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
from the Central District of California

BRIEF OF APPELLANT/CROSS-RESPONDENT

Team 7
Counsel for Appellant/Cross-Respondent Louis Wheatley

January 25, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because the government prosecuted Mr. Wheatley pursuant to federal law. The district court issued its order in February of 2011 returning a three-count indictment against Wheatley. Wheatley filed a motion to dismiss the indictment. The district court denied Wheatley's motion to dismiss and the jury convicted Wheatley on all three counts. Wheatley filed a motion for judgment of acquittal, which was denied as to count 1 but granted as to counts 2 and 3.

Wheatley appeals the district court's order denying his motion to dismiss count 1 and the government appeals the district court's order granting Wheatley's motion to dismiss counts 2 and 3. The Federal Circuit has jurisdiction in the appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Does Federal Law § 999.2(3), the Federal Agricultural Products Protection Act, violate the First Amendment Free Speech Clause in the U.S. Constitution, on its face or as applied to Mr. Wheatley, such that his conviction under that statute should be overturned?

2. Should Mr. Wheatley's conviction under Count I be overturned as a matter of public policy, or in the alternative, because his actions were justified under the defense of necessity?

3. Does 18 U.S.C. § 43, the Animal Enterprise Terrorism Act, exceed congressional authority under the Commerce Clause of the U.S. Constitution?

4. Did the District Court properly overturn the jury verdict convicting Mr. Wheatley of Counts 2 and 3 because 18 U.S.C. 43 does not apply to Mr. Wheatley's conduct under the evidence in this case?

STATEMENT OF THE CASE

The Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43 prohibits any person damaging or causing the loss of personal or real property of an animal enterprise "for the purpose of damaging or interfering with the operations of" that enterprise. The Federal Agricultural Products Protection Act ("APPA"), Federal Law § 999.2(3), prohibits videotaping within an agricultural animal facility unless expressly authorized by an owner or manager of the facility.

Mr. Wheatley, a former employee of Eggs R Us, was charged and convicted for (1) entering an animal facility and using or attempting to use video or audio recording equipment, in violation of section 999.2(3) of the APPA; (2) using the internet as a means of interstate commerce for the purpose of damaging or interfering with the operations of Eggs R Us (an animal enterprise), in violation of the AETA,18 U.S.C. §43(a)(1); and (3) intentionally damaging or causing the loss of any real or personal property used by an animal enterprise, in violation of the AETA, 18 U.S.C. §43(a)(2)(A).

The district court denied Wheatley's motion to dismiss and the jury entered judgment against Wheatley on all three counts. Wheatley filed a motion for judgment of acquittal, which was denied for count 1 but granted for counts 2 and 3.

Wheatley timely filed this appeal seeking reversal of the district court's denial of his motion for judgment of acquittal for count 1. Wheatley argues that Section 999.2(3) of the APPA unconstitutionally violates his First Amendment rights. Alternatively, Wheatley asserts that his conviction on count 1 under the APPA cannot be upheld because the statute is overly broad and restriction of Wheatley's particular speech would be against public policy. Second, Wheatley contends the AETA is unconstitutional because it exceeds congressional power under the Commerce Clause. Lastly, Wheatley argues that even if the AETA is unconstitutional, the

District Court properly overturned his conviction on Counts 2 and 3 of the indictment based on the evidence presented in the case.

STATEMENT OF FACTS

Eggs R Us is a privately owned company founded in 1966 that receives federal funding for the purpose of providing eggs for school children across California as part of the National School Lunch Program.Wheatley is a journalism student who was hired by Eggs R Us in May of 2010. Wheatley had previously joined a farmed animal protection organization in 2008, where he first learned about California's Proposition 8 but never became involved in any of the organizations activities. Wheatley initially accepted employment with Eggs R Us to help finance his education, but also thought the job would be a good opportunity to determine the accuracy of claims about animal cruelty in farm animal facilities. Although Wheatley thought his position with Eggs R Us would provide insight into the farm industry, he was not motivated by any intent to cause the Company harm. He merely intended to record his observations and opinions in an online journal ("blog") that was to be written in an unbiased journalistic manner.

Wheatley's employment began on June 1, 2010 as a "poultry specialist," which required him to feed and water the chickens and clean their cages. Wheatley's position exposed him to the Company's practice of disposing male chickens, which are considered a byproduct or "waste product" of the egg industry, by piling them into a large machine that grinds the male chickens, often while the chickens are still alive. According to one study, 219 million male chicks underwent maceration in 1998. Farm Animals and Their Welfare in 2000, in State of the Animals 2001 89, 90 (2001).

Roughly around June 17, 2010, Wheatley witnessed an unidentified coworker throwing live chickens into the grinder. The employee was laughing and telling jokes during the process, and personally squashed some of the chickens prior to throwing them in the grinder. Wheatley recorded the employee's actions in a video lasting about four minutes. Wheatley later posted the video on his Facebook with the caption: "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." Wheatley had not decided which forum he wanted to link the video to (or if at all), when one of his subscribed Facebook "friends" uploaded Wheatley's video to YouTube. Over 1.2 million people viewed the video from YouTube, spurring news reports and media attention.

On the same day, one male chick caught Wheatley's attention. The chick was in in the pile intended for maceration with the others when Wheatley decided to "rescue" the chick. Wheatley removed the chick from the pile and placed him in his pocket. Wheatley carried the chick in his pocket past the city limits where he resides and where it is legal to possess a limited number of particular farm animals. Wheatley named the chick George and has been caring for him since rescuing him.

In his position as care specialist, Wheatley noticed certain conditions that did not comply with provisions of the California Penal Code. Particularly, Wheatley saw that the Company grouped six chickens into a cage measuring 16 inches by 18 inches. The cages provided an average of only 48 square inches per hen, despite national guidelines recommending a minimum of 67 square inches for each hen. These cages, known as "battery cages" did not provide adequate room for the hens to extend their wings, as required by Cal. H&S Code §§ 25990(a) and 25991(f). Wheatley mentioned the inconsistency to his supervisor, but was advised that he "needn't be concerned." Wheatley then filmed a video, shorter in duration than his first video,

capturing the hens' conditions in the battery cages. Wheatley also uploaded this video to his Facebook page, however, if it was removed prior to trial. There has been no evidence presented that suggests this video was shared in any other forum. Wheatley discussed the video and the Company's noncompliance with Proposition 2 in his blog and contacted the farmed animal protection organization he joined in 2008.

Wheatley's blog, in combination with the YouTube video, resulted in negative media attention for the Company. The Company denied all allegations claiming violations of Proposition 2, but stated a feasibility study was underway to determine potential modification of the Company's practices. Two weeks after posting the videos, one of the Company's managers was alerted to Wheatley's Facebook. In addition to terminating Wheatley's employment, the Company notified federal authorities. Wheatley was arrested and charged with violating the APPA and AETA. Upon learning about George, the authorities added a charge of unlawful taking of company property.

SUMMARY OF THE ARGUMENT

Mr. Wheatley's conviction on Count 1 of the indictment should be overturned for several reasons. First, the APPA violates the First Amendment to the United States Constitution. Alternatively, the APPA is unconstitutionally overbroad and should thus be struck down. Moreover, the application of APPA to Mr. Wheatley's conduct violates public policy. Lastly, Mr. Wheatley's conduct was justified in view of his defense of necessity.

Second, the AETA violates the Commerce Clause of the United States Constitution. Congress exceeded its authority when it purported to regulate the internet as a facility of interstate commerce, both facially and as applied to Mr. Wheatley. However, even if the Court finds the AETA to be constitutional, the District Court properly vacated Mr. Wheatley's

convictions on Counts 2 and 3 of the indictment because the language of the AETA does not reach his conduct.

ARGUMENT

I. Standard of Review

This court reviews a district court's denial of a motion to dismiss under Rule 12(b)(6) *de novo*. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). In reviewing the denial of a motion to dismiss, the Court "accept[s] all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Id*. A pre-trial motion is appropriate when no material facts are in dispute. *See United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005) (allowing a pre-trial motion to be raised when the "general issue" can be determined without trial); *U.S. v. Phillips*, 367 F.3d 846, 855 (9th Cir. 2004) (affirming pre-trial motion to dismiss when there was no objection and a pure issue of law).

This court also reviews a ruling on a Rule 29 motion for acquittal *de novo*. *United States v. Tubiolo*, 134 F.3d 989, 991 (9th Cir.1998). A judgment of acquittal is proper if, viewing the evidence in the light most favorable to the government, a rational trier of fact could not have found the defendant guilty beyond a reasonable doubt. *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992); *see also United States. v. Ward*, 274 F.3d 1320, 1322 (11th Cir. 2001) (an evaluation of FRCP, Rule 29(c) is comparable to a review for the sufficiency of the evidence to sustain a conviction).

II. Count 1 of Wheatley's conviction should be reversed on the grounds that Federal Law §999.2(3) unconstitutionally violates the First Amendment Free Speech Clause.

The First Amendment states that, "Congress shall make no law … abridging the freedom of speech." This has been interpreted as prohibiting government restrictions based on the message,

ideas, subject matter, or content of a given expression. *See United States v. Stevens*, 130 S. Ct. 1577 (2010); *see also Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002).

Although courts have established exceptions permitting restrictions of speech on government-owned property, the restriction at hand cannot satisfy the standard applicable under the forum doctrine. The forum doctrine classifies government-owned property into three categories: (1) public forums, (2) limited public forums, and (3) non-public forums. Public forums are defined as "places which by long tradition or by government fiat have been devoted to assembly and debate." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). It would be difficult to extend this definition to include Eggs R Us considering the nature and purpose of the business. Similarly, Eggs R Us would not qualify as a limited public forum since property in this classification is public property, which the state has opened for use by the public for expressive activity. The third category is the non-public forum. This is the category that the lower court placed the Company in.

Non-public forums include privately owned property and publicly owned property that are not by tradition or designation open for public communication, but are used for business, education or other dedicated purposes. Examples of non-public forums include courthouses, jails, government offices, city halls and public schools. While such state property is required to be open for its devoted purposes, it is not required to be open to the public for other expressive activities. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983).

The lower court applies the standard for non-public forums without fully justifying such application. Eggs R Us is a privately owned company. The court stated that significant funding from the government complicates application of the traditional forum analysis, but does not

answer whether or not the federal funding for Eggs R Us is sufficiently "significant." The government's interaction with the company is limited, with little involvement in the day-to-day operations. Although the lower court should have held the APPA statute to a strict scrutiny standard of review, the statute nevertheless fails to satisfy the requirements for non-public forum restrictions of speech. A non-public forum may be reserved for its intended purpose, as long as the regulation on speech is reasonable in light of the function of the property and not an effort to suppress expression merely because public officials oppose the speaker's viewpoint. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985). For example, in *Perry*, the Supreme Court ruled that a rival teachers' union could be denied access to public school mailboxes, even though the elected union representative had been given access by the educational association. *Perry*, 460 U.S. 37 (1983). This restriction was reasonable to protect the function of the forum, in light of the elected representative's responsibilities to negotiate labor agreements on behalf of the union. However, the prohibited speech in our present case (audio/video-recording) would not pose the same threat to the business's function, assuming the current functions being performed are lawful.

The government asserts that the APPA is intended to protect animal facilities from terrorist activities and a loss of business and property. On its face this would appear to be a legitimate government interest, if the APPA reasonably restricted speech to further this purpose without regard to the view or content of the speech. APPA §999.2(3) specifically prohibits the use or attempted use of a camera, video recorder, or other video or audio recording equipment in an animal facility. There are animal activist organizations that are classified as domestic terrorists, but it is difficult to see a connection between the act of recording within an animal facility and terrorist activities. Similarly, protecting the facility's business is a reasonable

objective, however "reasonable grounds for limiting access to a nonpublic forum … will not save a regulation that is in reality a façade for viewpoint-based discrimination." *Cornelius,* 473 U.S. at 811 (citing *Perry,* 460 U.S. at 49).

Restrictions of speech in non-public forums must be viewpoint-neutral. This means that they "are justified without reference to the content of the regulated speech… ," or "content-neutral." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Content-neutral regulations are also called "time, place and manner restrictions," as the regulation seeks not to limit any particular type of speech, but merely to regulate the circumstances under which the speech may take place. Time, place, and manner restrictions, however, might be facially valid but unconstitutional in their application. If a content-neutral restriction is valid on its face but is applied in a manner that tends to regulate only certain topics or certain viewpoints, it might well be found unconstitutional despite its innocent appearance.

Applying APPA §999.2(3), Eggs R Us would only suffer a loss of business if the video or audio recording reflected a negative view of the facility or the occurrence of unlawful practices. Arguably, the company would be unopposed to favorable recording of its operations (good publicity). This would suggest that the prohibited activity is less about restricting general recordings in the facility and more likely about restricting unfavorable recordings, thereby violating the viewpoint-neutral requirement of non-public forum standard.

Additionally, content-neutral restrictions will only be found constitutional if "they leave open ample alternative channels for communication of the information." *Virginia Pharmacy,* 425 U.S. 748 at 771. The average person generally relies on the circulation of paper articles (i.e. leaflets, handbills, and pamphlets) or electronic means of communication that can be distributed and read in a cheap and efficient manner. As a result, courts are generally sensitive to protecting

these modes of communication, and TPM restrictions limiting their distribution usually founder. In the current context, Wheatley is limited in regards to the alternative channels available to him. He wants to portray the unethical treatment of animals and Company's unlawful conduct. Although he could simply speak about these issues, the message would have much less of an impact than visual depictions. As Wheatley's caption to the video stated, "You have to see this to believe it."

Moreover, the burden of overcoming a First Amendment challenge is placed on the government. It is therefore the government's responsibility to demonstrate that the restriction is both reasonable and viewpoint-neutral. The lower court emphasized the lack of a congressional record in its denial of Wheatley's theory, but the absence of such record should weigh against the government's claim since they bear the burden of proof and have not provided sufficient evidence in support of their claim that the restriction is reasonable in light of the purpose of the statute.

III. Even if the statute is not unconstitutional on its face or as applied to the facts of Wheatley, the conviction of Count 1 should be reversed on the grounds that the statute is overly broad.

The lower court noted that a person "to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). This is an accurate summary of the traditional rule; however, there are two exceptions that have been judicially recognized. One exception to the traditional rule barring third-party standing is the First Amendment overbreadth doctrine.

The First Amendment overbreadth doctrine holds that a party whose conduct is not constitutionally protected is permitted to raise the constitutional rights of third parties not before

the court, if the challenger can show that a "substantial number" of applications against third parties would be unconstitutional. *See Ferber*, 458 U.S. at 769-70; *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008) (holding that "a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep"). By applying the overbreadth doctrine, a court considers the constitutionality of a statute on its face, and in order to succeed, the "overbreadth of a 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); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) ("there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds").

Courts have justified this exception on the grounds of protecting third parties, who might fear prosecution under an overbroad statute, from self-censoring or "chilling" protected speech. *See Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). The APPA provision in question would, in fact, have this chilling effect and result in a substantial number of unconstitutional applications. The statute simply prohibits any video or audio recording of an animal facility. Unlike the statute in Stevens, which was found overly broad, the APPA statute is even less specific and lacks the exceptions clause of 18 U.S.C. § 48. *See Stevens*, 130 S. Ct. 1577 at 1582. The inclusion of the exceptions clause was insufficient to overcome the overbreadth doctrine, partly because the speech being regulated was the type that fell within the protections of the First Amendment and because the court was fearful of potential chilling effects. Both of these justifications support finding the APPA statute at hand overly broad. First, Wheatley's speech is

not de minimis in that it has political and social value, making it fall within the protections of the First Amendment. Second, the court should not risk chilling whistleblowing because doing so would allow the violations to continue unfettered.

Furthermore, the requirement for a "substantial number" of unconstitutional applications in Stevens was satisfied by hypotheticals presented by the judges rather than specific, real-life situations. Wheatley's argument included various theories by which the application of the APPA statute would be unconstitutional, including the aforementioned prevention of whistleblowing. Even if the court does not hold animal cruelty to be severe enough to warrant finding the statute unconstitutionally overly broad, a similar situation can occur involving human-health risks. These risks could be violations of health and safety standards or labor law. For example, with the statutes current language, it would likely be a felony if one employee is injured in an industrial accident or by an animal and another employee takes a picture of the accident without the owner's knowledge or consent. Liability my even extend to the injured employee under a conspiracy theory if he attempted to include the photos in his worker's compensation hearing or insurance claim. Another unconstitutional application that could arise is if a state trooper pursuing a speeding vehicle crosses onto property belonging to the animal facility. Under the statute's current language, it would be illegal for his on-board video camera to be recording. These scenarios demonstrate that APPA statute is substantially broad and prohibits any audio or video recording, without fully appreciating the value such recording may have or the potential consequences for animal/human health and public policy.

IV. Wheatley's conviction cannot stand as a matter of public policy.

Regardless of the whether the statute it unconstitutional on its face, as applied, or for being overly broad, convicting Wheatley would conflict with public policy. "The First

Amendment's guarantee of free speech applies with special vigor to discussion of public policy." *National Org. for Marriage v. Mckee*, 649 F.3d 34 (1st Cir. 2011); *see also Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (affording the "broadest protection to such political expression in order to 'ensure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people'"). Wheatley's category of speech arguably falls within scope of public policy with courts naming animal welfare as "an area of widespread public concern and controversy, and [that] the viewpoint of animal rights activists contributes to the public debate." *Huntington Life Sciences, Inc. v. Stop Huntington Animal Cruelty, U.S.A., Inc.*, 129 Cal. App. 4th 1228, 1246 (2005).

Whether or not Wheatley constitutes an "animal rights activist," his videos relate to animal welfare and are valuable for public debate. Furthermore, individuals within the animal facility have unique insight into the practices of employees and the company that outsiders lack. They are in a position to witness and record unlawful conduct and should not be prevented from doing so, which is the effect that this statute will have if Wheatley is convicted. The government suggests that the court should defer to the congressional intent in protecting animal enterprises such as the Company, but this misconstrues the type of protection the APPA is designed to provide.

The government has an interest in the protection and maintenance of the Company's intended purposes, however, it can be assumed that these purposes must be achieved through lawful practices. The government should not be able to violate state laws for the sake of financial security for the Company, and furthermore, the government should not be able to prevent disclosures of such violations by prosecuting those that make evidential recordings.

The government points to the lack of a whistleblower provision as support for its claim that the California legislature had not intended to protect individuals like Wheatley. The Supreme Court has interpreted omissions or silence, in the context of a "venerable common-law backdrop." *United States v. Bestfoods*, 524 U.S. 51, 62 (1998). Silence on its own is not conclusive of a legislative intent not to provide whistleblower protection. If the common-law generally extends whistleblower protections, the legislature may have thought the practice was well established, making an explicit provision unnecessary. Accordingly, the lower court did not adequately assess what "venerable common-law backdrop" influences interpretation of the statute's silence regarding whistleblowers. Considering the importance of encouraging whistleblowers, Wheatley's public policy argument undermines the government's claim.

V. Wheatley's conviction should also be overturned based on his asserted defense of necessity.

Similar to the public policy argument, Wheatley's defense of necessity is founded on the underlying principles that the highest social value is not always achieved by blind adherence to the law, that it is unjust to punish those who technically violate the letter of the law but are acting to promote or achieve a higher social value than strict adherence to the law would produce, and that it is in society's best interest to promote the greatest good and to encourage people to seek to achieve the greatest good even if doing so requires a technical breach of the law. The lower court was preoccupied by the application of the defense of necessity to direct civil disobedience, but this is not a case of civil disobedience. Civil disobedience is a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies. Direct civil disobedience is the attempt to repeal of an unjust law by openly and nonviolently breaking the law itself. Indirect civil disobedience is where the law being broken is not itself the target of the protest.

The lower court considered Wheatley's conduct an act of indirect civil disobedience, but found that his civil disobedience fails to meet the necessity defense because Wheatley was unaware of the APPA rule and because only direct civil disobedience can be justified under the necessity defense. First, it is incorrect that civil disobedience must be direct to fall within the defense of necessity. There may be instances in which indirect protests are the only means of civil disobedience

(such as protesting war) or where the actor is protesting the absence of a law or administrative malfeasance. Second, Wheatley was not practicing civil disobedience at all. He was not acting to produce reform of a legal rule, but rather to aid in the enforcement of a rule.

Wheatley's conduct was a simple case of necessity where he was acting to prevent a greater harm. For a successful defense of necessity claim, the defendant must affirmatively show that (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm (3) they reasonably anticipated a direct causal relationship between their conduct and the harm; and (4) they had no legal alternatives to violating the law. *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992). The Court quickly dismissed Wheatley's ability to satisfy these four elements; however, a closer look shows that it would be possible.

First, the danger Wheatley sought to avoid was the ongoing violations of the California Penal Code by the Company. These violations result in harms to the health of the animals and potentially to the interests of the public (whose motivations for voting for the regulations are being frustrated). This harm outweighs the harm posed by Wheatley's violation of the APPA. Wheatley's unlawful conduct only threatens to reveal the Company's own violations and force compliance with the relevant California rules. Second, the harm threatened by the company's conduct was imminent in that the animals were presently suffering and would continue to suffer

indefinitely under those conditions. Third, Wheatley's conduct is directly linked to the elimination of the harm. By recording the videos he has strong evidence of the company's violations and a greater likelihood of successfully forcing change. Wheatley's videos have already gained widespread publicity and led the company to issue a statement of intent regarding the feasibility study for modifications. Wheatley's videos could also be submitted as evidence in legal proceedings against the company to force compliance with the California regulations. Finally, Wheatley was limited in the alternatives available to him. Wheatley could, and in fact did, report the violations to his supervisors. His report was disregarded and Wheatley was told that he "needn't be concerned." Wheatley's only alternative was to report the violations to external officials, which would require some sort of proof. Without physical evidence of the wrongful conduct, Wheatley's report would not be as effective and therefore not a reasonable alternative. Contrary to the lower court's conclusion, a close analysis of the elements of necessity illustrate the necessity of Wheatley's conduct and justify application of this affirmative defense.

VI. The District Court's grant of Mr. Wheatley's Motion for Acquittal on Counts 2 and 3 of the indictment should be upheld because the Animal Enterprise Terrorism Act exceeds congressional authority under the Commerce Clause.

Through the Animal Enterprise Terrorism Act, 18 USC § 43 ("AETA"), Congress purported to extend direct federal regulation to activities undertaken with the purpose to damage or interfere with "animal enterprises." The statute prohibits, in relevant part, intentionally damaging or causing the loss of any real or personal property used by an animal enterprise in connection with the purpose of damaging or interfering with the operation of that enterprise, while traveling in interstate commerce or using any facility of interstate commerce. The statute further prescribes a criminal penalty of up to life imprisonment. 18 USC § 43(b). In attempting to

criminalize Mr. Wheatley's non-commercial Facebook posts relating to his observations at Eggs R Us, Congress has exceeded its authority under the Commerce Clause.

The United States government is one of enumerated, limited powers. Pursuant to the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In *United States v. Lopez*, 514 U.S. 549 (1995), the Court articulated three "broad categories of activity" that Congress may regulate pursuant to its authority under the Commerce Clause: (1) "Congress may regulate the use of the channels of interstate commerce"; (2) "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *Id*. at 558-59. The government asserts that AETA is a constitutional use of the commerce power pursuant either to the "instrumentality" of interstate commerce analysis, or to the "substantial relation" analysis. However, Facebook is not an instrumentality of interstate commerce. Even if Facebook generally can be an instrumentality of interstate commerce, Mr. Wheatley's specific use of Facebook is not covered by the language of the Act. Furthermore, Mr. Wheatley's Facebook posts regarding the ill-treatment of animals and the violation of state law that he witnessed at the Company's plant did not have a substantial effect on interstate commerce. As such, the District Court's grant of Mr. Wheatley's Motion for Acquittal on Counts 2 and 3 of the indictment should be upheld.

a. Facebook is not an instrumentality of interstate commerce.

The District Court erroneously concluded that Facebook was an instrumentality of interstate commerce, and that as such, the government was acting within its Commerce Clause

authority when it attempted to criminalize Mr. Wheatley's Facebook activity regarding his observations at the Company. However, AETA is not designed to regulate the internet, much less Facebook, and if interpreted as such, it would strain the bounds of congressional authority to construe it as a regulation of the internet. The AETA was enacted pursuant to congressional concerns over animal rights groups trespassing on animal enterprise property and physically damaging or stealing that property. Notwithstanding the obvious intent of the legislation, the government argues that Congress did intend to regulate the internet when it enacted the AETA, and moreover that it possesses the Constitutional authority to do so. The District Court itself acknowledged that there is no authority controlling the court as to whether Facebook constitutes a facility of interstate commerce under the Commerce Clause. The cases the government cites to support its argument that the internet is an instrumentality of interstate commerce (e.g. *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *United States v. Panfil*, 338 F.3d 1299 (11th Cir. 2003)) are indeed not controlling in this Court. Regardless, the District Court went on to conclude that despite that lack of controlling authority, because the Commerce Clause grants broad regulatory powers to Congress, the posting of the video clips to Facebook and blogging about operations at the company constitute the usage of a facility of interstate commerce within the meaning of the AETA. However, the District Court ignored the fact that Commerce Clause jurisprudence has increasingly moved to place some limitations on this broad scope of authority. *See Lopez*, 514 U.S. 549.

The power granted to Congress by the Commerce Clause "is the power to regulate; that is, to prescribe the *rule by which commerce is to be governed*." *Lopez*, 514 U.S. 549 at 553 (emphasis added) (citing *Gibbons v. Ogden*, 9 Wheat 1, 196 (1824)). In order to allow Congress to carry out this regulation, the Supreme Court has broadened the meaning of the Commerce

Clause to include the power to protect the instrumentalities of interstate commerce. *Lopez*, 514 U.S. 549 at 558. The government argues that the internet, and specifically Facebook, is an instrumentality of interstate commerce, because it is analogous to a movement of goods and people across state lines, transacting in commerce. The government further argues that Facebook is an instrumentality of interstate commerce because Congress may punish conduct that "interferes with, obstructs, or prevents" interstate commerce. *United States v. Dinwiddie*, 76 F.3d 914, 919 (8th Cir. 1996). However, the case the government cites to support its argument is inapposite with respect to the instant case. In *Dinwiddie*, the Eighth Circuit held that the Commerce Clause allowed Congress to criminalize violence against providers of reproductive health services, on the grounds that said violence substantially affected interstate commerce and that the law was intended to protect an instrumentality of interstate commerce. The Court in *Dinwiddie* held that the reproductive services providers were, in effect, instrumentalities of interstate commerce, and could be protected by federal congressional legislation. In the instant case, the government is not arguing that it is trying to protect Facebook or the Internet from Mr. Wheatley's actions. Rather, it is arguing that in order to protect the Company from economic harm, it has the authority to regulate postings on Facebook. As such, the government fails to support its argument that Facebook itself is an instrumentality of interstate commerce that needs protection.

b. Even if the internet is an instrumentality of interstate commerce, the AETA does not apply to Mr. Wheatley's use of the internet in the instant case.

Even if the Court chooses to accept the government's argument that the internet is an instrumentality of interstate commerce generally, Mr. Wheatley's use of Facebook does not make it a "facility of interstate commerce" for the purposes of the Act.

Mr. Wheatley's use of Facebook was expressive and political, but emphatically not commercial. While the internet does have many commercial applications and implications, the use of Facebook is not predominantly of a commercial or economic nature, but rather of an expressive and social nature. Mr. Wheatley, in posting the videos and blogging about his observations at the Company, was expressing his outrage and disgust for the operations of the Company. He was not engaged in a commercial or economic transaction; he was not using the internet for any commercial purpose. He was using Facebook, a social networking website, to express to his friends, family and acquaintances his views on the factory farm industry. As such, the District Court erred in characterizing Mr. Wheatley's use of Facebook as a facility of interstate commerce for the purposes of the AETA.

c. Mr. Wheatley's internet activities did not have a substantial effect on interstate commerce.

In *United States v. Morrison*, 529 U.S. 598 (2000), the Court articulated four "reference points" to apply in deciding whether prohibiting an activity exceeds Congress's authority under the Commerce Clause. The first factor is whether the activity is economic or part "of some sort of economic endeavor." The second favor is whether the federal statute contains an "express jurisdictional element which might limit its reach to a discrete set of possessions that additionally have an explicit connection with or effect on interstate commerce." The third favor is whether "there are any express congressional findings regarding the effects upon interstate commerce" of the activity in question." The fourth factor is whether "the link between the activity and a substantial effect on interstate commerce is attenuated. *Id*. at 609-13.

Factors one and four are particularly relevant here. In *Morrison*, the Court noted that in all previous cases in which the Court had upheld an activity based on its substantial effect on interstate commerce, "the activity in question" involved an economic endeavor of some type. Id.

at 611. Moreover, in Lopez, which involved regulation of a non-commercial activity, the Court declined to aggregate the effects of the activity because it was non-commercial in nature. As noted previously, Mr. Wheatley's conduct in posting videos and blogging on Facebook was not economic or commercial in nature. While he did state that he would cease buying eggs, he did so as an expressive, political statement against the mistreatment of animals. His conduct was in no way part of an economic endeavor. As relates to the fourth factor, Congress has plainly exceeded its authority. The government must show a *substantial* effect on interstate commerce, not merely a slight one. In *Gonzalez v. Raich*, 545 U.S. 1 (2005), the Court noted that "our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.'" *Id*. at 17. The Court went on to note that when such a class of economic activities are involved, even though they are characterized as intrastate, if they bear a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." *Id*. However, in the instant case, Mr. Wheatley's conduct does not fall within an "economic class of activities." The Court should not aggregate the potential effects of multiple instances of Mr. Wheatley's behavior, because Mr. Wheatley's conduct was plainly non-economic in nature. Without aggregation, the government simply fails to demonstrate that Mr. Wheatley's conduct had a substantial effect on interstate commerce.

VII. Even if the Animal Enterprise Terrorism Act does not exceed congressional authority under the Commerce Clause, the District Court properly overturned Mr. Wheatley's conviction on count 2 of the indictment because the Act does not apply to Mr. Wheatley's conduct under the evidence presented in this case.

a. Mr. Wheatley did not use the internet for the purpose of damaging or interfering with the operations of the Company.

The government argues that Mr. Wheatley posted the videos and commentary to Facebook with the purpose of damaging or interfering with the operations of the Company. The District Court erroneously agreed, on the grounds that by causing media attention to focus on the Company, Wheatley intended to damage and interfere with the Company's operations. However, the plain language of the statute contradicts this argument.

i. The Act excludes the alleged harms Mr. Wheatley caused to the company in its definition of "economic damage."

The definitions section of the AETA provides that the term "economic damage" "*does not include any lawful economic disruption* (including a lawful boycott) that results from lawful public, governmental, or business *reaction to the disclosure of information about an animal enterprise*." 18 U.S.C. 43(d)(3)(B) (emphasis added). Thus, Congress did not intend to sweep within the scope of the legislation the type of activity in which Mr. Wheatley engaged. It would twist logic, therefore, to say that Mr. Wheatley intended to damage the operations of the Company by engaging in activity that is itself not criminalized by the statute. It is true that a company can be damaged by economic loss caused by media exposure, as the District Court notes. However, that is not the type of damage that Congress envisioned when it drafted this legislation, as evidenced by the plain language.

ii. Mr. Wheatley cannot have interfered with the operations of the Company merely by causing the Company to comply with the law of the State of California.

The District Court further concluded that Mr. Wheatley acted with the purpose of interfering with the operations of the Company when he posted his videos and commentary to Facebook. However, the lower court itself notes that the only arguable interference Mr. Wheatley could have intended to cause was to force the Company to comply with the law of the State in

which it was operating. It would be ironic to hold that Mr. Wheatley intended to interfere with the operations of the Company simply by causing media exposure which prompted the Company to comply with the letter of the law.

b. Even if Mr. Wheatley used the internet for the purpose of damaging or interfering with the operations of the Company, Mr. Wheatley did not cause the loss of any real or personal property to the Company within the meaning of the Act.

The District Court correctly concluded that in using Facebook to post videos and comments regarding the Company's treatment of chickens, Mr. Wheatley did not cause the loss of any real or personal property to the Company within the meaning of the Act. The Act states, in relevant part:

> "Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate commerce
> (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
> (2) in connection with such purpose—
> (A) *intentionally damages or causes the loss of any real or personal property* (including animals or records) used by an animal enterprise..."

18 U.S.C. 43(a) (emphasis added). Thus, even if the Court accepts the argument that Facebook, as used by Mr. Wheatley, constitutes a facility of interstate commerce, and that the Act is a permissible exercise of the Commerce Clause power, and further that Mr. Wheatley acted with the purpose of damaging or interfering with the operations of Eggs R Us, it should still hold that the District Court properly vacated Mr. Wheatley's conviction on Count 2 of the indictment on the grounds that in so acting, Mr. Wheatley did not cause the loss of any real or personal property of the Company, nor did he intentionally damage the aforesaid property.

Count 2 of the indictment charges Mr. Wheatley with violating the AETA by making a video recording of working conditions and activity's at the Company's

California facilities. The government argues that Mr. Wheatley's activities caused economic harm to the Company, and therefore Mr. Wheatley intentionally damaged or caused the loss of real or personal property of the animal enterprise. The issue, thus, is whether this alleged economic harm to the company, indirectly caused by Mr. Wheatley's Facebook posts, constitutes a loss of "real or personal property." The language of the Act and its context indicate that it does not. The term real property is a term of art signifying an asset in the form of land, or, more loosely, any tangible asset. Black's Law Dictionary (9th Edition 2009). It is logical to give this meaning to "real property," because the Animal Enterprise Terrorism Act, by its very name, indicates that in enacting this legislation, Congress was concerned about animal activist groups using terrorism as a method of political change. Traditionally, terrorism takes the form of physical harm to real property as well as persons. The title of § 43 is "Force, violence, and threats involving animal enterprises." 18 U.S.C. § 43. Mr. Wheatley plainly did not harm or threaten to harm the Company's physical property, nor any person involved in the Company. Nor did he damage or cause the loss of any personal property within the meaning of the Act. Although the term personal property generally refers to money or chattels, the language of the AETA itself indicates that the alleged economic harm Mr. Wheatley's activities caused to the company were not within the scope of the legislation as Congress intended it. The Act provides specific penalties for causing "economic damage," as opposed to bodily injury. The definitions section of the Act provides that the term "economic damage" "*does not include any lawful economic disruption* (including a lawful boycott) that results from lawful public, governmental, or business *reaction to the disclosure of information about an animal enterprise*." 18 U.S.C. 43(d)(3)(B) (emphasis

added). This language demonstrates that Congress did not intend to criminalize any economic damage to a company that resulted from the disclosure of information about that company. Congress was concerned with criminalizing terrorism, and despite the government's contentions, Mr. Wheatley's activities simply do not fall within the scope of the Act

VIII. The District Court properly overturned Mr. Wheatley's conviction on count 3 of the indictment because Mr. Wheatley did not remove "George" from the premises of the company for the purpose of damaging or interfering with the operations of the Company within the meaning of the AETA.

The District Court properly concluded that Mr. Wheatley's actions in removing "George" from the premises of the Company were not undertaken for the purpose of damaging or interfering with the operations of the Company within the meaning of the AETA. The uncontroverted facts show that the sole reason Mr. Wheatley removed "George" from the premises was to save the chick from a terrible fate. Mr. Wheatley acted with no other purpose when he removed the chick from the facility. As such, the District Court properly vacated Mr. Wheatley's conviction on Count 2 of the indictment.

CONCLUSION

For the aforesaid reasons, the Appellant/Cross-Respondent Louis Wheatley respectfully urges the Court to uphold the lower court's grant of Mr. Wheatley's motion as to Counts 2 and 3 of the indictment and to reverse the lower court's denial of Mr. Wheatley's motion as to Count 1 of the indictment.