CASE No. 11-11223

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES — Respondent-Cross-Appellant

v.

LOUIS WHEATLEY — Appellant-Cross-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Brief for Respondent

TEAM NUMBER:
9

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QUESTIONS PRESENTED

1. Whether the First Amendment Free Speech Clause in the United States Constitution is violated by Federal Law § 999.2(3), when the language of the statute is neither ambiguous nor overly burdens Appellant's free speech rights, such that his conviction under that statute should be overturned.
2. Whether public policy or the defense of necessity are an inappropriate means to overturn the Appellant's conviction under Count I, when public policy arguments are best left to the legislature and the Appellant had numerous legal avenues available to him.
3. Whether 18 U.S.C. § 43 exceeds congressional authority under the Commerce Clause of the United States Constitution.
4. Whether the District Court erred in overturning the rational and reasonable jury verdict convicting Appellant under Counts 2 and 3, because 18 U.S.C. § 43 does apply to Appellant's conduct under the evidence presented in this case.

STATEMENT OF THE CASE

A federal grand jury sitting in the Central District of California returned a three-count indictment against Appellant in February of 2011. The indictment charged Appellant, a California resident, with (1) entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording device, in violation of § 999.2(3) of the Agriculture Products Protection Act ("APPA"); (2) using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise, in violation of the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43(a)(1); and (3) in connection with such purpose, intentionally damaging or causing the loss of any real or personal property (including animals or records) used by an animal enterprise, in violation of the AETA 18 U.S.C. § 43 (a)(2)(A). The Appellant filed a motion to dismiss the indictment in the district court, which the district court denied on all counts. The case proceeded to trial where a jury of Appellant's peers convicted Appellant on all three counts. Appellant filed a Federal Rule of Criminal Procedure 29 motion for judgment of acquittal. The district court denied Appellant's motion as to Count I of the indictment but granted his motion as to Counts II and III. Both parties cross-appealed from the judgment entered in the United States District Court for the Central District of California.

STATEMENT OF FACTS[1]

In 2008, Appellant became familiar with farmed animal condition protection advocacy. Appellant read about farmed animal issues and then joined a farmed animal protection organization. *Opinion* p. 2. In May of 2010, Appellant applied for a job at Eggs R Us (the "Company"), a mid-sized egg producing enterprise with facilities in California, Nevada, and

[1] Facts are taken from the District Court's memorandum opinion and will be cited as "*Opinion*".

North Dakota. *Opinion* p. 1-2. The Company hired Appellant to be a "poultry care specialist" during Appellant's summer vacation from college. *Opinion* p. 2. Appellant's job involved feeding and watering the chickens housed in industrial grade battery cages, and cleaning the cages as time permitted. *Id*. Appellant needed a job to help pay for college and apparently thought it would be the perfect opportunity to witness farmed animal industry conditions for himself. *Id*. Appellant began work on June 1, 2010. *Id.* Appellant contended that he did not take the job to harm the Company, but admitted he hoped to write an article for class and "blog" about his experiences at work on the internet. *Id*. The Company has been in business since 1966 and receives a great deal of federal compensation to provide eggs for school children in California through the National School Lunch Program. *Id*.

Around June 17, 2010, Appellant made a four-minute video of an unidentified co-worker at the Company following company and industry policy by throwing living and dead male chicks born at the facility into the grinder to be macerated. *Opinion* p. 3. Male chicks are considered a byproduct and "waste" in the egg industry. *Opinion* p. 2. Evidence at trial showed that industry custom is to dispose of the male chicks by grinding or macerating them. *Opinion* p. 2-3. Appellant posted the video to his own Facebook page that same evening and stated: "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." *Opinion* p. 3. After Appellant posted the video, a Facebook "friend" posted the video on YouTube and over one million people have viewed the video. *Id*. The video provoked local news reports and raised media attention on the issue. *Id*.

During Appellant's brief employment, he allegedly saw that the Company kept an average of six egg-laying hens in a cage with a floor area approximately 16 inches by 18 inches. *Id*. These cages provided an average of approximately 48 square inches of floor space for each

hen and evidence presented by Appellant at trial tended to show that industry recommendations were for at least 67 square inches per hen. *Id*. Through internet research, Appellant knew that the Prevention of Farm Animal Cruelty Act ("Prop 2") prohibited the confinement of farm animals in a manner that prevents them from spreading their limbs or wings. *Id*. Allegedly, Appellant inquired about the requirements with his supervisor and he was told he "needn't be concerned." *Id*. Appellant then made a second, shorter video of the hens in the cages, which he also posted to his personal Facebook page. *Id*. Evidence at trial indicated that Appellant removed the second video from his Facebook page and that it never was posted to YouTube. *Id*. In addition to the videos, Appellant blogged about the alleged violation of Prop 2 and the allegedly careless attitude of his supervisor as well as informed the farmed animal protection organization he had joined. *Opinion* p. 3-4. After the negative media attention focused in on the Company due to the actions of Appellant, the Company made public statements denying any violations of Prop 2, and that it would look into the feasibility of modifying some of its practices in the California facility. *Opinion* p. 4. Additionally, Appellant on the same day stole a male chick from the Company. *Id*.

A manager of the Company was informed of Appellant's Facebook postings approximately two weeks after he made the posts and Appellant was fired. *Id*. The Company then notified federal authorities and Appellant was arrested and charged with violations of the APPA and the AETA. *Id*. After authorities learned that Appellant stole the male chick new charges were added based on this theft of Company property. *Id*. Importantly, Appellant has never denied any of the factual allegations against him. *Id*.

STANDARD OF REVIEW

This Court reviews a District Court's conviction for Count I under Agriculture Products Protection Act and its grant of a motion for acquittal for Count II and Count III under the Animal

Enterprise Terrorism Act and applies a de novo standard of review. *See U.S. v. Collins*, 551 F.3d 914, 928 (9th Cir., 2009).

SUMMARY OF THE ARGUMENT

Curtailing actions that may inadvertently restrain a form of speech is well within the purview of Congress's abilities under the First Amendment in a non-public forum. The Agriculture Products Protection Act ("APPA") is a reasonable restriction on an individual's actions of videoing and audio recording without the permission of the owner. Other avenues of speech are available to individuals in expressing messages related to the internal procedures of animal facilities. Furthermore, the APPA is not overly broad as it extends only to actions performed without consent. Additionally, not all conduct can be considered speech and it is well within Congress's power to criminalize conduct. Protecting the health and safety of its citizens has always been a substantial interest for the government. Likewise, Congress has a substantial interest in protecting animal facilities and their employees from extremist actions, which can cause not only physical damage but also economic damage to these facilities.

Public policy arguments regarding animal welfare and the ability of citizens to help enforce those laws do not validate the Appellant's violation of the APPA. Congress has addressed Appellant's public policy argument and has conclusively left out any reference to a whistleblower exception. The only exceptions applicable to the APPA are where individuals get the owner's full consent for their actions as well as the lawful action of agencies performing their legal duties. Likewise, the necessity defense is inapposite to the Appellant's actions. Appellant was left with many legal options including reporting any alleged violations to the property government authorities. Furthermore, Appellant cannot reasonably show that his conduct would prevent immediate harm. Thus, Appellant's conviction under Count I of the indictment should be upheld.

Congress has broad powers under the Commerce Clause to regulate the channels, instrumentalities, and actions, which substantially affect interstate commerce. Clearly, an egg producing operation that receives funding from the federal government and is regulated by the federal government is an instrumentality of commerce. Furthermore, the Internet is an emerging and novel instrumentality of commerce and Congress has the authority under the Commerce Clause to regulate it. Likewise, Congress may regulate conduct, which has a substantial affect on interstate commerce. Thus, Congress may regulate conduct through the Animal Enterprise Terrorism Act ("AETA") that clearly can have a substantial affect on interstate commerce such as posting videos on the internet of alleged violations of animal welfare laws by an animal facility thereby causing economic harm to the animal facility.

With reasonable inferences to support its verdict, the jury was rational in finding the Appellant guilty under Counts II and III of the indictment. The AETA's provisions clearly apply to Appellant's conduct. Not only did Appellant illegally post videos of company practices causing substantial economic harm to the Company but the Appellant also stole a male chick, personal property of the company, on the same day and for the same purpose of causing the Company further economic damage. Through blogging and increased media attention Appellant will be able to glorify his rescuing this one chick from the "cruel" company and industry practices thereby throwing fuel on an already blazing firestorm against the Company. Thus, Appellant's act of rescuing the chick is inextricably intertwined with his purpose of causing economic harm to the Company.

ARGUMENT

This Court should uphold the ruling of the district court denying Appellant's Federal Rules of Criminal Procedure, Rule 29, motion for judgment of acquittal and upholding the jury verdict of guilty on Count I finding that the APPA, Federal Law § 999.2(3) is constitutional as a valid, reasonable restraint on speech and that the APPA is not overly broad. However, this Court should reverse the ruling of the district court granting Appellant's motion as to Counts II and III, involving violations of the AETA, and find that a rational trier of fact, the jury in this case, could find Appellant violated the applicable provisions of the AETA.

I. The Government may regulate speech in a non-public forum so long as the restriction is reasonable and content-neutral thereby making the APPA constitutional.

The APPA does not overly burden an individual's free speech rights and only places a reasonable restriction on speech, which Congress is permitted to do. Despite the fact the Company receives some government funding and is regulated by the United States Department of Agriculture, daily oversight of the company's operations rest squarely in the hands of the business owners. Therefore, the statute regulates conduct and speech in a non-public forum, namely a private business owned and operated by private individuals.

Additionally, the APPA is a content-neutral regulation, which applies to all types of speech regardless of the message. The APPA is a facially neutral law because it places no restrictions on a specific message or a particular type of content. Instead, the specific section challenged, Federal Law § 999.2(3), places limitations on particular actions, not speech. The challenged provision thus is meant only to regulate conduct, regardless of the viewpoint or subject matter. The APPA's prohibition against specific acts only incidentally affects speech without regard to the content. In conjunction with the non-public forum, the statute's intended

purpose, and Congressional intent, the statute is a reasonable and constitutional restriction on an individual's speech rights.

A. Under the forum doctrine, the APPA restrictions clearly apply only to actions made in a non-public forum, specifically private entities.

In order to determine the proper level of scrutiny to be applied to a challenged regulation, a court must first resolve in what forum the restricted speech is being made. Speech that is protected by the First Amendment is not immune from all restrictions. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc*., 473 U.S. 788, 800 105 S. Ct. 3439 (1985) ("Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.") Courts must look at what type of property or forum the speech is being made in and what interruptions may occur for others as a result of the speech. Thus, courts use the forum doctrine as the first step in any analysis of a First Amendment challenge to carefully draw the proper lines by which the restriction is to be judged.

The forum doctrine breaks property into three different categories: (1) public forums, (2) limited public forums, and (3) non-public forums. Public forums consist of property, which have historically always "…been devoted to assembly and debate" and in these public forums "…the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948 (1983). In order to pass constitutional challenges in a public forum, the government is required to show that a content-based regulation "…is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that

end." *Id*. On the other hand, the government may impose restrictions of speech in "time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id*. Thus even in a public forum, the government may at times impose reasonable time, place, and manner restrictions of a content-based nature so long as the regulation is narrowly tailored to meet the intended significant government interest, and there are other available options for speakers to correspond and exchange ideas.

Limited public forums include public property that the government has made open to the public as a place for public communication. Furthermore, limited public forums are often open for specific communicative reasons or to be used only by particular groups. *See, e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 97 S. Ct. 421 (1976) (school board meetings); *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981) (registered university student group meeting facility); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338 (1995) (private parade organization in public forum). When the government creates a limited public forum, the First Amendment still prohibits the government from making speech exclusions of a content-based nature unless the regulation is "narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46. Therefore, the burden of showing a compelling interest and that the statute is narrowly tailored to meet that interest rests squarely on the government.

Non-public forums generally include public property, which have neither been historically a forum for public discourse nor has the property been made so by performance on the government's part. Regulations of speech in non-public forums are subject to less rigid scrutiny because the "First Amendment does not guarantee access to property simply because it

is owned or controlled by the government." *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129, 101 S. Ct. 2676 (1981). In non-public forums the government may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because the public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. Furthermore, the Supreme Court has readily recognized that "the State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836, 96 S. Ct. 1211 (1976). Therefore, the government has significant latitude to restrict speech in a non-public forum so long as the restriction is a reasonable one and there is some other interest beyond suppression of a disfavored viewpoint.

In this case, the inescapable conclusion is that the APPA restricts conduct performed in a non-public forum. Eggs R Us is a private business and the APPA restricts conduct which occurs on private business property without the express permission of the owner or manager of the company. Eggs R Us remains at all times a private business entity even when coupled with government funding and oversight. Daily operations of the company rest solely with company management. The intended purpose of Eggs R Us is to be run as a business making money for the owner and shareholders of the company. Eggs R Us is a private employer and there is no evidence to suggest that the company opens its doors to the public or allows the public to freely use its facilities in any way for expressive or communicative means. Because the APPA restricts videoing and recording while on private property, a non-public forum, the restriction should be upheld so long as it is content-neutral, reasonable, and not for the purpose of suppressing disfavored speech. Since the forum restricts actions in a non-public forum, it must next be determined whether the restriction is viewpoint neutral or content-based.

B. The APPA is a law of general applicability to everyone regardless of the viewpoint or subject matter.

The right to freedom of speech is one of the strongest constitutional rights United States citizens enjoy. The First Amendment in relative part reads, "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. However, the Supreme Court has never accepted the view that the First Amendment prohibits all government regulation of expression. In any First Amendment challenge, a court must decide whether the restriction challenged limits the speech on the basis of its content or whether the restriction is content neutral. Any regulation that limits speech on the grounds of its content or message will be subject to the strictest of scrutiny. Regulations of this type "…pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting System, Inc. v. Federal Communications Commn.*, 512 U.S. 622, 641, 114 S. Ct. 2445 (1994). On the other hand, content neutral regulations are subject only to intermediate scrutiny because these regulations "…pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id*. at 642. To determine if a regulation is content-neutral or content-based, a court must ask whether the government has regulated the speech because of its agreement or disagreement with the message it conveys. Generally, laws that expressly distinguish favored speech from disfavored speech on the basis of the thoughts or views expressed are content-based, whereas those regulations, which grant benefits or restrictions without mentioning a particular message, are most likely content neutral. Thus, a court must first decide what type of regulatory category the speech restriction falls into in order to determine by what level of scrutiny the restriction may be tested.

In this case, the APPA Federal Law Section 999.2(3) is a content neutral regulation, which applies to a person's action and not the message he or she wishes to express. The statute reads in pertinent part, "No person who uses or causes to be used the mail or any facility of interstate or foreign commerce may without the effective consent of the owner: Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment." The statute's explicit language is silent as to what type of specific message, content, or purpose is needed in order that the actions be considered a violation of the statute. Likewise, the statute is silent, in all other sections, as to any message or ideas that will cause a violation. Simply, the APPA is designed to prohibit criminal conduct and impose punishments, regardless of any sort of message that could lead to the damage or destruction of an animal facility. For example, an animal facility competitor could make videos and/or recordings without the consent of the owner, which could lead to the discovery of company secrets or be used to make allegations against the company of animal welfare violations. Furthermore, an individual with a completely objective purpose of videoing or recording the animal facility and a person with a pro-animal facility stance would be equally guilty of violating the APPA as the individual with a malevolent intent. Thus, the statute applies to everyone regardless of his or her views or ideas.

Important to the analysis on whether a restriction is content-neutral, the *O'Brien* court stated "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673 (1968). Revealing of the case before this court, not all actions can be labeled speech or symbolic speech. Additionally, the *O'Brien* court specifically noted that "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in

regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id*. A content-neutral regulation that regulates speech or conduct will be upheld as constitutional so long as "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. Therefore, only those restrictions on speech rights that are reasonable and go no further than necessary will be upheld as constitutional. The restriction in this case furthers the substantial government interest of protecting animal facilities against animal terrorist actions, restricts speech only incidentally in a private forum, and only restricts actions that would disrupt or interfere with the purpose of the forum.

The APPA's restriction is reasonable and is not intended to suppress disfavored speech. This restriction is intended to protect animal facilities solely from damage and destruction of company property at the hands of rival competitors, violent animal activist terrorists, and disgruntled employees who could not only cause physical damage to property but also damage to intangible property rights such as corporate good will and reputation. As the court in *O'Brien* found, not all actions can be considered speech. The APPA prohibits a channel through which speech can be made, which only has the incidental effect of suppressing speech. Furthermore, the restriction is reasonable as it only applies to videos and recordings made while on the company property and made without permission. Alternative avenues are available including asking for permission to video and audio record, making written recordings, and informing the proper authorities of any alleged violations since the statute does not apply to the lawful activities of government agencies performing their duties under applicable law. Furthermore, the restriction is reasonable as it helps to keep the property cemented to its intended purpose, which is for

business-minded purposes only. Thus, the APPA restricts conduct only associated in a non-public forum, the restriction is content-neutral, and it is reasonable in light of the significant government interest.

II. The APPA is not overly broad because it restricts action integrally related to criminal conduct and there is no constitutional guarantee to video and record alleged violations of animal welfare laws in a private facility.

Plainly, the APPA restricts conduct that any private employer could restrict on its own accord. In any challenge to speech restrictions on overbreadth grounds, a court may invalidate such a restriction if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184 (2008). The traditional rule of standing is halted in an overbreadth challenge and those individuals who a statute may be constitutionally applied can argue the statute has unconstitutional applications to others. *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483, 109 S.Ct. 3028 (1989) ("Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else ") Additionally, the first inquiry in an overbreadth challenge requires a court "to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830 (2008). Here, the restriction focuses solely on videoing and audio recording done without the express permission of the owner, which leaves the availability of other avenues open to individuals. Essentially by videoing and recording without permission, individuals are trespassing on the property owner's right to exclude people and actions on its property, which may be harmful to the business

interests of the company. Furthermore, the burden of showing that a statute is constitutionally overbroad rests entirely with the challenger. *See, e.g., United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577 (2010) ("we have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists.") (internal citation omitted) Thus, Appellant bears the burden of showing there are no constitutional applications of the APPA.

Appellant simply cannot meet the requirements of showing the statute is constitutionally overbroad because the restriction applies only to videoing and audio recording without the express permission of the owner or manager. Furthermore, the statute exempts lawful activities of agencies carrying out legal duties. Additionally, there is no constitutional guarantee that private individuals may secure evidence of wrongdoing in privately owned animal facilities if the government agencies fail to properly investigate and/or enforce animal welfare laws. Moreover, had Congress wanted to include such protection for whistleblowers it would have done so. Instead, Congress only granted exceptions to those asking permission from the owner and to law agencies. Considering the important government interest in protecting animal facilities against animal terrorist activities, the statute is clearly survives an overbreadth challenge since it applies to unlawful, criminal activities of animal terrorists.

III. Public Policy concerns are best left to the legislature and any public policy arguments in this case do not dictate overturning Appellant's conviction under Count I.

Appellant's violation of the APPA is not justified through alleged public concerns. Public policy issues are most appropriately left for Congress to decide. However, assuming the court should address Appellant's public policy argument, Appellant's public policy argument fails to outweigh the substantial government interest of protecting animal facilities. Appellant's

public policy arguments fail not only because public policy is best left to Congress, but also because Congress has already decided the issue by choosing not to include a whistleblower provision in the statutes.

The conduct prohibited by the APPA is clear and Appellant has blatantly disregarded the law. The APPA, Federal Law 999.2(3), states that "no person who uses or causes to be used the mail or any facility of interstate or foreign commerce may without the effective consent of the owner may enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment." Appellant posted two illegal, undercover videos from inside the Company on facebook; one showing an employee placing live chicks through the grinder laughing and another showing battery cages allegedly in violation of California state animal welfare laws. While protecting animals is of public concern, the goal of animal protection must be achieved through legislative advocacy.

Appellant cannot rely on an exemption that is not expressed in the statute. The statute should be interpreted in its strictest form by the courts and the business of amending the statute should be left to Congress. *California Teachers Association v. Governing Board of Rialto Unified School District*, 927 P.2d 1175, 1177 (Cal. 1997)("In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law.") The making of illegal videos and placing them on the internet causing irreparable harm is exactly the type of conduct the APPA was intended to prevent. Congress, by not including a whistleblower provision, has made clear its intention to not afford an offender of the APPA this exception.

The decision to include a whistleblower provision is evident in other statutes enacted to protect animal enterprises such as similar statutes enacted in Kansas and North Dakota and the AETA. The failure to provide whistleblower provisions in neither the Kansas nor the North

Dakota statute evidences the intent to punish those who violate these laws despite the possibility of exposing illegal behavior. *See* Kan. Stat. Ann. § 47-1827 and N.D. Cent. Code 12.1-21.1-02. The AETA, another statute enacted in the interest of protecting animal enterprises, also does not provide a whistleblower provision. The failure of Congress to insert a whistleblower exception to the AETA has been realized in the animal rights movement as evidenced by articles concerning this purported deficiency. *See generally*, Michael Hill, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 Case W. Res. L. Rev. 651 (2010). Congress has expressed its intent to not make an exception for whistleblowers as they have had the opportunity to make an amendment and have failed to do so. The court should strictly construe the wording of the statute itself because "the words the legislature chose are the best indicators of its intent." *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*, 863 P.2d 218, 221 (Cal. 1993). No mention of a whistleblower provision demonstrates no such provision was intended. The court should not compromise the intentions of Congress by inventing a whistleblower provision for the benefit of Appellant.

Courts usually leave public policy concerns to Congress. It is the purpose of Congress to address the concerns of their constituents and "[i]t cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature." *California Teachers Association,* 927 P.2d at 1177. Animal welfare may be a valid public policy concern, but public policy concerns are best determined by Congress and courts should give deference to those policy judgments. *See Strong v. Superior Court of Orange County*, 132 Cal. Rptr. 3d 18, 26 (Cal. Ct. App. 2011)("We may not rewrite the law, nor pretend to write on a blank slate and reach different policy conclusions than the Legislature, nor decline to give effect to the Legislature's policy choices.") The plain

language of the statute and the lack of a whistleblower provision makes clear that Congress weighed its decision in favor of strongly protecting animal facilities rather than siding with Appellant's public policy concerns.

Not only are Appellant's public policy concerns not warranted in this forum, they also fail to outweigh the significant government interest of protecting animal facilities from damage or destruction. While there may be a valid interest in the well being of animals, this interest does not supersede the interests of people. *United States v. Stevens*, 533 F.3d 218, 227 (3rd Cir. 2008)("…the interest has-without exception-related to the well-being of human rights, not animals.") The purpose behind the APPA was to protect animal enterprises from the devastating economic damage arising from actions of illegal activity. Violation of the APPA, which protects human interests, in animal enterprises cannot be justified through concerns for animal treatment, especially concerns that were exposed through illegal means.

Appellant had many avenues for exposing allegedly illegal conduct by the Company and therefore the court should not tolerate his blatant violation of the law. Appellant could have exercised his First Amendment right in educating the public on the Company's practices through public speeches or an internet blog, orchestrated a protest with his farmed animal protection group, or contacted the proper authorities to take appropriate action. Appellant was not reduced to violating the law to expose alleged illegal conduct by the company making his argument for a whistleblower exception void.

Appellant has chosen the improper forum to address his public policy concerns. Advancing the rights of animals is a worthy cause, but comes at a price when one violates the law. Appellant must be willing to face the consequences in the court in order to present a case for Congress. In violating a clear statute, Appellant's conviction of Count I must be affirmed as

his public policy arguments do not outweigh the significant government interest of protecting animal enterprises.

IV. Appellant cannot rely on the necessity defense as an alternative to his public policy argument because of the availability of many legal options.

Appellant had numerous, legal alternatives for exposing the purported illegal acts of the company which renders the necessity defense unavailable. Appellant's failure to provide sufficient evidence of any of the prongs of the necessity defense disqualifies him from utilizing such defense. The necessity defense has high standards for those who wish to rely on its ability to validate lawlessness. To invoke the necessity defense one must prove each of the following elements: "(1) they were faced with a choice of two 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 to be averted; and (4) they had no legal alternative to violating the law." *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir., 1992). Appellant had other means available to him to bring to light the alleged illegal behavior of the Company and therefore he cannot receive the benefit of the necessity defense.

The Appellant is unable to show any evidence suggesting a remote possibility he qualifies to use the necessity defense. Most importantly, he is unable to show there were no legal alternatives available to him at the time of his actions. Therefore, further inquiry into the possibility of the necessity defense is unnecessary. *United States v. Sued-Jimenez*, 275 F.3d 1,6 (1 Cir., 2001)("Because the elements of the necessity defense are conjunctive, the defense may be precluded entirely if proof of any one of the four prongs is lacking.") Additionally, Appellant must present "more than a scintilla of evidence" to show that he can meet the prongs to invoke the necessity defense. *United States v. Tokash*, 282 F.3d 962, 967 (7 Cir., 2002). Making the

videos may have been the easiest method for the appellant, however, that does not dismiss the fact that appellant had other avenues for exposing purported illegal company practices which invalidates his reliance on the necessity defense.

The last prong of the necessity defense, existence of legal alternatives, was applicable to defendant in *Maxwell* as it is to Appellant. *United States v. Maxwell, 254 F.3d 21, 27 (1st Cir., 2001)*. In *Maxwell* the court responded that instead of disrupting the naval exercises, he could have used the electoral process, educated the public on his message or protested as he had done in the past. *Id.* The court made clear that even if other options are "unlikely to effect the changes he desires through the legal alternatives does not mean, ipso facto, that those alternatives are nonexistent." *Id.* at 29. The court rationalizes that to allow individuals to violate the law when other means have proven ineffective would allow people to utilize the necessity defense as a means for limitless power. *Id.* Appellant may have been discouraged in his farmed animals protection organization and as a citizen, but Appellant cannot invoke a necessity defense to grant him the right to violate laws when he is simply frustrated with the process.

Numerous legal options make the necessity defense inapplicable to Appellant's case. Appellant could have asked for consent from the owner to videotape practices by the company, which they may or may not have granted depending on Appellant's explanation; he could have gone to his farmed animals protection organization and utilized their resources to expose the inside practices of the company; he could have reported the practices to the proper authorities whom could do their own legal undercover investigation; and he also could have simply blogged about his experiences online in order to gain support and sympathy for the farmed animals. Since there were numerous, effective options accessible to Appellant, he does not meet the fourth element of the necessity defense and therefore the necessity defense does not apply.

Even assuming Appellant did not have other legal options available, he is still not able to prove any of the other prongs invoking the necessity defense. Appellant cannot show that he was faced with a choice between two evils or acted to prevent imminent harm. Imminent harm is "a real emergency, a crisis involving immediate danger to oneself or to a third party." *Id*. at 27. The possible failure to abide by cage size guidelines and the alleged mistreatment of farmed animals to be killed do not constitute a greater evil than breaking the law, nor an emergency that calls for immediate, illegal action. Thus, Appellant fails to meet the requirements of the first and second prongs.

Furthermore, Appellant cannot seriously argue he reasonably anticipated a direct causal relationship between his conduct and the harm to be averted. Appellant may have believed that posting the illegal videos and "rescuing" the chick would put an end to the abuse Appellant alleges, but mere belief does not create a causal relationship. In *Maxwell*, defendant claimed he reasonably believed that his disruption of naval exercises would cause Trident submarines to leave thereby enacting nuclear disarmament. *Id.* at 28. Since there was no evidence to prove this causal relationship and "he cannot will a causal relationship into being simply by the fervor of his convictions," the Court found that defendant failed to prove his actions would avoid the harm he sought to prevent. *Id*. Appellant also may have believed that the media attention from two illegal internet videos could make the company fix their supposed violations and "rescuing" the chick could prevent imminent harm to the male chicks at the facility. However, there is no charge or investigation into the Company's practices and male chicks are still property and still used by the Company demonstrating that the Appellant's actions have not had any causal relationship between Appellant's actions and the harm to be avoided. Therefore, Appellant fails to meet the third prong as well.

Appellant has failed to prove any of the elements required for one to invoke the necessity defense. Most importantly, in order to prevent the necessity defense from being abused to justify any illegal act, there must be a showing that no legal alternatives were available. Appellant is unable to provide any evidence that there were no other options available. As a result, Appellant cannot rely on the necessity defense in the alternative to his public policy argument. Thus, Appellant's conviction under Count 1 should be upheld.

V. The AETA is a valid use of Congress's Commerce Clause authority as it seeks to protect animal facilities in interstate commerce and it regulates activities having a substantial relation to interstate commerce.

Congress has broad authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.C.A. Const. Art. I § 8, cl. 3. The Supreme Court has detailed three distinct categories, which come under Commerce Clause power including: (1) "Congress may regulate the use of the channels of interstate commerce"; (2) "Congress is empowered to regulated and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *United State v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624 (1995). As to the breadth of the last category the *Lopez* court stated, "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id*. at 560. Thus, as long as the AETA meets one of the three broad categories it will be upheld as a valid Commerce Clause regulation.

Eggs R Us is an egg producing business with facilities in California, Nevada and North Dakota. *Opinion* p.1. Clearly, the Company is an instrumentality of commerce. Eggs R Us

receives funding from the federal government to supply eggs to school children. *Opinion* p.2. Congress has a substantial interest in protecting animal facilities such as Eggs R Us from interference with its daily operations, sustaining physical damage, or economic damage at the hands of animal terrorists. Appellant used the internet, an instrumentality of interstate commerce, for the purposes of damaging the reputation of the Company and interfering with its daily operations. Not only does Congress have the power to regulate and protect industries in interstate commerce, it also has the power to protect against activities which substantially affect interstate commerce. Appellant's illegally videoing the Company and industry practices and then posting the videos onto the internet where the videos were dispersed and viewed by over 1.2 million people resulted in massive public outrage and media attention. This outrage and attention have placed the Company in the precarious situation of launching a marketing campaign to defend itself from the alleged allegations which have never been substantiated. Clearly, Appellant's actions have caused lost profits for the Company as a result of the negative consumer reactions. Thus, Appellant used the internet as an instrumentality of commerce to post the videos and blog about the incidents, which substantially interfered with the Company's operations and caused economic damage to the Company. These actions are precisely within the powers of Congress to regulate under the Commerce Clause. Furthermore, regulation of the internet itself as a means of interstate commerce is entirely within Congress' power. *See, e.g., United States v. Hornday*, 392 F.3d 1306, 1311 (11th Circ., 2004)("Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce, and to prohibit its use for harmful or immoral purposes regardless of whether those purposes would have a primarily intrastate impact.") Although a case of first impression in this Circuit, this Court should rule that

the internet is indeed an instrumentality of interstate commerce and is within Congress' Commerce Clause powers.

VI. The jury was reasonable in its verdict finding that Appellant's conduct was within the scope for conviction under the Animal Enterprise Terrorism Act, 18 U.S.C. 43(a)(1) and 18 U.S.C. 43(a)(2)(A) and therefore should be upheld in convicting Appellant of Count II and Count III.

Appellant's actions had devastating consequences for the company, which place him within the scope of conduct the AETA was intended to prevent with its enactment. The posting of illegal videos combined with the stealing of company property stigmatized the Company as inhumane. Thus, the Company's daily operations were jeopardized.

A jury verdict should be afforded high deference as being rendered by a group of Appellant's peers who assessed all the facts in the case. Looking at the evidence, in the most favorable light to the government, a jury verdict will only ever be returned when no rational jury could have come to the same result. *See U.S. v. Nobari*, 574 F.3d 1065, 1081 (9th Cir., 2009). In this case there were strong inferences that the AETA applied to Appellant's actions. The following facts provided the substantial evidence the jury needed to make the reasonable inferences that led to a guilty verdict for the Appellant. Appellant used the internet as a weapon of interference and destruction of company good will. 18 U.S.C. 43(a)(1) prohibits using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise; and in connection with such purpose, intentionally damaging or causing the loss of any real or personal property (animals or records) used by an animal enterprise in violation of 18 U.S.C. 43(a)(2)(A). Appellant used the social network site facebook, a vastly used website on the internet, to display illegal videos of alleged company

practices that have ignited massive negative attention in the media and on the internet, which have caused irreparable damage to the company's reputation and finances.

Appellant's background and actions leave little doubt about his intent to violate the AETA. Appellant's background highly suggests his intentions were less than innocent. Appellant was exposed to the possibility of a need for standards in the egg producing business and was likely made sensitive to the standards advised in the guidelines. Appellant continued to learn about the farming practices on the internet and joined a farmed animal protection organization demonstrating that he is sensitive to the treatment of animals, but especially to the animals used in animal enterprises. It is this biased background that led the Appellant to seek employment in the egg producing industry.

Appellant claims he sought employment at the company because he needed money; however, there are many other places to seek employment. He contends he wanted to work at the company to determine the accuracy of the proclaimed substandard conditions in the industry. It is this motive for working at the facility that illustrates his intentions, upon finding allegedly cruel conditions, to expose such conditions to the detriment of the company. Appellant's background information erases any doubt his actions were for the purpose of interfering with the operations of an animal enterprise thereby violating 18 U.S.C. 43(a)(1).

Appellant's background is not itself a crime, but does shed light on his willingness to engage in illegal behavior to carry out "justice" for his cause. Being active in fighting for the rights of animals is not interfered with by the AETA as "the statute provides an exception that exempts *legal* protest activity from proscribed conduct." *United States v. Fullmer*, 584 F.3d 132, 155 (U.S. 2009). Appellant does not contest the fact that he posted the videos on facebook, which is clearly in violation of the APPA and then, as trial drew near, he removed one of the

videos from facebook demonstrating his admission and consciousness of guilt. Since this activity is illegal it is not protected by the First Amendment and therefore this conduct falls under the conduct required for conviction under AETA.

The illegal videos posted by Appellant cemented an immoral reputation for the Company. The Company will have to invest in a campaign to repair the extensive damage done to its image in hopes of reestablishing consumer support. These expenses constitute economic loss as "loss of profits or increased costs" as defined in 18 U.S.C. § 43(d)(3)(A). Appellant did not let the illegal videos speak for themselves; he antagonized the negative image of the company by adding his biased commentary provoking others to take action detrimental to the company. Accompanied with the video was the Appellant's statement: "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." *Opinion* p.3. This statement demonstrates Appellant's desire to economically damage the company. Eggs R Us makes its profit through the egg producing industry and interference with the purchasing of eggs will inevitably hurt the company financially. Appellant used this statement to cast the Company as being inhumane and that based on these alleged actions people should boycott the egg industry with the words "I'll never be able to eat another egg again." *Opinion* p.3. The AETA prohibits using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise. Appellant has placed the illegal videos on the internet, into the stream of commerce, for the purpose of damaging and interfering with the operations of Eggs R Us by instantly branding it as inhumane and criminal through inconclusive videos and by promoting the view of boycotting the egg industry which will subsequently hinder the egg producing business. Therefore, Appellant's conduct falls squarely within the meaning of 18 U.S.C. § 43(a)(1) and hence his jury conviction

was supported by substantial evidence and reasonable inferences and should be reinstated under Count II.

Appellant's conduct is also within the scope of prosecution for 18 U.S.C. 43(a)(2)(A) "and in connection with such purpose, intentionally damaging or causing the loss of any real or personal property (animals or records) used by an animal enterprise." Appellant purposefully stole a chick from the premises to raise as a pet. His membership of a farmed animal protection organization, his posting of the videos that same day, and his knowledge of the supposed violations of the company, are evidence that the purpose of taking of a male chick could not have been detached from the intention of interfering with the operations of an animal enterprise.

Appellant's action of taking the chick constituted as causing loss of property and in connection with interfering with the operations of an animal enterprise. First of all, no matter the monetary value of the property, it is still the property of the facility nonetheless. The chick was not abandoned by the Company and therefore it still has property rights over the chick on Company premises. To claim the chick was abandoned there must be a "total desertion by the owner without being pressed by necessity, duty, or utility to himself." *Katsaris v. United States,* 684 F.2d 758, 762 (11th Cir., 1982). The disposal of the chicks is due to necessity, duty and utility to the Company since there is no efficient way to dispose of millions of male chicks that serve no purpose to the Company and must be discarded. Therefore, the fact that the chick was considered a waste product does not change the illegality of Appellant's actions. The chick is property according to the definition of "economic damage" which is "replacement costs of lost or damaged property" 18 U.S.C. § 43(d)(3)(A). Depriving the Company of its own property by stealing the chick and using this personal property to ignite a campaign against the Company would constitute lost property within the meaning of the statute.

Secondly, there was an interference with the operations of an animal enterprise from this act. Appellant has not only given himself a pet but a "victim" to commercialize. By raising him as a pet and giving him the name "George" Appellant will garnish sympathy from the public adding fuel to the controversy surrounding his former employer. The costs associated with assuring the public that the Company does not endorse the unnecessary maltreatment of animals will surely impede the day-to-day operations as cuts in employment and changes in conditions are inevitable to regain public approval. Appellant, by stealing and personalizing property from the Company, has caused economic damage to the Company as it will have to expend its funds to combat the negative view of the Company resulting from Appellant's illegal actions. Therefore, the jury reasonably found that Appellant's conduct was within the scope of 18 U.S.C. § 43(a)(2)(A) and consequently Appellant's conviction of Count III should be reinstated.

CONCLUSION

The Agriculture Products Protection Act survives a First Amendment challenge as it is a content-neutral restriction in a non-public forum and it restricts only the speech which is necessary to achieve the significant government interest of protecting animal facilities from terrorist acts. Furthermore, the APPA is not overly broad as it only encompasses actions which occur without the rightful consent of the property owner and excludes lawful activities of agencies empowered to enforce the law. Neither public policy nor the defense of necessity requires the conviction under Count I to be reversed. Congress reasonably used its Commerce Clause powers in creating the AETA and proscribing conduct harmful to industries heavily involved in interstate commerce. The jury was reasonable in its decision to convict Appellant under 18 U.S.C. § 43(a)(1), Count II, and 18 U.S.C. § 43(a)(2)(A), Count III. Therefore,

Appellant's conviction of Count I should be affirmed and the granting of acquittal as to Count II and Count III should be reversed.