NO. 11-11223

In The
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

OPENING BRIEF FOR THE RESPONDENT

Team #10

Counsel for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

The Animal Enterprise Terrorism Act

The Agricultural Products Protection Act

STATE STATUTES

The Prevention of Farm Animal Cruelty Act

Other Statutes

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE ISSUES

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

2. Should Wheatley's conviction under Count 1 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 exceed congressional authority under the Commerce Clause of the U.S. Constitution?

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

STATEMENT OF THE CASE

This Court is being asked to affirm a United States District Court for the Central District of California denial of Louis Wheatley's ("Wheatley") motion for judgment of acquittal in regards to Count 1, and reverse the same Court's granting of Wheatley's motion for judgment of acquittal in regards to Counts 2 and 3.

A federal grand jury sitting in the Central District of California returned an indictment against Wheatley, charging him with: (1) entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment, in violation of Federal Law § 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 Enterprises Terrorism Act ("AETA"), 18 U.S.C. § 43(a)(1); and (3) in connection with such purposes, intentionally damaging or causing the loss of any real or personal property (including animals) used by an animal enterprise, in violation of the AETA, 18 U.S.C. § 43(a)(2)(A). Opinion at 4-5.

In the United States District Court for the Central District of California, Wheatley filed a

motion to dismiss the three-count indictment, arguing that: (1) Federal Law § 999.2(3) of the APPA unconstitutionally violated his First Amendment rights; (2) the AETA was unconstitutional because it exceeded congressional legislative authority under the Commerce Clause of the U.S. Constitution; and (3) as a matter of law and public policy, he could not be convicted for conduct that brought to light the illegal practices of *Eggs R Us* – namely, alleged violations of the Prevention of Farm Animal Cruelty Act[1], also known as Proposition 2 ("Prop 2"), and California's anti-cruelty statutes, California Penal Code §§ 597(b)[2] and 597t[3]. Opinion at 5. The Court denied Wheatley's motions on all three counts and allowed the case to go to a jury. *Id.* At trial, Wheatley was convicted on all three counts. *Id.*

Wheatley then filed a Federal Rules of Civil Procedure ("FRCP") Rule 29 motion for judgment of acquittal with the same Court and asserted all of his previously stated arguments. *Id.* The Honorable Wilma M. Fredericks, United States District Judge, denied Wheatley's motion in regards to Count 1 because he did not meet the standard of establishing that a "substantial number" of the APPA's applications are unconstitutional or that "strong medicine" of the overbreadth doctrine should be applied to his case. Opinion at 11. Judge Fredericks also held that while the First Amendment and public policy are very important in creating a forum for debate over issues of public concern, she was not going to run afoul of legislative intent and re-write the APPA. Opinion at 12-13. Finally, still in regards to Count 1, the Court found that the necessity defense did not apply to Wheatley because: (1) there was no evidence that Wheatley knew about the APPA and his actions could not have been considered "direct civil

[1] The Prevention of Farm Animal Cruelty Act ("Prop 2") provides that "a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from . . . .fully extending his or her limbs." Cal. Health & Safety Code §§ 25990, 25991.
[2] California Penal Code § 597(b) prohibits the mutilation and cruel killing of any animal.
[3] California Penal Code § 597t provides that "[e]very person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area."

disobedience"; and (2) even if Wheatley's acts could be considered "direct civil disobedience," he could not meet all four elements of the necessity defense. Opinion at 13-14.

In regards to Counts 2 and 3, Judge Fredericks granted Wheatley's motion for judgment of acquittal because although he used an instrument or facility of interstate commerce (the Internet) for the purposes of damaging or interfering with the operations of an animal enterprise by posting videos and blogging, he did not, in connection with the aforementioned purposes, intentionally cause the loss of real or personal property, which is required for a violation of the AETA, 18 U.S.C. § 43(a), to be upheld. Opinion at 17-19. Finally, Judge Fredericks also ruled that the Internet was an instrument or facility of interstate commerce, thus enabling Congress to regulate the AETA within constitutional limits. Opinion at 14-16.

The United States Circuit Court of Appeals for the Ninth Circuit has elected to hear cross-appeals from both parties. Wheatley (Appellant/Cross-Respondent) is appealing the District Court's denial of his motion to dismiss the indictment and its subsequent denial of his FRCP Rule 29 motion for judgment of acquittal as to Count 1 of the jury verdict. The United States is appealing the District Court's grant of Wheatley's motion as to Counts 2 and 3, and the District Court's order to vacate Wheatley's conviction on Counts 2 and 3.

STATEMENT OF THE FACTS

In 2008, Wheatley, who is a journalism student, first learned about the conditions of farmed animals during the California voter campaign for Proposition 2. Opinion at 2. Thereafter, he read about farmed animal issues on the Internet and joined a farmed animal protection organization. *Id.* During his summer vacation in May of 2010, Wheatley needed a job to help pay for college and applied for a "poultry care specialist" position at *Eggs R Us*. *Id.*

Eggs R Us is a prominent California egg producing company that has been in business

since 1966. *Id. Eggs R Us* is overseen by the United States Department of Agriculture ("USDA"). Opinion at 9. Also, it receives substantial compensation from the federal government to provide eggs for school children in California through the National School Lunch Program. Opinion at 2.

Eggs R Us hired Wheatley and he started his employment on June 1, 2010. *Id.* Wheatley's principal duties as a poultry care specialist included feeding and watering chickens housed in industrial grade battery cages, and cleaning out the cages. *Id.* Wheatley's intentions were to determine how accurate claims of poor and cruel conditions customary in the industry really were. *Id.* Moreover, Wheatley intended to write an article and "blog" about his experiences on the Internet. *Id.*

In the egg industry, it is a customary practice to dispose of male chicks, which are byproduct, by tossing them into piles and grinding, or macerating, the chicks. Opinion at 2-3. On approximately June 17, 2010, Wheatley recorded a four-minute video of a co-worker at *Eggs R Us* throwing living and dead male chicks born at the facility into the grinder to be macerated. Opinion at 3. The video included the worker laughing and joking and intentionally squashing some of the living chicks himself as he dumped them into the grinder. *Id.* Wheatley then posted the video on his personal Facebook page with the comment: "This is what happens every day – business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." *Id.* Shortly thereafter, one of Wheatley's Facebook "friends" uploaded the video to YouTube. *Id.*

Wheatley also made a second video. *Id.* Wheatley was familiar with the requirements of Prop 2 and was concerned that *Eggs R Us* was not following the guidelines recommended by national egg producer trade organizations for square inches of floor space in each battery cage.

Id. Wheatley asked his supervisor whether the hens the company kept had enough space in their cages to flap their wings and he was told he "needn't be concerned." *Id.* Thus, Wheatley recorded the second video, which showed the hens in the battery cages. *Id.* Wheatley also posted this video to Facebook. *Id.* Although, there is no evidence indicating that the second video was ever uploaded to YouTube, Wheatley blogged about what he assumed was a violation of Prop 2 and the alleged cavalier attitude of his supervisor, and informed the farmed animal protection organization he had previously joined. Opinion at 3-4.

The same day Wheatley posted the videos on Facebook, he seized a male chick from the *Eggs R Us* facility that was on top of a pile of living and dead chicks at the grinder. Opinion at 3. Wheatley took the chick to his home outside city limits where the zoning laws allow for possession of a limited number of certain farm animals, including chickens, and named it "George." *Id.*

Two weeks after Wheatley posted the videos to Facebook, a manager at *Eggs R Us* was alerted and Wheatley was promptly fired. *Id. Eggs R Us* then notified federal authorities. *Id.* Wheatley was arrested and charged with not only violations of the APPA and the AETA, but also unlawful taking of company property. *Id.*

More than 1.2 million people viewed the first video. *Id.* The videos and Wheatley's blog prompted news reports and increased media attention on the issue of animal cruelty. *Id.* Negative media attention was focused on *Eggs R Us*, though it had not been proven that the company was violating any laws or recommended guidelines. *Id. Eggs R Us* was forced to issue public statements denying all allegations regarding violations of Prop 2. *Id. Eggs R Us* also publicly stated that it was looking into the feasibility of modifying some of its practices in its California facility. *Id.*

SUMMARY OF THE ARGUMENT

The United States District Court for the Central District of California correctly denied Wheatley's motion for judgment of acquittal in regards to Count 1, but erroneously granted his motion for judgment of acquittal in regards to Counts 2 and 3. Federal Law § 999.2(3) of the APPA does not violate the First Amendment Free Speech Clause of the U.S. Constitution, on its face or as applied to Wheatley, and Wheatley's actions were not justified as a matter of public policy or under the defense of necessity. Neither does the AETA, 18 U.S.C. § 43, exceed congressional authority under the Commerce Clause of the U.S. Constitution. Further, the AETA applies to Wheatley's conduct under the evidence presented in this case.

The First Amendment does not allow Congress to make any law abridging the freedom of speech. However, protected speech is not permissible in all places at all times. The government has the power to uphold property under its control for the use to which it is lawfully dedicated. Thus, the right to free speech may be restricted depending upon the nature of the property or the disruption that might be caused by the speaker's activities. The Supreme Court of the United States has adopted a forum analysis as a means of determining when the government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to exercise their right to free speech. *Eggs R Us* is a non-public forum, which allows the government to reserve the forum for its intended purposes and restrict speech as long as the restriction on speech is reasonable in light of the purpose of the statute and not an effort to suppress expression merely because of viewpoint-based discrimination. The challenged section of the APPA is reasonable in light of the statute's purpose of protecting animal facilities and is not in reality a façade for viewpoint-based discrimination. Prohibiting photography or video or audio recordings under section 999.2(3) of the APPA is a reasonable method of protecting the

animal facility against competitors in the egg industry. Also, the language of the APPA is not impermissibly broad because a substantial number of its applications are not unconstitutional.

Next, it is clear that the intent of Congress in the APPA was protecting animal enterprises and not disclosing illegal activity by an animal enterprise. This must outweigh any possible public concern over the issue of animal welfare. If Congress had wanted to carve out acts intended to disclose illegal activity by an animal enterprise, it could have drafted the APPA accordingly. Further, if the California State Legislature's intent was disclosing illegal activity by an animal enterprise, it could have included a whistleblower provision or a private prosecutor or citizen suit provision in Prop 2 and California Penal Code §§ 597(b) and 597t.

Additionally, the necessity defense does not apply to Wheatley in this case and a claim of the necessity defense has no merit. The necessity defense is only applicable in cases of "direct civil disobedience." Wheatley's action amounted to "indirect civil disobedience." Wheatley's actions were not acts of "direct civil disobedience" because he was not protesting the existence of the APPA by breaking that law or preventing the execution of that law in a specific instance in which particularized harm would otherwise follow. Wheatley violated the APPA and the APPA was not, itself, the object of his protest. In fact, there is no evidence in the record that Wheatley even knew of the APPA's existence. Even if Wheatley's acts could reasonably be deemed acts of "direct civil disobedience," Wheatley would not be able to meet all four prongs to avail himself of the necessity defense. Wheatley was not faced with a choice of evils and chose the lesser evil. Also, he had legal alternatives to violating the law.

Furthermore, the government properly used its Commerce Clause authority to regulate Wheatley's actions on the Internet and Wheatley violated the Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a).

Congress can use its Commerce Clause authority to regulate activity in three broad categories. First, Congress can regulate the use of the channels of interstate commerce. Second, Congress can regulate the instrumentalities of interstate commerce. Third, Congress can regulate activities having a substantial relation to interstate commerce. Multiple jurisdictions have held that the Internet is a facility and instrument of interstate commerce. Therefore, Congress properly exercised its Commerce Clause power because Wheatley used the Internet to carry out his conduct and the Internet is a facility and instrumentality of interstate commerce. Congress is also permitted to regulate activity that has a substantial relation to interstate commerce. Even if this Court were to reject the argument that the Internet is a facility or instrumentality of interstate commerce, Wheatley's use of the Internet and his conduct in general had a substantial relation to interstate commerce, thus permitting Congress to use its Commerce Clause authority to regulate activities having a substantial relation to interstate commerce.

Moreover, to be convicted of a violation of the AETA, 18 U.S.C. § 43(a), one must (1) use or caused to be used any facility of interstate commerce, (2) for purposes of damaging or interfering with the operations of an animal enterprise, and (3) in connection with those purposes, intentionally damage or cause the loss of any real or personal property used by an animal enterprise. Wheatley used the Internet to upload videos and blog about industry accepted practices. The use of the Internet by Wheatley satisfies element one of the AETA. Although Wheatley's intent was not to harm *Eggs R Us*, his videos and blogging brought negative media attention onto the company. This media attention will cause *Eggs R Us* to spend money to assess practices in their California facility and replacement costs for the loss of current and potential customers. Wheatley's conduct, regardless of intention, damaged and interfered with the operations of *Eggs R Us*, thus satisfying the second element of the AETA. Finally, in connection

with the purposes of damaging and interfering with the operations of *Eggs R Us*, Wheatley seized a male chick that was property of *Eggs R Us* until it abandoned the property. Wheatley's conduct in taking the company's property satisfies element three, and subjects him to a conviction under the AETA.

Therefore, this Court should affirm the District Court's denial of Wheatley's motion for judgment of acquittal in regards to Count 1 and reverse the District Court's granting of Wheatley's motion for judgment of acquittal in regards to Counts 2 and 3.

STANDARD OF REVIEW

This is an appeal from the United States District Court for the Central District of California, which denied Wheatley's motion for judgment of acquittal in regards to Count 1 and granted his motion for judgment of acquittal in regards to Counts 2 and 3. This Court reviews Congress' authority under constitutional clauses *de novo.*" *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). In addition, this Court reviews a district court's construction of federal acts *de novo. Id.*

ARGUMENT

The District Court correctly denied Wheatley's motion for judgment of acquittal in regards to Count 1 because Federal Law § 999.2(3) of the APPA is not in violation of the First Amendment Free Speech Clause. It is constitutional facially and as applied to Wheatley. Section 999.2(3) of the APPA is reasonable in light of the statute‘s purpose of protecting animal facilities and is not in reality a façade for viewpoint-based discrimination. The prohibitions under section 999.2(3) of the APPA are a reasonable method of protecting the animal facility against competitors in the egg industry. Also, the language of the APPA is not overly broad. Furthermore, it is clear that the congressional and state legislative intent behind the APPA, Prop

2 and the California penal statutes is not disclosing illegal activity by an animal enterprise. The congressional and state legislative intent is protecting animal facilities. This must outweigh any potential public policy interest in animal welfare. It is not up to the Court to rewrite these statutes. Finally, regarding Count 1, Wheatley cannot avail himself of the necessity defense because the necessity defense does not apply to his case.

The District Court did not properly overturn the jury verdict convicting Wheatley under Counts 2 and 3. The AETA does not exceed congressional authority under the Commerce Clause of the U.S. Constitution because the government properly used its Commerce Clause authority to regulate the Internet. The Internet is a facility and an instrumentality of interstate commerce. Even if the Internet is held to not be a facility or instrumentality of interstate commerce, the AETA did not exceed its Commerce Clause authority to regulate the Internet because Wheatley's conduct bore a substantial relation to interstate commerce. In addition, the AETA applies to Wheatley's conduct under the evidence presented in this case. Wheatley used 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 those purposes, intentionally caused the loss of the company's personal property.

I. Federal Law § 999.2(3) of the APPA is neither unconstitutional facially nor as applied to Wheatley, and is not in violation of the First Amendment Free Speech Clause.

Federal Law § 999.2(3) of the APPA does not violate the First Amendment Free Speech Clause of the U.S. Constitution. Section 999.2(3) of the APPA is constitutional on its face and as applied to Wheatley. The challenged section of the APPA is reasonable in light of the statute's purpose and congressional intent, and is not in reality a façade for viewpoint-based discrimination. Furthermore, the APPA should not be overturned because the statute's language

is not overly broad. Consequently, Wheatley's conviction under section 999.2(3) should not be overturned.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. Amend. 1. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010), quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

However, even protected speech is not permissible in all places and at all times. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). There are certain exceptions.

Case in point, the government has the power to uphold property under its control for the use to which it is lawfully dedicated. *Id.* at 800. "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." *Id.* at 799. Thus, the right to free speech may be restricted depending upon the nature of the property or the disruption that might be caused by the speaker's activities. *Id.* at 799-800. As such, the Supreme Court of the United States has adopted a forum analysis, with different standards of review depending upon the character of the forum, as a means of determining when the government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to exercise their right to free speech. *Id.* at 800.

The forum doctrine divides government-owned property into three categories: (1) public forums; (2) limited public forums; and (3) non-public forums. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Public forums are places, which by long tradition or by

government fiat, have been devoted to assembly and debate. *Id.* Limited public forums are public property that the state has opened for use by the public as a place for expressive activity. *Id.* Non-public forums are public property that is not by tradition or designation a forum for public communication. *Id.*

Eggs R Us is a private organization. It has been in business since 1966. Opinion at 2. It receives substantial compensation from the federal government to provide eggs for school children in California through the National School Lunch Program. Opinion at 2. It is also subject to USDA oversight. Opinion at 2. Furthermore, *Eggs R Us* has never been a place devoted to assembly and debate. Nor has it been a place open to the public for expressive activity. Thus, *Eggs R Us* is not by tradition or designation a public forum. *Eggs R Us* is a non-public forum.

A. Section 999.2(3) of the APPA is reasonable in light of the statute‘s purpose, and is not in reality a façade for viewpoint-based discrimination.

The challenged section of the APPA is reasonable in light of the statute’s purpose of protecting animal facilities. In addition, the challenged section of the APPA is not in reality a façade for viewpoint-based discrimination.

Eggs R Us is a non-public forum. In a non-public forum, the government may reserve the forum for its intended purposes and restrict speech as long as the restriction on speech is reasonable in light of the purpose of the statute and not an effort to suppress expression merely because of viewpoint-based discrimination. *Perry Educ. Ass'n*, 460 U.S. at 46. Accordingly, the government may place viewpoint-neutral restrictions on speakers who would disrupt and hinder the effectiveness or purpose of *Eggs R Us*, as long as the restrictions are reasonable in light of the statute’s purpose.

Section 999.2(3) of the APPA states, “No person, who uses or causes to be used the mail

or any facility of interstate or foreign commerce, without the effective consent of the owner, may: 3. Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment." Federal Law §999.2(3). The statute's purpose is to protect animal facilities from terrorist activities and a loss of business and property. A restriction on photography or video or audio recordings is reasonable in light of such a purpose. Such a restriction helps to ensure that an animal enterprise is thoroughly protected from not only terrorist activities, but also a loss of business and property.

Furthermore, the restriction is not, in effect, viewpoint discriminatory. The prohibitions of photography or video or audio recordings under section 999.2(3) of the APPA are a reasonable method of protecting the animal facility against competitors in the egg industry. Competitors could potentially use the photography or video or audio recordings to cause a loss of business to *Eggs R Us*. The theory that the statute is exclusively intended to prohibit photography or video or audio recordings that could be used to raise awareness of facility practices that do not take into account animal welfare or interests is incorrect. There is no congressional record in support of such a position. It would be unreasonable to look to the intent of other legislative bodies regarding other statutes or statutory proposals at the state level when applying the federal statute at issue here. This theory provides an insufficient basis to overturn a statute on constitutional grounds.

B. The language of the APPA is not overly broad.

The language of the APPA is not impermissibly broad because a substantial number of its applications are not unconstitutional.

A law may only be overturned as impermissibly overbroad 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, n.6 (2008). Yet, the Supreme Court of the United States has recognized that the overbreadth doctrine is "strong medicine" and should be employed with great hesitation, and then only as a last resort. *New York v. Ferber*, 458 U.S. 747, 767 (1982). Striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment would cause wide-reaching effects. This would also be in contradiction of the traditional rule that states, "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." *Id.*

In *Stevens*, the defendant was convicted of violating a federal statute prohibiting the commercial creation, sale, or possession of depiction of animal cruelty. *Stevens*, 130 S. Ct. at 1583. The Court held that the statute was substantially overbroad, and thus, the statute was facially invalid under the First Amendment protection of speech. *Id.* at 1592. The Court reasoned that a number of the statute's applications were unconstitutional. *Id.* Further, the impermissible applications of the statute, such as hunting magazines and videos, far outnumbered its permissible ones, such as crush videos and depictions of animal fighting. *Id.*

Unlike *Stevens*, Wheatley has not established that a "substantial number" of the APPA's applications are unconstitutional. Neither has he demonstrated that the "strong medicine" of the overbreadth doctrine should be incurred.

The language of the APPA is not overly broad and section 999.2(3) is reasonable in light of the statute's purpose. Therefore, section 999.2(3) of the APPA is not unconstitutional facially or as applied to Wheatley and does not violate the First Amendment Free Speech Clause of the U.S. Constitution. Wheatley's conviction under section 999.2(3) should not be overturned and

the District Court's denial of Wheatley's motion for judgment of acquittal in regards to Count 1 should be affirmed.

II. Congressional and state legislative intent must outweigh any potential public policy interest in animal welfare.

The congressional intent of the APPA in protecting animal enterprises must outweigh any possible public concern over the issue of animal welfare.

It is clear that the intent of Congress in the APPA was protecting animal enterprises and not in disclosing illegal activity by an animal enterprise. If Congress had wanted to carve out acts intended to disclose illegal activity by an animal enterprise, it could have drafted the APPA accordingly. The California State Legislature also could have included a whistleblower provision or a private prosecutor or citizen suit provision in Prop 2 and California Penal Code §§ 597(b) and 597t if their legislative intent was disclosing illegal activity by an animal enterprise.

Further, the APPA is a federal law that was created by Congress. Prop 2 and the referenced penal statutes are state laws created by the California State Legislature. It is not up to the Court to rewrite these statutes or second-guess congressional or state legislative intent. The Court must not impede such explicit Constitutional authority and must seek to avoid frustrating the will of the state legislature. If the statutes are to be amended they must go through the appropriate legislative process.

Finally, someone inside the *Eggs R Us* facility taking photographs or making a video recording is not the only means of bringing illegal activity on the part of *Eggs R Us* to the attention of the appropriate government enforcement agencies. Federal and state government agencies adequately investigate *Eggs R Us*. If necessary, those government agencies will act to enforce existing statutes and regulations. However, no charges have ever been filed against *Eggs R Us* for violation of any such statutes and it has not been proven that *Eggs R Us* is indeed

violating any of the referenced statutes.

Because congressional and state legislature intent in the APPA, and Prop 2 and the referenced penal statutes is clear and neither Congress nor the California State Legislature included any whistleblower provisions or provisions intended to disclose illegal activity by an animal enterprise into either the APPA, or Prop 2 and the referenced penal statues, such intent must outweigh any potential public policy interest in animal welfare. Consequently, Wheatley's conviction under section 999.2(3) should not be overturned as a matter of public policy and the District Court's denial of Wheatley's motion for judgment of acquittal in regards to Count 1 should be affirmed.

III. Wheatley can neither avail himself of the necessity defense, nor is the necessity defense applicable in this case.

The necessity defense does not apply to Wheatley in this case and a claim of the necessity defense has no merit.

The necessity defense is only applicable in cases of "direct civil disobedience." *United States v. Schoon*, 971 F. 2d 193, 196 (9th Cir. 1992). "Direct civil disobedience . . . involves protesting the existence of a law by breaking that law or preventing the execution of that law in a specific instance in which particularized harm would otherwise follow." *Id.* The necessity defense does not apply to cases involving "indirect civil disobedience," which involves "violating a law or interfering with a government policy that is not, itself, the object of the protest." *Id.* Wheatley's action amounted to "indirect civil disobedience." Wheatley violated the APPA and the APPA was not, itself, the object of his protest. Wheatley's actions were not acts of "direct civil disobedience" because he was not protesting the existence of the APPA by breaking that law or preventing the execution of that law in a specific instance in which particularized

harm would otherwise follow. In fact, there is no evidence in the record that Wheatley even knew of the APPA's existence.

Arguendo, Wheatley's acts could reasonably be deemed acts of "direct civil disobedience." The necessity defense would apply to Wheatley's case. To invoke the necessity defense, defendants "colorably must have shown 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 casual relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law." *Id.* at 195. Nonetheless, Wheatley would not be able to meet all four prongs to avail himself of the necessity defense. Wheatley was not faced with a choice of evils in which he chose the lesser evil. Also, he had legal alternatives to violating the law.

The necessity defense does not apply to Wheatley's case. Further, even if the necessity defense did apply to Wheatley's case he would not be able to meet all four prongs to avail himself of the necessity defense. Thus, Wheatley's conviction under section 999.2(3) should not be overturned because his actions were not justified under the defense of necessity and the District Court's denial of Wheatley's motion for judgment of acquittal in regards to Count 1 should be affirmed.

IV. The AETA does not exceed congressional authority under the Commerce Clause of the U.S. Constitution.

The Animal Enterprise Terrorism Act does not exceed congressional authority under the Commerce Clause of the U.S. Constitution in this case because Wheatley's use of an instrumentality and facility of interstate commerce, namely the Internet, subjected his Facebook and YouTube postings, as well as himself, to Commerce Clause regulation.

Under Article I, Section 8, Clause 3 of the United States Constitution, more commonly

known as the Commerce Clause, "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. Art. 1 § 8. Within this authority, Congress can regulate local activities that are a part of a larger class of activities so long as the local activities have a substantial effect on interstate commerce. *Perez v. United States*, 402 U.S. 146, 154-55 (1971). The government can also regulate non-commercial activities if it "concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Gonzalez v. Raich*, 545 U.S. 1, 2 (2005). The Supreme Court has tied all of these ideas together and recognized that Congress may regulate under its commerce power in three general categories: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; or (3) activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

The AETA was originally passed in 1992 to prevent individual or group action against commercial entities engaged in interstate commerce with the intentions of causing economic damage or loss of real or personal property. It was last amended in 2006. The Act punishes

> Whoever travels in interstate or foreign commerce, or uses or causes to be used . . . any facility of interstate or foreign commerce . . . (1) for the purpose of damaging or interfering with the operations of 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, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise . . . .

18 U.S.C.A. § 43(a) (West 2006). To determine if Congress acted properly within its authority under the Commerce Clause in enacting and enforcing the AETA, the AETA must satisfy one of the three prongs of permissible Commerce Clause regulation set forth in *United States v. Lopez* as it pertains to the facts in this case.

A. The government properly used its Commerce Clause authority to regulate the Internet because it is a facility and an instrumentality of interstate commerce.

In *United States v. Lopez*, the Supreme Court held that Congress may regulate under three categories of activity under its Commerce Clause power (1) "[T]he use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). It does not matter whether Wheatley's use of the Internet to display disparaging videos of *Eggs R Us* was a wholly intrastate action or not, because local, intrastate actions not regarded as commerce may be reached by Congressional regulation if it exerts a substantial economic effect on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Here, the only concern is under prong two, namely, whether the means by which Wheatley interfered with interstate commerce, the Internet, qualifies as an instrumentality of interstate commerce.

Although the Supreme Court of the United States has remained silent on whether the Internet qualifies as an instrumentality or facility of interstate commerce, several jurisdictions have held that the Internet is an instrumentality or facility of interstate commerce, and thus lends itself to Commerce Clause regulation. The United States District Court for the Southern District of New York, in *American Libraries Ass'n v. Pataki*, stated, "The inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an innovative one, the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 172-173 (S.D.N.Y. 1997). In contention, Wheatley argues that his postings to Facebook and

YouTube were not-for-profit and did not have the characteristic of commercial gain, and, therefore, cannot be reached by Commerce Clause regulation. Not only does this argument fail to recognize the clear statutory language of the AETA, but it also fails to recognize the following considerations by the *Pataki* court:

> The Internet is not exclusively, or even primarily, a means of commercial communication. Many commercial entities maintain Web sites to inform potential consumers about their goods and services . . . but many other Web sites exist solely for the dissemination of non-commercial information. The other forms of Internet communication – e-mail . . . newsgroups, and chat rooms – frequently have non-commercial goals.

969 F. Supp. at 172. *See Generally United States v. Larry G. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) (holding that crossing state lines for any purpose, regardless of commercial nature of action, constitutes interstate commerce). In *Pataki*, the United States District Court for the Southern District of New York not only held that the Internet is an instrumentality and facility of interstate commerce, but it also recognized that although some Internet activity has not-for-profit and non-commercial goals, it remains part of an inescapable portion of the Internet that does have for profit and commercial goals. Thus, subjecting it to Commerce Clause regulation.

The 11th Circuit Court of Appeals, in *United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003), has also held that Internet activity, in the form of chat room participation, qualifies as any facility or means of interstate commerce as used in a federal statute, which prevents those that knowingly induce minors to engage in sexual activity.

In opposition to the aforementioned jurisdictions, in the lower court, Wheatley argued that based on a Ninth Circuit decision in *United States v. Jason Wright*, 625 F.3d 583 (9th Cir. 2011), the AETA does not apply to the use of the Internet in his case because there is no proof that the Facebook and YouTube postings actually traveled across state lines sufficient to satisfy

the "interstate commerce" requirement. In *Wright*, the Ninth Circuit held that the defendant's use of the Internet to transport images was insufficient to establish that the images crossed state lines as to satisfy the "interstate commerce" requirement of a federal statute. However, the Court in *Wright* based its decision on the statutory construction of a federal statute, and not the implied authority of a Constitutional provision. Also, the Court below properly held that *Wright* is inapposite to Wheatley's case because the "government did not dispute that the images were sent from the defendant in Arizona directly to the client in Arizona, and did not pass through a server so as to cross state lines." Opinion at 16.

The AETA does not exceed congressional authority under the Commerce Clause of the U.S. Constitution in this case because Wheatley's use of an instrumentality and facility of interstate commerce, namely the Internet, subjected his Facebook and YouTube postings, as well as himself, to Commerce Clause regulation

B. Even if the Internet is held to not be a facility or instrumentality of interstate commerce, the AETA did not exceed its Commerce Clause authority to regulate the Internet because Wheatley's conduct bore a substantial relation to interstate commerce.

As indicated by *Lopez*, only one of the three prongs must be met in order to give the government the ability to use its Commerce Clause power to enact regulations. Even if this Court refuses to find that the Internet is an instrument or facility of interstate commerce, it can be found that Wheatley's conduct bore a substantial relation to interstate commerce, thus, fulfilling the third prong of the *Lopez* test.

Under the third prong of the test set forth in *Lopez*, Congress can regulate "those activities having a substantial relation to interstate commerce . . . ." *Lopez*, 514 U.S. at 558-559. The *Lopez* Court concluded that the proper test to determine whether a certain regulated activity has a substantial relation to interstate commerce is whether the regulated activity "substantially

affects" interstate commerce. *Lopez*, 514 U.S. at 559. Therefore, "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. The issue, then, turns on whether Wheatley's conduct, or the means he used to carry out his conduct, substantially affected interstate commerce. If so, the government is free to regulate this activity and punish those in violation of such regulation.

Many jurisdictions, including the lower court in this proceeding, have already found that the Internet is an instrument or facility of interstate commerce. An argument can definitely be made that any action that uses the Internet as a means of engaging in certain conduct substantially affects interstate commerce. The Internet is a vast technology that represents a marketplace for the entire world. Any action taken over the Internet, whether it is commercial or non-commercial in nature, will have an effect on interstate commerce on some level. In addition, *Eggs R Us* is engaged in economic activity within the egg industry, which is a large industry that has most definitely engaged in interstate commerce from its inception. Wheatley's posting of disparaging videos on Facebook and YouTube could very well have substantially affected and injured the interstate commerce within the egg industry. If so, Congress has the authority under its Commerce power to regulate this activity and punish Wheatley for violating these permissible federal regulations.

The AETA did not exceed its Commerce Clause authority to regulate the Internet because Wheatley's use of Facebook and YouTube bore a substantial relation to interstate commerce within the industry in which *Eggs R Us* does business.

V. The District Court erroneously overturned the jury verdict convicting Wheatley under Counts 2 and 3 because Wheatley violated 18 U.S.C. § 43(a).

Wheatley was convicted of:

> (2) using the internet as a means of interstate commerce for

> purposes of damaging or interfering with the operations of an animal enterprise, in violation of the AETA, 18 U.S.C. § 43(a)(1); and (3) in connection with such purposes, intentionally damaging or causing the loss of any real or personal property . . . including animals . . . used by an animal enterprise, in violation of the AETA, 18 U.S.C. § 43(a)(2)(A).

Opinion at 4-5. These convictions are known as Counts 2 and 3 of the original jury verdict. After determining that the AETA does not exceed Congressional authority under its Commerce Clause power, any violation of the AETA should constitute a conviction and be punished accordingly. To determine if Wheatley violated the AETA, this Court must use strict construction in analyzing the statute. The Supreme Court of the United States has held, "In cases of statutory construction, we begin with the language of the statute." *Diamond v. Diehr*, 450 U.S. 175, 182 (1981). Unless the statute directs otherwise, "words will be interpreted as taking their ordinary, contemporary, common meaning . . . ." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Also, "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). One of the final rules of statutory interpretation is that courts should be reluctant to interpret any word in the context in which it is used in a way that renders other terms in the statute as mere surplusage. *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994). However, legislative intent should always be in the background so that the statute is not given a meaning that strays clearly from its legislative purpose. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). To summarize, the Supreme Court of the United States indicates that statutory interpretation should attempt to give every word in the statute its literal, common meaning, and legislative purpose should be a last resort in defining a portion of the statute that is ambiguous. Therefore, each pertinent provision of the AETA must be dissected and given meaning in order to determine if Wheatley should be convicted of Counts 2 and 3 of the original jury verdict. For the reasons stated below, the

government urges this court to adhere to the statute and reverse the District Court's dismissal of both counts.

A. Louis Wheatley violated 18 U.S.C. § 43(a) because he used 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 those purposes, intentionally caused the loss of the company's personal property.

The District Court erroneously overturned the jury verdict convicting Wheatley under Counts 2 and 3 because he used 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 those purposes, intentionally caused the loss of the company's personal property.

18 U.S.C. § 43(a) punishes

> Whoever travels in interstate . . . commerce . . . or uses or causes to be used . . . any facility of interstate . . . commerce – (1) for the purposes 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 . . .) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise . . . .

18 U.S.C.A. § 43(a) (West 2006). Within the statute, "animal enterprise" is defined as "a commercial . . . enterprise that uses or sells animals or animal products for profit . . ." 18 U.S.C.A. § 43(d)(1) (West 2006). Also, "economic damage" is defined as

> (A) . . . the replacement costs of lost or damaged property . . . and increased costs resulting from threats, acts or vandalism, property damage, trespass, harassment, or intimidation taken against a person or entity on account of that person's or entity's connection to, relationship with, or transactions with the animal enterprise; but (B) does not include any lawful economic disruption . . . that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise . . . .

18 U.S.C.A. § 43(d)(3) (West 2006).

Wheatley made a four-minute video of a co-worker disposing of live and dead male chicks into a grinder. Opinion at 3. Wheatley posted this video on his personal Facebook page with a comment disparaging the company for such actions. *Id.* The video was soon uploaded to YouTube by one of Wheatley's friends. *Id.* Wheatley then proceeded to create another video of hens in small battery cages that he also posted on Facebook. Opinion at 2. Further, he blogged about these cages and shed light on the fact that *Eggs R Us* may be violating a California statute. Opinion at 3. Finally, Wheatley seized a living chick that his co-worker disposed of and took it home with him. *Id.* At trial, Wheatley testified that he had no intentions of harming *Eggs R Us* in any way but did hope to write and blog about his experiences for his school classes. Opinion at 2. Regardless of Wheatley's intentions, the YouTube video of the maceration process was viewed by over one million people and has caused *Eggs R Us* to experience heightened scrutiny in the media, which could very well cause it economic damage.

To properly convict Wheatley of a violation of 18 U.S.C. § 43(a), the government must prove that Wheatley (1) used or caused to be used any facility of interstate commerce, (2) for purposes of damaging or interfering with the operations of *Eggs R Us*, and (3) in connection with those purposes, intentionally damaged or caused the loss of any real or personal property used by an animal enterprise.

First, the District Court and other jurisdictions (as indicated above) have already held that the use of the Internet qualifies as a facility of interstate commerce. Therefore, Wheatley's use of the Internet to display his videos satisfies the first element.

Second, Wheatley damaged and interfered with the operations of *Eggs R Us* by causing a media frenzy that will require the company to increase expenditures to change certain practices in California. In addition, *Eggs R Us* may lose business in California because of this negative

attention. *Eggs R Us* is a commercial enterprise that sells animal products for profit, making it an animal enterprise. In addition, Wheatley intentionally damaged and interfered in the company's operations by drawing attention to its practices. This will require *Eggs R Us* to increase costs to update practices and could possibly force *Eggs R Us* to incur replacement costs in securing new business that it may lose because of the negative media attention. For those reasons, the District Court correctly found that Wheatley satisfied the second element under the AETA.

Third, with the purposes of damaging and interfering with the operations of *Eggs R Us*, Wheatley intentionally caused the loss of personal property by taking a male chick owned by *Eggs R Us* as waste. Male chicks, even though waste, are property of *Eggs R Us* until the property is completely abandoned. Abandonment has been defined by many jurisdictions as "a voluntary intention to abandon, or evidence from which such intention may be presumed." *The No. 105, Belcher Oil Co. v. Griffin*, 97 F.2d 425, 426 (5th Cir. 1938). The Court of Appeals of Kentucky and the Sixth Circuit have defined the doctrine of abandonment as, "The relinquishment or surrender of rights or property by one person to another; a giving up; a total desertion. It includes both the intention to abandon and the external act by which the intention is carried into effect." *Sandy River Coal Co. v. Champion Bridge Co.*, 48 S.W.2d 1062, 1063 (Ky. 1932); *See e.g., State Mutual Life Assurance Co. of Worcester, Mass. v. Heine*, 141 F.2d 741, 744 (6th Cir. 1944) (holding that the abandonment has no application unless the owner completely deserts the property without being pressed by any necessity, duty, or utility to himself, but simply because he no longer desires to possess it and willingly abandons it to whoever wants it.) Abandonment does not apply in this case because *Eggs R Us* did not completely desert the property. While the company had the intent to eventually abandon the waste product, it had not done so yet, and abandonment requires both intent to desert and actual

desertion.

Wheatley did not deny that he caused loss of property to *Eggs R Us*, but instead argued that he did not take the chick, or property, in connection with the intent and purpose to damage or interfere with the company's operations, which is required by statute. Wheatley contended that he took the property only for the purpose of saving the chick's life. Opinion at 19. All of Wheatley's actions should be taken as an entire continuum of actions designed to damage the reputation and profits of *Eggs R Us*. Wheatley intentionally posted videos on Facebook, blogged, and took the personal property of *Eggs R Us* with the intent to shed light on a practice that he did not agree with. Wheatley did not take the job at *Eggs R Us* with the intent to damage the company. However, after he discovered their practices, which he did not agree with, he began a continuum of actions that has and will continue to damage the reputation and profits of *Eggs R Us*. All of Wheatley's actions should be considered one continuous action that was placed into motion with the intent to damage the company.

The District Court erroneously overturned the jury verdict convicting Wheatley under Counts 2 and 3 because he used 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 those purposes, intentionally caused the loss of the company's personal property. Therefore, the Court should reverse the lower Court's granting of Wheatley's motion for judgment of acquittal in regards to Counts 2 and 3.

CONCLUSION

Federal Law § 999.2(3) of the APPA is not in violation of the First Amendment Free Speech Clause. It is constitutional facially and as applied to Wheatley. It is reasonable in light of the statute‘s purpose and is not in reality a façade for viewpoint-based discrimination. In

addition, the language of the APPA is not overly broad. It is, furthermore, clear that the congressional and state legislative intent behind the APPA, Prop 2 and the California penal statutes is protecting animal facilities. This must outweigh any potential public policy interest in animal welfare. Moreover, the necessity defense does not apply to Wheatley in this case.

The AETA does not exceed congressional authority under the Commerce Clause of the U.S. Constitution. The government properly used its Commerce Clause authority to regulate the Internet because the Internet is a facility and an instrumentality of interstate commerce. Also, Wheatley's conduct bore a substantial relation to interstate commerce. Additionally, the AETA applies to Wheatley's conduct because he used 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 those purposes, intentionally caused the loss of the company's personal property.

Accordingly, this Court should affirm the District Court's denial of Wheatley's motion for judgment of acquittal in regards to Count 1 and reverse the District Court's granting of Wheatley's motion for judgment of acquittal in regards to Counts 2 and 3.