that the Company's chicken cages provided an average of 48 square inches of floor space for each hen. (R. at 3). California's Prop 2 prohibits confinement of any farm animal that prevents that animal from fully extending their limbs or wings. Cal. Health & Safety Code §§ 25990(a), 25991(f). The cages provided by the Company did not provide enough space for hens to spread their wings. (R. at 3). Wheatley promptly notified his supervisor about the violation of Prop 2 and was told he "needn't be concerned." (R.

at 3). Wheatley then documented these violations by videotaping the conditions at the facility. (R. at 3). In doing so, he captured an unidentified co-worker dumping living male chicks into the grinder. (R. at 3). When Wheatley walked past the chicks at the grinder one particular chick caught his eye. (R. at 4). Wheatley rescued this baby chick from being macerated and then left for the day. (R. at 4). He named this chick "George" and continues to care for him. (R. at 4). Once at home, Wheatley blogged about the Company's violation of Prop 2 and his supervisor's response. (R. at 3-4). He posted the video footage on his personal Facebook page and informed the animal welfare organization he had previously joined. (R. at 3-4).

The Company retaliates against Wheatley

The video of baby chicks being tossed into a grinder has been viewed by 1.2 million people on YouTube. (R. at 3). It has also garnered a flurry of local news reports. (R. at 3). In response to the negative media attention, the Company intends to look into the feasibility of modifying some of its practices. (R. at 4). However, the Company maintains that all allegations of Prop 2 violations are false. (R. at 4). The Company fired Wheatley and informed federal authorities of his actions. (R. at 4). As a result, Wheatley was arrested and charged with violations of the APPA and the AETA. (R. at 4). He was indicted by a federal grand jury on the following charges: Count 1) violating § 999.2(3) of the APPA by entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment; Count 2) violating the AETA, 18 U.S.C. § 43(a)(1) (2006), by using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise; and Count 3) in connection with such purpose, violating 18 U.S.C. § 43(a)(2)(A) (2006) by intentionally damaging or causing the loss of any real or personal property used by an animal enterprise. (R. at 4-5).

STANDARD OF REVIEW

The standard of review for all issues in this case is *de novo.* The court reviews the constitutionality of federal statutes *de novo*. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009). The standard of review on a motion for judgment of acquittal is *de novo*. *United States v. Anaya-Acosta*, 629 F.3d 1091, 1093 (9th Cir. 2011).

SUMMARY OF ARGUMENT

The fundamental framework of the Constitution is protection of individual liberties from government intrusion. This case involves two key components of the Constitution that zealously protect individuals from a run-amuck federal government. These are the First Amendment and the Commerce Clause. Regardless of Congress' opinions about Wheatley's view on animal rights, he deserves and it is prudent he receives the protections afforded to him in the Constitution.

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This clause expresses the fundamental principal that government suppression of expressive conduct is strongly disfavored. The APPA disregards this clear directive by limiting freedom of expression on animal facilities. Section 999.2(3) of the APPA is a content-based restriction of expressive conduct because the government's justification for the statute is inextricably linked to the message of the prohibited activity. As such, the APPA must survive strict scrutiny review. It cannot withstand strict scrutiny because it is both impermissibly underinclusive and overinclusive. Furthermore, this provision of the APPA is also overbroad because it reaches a substantial amount of First Amendment protected activity on a wide array of forums where individuals have a right of expression. Therefore, § 999.2(3) of the APPA is an unconstitutional infringement of First Amendment rights.

Even if the Court upholds § 999.2(3) of the APPA as constitutional, it should overturn Wheatley's conviction under the Act, Count 1, because of the public policy implications of convicting an individual who documented and publicized matters of public concern. Animal welfare and food safety concerns require that speakers, such as Wheatley, are able to publicize instances of animal cruelty and food contamination whenever and wherever they occur.

The Commerce Clause gives the federal government the authority to regulate matters concerning interstate commerce. This authority does not reach wholly intrastate criminal activity unless those activities have a substantial affect on interstate commerce. The AETA is a federal regulation of wholly intrastate criminal activity with an attenuated connection to interstate commerce. This Act turns simple trespass, theft, and harassment into federal crimes without a clear showing of how that intrastate activity has a substantial effect on interstate commerce. Merely because there is an attenuated national cost of crime associated with intrastate criminal activity is not sufficient to establish the necessary connection to interstate commerce. Even the use of a facility of commerce during the crime cannot sufficiently ensure through a case-by-case analysis that the activity regulated does in fact affect interstate commerce. Ultimately, Congress did not have the authority to enact the AETA under the Commerce Clause.

Assuming that the Court determines the AETA is a constitutional exercise of Congress' Commerce Clause authority, the District Court correctly concluded that the Government failed to prove every element of the crime. There are three elements that the Government must prove beyond a reasonable doubt to prove a violation under the AETA. The government failed to present evidence to establish all three elements. Even if the Government during this appeal is able to convince this Court otherwise, the two convictions should still be overturned because the District Court misinterpreted key language in the statute. Wheatley's disclosure of information

about the company inspired reaction from consumers and is therefore exempted activity and should not be used to meet an element of the crime.

Wheatley asks this Court to hold that both the APPA and the AETA are unconstitutional. In the alternative, Wheatley requests that his conviction under the APPA be reversed and the District Court's acquittal of his convictions under the AETA be affirmed.

ARGUMENT

I. SECTION 999.2(3) OF THE APPA IS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE IT IS A CONTENT-BASED RESTRICTION THAT FAILS STRICT SCRUTINY REVIEW AND IS SUBSTANTIALLY OVERBROAD.

A. Section 999.2(3) is a content-based restriction of First Amendment protected expressive conduct and cannot survive strict scrutiny review.

In the presence of a facially content-neutral statute that regulates expressive conduct, as opposed to pure speech, the Court must consider the communicative impact of the regulated conduct. *United States v. Eichman*, 496 U.S. 310, 315-17 (1990). The government regulation cannot be related to the "suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). If the harm the statute purports to prevent "arises as a consequence of the communicative content or impact of" the prohibited expressive conduct then the statute is considered content based. *Boos v. Barry*, 485 U.S. 312, 320-21 (1988). A content-based regulation is subject to strict scrutiny review. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

i. Section 999.2(3) restricts expressive conduct protected by the First Amendment.

The act of videotaping or photographing is expressive conduct protected by the First Amendment provided that (1) a message is communicated and (2) there is an audience that may easily understand the message. *Davis v. Stratton*, 575 F. Supp. 2d 410, 421 (N.D.N.Y. 2008). Videotaping animal facilities on public or limited public forums categorically meets this standard. *Bolbol v. City of Daly*, 754 F. Supp. 2d 1095, 1108 (N.D. Cal. 2010). Section 999.2(3)

restricts the act of recording in animal facilities and therefore fits squarely within the definition of expressive conduct protected by the First Amendment.

ii. Section 999.2(3) is a content-based restriction of expressive conduct because the government's purported interests are inextricably related to the suppression of free expression.

A primary function of the First Amendment is to "invite dispute," and expressive conduct is at its best when "it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Johnson*, 491 U.S. at 408-09. In *Johnson,* the Supreme Court held that a Texas statute that prohibited the expressive conduct of burning the American flag impermissibly "infringed on First Amendment rights" of expression. *Id.* at 399. The Supreme Court reasoned that Texas' purported interest of preserving the flag's representation of American unity was furthered *only* if a person perceives some message from the desecration of the American flag. *Id*. at 410. As a result, the Supreme Court concluded that the government's interest was inextricably related to the suppression of free expression and therefore the statute was content based and subject to strict scrutiny analysis. *Id.*

The government's purported interest in *Johnson* is analogous to the Government's purported interest in enacting the APPA. Both interests hinge on the communicative effects of the prohibited conduct. The Government's purported interest in enacting the APPA is to protect animal facilities from terrorist acts and the loss of business or property. United States v. Wheatley, No. 11-30445, 10 (C.D. Cal. 2011) ("Mem. Op."). The only reason the act of videotaping implicates terrorist activities is if the content of the message in the video causes unrest, dissatisfaction or anger. Moreover, the loss of business is directly linked to the content of the message contained in the video, not the act of taking the video. The implication is that the government wants to restrict the message conveyed in these videos. That message is that the

American food system is not as humane as the public believes it to be. Every individual who viewed Wheatley's video reacted according to this message. The Government's justification for restricting video recording in animal facilities is inextricably linked to the message conveyed in those videos. Thus, § 999.2(3) may be content neutral *on its face*, but it is content based *in operation*.

iii. Section 999.2(3) is not narrowly tailored to any compelling government interest because it is both underinclusive and overinclusive.

A content-based restriction of protected speech activity is presumptively invalid and must pass strict scrutiny review. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). Strict scrutiny requires the regulation be narrowly tailored to a compelling government interest. *Id.* A statute is not narrowly tailored if it is overinclusive or underinclusive when considered in light of the government's asserted justification. *Brown v. Entm't Merchs. Ass'n*, ____ U.S. ____, 131 S. Ct. 2729 (2011) *aff'g sub nom. Video Software Dealers Ass'n v. Schwarznegger*, 556 F.3d 950 (9th Cir. 2009). An underinclusive statute fails to fully advance the government's purported interest. *Id*. at 2740. An overinclusive statute sweeps in more protected speech than necessary to achieve its stated interest. *Id*.

Section 999.2(3) is both underinclusive and overinclusive. It is underinclusive because it singles out protecting animal facilities against terrorist attacks while excluding other facilities traditionally subject to terrorism, such as subway stations, airports or water treatment facilities.[1] The Supreme Court has found such exclusions the product of an underinclsive statute. *Brown*, 131 S. Ct. at 2732. In *Brown*, California justified their statute because of the need to limit minors' access to information about violence. *Id.* at 2732. The Supreme Court concluded that the

[1] Even if the Court assumes the Government meant animal-rights terrorism, the statute is still underinclusive because animal rights terrorism can be focused purely on individuals or corporations without animals at their facilities, such as in an individual's home and the corporate headquarters of pharmaceutical and other tertiary entities doing business with animal facilities.

statute was underinclusive because it did not restrict minor's access to other violent media, such as cartoons or the sale of pictures of guns. *Id*. at 2740. The Supreme Court also questioned why California found it acceptable to allow such "dangerous, mind-altering material" in the hands of children *so long as* they have consent from a parent. *Id*. Similarly, the APPA's allowance of "effective consent" for activity that could implicate a crime as serious as terrorism is equally puzzling. Particularly when that permission may be granted by "anyone authorized to speak for the owner," § 999.1(4), who may represent the lowest-level employee with the least amount of authority or responsibility.

Section 999.2(3) is overinclusive because it bans expressive activity for any facility with animals. Animal facilities such as research laboratories, fur farms, and agricultural facilities are traditionally targeted by the activity the government seeks to prohibit. However, Yellowstone National Park is also an animal facility according to the APPA because animals are "kept" on the premises. § 999.1(2). It is inappropriate to conclude that prohibiting video recording of activities or operations at national parks protects these facilities from terrorism. Not all animal facilities, such as national parks, fear the loss of business or property from patrons capturing video recordings without prior consent. Indeed, the opposite is true in many cases such as zoos, livestock shows, and rodeos that *encourage* such expressive activities. All of these facilities would be within the reach of the APPA. In sum, Section 999.2(3) fails strict scrutiny because it is not narrowly tailored to the governments asserted justification.

B. Even if the Court finds that Section 999.2(3) is content neutral it is still facially overbroad and therefore an unconstitutional restriction of expressive conduct.

Even if this Court agrees with the District Court that § 999.2(3) is subject to First Amendment analysis based on time, place and manner restrictions of a content-neutral regulation, it should still be struck as overbroad. The overbreadth doctrine allows Wheatley to

challenge the constitutionality of the APPA even if it can constitutionally be applied to him. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Section 999.2(3) is unconstitutionally overbroad because it prohibits a substantial amount of expressive conduct related to important social and political issues.

Overbreadth challenges are "strong medicine" and should be employed with "hesistation." *Id*. at 613. Yet, criminal statutes, like the APPA, that punish protected conduct are "ordinarily sufficiently great to justify an overbreadth attack." *Ernoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975). Part of what makes a statute overbroad is the chilling effect on actors who may "refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). A statute that affects expressive conduct is facially unconstitutional only if its overbreadth is *substantial. See Broadrick v. Oklahoma,* 413 U.S. 601 (1973). In order to reach this substantial threshold, the potential unconstitutional applications of the statute must be reasonably numerous in light of the constitutional applications.

i. Section 999.2(3) prohibits a substantial amount of protected speech activity on public, limited public, and nonpublic forums.

A speaker generally does not have First Amendment rights on private property. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980). The First Amendment protects expressive activities conducted on government property when the property meets the standards of public, limited public, or nonpublic forums. *See Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). Public forums are government properties that have been traditionally set aside for public debate; limited public forums are government properties which the government has opened to the public for expressive activity; and nonpublic forums are government properties which are not traditional or designated public forums. *Id.*

When analyzing a statute for overbreadth, the Court must determine what the statute at issue specifically covers. *United States. v. Williams*, 533 U.S. 285, 293 (2008). Section 999.2(3) categorically prohibits people from entering animal facilities and using, or attempting to use, a camera, video or audio recorder in or on animal facilities without prior consent by the owner. § 999.2(3). The term "animal facility" in the APPA is defined to encompass "any vehicle, building, structure, research facility, premise, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale." § 999.1(2).

The activity prohibited by § 999.2(3) is not just prohibited on private property given the broad nature of what is considered an "animal facility." It is also broadly prohibited on animal facilities that are considered public, limited public, or non-public forums. Animal facilities include places owned or controlled by the government such as: fairgrounds, state and national parks, arboretums, botanical gardens, state-run zoos, and the Smithsonian National Zoo. Conventional wisdom provides that people who visit these facilities bring cameras or video recording devices to capture and share the artistic expressions and ideas depicted. Under the APPA, this innocuous activity is unnecessarily chilled by subjecting would-be speakers to criminal liability if they fail to obtain effective consent.

ii. Section 999.2(3) chills the protected speech activity of government employees.

A government employee may engage in expressive conduct involving a matter of "public concern" on traditional public or even limited-public or non-public government forums. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). If the speech addresses a "matter of political, social, or other concern to the community," *Connick*, 461 U.S. at 146-47, or is legitimately newsworthy it is a matter of public concern. *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004). Independent government contractors receive the same protection under the First

Amendment as their public sector counterparts. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996).

Section 999.2(3) impermissibly chills the protected speech activity of government employees and independent government contractors who wish to speak out on matters of public concern. This is especially true in instances where these employees seek to "blow the whistle" on government misconduct in their workplace. Such misconduct could include fraud, waste, abuse, or activity that threatens public health and safety. In fact, federal and state government legislatures increasingly recognize a substantial interest in transparency and efficiency, so they have enacted whistleblower laws to *empower* public employees to take an active role in achieving these interests. In many cases, the most conclusive form of evidence of government misconduct is in the form of photographs, or video and audio recordings. Section 999.2(3), however, expressly *forecloses* this type of evidence.

For example, Congress enacted the Food Modernization Safety Act ("FMSA") to empower those employees closest to the source of the nation's food supply to uncover and report food safety violations. Food Modernization Safety Act, Pub. L. No 111-353, 134 Stat. 3885 (2010). This Act protects employees at all points of food production and distribution – from farm to fork – from employer retaliation. Congress' goals of food safety and employee empowerment in the FMSA are in direct conflict with the APPA. Combined with the First Amendment's goal of creating the opportunity to "inform the community of both sides of the issue," *Wood v. Georgia*, 370 U.S. 375, 391-82 (1962), this conflict silences the messages of those exposing inhumane or unsafe animal welfare practices that threaten food safety.

In sum, § 999.2(3) substantially burdens protected speech because it extends beyond the private property of some animal facility owners and spills over into many public, limited public,

and nonpublic forums. In these forums, § 999.2(3) chills the expressive conduct of government employees who have the right – and indeed are encouraged by legislatures – to speak up on issues of public concern. Therefore, § 999.2(3) is void on its face on account of its substantial overbreadth and should be struck.

II. PUBLIC CONCERN WITH ANIMAL WELFARE AND FOOD SAFETY REQUIRES PROTECTING INDIVIDUAL EXPRESSIVE CONDUCT, LIKE WHEATLEY'S, IN ANIMAL FACILITIES.

Even if this Court finds § 999.2(3) of APPA facially constitutional, unwavering First Amendment jurisprudence recognizes the fundamental right of individual expressive conduct and supports overturning Wheatley's Count 1 conviction.[2] Indeed, the ideas of those concerned with animal welfare contribute to the general public debate. *See Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty*, *U.S.A., Inc.*, 29 Cal. Rptr. 3d 521, 536 (2005). Section 999.2(3) impeded Wheatley's right of individual expressive conduct related to the most critical public issues regarding public health and safety.

Congress recently acknowledged that the humane treatment of animals is an important social interest. *United States. v. Stevens*, ___U.S.___, 130 S. Ct. 1577, 1585 (2010). Justice Alito stated in his dissent in *Stevens* that "depictions created to focus attention on methods thought to be inhumane" may have journalistic or educational value. *Id.* at 1597 (Alito, J. *dissenting*). In particular, California citizens have placed high value on animal welfare as evidenced by the fact that Prop 2 was passed by 63% of voters by ballot referendum in 2008. Cal. Health & Safety Code §§ 25990, 25991 (2008). In light of the substantial statutory and public support for animal welfare, it is imperative that speakers, such as Wheatley, are able to publicize instances of animal cruelty whenever and wherever they occur.

[2] The necessity defense is unavailable to Wheatley. Even though he was not engaging in acts of civil disobedience, Wheatley's expressive activity of videotaping animal cruelty was not in response to an "imminent harm."

Photographs and videos are powerful forms of communication and are instrumental in exposing the unsafe and unsanitary conditions that jeopardize food quality and safety in some animal facilities. The release of photos and videos to the American public and administrative officials have resulted in food recalls and property the enforcement or enactment of regulations all across the country. *Undercover Investigations,* Minnesota Voters for Animals Protection, http://votersforanimals.org/issues-legislation/current-legislation-2011-2012/minnesota-legislators-aim-to-ban-whistleblowers-from-exposing-inhumane-conditions-in-puppy-mills-and-factory-farms/undercover-investigations/ (last visited Jan. 22, 2011) (listing occurrences of undercover videos at animal facilities that led to criminal convictions of farm workers shown abusing animals in California, New Jersey, and Vermont and national food safety recalls as a result of contaminated eggs and meat.)

The ability to document instances of cruelty or unsafe conditions using the best evidence is critical. This is particularly pertinent to Wheatley. After informing his supervisor of legitimate animal welfare concerns, he was not assured that appropriate action would be taken. Wheatley's subsequent documentation of the conditions at the facility ultimately resulted in widespread public awareness. In light of Wheatley's video, that undoubtedly added to the ongoing debate regarding matters of public health and animal welfare, his conviction should be overturned.

III. THE ANIMAL ENTERPRISE TERRORISM ACT IS A NON-ECONOMIC REGULATION OF INTRASTATE CRIMINAL CONDUCT THAT DOES NOT HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

The Constitution prohibits Congress from converting its authority "under the Commerce Clause to a general police power of the sort retained by the States." *Gonzales v. Raich*, 545 U.S. 1, 45 (2005). The Supreme Court has firmly upheld this prohibition as fundamental to our dual system of government by refusing to allow federal action that "would effectually obliterate the

distinction between what is national and what is local." *United States v. Lopez*, 514 U.S. 549, 557 (1995) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37(1937)). The Commerce Clause limits Congressional action to three categories of activity. Congress can (1) "regulate the use of the channels of interstate commerce;" (2) "regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce;" and (3) "regulate those activities having a substantial relation to interstate commerce, i.e. those activities that substantially affect interstate commerce." *Lopez,* 514 U.S. at 558-59; *United States v. Alderman*, 565 F.3d 641, 646 (9th Cir. 2009).

A. <u>The AETA cannot be sustained as a regulation of an instrumentality of commerce and must be reviewed as a regulation of intrastate activity having a substantial effect on interstate commerce.</u>

The only function of the court is to determine if the "particular activity regulated" by the AETA "is within the reach of federal power." *Perez v. United States*, 402 U.S. 146, 152 (1971). The Court must first ascertain what "particular activity" is regulated before it can decide if that activity is within the reach of federal power. Jurisdictional language within the statute can speak to the reach of federal power, "but will not primarily define the behavior that the statute calls a 'violation' of federal law." *Scheidler v. Nat'l Org. for Woman, Inc.*, 547 U.S. 9, 17-18 (2006) (citing *Jones v. United States*, 529 U.S. 848, 854 (2000)).

The AETA criminalizes the "damage or interference with the operations of an animal enterprise." 18 U.S.C. § 43(a)(1) (2006). The sort of damage that would result in a violation of the Act could be either economic damage, i.e. the loss of profits, or personal property damage, i.e. the loss of records or animals. 18 U.S.C. §§ 43(a)(2)(A); (d)(3)(A) (2006). The activity regulated by this provision of the AETA is theft. The Act also criminalizes conduct such as threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation. 18

U.S.C. § 43(a)(2)(B)(2006). All of this regulated activity occurs wholly intrastate and is traditionally within the purview of state police power.

Wholly intrastate activity can be regulated by the federal government only if there is a sufficient federal connection to interstate commerce. Federal statutes that regulate channels and instrumentalities have a plain and clear relationship to interstate commerce. *Perez*, 402 U.S. at 150 (explaining that "the shipment of stolen goods" is a regulation of a channel and "the destruction of an aircraft" is a regulation of an instrumentality). In the absence of such a clear connection to interstate commerce, the federal statute "must employ some mechanism to ensure that federal regulation in fact regulates persons or things in interstate commerce," which has traditionally been "achieved by a jurisdictional element." *United States v. Bird*, 124 F.3d 667, 674 (5th Cir. 1997). Such an element ensures through a "case-by-case inquiry" that the government can establish an actual effect on interstate commerce. *Lopez*, 514 U.S. at 561-62.

One of the elements the government must prove to establish a violation of the AETA is that the alleged violator either traveled in interstate commerce or used a facility of interstate commerce. 18 U.S.C. § 43(a) (2006). This is the jurisdictional element. The presence of this element indicates the absence of a clear connection to interstate commerce. This is indicative of a statute that only has an effect on interstate commerce.

The government's position that the AETA is a regulation of the internet and, as such, a valid regulation of an instrumentality of commerce is misguided. This argument exploits the jurisdictional element as "the behavior that the statute calls a violation of federal law." *Scheidler*, 547 U.S. at 17-18. The Supreme Court in *Scheidler* expressly rejected this use of jurisdictional language to define the activity regulated by a statute. *Id.* The government further suggests that the AETA punishes conduct that "interferes with, obstructs or prevents" the interstate commerce

of animal enterprises and, as such, can be maintained as a protection of an instrumentality of commerce. (Mem. Op. at 14-15). If the AETA defined "animal enterprise" as only those facilities engaged in interstate commerce, then this position would be tenable. However, no such limitation exists in the statute. 18 U.S.C. § 43(d)(1) (2006).

The AETA can only be sustained, if at all, as a regulation of activity that substantially affects commerce. To determine if the regulated activity substantially affects commerce the Court must evaluate the following four factors; (1) "whether the statute has anything to do with 'commerce;" (2) "whether the statute contains an 'express jurisdictional element;'" (3) "whether the 'legislative history contain[s] express congressional findings regarding the effects upon interstate commerce;'" and (4) "whether the link between the regulated activity and the effect on interstate commerce is too 'attenuated.'" *San Luis & Delta-Mendota Water Auth. v. Salazar*, 683 F.3d 1163, 1174 (9th Cir. 2011) (citing *United States v. Morrison*, 529 U.S. 598 (2000)).

B. The AETA is a criminal statute that by its terms has nothing to do with commerce.

Where the activity regulated in the federal statute is "economic activity," then the regulation of "that activity will be sustained." *Raich*, 545 U.S. at 25. The Supreme Court has upheld federal laws that regulate coal mining, extortionate credit transactions, restaurants, and the production and consumption of wheat. *Lopez*, 514 U.S. at 559-60. The regulated activity in these statutes was economic. An "economic activity" is "the production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25-26. If the regulated activity is not itself economic, then Congress can regulate that activity *only* if the failure to regulate that class of non-economic activity "would undercut the regulation of the interstate market in [a] commodity." *Id.* at 18.

The AETA is a criminal statute that does not regulate economic activity. The regulated activity is wholly intrastate animal-rights-motivated crime. *Supra* at 16. The Supreme Court in *Morrison* held that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. Similarly, animal-rights-motivated crimes cannot be classified as economic activity. Moreover, theft, trespass, and intimidation are not "the production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25-26.

The activity regulated by the AETA, animal-right-motivated crime, is not itself commercial and can only be sustained if failure to regulate this class of activity would undercut the regulation of the interstate market in a commodity. Crucial to this determination is that the regulated activity must be "an essential part of a larger regulation of economic activity." *Raich*, 545 U.S. at 24-25. In *Raich*, the Supreme Court explained that the Controlled Substances Act was one part of a larger regulation, the Comprehensive Drug Abuse Prevention and Control Act, which "was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of controlled substances." *Id.* at 24. As such, the Supreme Court found that regulating Raich's wholly intrastate possession and production of marijuana for home use was an essential part of regulating a lucrative interstate market in that commodity. *Id.* at 26.

On the other hand, the Supreme Court in *Morrison* reasoned that the Violence Against Women Act only regulated gender-motivated violence and was not part of any larger regulation of a commodity. *Morrison*, 539 U.S. at 613. Gender-motivated violence is not a commodity. Marijuana is a commodity and a federal statute regulating this commodity was upheld. *Raich*, 545 U.S. at 26. Wheat is a commodity and a federal statute regulating this commodity was

upheld as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560; *Wickard v. Filburn*, 317 U.S. 111 (1942).

The AETA is the Violence Against Women Act except that its focus is on animal-rights-motivated crime. The AETA is a single-page statute and has absolutely no connection to any other regulation. This is not to say there are no federal statutes governing animals as commodities. In fact, there are numerous federal regulations aimed at ensuring a minimum level of humane treatment of these animals. *See e.g.*, Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1907 (1958); Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1976). However, the AETA is inherently contradictory to this comprehensive regulatory scheme. For instance, if anyone exposes a violation of one of the federal statutes listed above, they would likely be in violation of the AETA. A statute that is counterproductive to the existing regulation of a commodity cannot be "an essential part" of that larger regulation. *Raich*, 545 U.S. at 24-25.

C. <u>The AETA's jurisdictional element is essentially meaningless because there is nothing to ensure, through a case-by-case inquiry, that the prohibited conduct has a substantial effect on interstate commerce.</u>

A jurisdictional hook "is not always 'a talisman that wards off constitutional challenges.'" *Alderman*, 565 F.3d at 648. The purpose of an "express jurisdictional element [is to] limit [a statute's] reach to a discrete set" of activity that has "an explicit connection with or effect on interstate commerce." *Lopez, 514 U.S. 549*, 562 (1995). The Ninth Circuit has recognized that some jurisdictional elements are "almost useless" and can be rejected as "essentially meaningless" if they fail to achieve the purpose of a jurisdictional hook. *Alderman*, 565 F.3d at 647.

In our current world of constant online communication, a jurisdictional element that relies on the use of a facility of commerce, in other words a phone, internet, email, fax, etc., is so

broad as to encompass just about every activity imaginable. Our society today uses Facebook, YouTube, and text messages in lieu of face-to-face communication. Recognizing this aspect of our modern culture, it is impossible to use these facilities of commerce as a way of distinguishing what is truly local and what is truly national. For example, an individual can be prosecuted under the AETA if they post a message on Facebook about an entirely intrastate small bee farm. This is because the statute does not limit its application to animal enterprises engaged in interstate commerce. As a result, the AETA's jurisdictional element fails to achieve the purpose of a jurisdictional hook.

D. The Congressional record for the AETA attempts to link the activity regulated to a substantial effect on interstate commerce by the same "cost of crime" reasoning that the Supreme Court rejected in *Lopez* and *Morrison*.

"[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557. Rather, whether or not a particular activity "affect[s] interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question." *Id.* at 549; *United States v. Cortes*, 299 F.3d 1030, 1036 (9th Cir. 2002).

There are no express congressional findings in the AETA itself. 18 U.S.C. § 43 (2006). The legislative history offers a few, tenuous at best, connections to interstate commerce. One of the main assertions throughout the congressional record is that "[t]he true victims of the illegal acts of terrorism are . . . all members of society" because the "ultimate cost is levied against those who enjoy an abundant nutritious food supply." 135 Cong. Rec. E3079-3080 (daily ed. Sept. 19, 1989) (statement of Rep. Charles Stenholm). The legislative history also suggests that the threats from animal rights terrorism is a "strong disincentive to young people against entering careers in biomedical research if they see themselves as potential subjects of such terrorism. The

costs of those lost opportunities are incalculable." *Animal Research Facility Prot.: Joint Hearing Before the Subcomm. on Dep't Operations, Research, and Foreign Agric. and the Subcomm. on Livestock, Dairy, and Poultry of the Comm. on Agric.*, 101st Cong. 36 (1990) (testimony of William Raub, Acting Director of NIH).

Congress cannot rely on the "costs of crime" for the power to regulate "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Cortes*, 299 F.3d at 1035. This is exactly what the legislative history shows that Congress has attempted to do with the AETA.

E. The AETA intrudes on issues which are historically local concerns and are outside the regulatory power of the federal government.

The Supreme Court struck down a Congressional attempt to federally criminalize gender motivated crimes by reminding Congress that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618-19. Good intentions cannot save a federal law that usurps state police power.

In *Morrison*, the Supreme Court reminded Congress that they lacked a general police power when faced with a federal act that merely granted victims of violent crime a civil remedy. *Morrison*, 549 U.S at 601-02. The AETA has reached much further into the state police power by labeling animal-rights-motivated crime as terrorism. The AETA does not stop here. This Act intrudes so far into traditional state police power that it prevents enforcement of the state's criminal laws, a well-recognized exercise of a state's police power. *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("States possess primary authority for defining and enforcing the criminal law. . . Federal intrusions . . . frustrate [ ] the States' sovereign power to punish offenders."). Wheatley's conduct documented violations of California's Prop 2. Cal. Health & Safety Code § 259900.

These violations are not being prosecuted by the state. Instead, Wheatley's exposure of violations of California law is the basis of his federal conviction under the AETA.

This does not even begin to define the chilling effect that federal prosecution of the exposure of state animal cruelty violations will have on employees in other companies, in California and in other states. "All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty." *Stevens*, ___U.S. ___, 130 S. Ct. 1577, 1598 (2010) (Alito, J. *dissenting*). If an intrusion of this magnitude into state police power is allowed to stand, it is not hard to imagine the national implications of prosecuting this sort of whistleblowing activity.

In sum, the AETA cannot be sustained as a regulation of activity that has a substantial effect on interstate commerce. It regulates wholly intrastate criminal activity on the basis of a meaningless jurisdictional element and an attenuated "cost of crime" connection to interstate commerce that the Supreme Court has rejected.

IV. THE DISTRICT COURT PROPERLY OVERTURNED THE JURY CONVICTIONS UNDER COUNTS 2 AND 3 BECAUSE THE GOVERNMENT FAILED TO ESTABLISH ALL THE ELEMENTS NECESSARY TO PROVE A VIOLATION OF THE ANIMAL ENTERPRISE TERRORISM ACT.

The prosecution must "prove every element of a criminal offense beyond a reasonable doubt." *Mendez v. Knowles*, 556 F.3d 757, 768 (9th Cir. 2009) (citing *In re Winship,* 397 U.S. 358, 363-64 (1970)). "There is sufficient evidence to support a conviction if, 'viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hernandez-Franco*, 189 F.3d. 1151, 1155 (9th Cir. 1999). There are three elements of a violation of the AETA; (1) the jurisdictional element, either (a) the defendant traveled in interstate commerce or (b) used a facility of interstate commerce; (2) the defendant must have acted with the purpose of either damaging or interfering with the operations of an animal enterprise and; (3) in connection

with this purpose, either (a) intentionally caused damage, (b) intentionally caused fear, or (c) conspired or attempted to do so. 18 U.S.C. § 43(a) (2006).

A. The District Court properly overturned Wheatley's conviction on Count 2, but broadly interpreted "damaging," "operations," and "interfered" to include activity expressly excluded from the reach of the AETA.

The District Court correctly concluded that Wheatley's use of the internet, via Facebook and blogging, satisfied the jurisdictional element of the crime. However, the District Court's analysis of the terms "damaging," "operations," and "interfered" (components of the purpose element of the crime) are contrary to key provisions defining the scope of the AETA. Wheatley's conduct does not meet the purpose element of the crime when these three key terms are read in conjunction with the rest of the Act. Even if this Court disagrees, Wheatley's conviction still must be overturned because as the District Court found, there was no evidence to support the third element of the crime – actual or attempted damage to the animal enterprise.

Fundamental to statutory interpretation is "that a section of a statute should not be read in isolation from the context of the whole Act." *Richards v. United States*, 369 U.S. 1, 10-11 (1962); *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 805 (9th Cir. 1994). The terms "damaging," interfering," and "operations" are not defined in the statute. The District Court concluded that damaging or interfering with operations of an animal enterprise could certainly include economic loss. (Mem. Op. at 17). This interpretation is consistent with the "Penalties" section of the AETA, which lists increased levels of punishment based on the increased economic damage caused. 18 U.S.C. § 43(b) (2006). The statute defines "economic damage" as including loss of profits and increased costs. 18 U.S.C. § 43(b)(3)(A) (2006). However, absent from the District Court's interpretation is the part of the definition of "economic damage" that categorically excludes "any lawful economic disruption (including

lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise." 18 U.S.C. § 43(d)(3)(B) (2006). Therefore, if a person discloses information about an animal enterprise that results in loss profits, those economic damages should not be considered within the scope of the Act.

The District Court has deprived this exclusionary provision of all meaning by holding that Wheatley's purpose for disclosing information about the Company's operations, to allow the public to make an informed decision, satisfies the damaging purpose element of the crime. (Mem. Op. at 17). Wheatley disclosed information about the Company and explained that "[t]he public has to see this to believe it." (Mem. Op. at 3). A consumer has a right to make a determination about their purchases based on information disclosed about the Company. This is precisely the sort of activity that would fall under this exclusion. The evidence shows that Wheatley's purpose was to disclose information about the company. As such, even if the Government presented evidence to prove the third element of Count 2, it should still have been overturned.

B. The District Court properly overturned Wheatley's conviction on Count 3 because of the lack of evidence establishing both the jurisdictional requirement and a damaging or interfering purpose.

The District Court correctly found that there was not enough evidence to convict Wheatley under Count 3 because the Government failed to present facts to satisfy the first two elements of the crime. First, there are no facts to meet the jurisdictional requirement. Wheatley lives and works in California. (Mem. Op. at 2). There is no evidence that he traveled in interstate commerce in order to rescue the baby chick named "George." Furthermore, the Government did not present evidence that Wheatley used a facility of commerce when rescuing "George." Second, there was no evidence presented by the Government that Wheatley rescued "George" for

the “purpose of damaging or interfering with the operations” of an animal enterprise. Wheatley’s explanation that “this one chick caught his eye and he just couldn’t walk away from him” is not refuted by the Government. (Mem. Op. at 4). As a result, the record can only support the District Court’s conclusion that Wheatley took George “for the purpose of saving one chicks life.” *Id*.

In conclusion, the District Court properly overturned Wheatley’s convictions under the AETA. The Government failed to present evidence relating to all three elements of the crime for both Counts 2 and 3. In light of this lack of evidence, this Court must affirm the District Court’s ruling on Counts 2 and 3.

CONCLUSION

For all the aforementioned reasons, this Court must find the APPA and the AETA unconstitutional. In the alternative, this Court should affirm the District Court’s ruling as to Counts 2 and 3 and reverse the ruling as to Count 1.

Respectfully submitted,

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Competition Number 3