No. 11-11223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,
Respondent/Cross-Appellant,

v.

LOUIS WHEATLEY,
Appellant/Cross-Respondent.

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

RESPONDENT/CROSS-APPELLANT'S BRIEF

TEAM 5
Attorneys for the Respondent/Cross-Appellant

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STATEMENT OF THE ISSUES

1. Under the Free Speech Clause in the First Amendment to the U.S. Constitution, should this Court affirm Louis Wheatley's conviction under Count 1 for violating Federal Law § 999.2(3) (the Agricultural Products Protection Act, or "APPA") because the statute is valid as applied to Wheatley and on its face?
2. Should this Court affirm Wheatley's conviction under Count 1 because APPA § 999.2(3) is constitutional as a matter of public policy and because Wheatley's actions were not justified under the defense of necessity?
3. Under the Commerce Clause of the U.S. Constitution, is 18 U.S.C. § 43 (the Animal Enterprise Terrorism Act, or "AETA") within the scope of congressional authority?
4. Should this Court reinstate the jury verdict convicting Wheatley under Counts 2 and 3 because the AETA applies to Wheatley's conduct in this case?

STATEMENT OF THE CASE

A federal grand jury indicted Louis Wheatley, charging him with three counts. R. at 4. Count 1 charged Wheatley with violating APPA § 999.2(3) for "entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment." R. at 4. Count 2 charged him with violating the AETA, 18 U.S.C. § 43(a)(1), for "using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise." R. at 4. Finally, Count 3 charged Wheatley with violating the AETA, 18 U.S.C. § 43(a)(2)(A), for "intentionally damaging or causing the loss of any real or personal property (including animals or records) used by an animal enterprise" in connection with the "purpose[] of damaging or interfering with the operations of an animal enterprise." R. at 4–5.

The United States District Court for the Central District of California denied Wheatley's motion to dismiss the indictment on all three counts. R. at 5. After a jury found Wheatley guilty of all three counts, he filed a motion for judgment of acquittal. R. at 5. Wheatley argued that APPA § 999.2(3) is unconstitutional under the First Amendment and that the AETA exceeds congressional authority under the Commerce Clause. R. at 5. He also argued that he should not be convicted "as a matter of law and public policy" because he claims that his conduct brought to light alleged violations of California Health & Safety Code §§ 25990, *et seq.* (known as "Proposition 2" or "Prop 2") and anti-cruelty statutes under California state law. R. at 5. Eggs R Us, however, has not been charged with any violations of the laws. R. at 5.

The district court denied Wheatley's motion for judgment of acquittal as to Count 1 and granted it as to Counts 2 and 3. R. at 5. Both parties appealed the district court's decision to this Court. The United States respectfully requests that this Court AFFIRM the district court's judgment as to Count 1 and REVERSE the district court's judgment as to Counts 2 and 3.

STATEMENT OF THE FACTS

Appellant, Louis Wheatley, is a college student who joined an organization dedicated to protecting farmed animals after learning about farmed animals from the campaign for Prop 2. R. at 2. In May 2010, Wheatley applied for a job as a "poultry care specialist" at Eggs R Us, which produces eggs and has been in business since 1966. R. at 1–2. It has facilities located in California, Nevada, and North Dakota. R. at 1. The federal government oversees Eggs R Us and gives it "substantial compensation" because the company participates in the National School Lunch Program by providing eggs to California school children. R. at 2, 8.

Wheatley believed that the job at the company's California facility would give him the opportunity to learn firsthand about the conditions of farmed animals. R. at 1–2. He started the

job on June 1, 2010, and although he claims he did not take the job with the intention to harm Eggs R Us, he hoped that he could write an article and "blog" on the internet about his experiences as an employee. R. at 2. Around June 17, 2010, Wheatley videotaped a co-worker at Eggs R Us who was disposing of male chicks in a grinder, which is the standard industry practice. R. at 2–3. Wheatley posted the four-minute video on the internet using Facebook and commented, "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 (emphasis added). One of his Facebook "friends" shared the video on YouTube, and over 1.2 million people have watched the video. R. at 3.

While working at the company's California facility, Wheatley came to believe that Eggs R Us was violating Prop 2 by allegedly not providing enough space for the hens. R. at 3. Even though Wheatley's supervisor told him that he "needn't be concerned," Wheatley made another video at the facility. R. at 3. Wheatley videotaped the hens in their cages, and although this second video was not shared on YouTube, he posted the second video to Facebook. R. at 3. In addition, Wheatley wrote about the alleged violations on his blog, and he informed the other members of the farmed animal protection organization. R. at 4. On the same day that Wheatley posted the videos, he also took a live male chick from the Eggs R Us facility by putting the chick in his pocket. R. at 4.

After a manager learned about Wheatley's videos two weeks later, the manager fired Wheatley and notified federal authorities about Wheatley's actions. R. at 4. Authorities arrested Wheatley and charged him with violating the APPA and the AETA. R. at 4. As a result of the first video on YouTube and Wheatley's blog, Eggs R Us received negative media attention when local news companies and other media outlets reported about the issue. R. at 3–4.

SUMMARY OF THE ARGUMENT

This Court should uphold Wheatley's conviction under Count 1 because APPA § 999.2(3) is constitutional under the First Amendment Free Speech Clause as applied to Wheatley and on its face. Under the forum analysis, this Court should determine that the Eggs R Us egg-producing facility in California is a nonpublic forum because the facility is used for the purpose of maintaining a business and because the government has not opened it up to expressive activity. In a nonpublic forum, government restrictions on speech are permissible if the restrictions are reasonable and viewpoint neutral. The government's restriction on videotaping in agricultural facilities is a reasonable restriction on speech, including Wheatley's speech, because it serves a legitimate government need to protect agricultural facilities against competitors, business disruptions, and terrorism. The restriction is viewpoint neutral as applied to Wheatley because it does not discriminate against Wheatley or any other person or groups based on their views. Rather, the restriction prevents *all* videotaping without permission. Because the restriction is reasonable and viewpoint neutral, this Court should hold that APPA § 999.2(3) is constitutional as applied to Wheatley.

Additionally, APPA § 999.2(3) is not overbroad on its face. The overbreadth doctrine is considered "strong medicine," and courts rarely use it to find a statute unconstitutional. In order to succeed on an overbreadth challenge, a person must show that the statute impermissibly applies to a substantial number of situations. Wheatley has only suggested that it might prevent people from exposing alleged legal violations at agricultural facilities and might compete with whistleblower provisions in other statutes relating to workplace safety. APPA § 999.2(3), however, applies equally to all people—including Wheatley—who make videos in agricultural facilities without permission, and the statute is reasonable and viewpoint neutral. Because

Wheatley has failed to show that the statute impermissibly applies to a substantial number of situations, the statute is not overbroad on its face.

As a matter of public policy, this Court should uphold Wheatley's conviction under Count 1 because this Court must defer to Congress on policy issues. Congress could have included a whistleblower provision in APPA § 999.2(3) but chose not to include such a provision, and this Court cannot read a whistleblower provision into the statute. Further, the statute serves to protect the company and the American people from terrorism.

Additionally, Wheatley cannot argue that his conduct was valid under the defense of necessity. His actions were, at most, acts of indirect civil disobedience because he did not violate the APPA as part of any protest relating to the APPA. This Court has previously held that the defense of necessity is not applicable in cases of indirect civil disobedience, so Wheatley cannot claim the defense of necessity. Further, Wheatley cannot even meet all four requirements. First, Wheatley did not choose the lesser of the evils because the video he created in violation of the APPA could be used to cause even greater harm than the alleged harms he perceived. Second, Wheatley did not post the videos to prevent any imminent harm. Third, it was not reasonable for him to believe that his actions would avert the alleged violations he perceived because posting the video did not have a direct causal relationship with preventing any harm. Fourth, Wheatley had many legal alternatives to violating APPA § 999.2(3), such as advocating for Congress to amend the law. Accordingly, this Court should affirm his conviction under Count 1.

As to Counts 2 and 3, this Court should hold that Congress acted within its constitutional powers in enacting the AETA. Under the Commerce Clause, Congress can regulate the channels—the actual movement—of interstate commerce, the instrumentalities and persons or things engaging in interstate commerce (even if those actors are engaging in only intrastate

activities), and the activities that have a relation to and substantially affect interstate commerce. Under Congress' power to regulate the instrumentalities of interstate commerce, Congress can act to protect interstate commerce, even from purely intrastate threats.

This Court has previously held that the internet is an instrumentality of interstate commerce. Wheatley used the internet to disseminate his video of the Eggs R Us facility and his comments; therefore, Wheatley's internet conduct falls within the legislative purview of Congress. By requiring the use of "any facility of interstate or foreign commerce," Congress intended to reach Wheatley's activities in interstate commerce, even if Wheatley did not intend for his internet activities to cross state lines. Consequently, this Court should hold that Congress acted within its constitutional authority to regulate commerce in enacting the AETA.

If a court substitutes its own factual judgment for that of a rational juror, then a reviewing court may overturn the district court's judgment and reinstate the jury's verdict. A rational jury properly convicted Wheatley of Count 2 of the indictment for violating the AETA when he used the internet to disseminate his comments and to post a video that he recorded within the Eggs R Us facility. Under the AETA, a defendant must be convicted under both section 43(a)(1) and section 43(a)(2), but an error in the indictment's citation is not a ground for overturning a conviction absent prejudice. Even though the indictment for Count 2 only charged Wheatley with a violation of section 43(a)(1), he was not prejudiced because the government presented evidence that his internet activities caused the loss of the company's goodwill. Goodwill is an intangible property that enhances, and is part of, tangible property. The government also presented evidence that this loss of goodwill caused, or will cause, Eggs R Us to spend its tangible property (money) to fix the damage to the company's goodwill. Consequently, Wheatley was presented with evidence that he violated section 43(a)(2) by causing the loss of company property. When

combined with a plain and ordinary reading of section 43(a)(1), a rational juror could have made the same connection and convicted him under Count 2. As such, this Court should reverse the district court's judgment and remand for reinstatement of Wheatley's conviction under Count 2.

The jury also properly convicted Wheatley under Count 3 for stealing company property—a chick that the company had not abandoned. Abandonment requires the physical act of abandonment and the intent or motive to abandon the property. Wheatley's taking of the chick before the chick could be euthanized in accordance with company practices is evidence that the company could not have abandoned the chick because the chick had not yet gone through all of the company's procedures. Because the language "in connection with such purpose" in section 43(a)(2) is construed to require only a simple relation between the theft of the chick and Wheatley's overall purposes at the company (as evidenced by the internet postings), a rational juror could convict Wheatley under Count 3. Therefore, this Court should reverse the district court's judgment and remand for reinstatement of Wheatley's conviction under Count 3.

STANDARD OF REVIEW

This Court should review *de novo* the constitutionality of APPA § 999.2(3) and the AETA, 18 U.S.C. § 43. *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010). This Court should also review *de novo* the district court's rulings as to Wheatley's motion for judgment of acquittal under all three counts. *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir. 2000). Specifically, this Court should "review the evidence presented in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Ladum*, 141 F.3d 1328, 1337 (9th Cir. 1998).

ARGUMENT

I. THIS COURT SHOULD AFFIRM WHEATLEY'S CONVICTION UNDER COUNT 1 BECAUSE APPA § 999.2(3) IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT AS APPLIED TO WHEATLEY AND ON ITS FACE.

APPA § 999.2(3) is constitutional as it applies to Wheatley because the statute is a valid restriction on speech under the U.S. Supreme Court's forum analysis. In an as-applied challenge, an individual argues that the statute is unconstitutional as it applies to that person, even though the statute may be valid as it applies to other people. *Foti v. City of Menlo Park,* 146 F.3d 629, 635 (9th Cir. 1998). In this case, APPA § 999.2(3) is constitutional as applied to Wheatley because the Eggs R Us facility is a nonpublic forum and because the statute is a reasonable and viewpoint-neutral restriction on Wheatley's speech.

A. According to the U.S. Supreme Court's forum analysis, APPA § 999.2(3) is a constitutional restriction on speech under the First Amendment.

The First Amendment does not necessarily guarantee people access to property that the government owns or controls. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129 (1981). In restricting access to property, the government can consider the type of property involved and the disruption that the person's speech activities might cause. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985). The government, like private property owners, may preserve "'property under its control for the use to which it is lawfully dedicated.'" *Greer v. Spock,* 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida,* 385 U.S. 39, 47 (1966)).

This Court applies the U.S. Supreme Court's three-step analysis to determine whether a restriction on speech is constitutional. *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003). First, this Court must determine what type of forum is involved, *Brown,* 321 F.3d at 1222, and this first step determines how much the government may limit access, *Preminger v.*

Principi, 422 F.3d 815, 823 (9th Cir. 2005). During the second step, this Court must determine what level of scrutiny applies to that forum. *Brown*, 321 F.3d at 1222. Finally, during the third step, this Court must determine whether the restriction withstands that level of scrutiny. *Id.*

i. The Eggs R Us facility is a nonpublic forum under the forum analysis.

In determining what type of forum is involved, this Court should consider the access that the speaker sought, *Brown*, 321 F.3d at 1222, and should also consider the property's location and purpose. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966 (9th Cir. 2002). A public forum is "a place that has traditionally been available for public expression." *Brown*, 321 F.3d at 1222 (citation omitted) (internal quotation marks omitted). Streets and parks are examples of traditional public forums. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A designated public forum is a nontraditional public forum that the government has intentionally opened for public expression. *Id.*

In this case, the company's California egg-producing facility is not a public forum or a designated public forum. Although Eggs R Us is privately owned, it receives significant funding from the federal government and is subject to USDA oversight. R. at 2, 8. This type of business facility is not a public forum because it is not a forum that has traditionally been open to the public for expressive activity. Further, the facility is not a designated public forum because nothing in the record before this Court indicates that the government has ever opened up the facility to expressive activity.

Instead, this Court should classify the facility as a nonpublic forum. If public property is not a public forum or a designated public forum, then it is a nonpublic forum. *Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910, 919 (9th Cir. 2006). Interstate rest stops and airport terminals are examples of property that courts have classified as nonpublic

forums. *Id.* In determining whether a piece of property is a nonpublic forum, courts may consider the property's "history, purpose, and physical characteristics." *Id.* In this case, the purpose of the facility is to run an egg-producing business, and because the facility is neither a public forum nor a designated public forum, this Court should classify it as a nonpublic forum.

Additionally, if the government is acting as a proprietor to manage the internal business of the forum, then the forum is generally considered a nonpublic forum. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 966 (9th Cir. 1999). The purpose of a workplace is to accomplish the employer's business, so when the government acts as an employer, it has discretion over the management of the business affairs and personnel and has authority to control access to the workplace to avoid interruptions that would affect its employees' performance. *Cornelius*, 473 U.S. at 805–06. In this case, although Eggs R Us is not a federal workplace, it is subject to government oversight, receives government funding, and participates in a government program; therefore, the government should have discretion to control access to the facility as a nonpublic forum.

In *Perry Education Association*, the U.S. Supreme Court determined that a school system's internal mail system was a nonpublic forum because the system was not the type of forum that had traditionally been open to expressive activity (like a street) and because the general public could not access it without permission. 460 U.S. at 47. Similarly, this Court should find that the Eggs R Us facility is a nonpublic forum because the facility is not open to the general public and requires people to obtain permission before engaging in certain activities.

ii. Because the Eggs R Us facility is a nonpublic forum, this Court should apply a lenient standard of scrutiny when analyzing APPA § 999.2(3).

After determining the type of forum, this Court must determine what level of scrutiny to apply. *Brown*, 321 F.3d at 1222. Courts apply strict scrutiny to restrictions on speech in both

public forums and designated public forums. *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004). If, however, the property is a nonpublic forum, then courts apply a more lenient standard to determine whether a restriction on speech is constitutional. *Sammartano*, 303 F.3d at 965. Specifically, if property is a nonpublic forum, then the government may restrict speech in that forum if the restriction is reasonable considering the forum's purpose and is viewpoint neutral. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Brown*, 321 F.3d at 1222.

a. APPA § 999.2(3) is constitutional under the First Amendment because the restriction is a reasonable restriction on speech.

If the property is a nonpublic forum, then the government may make reasonable restrictions on speech based on the speech's subject matter and identity of the speaker. *Perry Educ. Ass'n*, 460 U.S. at 49. For example, if the government has not opened up the property to expressive activity, then the government may restrict access to people who are part of the official business of the forum. *Id.* at 53. Here, the government has not opened the Eggs R Us facility to expressive activity, so it is reasonable for the government to restrict access and speech within the facility. The availability of "substantial alternative channels" for expressive activity also helps to show that a restriction is reasonable. *Id.* Wheatley had many other channels to convey his message. For instance, he could still blog and write about his experiences or inform other people about his concerns.

In determining whether a restriction on free speech in a nonpublic forum is reasonable, this Court should consider the forum's purpose and the surrounding circumstances. *Principi*, 422 F.3d at 824. The restriction must "reasonably fulfill a legitimate need," but the restriction does not have to be "the least restrictive alternative available." *Id.* Courts focus on whether the restriction "is consistent with preserving the property for the purpose to which it is dedicated."

DiLoreto, 196 F.3d at 967. In addition, a restriction in a nonpublic forum does not have to "be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

In this case, the purpose of the facility is to maintain an egg-producing business. In light of this purpose, APPA § 999.2(3) fulfills a legitimate government need because it protects the company from competition and protects the facility and its workers against terrorist attacks. By protecting the facility against terrorist attacks, the statute also contributes to the safety of the American people, as terrorist attacks on agricultural facilities are a legitimate threat to the United States. *See* U.S. Gov't Accountability Office, GAO-04-259T, *Bioterrorism: A Threat to Agriculture and the Food Supply* 1–2, *available at* http://www.gao.gov/assets/90/82077.pdf (explaining that terrorist attacks on the country's agriculture industries, which "are vulnerable to potential attack," could have devastating effects). *See also* Presidential Directive on Defense of United States Agriculture and Food, 40 Weekly Comp. Pres. Doc. 183 (Feb. 3, 2004) (stating that "[t]he United States agriculture and food systems are vulnerable to . . . acts of terrorism" because the "agriculture and food system is an extensive, open, interconnected, diverse, and complex structure providing potential targets for terrorist attacks"). Additionally, this Court has previously held that promoting safety is a legitimate government interest. *Ctr. for Bio-Ethical Reform, Inc.*, 455 F.3d at 922. Because APPA § 999.2(3) is consistent with the purposes of the facility and fulfills a legitimate government need to maintain a business and promote safety, the statute is a reasonable restriction on speech.

In *Preminger v. Peake*, 552 F.3d 757, 764, 765–66 (9th Cir. 2008), this Court held that a Department of Veterans Affairs regulation that prohibited specific expressive activities (such as partisan activities) in a building on a VA campus (a nonpublic forum) was reasonable because the purpose of the facility was to care for patients and partisan activities would be disruptive.

This Court explained that the restriction was reasonable because it was consistent with the purpose of running the VA facility. *Id.* at 766. Similarly, this Court should find that APPA § 999.2(3) is reasonable because the restriction is consistent with the purpose of running an egg-producing business and protecting against competition and terrorism.

b. APPA § 999.2(3) is constitutional under the First Amendment because the restriction is viewpoint neutral.

A restriction on speech in a nonpublic forum also must be viewpoint neutral, which means that the government cannot discriminate based on a speaker's particular views on an issue. *Brown*, 321 F.3d at 1223. If the government does not favor the views of one speaker over the views of another speaker on the same issue, then the restriction is viewpoint neutral. *Flint v. Dennison*, 488 F.3d 816, 833 (9th Cir. 2007). The government may use viewpoint-neutral restrictions to exclude speakers if they "would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Peake*, 552 F.3d at 766 (quoting *Cornelius*, 473 U.S. at 811). In this case, APPA § 999.2(3) is viewpoint neutral as applied to Wheatley because it does not discriminate against Wheatley on the basis of his views. Instead, the statute applies equally to all people, regardless of their views on an issue. The statute specifically says "no person" and does not discriminate against any particular speakers or against any particular view, so the statute is viewpoint neutral.

In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 791–92, 804 (1984), the U.S. Supreme Court held that an ordinance that prohibited people from putting up signs on public property was viewpoint neutral because the ordinance's text was silent about any speaker's point of view. Also, in *Monterey County Democratic Central Committee v. United States Postal Service*, 812 F.2d 1194, 1195, 1198 (9th Cir. 1987), this Court held that a guideline preventing voter registration on postal premises by partisan groups was viewpoint neutral. The

Court explained that "[n]othing suggest[ed] the Postal Service intended to discourage one viewpoint and advance another." *Id.* at 1198. Similarly, in this case, nothing in the record before this Court indicates that the government intended to discourage Wheatley's views or the views of anyone else, and instead, the statute applies equally to everyone. A restriction that is really a pretext for discriminating against a specific view is invalid, *Swarner v. United States*, 937 F.2d 1478, 1483 (9th Cir. 1991), but there is absolutely no evidence in this case that the restriction was a pretext for discriminating against Wheatley's viewpoint or any other viewpoint. Because APPA § 999.2(3) is both reasonable and viewpoint neutral as applied to Wheatley, this Court should hold that the statue is constitutional.

B. On its face, APPA § 999.2(3) is not overly broad because Wheatley has not shown that it impermissibly applies to a substantial number of situations.

Courts disfavor facial challenges because such claims are often based on speculation and raise the risk that a court will prematurely interpret a statute. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008). Traditionally, if a statute constitutionally applies to a specific person, then that person cannot challenge the statute simply because the statute may be unconstitutional as applied to other people in different situations. *L.A. Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999). This is because courts should not have to consider every possible situation that could occur when applying legislation. *New York v. Ferber*, 458 U.S. 747, 768 (1982). The overbreadth doctrine in the context of the First Amendment is one exception to this traditional principle. *Id.* The overbreadth doctrine is "strong medicine," however, and the U.S. Supreme Court has used it sparingly. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In order to succeed on an overbreadth challenge, a person must show more than some overbreadth; the person must show that the overbreadth is real and substantial. *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002). A person must show that "'a substantial number of

[the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Wash. State Grange*, 552 U.S. at 449 n.6).

In this case, the statute serves the legitimate purpose of protecting Eggs R Us against competitors and terrorist attacks, and Wheatley has failed to show that the statute is unconstitutional in a substantial number of situations. Instead, Wheatley has only suggested that the statute is unconstitutional because it might prevent people from exposing alleged violations of animal cruelty statutes or might compete with other workplace safety statutes that do include whistleblower provisions. These two suggestions are clearly not enough to constitute a "substantial number," especially when compared with the APPA's "plainly legitimate sweep," which is to protect Eggs R Us, its workers, and the American people. APPA § 999.2(3) is not overbroad; rather, it serves a legitimate need and is a constitutional restriction on speech.

II. THIS COURT SHOULD AFFIRM WHEATLEY'S CONVICTION UNDER COUNT 1 BECAUSE WHEATLEY'S ACTIONS WERE NOT JUSTIFIED AS A MATTER OF PUBLIC POLICY OR UNDER THE DEFENSE OF NECESSITY.

Wheatley also argues that this Court should overturn his conviction under Count 1 because his violation of APPA § 999.2(3) brought to light the alleged violations under Prop 2 and California Penal Code §§ 597(b) and 597t. Despite Wheatley's argument, this Court should uphold his conviction as a matter of public policy because this Court must defer to Congress' decision not to include a whistleblower provision and because the statute serves a legitimate government need. Wheatley also claims that his actions were justified under the defense of necessity, but this Court should uphold his conviction because the defense of necessity does not apply to acts of civil disobedience and because he cannot meet the four elements of the defense.

A. Wheatley's actions were not justified as a matter of public policy.

Eggs R Us has not even been charged with any violations of the statutes and has denied all allegations against it, so it is not clear whether Wheatley's actions really exposed any violations at all. Wheatley argues that the statute should contain a whistleblower provision, but this Court must defer to congressional intent on policy issues. *Brower v. Evans*, 257 F.3d 1058, 1066 (9th Cir. 2001). Courts cannot add to a statute and should instead try to ascertain Congress' purpose. *Sixty-Two Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) (stating that "[i]t is for [the courts] to ascertain—neither to add nor to subtract, neither to delete nor to distort"). If "Congress has specifically excluded a term or phrase," courts should not try to read it into the statute. *United States v. Moreno*, 561 F.2d 1321, 1322 (9th Cir. 1977). Here, Congress specifically chose not to include a whistleblower provision in the APPA, and this Court cannot read such a provision into the statute.

Additionally, Wheatley's actions were not justified as a matter of public policy because APPA § 999.2(3) itself serves valuable public policy purposes. Terrorist attacks on the country's food supply could "cause illnesses and deaths" and negatively impact the economy. Council on Foreign Relations, *Targets for Terrorism: Food and Agriculture*, CFR.org (last updated Jan. 2006), http://www.cfr.org/homeland-security/targets-terrorism-food-agriculture/p10197. The statute helps to protect against such terrorist activities, so public policy actually weighs in favor of the statute's prohibition on videotaping in agricultural facilities.

B. Wheatley's actions were not justified under the defense of necessity.

i. Wheatley cannot claim the defense of necessity because the defense of necessity does not apply to indirect civil disobedience.

Civil disobedience occurs when a person intentionally violates a law as part of a "social or political protest." *United States v. Schoon*, 971 F.2d 193, 195–96 (9th Cir. 1991). A person

commits direct civil disobedience when the person breaks or prevents the execution of the specific law that the person is protesting. *Id.* at 196. Indirect civil disobedience, by contrast, occurs when a person violates another law that is not the subject of the person's protest. *Id.* Wheatley's actions were probably not a form civil disobedience because nothing in the record before this Court indicates that Wheatley intended to violate any law as part of a protest.

If, however, this Court determines that Wheatley's actions were a form of civil disobedience, then this Court should decide that he committed acts of indirect civil disobedience. Wheatley's actions were indirect civil disobedience because he did not violate the APPA as part of a protest relating to the APPA. Rather, Wheatley believed that Eggs R Us was allegedly violating Prop 2 and California Penal Code §§ 597(b) and 597t. R. at 3. If Wheatley's actions were civil disobedience, then his actions were *indirect* civil disobedience. This Court has previously concluded that a defendant cannot invoke the necessity defense in cases of indirect civil disobedience. *Schoon*, 971 F.2d at 196. Because Wheatley's actions were indirect civil disobedience, this Court should hold that Wheatley cannot invoke the defense of necessity.

ii. Wheatley's actions also do not meet the four required elements of the defense of necessity.

Even if this Court determines that the defense of necessity is applicable in this case, Wheatley's actions still were not justified under the defense of necessity because he cannot meet the necessary elements. A defendant must show four elements in order to invoke the defense of necessity. *Zal v. Steppe*, 968 F.2d 924, 929 (9th Cir. 1992); *Schoon*, 971 F.2d at 195. First, the defendant must show that the he or she had to choose between evils and chose the lesser of the evils. *Schoon*, 971 F.2d at 195. Second, the defendant must show that the he or she "acted to prevent imminent harm." *Id.* Third, the defendant must show that he or she "reasonably anticipated a direct causal relationship between [his or her] conduct and the harm to be

averted." *Id.* Fourth, the defendant must show that he or she did not have any "legal alternatives to violating the law." *Id.* If the defendant cannot prove all four of the elements, then the defendant cannot invoke the defense of necessity. *Id.*

In this case, Wheatley's actions do not meet the four required elements for the defense of necessity. Wheatley cannot meet the first element because his actions of making and posting the videos were greater evils than the company's alleged violations. Wheatley's actions endangered Eggs R Us, its workers, and potentially, the American people, so his actions were arguably worse than the alleged violations. Wheatley cannot meet the second element because he did not act to prevent imminent harm. The district court determined that Wheatley posted the video to change conditions within the facility, R. at 17, but this does not show that he acted to alleviate or prevent any specific imminent harm. Preventing *imminent* harm simply was not his purpose. For similar reasons, he cannot meet the third element because it was not reasonable for him to anticipate that his conduct would directly avert the alleged harms at the facility. Making and posting the videos to his Facebook page might allow people to see what happens in the facility, but this act does not directly help avert any alleged harm. Rather, the videos just spread Wheatley's views.

Even if Wheatley could meet the first three elements of the defense of necessity, he definitely cannot meet the fourth element because he had many legal alternatives to violating the APPA. Wheatley informed his supervisor of his concerns, but he could have informed other supervisors or managers at Eggs R Us. He also could have tried to obtain permission to make the video in accordance with the requirements of the APPA. As an alternative, Wheatley could have left it up to law enforcement authorities to inspect and address any alleged violations. Most importantly, Wheatley could have relied on Congress to mitigate the harm. If congressional activity can mitigate the harm, then the defendant cannot meet the fourth requirement of the

defense of necessity. *Schoon*, 971 F.2d at 198–99. Here, Wheatley could have advocated for Congress to amend the statute. Because Wheatley cannot meet all four elements of the defense of necessity, this Court should uphold his conviction under Count 1.

III. THE ANIMAL ENTERPRISE TERRORISM ACT IS A CONSTITUTIONAL EXERCISE OF CONGRESS' COMMERCE CLAUSE POWERS.

Congress can only act within the confines of its constitutional powers, *United States v. Lopez*, 514 U.S. 549, 552–53 (1995), which include its power to legislate in the area of "[c]ommerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3. As the country's economy developed and changed, so did the U.S. Supreme Court's Commerce Clause jurisprudence, which broadened the legislative power of Congress. *See Lopez*, 514 U.S. at 555–58 (highlighting the historical development of the Court's Commerce Clause cases). *See also Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005) (observing that Congress' legislative activity under the Commerce Clause and Supreme Court Commerce Clause jurisprudence "has evolved over time").

Today Congress can legislate in three categories under its Commerce Clause powers: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "activities [that have] a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558–59 (internal citations omitted). As this Court noted in *United States v. Alderman*, 565 F.3d 641, 646–47 (9th Cir. 2009), the lines of separation between these three categories are not conclusive and are not meant for this Court to "straitjacket" itself, but the *Lopez* categories give this Court a still-useful guide for analysis.

When Congress legislates in the first *Lopez* category, it legislates concerning the actual movement of interstate commerce—the goods and services moving across the states. *United States v. Patton*, 451 F.3d 615, 621, 624 (10th Cir. 2006). *Accord Alderman*, 565 F.3d at 647 n.4. For the second *Lopez* category, Congress can regulate the methods ("the means") by which items travel in interstate commerce and "the persons or things transported by the instrumentalities among the states." *Patton*, 451 F.3d at 621. Further, under this second *Lopez* category, Congress can regulate activities that jeopardize interstate instrumentalities of commerce. *Id.* at 622. In the last *Lopez* category, Congress can legislate a person's intrastate activities when those activities have a substantial interstate effect, even if that activity is not commercial. *Id.*

In *United States v. Sutcliffe*, 505 F.3d 944, 952–53 (9th Cir. 2007), this Court confirmed that in today's economic and inter-connected reality, the internet is an instrumentality of interstate commerce. Congress' power to regulate Wheatley's internet comments and video is therefore constitutional, and under this Court's precedent in *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997), when Congress legislates in the area of instrumentalities of interstate commerce (the second category in *Lopez*), "no further inquiry is necessary."

A. The internet is an instrumentality of interstate commerce.

This Court has made it abundantly clear that the internet is an instrumentality of interstate commerce subject to regulation by Congress under its Commerce Clause powers. *Sutcliffe*, 505 F.3d at 952–53. In *Sutcliffe*, this Court analyzed the interconnected nature of the internet in the broader context of a criminal prosecution for making threats over the internet. *Id.* at 952. Next, this Court analogized the interconnectedness of the internet to the national telephone system and reasoned that this interconnectedness allows for rapid communication to a global audience. *Id.* at 952–53. This Court then fully adopted the reasoning of the Eighth Circuit in *United States v.*

Trotter, 478 F.3d 918, 921 (8th Cir. 2007), where the Eighth Circuit held that "the internet is an instrumentality and channel of interstate commerce." *Sutcliffe*, 505 F.3d at 953 (quoting *Trotter*, 478 F.3d at 921).

Similar to the defendant in *Sutcliffe*, who used the internet as a means of disseminating his threats, Wheatley used the internet to disseminate his personal comments and the video that he recorded inside of the Eggs R Us facility. Wheatley posted the video and his comments to his Facebook account (an internet site), and the video ultimately has been viewed over a million times through another website, YouTube. R. at 3. Like the defendant in *Sutcliffe* who made threats over the internet, Wheatley's internet use puts his conduct at issue. Accordingly, this Court should hold that Wheatley utilized an instrumentality or channel of interstate commerce when he posted his comments and his video.

B. Under the AETA, Wheatley's internet activities fall under Congress' constitutional authority.

Because the AETA contains the phrase "uses or causes to be used the mail or any facility of interstate or foreign commerce" and the internet is a facility in interstate commerce, Congress acted within its Commerce Clause powers in enacting the AETA. Congress' language in drafting the AETA requires only the use of an instrumentality or channel in interstate commerce—it does not require that the conduct itself be in interstate commerce. Because Wheatley utilized an instrumentality of interstate commerce (the internet), his internet activities—even if he could prove those activities are purely intrastate—are within Congress' legislative power.

Congress' use of the phrase "uses the mail or any facility in interstate or foreign commerce" merely requires that the actual facility used be in interstate commerce. *United States v. Nader*, 542 F.3d 713, 717–18 (9th Cir. 2008). A court can construe "of interstate or foreign commerce" to be synonymous with "in interstate or foreign commerce." *Id.* at 720 (noting that

three circuits, when reviewing statutes where the definition section contains one phrase and the text of the statute contains the other, concluded that Congress used the phrases interchangeably). When Congress regulates an instrumentality or facility in or of interstate commerce, the *Lopez* analysis ends with the second category, and it does not need to be shown that the intrastate activity substantially affects interstate commerce. *Clayton*, 108 F.3d at 1117. *Accord United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002).

In *Nader*, this Court analyzed the nature of intrastate telephone calls violating the federal Travel Act. 542 F.3d at 715–16. The defendants were proprietors of a prostitution business who made intrastate telephone calls as part of their operation. *Id.* This Court rejected the defendants' argument that the telephone calls must actually cross state lines and noted that the actual question is not whether Congress acted appropriately within its Commerce Clause powers, but whether Congress intended to reach intrastate activities. *Id.* at 716–17. Concluding that Congress intended to regulate intrastate telephone calls as part of the Travel Act, this Court held that the plain language of the phrase "uses the mail or any facility in interstate or foreign commerce" used in the Travel Act showed Congress' intent that "[t]he facility itself, not its use, must be in interstate commerce." *Id.* at 718. This Court reasoned that the word "facility" is modified by "in interstate or foreign commerce"; therefore, as long as the facility itself is in interstate commerce, a person can violate the Act by using that interstate facility to commit an illegal act under the statute. *Id.* at 717–18. Ultimately concluding that the phrase "in interstate or foreign commerce" is synonymous with "of interstate or foreign commerce," this Court explained that the latter phrase is "highly persuasive" evidence that Congress intended for intrastate activity using interstate facilities to be covered under the statute. *Id.* at 719 (quoting *Spilker v. Shayne Labs., Inc.*, 520 F.2d 523, 525 (9th Cir. 1975)) (internal quotation marks omitted).

This case involves a strikingly similar situation that turns on the intrastate use of an interstate facility. Similar to the Travel Act in *Nader*, the AETA requires that a defendant "use[] or cause[] to be used the mail or any facility of interstate or foreign commerce." 18 U.S.C. § 43(a) (2006). In *Nader*, this Court noted that "of interstate" is, in and of itself, persuasive authority that Congress directly intended intrastate activities to be considered when an interstate facility was used in the intrastate conduct. 542 F.3d at 719. Accordingly, Congress' use of the phrase "any facility of interstate or foreign commerce" in the AETA is "highly persuasive" evidence that Congress intended *intra*state activities, such as Wheatley's conduct in using the internet, to be covered under the AETA so long as an *inter*state facility, such as the internet, is used. Consequently, Congress acted within its authority to regulate an instrumentality or channel of interstate commerce and intended to regulate Wheatley's conduct in utilizing such a facility—the internet.

Under *Clayton*, once Congress has regulated an instrumentality in interstate commerce, the analysis ends there—no showing of a substantial effect on interstate commerce (the third *Lopez* category) is required. 108 F.3d at 1117. Therefore, this Court should hold that Congress acted within its Commerce Clause powers in enacting the AETA.

IV. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S JUDGMENT AS TO COUNTS 2 AND 3 BECAUSE THE DISTRICT COURT ERRONEOUSLY SUBSTITUTED ITS OWN FACTUAL JUDGMENT IN PLACE OF THE JURY'S WHEN IT OVERTURNED THE VERDICT.

A reasonable jury could have found—and did find—Wheatley guilty of violating the AETA, which forms the basis of Counts 2 and 3 of the indictment. If a court grants a motion for judgment of acquittal when a rational trier of fact could have properly convicted the accused, then a reviewing court may reverse the judgment of acquittal. *See, e.g.*, *United States v. Ling*,

283 F. App'x 565, 565–66 (9th Cir. 2008) (vacating a judgment of acquittal and remanding to the lower court because a rational juror could find guilt beyond a reasonable doubt).

Well-established principles of statutory construction dictate that unambiguous language within a statute should be given its plain and ordinary meaning. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). Additionally, courts should use the overall context of the word or phrase in question. *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). When Congress' intent is clearly and unambiguously expressed in the statute, a court does not need to utilize any other methods of statutory construction. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). If statutory language is ambiguous, however, then a court may use other interpretative aids, such as legislative history, to determine the intent of Congress. *United States v. Dickerson*, 310 U.S. 554, 561–62 (1940).

The jury properly convicted Wheatley of violating the AETA by using the internet to disseminate his self-made video and by taking company property. Under the AETA, an accused must commit both the acts contemplated by section 43(a)(1) and section 43(a)(2) in order to be convicted. *United States v. Buddenberg*, No. CR-09-00263 RMW, 2009 WL 3485937, at *7 (N.D. Cal. Oct. 28, 2009). Absent a showing of prejudice to a convicted defendant, however, a court will not overturn a jury's verdict merely because of a citation error in the grand jury's indictment. *United States v. Fekri*, 650 F.2d 1044, 1046 (9th Cir. 1981). By using conventional principles of statutory construction, a rational juror could conclude that Wheatley purposefully damaged or interfered with the operations of Eggs R Us when he posted his video on the internet and when he stole company property, which is intentionally damaging or causing the loss of company property. As such, the district court erroneously overturned the jury's guilty verdict on Counts 2 and 3.

A. The district court erred in overturning the jury's verdict on Count 2 because Wheatley violated the AETA when he posted his video and comments, which damaged the company's property.

Under the plain and ordinary language of the AETA, Wheatley's activities in blogging about Eggs R Us and the internet posting of his video taken at the Eggs R Us facility violate the AETA. If the language of a statute is unambiguous, then a court should interpret the language through its plain and ordinary meaning. *Satterfield*, 569 F.3d at 951, 953. Also, courts should interpret questionable words or phrases by using the entire context of the provision. *Montclair*, 107 U.S. at 152.

Wheatley disputes the jury's verdict that he acted with the "purpose of damaging or interfering with the operations" of Eggs R Us. R. at 17 (internal quotation marks omitted). "Damaging" and "interfering" are terms that do not require interpretation beyond their plain and ordinary meanings. *See Buddenberg*, 2009 WL 3485937, at *6, *8. In *Buddenberg*, a defendant challenged "damaging" and "interfering" in section 43(a)(1) of the AETA as unconstitutionally overbroad. *Id.* Reasoning that "damages," as used in section 43(a)(1), links to the specific form of damage contained in the subsections of section 43(a)(2), the court explained that "the 'damaging' terms would appear at most to relate to punishment for violations of §§ of 43(a)(1) and (2)(A)." *Id.* at *6.

Further, in analyzing the term "interfering" under the AETA, the *Buddenberg* court adopted the reasoning of this Court in *United States v. Willfong*, 274 F.3d 1297 (9th Cir. 2001) with regard to the plain and ordinary meaning of the word "interference." *Buddenberg*, 2009 WL 3485937, at *8. The *Buddenberg* court noted "that a wide variety of expressive and non-expressive conduct might plausibly be undertaken with the purpose of interfering with an animal enterprise" and applied this Court's dictionary definition of "interfere" outlined in *Willfong*: "[t]o

interfere is to oppose, intervene, hinder or prevent. Interfere has such a clear, specific and well-known meaning as not to require more than the use of the word itself in a criminal statute." *Id.* at *8 (alteration in original) (citations omitted) (quoting *Willfong*, 274 F.3d at 1301) (internal quotation marks omitted).

The *Buddenberg* court's analysis with regard to "damaging" and its adaptation of this Court's "interfere" analysis in *Willfong* are instructive tools in concluding that Wheatley's internet-related Count 2 activities violated the AETA. Wheatley does not dispute that he made a video of what he perceived to be wrongful conditions at Eggs R Us and that he posted the video on the internet with a comment stating that "[t]he public has to see this [video] to believe it." R. at 3–4. In the district court's opinion rejecting Wheatley's challenge to the interpretation of "damaging" and "interfering," the district court noted that "[w]hen [Wheatley] posted and blogged about conditions at the Company, he did so with the purpose of changing those conditions." R. at 17. Given the broad application of interference as contemplated by this Court in *Willfong* and applied to the AETA by the *Buddenberg* court, Wheatley's video and blogging activities violate the AETA.

In order to convict a person for violating the AETA, there must be an intentional damaging or interference with an animal enterprise contemplated by section 43(a)(1) in connection with one of the enumerated acts in section 43(a)(2). *Buddenberg*, 2009 WL 3485937, at *7. The text of the indictment for Count 2 charges Wheatley with violating only section 43(a)(1), R. at 4; however, Federal Rule of Criminal Procedure 7(c)(2) provides that "unless [Wheatley] was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground . . . to reverse a conviction." When the text of the indictment contains an error in citation but nonetheless includes the elements of the crime and "fairly informs [the]

defendant of the crime charged" so that the defendant can adequately plead, the indictment is acceptable. *Hamling v. United States*, 418 U.S. 87, 117 (1974). If a defendant is not misled by the evidence as to the criminal accusation, then there is no prejudice to a defendant from the citation error, and a court should not overturn the jury's verdict. *Fekri*, 650 F.2d at 1046.

Here, the indictment for Count 2 only cited section 43(a)(1) as the basis for Wheatley's alleged wrongful conduct; however, the government asserted that Wheatley's section 43(a)(1) acts caused the loss of real or personal property contemplated by section 43(a)(2). R. at 4, 17. The company's goodwill and the money that it lost, or will lose, as a result of Wheatley's actions are a form of property that should fall under the property-loss requirement of section 43(a)(2). *See McReath v. McReath*, 800 N.W.2d 399, 408 (Wis. 2011) ("[T]he intangible asset called good will [sic] may be said to be reputation; however, a better description would probably be that element of value which inheres in the fixed and favorable consideration of customers arising from an established and well-conducted business.") (citations omitted). *See also Clark v. Lucas Cnty. Bd. of Review*, 44 N.W.2d 748, 758 (Iowa 1951) (reasoning that goodwill "is an intangible property right or asset, which enhances the value of tangible property to which and in which it appertains and inheres, and is an incident and part of it"). Additionally, Wheatley did not directly challenge the textual sufficiency of the indictment. R. at 7.

Wheatley was presented with evidence that he violated sections 43(a)(1) and the property-loss requirement of section 43(a)(2). Consequently, Wheatley was not misled as to the nature of the accusations and was not prejudiced by the citation error in the indictment. A rational juror could conclude that Wheatley's video and blogging activities caused harm to the company's property—its goodwill—that will require company expenditures to repair. Despite the citation error contained in the indictment for Count 2, a rational juror could find that when

Wheatley posted the video and comments, he also violated section 43(a)(2)(A) by intentionally damaging the property of Eggs R Us. The district court, therefore, erred when it overturned the jury's verdict as to Count 2.

B. Because a rational juror could find that Wheatley sought to interfere with the operations of Eggs R Us by depriving the company of its property, the district court erred in overturning the jury's verdict on Count 3.

The district court also erred when it overturned Wheatley's conviction under Count 3 by incorrectly reading the AETA's "in connection with such purpose" requirement in section 43(a)(2). A rational juror could conclude that Wheatley acted in relation to his purpose of disrupting the operations of Eggs R Us by stealing company property that the company had not abandoned.

i. The company had not abandoned the property that Wheatley stole.

Wheatley took company property that the company had in no way abandoned. Abandonment of property requires both "the physical act of abandonment and the intent or motive." *Paul v. United States*, 21 Cl. Ct. 415, 424 (Cl. Ct. 1990). In order for there to be a physical act of abandonment, the owner must no longer want the object and must "'willingly abandon[] it to whoever wishes to possess it.'" *Id.* at 424 (quoting *Katsaris v. United States*, 684 F.2d 758, 762 (11th Cir. 1982)). The question of whether intent to abandon exists is proven by circumstantial evidence, *id.*, and abandonment is a question of fact for the fact-finder. *Utt v. Frey*, 39 P. 807, 809 (Cal. 1895).

Eggs R Us did not abandon the property (a male chick) that Wheatley took. Although Eggs R Us macerates all of its male chicks, Wheatley took a chick pre-maceration. R. at 4. Maceration may seem to be an inhumane way to dispose of industrial excess, but macerating chicks—like the chick that Wheatley took—is a widely accepted method of slaughter. American

Veterinary Medical Association, *AMVA Guidelines on Euthanasia* 17 (June 2007), *available at* http://www.avma.org/issues/animal_welfare/euthanasia.pdf (stating that "[m]aceration . . . is considered an acceptable means of euthanasia for newly hatched poultry by [multiple international bodies]").

Despite Wheatley's views about how Eggs R Us disposed of male chicks, the act of macerating male chicks before disposal—the point at which Eggs R Us could abandon the waste if it wanted to—is evidence that Eggs R Us did not abandon any live chicks like the one Wheatley stole. In fact, even if chicks are macerated, the chicks still have economic value, as a company can sell chicks as animal feed. Jordan Curnutt, *Animals and the Law: A Sourcebook* 162 (2001). By utilizing the practice of macerating live male chicks, Eggs R Us did not express any physical act of abandoning the live male chick that Wheatley took. Accordingly, this Court should reject Wheatley's claim that Eggs R Us abandoned the chick that he took.

ii. A rational juror could find that in relation to Wheatley's purpose of changing conditions at the company, he stole company property.

When the phrase "in connection with" is undefined in a statute (as it is in the AETA), it means "related to, linked to, or associated with" the following provision. *State ex rel. Miller v. Cutty's Des Moines Camping Club*, 694 N.W.2d 518, 526 (Iowa 2005) (citations omitted) (internal quotation marks omitted). Where it is used in a statute, "only . . . some relation or nexus between the two [parts]" needs to be proven. *Id.* Because a rational juror could find some relation between Wheatley's internet activities that formed the basis for his conviction under Count 2 of the indictment and his theft of company property, the district court wrongfully overturned Wheatley's conviction under Count 3.

In *Miller*, the Iowa Consumer Fraud Act outlawed "an unfair [business] practice . . . in connection with the . . . sale . . . of any merchandise." *Id.* at 525. The Iowa Supreme Court

reasoned that only "some relation or nexus between the two [parts]" needed to be shown and noted that the phrase "in connection with" is a phrase intending to have a "broader reach" than other, more limiting phrases (for example, "arising out of") that the legislature could have used. *Id.* at 526. The Iowa Supreme Court refused to adopt reasoning that would limit the legislature's "broad language" in drafting the statute. *Id.* at 527–28.

Here, Congress, like the Iowa legislature in *Miller*, used the same broad "in connection with" language in drafting section 43(a)(2) of the AETA. Congress did not use a more limiting phrase, and instead, Congress used the phrase "in connection with such purpose" in section 43(a)(2) of the AETA. Like *Miller*, where the court interpreted that same phrase liberally and only required some relationship or nexus between the two parts of the statute, this Court should hold that the prosecution merely needed to show some relation or nexus between Wheatley's theft of company property and his purposes. When viewed liberally and when viewed in combination with the purposes of his internet advocacy, which was intended to damage the company, some relation between the theft of the chick and all of these activities exists. A rational juror could also make the connection and find Wheatley guilty beyond a reasonable doubt. In overturning the jury's verdict on Count 3, the district court instead substituted its own factual judgment for that of the jury's, and this Court should reverse the district court's judgment and remand for reinstatement of the jury's guilty verdict as to Count 3.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court AFFIRM the district court's judgment and uphold Wheatley's conviction as to Count 1. Additionally, the United States requests that this Court REVERSE the district court's judgment and REMAND for reinstatement of the jury's guilty verdict as to Counts 2 and 3.