Case No. 11-11223

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES, Respondent/Cross-Appellant, v. LOUIS WHEATLEY, Appellant/Cross-Respondent.	§	Appeal, Petition for Review of the United States District Court for the Central District of California

RESPONDENT/CROSS-APPELLANT BRIEF

Submitted by: Team 11

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Statement of the Issues Presented for Review

Each party has been directed to brief the following questions. First, does Federal Law § 999.2(3) violate the First Amendment Free Speech Clause in the U.S. Constitution, on its face or as applied to Mr. Wheatley, such that his conviction under that statute (Count 1) should be overturned? Second, should Mr. 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? Third, does 18 U.S.C. § 43 exceed congressional authority under the Commerce Clause of the U.S. Constitution? Fourth, did the District Court properly overturn the jury verdict convicting Mr. Wheatley under Counts 2 and 3 because 18 U.S.C. § 43 does not apply to Mr. Wheatley's conduct under the evidence presented in this case?

Statement of the Case

Mr. Wheatley was indicted by a federal grand jury sitting in the Central District of California in February 2011 for: 1) entering an animal facility and using a video recorder in violation of § 999.2, subdivision (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, subdivision (a)(1); and 3) in connection with such purpose, intentionally causing the loss of any personal property (including animals) used by an animal enterprise or intentionally causing the loss of transactions with an animal enterprise, in violation of the AETA, 18 U.S.C. § 43, subdivision (a)(2)(A).

Mr. Wheatley filed a motion to dismiss the indictment, which the District Court denied. At trial, the jury convicted Mr. Wheatley on all three counts. Mr. Wheatley then filed a Federal Rules of Criminal Procedure, Rule 29, motion for judgment of acquittal. The District Court

denied Mr. Wheatley's motion for judgment of acquittal as to Count 1, but granted his motion as to Counts 2 and 3.

Mr. Wheatley appeals the District Court's denial of his motion to dismiss the indictment. Mr. Wheatley also appeals the District Court's subsequent denial of his motion for judgment of acquittal as to Count 1 of the jury verdict. The United States government appeals the District Court's grant of Mr. Wheatley's motion for judgment of acquittal as to Counts 2 and 3.

Statement of the Facts

On June 17, 2010, Mr. Wheatley made two videos of *Eggs R Us*'s activities on *Eggs R Us*'s property, used the internet to post both of those videos to Facebook, and took a chick home from *Eggs R Us*'s premises. (United States v. Louis Wheatley, Memorandum Opinion, Hon. Wilma M. Fredericks, United States District Court Judge, Central District of California, August 29, 2011, at 3-4, hereinafter referred to as "M.O.").

In May of 2010, Mr. Wheatley was hired by *Eggs R Us* to be a "poultry care specialist" during his summer vacation from college. (M.O. at 2). Starting June 1, 2010, Mr. Wheatley had access to the California facility because of his status as an employee. (M.O. at 2). *Eggs R Us* is a mid-sized egg producing company with facilities in California, Nevada, and North Dakota. (M.O. at 1). It has been in business since 1966. (M.O. at 2). *Eggs R Us* receives substantial compensation from the federal government to provide eggs for school children in California through the National School Lunch Program. (M.O. at 2). *Eggs R Us* also receives government funding and is overseen by the U.S. Department of Agriculture (USDA). (M.O. at 8).

On June 17, 2010, Mr. Wheatley made a four-minute video of a coworker at *Eggs R Us* throwing living and dead male chicks born at the California facility into the grinder to be

macerated. (M.O. at 3). As is customary industry practice, the male chicks were being macerated because they are a "waste product" of the egg industry. (M.O. at 2-3).

As soon as Mr. Wheatley returned home from work on June 17, 2010, he posted the chick grinder video on his Facebook page. (M.O. at 3). Mr. Wheatley posted the video with the following comment: "This is what happens every day – business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." (M.O. at 3). One of Mr. Wheatley's Facebook friends then posted the video on YouTube. (M.O. at 3). The video has been viewed by more than 1.2 million people. (M.O. at 3). The video has also prompted news reports and increased media attention on *Eggs R Us*'s business practices. (M.O. at 3-4).

On June 17, 2010, Mr. Wheatley also made a second video of the business practices at *Eggs R Us*'s California facility. (M.O. at 3). Mr. Wheatley's second video showed the hens at *Eggs R Us* in battery cages. (M.O. at 3). Mr. Wheatley also posted the video of the hens on Facebook that same evening. (M.O. at 3).

On June 17, 2010, the same day that Mr. Wheatley made the videos and posted them on Facebook, Mr. Wheatley also stole a male chick from *Eggs R Us*'s facility. (M.O. at 4). Mr. Wheatley "rescued" the male chick from on top of the pile of living and dead chicks at the grinder. (M.O. at 4). Mr. Wheatley hid the chick in his coat pocket and took the chick home at the end of his shift. (M.O. at 4).

In addition to making videos of *Eggs R Us*'s business activities and stealing a chick from *Eggs R Us*, Mr. Wheatley blogged about *Eggs R Us*'s alleged violation of Prop 2.[1] (M.O. at 3-4). While Mr. Wheatley did not inform a prosecuting authority about *Eggs R Us*'s alleged violation

[1] Also known as the "Prevention of Farm Animal Cruelty Act," Prop 2 was passed by California's voters and enacted as California Health & Safety Code §§ 25990, *et seq.* Specifically, Prop 2 prohibits confining farm animals in a manner that prevents them from spreading their limbs or wings. Mr. Wheatley presented evidence at trial that showed that the battery cages *Eggs R Us* kept their hens in did not provide enough space for each hen to flap their wings.

of Prop 2, Mr. Wheatley did inform a farmed animal protection organization about *Eggs R Us*'s activities. (M.O. at 4). Further, Mr. Wheatley confronted his supervisor about what he perceived as violations of Prop 2. (M.O. at 3).

Mr. Wheatley's actions resulted in negative media attention. (M.O. at 3-4). As a result of Mr. Wheatley's YouTube video and Mr. Wheatley's blogging about the battery cages, *Eggs R Us* was forced to make public statements denying all allegations regarding violations of Prop 2. (M.O. at 4). *Eggs R Us* was also forced to announce that it would look into modifying some of its practices at the California facility. (M.O. at 4). No charges have been brought against *Eggs R Us* for their alleged violations of Prop 2. (M.O. at 5).

Summary of the Argument

The government respectfully requests that this Court affirm the District Court's ruling as to Count 1 of the indictment and reverse the District Court's ruling as to Counts 2 and 3 of the indictment.

First, APPA § 999.2 does not unconstitutionally restrict Mr. Wheatley's First Amendment rights. In addition, APPA § 999.2 withstands a facial attack under the First Amendment's overbreadth doctrine. *Eggs R Us* is a non-public forum that can be regulated by the government so long as the regulation is reasonable and viewpoint neutral. APPA § 999.2 is not subject to the higher scrutiny placed on speech regulations in traditional public forums. Since *Eggs R Us* is not a street, park, or sidewalk, regulations of their property are not subject to the traditional public forum analysis. APPA § 999.2 is also not subject to the higher scrutiny placed on designated public forums. Since *Eggs R Us* was not opened by the government as a locale for speech, it cannot be a designated public forum. *Eggs R Us* is thus the remaining type of forum, a non-public forum, and any regulation need only be viewpoint neutral and reasonable

in light of the purpose of the property. APPA § 999.2 only regulates conduct that damages or destroys animal facilities. This restriction is reasonable because it ensures that the lawfully designated purpose of *Eggs R Us* is not disrupted. Since APPA § 999.2 applies to all conduct damaging or destroying an animal facility no matter the motivation, it is viewpoint neutral. Thus, APPA § 999.2 can constitutionally be applied to Mr. Wheatley.

Also, APPA § 999.2 is not unconstitutional under a facial First Amendment overbreadth challenge. Overbreadth, when used, targets regulations aimed at pure speech. For an overbreadth challenge to invalidate a law regulating conduct, the improper applications of the law must be substantial in comparison to the legitimate sweep of the law. APPA § 999.2 is aimed at conduct that damages or destroys animal facilities, not pure speech. Thus, Mr. Wheatley must prove substantial overbreadth, which he cannot. Consequently, APPA § 999.2 is not facially unconstitutional.

Second, neither the defense of necessity nor public policy in exposing violations of law can justify overturning Mr. Wheatley's conviction as to Court 1 of the indictment. The Ninth Circuit only allows the defense of necessity when a defendant is engaged in direct civil disobedience. Mr. Wheatley violated the APPA by recording in *Eggs R Us*, but the law he was protesting was Prop 2. Thus, Mr. Wheatley engaged in indirect civil obedience and cannot claim the defense of necessity. Moreover, Mr. Wheatley would fail to meet the elements of the defense of necessity: he cannot show that violating the APPA was a lesser evil when compared to Prop 2, his videotaping could not reasonably abate the immediate alleged Prop 2 violation, and Mr. Wheatley's lawful alternative to violating the APPA was to report any alleged Prop 2 violations to the proper authority. Thus, Mr. Wheatley's conviction should not be overturned based on the defense of necessity.

Also, if public policy dictated that an individual should be not be prosecuted for revealing criminal acts of another, the policy would be preempted under conflict preemption by the APPA. Moreover, any public policy considerations by Mr. Wheatley would be undercut by public policy favoring the rule of law and the uniform prosecution of law by federal and state prosecutors. Thus, public policy should not overturn Mr. Wheatley's conviction as to Count 1.

Third, 18 U.S.C. § 43 does not exceed Congress's authority under the Commerce Clause of the U.S. Constitution because Congress has the authority to regulate the internet as a channel of interstate commerce or as an instrumentality of interstate commerce. In either case, Mr. Wheatley used the internet to post two videos to Facebook in violation of the AETA. In the alternative, Congress has the authority to regulate Mr. Wheatley's internet activities under the AETA because Mr. Wheatley's activities had a substantial relation to interstate commerce. Mr. Wheatley's video postings to Facebook generated substantial web traffic and substantial negative media attention for *Eggs R Us*. This negative press likely resulted in substantial financial loss to *Eggs R Us*, a company who has facilities in multiple states. This negative press also likely resulted in financial loss to the entire U.S. egg industry. Thus, Mr. Wheatley's conviction should not be overturned because 18 U.S.C. § 43 does not exceed Congress's authority.

Fourth, the District Court did not properly overturn the jury verdict convicting Mr. Wheatley under Counts 2 and 3. When Mr. Wheatley filmed the videos, posted the videos online, and blogged about *Eggs R Us*'s business practices, he acted for the purpose of damaging and interfering with the operations of *Eggs R Us* and he intentionally caused *Eggs R Us* to lose financial "transactions" with the public in violation of 18 U.S.C. § 43. Mr. Wheatley wanted *Eggs R Us* to change their business practices and hoped to achieve his goal by garnering enough public attention to put economic pressure on *Eggs R Us*. Additionally, when Mr. Wheatley took

the chick from *Eggs R Us*, he acted for the purpose of interfering with the operations of *Eggs R Us* and he intentionally caused *Eggs R Us* to lose personal property. In order to steal the chick, Mr. Wheatley stopped his work and distracted a coworker from doing his job. Thus, Mr. Wheatley's conviction as to Counts 2 and 3 should not be overturned because 18 U.S.C. § 43 does apply to Mr. Wheatley's conduct under the evidence presented in this case.

Argument

I. *EGGS R US* IS A NON-PUBLIC FORUM AND APPA § 999.2(3) IS A VIEWPOINT NEUTRAL RESTRICTION THAT IS REASONABLE IN LIGHT OF THE PURPOSE OF THE PROPERTY, AND CONSEQUENTLY DOES NOT VIOLATE THE FIRST AMENDMENT AS APPLIED TO MR. WHEATLEY

A. THE PARTIES' CONTENTIONS

Mr. Wheatley contends that his conviction on Count 1 of his indictment under APPA § 999.2(3) is unconstitutional because § 999.2(3) violates the Free Speech Clause of the First Amendment as applied to him. (M.O. at 6). Mr. Wheatley relies on the U.S. Supreme Court's public fora doctrine, see Int'l Soc'y for Krishna Consciousness, Inc. (*ISFKC*) v. Lee, 505 U.S. 672, 679 (1992), (M.O. at 9), to argue that the government's restriction of speech at *Eggs R Us* is viewpoint based and therefore unconstitutional. (M.O. at 9-10). The government contends that the regulation at *Eggs R Us* is reasonable in light of the purpose of the property and the statute as a whole, and that the regulation is not viewpoint discriminatory. (M.O. at 7).

B. THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*

Where, as here, the District Court's ruling rests solely on a premise of law and the facts are established, the applicable standard of review is *de novo*. See Sammartano v. Carson, 303 F.3d 959, 965 (9th Cir. 2002); see also A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001).

C. THE LEGAL STANDARD

The First Amendment protects individuals from unconstitutional restrictions on speech, however, even protected speech is not permissible at all times and at all places. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799 (1985). Nothing in the Constitution requires that the government grant access to all who wish to exercise their right to free speech on every type of government property[2] without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. Id. at 799-800. There is no guaranteed access to property simply because it is owned or controlled by the government. Id. at 803. The extent of regulation depends on whether the property is a traditional public forum, a designated public forum, or a non-public forum. Id. at 802.

Traditional public forums are places which by long tradition or by government fiat have been devoted to assembly and debate. Id. Public streets and parks fall into this category. Id. Among their purposes is the free exchange of ideas and they have "time out of mind been used for purposes of communicating thoughts between citizens, and discussing public questions." *ISFKC*, 505 U.S. at 686. Traditional public forum status does not extend beyond its historic confines. Ark. Educ. Television Commission v. Forbes, 523 U.S. 666, 678 (1998).

The government can create a designated public forum for general public use, for assembly and speech, for use by certain speakers, or for the discussion of certain subject. Cornelius, 473 U.S. at 802. A designated public forum cannot be created by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Id. at 802.

[2] Even though *Eggs R Us* is a private entity, it is a recipient of government funding and the USDA oversees its operations. Mr. Wheatley did not contest in the trial court, and does not contest now, the application of the forum analysis that is applied to government owned property. The government accepts the forum analysis as the applicable standard.

All remaining forums are non-public forums and can be regulated as long as the regulations are reasonable and are viewpoint neutral. Id. at 800. The government's decision to restrict access to a non-public forum need only be reasonable, it need not be the most reasonable or the only reasonable limitation. Id. at 808. The reasonableness of a restriction on a non-public forum must be based on the purpose of the forum and all the surrounding circumstances. Id. at 809. A restriction on speech in a non-public forum is reasonable when it is consistent with the government's legitimate interest in preserving the property for the use to which it is lawfully dedicated. ISFKC, 505 U.S. at 688.

i. *EGGS R US* IS A NON-PUBLIC FORUM

Eggs R Us is a non-public forum. Traditional public forums include streets, parks, and other locales where their purpose is discussing public questions. See Id. at 686. *Eggs R Us* is neither a street nor a park nor a location that is within the historic confines of a traditional public forum. Since the definition of traditional public forums is not extended to new properties, see Forbes, 523 U.S. at 678, the lower court property excluded *Eggs R Us* from the traditional public fora category when making its holding.

Eggs R Us was also properly excluded from the designated public fora category by the trial court. In Cornelius v. NAACP Legal Defense and Educational Fund, the Court held that the creation of an annual charity fundraising drive for federal employees was not a forum opened by the government for discussion of certain subject or for use by certain speakers. See Cornelius, 473 U.S. at 790, 805. Similarly, in Perry Education Association v. Perry Local Educators' Association, the Court held that a school district's internal mail system was not a designated public forum when the teachers union was allowed to send communications through the mail system, but a competing union was not allowed to do so. See Perry Educ. Ass'n v. Perry Local

Educs. Ass'n, 460 U.S. 37, 45, 47 (1983). Finally, in International Society for Krishna Consciousness, Incorporated (*ISFKC*) v. Lee, the Court held that an airport, which was opened to the public for travel and public use, was still not a designated public fora. See ISFKC, 505 U.S. at 686, 692-93. *Eggs R Us* is a business that receives substantial compensation from the federal government but is only generally open to employees. If an airport, a fundraising forum, and a mail system created by the government are not considered designated public forums, then a private business with a heavy government subsidy should also not be considered a designated public forum. Thus, *Eggs R Us* is a non-public forum and the restriction of the APPA must only be reasonable and viewpoint neutral.

ii. THE APPA IS A REASONABLE RESTRICTION ON A NON-PUBLIC FORUM THAT IS VIEWPOINT NEUTRAL

The APPA is a reasonable restriction on access to a non-public forum given the purpose of *Eggs R Us* and the surrounding circumstances. In Cornelius, the Court found the exclusion of legal defense and political advocacy organizations from a federal employee charitable fundraiser reasonable because participation by these groups could jeopardize the success of the fundraising activities and disrupt the workplace. See Cornelius, 473 U.S. at 790, 810, 813. In Perry, the Court found that excluding a rival teacher's union from sending messages through the internal mail system in a school district was reasonable because "it [was] wholly consistent with the District's legitimate interest in preserving the property . . . for the use to which it is lawfully dedicated" and because excluding the rival union could reasonably be considered a means of insuring labor peace within the school. See Perry, 460 U.S. at 41, 50-51, 52. Similarly, in ISFKC, the Court stated that a limitation on in-person solicitation for money at an airport could reasonably be regulated because solicitation would create congestion problems. See ISFKC, 505 U.S. at 690. However, the court in Summartano v. Carson held that a restriction preventing

litigants from entering a courthouse while wearing clothing that indicated an affiliation with street gangs or biker organization was unreasonable given there was no history of violence or disruption in the courthouse related to this clothing. See Summartano, 303 F.3d 963, 968.

When examining the totality of the circumstances regarding *Eggs R Us*'s business and the APPA, § 999.2 is reasonable. *Eggs R Us* is a business with the purpose of farming eggs for consumption. *Eggs R Us* receives a substantial portion of compensation for providing eggs to school children through the National School Lunch Program. *Eggs R Us* is not open to the public; Mr. Wheatley only had access to the California facility as part of his official capacity as a "poultry care specialist." Moreover, the title of APPA's § 999.2 is "Animal facility - Damage or destruction" indicating that just like Cornelius, Perry, and ISFKC, this regulation targets disruption of the lawfully dedicated purpose of the property. Taking § 999.2 as a whole, § 999.2(1) targets destruction, § 999.2(2) targets illegal entry with intent to destroy, § 999.2(4) targets entry to areas not open to the public, § 999.2(5) targets actions to remain concealed in an animal facility to commit a prohibited action, and § 999.2(6) targets individuals who have successfully damaged or destroyed an animal facility. APPA §§ 999.2(1)-(6). All of these regulations are aimed at actions that will disrupt the lawfully dedicated use of a property like *Eggs R Us*'s California facility and are consistent with the government's legitimate interest in preserving the property for that use. Additionally, the existence of a federal statute to cabin destructive and disruptive acts in an animal facility implies that there is a history of these types of acts that need to be remedied. This history would distinguish the present case from Summartano in which there was no history of disruption. Cornelius, Perry, and ISFKC show that it is reasonable to regulate non-public forum in a way that prevents disruption of the property.

The Court should hold that the APPA is a reasonable regulation of *Eggs R Us*'s property because taken as a whole, the regulation furthers the lawfully dedicated purpose of *Eggs R Us*'s property.

This Court should also find that § 999.2 of the APPA is viewpoint neutral and thus a constitutional regulation by the government of a non-public forum. Section 999.2(3) should be viewed concurrently with the rest of § 999.2 when examining for viewpoint neutrality. The APPA regulates damaging or disturbing conduct of a class of individuals: those seeking to damage or disturb an animal facility. In Perry, the Court held that a reasonable regulation was viewpoint neutral when it regulated a status. See Perry, 460 U.S. at 49. The Court explained that the status of being a different union allowed for regulation of the school mail system. Id. at 49. In this case, the APPA, when taken as a whole, regulates people of a certain status: those hoping to damage or disturb an animal facility no matter the rational. Individuals of that status would want to damage or disturb an animal facility for any number of reasons. Mr. Wheatley submits that a prohibition of video or audio recording in an animal facility can only be a viewpoint regulation: the viewpoint of those intending to raise awareness of facility practices that do not take into account animal welfare or interest. Section 999.2(3) is not a regulation of viewpoint, as it applies to all recordings taken without permission. The section would be equally applicable to someone wanting to show the working conditions of workers in animal facilities when compared to other industries. Section 999.2 would also regulate individuals videotaping in an animal facility to expose unsafe building conditions. Section 999.2 does not regulate viewpoint and this Court should affirm the decision of trial court and hold that § 999.2 of the APPA is a viewpoint neutral and a reasonable regulation of a non-public forum. Section 999.2(3) of the APPA is thereby constitutional as applied to Mr. Wheatley.

II. MR. WHEATLEY'S FACIAL CHALLENGE TO THE APPA MUST FAIL BECAUSE THE FIRST AMENDMENT OVERBREADTH DOCTRINE IS STRONG MEDICINE THAT SHOULD BE USED RARELY ESPECIALLY WHEN CONDUCT AND NOT PURE SPEECH IS BEING REGULATED

A. THE PARTIES' CONTENTIONS

Mr. Wheatley contends that his conviction under Count 1 of the indictment under APPA § 999.2(3) is unconstitutional because a facial challenge under the First Amendment should wholly invalidate the law. (M.O. at 6). Mr. Wheatley contends that the statutory prohibition reaches too much protected speech and has a chilling effect on protected First Amendment activity. See United States v. Stevens, 130 S. Ct. 1577 (2010); (M.O. at 10). The government contends that the APPA is not unconstitutionally overbroad. (M.O. at 10).

B. THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*

Where, as here, the District Court's ruling rests solely on a premise of law and the facts are established, the applicable standard of review is *de novo*. See Sammartano v. Carson, 303 F.3d 959, 965 (9th Cir. 2002).

C. THE LEGAL STANDARD

First Amendment doctrine provides an individual with the opportunity to wholly invalidate a law that is substantially overbroad and thereby proscribes too much protected speech. See Broadrick v. Oklahoma, 413 U.S. 601, 610-12 (1973). This facial overbreadth doctrine has been entertained in cases involving statutes which, by their terms, seek to regulate only pure speech. Id. at 612. Applications of the overbreadth doctrine is manifestly "strong medicine" and has been employed by the Court sparingly and only as a last resort. Id. at 613. Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech, such as picketing or demonstrating. See Virginia v. Hicks, 539 U.S. 113, 124 (2003). To put the matter

another way, particularly where conduct and not merely speech is involved, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. Broadrick, 413 U.S. at 615. The overbreadth claimant bears the burden of proving substantial overbreadth. See Hicks, 539 U.S. at 122.

Section 999.2 of the APPA is a regulation that primarily regulates conduct and not pure speech, and is not substantially overbroad when considering its legitimate sweep. Section 999.2 of the APPA is more analogous to the regulations in Broadrick v. Oklahoma and Holder v. Humanitarian Law Project than it is to the regulations of Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus and United States v. Stevens. In Broadrick, the Court held that a law restricting the political activities of many state employees, including solicitation for a political organization, was not substantially overbroad and thereby constitutional. See Broadrick, 413 U.S. at 602, 606, 610. Similarly, in Holder, the Court held that a law criminalizing the provision of material support or resources to a foreign terrorist organization was not volatile of the First Amendment for being overbroad. See Holder v. Humanitarian Law Project, 130 S. Ct. 2712, 2730 (2010). However, the Court in Jews for Jesus dealt with a law restricting "all First Amendment activities" in an airport, and struck down this regulation of pure speech under the overbreadth doctrine. See Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, 482 U.S. 569, 571, 577 (1987). Similarly, in Stevens, the Court invalidated as overbroad a regulation aimed at the knowing creation, sale, or possession of depictions of animal cruelty. See Stevens, 130 S. Ct. at 1582, 1592.

This court should uphold the constitutionality of the APPA because it regulates conduct and not pure speech just like the regulations in Holder and Broadrick. The text of the statute criminalizes conduct that damages or destroys an animal facility and is not a regulation of

speech. Mr. Wheatley may believe that the APPA regulates speech, but it does not, it regulates conduct. An invalidation via the overbreadth doctrine should be used rarely, if ever, with a regulation of conduct. Moreover, it is Mr. Wheatley's burden to show that the APPA reaches a substantial amount of constitutionally protected speech in comparison to its legitimate sweep, and he has not made that showing. Since the APPA is a regulation of conduct that does not substantially affect more constitutionally protected speech than constitutionally prescribable conduct, it must be upheld as constitutional despite Mr. Wheatley's overbreadth challenge.

III. MR. WHEATLEY'S ACTIONS WERE NOT JUSTIFIED UNDER THE DEFENSE OF NECESSITY BECAUSE THE NINTH CIRCUIT PROHIBITS THAT DEFENSE IN INDIRECT CIVIL DISOBEDIANCE CASES AND BECAUSE IF THE DEFENSE WAS AVAILABLE, HE WOULD STILL FAIL TO SATISFY THE ELEMENTS OF THE DEFENSE

A. THE PARTIES' CONTENTIONS

Mr. Wheatley contends that his actions in violation of APPA § 999.2(3) were justified and that he has a complete defense under the defense of necessity doctrine. (M.O. at 6). The government contends that defense of necessity is inapplicable in this instance. (M.O. at 11).

B. THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*

Where, as here, the District Court's ruling rests solely on a premise of law and the facts are established, the applicable standard of review of a denial of the defense of necessity is *de novo*. See United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991).

C. THE LEGAL STANDARD

The defense of necessity covers the situation where physical forces beyond the actor's control rendered certain conduct illegal and the actor chose that illegal conduct as the lesser of two evils. United States v. Bailey, 444 U.S. 394, 410 (1980). All defendants must show that: 1) they were faced with a choice of evils and chose the lesser evil; 2) they acted to prevent imminent harm; 3) they reasonably anticipated a direct causal relationship between their conduct

and the harm to be averted; and 4) they had no legal alternatives to violating the law. Schoon, 971 F.2d at 195. If there is a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense will fail. Bailey, 444 U.S. at 410. The defense of necessity is only available when a defendant engages in direct civil disobedience, which is the protesting of the existence of a law by breaking that specific law. Schoon, 971 F.2d at 196.

Mr. Wheatley cannot assert the defense of necessity because he engaged in indirect civil disobedience with respect to the APPA. Mr. Wheatley alleges that his video recording brought to light conditions which demonstrate a violation of California Prop 2, however he violated the APPA, not Prop 2. Had Mr. Wheatley recorded the video inside *Eggs R Us* to protest APPA § 999.2(3), then he would have engaged in direct civil disobedience and would be eligible to claim the defense of necessity. However, Mr. Wheatley was not protesting the APPA, so his criminal conduct was an act of indirect civil disobedience and binding Ninth Circuit precedent prohibit the defense of necessity.

Notwithstanding, had Mr. Wheatley's recording been an act of direct civil disobedience, he would still fail to prove several elements of the defense of necessity. First, Mr. Wheatley has failed to prove that he chose the lesser of two evils. His choice was between the violation of a federal law which comprehensively regulates subsistence of animal facilities and letting an alleged violation of Prop 2 continue. He has not shown that he chose the lesser of two evils. Moreover, Mr. Wheatley's actions were not reasonably anticipated to have a direct causal link that would abate the alleged harm. His illegal act was to videotape within *Eggs R Us*. One cannot reasonably think that posting a video to Facebook would abate the alleged violation of Prop 2. Rather, recording a video and showing it to the proper authorities would have a

reasonably direct causal relationship to abate the alleged harm. Evidence that Mr. Wheatley could not have reasonably anticipated a direct causal relationship between his illegal conduct and abatement of the alleged Prop 2 harm is seen in the fact that there has been no prosecution of *Eggs R Us*. Moreover, Mr. Wheatley's first violation of the APPA was videotaping a facility worker, but there was no harm to abate because the killing of male chicks is not a violation of Prop 2. Finally, Mr. Wheatley's defense of necessity claim cannot win because there were reasonable legal options that he could have taken instead of violating the APPA. Mr. Wheatley could have reported any alleged violations to the proper authorities or could have raised the issue with his supervisor's supervisor. There were reasonable legal options not requiring a violation of the APPA. Since Mr. Wheatley cannot prove the elements of the defense of necessity, his conviction under Count 1 of the indictment should be affirmed.

IV. MR. WHEATLEY'S CONVICTION UNDER COUNT 1 SHOULD NOT BE OVERTURNED AS A MATTER OF PUBLIC POLICY BECAUSE OF FEDERAL PREEMPTION AND OTHER PUBLIC POLICY IN THE RULE OF LAW

A. THE PARTIES' CONTENTIONS

Mr. Wheatley contends that California public policy in promoting conduct that reveals violations of state laws should prevent his conviction for violating the APPA. (M.O. at 6, 13). Mr. Wheatley also contends that the First Amendment favors discussion of public policy and his actions brought violations of Prop 2 into public discourse. (M.O. at 12). The government contends that if Congress wanted to allow for an exception to criminal prosecution it would have written one into the APPA. (M.O. at 13).

B. THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*

Where, as here, the District Court's ruling rests solely on a premise of law and the facts are established, the applicable standard of review is *de novo*. See Sammartano v. Carson, 303 F.3d 959, 965 (9th Cir. 2002).

C. THE LEGAL STANDARD

The Supremacy Clause of Article VI of the U.S. Constitution grants Congress the power to preempt state or local law. Olympic Pipe Line Co. v. City of Seattle, 437 F.2d 872, 877 (9th Cir. 2006). A state law will be displaced by federal law if the state law conflicts with federal law or frustrates the federal scheme. Paige v. Henry J. Kaiser Co., 826 F.2d 857, 861 (9th Cir. 1987).

D. ANY STATE PUBLIC POLICY FAVORING REPORTING CRIME AT THE EXPENSE OF CRIMINAL PROSECUTION UNDER THE APPA IS PREEMPTED UNDER CONFLICT PREEMPTION AND IS VITIATED BY OTHER PUBLIC POLICY

The APPA is a federal statute aimed at the prevention of damage or destruction to animal facilities by individuals. The combination of significant federal funding to companies like *Eggs R Us* to provide eggs for school lunches nationwide in addition to the protective legislation of the APPA, aimed at criminalizing conduct that would damage or destroy facilities, demonstrate that there is a strong federal policy in regulating and protecting this area. According to the record, there is no established California public policy that favors ignoring violations of one law because that violation brought to light other violations of law. Even if there was such a policy, the APPA should be enforced because of conflict preemption. To uphold a California public policy of this nature would prevent prosecutions under the APPA; the APPA evidences Congress's desire to comprehensively regulate this field. Thus, a public policy of the type submitted by Mr. Wheatley would be in conflict, and thus preempted, by the APPA. Consequently, this court should uphold Mr. Wheatley's conviction on Count 1 because any public policy favoring a lack of prosecution under the APPA would be preempted.

Even if the APPA does not preempt a policy disfavoring prosecution, two other public policies vitiate the validity of the policy offered by Mr. Wheatley. First, public policy promoting the rule of law would prohibit a policy promoting one individual's freedom from prosecution for

breaking the law merely by revealing the violations of others. To exempt prosecution would be to promote lawlessness. For example, under Mr. Wheatley's proposed public policy, if an individual wanted to break the law, all he would need to do is reveal the crimes of others to escape prosecution; this does not promote the rule of law. Moreover, a blanket policy such as Mr. Wheatley's would not guarantee that the violation being forgiven is less serious than the violation being revealed. Second, Mr. Wheatley's proposed policy removes the power of prosecutorial discretion from our state and federal authorities. United States Attorneys and state District Attorneys would not be able to exercise their prosecutorial discretion because an individual could ensure escape from prosecution by revealing the criminal acts of another. Federal and state public policy favoring prosecutorial discretion and enforcement of established law by those endowed with the power of enforcement should vitiate any weight of the public policy rational posited by Mr. Wheatley. For these reasons, this Court should affirm Mr. Wheatley's conviction as to Count 1 of the indictment.

V. 18 U.S.C. § 43 DOES NOT EXCEED CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION

A. THE PARTIES' CONTENTIONS

Mr. Wheatley argues that the jury verdict on Count 2 must be overturned because the AETA exceeds congressional authority under the Commerce Clause under Article I, Section 8 of the U.S. Constitution. (M.O. at 6).

The government argues that Congress has the authority to regulate under the AETA because the AETA protects the instrumentalities and channels of interstate commerce and regulates conduct that has a substantial effect on interstate commerce. (M.O. at 7).

B. THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*

Where, as here, the District Court's ruling rests solely on a premise of law and the facts are established, the applicable standard of review is *de novo*. See Sammartano v. Carson, 303 F.3d 959, 965 (9th Cir. 2002).

C. THE LEGAL STANDARD

The U.S. Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., Art. I, § 8, Cl. 3. Specifically, Congress may regulate: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce; and 3) any activity that has a substantial relation to interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

i. CONGRESS HAS THE AUTHORITY TO REGULATE THE INTERNET UNDER THE AETA BECAUSE THE INTERNET IS A CHANNEL AND AN INSTRUMENTALITY OF INTERSTATE COMMERCE

Congress has the authority to regulate the "use of the channels of interstate commerce." The internet is a channel of interstate commerce. See United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004); United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006). Congress also has the authority to regulate the "instrumentalities of interstate commerce." The internet is also an instrumentality of interstate commerce. American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 173 (S.D.N.Y. 1997); Hornaday, 392 F.3d at 1311; United States v. Panfil, 338 F.3d 1299, 1300 (11th Cir. 2003); United States v. Pipkins, 378 F.3d 1281, 1295 (11th Cir. 2004). When there is no evidence presented on whether a video on the internet has crossed state lines, "'the very interstate nature of the internet' . . . may serve as a proxy for satisfying the interstate commerce requirement." United States v. Wright, 625 F.3d 583, 595 (9th Cir. 2010).

The AETA states that "[w]hoever . . . uses . . . any facility of interstate . . . commerce" to "interfer[e] with the operations of an animal enterprise" and "intentionally . . . causes the loss of any real or personal property . . . or transactions with an animal enterprise . . . shall be punished . . . ."[3] 18 U.S.C. § 43. In this case, Mr. Wheatley used the internet to post two videos of activities that took place on *Eggs R Us*'s property. Mr. Wheatley posted both of these videos to Facebook, an internet website. One of Mr. Wheatley's friends then posted Mr. Wheatley's video to YouTube, another internet website. While there was no evidence presented on whether either of the videos that Mr. Wheatley posted on Facebook has crossed state lines, the analysis in United States v. Wright makes it so that Mr. Wheatley's use of the internet itself may serve as a proxy for satisfying the interstate commerce requirement. Since Congress has the authority to regulate the channels of interstate commerce and the instrumentalities of interstate commerce and the internet is both a channel and an instrumentality, regulating Mr. Wheatley's activities on the internet under the AETA is within Congress's power under the Commerce Clause.

ii. CONGRESS HAS THE AUTHORITY TO REGULATE MR. WHEATLEY'S ACTIVITY UNDER THE AETA BECAUSE HIS ACTIVITIES HAD A SUBSTANTIAL RELATION TO INTERSTATE COMMERCE

Congress has the authority to regulate any activity that has a "substantial relation to interstate commerce." Lopez, 514 U.S. at 558-59. A court must consider four factors to determine if a regulated activity substantially affects interstate commerce: 1) "whether Congress made findings regarding the regulated activity's impact on interstate commerce;" 2) "whether the statute contains an 'express jurisdictional element' that limits its reach;" 3) "whether the

[3] The District Court's Commerce Clause analysis interprets the term "facility" of interstate commerce from the AETA to mean "channel" or "instrumentality" of interstate commerce, see (M.O. at 15-16), when discussing the power of the federal government to regulate interstate commerce. The government accepts the lower court's interpretation of facility to mean a channel or instrumentality of interstate commerce.

regulated activity is commercial or economic in nature;" and 4) "whether the link between the prohibited activity and the effect on interstate commerce is attenuated." United States v. Paige, 604 F.3d 1268, 1271 (11th Cir. 2010) (citing United States v. Morrison, 529 U.S. 598, 610-12 (2000)).

First, there is no record in this case of Congress making findings about how filming a company's activities and then posting that information on the internet impacts interstate commerce. Second, the AETA does contain an express jurisdictional element that limits its reach. The statute states that anyone who "travels in interstate or foreign commerce," anyone who "use[s] the mail," or anyone who uses a "facility of interstate or foreign commerce" is subject to the regulations under the AETA. Thus, the statute only restricts activity that is interstate. Third, filming a company's activities and then posting those videos on the internet is not commercial or economic in nature because Mr. Wheatley did not do this for a profit, but rather to raise awareness. Fourth, there is a strong link between the prohibited activity, namely Mr. Wheatley filming *Eggs R Us*'s activities and posting those videos to the internet, and the effect Mr. Wheatley had on interstate commerce. Mr. Wheatley posted his videos to Facebook to try and convince other people to boycott the egg industry. When Mr. Wheatley posted his first video, Mr. Wheatley included the following comment with it: "I'll never be able to eat another egg again. The public has to see this to believe it." If the egg industry lost Mr. Wheatley's business because of their activities, and Mr. Wheatley wants to show the "public" what made him no longer "able to eat another egg again," it is logical to conclude that Mr. Wheatley posted the video on Facebook so that others would see the video and no longer want to buy eggs either.

There are two ways in which Mr. Wheatley's video postings affected interstate commerce. First, it is highly likely that *Eggs R Us* has suffered financially as a result of the

negative news reports. As a result of Mr. Wheatley's first video and his blogging about alleged Prop 2 violations, *Eggs R Us* received extensive negative media attention and had to make public statements to try and counter the negative media attention it received. The bottom line is that consumers do not like to hear bad facts about their food in the nightly news. If *Eggs R Us*'s profits have gone down because people do not want to buy eggs from them anymore, interstate commerce will be substantially affected. *Eggs R Us* is a not a small company located solely within one state; rather, *Eggs R Us* is a mid-sized egg producing business that has been in business for over 55 years. *Eggs R Us* has facilities in California, Nevada, and North Dakota. With facilities spread throughout the United States, *Eggs R Us* likely services a large segment of the American population with eggs. Thus, not only do lost profits to *Eggs R Us* likely result in a corresponding increase in the sales of other egg companies who people believe are in compliance with Prop 2 in California, it likely also leads to an increase in the sales of other egg companies outside of California, namely Nevada and North Dakota, because people want to avoid buying food from companies with negative press.

Second, it is likely that the entire egg industry suffered financial repercussions as a result of the negative press surrounding Mr. Wheatley's first internet video. As of the time of trial, over 1.2 million people had viewed Mr. Wheatley's first video on YouTube alone. The 1.2 million views on YouTube do not take into consideration the amount of additional people that viewed the video on television during the negative news reports. Thus, Mr. Wheatley's first video could have realistically caused the egg industry to lose at least 1.2 million people's business. Even if all these customers live in California, a change in the buying habits of 1.2 million Californians would substantially affect interstate commerce. It would mean that

Californians would now increase their purchases of other foods and at least some of those foods are certain to be grown or made in different states.

However, it is highly unlikely that all of Mr. Wheatley's YouTube views were limited to people who live in California. Since the internet can be accessed by anyone worldwide, it is almost certain that many of the YouTube viewers live in other states and some might even live in other countries. Thus, Mr. Wheatley's video could have potentially affected the buying habits of 1.2 million Americans, which would substantially affect interstate commerce. It would mean that a large number of Americans would no longer be purchasing eggs and the egg market would be substantially affected financially by the resulting loss of profits.

Thus, while Congress did not make findings and while Mr. Wheatley's activity was not economic in nature, the fact that there is an express jurisdictional element to the AETA and that there is a very strong link between Mr. Wheatley's prohibited activity and the effect those activities had on interstate commerce, should convince the Court that Mr. Wheatley's filming and posting videos to the internet had a "substantial relation to interstate commerce."

VI. THE DISTRICT COURT DID NOT PROPERLY OVERTURN THE JURY VERDICT CONVICTING MR. WHEATLEY UNDER COUNTS 2 AND 3 BECAUSE 18 U.S.C. § 43 DOES APPLY TO MR. WHEATLEY'S CONDUCT

A. THE PARTIES' CONTENTIONS

Mr. Wheatley argues that even if the AETA does not exceed Congress's authority, the jury's verdicts on Counts 2 and 3 must still be overturned because the AETA was not intended to apply to the type of conduct for which he was convicted. (M.O. at 6).

The government argues that the jury's verdict as to Counts 2 and 3 must be upheld since Mr. Wheatley's actions demonstrate an intent to interfere with *Eggs R Us*'s operations and to cause them loss. (M.O. at 8).

B. THE APPLICABLE STANDARD OF REVIEW IS *ABUSE OF DISCRETION*

Where, as here, the District Court overturned a jury verdict, the Court must see if the District Court abused its discretion in determining that there was not substantial evidence to support the jury verdict. Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1370-71 (9th Cir. 1987).

C. THE LEGAL STANDARD

A District Court must uphold the jury verdict if there "is substantial evidence to support the verdict." Id. at 1370-71. Substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." Id. The District Court may not weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. Id.

i. WHEN MR. WHEATLEY FILMED AND POSTED VIDEOS ONLINE, AND BLOGGED ABOUT *EGGS R US*'S BUSINESS PRACTICES, HE ACTED FOR THE PURPOSE OF DAMAGING AND INTERFERING WITH THE OPERATIONS OF *EGGS R US*

The AETA makes it a crime to use "any facility of interstate . . . commerce . . . for the purpose of damaging or interfering with the operations of an animal enterprise" and to "intentionally . . . cause[] the loss of any real or personal property (including animals or records) used by an animal enterprise . . . or transactions with an animal enterprise." 18 U.S.C. § 43.

First, there was substantial evidence for the jury to conclude that Mr. Wheatley acted for the purpose of damaging the operations of *Eggs R Us*. Mr. Wheatley filmed his videos and posted them online and blogged about *Eggs R Us* so he could inform the public of *Eggs R Us*'s business practices. Mr. Wheatley's intent is evidenced by the fact that Mr. Wheatley posted the videos to his Facebook page, a public website, as soon as he returned home from work that

evening. Mr. Wheatley's intent is also evidenced by his comment that "[t]he public has to see this to believe it." Further, Mr. Wheatley wanted people to stop buying eggs, as evidenced by Mr. Wheatley's comments that the practices at *Eggs R Us* made it so he would "never be able to eat another egg again."

Mr. Wheatley damaged *Eggs R Us*'s operations by forcing *Eggs R Us* to spend money to look into modifying certain conditions and procedures at its California facility. Further, because of the negative media attention, *Eggs R Us* likely lost customers. It is very likely that some previous customers will no longer eat eggs as a result of Mr. Wheatley's videos, and other customers will simply buy eggs from other companies who are in compliance with Prop 2. Thus, Mr. Wheatley's actions demonstrate that he intended to damage *Eggs R Us* by causing them economic loss.

Mr. Wheatley's actions might also subject *Eggs R Us* to criminal charges. While the District Attorney's office has not yet charged *Eggs R Us* with violation of any state laws, it is possible that the District Attorney might decide to file charges in light of Mr. Wheatley's allegations against *Eggs R Us*. If the District Attorney does file charges, it will be a direct result of Mr. Wheatley's actions: had he not posted videos or blogged about *Eggs R Us*'s operations, the District Attorney would not have discovered that *Eggs R Us* was in violation of Prop 2. Thus, Mr. Wheatley's actions demonstrate that he intended to damage *Eggs R Us* by exposing them to potential criminal charges.

Second, there was substantial evidence for the jury to conclude that Mr. Wheatley acted for the purpose of interfering with the operations of *Eggs R Us*. Mr. Wheatley filmed videos and posted them online and blogged about *Eggs R Us*'s alleged violation of Prop 2 so he could try and get *Eggs R Us* to change their business practices. Mr. Wheatley interfered with *Eggs R Us*'s

operations by causing extensive negative media attention which forced *Eggs R Us* to make public announcements that it would look into modifying the "practices in its California facility." Mr. Wheatley's intent is evidenced by the fact that Mr. Wheatley approached his supervisor about *Eggs R Us*'s noncompliance with Prop 2. Mr. Wheatley's intent is also evidenced by the fact that Mr. Wheatley informed a farmed animal protection organization about *Eggs R Us*'s noncompliance with Prop 2. Thus, Mr. Wheatley intended to interfere with *Eggs R Us* by trying to get them to comply with the requirements of Prop 2.

Consequently, the District Court abused its discretion in determining that there was not substantial evidence to support the jury's verdict as to Count 2.

ii. WHEN MR. WHEATLEY FILMED AND POSTED VIDEOS ONLINE, AND BLOGGED ABOUT *EGGS R US*'S BUSINESS PRACTICES, HE INTENTIONALLY CAUSED *EGGS R US* TO LOSE FINANCIAL "TRANSACTIONS" WITH THE PUBLIC

In this case, there was substantial evidence for the jury to conclude that Mr. Wheatley intentionally caused *Eggs R Us* to lose financial "transactions" with the public. Mr. Wheatley filmed the video of the chick grinder and posted it online so that *Eggs R Us* would lose business. Mr. Wheatley filmed the videos so the "public" could see what went on at *Eggs R Us*'s facility "every day" in the hopes that the public would feel as repulsed as him and take action against *Eggs R Us*. Mr. Wheatley intentionally posted a video of what caused him to no longer be "able to eat another egg again," so that others would see the video and no longer be able to eat eggs again either. If Mr. Wheatley was successful in convincing some of the public to stop eating eggs, the egg industry, and *Eggs R Us*, would lose a significant amount of business.

Mr. Wheatley also filmed the video of the hens in the battery cages, posted the video online, and blogged about the hens so that *Eggs R Us* would lose business. Mr. Wheatley hoped

that *Eggs R Us* would change their ways as a result of: 1) negative media attention; and 2) losing customers to other companies who are in compliance with Prop 2.

Thus, when Mr. Wheatley filmed videos, posted videos online, and blogged about *Eggs R Us*'s business practices, he intentionally caused *Eggs R Us* to lose financial "transactions" with the public. Consequently, the District Court abused its discretion in determining that there was not substantial evidence to support the jury's verdict as to Count 2.

iii. WHEN MR. WHEATLEY TOOK THE CHICK FROM *EGGS R US*, HE ACTED FOR THE PURPOSE OF INTERFERING WITH THE OPERATIONS OF *EGGS R US*

In this case, there was substantial evidence for the jury to conclude that Mr. Wheatley acted for the purpose of interfering with the operations of *Eggs R Us*. First, Mr. Wheatley took the male chick from the pile of living and dead chicks at the grinder the same day that he made and posted his videos to Facebook. Thus, Mr. Wheatley's state of mind was the same when he filmed the videos, posted the videos, and took the chick. Since, Mr. Wheatley filmed the videos and posted them to Facebook in an attempt to get *Eggs R Us* to change their business practices, it is reasonable to infer that Mr. Wheatley also took the chick to interfere with *Eggs R Us*.

Second, while there is no evidence that Mr. Wheatley used the chick to directly promote his political agenda, the fact remains that Mr. Wheatley still chose to stop doing the work he was assigned to do at *Eggs R Us* to go over to the grinder, film a video, steal a chick from the pile and interfere with another worker's job, hide the chick in his coat pocket all day at work, and then illegally take the chick home. If this Court does not believe that refusing to do your assigned job, preventing another worker from effectively doing their job, and stealing from your employer counts as "interfering with the operations of an animal enterprise," then the AETA will effectively be rendered moot. While taking a chick in and of itself may not rise to the level of

acting "for the purpose of interfering" with *Eggs R Us*, Mr. Wheatley's actions before, after, and during when he actually took the chick rise to the level of acting "for the purpose of interfering" with *Eggs R Us*.

Thus, Mr. Wheatley intended to interfere with *Eggs R Us* by taking their property and by decreasing the efficiency of their workers. Consequently, the District Court abused its discretion in determining that there was not substantial evidence to support the jury's verdict as to Count 3.

iv. WHEN MR. WHEATLEY TOOK THE CHICK, HE INTENTIONALLY CAUSED *EGGS R US* TO LOSE PERSONAL PROPERTY

In this case, there was substantial evidence for the jury to conclude that Mr. Wheatley intentionally caused *Eggs R Us* to lose personal property. When Mr. Wheatley took the chick, he intended to keep it. The fact that Mr. Wheatley took the chick home with him and has been raising him ever since shows Mr. Wheatley's intent to steal from *Eggs R Us*. Stealing one of *Eggs R Us*'s chicks falls directly under the behavior that the AETA prohibits: namely, that someone cannot intentionally cause the animal enterprise to lose any personal property, including animals.

While Mr. Wheatley admits that he intentionally took the chick from *Eggs R Us*, he argues that he "rescued" the chick. Mr. Wheatley contends that since *Eggs R Us* considers male chicks to be a "waste product," taking *Eggs R Us*'s garbage cannot be considered stealing. However, the Court cannot accept Mr. Wheatley's contention that taking the chick was not stealing because Mr. Wheatley took the chick before it was considered garbage. The doctrine of abandonment does not apply unless the owner completely deserts the property because he no longer desires to possess it and he willingly abandons it to whoever wants it. See, e.g., State Mutual Assurance Co. v. Heine, 141 F.2d 741 (6th Cir. 1944). When Mr. Wheatley took the chick, *Eggs R Us* had not abandoned it. The chick was still alive and *Eggs R Us* still desired to

possess it so that it could grind it up. *Eggs R Us* did not offer the chick to anyone to take. Further, there is no evidence in the record that *Eggs R Us* actually considered ground up chicks to be "garbage." While the male chicks are considered to be a "waste product," it is possible that in a ground up form, the bodies of the chicks might have some useful purpose: such as being used as fertilizer.

Thus, when Mr. Wheatley stole the chick from *Eggs R Us*, he intentionally caused *Eggs R Us* to lose personal property. Consequently, the District Court abused its discretion in determining that there was not substantial evidence to support the jury's verdict as to Count 3.

Conclusion

For the foregoing reasons, this Court should affirm the District Court's ruling in part and reverse in part. This Court should affirm that prosecution under Count 1 of the indictment did not violate the First Amendment and that neither the defense of necessity nor public policy warrant overturning Mr. Wheatley's conviction as to Count 1. This Court should reinstate the jury's verdict as to Counts 2 and 3 because 18 U.S.C. § 43 does not exceed congressional authority under the Commerce Clause and because Mr. Wheatley's conduct properly falls within the bounds of 18 U.S.C. § 43.