UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 11-11223

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 OF APPELLANT/ CROSS-RESPONDENT LOUIS WHEATLEY

Team # 4

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Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 4

I. WHEATLEY'S CONVICTION SHOULD BE OVERTURNED BECAUSE FEDERAL LAW § 999.2(3) UNCONSTITUTIONALLY VIOLATES THE FIRST AMENDMENT FREE SPEECH CLAUSE OF THE UNITED STATES CONSTITUTION BOTH ON ITS FACE AND AS APPLIED 5

A. Standard of Review 6

B. The Statute is Facially Overbroad Because It Does Not Adequately Limit or Define "Animal Facility," "Use of Audio or Video Recording Equipment," or "Effective Consent." 6

C. Fed. Law § 999.1-4 is Unconstitutionally Vague on its Face Because Citizens Do Not Have Clear Notice As To What Conduct Is Prohibited. 9

D. Section 999.2(3) is Void As Applied Because its Content Based and Its Exposure into Animal Enterprises Are Its Secondary Effects 12

II. FEDERAL LAW § 999.2(3) SHOULD BE OVERTURNED BECAUSE IT VIOLATES PUBLIC POLICY AND WHEATLEY'S ACTIONS WERE JUSTIFIED UNDER THE DEFENSE OF NECESSITY. 17

A. As a Matter of Public Policy, Louis Should Not Be Punished for Revealing Company's Wrongful Acts 17

B. Standard of Review 20

C. Louis's Conviction Should Be Overturned Because He Meets All Four Prongs Required Under the *Schoon* Test. 20

III. THE UNITED STATES CONGRESS EXCEEDED ITS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION WHEN ENACTING 18 U.S.C. 43. 22

A. Standard of Review 23

B. General Principles: Commerce Clause 23

C. Limits on the Commerce Clause 23

1. 18 U.S.C. 43 Does Not Regulate Channels Of Interstate Commerce 24

2. 18 U.S.C. 43 Does Not Regulate Or Protect The Instrumentalities, Or Persons Or Things In Interstate Commerce 24

3. 18 U.S.C. 43 Does Not Regulate Activities Having A Substantial Relation To Interstate Commerce 27

IV. THE DISTRICT COURT PROPERLY OVERTURNED THE JURY VERDICT CONVICTING LOUIS UNDER COUNTS 2 AND 3 AS 18 U.S.C. 43 DOES NOT APPLY TO LOUIS 'S CONDUCT UNDER THE EVIDENCE PRESENTED IN THIS CASE. 29

A. Standard of Review 30

1. The Government Failed To Provide Sufficient Evidence That Louis's Conduct Meets AETA's Two Requirements 30

2. Louis 's Conduct Did Not Incite Future, Imminent Unlawful Conduct And Is Therefore Protectable Under The First Amendment. 31

CONCLUSION 33

TABLE OF AUTHORITIES

United States Supreme Court Cases

Am. Civil Liberties Union, 535 U.S. 564 (2002). 5

Ashcroft v. ALCU, 542 U.S. 656 (2004). 13

Boos v. Barry, 485 U.S. 312 (1988). 13

Broadrick v. Oklahoma, 413 U.S. 601 (1973). ..... passim

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). 11

City of Chicago v. Morales, 527 U.S. 41 (1999). 9, 10

Coates v. City of Cincinnati, 402 U.S. 611 (1971). 5, 9

Connally v. Gen. Constr. Co., 269 U.S. 385 (1926). 9

Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Commn., 447 U.S. 530 (1980). 12

Glasser v. United States, 315 U.S. 60 (1942). 26

Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996) 22

Houston v. Hill, 482 U.S. 451 (1987). 7

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) 21

Niemotko v. Maryland, 340 U.S. 268 (1951). 12, 14

Perez v. United States, 402 U.S. 146 (1971). 21

Perry Educ. Ass'n. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). 12

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). 11

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992). 11

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). 13

Shreveport Rate Cases, 234 U.S. 342 (1914). 21

Simon & Schuester, Inc., 502 U.S. at 116. 11

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 11

United States v. Bird, 124 F.3d 667 (5th Cir. 1997). 22

United States v. Lopez, 514 U.S. 549 (1995). 20, 21, 24, 25

United States v. Morrison, 529 U.S. 598 (2000). 24

United States v. Playboy Entm't Grp, Inc., 529 U.S. 803 (2000). 12

United States v. Schoon, 971 F.2d 193 (1991). 18, 19

United States v. Stevens, 130 S. Ct. 1577 (2010). 5, 6, 8, 11

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008). 6

United States Court of Appeals Cases

Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996). 6

Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998). 6

Raich v. Gonzales, 500 F.3d 850 (9th Cir. 2007). 17

United States v. Aguilar, 883 F.2d 662 (9th Cir.1989). 18

United States v. Fullmer, 584 F.3d 132, 154 (3d Cir. 2009). 28, 29

United States v. Weatherly, 525 F.3d 265 (3d Cir. 2008). 20

Constitutional Provisions

U.S. CONST. amend. I, § 3. 5

US CONST., Art. I, § 8, cl. 3. 20

Statutory Provisions

Cal. H&S Code § 25991. 15

Cal. H&S Code §§ 25990. ..... 15, 18

Fed. Law § 999.1-4. 8

Fed. Law § 999.2(3). 5, 13, 14

Secondary Sources

LaFave, Substantive Criminal Law § 9.1(a) (2d ed. 2003 & Supp.2005). 18

Amy Sabrin, Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?, 102 Yale L.J. 1209, 1220 (1993). 12, 13

Dean G. Kilpatrick, Ph.D., Definitions of Public Policy and the Law, Medical University of South Carolina Jan. 14, 2012) http://www.musc.edu/vawprevention/policy/definition.shtml.15

Merriam-Webster (Jan. 3, 2012) http://www.merriam-webster.com/dictionary/eco-terrorism. .. 16

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Federal Law § 999.2(3) violates the First Amendment Free Speech Clause of the United States Constitution because (i) as applied, the statute is content-based and its secondary effects prohibit speech against animal enterprises, (ii) the statute is facially overbroad because it generalizes "animal facilities," (iii) and finally, the statute is facially vague because a reasonable person does not understand what the statute prohibits, therefore, chilling free speech.

II. Count 1 of Louis Wheatley's conviction should be overturned because (i) as a matter of public policy, Louis should not be punished for exposing the wrongful and illegal acts of Egg's R US, (ii) Louis's concern over the lawful treatment of the well-being of animals is a matter of public concern, and (iii) Louis's actions allow for the invocation of the defense of necessity.

III. The United States Congress exceeded its Congressional authority under the Commerce Clause of the United States Constitution when enacting 18 U.S.C. 43. as the statute (1) does not regulate channels of interstate commerce; (2) does not regulate or protect the instrumentalities, or persons or things in interstate commerce; and (3) does not regulate activities having a substantial relation to interstate commerce

IV. The District Court properly overturned the jury verdict convicting Louis under Counts 2 and 3 as 18 U.S.C. 43 does not apply to Louis's conduct under the evidence presented in this case since (1) the Government failed to provide sufficient evidence that Louis's conduct meets AETA's two requirements; and (2) Louis 's conduct did not incite future, imminent unlawful conduct and is therefore protectable under the First Amendment.

STATEMENT OF THE CASE

This case involves the defendant, Louis Wheatley, who simply made two videos recording the working conditions and activities of the Company's facility and rescuing a baby male chick. The Company notified federal authorities of these acts and Louis was arrested and charged with violations of the Animal Enterprise Terrorism Act ("AETA") and the Federal Agricultural Products Protection Act ("APPA"). APPA and the AETA.

In February of 2011, a federal grand jury sitting in the Central District Court of California returned a three-count indictment against Louis, a resident of California, charging him with (1) entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment, 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 a purpose, intentionally damaging or causing the loss of any real or personal property (including animal or records) used by an animal enterprise, in violation of AETA, 18 U.S.C. §43(a)(2(A). Louis filed a motion to dismiss the indictment, asserting that §999.2(3) of the APPA violates the First Amendment, that AETA exceeds congressional authority under the Commerce Clause, and as a matter of law and public policy, he should not and cannot be convicted for conduct that brings to light illegal conduct of others.

The United States District Court for the Central District of California denied Louis's motion on all counts and allowed the case to proceed to jury. At trial, the jury convicted Louis of all three counts. Louis then filed an FRCP Rule 29 motion for judgment of acquittal, asserting anew all of the argument he previously raised on his motion to dismiss the indictment, also presenting argument on the evidence as well. The Court denied the motion as to Count 1 but granted the motion as to Count 2 and 3.

Defendants appeals the District Court's denial of his motion to dismiss the indictment and the District Court's subsequent denial of his Federal Rules of Criminal Procedure, Rule 29, motion for judgment of acquittal as to Count 1 of the jury verdict against him. The United States appeals the District Court's grant of Wheatley's motion as to Counts 2 and 3, and the District order vacating Louis's conviction on Counts 2 and 3.

STATEMENT OF THE FACTS

On June 1, 2010, Louis Wheatley ("Louis") started working as a poultry care specialist at Eggs R Us ("the Company") as he needed a job to help pay for college. (R. at 2). During his employment, Louis learned about two conditions of farmed animals common in animal

enterprises: (1) male chicks are a byproduct and waste product of the egg industry and (2) hens are confined in a manner that prevents them from spreading their limbs or wings. (R. at 2-3).

For the first condition, evidence at trial revealed that a customary industry practice is to dispose of baby male chicks by tossing them into piles and grinding, or macerating them. (R. at 2-3). At the point of maceration, the chicks may be alive or already dead. (R. at 3). In fact, in 1998, 219 million chicks were killed by the commercial egg industry. (R. at 3). To raise public awareness of this condition, Louis on or about June 17, 2010 made a four minute video of this act and posted it to his personal Facebook page that evening with the comment: "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." (R. at 3). Afterward, one of Louis's Facebook friends posted the video on YouTube. (R. at 3).

As for the second condition, Louis saw that the Company kept an average of six egg-laying hens in a cage with a floor area approximately 16 inches by 18 inches, providing an average of 48 square inches of floor space for each hen, and clearly not enough space for hens to flap their wings. (R. at 3). Louis asked his supervisor about this but his supervisor indicated that it was of no concern. (R. at 3). Prop 2 prohibits confining farm animals in a manner that prevents them from spreading their limbs or wings. Cal. H&S Code §§ 25990(a) and 25991(f). In response, Louis made a second, shorter video of the hens in the battery cages, which he also posted on Facebook and then, blogged about this condition. (R. at 3-4).

The public had a strong interest in these videos and media attention led the Company making public statements denying all allegations regarding violations of Prop 2. (R. at 4). Fortunately, the Company is looking into the feasibility of modifying some of its practices in its California facility. (R. at 4).

In addition to the videos, Louis bravely rescued a male chick that was on the top of the pile of living and dead chicks at the grinder. (R. at 4). Louis testified that this one chick in particular caught his eye and he just could not walk away from him so he placed the chick in his coat pocket and took the chick to his home. (R. at 4).

SUMMARY OF THE ARGUMENT

The District Court incorrectly denied Louis's Motion for Judgment of Acquittal under Count 1 of the Jury Verdict against him because § 999.2(3) violates the First Amendment Clause of the United States ("U.S.") Constitution and should be void as a matter of public policy. First, the statute is void on its face because it over generalizes where individuals may take audio or video in an animal facility. The statute is also void on its face because it is impermissibly vague and does not adequately define several important terms of the statute, such as "effective consent." Moreover, the statute is void in its application because it intentionally discriminates based off of the content of the message, therefore precluding exposure of certain animal enterprises unethical, and as in this, illegal, operations. Second, § 999.2(3) should be overturned because it violates public policy because individuals should not be criminally punished for exposing the illegal acts of others, particularly if they are a commercial enterprise. Finally, Count 1 should be dismissed under the defense of necessity because Louis believed that he could deter the Company's unlawful acts by documenting the violations.

However, the District Court correctly granted Louis's motion for judgment of acquittal of Counts 2 and 3 because the U.S. Congress exceeded its congressional authority under the Commerce Clause of the U.S. Constitution when enacting 18 U.S.C. 43. First, 18 U.S.C 43 does not regulate channels of interstate commerce because the statute regulates criminal conduct in the animal enterprise industry. Second, 18 U.S.C. 43's main purpose does not regulate or protect

the instrumentalities, or persons or things in interstate commerce, but rather criminal conduct in animal enterprises. Third, 18 U.S.C. 43 does not regulate activities having a substantial relation to interstate commerce because its not economic in nature. Finally, 18 U.S.C. 43 does not apply to Louis's conduct in this case because the government failed to provide sufficient evidence to meet its requirements and Louis's conduct did not incite future, imminent unlawful conduct, therefore it is protected under the First Amendment.

ARGUMENT

I. WHEATLEY'S CONVICTION SHOULD BE OVERTURNED BECAUSE FEDERAL LAW § 999.2(3) UNCONSTITUTIONALLY VIOLATES THE FIRST AMENDMENT FREE SPEECH CLAUSE OF THE UNITED STATES CONSTITUTION BOTH ON ITS FACE AND AS APPLIED

The First Amendment states, "Congress shall make no law … abridging the freedom of speech." U.S. CONST. amend. I, § 3. "[A]s a general matter, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

The Supreme Court has said that laws that plainly forbid conduct that is constitutionally protected conduct may be void either on their face or merely as applied in certain instances. *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971). The challenged statute at issue, under the Agriculture Products Protection Act ("APPA), states, "No person who uses, or causes to be used, the mail or any facility of interstate or foreign commerce may without the effective consent of the owner may…[e]nter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment." Fed. Law § 999.2(3).

A. Standard of Review

Courts review constitutional issues de novo. *Cohen v. San Bernardino Valley Coll.,* 92 F.3d 968, 971 (9th Cir. 1996); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998).

B. The Statute is Facially Overbroad Because It Does Not Adequately Limit or Define "Animal Facility," "Use of Audio or Video Recording Equipment," or "Effective Consent."

The Supreme Court has recognized that a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 130 S. Ct. at 1587, *citing Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449, n. 6 (2008) (internal quotation marks omitted). It has been the judgment of the Supreme Court that "the possible harm to society in permitting some unprotected speech to go unpunished is *outweighed* by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Id.* at 615. (emphasis added). In fact, litigants may be allowed to challenge statutes where court may predict or assume that statute's very existence may cause others not before court to refrain from constitutionally protected speech or expression. *Id.* at 613.

When challenging a statute for overbreadth, there are two major aspects of the doctrine. First, a law must be substantially overbroad; that is, it must restrict significantly more speech than the Constitution allows to be controlled. For example, the Court has said that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep . *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Therefore, in order to show a substantial overbreadth, one must demonstrate a significant number of situations where a law

could be applied to prohibit constitutionally protected speech. For example, in *Houston v. Hill*, the Court declared unconstitutional an ordinance that made it unlawful to interrupt police officers in the performance of their duties. 482 U.S. 451, 455 (1987).The Court later determined the law unconstitutional because it said that the ordinance criminalize[d] a substantial amount of constitutionally protected speech. *Id.*

Second, a person to whom the law constitutionally may be applied can argue that it would be unconstitutional to others. *Broadrick*, 413 U.S. at 610. This is an exception to the general standing issue that requires people to assert their own rights. *Id.* Thus, the Court has recognized the overbreadth doctrine as "strong medicine" because individuals who otherwise could be constitutionally punished are allowed to go free. *Id.* at 613.

Finally, overbroad restrictions touching speech are particularly repugnant when they carry criminal sanctions. *State v. Hauge*, 1996 SD 48, 547 N.W.2d 173 (S.D. 1996). If a statute criminalizes a substantial amount of constitutionally protected speech, it is unconstitutionally overbroad even if it has some legitimate application. *State v. Kilburn*, 151 Wash. 2d 36, 84 P.3d 1215 (2004), as amended, (Feb. 17, 2004).

There are a significant number of situations where § 999.2(3) could be applied to prohibit constitutionally protected speech. *See Broadrick*, 413 U.S. at 615. For example, the statute includes the term "animal facility" and defines that as "any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale." Additionally, almost all companies that handle an animal in any way are considered an "animal facility" under this statute. Any research facilities that have any living organisms (other than plants or bacteria) on the premise, any fishing boats that have live fish onboard, any grocery trucks that contain live animals, the list could go on and on, are affected by

this statute. Thus, all individuals that enter any of these "animal facilities" are prevented from using any audio or video recording equipment within the facility without "effective consent." Therefore, when read literally, an individual is not permitted to bring any audio or video recording device into many common places that many of us visit frequently. Almost all grocery stores handle, house, exhibit, and offer live animals for sale; one example would be "Live Maine Lobster." Consequently, any person who enters a grocery store and uses a camera to take a picture of their friend or of a product in the store that they want to post on facebook is in clear violation of § 999.2(3) unless they get "effective consent" from the owner. Moreover, under the statute as it stands, an individual cannot take audio or video recording of any living animals exhibited at a zoo, county fair, circus, marine mammal park, or educational facility without first obtaining consent from the owner. Moreover, what constitutes "effective consent" is also not defined in the statute. Therefore, there are a significant number of situations where § 999.2(3) could be applied to prohibit constitutionally protected speech.

Finally, § 999.2(3) is particularly repugnant because it has resulted in criminal prosecution against Louis. *Broadrick*, 413 U.S. at 610. To make matters worse, those seeking to comply with the law face a bewildering maze of regulations. The only thing standing between defendants who take video or audio within these "animal facilities" and imprisonment of seven years and fines is the mercy of the prosecutor. In other cases, the government has at least attempted such regulations to include an exceptions clause. *See Stevens*, 130 S.Ct. at 1590. However, § 999.1-4 contains no such clause. Consequently, the statute as it stands is too overbroad.

C. Fed. Law § 999.1-4 is Unconstitutionally Vague on its Face Because Citizens Do Not Have Clear Notice As To What Conduct Is Prohibited.

A law in unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Moreover, courts have long held that laws so vague that a person of common understanding cannot know what is forbidden are also unconstitutional on their face. *Coates*, 402 U.S. at 616.

Unduly vague laws violate due process whether or not speech is regulated. For example, in *City of Chicago v. Morales*, the Supreme Court invalided a law on due process vagueness grounds. 527 U.S. 41, 60-61 (1999). Chicago adopted an anti-gang ordinance that required gang members to disperse if ordered to do so by police officers; if they failed to do so, it was a crime. *Id.* at 48-49. If police officers reasonably believed that at least one person in a group of two or more was a gang member and they were loitering, their failure to do so could result in imprisonment. *Id.* at 47. The Court found that the definition of loitering under the statute, which was defined as "being in a place with no apparent purpose" was vague. The Court said the ambiguity in the law meant that it failed due process. *Id.* at 57.

Finally, courts are particularly troubled about vague laws restricting speech out of concern that they will chill constitutionally protected speech. It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Broadrick*, 413 U.S. at 611-12. ..

A reasonable person, such as Louis, cannot determine what is prohibited under § 999.2(3) and what is permitted. *Connally*, 269 U.S. at 391. Section 999.2(3) includes so many types of "animal facilities" that a person of common understanding does not know what exactly is forbidden. For example, the statute is unclear of what an animal facility includes. Under the

statute, it appears that a person who takes a picture in a vehicle on the way home from a fishing trip, is in violation of the statute if he does not give consent.

The fact that § 999.2(3) carries a punishment of imprisonment not exceeding seven years reinforces the need for the statute to be more clearly defined. In *Chicago*, the court determined that even though loitering was a defined term within the statute, the court determined it to be too vague because an ordinary person would not know what the law precluded. 527 U.S. at 59. Similarly, in the case at hand, it is unclear what would constitute violation under the statute as it currently reads. The statute requires "effective consent," but does not define what "effective consent" requires, but rather, when it is not effective. R. at 20. The approval or lack of consent is what results in imprisonment. Surely, this is a statute that should be defined so that a person of ordinary intelligence can ensure they obtain the requisite consent to avoid criminal prosecution.

Moreover, because § 999.1-4 does not adequately define consent, it allows the risk of selective prosecution. The legislature did not properly define the minimum guidelines to govern law enforcement of the statute because policemen and prosecutors to choose who violated the statute and who did not. *See Kolender*, 461 U.S. at 358. As a result, the statute has resulted, and will continue to result in, an arbitrary deprivation of liberty. *City of Chicago*, 527 U.S. at 42. Finally, § 999.2(3) is so vague that will lead to a chilling effect on constitutionally protected speech. *Broadrick*, 413 U.S. at 601. The requirements that the individual (i) obtain effective consent, which is undefined, (ii) refrain from recording in basically any facility that includes an animal for sale, research, or education, and (iii) prohibit the recording of the operations of these facilities in the form of audio or video, has certainly chilled speech. The "breathing space" the First Amendment requires, as discussed in *Broadrick*, is non-existent under the statute. *Id.*

D. Section 999.2(3) is Void As Applied Because its Content Based and Its Exposure into Animal Enterprises Are Its Secondary Effects

The Supreme Court frequently has declared that the very core of the First Amendment is that the government cannot regulate speech based on its content. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). In fact, content-based regulations are presumptively invalid. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, (1991). The general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulation only need to meet intermediate scrutiny. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-42 (1994). Since its enactment, "the First Amendment has permitted restrictions on a few historic categories of speech – including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct that "have never been thought to raise any Constitutional problem." *Stevens*, 130 S.Ct. at 1580, *citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Moreover, from 1791 to the present, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382-83 (1992).

The concern over content neutrality stems from the fear that the government will target particular messages and attempt to control thoughts on a topic by regulating speech. *Simon & Schuester, Inc.*, 502 U.S. at 116. Importantly, "[l]aws of this sort pose inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion." *Turner Broadcast System*, 512 U.S. at 641. The Court has explained that "[t]o allow a government the choice of permissible subjects for public debate would be to allow the government control over

the search for the political truth." *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Commn.*, 447 U.S. 530, 538 (1980).

Therefore, in order for the regulation to not be content-based, the government regulation must be both viewpoint neutral and subject matter neutral. *Perry Educ. Ass'n. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Viewpoint neutral means that the government cannot regulate speech on the ideology of the message. *See* Amy Sabrin, Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?, 102 Yale L.J. 1209, 1220 (1993). The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of the Supreme Court. *Perry Educ. Ass'n*, 460 U.S. at 57-58. Moreover, in *Niemotko v. Maryland*, two Jehovah's Witnesses were denied access to a public park to give Bible talks. 340 U.S. 268 (1951). In that case, members of other religious organizations had been granted access to the park for purposes related to religion. The Court found that the denial of access was based on public officials' disagreement with the Jehovah's Witnesses' views, and held it invalid. *Id.* at 272. During the course of its opinion, the Court stated: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Id.*

Subject matter neutral means that the government cannot regulate speech based on the topic of the speech. Sabrin, *supra* note 15, at 1217. For example, in *United States v. Playboy Entm't Grp, Inc.*, the Court found that a law that regulated only sexual speech was a subject matter restriction and had to meet strict scrutiny. 529 U.S. 803 (2000). In *Playboy*, a provision of the federal Cable Act prohibited "signal bleed" of sexual images, which occurred when people

receive images from cable stations to which they do not subscribe. The Court found this law unconstitutional because the law failed to meet strict scrutiny because it was not the least restrictive alternative for achieving the government's interest. *Id.* Moreover, in another case, a federal law regulated sexually oriented commercial websites and required age verification and several ways to do so. *Ashcroft v. ALCU*, 542 U.S. 656 (2004). The Court said that the law was a content-based restriction on speech, and therefore it must also meet strict scrutiny. The Court found there were less restrictive alternatives for protecting children from exposure to sexually explicit material.

The Court permits a content-based restriction if it is motivated by a permissible content-neutral purpose, namely the statute's secondary effects. This rule was articulated in *Renton v. Playtime Theatres, Inc.*, where the Court said treated the law content-neutral because it said that the law was motivated by a desire to control the secondary effects of adult movie theaters, such as crime, and not to restrict the speech. 475 U.S. 41, 41-48 (1986). However, in *Boos v. Berry*, the Court determined the government's justification unconstitutional. 485 U.S. 312, 322 (1988). The statute prohibited anyone from displaying signs within 500 feet of a foreign embassy to prevent speech that offends their dignity unconstitutional because the government did not point to the secondary effects of the signs, such as congestion, visual clutter, or the need to protect the embassy's security, but rather only focused on the content of the speech, which was shielding the embassy from speech critical to their governments. *Id.* at 321.

Section 999.2(3) is void as applied because it is neither viewpoint neutral nor subject-matter neutral. The statute is discriminates based off viewpoint because it is regulating the ideology of the message. *See* Amy Sabrin, 102 Yale L.J. 1220. Just like in *Niemotko*, the government is denying access for animal welfare advocates to visually or audibly record any of

these experiences. 340 U.S. at 274. . The Court found that the public official's disagreement with Jehovah's Witnesses' views, and thus denial for their access to the park was unconstitutional. Similarly, the public officials that have a disagreement over distributing the reality of what occurs in animal facilities is discriminating based off of their viewpoint. The very purpose of the statute's creation is to criminally prosecute individuals who expose what occurs behind closed doors of these facilities. And for that reason, it is clearly viewpoint. Discriminatory. Moreover, as applied, the government is impermissibly regulating speech based off of the subject-matter. As the court properly struck down in Playboy, the Court is not permitted to prohibit a message based off a subject-matter, unless it is one of the few exceptions discussed above (i.e. obscenity, defamation, etc.) Section § 999.2(3) was implemented to discriminate against the individuals who want to advocate against the subject-matter of factory farming.

Finally, even though § 999.2(3) is content-based, the government cannot show that the statute's motivation was for an appropriate secondary effect. Louis was not in violation of any crimes, other than § 999.2(3) when he recorded the unlawful acts of the company. Unlike in *Renton*, where the government was trying to restrict crime, this statute is impermissibly attempting to restrict the speech of animal welfare activists. 475 U.S. at 41-48. Moreover, as in *Boos*, where the government was seeking to limit the speech of individuals from criticizing foreign governments' policies, § 999.2(3) is attempting to limit animal welfare activists from criticizing the speech of the animal facilities. There is no valid, legal reason as to why the government would have an interest to protect animal facilities from audio and visual recording. The government is merely attempting to prohibit the public from viewing the animal facilities' operations. Therefore, because the government's justifications are not valid secondary effects,

the content-based speech cannot be protected as content-neutral. As a result, the statute is unconstitutional as applied.

II. FEDERAL LAW § 999.2(3) SHOULD BE OVERTURNED BECAUSE IT VIOLATES PUBLIC POLICY AND WHEATLEY'S ACTIONS WERE JUSTIFIED UNDER THE DEFENSE OF NECESSITY.

Public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives. Dean G. Kilpatrick, Ph.D., Definitions of Public Policy and the Law, Medical University of South Carolina Jan. 14, 2012) http://www.musc.edu/vawprevention/policy/definition.shtml.

A. As a Matter of Public Policy, Louis Should Not Be Punished for Revealing Company's Wrongful Acts

As a matter of public policy, Wheatley should not be convicted for conduct that revealed the Company's violation of state laws. Company violated Proposition Two and the California Health and Safety Code, specifically § 25990 and § 25991, which state:

> § 25990. Prohibitions. In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:
>
> (a) Lying down, standing up, and fully extending his or her limbs; and
>
> (b) Turning around freely.
>
> § 25991. Definitions. For the purposes of this chapter, the following terms have the following meanings:
>
> (f) "Fully extending his or her limbs" means fully extending all limbs without touching the side of an enclosure, including, in the case of egg-laying hens, fully spreading both wings without touching the side of an enclosure or other egg-laying hens.

Cal. H&S Code §§ 25990(a) & (b) and 25991(f).

Yet, despite Company knowingly violating these prohibitions, the government is shielding it from accountability, but prosecuting Louis for exposing these wrongful acts.

Company knowingly kept its living, breathing hens in cages that were significantly smaller than California law permitted. In fact, the cages were so small that the animals were not able spread their wings or move within the cage. Once Louis noticed the violations, Louis's supervisor simply told him it was not his concern.

The government has urged judicial deference to the congressional intent in protecting animal enterprises such as the Company, and has urged that any public policy debate should be left to Congress. However, in a world that is controlled by agricultural lobbyists, pork barrel legislation, and corporate greed, it would be improper for this court to close their eyes to the alarming violations of public policy that have occurred with the implementation of this statute and its application to Louis. The statute's entire purpose is to prevent the public from viewing the methods of how their meat is produced for fear that the truth will lower profit margins and deter customers from purchasing their brand of meat.

Moreover, the effects of § 999.2(3) exceed the scope of the statute, which was to prevent "eco-terrorism." Traditionally, eco-terrorism is defined as (i) sabotage intended to hinder activities that are considered damaging to the environment or (ii) political terrorism intended to damage an enemy's natural environment. Merriam-Webster (Jan. 3, 2012) http://www.merriam-webster.com/dictionary/eco-terrorism. However, for an animal welfare advocate, a camera can be the greatest weapon to implement change. The intent of using a camera to record these illegal activities is not to create any actual harm on the Company, but rather to keep the public informed on the operations of the animal facility. Therefore, by prohibiting the recording of the illegal activities within Company by Louis, this court would turn their head to the public policy considerations, which is keeping the public informed if illegal acts are taking place at these facilities.

Finally, the public has taken a greater concern over the well being of farm animals, thus it is improper to criminally punish Louis for violating a statute that prohibits accountability of animal facilities. In fact, there has been a greater push to improve the quality of life for animals at factory farms. The European Union, for example, is bringing in further regulation to set maximum stocking densities for meat chickens, where the UK Animal Welfare Minister commented, "The welfare of meat chickens is a major concern to people throughout the European Union. This agreement sends a strong message to the rest of the word that we care about animal welfare." Similarly, many people in the United States also have a growing concern over this issue and therefore, we should not silence individuals, such as Louis, who educate the public on the current state of these animal facilities.

Therefore, as a matter of public policy, Louis's conviction should be overturned. He should not be punished for exposing Company's illegal acts. Moreover, leaders of the farm industry implemented the statute to protect their own financial interests. Consequently, even though Louis violated the statute, as a whole, it goes against the public interest. Louis cannot and should not be convicted for conduct that brings to light illegal activity and violations of unethical treatment of living beings, along with intentional violations of California statutes.

B. Standard of Review

Court's review a lower court's decision to bar a necessity defense *de novo*. *Id.* at 692. *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991).

C. Louis's Conviction Should Be Overturned Because He Meets All Four Prongs Required Under the *Schoon* Test.

The necessity defense is an affirmative defense that removes criminal liability for violation of a criminal statute and is essentially a justification for the prohibited conduct. *Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir. 2007) citing *See* 2 LaFave, Substantive Criminal Law §

9.1(a) (2d ed. 2003 & Supp.2005). To invoke the necessity defense, a defendant must show that: (i) they were faced with a choice of evils and chose the lesser evil; (ii) they acted to prevent imminent harm; (iii) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (iv) they had no legal alternatives to violating the law. *United States v. Schoon*, 971 F.2d 193, 195 (1991); *United States v. Aguilar,* 883 F.2d 662, 693 (9th Cir.1989), *cert. denied,* 498 U.S. 1046, 111 S.Ct. 751, 112 L.Ed.2d 771 (1991). Moreover, a common law necessity defense thus singles out conduct that is "otherwise criminal, which under the circumstances is socially acceptable and deserves neither criminal liability nor even censure. LaFave, Substantive Criminal Law § 9.1(a)(3). A necessity defense is best considered in the context of a concrete case where a statute is allegedly violated, and a specific prosecution results from the violation. *Raich*, 500 F.3d at 861.

First, Louis was given no choice but to either turn a blind eye to the Company's illegal acts and complete disregard to the requirements under Ca. H & S § 25990, or choose to violate § 999.2(3) instead. Before Louis decided to make the video, he contacted his supervisor, but he said he "needn't be concerned." R. at 3. When Louis's supervisor refused to do anything about the violations, Louis decided to make a second video that recorded proof of the violations, which served as evidence of the violations. Louis was faced with a choice of evils and chose the lesser evil. *See Schoon*, 971 F.2d at 195.

Second, Louis recorded the illegal acts to prevent imminent harm to the animals, but also to the public. In fact, factory farms pollute communities and adversely affect public health, thereby increasing medical costs for those living near such farms. Furthermore, when animals are held in an area close together with little room for natural behavior, this causes a large portion of animal waste to be condensed in one area. This waste pollutes the air with a foul odor, emits

airborne dung particles, greenhouse gasses, and contaminates water recourses with toxins that can be deadly. As a result, Louis violated § 999.2(3) in order to prevent imminent harm. *See Schoon*, 971 F.2d at 195.

Third, Louis believed that he could deter Company's illegal acts by recording unlawful conditions and subsequently posting the information to the public. In fact, since Louis posted the video, the Company has publicly stated that it is looking into the feasibility of modifying some of its practices in its California facility. R. at 4. Therefore, Louis violated the statute because he reasonably anticipated a direct causal relationship between his conduct and the harm to be averted to the animals and the public.

Finally, Louis violated § 999.2(3) because he had no legal alternatives to violating the law. The statute prohibits any recording with a camera, video recorder, or any other video or audio recording equipment. Ironically, the government has allowed the animal facilities to shield themselves of liability for violating the law because they prohibit essentially all recording within their facility to document such wrongful acts. § 999.2(3). Because Louis had no way of proving liability other than by documenting the violations, Louis had no choice but to violate the law.

Therefore, Louis's conviction should be overturned under the defense of necessity because he has met all four requirements of the *Schoon* test. Louis was faced with a choice of violating § 999.2(3) or allowing Company to violate § 25990. Louis also acted to prevent immenent harm on both the animals and the public, as a result of Company's violations. Furthermore, Louis anticipated that by recording the illegal acts and posting the information on the internet that Company's conduct might change or avert the harm on the animals and the

public to be averted. Finally, Louis had no legal alternatives to violate the law because recording of any kind is prohibited within the Company's facility.

III. THE UNITED STATES CONGRESS EXCEEDED ITS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION WHEN ENACTING 18 U.S.C. 43.

A. Standard of Review

This Court reviews challenges to the constitutionality of a statute under a *de novo* standard of review. *United States v. Weatherly*, 525 F.3d 265, 273 (3d Cir. 2008).

B. General Principles: Commerce Clause

Under the Commerce Clause, the United States Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." US Const., Art. I, § 8, cl. 3. The Supreme Court has pointed out that Congress's authority pursuant to this Clause, while plenary within its sphere, is limited to the regulation of three broad categories of activity: (1) "Congress may regulate the use of channels of interstate commerce"; (2) "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

C. Limits on the Commerce Clause

The scope of the Commerce Clause "must be considered in the light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely

centralized government." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Thus, Congress's Commerce power is not and cannot be unlimited. *Id*. Rather, it is the duty of the Court to articulate and apply constitutional limits upon that power. *Id*.

1. 18 U.S.C. 43 Does Not Regulate Channels Of Interstate Commerce

Under the Commerce Clause, Congress "may regulate the use of channels of interstate commerce." *Lopez*, 514 U.S. at 558-59. This category reaches the misuse of channels of interstate commerce and includes the transportation or shipment of stolen goods, kidnapped persons, prostitutes, and drugs. *Perez v. United States*, 402 U.S. 146, 148-59 (1971).

The first *Lopez* category of permissible interstate regulation, involving regulation of the channels of interstate commerce, is plainly not applicable to 18 U.S.C. 43 as this statute regulates criminal conduct in the animal enterprise industry. Thus, it is not a regulation of the use of the channels of interstate, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce.

2. 18 U.S.C. 43 Does Not Regulate Or Protect The Instrumentalities, Or Persons Or Things In Interstate Commerce

The second *Lopez* category "empowers Congress to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activity." *Lopez*, 514 U.S. at 558-59. Instrumentalities of interstate commerce are the means used to transport goods and persons in interstate commerce including railroad cars, buses, trucks, airplanes, and boats. *Shreveport Rate Cases,* 234 U.S. 342 (1914). In *Shreveport,* the Court upheld rate restrictions on railroads travelling between Texas and Louisiana. *Id.* at 351. The Court reasoned that Congress's authority extends to these interstate carriers as instruments of interstate commerce. *Id*.

Furthermore, Congress may only regulate and protect those persons or things that have a

plain and clear nexus to interstate commerce unless the statute employs some mechanism to ensure the federal regulation in fact regulates persons or things in interstate commerce. *United States v. Bird*, 124 F.3d 667, 674 (5th Cir. 1997). In *Bird*, the Defendant was convicted of violating the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C.S. § 248(a)(1), after he damaged a doctor's automobile and threatened the doctor when he presented for work at an abortion clinic. *Id.* at 670. The court found that FACE was not a valid exercise of Congress's Commerce power to protect persons or things in interstate commerce as medical doctors, patients, or medical supplies are not by their nature involved in interstate commerce. *Id*. at 674. In fact, the court noted that "congressional regulation or protection of persons or things that move in interstate commerce must ensure that…[those] persons or things [have] a plain and clear nexus to interstate commerce." *Id*.

In addition, the statute's main purpose must be to protect or regulate those persons or things. *Hoffman v. Hunt*, 923 F. Supp. 791, 818 (W.D.N.C. 1996) rev'd on other grounds by *Hoffman v. Hunt,* 126 F.3d 575 (4th Cir. 1997). In *Hoffman*, the court found FACE was not a valid exercise of Congress's authority to "protect ... persons or things *in interstate commerce."* *Id.* The court reasoned that "the statute was not focused, by its terms, on efforts to obstruct individuals from moving between states to secure or provide abortions but rather, the statute regulates protest in the immediate vicinity of abortion clinics that may impede abortion-related traffic." *Id*.

With the statute at hand, Congress clearly lacked authority to legislate 18 U.S.C. 43 under the second Lopez category as the statute regulates neither instrumentalities of interstate commerce nor persons or things with a plain and clear nexus to interstate commerce.

First, unlike the statute in *Shreveport,* 18 U.S.C. 43 does not regulate any means used to transport goods and persons in interstate commerce as it regulates force, violence and threats involving animal enterprises. Also, property of animal enterprises and people connected with animal enterprises lack a plain and clear nexus to interstate commerce. Like the statute in *Bird*, 18 U.S.C 43 regulates property and people that are not involved in interstate commerce by their nature. In fact, there is no allegation or showing that the Company employs out-of-state workers, serve out-of-state clients and utilize supplies and equipment that have traveled interstate.

In the absence of such a plain and clear nexus, the *Bird* court requires a statute to employ some mechanism to ensure the federal regulation in fact regulates persons or things in interstate commerce. 18 U.S.C. 43 fails to do so. Although Congress requires the individual causing the damage to the property or people to travel in interstate commerce, Congress fails to place the same requirement on the property and people. It is not enough to require the individual to travel in interstate commerce; rather the property and people must be involved in interstate commerce.

Furthermore, 18 U.S.C 43's main purpose is not to protect or regulate those persons or things but instead, to regulate criminal conduct in animal enterprises. Similar to the statute in *Hoffman*, 18 U.S.C 43 is not focused, by its terms, on efforts to protect individuals connected to the animal enterprise industry nor to protect the real or personal property connected to an animal enterprise. Rather, 18 U.S.C. 43 specifically states that the concern is with conduct designed to damage or interfere with the operations of an animal enterprise. In fact, Congress only regulates efforts to damage property or threaten individuals connected to animal enterprises if done for the reason of interfering with the operation of an animal enterprise.

3. 18 U.S.C. 43 Does Not Regulate Activities Having A Substantial Relation To Interstate Commerce

Congress's commerce authority includes the power to regulate those activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. These referenced activities must be *economic* in nature. *Id.* at 561. In *Lopez,* the Supreme Court reviewed the Gun-Free School Zones Act of 1990 ("GSA"), a criminal statute that made it a federal offense to knowingly possess a firearm in a school zone. *Id*. The Court determined that the GSA was "a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms." *Id*. Accordingly, the *Lopez* Court concluded that the GSA was unconstitutional in part because it regulated an activity that was noneconomic and therefore could not be justified under the third prong of Congress's s Commerce Clause authority. *Id.*

Likewise, in *Morrison*, the Supreme Court reviewed the Violence against Women Act ("VAWA") that regulated the criminal activity of gender-motivated violence. *United States v. Morrison*, 529 U.S. 598, 605 (2000). The Supreme Court struck down VAWA as an impermissible exercise of Congress's Commerce Clause as the regulated activity lacked an economic element. *Id.* at 617-18. In fact, the *Morrison* Court noted that "*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, *the activity in question has been some sort of economic endeavor.*" *Id.* at 611.

Similarly, purely criminal activities that are not premised in economic or commercial contexts are subject to an entirely different scheme of congressional regulations, none of which is justifiable under the Commerce Clause. *Id*. at 617-18. The Court in *Morrison* even suggested

that Congress cannot simply exercise a general police power and regulate noneconomic or noncommercial activities. *Id*. In fact, the Court stated:

> The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, 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.

Id. Moreover, the Court in *Lopez* noted: "Under our federal system, the States possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 561. Congress itself has noted that state statutes, including criminal trespass, criminal contempt, disorderly conduct, resisting arrest, and unlawful assembly are more than adequate to address certain criminal activities. *See* H.R.Rep. No. 103-306, at 22 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, 717.

Furthermore, the Commerce Clause may not reach noneconomic activity that only affects commerce through a "but-for" causal chain. *Morrison*, 529 U.S. at 613. The *Morrison* Court rejected this long held belief by explaining that "[w]e accordingly reject that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Id.

With that said, *Lopez*'s third category does not apply in the case at hand. As in *Lopez* and *Morrison*, the criminal activity regulated by 18 U.S.C. 43, the use of force, violence, or threats involving an animal enterprise, is neither an economic nor a commercial activity. In fact, 18 U.S.C. 43 is simply a federal criminal statute regulating intrastate noncommercial conduct.

As a criminal activity not premised in economic or commercial contexts, 18 U.S.C. 43 is beyond Congress's authority as it does not have a general police power to regulate such private criminal conduct under federal law. Rather, the States possess the power to do so, and here, state statutes are adequate at addressing the concerns.

Since the criminal, intrastate activities regulated by 18 U.S.C 43 are neither commercial nor economic in nature, the analysis ends as the *Morrison* Court expressly rejected the contention that such activity can be aggregated in order to create a substantial effect on interstate commerce. Thus, under the third category of *Lopez*, Morrison's limitation of the aggregations principle necessarily compels a finding that Congress exceeded its Commerce Clause authority when it enacted 18 U.S.C. 43.

IV. THE DISTRICT COURT PROPERLY OVERTURNED THE JURY VERDICT CONVICTING LOUIS UNDER COUNTS 2 AND 3 AS 18 U.S.C. 43 DOES NOT APPLY TO LOUIS 'S CONDUCT UNDER THE EVIDENCE PRESENTED IN THIS CASE.

A. Standard of Review

The proper inquiry in reviewing grants of motions for judgments of acquittal is whether, viewing the evidence in the light most favorable to the Government, a reasonable jury *must necessarily* entertain a reasonable doubt on the evidence presented. *Glasser v. United States,* 315 U.S. 60, 80 (1942).

1. The Government Failed To Provide Sufficient Evidence That Louis's Conduct Meets AETA's Two Requirements

18 U.S.C. 43 is applicable only if the following **two** requirements are met: 1) the individual must use a means of interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise and 2) in connection with such a purpose, the individual must use force, violence, or threats against property or persons related to an animal enterprise. 18 U.S.C. §43(a).

In the case at hand, Louis's use of the internet was not designed to damage or interfere with the operations of an animal enterprise. In fact, Louis posted the videos to Facebook and blogged about the company to raise awareness about farmed animal issues. Louis posted his first video on his personal Facebook page on or about June 17, 2012 with the following comment: "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." (R. at 3). This comment highlights Louis's interest to raise public awareness, and negates any belief that he had an interest of damaging the company.

However, even if the Court finds that Louis posted the videos with the purpose of damaging or interfering with the operations of an animal enterprise, the second requirement of the statute cannot be met. In fact, the only evidence that the Government has set forth to meet the second requirement is that Louis saved a chick at work by taking him home. (R. at 4). Yet, Louis's decision to save a chick was completely independent and unrelated to his use of the internet. His purpose of posting the videos was to raise public awareness while his purpose of saving the chick was solely to rescue the chick. Knowing of the gruesome custom of disposing of these baby chicks by tossing them into piles and grinding them, Louis saw a chick on top of the pile of living and dead chicks at the grinder and he bravely rescued him by taking him home. (R. at 4). In addition, Louis knew that the taking of the chick would not damage or interfere with the operations of the company because male chicks are a byproduct and waste product of the egg industry. (R. at 4). Thus, the evidence establishes that the 18 U.S.C. 43 does not apply here as Louis did not rescue the chick as a means of damaging or interfering with the operations of an animal enterprise.

Viewing the evidence in the light most favorable to the Government, there is sufficient evidence in the record to grant a motion for judgment of acquittal as to Counts 2 and 3. The clear language of 18 U.S.C. 43 indicates that the statute only applies to the usage of a facility of interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise and "in connection with such purpose" intentionally causing the loss of property. Here, the evidence established that Wheatley blogged and posted videos to Facebook about the

Company to raise public awareness about animal rights, and not for the purpose of damaging or interfering with the operations of an animal enterprise. However, even if Wheatley's use of the internet is found to have had that purpose, Wheatley did not take the chick in connection with a purpose of damaging or interfering with the Company's operations.

2. Louis 's Conduct Did Not Incite Future, Imminent Unlawful Conduct And Is Therefore Protectable Under The First Amendment.

First, the legislature had a clear intent to protect political speech from 18 U.S. 43's coverage. 18 U.S.C. §43(e). In fact, the legislature placed a rule of construction in the statute indicating that "Nothing in this section shall be construed...to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution…." *Id*. Thus, the clear language of the statute mandates that political speech is protected. *Id.*

Importantly, criminalization of speech protected by the First Amendment is unconstitutional. US Const., amend 1. In fact, the First Amendment states, in part, that "Congress shall make **no** law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." *Id*. Postings on websites referring to the humane treatment of animals fit squarely within this right as such postings contribute to the marketplace of ideas as well as educate and urge other to take action. *United States v. Fullmer*, 584 F.3d 132, 154 (3d Cir. 2009). Furthermore, such postings clearly constitute political speech as the issue is of political, moral, and ethical importance in today's society. *Id*. Moreover, many find such issues to be offensive and uncomfortable, which is precisely the type of speech that requires First Amendment protection. *Id*.

In addition, the exemption in 18 U.S.C. 43 applied to political speech unless the conduct invites imminent lawlessness and that the imminent lawlessness was likely to occur. *Id*. In

Fullmer, defendants were charged with violating AEPA(an earlier version of AETA) for posting information to their website about conducting protests in front of companies that inhumanly treated their animals. *Id*. at 140. Finding the speech political, the court then solely focused its inquiry on whether the speech advocated violence that was imminent and likely to occur. *Id.* at 154. Thus, the court clearly found the other exceptions to free speech to be of no concern as the court purposely omitted such a discussion. *Id*. The court assumingly believed that the statute's purpose was only to prohibit speech that caused imminent lawless action. *Id*. Based on this, political speech is always protected from AEPA's coverage unless it meets the Brandenburg standard. *Id*.

In terms of public policy, courts must limit the scope of AETA as this statute has the potential of criminalizing legitimate advocacy. In fact, "investigations into unlawful animal enterprises, such as animal fighting organizations or illegal puppy mills, could be deterred as employees, citizens and legitimate animal activities may be afraid to cooperate or provide information to law enforcement agencies for fear of prosecution under the terms of this bill." 152 Cong. Rec. E2100-01 (daily ed. Nov. 13, 2006) (statement of Hon. Steve Israel of New York). In addition, AETA's application of the politically charged terrorism label will impose a horrific chilling effect on animal rights advocates and will lead enterprises failing to recognize the business value of making improvement in social concern.

The clear language of 18 U.S.C. 43 exempts Louis's speech from attack as his speech is protected by the First Amendment. Similar to the postings in *Fullmer*, Wheatley's blogs and video posts are protected by the First Amendment since there are referring to the humane treatment of animals. Thus, like the defendants in *Fullmer*, Wheatley's postings and blogs are protected unless they invite imminent lawlessness and that the imminent lawlessness was likely

to occur. It is obvious that Wheatley's conduct did neither. With that said, 18 USC 43 specifically exempts such protected speech from its reach.

CONCLUSION

The First Amendment Clause was violated with the implementation of § 999.2(3). The statute violates the Constitution both on its face and as applied because the defined terms are overbroad and vague, and the statute is content-based in its application. Moreover, as a matter of public policy, Louis should not have been criminally punished for exposing the illegal acts of others; and therefore, Count 1 should be dismissed under the defense of necessity.

Congress exceeded its congressional authority under the Commerce Clause of the U.S. Constitution when it enacted 18 U.S.C. 43 because it does not regulate channels of interstate commerce, its main purpose does not regulate or protect the instrumentalities, or persons or things in interstate commerce, and it does not regulate activities having a substantial relation to interstate commerce because its not economic in nature. Moreover, 18 U.S.C. 43 does not apply to Louis's conduct in this case because the government failed to provide sufficient evidence to meet its requirements and Louis's conduct did not incite future, imminent unlawful conduct, therefore it is protected under the First Amendment.

Therefore, for the foregoing reasons, Appellant respectfully requests that this Honorable Court overturn Count 1 of Louis's conviction under § 992.(3) and affirm the District Court's decision to overturn Louis's conviction under Counts 2 and 3 because 18 U.S.C. § 43 does not apply to Louis in this case.